The Obama Administration’s contraceptive mandate, requiring all but the most insular religious organizations to pay the costs of a practice their religious tenets explicitly reject, raises fundamental issues regarding the rights of conscience in the contemporary United States. This article examines recent attempts to defend religious liberty on the grounds that the state should take care not to violate the rights of individual conscience. The problem with such an approach, this article argues, is that, in the name of a justice system more sensitive to individual beliefs, it further erodes the rights of religious associations to act on the common beliefs of their members, undermining believers’ ability to actually act according on their faith.

In one of twelve lawsuits filed on May 23, 2012, the Archdiocese of New York challenged the “contraception mandate” included in the Obama Administration’s Patient Protection and Affordable Care Act. This mandate would require employers to fund provision of contraceptive and abortion-inducing drugs and sterilization through their health plans. Only organizations deemed sufficiently “religious” would be exempt from the mandate, and these would not include charities, schools, and other religiously affiliated entities not restricting their employment and services primarily to co-religionists and not having inculcation of the faith as their primary function.

According to the Archdiocese’s complaint, the lawsuit concerns not whether such drugs and services will be available, or even subsidized by the government, but whether the government can require Catholic entities “to violate their sincerely held religious beliefs by providing, paying for, and/or facilitating access to those products and services.” Moreover, the Archdiocese argues, the Obama Administration’s faith-based “exemption” violates Catholics’ religious freedom by demanding that they cease a practice essential to their faith—good works. As New York Archbishop Dolan is quoted in the complaint: “We don’t serve people because they’re Catholic, we serve them because we are, and it’s a moral imperative for us to do so.”
The contraception mandate is one of several recent government actions raising issues of Church associations’ freedom. A letter from the United States Conference of Catholic Bishops’ ad hoc Committee for Religious Liberty addressed what Pope Benedict XVI has characterized as “concerted efforts . . . to deny the right of conscientious objection on the part of Catholic individuals and institutions with regard to cooperation in intrinsically evil practices” along with “a worrying tendency to reduce religious freedom to mere freedom of worship without guarantees of respect for freedom of conscience.”

Of particular concern to the bishops: an Alabama immigration law forbidding priests from baptizing, hearing confessions of, or preaching the word of God to illegal immigrants; several cities’ revocation of licenses and/or government contracts for Catholic adoption and foster-care organizations refusing to place children with cohabiting heterosexual and same-sex couples; and the federal government’s requirement that organizations providing services to refugees provide or refer for contraceptive and abortion services.

This church/state conflict is ironic, given that both sides assert the primacy of human rights. Thus, it could be analyzed in terms of the intrinsic dichotomy between liberal-individualist theories of rights and more expansive, theologically grounded understandings of rights as rooted in the natural sociability of the person. In order to show the intrinsic, perhaps irremediable nature of the conflict between these understandings, this article will take a somewhat different tack, examining the attempts of contemporary liberals to bridge the gap between autonomous individual and social person. These attempts rest on reinterpretations of the rights—and the nature—of religious belief. In the end, such attempts are fruitless because, while they seek to recognize individuals’ need for meaning, they fail to respect the intrinsic values and rights of associations, especially religious associations, in which meaning is found.

In the name of freedom—including religious freedom—contemporary leaders in politics and the law would further undermine the public nature of religious practice. In seeking to protect individuals from institutional coercion, the state increasingly denies the need for associations to organize according to their own articles of faith in order to fulfill the expectations of their members and serve their intrinsic ends, including both worship of God and service to mankind. The inevitable tendency: a situation in which “the state alone will determine who gets to contribute to the common good.”
The Problem with Empathy

CONFLICTING VALUES

Lawyers in particular tend to believe that individual rights are the primary and proper focus of constitutional protection, and that these rights rest on acceptance of a value pluralism ruling out public consideration of higher truths and goods. For several decades, a loose collection of intellectuals generally dubbed “communitarians” have sought to defend the liberal consensus of value pluralism while paying greater heed to resurgent claims of community and the pursuit of spiritual meaning. Their goal has been presented as promoting “situated selves,” recognizing the importance of personal and historical attachments to our flourishing. This movement reached perhaps its highest intellectual point in Charles Taylor’s *A Secular Age*. Taylor argues that we have become selves radically different from those of the former, irretrievable age of “enchantment,” in which we experienced the world as the realm of spirits, in which God played a defining role. Importantly, Taylor also argues that our new, more authentic and freer selves remain capable of choosing meaningful, spiritual lives, properly understood.

But is it possible to have both liberal value pluralism and meaning, and can the associations in which we find meaning survive liberalism’s relentless emphasis on individual autonomy? In examining these questions, this article will focus on a particular, indicative volume: Paul Horwitz’s *The Agnostic Age: Law, Religion, and the Constitution*. Horwitz defends the proposition of a meaningful liberalism through examination of legal principles and church/state jurisprudence. His effort integrates discussions of legal and religious debates constituting perhaps the most important attempt at a liberal communitarian synthesis in the legal context. Examination of his arguments as a whole can provide greater understanding, not just of Horwitz’s work, but also of the liberal communitarian project and its implications for the rights of conscience and the search for meaning within contemporary constitutional structures.

AGNOSTICISM AND EMPATHY

Horwitz spends the bulk of his book describing and defending agnosticism as a belief system and a basis for constitutional thought and adjudication. Of central importance, for Horwitz, agnosticism is in many ways “the perfect representation of our age.” Science and liberalism’s privatizing of religion have made secularism our *lingua franca*, he argues, by making religion irrelevant to the bulk of most people’s daily lives. But Horwitz’s stated goal is not to defend or extend secularism; rather, it is to calm what
he argues is a “war” between atheists and fundamentalists through his vision of a new, empathetic agnosticism.\textsuperscript{15}

Horwitz would promote civil peace and save liberal religious freedoms through formulation and application of his “new agnosticism”—a philosophical/spiritual stance he presents as meaningful and capable of engaging all sides in discussion of religious truth while eschewing attempts to recapture any specific religious grounding for society. He celebrates our “Agnostic Age” as one characterized by abundant open spaces and possibilities to be experienced and cherished, even presenting a kind of agnostic hero, a lifestyle “jack of all trades” fighting battles with religious truths and making commitments that, however provisional, he treats as if they are deeply held, thereby leading a meaning-filled life.\textsuperscript{16}

Horwitz’s new agnostic would pacify our public sphere through use of what he terms “negative capability.” A person using negative capability can flourish in uncertainties, entering fully and empathetically into diverse and even clashing worldviews. Particularly with regard to religious truths, according to Horwitz, negative capability enables one to negotiate conflicts among antagonistic persons and views so as to treat all fairly and bring peace. The individual agnostic has no clear view of the existence or nature of the divine, but he seeks to enter into various religious understandings—to become, however temporarily and provisionally, a Buddhist or Christian for the sake of the experiences and insights offered by these forms of belief.\textsuperscript{17}

We need a \textit{constitutional} agnosticism, according to Horwitz, because, despite a powerful liberal consensus that religious questions are purely private in nature, “questions of religious truth stubbornly persist” and raise contentious issues of law and religion. The liberal strategy of damping down such concerns only increases their power while undermining the regime’s legitimacy. So, for Horwitz, we need a jurisprudence that will help us confront “the practical question of how we can collectively coexist and govern ourselves in a fragmented and pluralistic society.” This jurisprudence will not provide a new, all-encompassing doctrine, but rather mediate between diverse perspectives.\textsuperscript{18}

Constitutional agnosticism, for Horwitz, is a “coping mechanism” intended to resolve conflicts between individuals’ religious rights and the need for public order through an infusion of empathy.\textsuperscript{19} Horwitz explains how this process would work:

The constitutionally agnostic judge or legislator . . . attempts to enter imaginatively into the perspective of the religious claimant, asking what that claim would mean if it were \textit{true}: what it should mean for the law if, for example, God truly requires a parent
to withdraw his or her children from public school—or from potentially life-saving medical treatment. It does not simply ask if the claim is important or even true for him, but treats the religious claim as a genuine statement of fact.\textsuperscript{20}

Despite the seeming call for a new form of decision-making, however, Horwitz promises no marked change in constitutional law. Rather, the goal is greater understanding, greater possibility for compromise, and a reduction in the level of acrimony within the legal sphere, and potentially, public policy debates.\textsuperscript{21}

Horwitz seeks to justify constitutional agnosticism as the only workable solution to the conflict between private belief and public order, arguing that it provides the only theory of religious liberty that can command consensus among religious believers and nonbelievers alike. Constitutional agnosticism in effect would save liberalism from itself by addressing religious persons’ concern that their truth claims be respected while maintaining liberalism’s institutional neutrality. In effect, Horwitz would trade the attitude of liberalism (neutrality) for a new attitude of agnosticism (empathy), thereby winning over religious believers in particular to the pre-existing liberal structure of church/state separation.\textsuperscript{22} Ironically, however, the agnostic consensus he seeks to build would rest on a pre-existing liberal consensus that is, in fact, a myth, obscuring an unpleasant, contested reality.

THE CONTESTED CONSENSUS

Horwitz seeks to restore a “liberal consensus” according to which all participants in public life support a number of public goods, including: public neutrality toward conceptions of the good; democracy; individual rights; religious freedom; equality; and a “public reason” that rules out the use of religious doctrine in policy debates. This consensus is splintering, according to Horwitz, because its adherents have come to doubt whether its attempts to relegate religious concerns to the private sphere rest on truly neutral principles. His constitutional agnosticism would solve this problem because its empathetic methodology would reduce conflict and win the loyalty of both believers and nonbelievers.\textsuperscript{23}

The structure of Horwitz’s consensus derives from what he terms the “liberal treaty.” According to this treaty the state will maintain strict neutrality among beliefs and between belief and non-belief while protecting individual rights, and providing equal treatment to religious and non-religious groups.\textsuperscript{24} In describing how this treaty came to pass (for clearly it never was formally adopted), Horwitz presents a brief narrative of the development of liberal religious freedom, in which the decline of religious
influence was tied directly to the expansion of reason and liberty. Horwitz describes society’s progress from constant religious warfare and repressive religious orthodoxy to the assertion of individual rights in the philosophy of John Locke, the enshrinement of rights in the American Constitution, and the movement from orthodoxy-with-toleration to a true “liberalism of neutrality and equality in which there is not even an official orthodoxy.”

Horwitz’s story of a unified effort on the part of rational elites to “tame” religion and so bring peace to public life is false; it exaggerates the benefits of modern secularism and conceals the coercion by which it was imposed. His story overlooks 1) the origins of rights, not in abstract secular theorizing, but in the religious thought and practice of the Middle Ages, buttressed and spread by a plurality of legal (including ecclesiastical) jurisdictions that tamed the powers of kings; 2) the oppressive designs and impact of centralizers during the era of “enlightenment” which saw the elimination of the ecclesiastical sphere and the birth of modern tyranny; and 3) the highly destructive means and bigoted (especially anti-Catholic) intentions behind the shift from “orthodoxy-with-toleration” to the liberal treaty.

This article leaves aside, for present purposes, the deeper historical problems of points one and two. The last point, regarding development of the liberal treaty’s secularism, is most relevant here, because it highlights the contested and unjust character of the liberal version of religious liberty. This character also has been definitively established, particularly in the work of Philip Hamburger.

Hamburger’s *Separation of Church and State* details the campaign of legislative and constitutional activism carried out by secularists, nativists, and liberal Protestants beginning in the first half of the nineteenth century. The campaign gained public power as a response to large-scale Catholic immigration and, more specifically, Catholic attempts to secure local, public support for their schools. Public schools (Hamburger focuses on New York City) taught from King James (Protestant) Bibles and anti-Catholic texts. The Catholic response, in then-classic American style, was to form and seek support for their own schools.

Catholics during the early nineteenth century translated their increasing numbers into political clout, securing local control over public school funds. Neither side, to this point, had attempted to bring the federal courts into the fray. After all, the Constitution’s Religion Clause forbade only church establishment in the specific sense of government provision of unequal benefits and/or burdens to persons based on their religious affiliation, including most prominently the provision of salaries to ministers from particular, favored religions.
Protestant elites reacted with horror to the specter of politically powerful Catholics. The first legal response was a demand for constitutional amendments de-funding Catholic institutions. Only when these attempts failed did opponents of Catholic schooling recast American constitutionalism as rooted fundamentally in a strict separation of church and state.\textsuperscript{32} They asserted that there was no conflict between this vision and public support for standard public school practices, including daily readings of the King James Bible and daily recitation of the Lord’s Prayer.\textsuperscript{33} In addition, in their view Protestantism was independent of “foreign” influences and institutional hierarchies and so immune to the charge of being a state-sponsored church.\textsuperscript{34} These activists enacted a number of state constitutional amendments banning public support for “sectarian” schools.\textsuperscript{35} More generally, they translated their suspicion of Catholic theological authority into opposition to religion in the public square. In addition to a principle of “external liberty,” or freedom from government penalties for religious beliefs, American elites increasingly demanded “internal liberty,” or freedom from the authority of their own religious societies.\textsuperscript{36}

The liberal treaty was imposed in an attempt to maintain Protestant orthodoxy. It was aimed squarely at “hyphenated Americans”—especially Irish and German Catholic immigrants—who sought to maintain their communal identities and faith in the new land.\textsuperscript{37} As mainline Protestantism lost sway, of course, Protestant orthodoxy gave way to secularist orthodoxy.\textsuperscript{38} But the “constitutional” concern to protect individuals from religious influence was not natural, nor rooted in the inevitable spread of some individualist political theory. Rather, it was the result of an open hostility toward “different” immigrants that continues to this day.\textsuperscript{39}

The liberal treaty (and constitutional agnosticism) privileges a particular Protestant conception of faith as highly individualistic and of the Constitution as demanding institutional separation of church and state; it also forcefully excludes religious communities from being heard in the public square.\textsuperscript{40} Rather than a part of the march of freedom and rights from an era of tyranny, the rise of secularism belongs within the narrative of nativism and the forced assimilation and/or exclusion of immigrant communalist groups.\textsuperscript{41} Hostility toward corporate religious groups and their participation in public life should be seen as continuing a bias rooted, not in the Constitution, but in an individualist ideology with an unpleasant pedigree.\textsuperscript{42} Moreover, this article argues in the next section that Horwitz’s failure to appreciate the intrinsic value of religious attachments is indicative of an excessively thin view of human personality—a view that makes true empathy impossible.
MISSING TRADITIONS

The model for Horwitz’s agnosticism, including its constitutional form, is the “negative capability” espoused by the poet John Keats. The artist possessed of this capability “is nimble at ‘entertaining and even multiplying doubts indefinitely’; he ‘manages to project himself sympathetically into the positions occupied by his many and varied characters[,] . . . to be all of them and none of them, to be everywhere and nowhere.’” This is all well and good, for an author. Projecting oneself into a variety of characters may well make for excellent literature. But people are not characters in a poem or even a novel; they are living, thinking beings with stories of their own rooted in inherited customs, habits, and beliefs—that is, traditions.

Nowhere are the dangers of a methodology that fails to treat persons as whole beings embedded within traditions more apparent than in Horwitz’s motif of Abraham and Isaac. He returns repeatedly to the Old Testament story of the patriarch Abraham, who hears God command him to sacrifice his beloved son, on whom his hopes for a patrimony depend, for the sake of which he entered his covenant with God. Seeking to emphasize the radical nature of the conflict between religious belief and societal values, Horwitz asserts the jurisprudential possibility of a latter-day Abraham. The agnostic judge must accept as true a claimant’s belief that he has received a divine call to ceremonially kill his son.

Rejecting constitutional justification for human sacrifice, Horwitz seeks to encourage appreciation for incommensurate values. Judges operating within a mindset in which literally any religious belief might be “true” should seek the resolution of conflicting interests and visions, or at least a common, tragic sense of loss. Such a spirit of empathy and compromise has an intrinsic appeal. But Horwitz enters into this spirit only at a highly atomistic level. Most prominently, he rejects both the Judaic and the Christian responses to the problem of a latter-day Abraham on the grounds that they are mere traditions, not personal beliefs. Jews recognize, in Abraham and Isaac’s story, God’s rejection of human sacrifice; Christians see in it the promise of Christ, also ruling out a genuine call to human sacrifice. Horwitz, however, sees, and would allow his judge to see, only the specific belief of a particular person.

Such rejection of tradition has a long history: one outcome of the Enlightenment was the increasing identification of tradition with ignorance, superstition, and the unjust imposition of religious dogma. Yet, as sociologist Edward Shils pointed out, tradition is essential if the naked infant is to become a member of society. At its most basic level a tradition is simply “whatever is persistent or recurrent through transmission.” Traditions, be
they religious, legal, or artistic, shape habits of conduct and belief. The “transmissible parts of [traditions] are the patterns or images of actions which they imply or present and the beliefs requiring, recommending, regulating, permitting, or prohibiting the reenactment of those patterns”; they are “conditions for subsequent actions.” One doubts, then, that a belief as life-changing as that of God’s command to sacrifice one’s child could be interpreted meaningfully without reference to the traditions that formed it. To say that one must take the belief as “true” is simply not enough, for the “fact” of the demand for human sacrifice would mean very different things within different traditions.

This is not to say that traditions negate free will or dissent; traditions develop when people seek to preserve and improve as well as reenact them. Moreover, religions themselves may be changed radically, or spawn new dogmas and/or traditions. But not even the scientific method and the primacy of analytic reason exist outside the sphere of tradition—they developed and have been transmitted as concrete, often unreflective, habits and practices.

What is passed on or left behind within a tradition is determined in significant measure by the tradition itself—some parts survive and others fall into disuse on account of habitual patterns of conduct. Whether one approves of a particular tradition is irrelevant to the fact that traditions serve as guiding patterns of conduct and belief, telling us what it means to be a “hero” or a “gentleman,” to take two of Shils’ examples. To take an individual’s belief as the only “fact” to be considered, even if it is to be held true, is not to take the believer seriously as a person. Indeed, it seems simply incorrect to claim that one may act with full empathy, may “enter into” a claimant’s belief, if all one accepts is the belief, and not the traditional context within which that belief must be understood.

There is no tradition in which human sacrifice can be “true” in America today because it would be a barbaric, impious act according to all our religions—most relevantly Christianity and Judaism. Many aspects of our varied religions would sound odd to those who had never heard of them. Any Catholic who has tried to explain transubstantiation to a Baptist, let alone a Buddhist or Hindu, will understand this. It would seem odd, however, for any people to doubt that it is an improvement in one’s spiritual understanding to have ruled out the use of a person, at the cost of that person’s life, as a means to gain favor with some higher being. Admitting its possibility would seem, then, to constitute a regression of our existential being. Perhaps Horwitz fears that stopping short of human sacrifice as a possible truth would put us on a slippery slope toward forbidding all unpopular belief-based acts; after all, he asserts that religious truth claims
leave no room for exempting dissenters from generally applicable laws.\textsuperscript{54} But Christian natural law teaching in particular dictates concern with human rights, basing them in a human dignity possessed by all persons, regardless of their religion (or lack thereof).\textsuperscript{55}

It seems simply inappropriate, in this light, to make individual belief the sole object of protection. Where Horwitz is concerned with internal voices and images driving human actions, a more appropriate concern would be with vindicating the rights of the person’s socially embedded conscience. Conscience relates to both the inner environment of the person, and fundamentally, to the “real outer environment” of moral teachings, habits and traditions that have formed the inner environment in which beliefs exist.\textsuperscript{56} Conscience is rooted in external sources of moral belief such as family, church, and local associations, and as such cannot be treated in isolation from the traditions that help form it.\textsuperscript{57} Thus, religious freedom begins not with acceptance of the putative truth of individual, idiosyncratic belief, but with the demands of beliefs rooted in our traditions. These traditions, historically, have balanced respect for public order\textsuperscript{58} and the institutional requirements of our way of life\textsuperscript{59} against Americans’ commitment to individual and corporate freedom and deeply ingrained fear of political power, especially at the national level. Moreover, the Hebrew and Christian traditions, those numerically and culturally dominant in the present-day United States, have, as Horwitz notes, at least put human sacrifice out of bounds. This is not to say that these traditions should be held beyond questioning; rights of conscience dictate allowance of dissent and engagement. But discounting such traditions makes way for the possibility of many practices being brought “in bounds” that we should find troubling.

For example, courts have upheld laws against polygamy largely on the grounds that it would undermine our traditions. Such grounds have become suspect in other areas of marriage law, leading some to question the legitimacy of their role in justifying laws against polygamy.\textsuperscript{60} Tradition currently is both in bad odor and subject to “reinterpretation” in light of various policy shifts, but remains relevant in judicial decision-making, for now.\textsuperscript{61} Is Horwitz willing to consider, not just whether the demand of polygamy is “true,” but whether he is (and we should be) willing to undergo the cultural, economic, and social as well as theological changes that possession by one man of many wives would bring?

Contemporary experiments with family structure pose real dangers to the development of full, active, relational conscience. Even as currently deep-rooted a legal practice as no-fault divorce pervades families with calculations of when marital costs may exceed benefits, destroying intimacy and harming the institution’s ability to shape properly children’s charac-
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ters. Moreover, the social-science data is clear that the increasing lack of committed, stable, and long-term two-parent households harms children’s physical, emotional, and social well-being. If they are to shape children of good conscience, societies must support, not just “family” in the abstract, but a particular family rooted in their traditions.62

**DEFENDING THE CONSENSUS:**
**THE RIGHTS OF BELIEVERS**

We live in a time of great social change, toward which Horwitz’s individualist emphasis seems attuned. But what of legal change in particular? Here, in the area supposedly central to his book, Horwitz has relatively little to offer beyond a call to eliminate recent inroads on his “liberal consensus.”

Horwitz’s constitutional agnosticism would further emphasize the right of individuals to engage in “their religious exercises” without governmental interference, as well as eliminating state actions that might be taken as endorsements of beliefs tainted by religion or anti-religion. In addition, of course, constitutional agnosticism would bring empathy to an area of law in which he believes individuals’ subjective beliefs are shown insufficient deference. Still, his judge’s empathy produces, by his own account, nothing more in concrete cases than a heavier thumb on the scales weighing individual autonomy against state interests.63

Horwitz briefly reviews a number of cases, emphasizing the role of empathy in a proper jurisprudence of religious freedom. The outcome can be reviewed in summary fashion: where the Supreme Court allowed the military to ban yarmulkes for the purpose of maintaining uniformity, allowed the government to build a road over an Indian burial ground, and forced an Amish employer to choose between paying into the Social Security system and going out of business, Horwitz would have had them side with the religious claimants.64 In each case the argument is the same: by treating as possibly true the claimant’s religious belief (e.g., that the road would disturb ancestral spirits) a court would be more sympathetic toward that claimant, hence more likely to protect the free exercise right.65

Then there is Horwitz’s view of non-establishment—or rather dis-establishment, for Horwitz is convinced that the state must be utterly silent on all issues of religion vs. non-religion.66 Even the dregs of ceremonial deism—“in God we trust” on the coinage, and the like—should be removed to ensure the state takes no position on personal decisions regarding the possibilities of religious belief.67 This is not, in Horwitz’s view, a further ratcheting up of secularist hostility toward public expressions of religion, but a necessary component of a neutral state. And, for Horwitz,
a neutral state must suspend all “ontological commitments”—that is, all positions regarding the meaning of existence.\textsuperscript{68}

Horwitz also approves what he sees as a growing consensus according to which government funding of institutions such as religious schools is constitutionally permissible—so long as secular institutions also may participate, there is a secular purpose, and individual choice is paramount. He seeks to encourage this trend by formulating it in terms of the state’s duty to treat all religious groups with full fairness and equality. According to Horwitz, this position would increase availability of federal funds to religiously affiliated organizations providing public services. But the state remains the master in this relationship, determining what needs will be met and how. Horwitz acknowledges the “complications” inherent in this situation—with the state determining regulatory requirements that may include nondiscrimination policy as well as issues of efficiency, environmental impact and the like—but fails to consider the wide and deep issues raised thereby.\textsuperscript{69}

The importance of such considerations would seem to merit more attention than Horwitz gives them. For example, Horwitz asserts that establishment concerns would not be raised were a graduation speaker, chosen for purely non-religious reasons, to reference religion in his or her speech.\textsuperscript{70} But the state is implicated, and local officials and institutions potentially put under federal scrutiny, in determining the “non-establishmentarianism” of such criteria.\textsuperscript{71} The state even may find itself counting the number of times Jesus is mentioned in prayers said at the opening of county-commission meetings.\textsuperscript{72} While Horwitz may be comfortable with state regulation involved in setting rules of speaker selection and the like, it remains a clear entanglement of government with choices impinging on religion.

Clearly, then, Horwitz provides no reason to believe constitutional agnosticism would prevent application of policies like the contraception mandate to religious organizations. And the Church’s suit challenging this provision in the Obama healthcare legislation was no sure “winner,” given recent court decisions. For example, in \textit{Catholic Charities of Sacramento Inc. v. Superior Court}\textsuperscript{73} the California Supreme Court held that Catholic Charities was not “really” a Catholic organization, but rather a charitable nonprofit like any other, and so could be forced to comply with that state’s contraception mandate.\textsuperscript{74} The importance of the designation “insularly religious” was shown more recently in \textit{Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.},\textsuperscript{75} in which a religious school was granted a “ministerial exception” and so allowed to dismiss an employee in violation of anti-discrimination law, only because it engaged solely in pervasively religious activities.\textsuperscript{76}
The wall of separation between church and state is becoming a wall of confinement for religious associations, forcing them to mind their religious purposes only or lose protection from forced conformity with state values. Moreover, the ghetto within which religious groups may operate is monitored, even internally, by the state. Religious organizations at any time may be forced to prove compliance with state standards of pervasive religiosity. The sphere also is shrinking as the state encompasses greater portions of our lives, both through direct action, for example providing unemployment benefits, or more indirectly, as when the state imposes non-discrimination and other rules bounding allowable activities.

This “agnostic” model of a government tasked with redirecting the acts and policies of religious groups to guarantee that individuals receive mandated treatment and benefits goes to the heart of the liberal consensus Horwitz seeks to salvage.77 And this liberal consensus undermines recognition of the full, embedded human person and that person’s need, not merely for neutral rules maintaining peace within value pluralism, but for constitutive, self-governing associations participating fully in public life.78

**THE DIS-EMBEDDED SELF AND THE PERSON**

Horwitz’s conceptual mentor, Charles Taylor, argues that we moderns all are “buffered selves.” That is, unlike the “porous self” of the previous “enchanted age,” we are capable of disengaging from the world around us. This disengagement is made possible by a “thick emotional boundary” between our self and the various (often spiritual) forces that give life meaning. Taylor’s buffers allow the self to engage with experiences, taking them in on its own terms. Such a self may choose to be influenced by the world. But it is an imperial self, standing over and manipulating facts and experiences in determining what meaning, if any, they will have.79

One may choose, on this reading, to become immersed in and shaped by outside forces—be they religion or narcotics. But this clearly is the coward’s way out, or at least the primitive way out, because it means surrendering the distance and autonomy of the self; it means giving up mastery. Taylor recognizes arguments that the secular age courts moral and spiritual atrophy, but discusses them in terms of a need for courage as an alternative to nostalgia for a lost past.80

It is Taylor’s self that Horwitz claims can act empathetically, entering into various beliefs without being trapped in any one conception of truth. This self, like the liberal state, is to exist simultaneously somewhere and nowhere, above beliefs and ways of life. Such a balancing act is necessary both among private selves and judges to accommodate the irrepressible questions of life’s meaning while maintaining the thin set of common val-
ues and interests that are all we can expect from political community in a pluralist society.\textsuperscript{81}

But neither the self nor the judge can succeed in Horwitz’s balancing act because it rests on a mistakenly thin view of the person.\textsuperscript{82} The person is not merely a self that chooses whether to be influenced by the world outside the mind, but in important ways a personality constituted by membership in various groups.\textsuperscript{83} Whether in familial, religious, civic or other forms of association, persons fully engaged in their community experience what John C. Turner refers to as a “category shift”; they become

\textit{subjectively} the exemplars or representatives of society or some part of it, the living, self-aware embodiments of the historical, cultural, and politico-ideological forces and movements which formed them. Indeed, psychologically speaking, they do not ‘represent,’ they ‘are’; they become self-conscious society.\textsuperscript{84}

Persons transcend their individual selves by taking on the habits, interests, and perspectives of the groups with which they are engaged.\textsuperscript{85}

Some might find in this picture of engagement a frightening elimination of the sovereign self, but Turner disagrees, arguing that the shift to social identity “[i]n many respects may be seen as a \textit{gain} in identity, since it represents a mechanism whereby individuals may act in terms of the social similarities and differences produced by the historical development of human society and culture.”\textsuperscript{86} Moreover, as philosopher Michael Oakeshott noted, “For most [people], to be deprived of the right of voluntary association . . . would be a far greater and more deeply felt loss of liberty than to be deprived of the right to speak freely.”\textsuperscript{87} For similar reasons Alexis de Tocqueville counted the right of association as fundamental as that to individual liberty.\textsuperscript{88} This is not to say the buffered self is a mere fantasy; as an ideal it motivates human actions that cut people off from their fellows, impoverishing their humanity. But, like the questions of meaning Horwitz recognizes, the quest for belonging cannot be eliminated by liberal structures or ideology.

If Taylor and Horwitz’s conception of the person rests on ignorance or disapproval of our deepest natural desires, what implications does this have for constitutional agnosticism? It shows that, despite his protestations to the contrary, Horwitz is engaged in the same secularizing jurisprudence he claims constitutional agnosticism will combat. His empathetic adjudicatory techniques, by which he would soften application of the liberal consensus to religious viewpoints, remains destructive of the kinds of associations necessary for human flourishing.
Unfortunately for Horwitz, and for liberalism more generally, we cannot simply will empathy into existence; it requires sharing of actual, substantive beliefs, habits, and social connections. Without these commonalities, one’s attempts to “enter into” the beliefs of another individual cannot help but be superficial and ignorant of the structures that give meaning and purpose to those beliefs. Thus, liberal “value pluralism” establishes, not social harmony, but antisocial chaos.

Calls to good feelings cannot slow the assault on embedded personhood, particularly when that personhood is discouraged by a state and liberal ideology tying individuals to what Mary Ann Glendon calls the individual-state-market grid.\(^89\) This grid seeks to constitute all of public reality. Other forms of relationship are possible, but cannot be publicly acknowledged or even tolerated if they threaten the overall grid that is seen as necessary for the maintenance of individual autonomy and flourishing. Thus the “self” may be “constituted” by whatever relationships it chooses to recognize, in private. But those groups cannot be recognized, let alone be allowed meaningful self-government, for fear they may undermine the state’s general policies—including, of course, moral pluralism within state value neutrality.\(^90\)

Yet these groups, including religious groups, remain the existential center of any meaningful life. It may be a step forward from militant secularism to see the state as the proper enabler of all forms of private choice including religious choices. But it remains an impoverished vision of society and of the person. Moreover, in an era in which massive state power faces threats of terrorism and cultural unrest, it would seem unwise to ignore the wisdom of observers like Tocqueville who pointed out that, without strong intermediary institutions, the individual is left at the mercy of the state, incapable of defending his integrity and way of life.\(^91\) Where, as with Horwitz’s constitutional agnosticism, the state polices the boundaries of group conduct to defend church/state distinctions, the individual remains the locus of concern and the group the locus of suspicion, control and potential destruction, denying it the self-governed action necessary for it (and its members) to flourish.\(^92\)

By forcing Catholic groups, either directly or indirectly, to provide insurance coverage for contraceptive and abortion-inducing drugs, the state demands that they deny a crucial reason for their existence. Catholic charitable associations exist to do good works as expressions of the Catholic faith. Forcing support for violation of that faith undermines, not the power of some distant institution to control individual choice, but the very identity of Catholics as Catholics—as members of a community of faith. To
pretend otherwise is to deny the reality of constitutive human attachments, and our humanity itself.

Sociologist Robert Nisbet observed that the person “does not live merely as one of a vast aggregate of arithmetically equal, socially undifferentiated, individuals.”93 “Nowhere do we in fact find [such] aggregates of ‘individuals.’ What we find are human beings bound, in one or another degree, by ties of work, friendship, recreation, learning, faith, love, and mutual aid.”94 Agnostic individuals may exist, but there can be no society of agnostic individuals, only a community of communities rooted in the principle and practice of subsidiarity, or an ersatz community ruled from the political center.95 Despite his good will, Horwitz’s constitutional agnosticism pushes toward ersatz community; his legal rules, intended to balance personal religious obligations against the thin political interests of liberal citizenship, leave no room for real, constitutive communities, or for real, full persons.96

Notes

3. Id. at 1.
4. Id. at 2. Emphasis in original.
6. Id. at 2–3.
7. This is the theme of the essays included in Rethinking Rights: Historical, Political, and Philosophical Perspectives, ed. Bruce P. Frohnen and Kenneth L. Grasso (University of Missouri Press, 2010).
11. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 11–13 (Cambridge University Press, 1998); HORWITZ, supra note 9, at 158.
13. Id. at 41.
14. Id. at 5–6.
15. HORWITZ, supra note 9, at 116, 123.
16. Id. at 140, 75, xiv, 83, 97.
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17. Id. at xxii–xxiii, 96–98.
18. Id. at 145, 143, 147.
19. Id. at 161.
20. Id. at 172.
21. Id. at 184, 172, 155–59.
22. Id. at 143, 168, 166–67, 144–45, 145.
23. Id. at 10–14, 144–45, 145.
24. Id. at 4–5.
25. Id. at 7, 8–9, 9.
26. Id.
28. See generally Alexis de Tocqueville, The Old Regime and the Revolution (University of Chicago Press, 1998) 1856 (detailing the manner in which the French monarchy destroyed intermediary institutions in its drive for power and uniformity, resulting in the destruction of social order).
29. But see Kent Greenawalt, History as Ideology: Philip Hamburger’s Separation of Church and State, 93 CAL. L. REV. 367 (2005) (arguing that contemporary separationism is a natural outgrowth of the conflicts portrayed in Hamurger’s account of historical events).
31. Id. at 221–22, 227–28, 10, 12.
32. Id. at 191, 228, 10, 10–11, 226.
34. Hamburger, supra note 30, at 228.
35. Id. at 193–252. See also Robert A. Kahn, Are Muslims the New Catholics? Europe’s Headscarf Laws in Comparative Historical Perspective, 21 DUKE J. COMP. & INT’L L. 567, 577–78 (2011) (detailing laws, including those banning the wearing of clerical garb by schoolteachers, used to discourage Catholic education).
38. Hamburger, supra note 30, at 479–92.
41. Duncan, supra note 33, at 504.
43. Horwitz, supra note 9, at xxii.
44. Id.
45. Id. at 151, 165, 151–53, 165–66, 210–14, 212.
46. Id. at 213, 166, 213, 212, n. 68.
47. Edward Shils, Tradition 5, 8–9, 16, 12 (University of Chicago Press, 2006).
48. Id. at 14–15, 28, 21.
49. Id. at 25–26.
50. Id. at 32. That these patterns may include bad conduct seems obvious; some may, indeed, be evil.
52. Horwitz, supra note 9, at 212, n. 68.
53. Griffiths, supra note 51, at 44.
54. Horwitz, supra note 9, at 65.
57. Vischer at ch. 2.
58. See, e.g., People v. Ruggles, 8 Johns. R. 290 N.Y. (1811) (criminal punishment for blasphemy—using vulgar terms to describe Jesus Christ—was upheld, not as theologically required, but as a measure to protect the peace).
59. See, e.g., Reynolds v. United States, 98 U.S. 145 (1878) (some bigoted language was used in rendering a decision protecting the traditional Judeo-Christian family unit).
62. Vischer, supra note 56, at 239–42, 123, 245, 264, 264, 263–65. Vischer nonetheless is willing to subject the family to significant modification in light of contemporary opinions and circumstances, but it seems clear that such modifications pose dangers for the stability of human relationships and the nurturing of children, whatever the beliefs of particular individual persons.
63. Horwitz, supra note 9, at 172, 245, 184, 185, 172.
64. See id. at 177, 209, and citations therein.
65. *Id.* See also *id.* at 178 (criticizing decisions preceding *Smith* for muting the importance of applying strict scrutiny to any governmental action burdening religious free exercise through their insistence on secular reasons and arguments in defense of the religious practice in question).

66. *Id.* at 245–46.

67. *Id.* at 265. Consistent with his concern to maintain consensus, Horwitz foresees no strenuous judicial movement to end ceremonial deism, but wishes judges would admit to themselves that they are making concessions merely for the sake of public opinion. *Id.* at 266.

68. *Id.* at 265–66, 245.

69. *Id.* at 259–61, 250, 252, 254–55, 252, 255.

70. *Id.* at 246.

71. See *id.* at 257–58 (referencing with approval the Supreme Court decision in *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 [2000], for looking behind formal criteria to catch out the “leveraging” of majority opinion among students to name a religious commencement speaker).


73. 32 Cal.4th 527, 85 P.2d 67 (2004).

74. *Id.* at 540.

75. 132 S. Ct. 694 (2012).

76. *Id.*


78. *Id.*

79. TAYLOR, supra note 12, at 37, 38, 541, 38.

80. *Id.* at 38–39.

81. HORWITZ, supra note 9, at 115, 243.

82. Hager, supra note 77, at 145.

83. *Id.* at 144.


85. *Id.*

86. *Id.* at 51.

87. Quoted in Hager, supra note 77, at 147.

88. *Id.*

89. Mary Ann Glendon, *RIGHTS TALK* 143 (Free Press, 1983).

90. See generally Kenneth L. Grasso, *Contemporary Communitarianism, the Lure of the State, and the Modern Quest for Community*, in COMMUNITY AND TRADITION (George W. Carey and Bruce Frohnen, eds., Rowman and Littlefield, 1998).

Americans maintain their freedom only because of their ability to form a variety of powerful local associations insulating them from state centralization.

92. See George W. Carey, *The Constitution and Community* in Carey and Frohnen, *supra* note 90, at 63–84 (arguing that associations must be given space and purpose in order to flourish).


96. Horwitz, *supra* note 9, at 143.