

## Nervous Victors, Illiberal Measures: A Response to Douglas NeJaime and Reva Siegel

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### INTRODUCTION

Douglas NeJaime and Reva B. Siegel's *Conscience Wars*<sup>1</sup> is an exemplar of a dying breed: a progressive piece that takes religious freedom seriously for political foes in the sex-and-reproduction culture wars. In just one generation, those battles have turned religious liberty, that consensus ideal of American public life, into a source of the fiercest divisions.<sup>2</sup> The conflict now clusters around clashes between religious believers' refusals to provide services they find sinful and others' entitlements to those services.

Though the progressive side has made gains, NeJaime and Siegel's aim is ecumenical: to offer *shared* terms for a peace. Their article is therefore generous, charitable, and restrained. It gives conscience claims real weight, never doubts their sincerity, and holds back from judging cases, happier to win wider approval of a framework for deciding them. It is also scrupulously fair-minded, rehearsing opponents' views in the words of articulate advocates. An analysis with these virtues, in this debate, is an enormous contribution. Here,

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1. Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516 (2015).
  2. As recently as 1993, for instance, the federal Religious Freedom Restoration Act passed by voice vote in the House and a vote of 97-3 in the Senate. U.S. SENATE, Roll Call Vote No. 331, 103d Cong. (Oct. 27, 1993), [http://www.senate.gov/legislative/LIS/roll\\_call\\_lists/roll\\_call\\_vote\\_cfm.cfm?&congress=103&session=1&vote=00331](http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?&congress=103&session=1&vote=00331); 139 CONG. REC. 9,680-87 (1993). Today, as NeJaime and Siegel's whole Article shows, the culture wars have made that and similar state provisions politically radioactive. See, e.g., Rachel Brody, *Views You Can Use: A Discrimination Debacle* (Mar. 31, 2015), U.S. NEWS & WORLD REP., <http://www.usnews.com/opinion/articles/2015/03/31/indiana-religious-freedom-act-prompts-backlash-pundits-react> [<http://perma.cc/Y6Q6-R6PW>] (collecting reactions to Indiana's RFRA bill); Abby Ohlheiser, *Look at All These Horrible Bullies Bullying Jan Brewer Over Arizona's Anti-Gay Bill*, WIRE (Feb. 24, 2014), <http://www.thewire.com/politics/2014/02/look-all-these-horrible-bullies-bullying-jan-brewer-over-anti-gay-bill/358524> [<http://perma.cc/VBZ2-9HSU>] (collecting reactions against Arizona's RFRA bill).

though, I focus on what I see as two of the article's errors—which I think expose surprising roots of our conscience wars.

First, for NeJaime and Siegel, a conscience claim's power to help overturn progressive policies on sex, marriage, or reproduction should count against granting it. Second, so should its risk of sending the message that others are acting immorally.

In truth, these effects—the “material” harm of shaping policy,<sup>3</sup> and the “dignitary” harm of expressing moral opposition—are features, not bugs, of a healthy regime of civil liberties. A claimant's moral or religious integrity matters in itself. But the corresponding liberties also make room for civil society: for private associations that shape our loyalties, check the state, and provide resources for its reform. For these social benefits, potential for political impact is crucial. Moral stigma, too, can stoke moral reform, by forcing us to reexamine our complacent assumptions. We shrink these fruits of freedom by treating the spread of political dissent as a reason to *prune* civil liberties; by winnowing conscience claims for *upsetting* mainstream sensibilities.

In a way, then, NeJaime and Siegel's missteps betray not too little focus on believers' interests, but too much. For NeJaime and Siegel, freedoms of religion and conscience are *only* for the claimants' sake. Their social effects—stirring up political and moral dissent—are only perils. Likewise, civil society's diverse associations, which these liberties empower, are threats to liberal order, to be tolerated only at the state's pleasure, when they bear its image.

My surface objections to NeJaime and Siegel's proposal thus point to bedrock differences over the meaning of liberalism, not just religion. NeJaime and Siegel's vision of liberal order makes them anxious victors in the culture wars, eager to secure gains against dissent of any social consequence. Classical liberalism, I suggest, offers a superior vision, and more repose.

Part I sketches NeJaime and Siegel's analysis, and Part II rejects two of its features. Part III expands on the reasons to reject these, and Part IV answers objections. The Conclusion sketches the fault lines within the liberal tradition here laid bare—fissures that might explain how our nation's apparent consensus on the scope of religious liberty crumbled so utterly, so fast.

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3. By “material” harms, NeJaime and Siegel refer mainly to denials of goods otherwise owed to third parties, which this Essay sets aside. But they also worry about another “material” effect of conscience claims by powerful groups. They fear that these groups might not just limit others' access to legally guaranteed goods but lead to repeal of the laws guaranteeing them. What I reject is counting this latter possibility against a conscience claim.

## I. COMPLICITY CLAIMS

*Conscience Wars* analyzes religious believers' legal claims against being made complicit (as they see it) in others' sins.<sup>4</sup> It focuses on requests for exemptions or accommodations from legal requirements to facilitate abortion, contraception, sterilization, and same-sex or non-marital relationships.<sup>5</sup> These *complicity claims* have grown as traditionalists have lost cultural ground.

NeJaime and Siegel argue that complicity claims differ—in “form,” “social logic,”<sup>6</sup> and cost—from conscience claims that dotted the Court’s docket from *Sherbert v. Verner*<sup>7</sup> to *Employment Division v. Smith*.<sup>8</sup> The new claims’ *form* is to seek distance from others’ sins. Their social logic, or aim, is to help traditionalists recapture the culture.<sup>9</sup> And for both reasons, protecting them imposes costs on “singled-out” groups.<sup>10</sup> The material costs may include delays or denials of services like abortion, and the dignitary harm is the social implication that those being refused are sinning. Exacerbating both harms is the strategic role that complicity claims play in our culture wars, as leaders enlist believers to assert them in a campaign to win converts to their causes.<sup>11</sup>

## II. COUNTING HARMS

These harms, NeJaime and Siegel say, are novel, and they should count against granting such claims. I doubt that they are novel;<sup>12</sup> and I will show that they should not so count. Here I will grant<sup>13</sup> that in weighing complicity claims, officials should heed the risk of depriving bystanders of material goods to which the law otherwise entitles them.<sup>14</sup> But I reject NeJaime and Siegel’s proposal to weigh two other effects on third parties.

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4. *Id.* at 2520.

5. *Id.* at 2520 n.12.

6. I use the same terms as the authors. *E.g.*, NeJaime & Siegel, *supra* note 1, at 2516.

7. 374 U.S. 398 (1963).

8. 494 U.S. 872 (1990).

9. NeJaime & Siegel, *supra* note 1, at 2542.

10. *Id.* at 2521.

11. *Id.* at 2566.

12. See, e.g., Marc O. DeGirolami, Free Exercise by Moonlight, SAN DIEGO L. REV. (forthcoming) (manuscript at 26-30), <http://ssrn.com/abstract=2587216> [<http://perma.cc/JL4D-6C6Y>] (showing precedents in Free Exercise case law for conscience claims similar in almost every respect to those that NeJaime and Siegel highlight).

13. I suspect that only an important subset of such goods should count, but I set that aside here.

14. But note that, quite often, respecting complicity claims need not have this effect. Thus, Marc DeGirolami:

First, however, a word on who does the weighing of harms, and when. Lawmakers consider third-party harms in carving out accommodations, judges in applying Religious Freedom Restoration Acts (RFRA), and both in heeding or applying the Constitution. The federal and state RFRA direct courts to exempt people from a law that substantially burdens their religion, unless applying it to them is the “least restrictive means” to serving a “compelling state interest.”<sup>15</sup> Under the Free Exercise Clause, courts strike down laws that target religion for special burdens unless they are “narrowly tailored” to serve a “compelling governmental interest.”<sup>16</sup> Both tests, then, require weighing harms. But how does one decide which harms to count?

The task is subtle. Making money is in a person’s interest, but no legal harm arises when one business fairly inches out another. What is the baseline for deciding when costs become legal harms—and serious enough that avoiding them is compelling? NeJaime and Siegel give no general answer. But besides the denial of goods otherwise owed to third parties, they propose two costs that we can count only at the expense of important liberal values. Certainly, then, we should not see preventing them as a *compelling* interest under RFRA or the Constitution.

#### A. A Material Harm: Political Potency

NeJaime and Siegel see the complicity claims now arising as ominous. Those asserting them invoke not some benignly oddball belief but the potent traditionalism of the culture wars. They are not few and isolated, but many and mobilized. What they seek is not a quiet corner for living out their faith, but a foothold for remaking our culture.<sup>17</sup>

The implication is clear: Officials should discount claims when granting them might empower believers to push for their views, or even change laws they oppose. We should be quicker to grant the claims of powerless minorities

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Decisions about cost allocation in the face of a legally cognizable religious objection are the government’s, not the claimant’s. In *Hobby Lobby*, it was the federal government’s decision, not Hobby Lobby’s, not to allocate the cost of contraception coverage to “society as a whole” (through the mechanism of taxation, for example) but instead to impose it on private religious objectors. . . . [Nothing] in the nature of [Hobby Lobby’s] objection had the necessary effect of imposing the costs of its objection on third parties; it had that effect only because of the scheme selected by the government.

*Id.* at 30 (internal citations omitted).

15. *E.g.*, 42 U.S.C. §§ 2000bb-1(b)(2), 2000c(a)(1)(B), 2000cc-1(a)(2) (2012); 71 PA. STAT. ANN. §§ 2401-2707 (West 2015).

16. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993).

17. NeJaime & Siegel, *supra* note 1, at 2543.

resigned to their political defeat (or “conceding a new consensus”).<sup>18</sup> We should sooner *refuse* those who would use their freedom to “contest society-wide norms.”<sup>19</sup> In plain terms, we should favor the Amish over Evangelicals.<sup>20</sup>

NeJaime and Siegel do not say whether it is lawmakers, judges, or both who should consider this feature of a complicity claim—what I will call its *political potency*. It may be permissible, if unseemly, for democratic lawmakers to protect their preferred policies against politically powerful dissent. But should judges so interfere in the political process, insulating current policy against those who would challenge it with any hope of success?

As NeJaime and Siegel remind us, of course, people denied exemptions can still “express[]” their concerns and push to “change . . . objectionable laws.” They retain “all of the resources of speech and political advocacy” available to others—just not “the special advantage of an exemption.”<sup>21</sup> But calling exemptions a “special advantage” is tendentious. It assumes that the default in a constitutional democracy is *not* to protect conscience claims that might make a political splash.<sup>22</sup> Only then does protecting them anyway seem like favoritism.<sup>23</sup>

It is likewise unfair to say that what religious traditionalists seek, in the absence of “laws enforcing traditional sexual norms,” is “to enforce those norms” through exemptions “against” others.<sup>24</sup> Legally enforcing a norm against someone suggests coercing her to follow it. So NeJaime and Siegel are lumping traditionalist-conduct *exemptions* together with *legal enforcement* of traditionalist views. That seems fair only if one assumes that the default is not to accommodate these views—so that doing so seems like a gratuitous imposition on others. Only then does *actually* coercing *traditionalists* to violate their consciences seem like the neutral norm.

Yet NeJaime and Siegel take religious liberty seriously. So why do they give political potency any weight? Here is a first hint that they focus too narrowly

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18. *Id.* at 2563.

19. *Id.*

20. Compare *id.* at 2525-26 (favorably emphasizing the modest social impact of the Amish in *Wisconsin v. Yoder*), with *id.* at 2552-65 (highlighting, with concern, Catholic and Evangelical ambitions to evangelize).

21. *Id.* at 2584 (emphasis added).

22. *But see infra* Section III.B (arguing that potential political reform is a valuable historic goal of religious liberty).

23. Perhaps NeJaime and Siegel are concerned that RFRA unfairly provide exemptions for religious but not secular conscience claims. If so, I agree that (perceived) moral and religious duties should be treated alike.

24. NeJaime & Siegel, *supra* note 1, at 2591 (emphasis added).

on religious liberty's benefits to those who claim it, seeing its wider effects only as harms to be managed.<sup>25</sup>

*B. A Dignitary Harm: Moral Stigma*

Heightening that suspicion is NeJaime and Siegel's proposal to weigh another factor against complicity claims: dignitary harm. Conscientious refusals to deal, they say, are salvos in a culture war. A certain message resounds from them, whatever the refusing party herself might mean or say.<sup>26</sup> Refusals to provide morning-after pills, for instance, tell women that what they seek is sinful or wrong—even that they are sinners.<sup>27</sup> This is stigmatizing. And a thousand such refusals, mobilized by zealous generals in our culture wars, only intensify what I will call *moral stigma*<sup>28</sup>—the harm of being told (even just by deeds) that decisions central to your identity are immoral.

Taking moral stigma into account is even more problematic than weighing political potency. First, counting it can be self-undermining because fear of it can be self-fulfilling. The more that we—or officials, in weighing complicity claims—say that a policy or belief expresses disdain for a group, the more it will take on that social meaning. Lawmakers or judges trying to fight the harm might thus extend it. This is not to blame the victims as hypersensitive. It is to accept what NeJaime and Siegel make central: that social meaning depends on diffuse social facts, not on any given person's state of mind.

Second, in many disputes, both sides could claim with equal force that a decision against them would morally stigmatize them. Grant that exemptions from baking same-sex wedding cakes tell gay couples that intimacies central to their identity are immoral. What about denying the bakers' claims? Won't that tell them—and traditional Muslims, Orthodox Jews, and Christians—that beliefs central to their identity are bigoted? If exemptions from performing abortions tar women who've had them, coercing prolife doctors must brand them enemies of women's equality.<sup>29</sup> On most serious issues, any side might feel deeply stigmatized by rival actions or policies.

NeJaime and Siegel might reply that sometimes the stigma is justified, because the targeted view is deplorable. Maybe. But to curb rights to expressive

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25. I discuss problems with this assumption *infra* Section III.B.

26. NeJaime & Siegel, *supra* note 1, at 2575.

27. *Id.* at 2576.

28. I use this term to distinguish this harm from other species of dignitary harm, which might contain no moral accusation.

29. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 292 (2007) (“[L]aws criminalizing abortion violate the Fourteenth Amendment’s principle of equal citizenship and its prohibition against class legislation.”).

conduct on that basis is, as discussed below, illiberal— toxic to interests that classical liberalism has rightly served.

So far, we have pieced together from NeJaime and Siegel’s proposals a picture of the purpose and beneficiaries of civil liberties: Religious liberty and conscience rights help only those who exercise them. The rest of us stand only to lose if another’s freedoms challenge our policies or moral convictions. Perhaps that is why, on this view, actions expressing dissent deserve most protection when they are least consequential: when the odd minority-religious believer, conceding political defeat, pleads to be left alone.<sup>30</sup>

### III. THE VIRTUES OF FREEDOM

Against this honest but blinkered vision, this Part argues that freedoms of religion and conscience serve more than the claimants’ interests; for others in society, they enable moral reform. But we would squelch this social benefit—and compromise even the case for the claimants’ rights—by treating political potency and moral stigma as legal harms.

#### A. Benefits to the Claimant

Liberties of conscience and religion protect our ability to fulfill moral and religious duties as best we know how; they protect the coherence of our convictions and actions. That integrity is valuable in itself, and always at risk of being compromised by law. For the claimant, then, these liberties protect her basic interest in integrity, as far as the common good allows.

This sort of justification finds support on both sides of our culture wars and deep in our tradition. It is cited by LGBT advocates as well as social conservatives.<sup>31</sup> James Madison lists it first in his *Memorial and Remonstrance Against Religious Assessments*.<sup>32</sup> Michael McConnell calls it “traditionally the most important argument.”<sup>33</sup> And it is one that NeJaime and Siegel can accept.

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30. Cf. Michael W. McConnell, *Why Is Religious Liberty the “First Freedom”?*, 21 CARDOZO L. REV. 1243, 1265 (2000) (“Modern liberalism tends to protect religious freedom only when it does not matter—when it is private and inconsequential.”).

31. Compare Robert P. George, CONSCIENCE AND ITS ENEMIES ch. 11 (2013) (a social conservative offering a natural-law defense of freedoms of religion and conscience), with ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY ch. 4 (2013) (an LGBT advocate defending special protections for religion).

32. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), <http://founders.archives.gov/documents/Madison/01-08-02-0163> (arguing that, because religion “can be directed only by reason and conviction, not by force,” it must “be left to the conviction and conscience of every man”).

33. Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT. L. REV. 453, 456 (2000).

But it is in some tension with their proposal to treat moral stigma as a legal harm. It's simple: In a diverse society, religious liberty *always* creates moral stigma. Religious freedom includes nothing if not the rights to worship, proselytize, and convert—forms of conduct (and speech) that can express the conviction that outsiders are wrong.<sup>34</sup> Perhaps not just wrong, but deluded about matters of cosmic importance around which they have ordered their lives—even *damnable* wrong.

This can hold within religions, too—even among Christians allied in the sex-and-reproduction culture wars. On the Catholic view, for instance, worship of the Eucharist ought to be the organizing principle of one's life;<sup>35</sup> for Evangelicals, making it so might mean building one's identity on idolatry—a violation of literally the First Commandment.<sup>36</sup> In a world full of conflicting faiths or even denominations, then, religious freedom is the *ultimate source* of moral stigma.<sup>37</sup>

But not the only one. Actions based on *moral* views held to be objectively true might also impose it. At a dinner out with friends, a vegan's order of tofu might suggest judgment of her friends' choice of beef. That hardly favors her ordering tenderloin—and her friends should agree.<sup>38</sup>

To be sure, in the religious context, NeJaime and Siegel would deny that we should whittle away at rights to worship or convert where exercising them would imply that others are sinning. They might set different standards for *these* dimensions of religious liberty. But on what ground? Yes, they are central to religious freedom, but so is freedom of conscience. If the power to stigmatize should count against the latter, why not against the former?

Moreover, since we certainly *won't* suppress the former and far more pervasive exercises of religious liberty, how much good would it do to stamp out only the moral stigma created by complicity claims caught up in culture wars? The reduction in public rancor would be slight, but the cost for each person coerced against her conscience quite grave. Counting denials of material goods is one thing. But so far, I see little public good, and some inconsistency

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34. Cf. Andrew Koppelman, A Free Speech Solution to the Gay Rights/Religious Liberty Conflict 23 (Sept. 15, 2015) (unpublished manuscript) (on file with author) (“Long before James Madison argued that democracy logically entailed the freedom to criticize incumbent officeholders, the principal focus of arguments against censorship was the prohibition of heresy and blasphemy. Free speech and freedom of religion weren’t always in separate analytical silos.”).

35. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1324-25 (1992).

36. See, e.g., Dan Corner, *John 6:53 and the Catholic Holy Eucharist*, EVANGELICAL OUTREACH, <http://www.evangelicaloutreach.org/communio.htm> [<http://perma.cc/9UNW-4DG9>] (calling worship of the Eucharist “faulty worship in the form of idolatry”).

37. Thanks to Andy Koppelman for discussion on this point.

38. Ben Eidelson suggested this example.



or harm, in legally counting moral stigma—painful though it can be, culture war or not.

### *B. Social Benefits*

But these doubts—and those about cognizing political potency—only sharpen if we consider the *social* benefits of freedoms of conscience and religion. These liberties foster the institutions that populate civil society, and jar us out of moral complacency. They can limit the state’s excesses and foster personal and political reform. But these purposes are more pressing, not less, where the beliefs protected would upset mainstream policies or sensibilities. Socially, then, political potency and moral stigma are *part of the point*.

#### *1. Flourishing Civil Society*

The first social benefit of freedoms of conscience and religion is to create the private sphere—to distinguish in theory, and to protect in practice, private associations from the state. Civil society and religious freedom thus have common roots. Or rather, religious freedom is the root and civil society the outgrowth. Historically, the former really was our “first freedom.” Thus, from McConnell:

Long before liberalism . . . the division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of a civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas.<sup>39</sup>

McConnell shows how Christian theology long justified a division of the spiritual and temporal into separate domains, under separate authorities. That division “at the heart of our First Amendment” enabled “a more general liberal theory of government” by puncturing the “omnicompeten[ce]” of “the political sphere.”<sup>40</sup> It made clear that government was not the highest authority; that it was subject to transcendent moral limits, and meant to serve people’s

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39. McConnell, *supra* note 30, at 1244.

40. *Id.* at 1247-49. See also, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1226 (2d ed. 1988) (discussing the ways in which American constitutional law ensures that “secular and religious authorities . . . not interfere with each other’s respective spheres of choice and influence”).

independent rights and interests. Harold Berman has shown in more detail how civil society thus grew into its own.<sup>41</sup>

And that story has a moral for our politics. Associations that mediate between individuals and the state—religious and other “nomic”<sup>42</sup> communities—have their own value, as expressions of private initiative and self-determination. But as cultural authorities separate from the state, they also limit its power and check its “hegemonizing ambitions.”<sup>43</sup> Even our jurisprudence has come to see them as “critical buffers between the individual and the power of the State,” in Justice William Brennan’s words.<sup>44</sup> They both create the private sphere and shield it from tyranny.

To be clear, associations do more than give us occasions to exercise our liberties against the state. They *empower* us to do so, by giving us separate identities—by forming our loyalties and motivations.<sup>45</sup> Without them, bare individualistic liberties would count for little; we would lack resources to use them well. Just as freedom of speech requires, in Jack Balkin’s phrase, an “infrastructure of free expression” consisting of “institutions, practices and technological structures” to “foster” it,<sup>46</sup> so do all our freedoms.<sup>47</sup> As Balkin observes, this infrastructure includes “churches, educational institutions, and charities.”<sup>48</sup> So it is served by religious institutions’ autonomy—and by freedom of expressive association, which the Supreme Court calls “crucial in preventing the majority from imposing its views” on dissenting minorities.<sup>49</sup>

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41. See, e.g., HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 87-88 (1983).

42. See Robert Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

43. Richard W. Garnett, *Religious Freedom and the Nondiscrimination Norm*, in *LEGAL RESPONSES TO RELIGIOUS PRACTICES IN THE UNITED STATES: ACCOMMODATION AND ITS LIMITS* 224 (Austin Sarat ed., 2012).

44. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619 (1984).

45. See PETER L. BERGER & RICHARD JOHN NEUHAUS, *TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY* (1977); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 489-99 (Harvey C. Mansfield & Delba Winthrop eds. & trans., Univ. of Chi. Press 2000); Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1846 (2001).

46. Jack M. Balkin, Address at the Second Access to Knowledge Conference at Yale University: Two Ideas for Access to Knowledge—the Infrastructure of Free Expression and Margins of Appreciation (Apr. 27, 2007), <http://balkin.blogspot.com/2007/04/two-ideas-for-access-to-knowledge.html> [<http://perma.cc/T8Z3-DJQP>].

47. Jack M. Balkin, *The Infrastructure of Religious Freedom*, BALKINIZATION (May 5, 2007, 3:15 PM), <http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html> [<http://perma.cc/L5NE-HEKF>].

48. *Id.*

49. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000).

Freedoms of conscience and religion, fortified by free association, have thus fenced in the state's claims and made civil society thrive. But we take *direct aim* at these effects by demoting claims made by institutions or movements with political muscle and ambition.

## 2. *Moral and Social Reform*

Freedoms of religion, conscience, and association don't just protect associations that shape our identities. Empowering private sources of moral authority—even, indeed *especially* when doing so intensifies moral debate—can also lead to moral reform. Personally, it does us the painful but needed service of disturbing our dogmatism about ultimate questions. It likewise prevents political victories or defeats from ossifying into orthodoxies.

As long as civil society's ideological currents are allowed to run freely, we all enjoy a steadier flow of fresh ideas about morality, religion, and politics. Mainstream assumptions are challenged by countercurrents; no cultural tide becomes too strong to turn. That is why some of our greatest reforms first sprouted in the soil of civil society, long irrigated by religion. Consider the movements for abolition, civil rights, peace, and more open immigration.<sup>50</sup>

In this way, freedoms of speech and conscience build off each other. John Stuart Mill famously argued (to switch to the usual metaphors) that a marketplace of ideas allows us to test ours against rivals and appropriate the truth more deeply.<sup>51</sup> But freedoms of conscience and religion also serve that market. As we've seen, they furnish ideas traded on it, and empower those selling them. But to do so, these rights must be protected evenhandedly. The state cannot play the crony capitalist with ideas, giving stronger protections to those it finds congenial. Or as Justice Robert Jackson wrote, in a case that (fittingly) combined religion and free speech: it is a "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>52</sup>

These points weigh against NeJaime and Siegel's proposals. At the personal level, we are roused from dogmatism not simply by the detached observation that someone somehow disagrees with us. Important is what Andrew Koppelman, a longtime advocate of socially progressive causes, calls "the open collision of moral views," which liberalism has long seen as a benefit:

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50. Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 U.C. DAVIS L. REV. 793, 801-03 (1996).

51. JOHN STUART MILL, ON LIBERTY ch. 2 (1859).

52. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

When John Stuart Mill's classic defense of free speech balances liberty against harm, Jeremy Waldron has observed, that balancing cannot count as harm the moral distress of having your most cherished views denounced . . . A core value of free speech is that it will and must induce such distress. Mill, and liberalism more generally, places great value on "ethical confrontation – the open clash between earnestly held ideals and opinions about the nature and basis of the good life." Moral distress, "far from being a legitimate ground for interference . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."<sup>53</sup>

The moral distress of having your ideals blasphemed is thus a boon, even when it is also a bane. Counting moral stigma against a claim doesn't simply undermine religious liberty.<sup>54</sup> It also shields us from the moral confrontation that might force us to rethink and reform our lives.

Political reform, too, requires more than freely circulating dissent; it requires giving ideas a real chance to land, to make political impact. We oppose this goal head-on by punishing expressive conduct for its political effectiveness—by treating political muscle as a reason to ban behavior we might otherwise (for the claimant's sake) allow.<sup>55</sup>

In short, what NeJaime and Siegel see as legal harms of complicity claims—moralized offense and political power—have been means to social reform. They don't serve this goal in every case. But at any moment, almost by definition, the majority is in no position to tell. So we must give them wide berth.

#### IV. OBJECTIONS

Just how wide should that berth be? Is it not *sometimes* necessary to turn down liberty claims for their political potency, or fight moral stigma by law? Here I address these objections.

##### A. *Politically Entrenching Certainties?*

Some moral principles seem certain enough that we can entrench them—by protecting them against political turbulence—without risking a missed opportunity for social reform.

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53. Koppelman, *supra* note 34, at 24-25 (quoting Jeremy Waldron, *Mill and the Value of Moral Distress*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 115, 120 (1993)).

54. See *supra* Section III.A.

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For a real-life example, take the IRS's decision in 1970 to revoke Bob Jones University's tax-exempt status because of its campus ban on interracial dating.<sup>56</sup> We can be certain that Bob Jones's principles were wicked—that punishing the university for holding them didn't mute a voice for genuine reform. But wouldn't my argument condemn the IRS's decision as illiberal? (Set aside its legality.) Tax-exemption, after all, fosters charities that span the ideological spectrum. It subsidizes civic associations that—on my argument—can serve social reform only if we don't punish them for political effectiveness (or offensive morals). Yet we might see the IRS's revocation as an attempt to do just that: to shore up then-fragile political gains against racism (or to punish action based on degrading ideas).

But the Supreme Court itself was eager to quarantine the IRS's decision,<sup>57</sup> and for reasons similar to mine.<sup>58</sup> The Court upheld (as legally authorized) the agency's finding that the dating ban was against public policy. But it implicitly set a very high bar for such findings in the future. For example, it made much of the fact that every branch of the federal government had opposed racial segregation firmly, in sundry ways and for decades.<sup>59</sup> It thus sought to ensure that tax exemption wouldn't later be revoked simply because, say, the IRS Commissioner found a group's values demeaning.

That caution is what my argument calls for. It would be a mistake to allow ourselves much easier ways to entrench political victories (or punish offensive views)—even just partially, as NeJaime and Siegel would, by having judges penalize claims for their political potency (or moral stigma). After all, we often disagree as vehemently about what should lie beyond ordinary politics as we do about the right answers on issues within it. Nor is the perceived importance of a principle a barometer of its correctness: Avid pro-life and pro-choice citizens agree that abortion is a question of the highest moral importance, but they would entrench exactly opposite regimes, and find exactly opposite views to be morally demeaning of some group or other.

History shows that humanity's most certain, centuries-long consensus can be wrong, and disastrously so: Witness the world-historical record on slavery

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56. *Bob Jones Univ. v. United States*, 461 U.S. 574, 578 (1983).

57. *Id.* at 592 (“We are bound to approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected; a declaration that a given institution is not ‘charitable’ should be made only where there can be no doubt that the activity involved is contrary to a fundamental public policy.”).

58. *Id.* at 609 (Powell, J., concurring) (“[T]he provision of tax exemptions to nonprofit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.”).

59. *Id.* at 593 (“Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education.”).

or women's rights. One benefit of our constitutional democracy, then, is that it makes political entrenchment hard. I see no footing, above the fray, from which to decide which matters should be exceptions to that norm. Certainly, the monumentally controversial questions of our culture wars are no candidates.

*B. Stamping Out the Worst Moral Stigmas?*

What about moral stigma? If erasing it is *always* a dangerous basis for official action, what about canonical cases and laws like *Brown v. Board of Education*<sup>60</sup> and Title II of the Civil Rights Act of 1964?<sup>61</sup> Both focused on eradicating “institutionalized humiliation.”<sup>62</sup> The “fundamental object” of the latter was to “vindicate ‘the deprivation of personal dignity that surely accompanies denials of equal access to public establishments.’”<sup>63</sup>

The state should indeed fight the peculiar social harm that *results from being excluded from the public square*. That was the focus of *Brown* and the Civil Rights Act (as the last quotation shows). Driving people out of public gathering spaces drives them to the social margins. The message that a certain group has no place in our public life doesn't serve civil society; it depopulates it. So my civil-society-based argument could support efforts to fight racial humiliation by integrating schools, restaurants, theaters, and inns.<sup>64</sup>

Of course, Jim Crow was about avoiding contact with certain patrons, by refusing them any service at all; complicity claims are about denying certain *services*—*whoever* comes in to order them—while avoiding contact with no one. NeJaime and Siegel discuss not doctors' refusals to serve women, or florists' refusals to serve gay people, but refusals to *perform abortions* or *celebrate weddings* deemed sinful.<sup>65</sup> Allowing enough of these refusals to dominate a local

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60. 347 U.S. 483 (1954).

61. 42 U.S.C. § 2000a (2012).

62. 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 142, 150 (2014).

63. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (quoting S. REP. NO. 88-872, at 16-17 (1964)).

64. Note that Title II's focus on public accommodations is narrow: theaters, restaurants, and inns. It leaves out the smaller businesses often at stake in the complicity claims on which NeJaime and Siegel focus.

65. For example, Barronelle Stutzman, a florist penalized for refusing to make arrangements for Robert Ingersoll's wedding to his same-sex partner, said that she had served him fruitfully for years, aware that he was in a same-sex relationship. Barronelle Stutzman, *Why a Friend Is Suing Me: The Arlene's Flowers Story*, SEATTLE TIMES (Nov. 9, 2015), <http://www.seattletimes.com/opinion/why-a-good-friend-is-suing-me-the-arlens-flowers-story> [<http://perma.cc/BU5V-ZS42>] (“I always liked bouncing off creative ideas with Rob for special events in his life. . . . For 10 years, we encouraged that artistry in each other. I knew he was in a relationship with a man and he knew I was a Christian. But that never clouded

market might have *material* effects. But even that wouldn't produce the dignitary harm at issue in *Brown* and the Civil Rights Act. There is a vast difference between the humiliation of being denied a seat at the table of public life and the pain of sitting by people who oppose decisions you prize. The first, rooted simply in others' contempt, can and must be avoided. The second, stemming from their consciences, is unavoidable in free societies and conducive to reform. It is the latter sort of offense that we should not punish. We should brook no *freestanding* right not to be offended.

Moral stigma is a real cost. But tolerating it is a fair price for freedom with dividends of its own: an open society, rich in dissent. We cannot advance these goals while rejecting otherwise justified civil liberties simply because they give offense. As attractive as that rejection will necessarily seem to a majority in every case, it is a sure path to stultification.

### CONCLUSION: TWO VISIONS OF LIBERALISM

The vision that emerges from NeJaime and Siegel's treatment is one of culture-war victors nervous to secure the peace before fragile gains are dispersed. They see social conflict as a barely contained threat to individual rights and peaceful coexistence, which they would have the state neutralize by keeping tabs on associations and favoring culturally inert dissent.

So it is not political vindictiveness that motivates this proposal, or indifference to religious interests, but the honest Rousseauian fear that "[i]t is impossible to live at peace with those whom we regard as damned."<sup>66</sup> Rousseau took this fear to extremes. Believing that "all institutions" that "destroy[] social unity" are "worthless," he favored a civil religion to "bind[] the hearts of the citizens to the State," unmediated by rival private authorities.<sup>67</sup> But we catch hints of the same will to tame in NeJaime and Siegel's abiding anxiety about moral and political conflict.

That anxiety has also laced our jurisprudence on religious establishments and tense social issues. In *Lemon v. Kurtzman*, the Supreme Court called "political division along religious lines" a "principal evil" targeted by the First

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the friendship for either of us or threatened our shared creativity—until he asked me to design something special to celebrate his upcoming wedding.”).

66. JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 122 (Maurice Cranston trans., Penguin ed., 1968) (1762).

67. *Id.* at 179–81.

Amendment.<sup>68</sup> In *Planned Parenthood v. Casey*, the Court seemed existentially desperate for the nation to accept its terms for a truce in the abortion wars.<sup>69</sup>

Competing with this nervousness in our tradition is a more sanguine view of the messiness of civil society. If the first vision unites Rousseau and contemporary progressives, this second links thinkers like Burke<sup>70</sup> and Tocqueville<sup>71</sup> to today's more classically minded liberals. It sees divisions of principle as the political norm,<sup>72</sup> pluralism as our "native condition,"<sup>73</sup> and private institutions as growths that do not choke the common good but give it color and life. Justice depends not on pruning them to contain conflict or moral distress, but bringing them into "unity of a limited order."<sup>74</sup> Its aim is not a "contrived homogeneity" but a "balance of power among sects."<sup>75</sup>

Tending to civil society so understood requires what Jefferson Powell calls the "constitutional virtue" of humility. It requires accepting the Constitution's limits as a framework mainly for deciding amid debate, not eliminating it; for leaving most "divisive . . . social issues" to be "thrashed out" in "ordinary, revisable politics."<sup>76</sup> And it requires contentment to wager on what cannot be guaranteed:<sup>77</sup> that letting social institutions grow freely, even illiberally, will not bring our experiment in ordered liberty to ruin. Or at least that abiding that risk is the lesser evil.

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68. 403 U.S. 602, 622 (1971). *See also, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 725 (2002) (Breyer, J., dissenting) (citing "the Establishment Clause concern for protecting the Nation's social fabric from religious conflict").

69. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 866-67 (1992) (joint opinion of O'Connor, Kennedy & Souter, JJ.) (noting that, in "intensely divisive" cases, the Court "calls the contending sides of a national controversy to end their national division by accepting a common mandate").

70. EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE*, 41 (J.G.A. Pocock ed., Hackett Pub. Co. 1987) (1790) (discussing the importance of the "little platoon[s]" of civil society).

71. *See* TOCQUEVILLE, *supra* note 45, at 489-99.

72. JEREMY WALDRON, *LAW AND DISAGREEMENT* 15 (1999) ("[D]isagreement on matters of principle is not the exception but the rule in politics.").

73. JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION* 23 (1988).

74. *Id.* at 59.

75. McConnell, *supra* note 30, at 1254.

76. H. Jefferson Powell, *Constitutional Virtues*, 9 *GREEN BAG 2D* 369, 378 (2006).

77. *Cf.* McConnell, *supra* note 33, at 457 ("On the whole, even if some subgroups are not liberal, a pluralistic society seems more likely to live harmoniously if it extends freedom of speech, association, and religion to seemingly illiberal subgroups than if it attempts to weed out dangerous voices.").



## NERVOUS VICTORS, ILLIBERAL MEASURES

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