

JUSTICE STEVENS, RELIGION, AND CIVIL SOCIETY

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Did Justice John Paul Stevens, who retired from the Supreme Court last year, harbor a bias against religion? During his thirty-five years on the Court, Justice Stevens showed little favor for religious claimants. In Establishment Clause cases he advocated a strong doctrine of separation between church and state. In the most contentious Free Exercise Clause cases, he opposed exempting religious believers from laws that interfered with religious exercise. This combination of positions, unique among the Justices of the Burger, Rehnquist, and Roberts Courts, has led commentators to charge Justice Stevens with hostility toward religion. In this Article, Professor Magarian debunks that conventional analysis and offers a new explanation of Justice Stevens's religion jurisprudence. Professor Magarian shows that Justice Stevens took the same approach to constitutional cases about churches that he took to constitutional cases about other powerful institutions of civil society, including the major political parties and voluntary membership associations. Justice Stevens resisted these varied civil society institutions' demands for increased constitutional autonomy, based on two persistent concerns. First, Justice Stevens sought to constrain civil society institutions' coercive power over individuals. Second, he viewed civil society institutions' tendencies toward factionalism as a threat to national unity. Justice Stevens did not consider religion a special object of constitutional concern, let alone a special object of disdain. This descriptive insight allows Professor Magarian to make a fresh normative assessment of Justice Stevens's religion jurisprudence. Justice Stevens's anti-coercion principle provided the driving force behind his Establishment Clause opinions. Professor Magarian finds the anti-coercion principle normatively compelling in the abstract and well adapted to Establishment Clause disputes. In contrast, Justice Stevens's anti-factionalism principle drove his opinions about free exercise accommodations. Professor Magarian finds the anti-factionalism principle normatively problematic in general and particularly ill-suited to the problem of free exercise accommodations.

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INTRODUCTION

The notion that Justice John Paul Stevens's constitutional jurisprudence displays a bias against religious interests has become conventional wisdom. Commentators dispute the source and degree of Justice Stevens's antipathy toward religious claims and claimants, but few appear to dispute that he distinctly disfavored religion over the course of his thirty-five years on the Supreme Court. Justice Stevens's record on the Court appears to support this assessment. In Establishment Clause cases he wrote and voted as a thoroughgoing separationist, consistently opposing various forms of government support for religion.¹ He vigorously advocated limiting the legal force of the Free Exercise Clause to cases of direct governmental discrimination against religious believers, opposing a broader view of free exercise that would require government to exempt believers from generally applicable laws that countermanded their religious obligations. No other Justice of the Burger, Rehnquist, or Roberts Court so consistently and forcefully combined Justice Stevens's

1. See *infra* Part I.A.2.

separationist view of the Establishment Clause with his restrictive view of the Free Exercise Clause.

Justice Stevens's retirement from the Court last year makes this an opportune moment to reexamine his religion jurisprudence. Justice Stevens exerted enormous influence on the constitutional law of religion. His majority opinions on religion will affect a central aspect of many people's lives for decades to come, and his dissenting opinions will continue to provide templates for reform of the prevailing doctrine on religious liberty. If the Justice's critics have correctly identified in his jurisprudence a bias against religion, then we have a powerful basis for discrediting his religion opinions, and with them many important principles in the constitutional law of religion. If, on the other hand, some other factor explains Justice Stevens's disfavor for religious claims and claimants, then any cloud that hangs over his religion jurisprudence must dissipate. Moreover, deepening our understanding of Justice Stevens's work in this area will pay intellectual dividends for scholarship on the constitutional law of religion and on whatever broader construct might frame Justice Stevens's religion jurisprudence.

Notwithstanding Justice Stevens's undeniable record of disfavor for religious claims and claimants, this Article contests the conventional view of Justice Stevens's religion jurisprudence and proposes an alternative understanding. Justice Stevens's religion opinions, taken as a whole, do not display any bias against religion. Instead, his disfavor for religious claims and claimants emerges as simply one component, albeit an important and vivid component, of a broadly, consistently skeptical approach toward constitutional autonomy claims of powerful institutions of civil society, including political parties and private membership associations. Two central concerns characterize Justice Stevens's analysis of both religious entities' and other civil society institutions' constitutional autonomy claims. First, Justice Stevens warned that powerful institutions of civil society would use constitutional cover to exert coercive power over individuals.² Second, he maintained that excessive constitutional protection for civil society institutions would encourage factionalism and undermine national unity.³ Overlooking the prevalence of these two concerns across Justice Stevens's civil society jurisprudence has led commentators to assume Justice Stevens thought religion was special. In fact, he viewed religious claims as just one manifestation of a broader constitutional dynamic. This insight enables a fresh assessment and critique of Justice Stevens's approach to the Religion Clauses.

2. See *infra* Part II.B.

3. See *infra* Part I.A.1.

This Article first examines Justice Stevens's religion jurisprudence and the commentary it has inspired, emphasizing the themes of anti-coercion and anti-factionalism that feature prominently in his major opinions on the constitutional law of religion. Next, it demonstrates parallels between Justice Stevens's treatment of religious autonomy claims and his treatment of constitutional autonomy claims by other powerful institutions of civil society, including the major political parties, private membership organizations, and business corporations alleged to serve civil society interests. The Justice's opinions about those other civil society institutions manifest the same themes of anti-coercion and anti-factionalism that emerge from his religion opinions. With that descriptive insight in place, the Article finally offers a fresh normative assessment of Justice Stevens's religion jurisprudence. The Justice's concern about civil society institutions' coercive power predominates on the Establishment Clause side of his religion jurisprudence. That anti-coercion principle, while hardly uncomplicated, strikes me as both normatively persuasive in the abstract and sensible in its application to Establishment Clause controversies. In contrast, the Justice's concern about civil society institutions' tendency toward factionalism drives his Free Exercise Clause jurisprudence. That anti-factionalism principle strikes me as normatively problematic in general and particularly ill-suited to Free Exercise Clause controversies. Accordingly, my analysis of Justice Stevens's religion jurisprudence in light of his broader civil society jurisprudence leaves me confident in his approach to the Establishment Clause but doubtful about his approach to the Free Exercise Clause.

I. JUSTICE STEVENS'S DISFAVOR FOR RELIGIOUS CLAIMS

Justice Stevens rarely showed favor to religious claims or claimants in constitutional cases.⁴ The Supreme Court's religion

4. The Justice's record reveals several important but limited exceptions. *See, e.g., Watchtower Bible & Tract Soc'y of N. Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–69 (2002) (majority opinion by Justice Stevens sustaining a religious group's First Amendment free speech challenge to a municipality's permit requirement for door-to-door solicitation); *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987) (majority opinion joined by Justice Stevens rejecting an Establishment Clause challenge to a federal statutory exemption for religious employers from a bar against religious discrimination in employment); *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 147–48 (1987) (Stevens, J., concurring) (invoking *stare decisis* and principles of equal treatment in support of a decision that the Free Exercise Clause barred a state from denying unemployment benefits to a worker fired because her religious commitments conflicted with her work responsibilities). These and other nominally pro-religion votes

jurisprudence breaks down into two broad categories: Free Exercise Clause challenges to government constraints on religious activity, the most contentious of which involve claims for exemption from generally applicable laws; and Establishment Clause challenges to various kinds of government support for religion or religious institutions. An examination of Justice Stevens's most important written opinions in each category substantiates the premise that he tended to disfavor religious claims and claimants across the board. Moreover, that examination reveals two prominent concerns that drove the Justice's rejection of religious claims: wariness about religious organizations' coercion of individuals, and anxiety that religious organizations promote factionalism and thus undermine national unity.

A. Themes of Anti-coercion and Anti-factionalism in Justice Stevens's Religion Jurisprudence

The most prominent opinions on religion that Justice Stevens authored during his thirty-five years on the Supreme Court reflect two dominant themes. First, Justice Stevens warned of the danger that religious organizations, given increased constitutional solicitude, might use their considerable influence to exert some manner of coercive authority over individuals—both believers and nonbelievers. Coercive authority may induce behavior through the threat of sanction, or it may take the form of a punitive action, such as ostracism, that does not give the individual a choice whether to conform her behavior to institutional dictates. Justice Stevens saw institutional coercion as a threat to individual rights, and he therefore saw government constraints on institutions' coercive tendencies as advancing individual rights. This anti-coercion theme plays the leading role in his separationist account of the Establishment Clause. Second, Justice Stevens warned that strengthening constitutional solicitude toward religion would exacerbate factional divisions in a manner and to an extent that could undermine national unity and threaten our collective commitment to the common good. This anti-factionalism theme animates both his Establishment Clause and Free Exercise Clause opinions.

1. ANTI-FACTIONALISM IN JUSTICE STEVENS'S FREE EXERCISE
CLAUSE OPINIONS

Justice Stevens did not write extensively on the Free Exercise Clause. This deficit mainly owes to the fact that the Court's decision in

by Justice Stevens, in my view, do little to diminish his overall record of antipathy to religious claims and claimants. *See infra* notes 65–77 and accompanying text.

Employment Division v. Smith,⁵ which Justice Stevens joined without writing separately, effectively eliminated what had been the most contentious category of free exercise claims a mere fifteen years into Justice Stevens's epic tenure on the Court. *Smith* broadly rejected the doctrine of mandatory religious accommodations, under which courts had employed strict scrutiny to review burdens that neutral, generally applicable laws imposed on religious exercise.⁶ In a footnote to a dissent in a later non-religion case, Justice Stevens explicitly declared that a Madisonian concern with the hazards of factionalism⁷ compelled the holding in *Smith*.⁸ His few writings in mandatory religious accommodation cases develop that theme.

Justice Stevens wrote one emphatic opinion rejecting a mandatory accommodation claim, and that opinion reveals a driving concern with the danger of factionalism for national unity and, literally, uniformity. In *Goldman v. Weinberger*,⁹ the Court rejected a Jewish military doctor's free exercise claim for exemption from Air Force regulations that forbade him from wearing a yarmulke.¹⁰ Justice Stevens's concurring opinion acknowledged the appeal of the doctor's claim, but he found sufficient support for the holding in "the separate interest in uniformity itself."¹¹ He portrayed uniformity as both an important military value entitled to judicial deference¹² and a necessary check on the danger that the government, or the Court, would extend preferential treatment to particular religions.¹³ Significantly, he went out of his way

5. 494 U.S. 872 (1990).

6. The Court's leading decision on mandatory accommodation claims prior to *Smith* was *Sherbert v. Verner*. 374 U.S. 398, 399–402 (1963) (holding that the Free Exercise Clause barred a state from denying unemployment benefits to a Seventh-Day Adventist who was fired for refusing to work on Saturday).

7. See THE FEDERALIST NO. 10 (James Madison).

8. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1072 n.7 (1992) (Stevens, J., dissenting) (likening the idea of generality in takings doctrine to the holding in *Smith* and linking both to Madison's warning against factionalism). Of course, Justice Stevens's disfavor for religious claims and claimants never led him to disregard claims of discrimination against religious groups or believers—after *Smith*, the only practically significant class of Free Exercise Clause claims. See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542–46 (1993).

9. 475 U.S. 503 (1986).

10. *Id.* at 504.

11. *Id.* at 512 (Stevens, J., concurring).

12. See *id.* (Stevens, J., concurring) ("Because professionals in the military service attach great importance to that plausible interest [in uniformity], it is one that we must recognize as legitimate and rational . . .").

13. See *id.* at 512–13 (Stevens, J., concurring) (warning that "the probable reaction of the majority to the favored treatment of a member of [any given] faith . . . will play a critical part in the decision" whether to grant a religious accommodation); see also *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)

to emphasize the uniformity interest, viewing the dispute as a general test of religious departures from uniform regulations, even though he acknowledged indications that the military had enforced the regulations in this case to retaliate against the plaintiff for other conduct.¹⁴ Justice Stevens's refusal to allow religious symbols to compromise military uniformity prefigures his ardor for shielding the American flag, which he associated with the nation's military sacrifices, from acts of desecration by political dissidents.¹⁵ In both contexts he prioritized national unity over what he portrayed as divisive rights claims.¹⁶

Justice Stevens elaborated on his concern about the corrosive danger of constitutionally empowered religious practice for national unity in cases that arose at the intersection of the Free Exercise and Establishment or Free Speech Clauses. The Court in *Board of Education of Kiryas Joel Village School District v. Grumet*¹⁷ sustained an Establishment Clause challenge to New York's creation of a special school district for members of a Jewish sect, the Satmar Hasidim.¹⁸ In his brief concurring opinion, Justice Stevens emphasized the close relationship between the Establishment Clause claim before the Court and the problem of religious accommodation.¹⁹ He indicted New York's action as a particularly pernicious sort of accommodation "that affirmatively supports a religious sect's interest in segregating itself and

("[T]he principal reason for adopting a strong presumption against [free exercise accommodation] claims . . . is the overriding interest in keeping the government—whether it be the legislature or the courts—out of the business of evaluating the relative merits of differing religious claims.")

14. See *Goldman*, 475 U.S. at 511–12 (Stevens, J., concurring).

15. See *Texas v. Johnson*, 491 U.S. 397, 436–37 (1989) (Stevens, J., dissenting).

16. Other cases in which Justice Stevens wrote to express skepticism about free exercise accommodation claims include *Bowen v. Roy*, 476 U.S. 693, 716–17 (1986) (Stevens, J., concurring) (supporting the majority's decision against one part of an accommodation claim and arguing that resolution of that issue rendered consideration of the other part of the claim unnecessary), and *United States v. Lee*, 455 U.S. at 261–63 (Stevens, J., concurring) (rejecting a claim by an Amish employer for mandatory exemption from Social Security taxes).

17. 512 U.S. 687 (1994).

18. *Id.* at 703–05.

19. See *id.* at 711–12 (Stevens, J., concurring). Likewise, when the Court confronted the Federal Religious Freedom Restoration Act (RFRA), which sought to strengthen voluntary accommodation claims across the board, Justice Stevens stood alone in maintaining that such solicitude toward voluntary accommodations not only lacked support in the Free Exercise Clause but violated the Establishment Clause. See *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) (criticizing the Act for giving religious entities "a legal weapon that no atheist or agnostic can obtain").

preventing its children from associating with their neighbors.”²⁰ Meanwhile, the Justice disapproved of what he saw as efforts to subordinate public schools’ institutional authority to religious initiatives. Dissenting in *Board of Education v. Mergens*,²¹ he suggested that a religious group’s constitutionally grounded demand to meet in a public high school actually raised potent Establishment Clause concerns to the extent the school’s faculty and administration objected to meetings by “controversial or partisan organizations.”²² In a similar vein, he concurred in the Court’s judgment in *Widmar v. Vincent*²³ that denying a religious group access to meeting space at a public university violated the group’s free speech rights only because he saw the exclusion at issue as viewpoint-based discrimination.²⁴ These opinions confirm that Justice Stevens’s concern about factionalism drove his opposition to preferential exemptions for religious interests.

2. ANTI-COERCION AND ANTI-FACTIONALISM IN JUSTICE STEVENS’S ESTABLISHMENT CLAUSE OPINIONS

Justice Stevens’s Establishment Clause jurisprudence, to some extent, reflects the same anti-factionalist concern that dominates his Free Exercise Clause jurisprudence. In his last major statement on the constitutional law of religion, Justice Stevens dissented from the Court’s conclusion in *Van Orden v. Perry*²⁵ that a Ten Commandments monument on the Texas state capitol grounds did not violate the Establishment Clause.²⁶ He characterized the dispute as implicating “[g]overnment’s obligation to avoid divisiveness and exclusion in the religious sphere,” which he saw as “compelled by the Establishment and Free Exercise Clauses . . . together.”²⁷ He further described the text of the Ten Commandments as “invariably plac[ing] the State at the center of a serious sectarian dispute”²⁸ and contended that “allowing the

20. *Kiryas Joel*, 512 U.S. at 711 (Stevens, J., concurring).

21. 496 U.S. 226 (1990).

22. *Id.* at 285–86 (Stevens, J., dissenting). Justice Stevens discussed the Establishment Clause issue in the case on the understanding that he believed his construction of the statute at issue sufficed to resolve the dispute. *Id.* at 284.

23. 454 U.S. 263 (1981).

24. *See id.* at 280 (Stevens, J., concurring); *see also Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2997 (2010) (Stevens, J., concurring) (“[R]eligious organizations, as well as all other organizations, must abide by certain norms of conduct when they enter an academic community.”).

25. 545 U.S. 677 (2005).

26. *Id.* at 707–08 (Stevens, J., dissenting).

27. *Id.* at 709 (Stevens, J., dissenting).

28. *Id.* at 718–19 (Stevens, J., dissenting).

seat of government to serve as a stage for the propagation of an unmistakably Judeo-Christian message of piety would have the tendency to make nonmonotheists and nonbelievers feel like outsiders in matters of faith, and strangers in the political community.”²⁹ That stand closely tracked his declaration a quarter century earlier, writing for the Court in *Wallace v. Jaffree*,³⁰ that permitting prayer in public schools undermined “the political interest in forestalling intolerance.”³¹ Justice Stevens’s positions in these cases work a variation on the “non-endorsement” trope that figured prominently in the Rehnquist Court’s Establishment Clause jurisprudence.³² His reasoning distinctively ties the idea of non-endorsement to a warning about the danger for democracy of excessive factionalism.

More strongly than anti-factionalism, however, Justice Stevens’s Establishment Clause opinions express a second concern: that religious organizations should not enjoy constitutional sanction to exercise undue coercive authority over individuals. For Justice Stevens, this anti-coercion principle encompassed much more than the danger of overtly coerced religious conduct.³³ In *Jaffree*, which struck down an Alabama statute that mandated time for silent prayer or meditation in the public school day, Justice Stevens’s majority opinion concluded that the Alabama legislature fully intended the school prayer provision to advance religion.³⁴ The opinion casts the Establishment Clause as a complement to the Free Speech and Free Exercise Clauses in protecting individuals against government-directed coercion. Throughout the opinion, the Justice portrayed the Establishment Clause as protecting individual rights of conscience.³⁵ Of course, the idea that the Establishment Clause serves to complement the Free Exercise Clause in

29. *Id.* at 720 (Stevens, J., dissenting) (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 797 (1995) (Stevens, J., dissenting)) (internal quotation marks omitted).

30. 472 U.S. 38 (1985).

31. *Id.* at 54; see also *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309–10 (2000) (condemning a school district’s allowance for prayers before high school football games as sending a message of exclusion to nonbelievers).

32. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 690–91 (1984) (O’Connor, J., concurring) (describing and advocating a prominent version of the non-endorsement test).

33. See *Van Orden*, 545 U.S. at 733 n.35 (Stevens, J., dissenting) (rejecting the idea that the Establishment Clause protects only against “direct coercion”).

34. *Jaffree*, 472 U.S. at 61 (holding that an Alabama school prayer provision violated the First Amendment because it “was intended to convey a message of state approval of prayer activities in the public schools”).

35. See, e.g., *id.* at 49 (framing the case as implicating “the individual’s freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience”).

protecting liberty of conscience is hardly novel. But that idea usually underwrites efforts to limit the domain of the Establishment Clause to situations in which government interaction with religion threatens religious believers' autonomy.³⁶ In contrast, Justice Stevens in *Jaffree* made clear that the Establishment Clause bars believers from using government to coerce nonbelievers as surely as it bars them from using government to coerce believers in other faiths. "[T]he political interest in forestalling intolerance," he wrote, "extends beyond . . . intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain."³⁷

Justice Stevens reiterated his expansive opposition to religious coercion in his majority opinion in *Santa Fe Independent School District v. Doe*.³⁸ Sustaining an Establishment Clause challenge to a high school's tacit sponsorship of student-led prayers before football games, the Justice condemned the school district's "plac[ing] the students who hold [minority] views at the mercy of the majority."³⁹ He found the coercive character of the *Santa Fe* scheme especially acute because the prayer carried the imprimatur of the school⁴⁰ and because nonbelieving students could only avoid religious conformity by foregoing or disrupting an important social ritual.⁴¹ In both *Santa Fe* and his dissenting opinion in *Salazar v. Buono*,⁴² Justice Stevens specifically rejected government efforts to ameliorate the coercive force of religious endorsements by laundering them through private hands.⁴³ In *Van Orden*, he characterized the Texas government's Ten Commandments monument as "governmental promotion of orthodoxy."⁴⁴ In particular, he emphasized the mandatory character of the Ten Commandments, describing the Decalogue as "a compelled code of conduct from one God, namely, a Judeo-Christian God, that is

36. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 642 (1992) (Scalia, J., dissenting) (advocating an anti-coercion test as a basis for rejecting an Establishment Clause claim).

37. *Jaffree*, 472 U.S. at 54.

38. 530 U.S. 290 (2000).

39. *Id.* at 304.

40. See *id.* at 309–10 (describing and criticizing the school district's sponsorship and facilitation of the football game prayer).

41. See *id.* at 311–12 (quoting *Lee v. Weisman*, 505 U.S. at 593, 595–96 (1992)).

42. 130 S. Ct. 1803 (2010) (Stevens, J., dissenting) (rejecting the federal government's effort to cure an Establishment Clause violation by conveying a Latin cross display to private owners).

43. *Id.* at 1837.

44. *Van Orden v. Perry*, 545 U.S. 677, 710 (2005) (Stevens, J., dissenting).

rejected by” believers in other religions and nonbelievers.⁴⁵ Justice Stevens’s concurring opinion in *Kiryas Joel* extends his anti-coercion concern to encompass children within a religious community.⁴⁶ He maintained that the state’s creation of a school district specifically for the Satmar Hasidim improperly “increased the likelihood that [Satmar children] would remain within the fold, faithful adherents of their parents’ religious faith.”⁴⁷ The central importance of the anti-coercion principle sharply distinguishes Justice Stevens’s Establishment Clause jurisprudence from his Free Exercise Clause jurisprudence.⁴⁸

B. *The Conventional Analysis: Justice Stevens’s Disdain for Religion*

Justice Stevens’s consistent rejection of religious claims has led to accusations that he actively disdained religious believers, beliefs, and practices. Chief Justice William Rehnquist, dissenting in *Santa Fe*, pronounced himself “disturb[ed]” by “the tone of the Court’s opinion,” which, in his view, “bristles with hostility to all things religious in public life.”⁴⁹ Commentators sympathetic to religious interests echo this theme. “The apparent explanation for [Justice Stevens’s] voting pattern [in religion cases],” asserts Douglas Laycock, “is hostility to religion. Religion in his view is subject to all the burdens of government, but entitled to few of the benefits.”⁵⁰ Robert Nagel appears to have religious bias in mind when he condemns Justice Stevens’s rejections of free speech and association claims in abortion protest and anti-gay discrimination cases as “drawing on—and giving voice to—the dark

45. *Id.* at 719.

46. *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 711 (1994) (Stevens, J., concurring).

47. *Id.* (Stevens, J., concurring).

48. Other cases in which Justice Stevens wrote to advance his separationist account of the Establishment Clause include *Marsh v. Chambers*, 463 U.S. 783, 822–24 (1983) (Stevens, J., dissenting) (contending that a state legislature’s employment of a chaplain of one faith to open legislative sessions violated the Establishment Clause); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 513–15 (1982) (Stevens, J., dissenting) (advocating continuation of relaxed standing analysis for Establishment Clause claims); *Comm’n for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (opposing government payments to religious schools); *Wolman v. Walter*, 433 U.S. 229, 265 (1977) (Stevens, J., concurring in part and dissenting in part) (opposing government payments to religious schools); and *Roemer v. Md. Dep’t of Pub. Works*, 426 U.S. 736, 775 (1976) (Stevens, J., dissenting) (opposing government payments to religious schools).

49. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 318 (Rehnquist, C.J., dissenting).

50. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1010 (1990).

fears and suppressive urges that lie very near the surface of modern political life.”⁵¹ Michael Paulsen has condemned Justice Stevens’s writings on religion in especially vitriolic terms. “Stevens, of course,” declares Paulsen, “is implacably hostile to religion, in a way that seems to go beyond jurisprudence. . . . [T]here is evidence that Stevens simply thinks religion is narrow-minded, suspicious, [and] a troubling way for people to view the world (if not affirmatively stupid and dangerous)”⁵² Paulsen calls Justice Stevens’s dissent in *Boy Scouts of America v. Dale*⁵³ “stunningly bigoted,”⁵⁴ accusing the opinion of treating “religious belief, religious ideas, religious motivations, and religious values . . . as uniquely suspect, backward, and presumptively illegitimate.”⁵⁵ Paulsen goes so far as to declare that

51. Robert F. Nagel, *Six Opinions by Mr. Justice Stevens: A New Methodology for Constitutional Cases?*, 78 CHI.-KENT L. REV. 509, 528 (2003). Nagel’s attack focuses on *Hill v. Colorado*, 530 U.S. 703 (2000), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). *Id.* at 511–17, 523–26.

52. Michael Stokes Paulsen, *Counting Heads on RFRA*, 14 CONST. COMMENT. 7, 17 (1997).

53. 530 U.S. 640, 644 (2000) (holding that the First Amendment shielded the Boy Scouts from anti-discrimination liability for expelling an openly gay member). For discussion of *Dale*, see *infra* notes 134–42 and accompanying text.

54. Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1917 (2001). Rob Vischer has endorsed Paulsen’s charge. See Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 NOTRE DAME L. REV. 949, 972 n.85 (2004).

55. Paulsen, *supra* note 54, at 1938. Paulsen’s evidence of Justice Stevens’s bigotry in *Dale* consists of the Justice’s statements that anti-gay bias was “atavistic”; that antigay bias therefore resembled racial bias; and that “sectarian doctrine” had in the course of history promoted both biases. See *id.* (quoting *Dale*, 530 U.S. at 699 (Stevens, J., dissenting)). To support his statement about religion and sexual orientation, Justice Stevens cited a passage from *Bowers v. Hardwick*, in which Chief Justice Burger had approvingly stated: “Condemnation of [gay sex] is firmly rooted in Judeo-Christian moral and ethical standards.” 478 U.S. 186, 196 (1986) (Burger, C.J., concurring). To support his statement about religion and racial bias, Justice Stevens quoted the trial judge in *Loving v. Virginia* to the effect that “Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.” 388 U.S. 1, 3 (1967). Alongside the cited comments, Justice Stevens extolled “a move toward greater understanding within some religious communities” as an important indicator of societal progress on sexual orientation issues. *Dale*, 530 U.S. at 699 (Stevens, J., dissenting). Given how unremarkably the points that Paulsen condemns elaborate the Justice’s substantive analysis, one might conceivably read Paulsen as arguing that anything less than substantive agreement with his own conception of “traditional sexual moral values derived from religious belief” constitutes “wholly inappropriate . . . hostility to religion.” Paulsen, *supra* note 54, at 1937. Such a conception would qualify most Americans, including a substantial percentage of deeply religious Americans, as anti-religious bigots. Paulsen, however, certainly portrays Justice Stevens as more than ordinarily bigoted.

Justice Clarence Thomas's assertion in a later case that a dissent by Justice David Souter showed anti-religious bias "is probably more about Justice Stevens's *Boy Scouts* dissent."⁵⁶

Kathleen Sullivan, though more measured in tone than other critics of Justice Stevens's religion jurisprudence, provides a sophisticated grounding for the idea that the Justice treated religion as posing a special danger for liberal democracy.⁵⁷ Sullivan identifies several distinct views about religious associations that lead to correspondingly distinct prescriptions for enforcing the Religion Clauses. The first view treats religious associations "as not like other private associations at all, but rather as unique in their power to interpret the world and express shared understandings, and to command deep allegiance, fidelity, and obedience from their adherents."⁵⁸ This perspective, she explains, treats religious associations as dangerous because of their propensity to become "quasi-governments" that threaten the primacy of the state.⁵⁹ Accordingly, it counsels strong enforcement of the Establishment Clause and weak enforcement of the Free Exercise Clause. For Sullivan, Justice Stevens exemplifies this perspective.⁶⁰ In contrast, a second view treats religious associations like other private associations, which in Sullivan's conception entails respecting their autonomy (strong Free Exercise Clause) while acknowledging and strongly enforcing the distinctive constraints of the Establishment Clause.⁶¹ As my analysis will demonstrate, I think Sullivan misconceives the implications of these two approaches, at least where Justice Stevens is concerned, and accordingly misdiagnoses him as treating religious claims unlike claims by other sorts of private associations.

Justice Stevens's religion jurisprudence bears few if any marks of simple animus. He certainly never cast religion as the enemy in a "Kulturkampf."⁶² Likewise, one cannot easily explain Justice Stevens's religion jurisprudence as an ideological reflex. None of his liberal contemporaries, from Justice William Brennan to Justice Stephen Breyer, replicated his combination of strong separationism on Establishment Clause questions and thorough skepticism of free

56. Paulsen, *supra* note 54, at 1949 (discussing *Mitchell v. Helms*, 530 U.S. 793, 826–28 (2000)).

57. See Kathleen M. Sullivan, *The New Religion and the Constitution*, 116 HARV. L. REV. 1397, 1403–05 (2003).

58. *Id.* at 1403.

59. *Id.* at 1403–04.

60. See *id.* at 1404–05.

61. See *id.* at 1405–07. Sullivan expresses sympathy with this approach. See *id.* at 1420–21 (advocating respect for religious schools' autonomy accompanied by denial of government financial assistance).

62. Cf. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

exercise accommodation claims. As Sullivan's dissection of the Court's religion doctrines makes clear, the constitutional law of religion has never developed along straightforward liberal versus conservative lines. The clash between liberal Justices William Douglas and Hugo Black over the Establishment Clause, with the generally more liberal Justice Douglas advocating for religious interests,⁶³ and the later clash between conservative Justices Antonin Scalia and Sandra O'Connor over the Free Exercise Clause, with the generally less conservative Justice O'Connor advocating for religious interests,⁶⁴ foreclose ideologically reductionist explanations of religion jurisprudence. This Article will situate Justice Stevens's religion jurisprudence in a larger context related to his brand of liberalism, but neither the linkage nor the Justice's liberalism fits a narrative of anti-religious bias.

Nonetheless, Justice Stevens's antipathy toward religious claims and claimants remains difficult to minimize. Eduardo Peñalver⁶⁵ and Chris Eisgruber⁶⁶ have made strong efforts to defend Justice Stevens's religion jurisprudence against charges of generalized antipathy toward religion. Peñalver emphasizes that Justice Stevens did in fact vote with religious claimants in more than a few cases over the years. Examining those cases, he suggests that religious claimants elicited greater sympathy from Justice Stevens when the government had subjected them to some sort of unequal burden or when they suffered from some special vulnerability.⁶⁷ Eisgruber too explains Justice Stevens's approach to religion as reflecting a central concern with equality. While acknowledging Justice Stevens's propensity to vote against religious positions, Eisgruber maintains that Justice Stevens shared with Justice O'Connor—probably the contemporary of Justice Stevens most favorably inclined toward religious claims and claimants—a central concern with equal citizenship.⁶⁸ These defenses of Justice Stevens's

63. See *Zorach v. Clauson*, 343 U.S. 306, 311–15 (1952) (rejecting an Establishment Clause challenge to a public school's allowance for releasing students to attend religious instruction); cf. *id.* at 319 (Black, J., dissenting) (decrying "the Court's legal exaltation of the orthodox and its derogation of unbelievers").

64. See *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 884–89 (1990) (announcing a lenient standard of review for free exercise accommodation claims); cf. *id.* at 897–900 (O'Connor, J., concurring) (arguing that the Court should continue to review mandatory accommodation claims under a strict scrutiny standard).

65. See Eduardo Moisés Peñalver, *Treating Religion as Speech: Justice Stevens's Religion Clause Jurisprudence*, 74 FORDHAM L. REV. 2241 (2006).

66. See Christopher L. Eisgruber, *Justice Stevens, Religious Freedom, and the Value of Equal Membership*, 74 FORDHAM L. REV. 2177 (2006).

67. See Peñalver, *supra* note 65, at 2247–49.

68. See Eisgruber, *supra* note 66, at 2177–80.

religion jurisprudence forcefully contest the caricature of Justice Stevens as, in Peñalver's phrase, an "antireligious crank."⁶⁹

In the end, however, neither Peñalver nor Eisgruber squarely addresses the central concerns of Justice Stevens's critics. Both discern equal citizenship as a theme that runs through Justice Stevens's religion jurisprudence. Identifying that theme, however, only begins a discussion of how and why the Justice saw religion as promoting, discouraging, or problematizing equal treatment of citizens. Peñalver's attempt to present a more balanced version of Justice Stevens's record depends on circumstances that transcended the central themes of his religion opinions. Some of the religion-favoring votes that Peñalver cites were all but compelled by precedent.⁷⁰ In other cases where Justice Stevens voted with religious claimants, religion figured prominently in the underlying facts and the plaintiffs' claims, but had little or no bearing on the Court's legal analysis.⁷¹ Still other votes by Justice Stevens to sustain religious claims joined unanimous decisions that struck down instances of what the Court found to be blatant, invidious discrimination against religious believers.⁷² Similarly, Justice Stevens on two occasions joined his colleagues in unanimously rejecting, on narrow grounds, Establishment Clause challenges to programs that benefited especially vulnerable populations—blind

69. Peñalver, *supra* note 65, at 2256.

70. Justice Stevens's adherence to the precedent of *Sherbert v. Verner*, 374 U.S. 398 (1963), suffices to explain his votes in *Frazee v. Ill. Dep't. of Soc. Sec.*, 489 U.S. 829 (1989); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); and *Thomas v. Review Bd.*, 450 U.S. 707 (1981). All of those cases involved Free Exercise Clause claims for unemployment benefits by religious believers who had lost their jobs because they had refused to compromise their religious commitments. Peñalver is technically correct to characterize the later decisions as "expanding" *Sherbert*. Peñalver, *supra* note 65, at 2244–45. But in each case the expansion merely involved a slightly different factual setting, not any broader principle of religious liberty. Indeed, Justice Stevens wrote a succinct concurrence in *Hobbie* to make clear that he found *Sherbert* and *Thomas* controlling. See *Hobbie*, 480 U.S. at 147–48 (Stevens, J., concurring).

71. See *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–68 (2002) (striking down under the First Amendment's Free Speech Clause a municipality's standardless licensing requirement for paid petition circulators); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 656–57 (1981) (Brennan, J., concurring in part and dissenting in part) (contesting the Court's rejection of a First Amendment free speech challenge to regulations that restricted distribution of literature at a state fair to enclosed areas); cf. Peñalver, *supra* note 65, at 2246–47 (discussing these cases).

72. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993), a free exercise discrimination case, and the discussion in Peñalver, *supra* note 65, at 2245. See also *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 386–87 (1993), a free speech discrimination case, and the discussion in Peñalver, *supra* note 65, at 2246.

students⁷³ and prisoners.⁷⁴ Justice Stevens's votes in favor of autonomy for religious organizations' internal governance⁷⁵ might have offered his religious critics some comfort, but probably not much, given the narrow context and the failure of those votes to prefigure support for religious interests in other settings. Moreover, those votes came during the first third of Justice Stevens's tenure on the Court; indeed, most of the eleven "pro-religion" votes that Peñalver cites came during that period, and all but two came during the first half of the Justice's tenure. The pattern suggests that Justice Stevens's disfavor for religious claims and claimants may have deepened over time. He only wrote in support of two of the votes Peñalver cites,⁷⁶ and he only signed on to one "pro-religion" dissent.⁷⁷ None of those three opinions sought to vindicate specifically religious interests.

Arguments about the constitutional law of religion frequently pit an ideal of separation against an ideal of neutrality. Separationism treats religion as a special source of constitutional concern and strives to separate religion from government.⁷⁸ Neutrality, in contrast, treats

73. See *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 482 (1986) (holding that a state's vocational assistance grant to a blind religious student did not violate the Establishment Clause); Peñalver, *supra* note 65, at 2245.

74. See *Cutter v. Wilkinson*, 544 U.S. 709, 712–14 (2005) (rejecting a facial Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act); Peñalver, *supra* note 65, at 2245. Justice Stevens also voted to allow a RFRA claim to proceed against the federal government, presumably on the view that Congress had constitutional authority to apply RFRA's constraints to its own enactments. See *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 423 (2006) (holding that the government's designation of a drug as a controlled substance did not satisfy RFRA's compelling-interest requirement).

75. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987) (rejecting an Establishment Clause challenge to Title VII's allowance for religious employers to discriminate in hiring on religious grounds); *NLRB v. Catholic Bishop of Chi.*, 440 U.S. 490, 491, 507 (1979) (invoking the canon of constitutional avoidance to rule that the National Labor Relations Act did not give the NLRB jurisdiction over a parochial school's labor dispute); *cf.* Peñalver, *supra* note 65, at 2246.

76. See *Watchtower*, 536 U.S. at 153 (free speech case); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 147–48 (1987) (Stevens, J., concurring) (one-paragraph concurrence).

77. See *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 661–63 (1981) (Brennan, J., concurring in part and dissenting in part).

78. See generally, *e.g.*, LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed. 1994). Religious believers often view religion as especially virtuous, and that view leads some believers to advocate a substantive governmental preference for religion. Basic principles of liberal pluralism, however, foreclose such a preference. See JOHN RAWLS, *POLITICAL LIBERALISM* 13–14 (1996) (identifying religion with the social rather than political sphere in a liberal democracy).

religion as merely one among many similarly situated societal institutions, giving it neither special favors nor special burdens.⁷⁹ Justice Stevens's critics and defenders alike have considered him a thoroughgoing separationist.⁸⁰ The Justice, however, freely combined and blended the rhetoric of separation and neutrality. Dissenting in *Van Orden v. Perry*,⁸¹ for example, he described the "wall of separation between church and state" as protecting important principles, of which the foremost is "religious neutrality."⁸² Both Justice Stevens's critics and his defenders, I think, make the same fundamental mistake in emphasizing the separationist character of his religion jurisprudence: they miss a critical sense in which he viewed religion neutrally. Justice Stevens's approach to religious claims and claimants shows remarkable consistency with his approach to claims by a variety of other repositories of private institutional power. The themes of anti-factionalism and anti-coercion, which played a decisive role in Justice Stevens's religion jurisprudence, enjoy the same prominence in his opinions about constitutional autonomy claims advanced by other sorts of civil society institutions. Justice Stevens did not treat religion distinctively; rather, he viewed certain claims for religious autonomy as threatening liberal democracy in the same ways as autonomy claims by other civil society institutions. The next Part develops this descriptive thesis.

II. JUSTICE STEVENS'S DISFAVOR FOR RELIGIOUS CLAIMS AS AN INSTANCE OF HIS BROADER CONCERN ABOUT POWERFUL CIVIL SOCIETY INSTITUTIONS

A. *The Civil Society Debate*

Debates about the relationship between civil society and liberal democracy have attained great prominence in law and political theory. Given the scope of this Article and the complexity of the subject, I can only offer an oversimplified, broad-brush description of the discourse.⁸³

79. See, e.g., Laycock, *supra* note 50, at 1001–02. Although some advocates for religious interests embrace neutrality, others object that treating religion neutrally improperly denies the distinctive constitutional protection that the First Amendment affords religion. See, e.g., Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 22–23 (2000).

80. See, e.g., Laycock, *supra* note 50, at 1010.

81. 545 U.S. 677, 691–92 (2005) (upholding display of Ten Commandments monument on Texas state capitol grounds).

82. *Id.* at 709 (Stevens, J., dissenting).

83. My summary encompasses debates about civil society per se as well as debates about the proper degree of autonomy for broad ranges, or specific examples, of

The precise conceptual and rhetorical boundaries of “civil society” vary in different accounts. Some accounts of civil society emphasize the family⁸⁴ while others focus on larger institutions.⁸⁵ Some accounts focus intently on religion⁸⁶ while others treat religion simply as one component among several. Some definitions of civil society explicitly exclude commercial associations⁸⁷ while others question that exclusion.⁸⁸ Some accounts emphasize the value for civil society of increasing state- and local-government power at the expense of the federal government⁸⁹ while others ignore intergovernmental divides. The various accounts generally portray whatever institutions they associate with civil society as *intermediate* and *intermediary*. Civil society institutions are intermediate in that they occupy social space between individuals and the federal government.⁹⁰ They are intermediary in that they perform some function, or set of functions, that helps to reconcile or resolve tensions between the interests of individuals and those of the federal government.⁹¹ Civil society

what I refer to as “civil society institutions.” Where fine points of generic distinction might make any meaningful difference, I attempt to identify the nuances.

84. See generally Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531 (2000) (discussing and critiquing family-focused accounts of civil society).

85. Such accounts focus on various sorts of private associations. See generally JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (forthcoming 2012) (manuscript on file with the author); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Vischer, *supra* note 54.

86. See generally Paul Horwitz, *Churches as First Amendment Institutions: Of Sovereignty and Spheres*, 44 HARV. C.R.-C.L. L. REV. 79 (2009); Michael W. McConnell, *The New Establishmentarianism*, 75 CHI.-KENT L. REV. 453 (2000).

87. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 634–36 (1984) (O’Connor, J., concurring) (predicating rejection of an organization’s free association challenge to enforcement of an anti-discrimination statute on the organization’s commercial character); INAZU, *supra* note 85, at 166–69 (proposing a distinction between commercial and noncommercial institutions as a basis for limiting a reinvigorated constitutional freedom of assembly).

88. See, e.g., Hills, *supra* note 85, at 165–67 (criticizing an approach to organizational rights that would exclude commercial associations from constitutional protection).

89. See, e.g., John O. McGinnis, *Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 507–26 (2002).

90. See, e.g., Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 343 (2000) (defining civil society as “a realm between the individual and the state, or besides the market and the state”).

91. See, e.g., Vischer, *supra* note 54, at 951–52 (positing the state’s mediating role in, and complication of, the relationship between the individual and the state).

advocates tend to portray the federal government as an undifferentiated state apparatus, uniquely powerful and pervasive in most or all societal contexts, determined to dominate social life.⁹²

Civil society advocates, sometimes labeled civil society revivalists,⁹³ generally share a few essential premises. Descriptively, civil society advocates portray contemporary society as increasingly atomistic and alienating.⁹⁴ Normatively, they deplore the decline of civil society institutions that they portray as providing substantial social benefits.⁹⁵ Prescriptively, they call on government, including courts, to facilitate increased influence for some range of civil society institutions in order to improve social life.⁹⁶ Most people, regardless of ideology, demographics, or lifestyle, probably would agree that society would benefit from more and better opportunities for interpersonal connection and collective engagement, that at least some civil society institutions can provide such opportunities, and that enhancing the legal autonomy of some such institutions would therefore benefit society. Beyond that level of broad consensus, however, debates about the relationship between civil society and liberal democracy reveal substantial disagreements. Civil society advocates differ sharply among themselves about how civil society benefits liberal democracy.⁹⁷ One group emphasizes the communitarian value of shared moral commitments, most commonly grounded in religion. This school of thought often emphasizes the value of civil society institutions' opposition to state or collective norms.⁹⁸ A contrasting group derives support for civil society from liberalism itself. This school of thought tends to place greater emphasis on civil society's capacity to renew and strengthen liberalism by enabling various forms of civic participation and engagement.⁹⁹

Skeptics of the movement to strengthen civil society express a variety of concerns. Some question the basic conceptual line that civil society advocates draw between civil society and government. They

92. See, e.g., McGinnis, *supra* 89, at 501–03 (portraying the Warren Court as having naively disdained “mediating institutions” in favor of “centralized democracy,” which subsequent developments in economic theory have exposed as oppressive and inefficient).

93. McClain & Fleming, *supra* note 90, at 301.

94. For a useful elaboration of these basic elements, see *id.* at 301–09.

95. See *id.* at 302–04.

96. *Id.* at 301–05.

97. See generally Amitai Etzioni, *Law in Civil Society, Good Society, and the Prescriptive State*, 75 CHI.-KENT L. REV. 355 (2000) (discussing this divergence and making a strategic case for emphasizing the civic rather than moral attributes of civil society).

98. McClain & Fleming, *supra* note 90, at 305–06.

99. *Id.* at 343.

wonder how civil society institutions can mediate between the individual and the state when government “defines the boundaries within which [civil society institutions] may operate and assists them with institutional guarantees[.]”¹⁰⁰ Other critiques question the underlying norms or motives of some or all civil society advocates. These critiques most commonly focus on religiously or morally grounded conceptions of civil society; sometimes they encompass a broader, often complementary anxiety about a perceived right-wing slant among civil society advocates.¹⁰¹ The most common sort of critique questions policy prescriptions urged by civil society advocates. Civil society skeptics generally acknowledge the substantial value that many civil society institutions bring to liberal democracy, but they chide civil society advocates for overstating and/or under-theorizing that value and for understating the attendant costs of empowering civil society institutions.¹⁰² Skeptics emphasize how feminist insights about social power disparities complicate proposals to strengthen the societal role of families and the traditional private sphere as embodied in home life.¹⁰³ They also express concern about the human costs of giving civil society entities greater autonomy from particular legal rules, particularly anti-discrimination laws.¹⁰⁴ Skeptics question the desirability of including religious organizations in government programs that fund private entities to provide social benefits.¹⁰⁵ They question civil society advocates’ frequent calls for devolution and decentralization of government authority.¹⁰⁶

Civil society debates most commonly enter legal discourse when the Supreme Court decides ideologically charged cases about whether and to what extent constitutional principles justify certain government benefits for, and/or allow government to impose certain duties upon, entities within civil society. The universe of such cases prominently

100. Mark Tushnet, *The Constitution of Civil Society*, 75 CHI.-KENT L. REV. 379, 382 (2000).

101. See, e.g., Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 CHI.-KENT L. REV. 555 (2000).

102. See, e.g., McClain & Fleming, *supra* note 90, at 309–22.

103. See, e.g., *id.* at 326–35.

104. See Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001); Andrew Koppelman, *Should Noncommercial Associations Have an Absolute Right to Discriminate?*, 67 LAW & CONTEMP. PROBS. 27 (2004).

105. See, e.g., Stephen Macedo, *Constituting Civil Society: School Vouchers, Religious Nonprofit Organizations, and Liberal Public Values*, 75 CHI.-KENT L. REV. 417 (2000) (advocating various constraints and conditions on including religious institutions in government benefit programs).

106. See, e.g., McClain & Fleming, *supra* note 90, at 350–52.

includes the sorts of religious liberty disputes discussed above, as well as the disputes I will now discuss that involve political parties, private membership associations, and the posited civil society functions of certain business corporations.

B. Justice Stevens's Skepticism toward Constitutional Solicitude for Powerful Civil Society Institutions

My discussion of Justice Stevens's civil society jurisprudence focuses on the range of civil society institutions larger than the family and smaller than state and local governments.¹⁰⁷ This class includes—in addition to religious organizations—political parties and private membership associations. I also consider posited civil society functions of business corporations, including the institutional media. Finally, I discuss a sort of civil society institution noted but rarely emphasized in the civil society literature—racial affinity associations. In addressing the constitutional claims of these various sorts of civil society institutions, Justice Stevens employed reasoning and rhetoric that strikingly recall his key opinions in religion cases. He resisted claims for expanding constitutional solicitude for civil society institutions' autonomy because such solicitude threatened to facilitate those institutions' exercise of coercive power and/or to interpose factionalism against shared national commitments and values.

1. THE MAJOR POLITICAL PARTIES

Political parties play a critical role in civil society advocates' vision of an organized private sphere that can counterbalance the state, influencing government behavior from both within and without while also encouraging ordinary citizens to engage actively in organized

107. Legal disputes involving autonomy claims of families and sub-federal governments entail complications that distinguish them from the relatively more similar types of disputes that I discuss. Even so, Justice Stevens seems to have recognized dangers from unchecked parental authority similar to the dangers that I will show animated his views about private institutional autonomy. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 85–91 (2000) (Stevens, J., dissenting) (contending that the Due Process Clause did not foreclose states from overriding arbitrary parental decisions not in a child's best interest). Similarly, Justice Stevens's general skepticism about constitutionally grounded efforts to enhance state power vis-à-vis federal authority tracks his skepticism toward civil society institutions. *See, e.g., Printz v. United States*, 521 U.S. 898, 939–41 (1997) (Stevens, J., dissenting) (objecting to the Court's expansion of the Tenth Amendment's prohibition on federal commandeering of state government instrumentalities to bar the Brady Act's requirement that local law enforcement officers perform background checks on gun purchasers).

political activity.¹⁰⁸ Of course, the reality of political parties presents serious complications from a civil society perspective. Parties function as membership organizations, but they simultaneously harbor hierarchical management structures and play a vital role in constituting the government to which we suppose civil society will provide a counterweight.¹⁰⁹ In our political system, a variety of electoral structures encourages the continuing dominance of two major parties, an effect that gives those two parties exceptional power to define electoral coalitions and channel political energy.¹¹⁰ Justice Stevens, in a posture that perhaps reflects his early career as a moderate Republican under the Chicago Democratic machine, strongly resisted constitutional claims aimed at strengthening the major parties' autonomy.¹¹¹ This resistance appears both in cases that struck down party patronage systems and in a series of dissents from decisions that enhanced the major parties' control over primary elections.

In two of the Court's leading cases on political patronage, Justice Stevens resisted efforts to exempt the major parties' disciplinary structures from First Amendment review.¹¹² Writing for the majority in *Branti v. Finkel*,¹¹³ he expanded the class of employees the Court had previously shielded from patronage dismissals¹¹⁴ to include any employee as to whom "party affiliation is [not] an appropriate requirement for the effective performance of the public office involved."¹¹⁵ A decade later, when the Court in *Rutan v. Republican*

108. Nancy Rosenblum has extolled these functions of political parties and has criticized both democratic political theorists and civil society advocates for neglecting what she views as political parties' central importance for a healthy civil society. See Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 813 (2000); Nancy L. Rosenblum, *Primus Inter Pares: Political Parties and Civil Society*, 75 CHI.-KENT L. REV. 493 (1999).

109. See V.O. KEY, JR., *POLITICS, PARTIES, AND PRESSURE GROUPS* 163–65 (5th ed. 1964) (distinguishing among the political party in government, the party in the electorate, and the party organization).

110. I discuss this dynamic at length in Gregory P. Magarian, *Regulating Political Parties Under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 2010–60 (2003).

111. For a discussion of nonpartisanship as a unifying theme in Justice Stevens's political-process jurisprudence, see Pamela S. Karlan, *The Partisan of Nonpartisanship: Justice Stevens and the Law of Democracy*, 74 FORDHAM L. REV. 2187, 2191–92 (2005).

112. Indeed, then-Judge Stevens had subjected political patronage to strong constitutional constraints in a Seventh Circuit decision that predated (and perhaps prefigured) the Supreme Court's major patronage decisions. See *Ill. State Emps. Union v. Lewis*, 473 F.2d 561, 572 (7th Cir. 1972).

113. 445 U.S. 507 (1980).

114. See *Elrod v. Burns*, 427 U.S. 347, 359–60 (1976).

115. *Branti*, 445 U.S. at 518.

*Party of Illinois*¹¹⁶ extended constitutional restrictions on patronage to cover not only firings but also lesser adverse employment actions, Justice Stevens clashed with Justice Scalia over the significance and value of patronage systems.¹¹⁷ Justice Scalia's dissent advanced a classic argument for the major political parties' leading role in civil society. He asserted the importance of patronage for preserving a strong two-party system and, in turn, the importance of the two-party system for preserving a healthy democracy.¹¹⁸ Moreover, he lauded patronage as "a powerful means of achieving the social and political integration of excluded groups."¹¹⁹ In contrast, Justice Stevens emphasized "the critical distinction between partisan interest and the public interest."¹²⁰ His concurring opinion assailed the major parties' propensities toward coercion and factionalism. As to coercion, "the harsh reality of party discipline" inherent in patronage systems severely diminished employees' rights of speech and association by coercing their political allegiance.¹²¹ "By impairing individuals' freedoms of belief and association," he concluded, "unfettered patronage practices undermine the 'free functioning of the electoral process.'"¹²² As to factionalism, he viewed political parties as eroding bonds among diverse groups and individuals, a problem that caused the Framers to view the party system as "a pathology."¹²³

Justice Stevens expressed a similar impatience with the major political parties' pleas for constitutional solicitude in a pair of cases that dealt with state regulation of primary elections. In *California Democratic Party v. Jones*,¹²⁴ the Court sustained the major parties' First Amendment challenge to California's blanket primary system, under which a voter could vote for any candidate, regardless of party, in any race.¹²⁵ The State maintained that its system served the interests of voters who did not wish to align with either major party and dissident voters in districts dominated by either of the major parties by giving those groups a voice in what were often decisive primary

116. 497 U.S. 62 (1990).

117. *Id.* at 75.

118. *See id.* at 104–08 (Scalia, J., dissenting).

119. *Id.* at 108 (citations omitted).

120. *Id.* at 88 (Stevens, J., concurring).

121. *Id.* at 89 (Stevens, J., concurring).

122. *Id.* at 91 (Stevens, J., concurring) (quoting *Elrod v. Burns*, 427 U.S. 347, 356 (1976)).

123. *Id.* at 82 n.3 (Stevens, J., concurring).

124. 530 U.S. 567 (2000).

125. *Id.* at 569–70, 586.

elections.¹²⁶ Justice Stevens's dissent credited the State for resisting the major parties' factional and coercive pressures.¹²⁷ Reiterating his view that the Framers largely disdained the factionalism of political parties,¹²⁸ he portrayed the parties as undermining "the State's right to define the obligations of citizens and organizations performing public functions" and "[to encourage] participation in the political process."¹²⁹ A few years later, in *Clingman v. Beaver*,¹³⁰ minor party members challenged a state's effort to aid the major parties by barring minor parties from opening their primary elections to major party members.¹³¹ This time the State's regulation survived the Court's First Amendment review. In dissent, Justice Stevens portrayed the case exactly as he had portrayed *Jones*: the major parties' coercive desires clashed with the people's interest in an open and inclusive political process.¹³² *Clingman* also exemplified Justice Stevens's distinction as by far the Court's strongest advocate for minor political parties' constitutional interests.¹³³

2. PRIVATE MEMBERSHIP ASSOCIATIONS

During Justice Stevens's tenure on the Court, a line of decisions rejected First Amendment challenges by private membership

126. *Id.* at 570, 582–83.

127. *Id.* at 600–01 (Stevens, J., dissenting).

128. "At best, some members of [the founding] generation viewed parties as an unavoidable product of a free state that were an evil to be endured, though most viewed them as an evil to be abolished or suppressed." *Id.* at 591 n.2 (Stevens, J., dissenting) (citation omitted).

129. *Id.* at 592 (Stevens, J., dissenting). Justice Stevens similarly saw constitutional problems with the major parties' domination and manipulation of redistricting processes. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 318–19 (2004) (Stevens, J., dissenting) (arguing for the justiciability of political gerrymandering claims). For a discussion and analysis of this aspect of his jurisprudence, see Karlan, *supra* note 111, at 2192–99.

130. 544 U.S. 581 (2005).

131. *Id.* at 584–85.

132. *See id.* at 608 (Stevens, J., dissenting) (contending that a voter's "right to support the candidate of her choice . . . far outweighs any public interest in punishing registered Republicans or Democrats for acts of disloyalty").

133. *See id.* at 612–15 (emphasizing a minor party's First Amendment right of political association); *cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 684 (1998) (Stevens, J., dissenting) (criticizing the "standardless character" of a public television station's decision to exclude an independent candidate from a televised candidate debate); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 370 (1997) (Stevens, J., dissenting) (contending that a state's ban on fusion candidacies violated the First Amendment rights of minor political parties that wished to co-nominate major party candidates); *Anderson v. Celebrezze*, 460 U.S. 780, 782, 806 (1983) (sustaining a constitutional challenge to a state's requirement that independent candidates file statements of candidacy in March in order to appear on the November election ballot).

associations to state laws that prohibited various sorts of discrimination in group membership.¹³⁴ Justice Stevens joined the majority opinions in those cases without qualification, but he did not write on the subject until the Court dramatically shifted gears in *Boy Scouts of America v. Dale*.¹³⁵ The majority in that case held that the First Amendment shielded from New Jersey's anti-discrimination law the Boy Scouts's decision to expel an openly gay member.¹³⁶ Justice Stevens's dissenting opinion contrasted the enlightenment of the state's anti-discrimination policy with the coercive and divisive exclusion that the majority valorized.¹³⁷ New Jersey, Justice Stevens argued, sought "to replace prejudice with principle," and the Court's decision "does not accord this 'courageous State' the respect that is its due."¹³⁸ By reifying the Boy Scouts's professed self-interest in homophobia, he maintained, the Court "turn[ed] the right to associate into a free pass out of antidiscrimination laws"¹³⁹ and allowed a private organization to impose on disfavored citizens "a constitutionally prescribed symbol of inferiority."¹⁴⁰ He emphasized, in contrast to the Boy Scouts's abstract and dubious interest in the dispute, the "serious and tangible harm to countless members of the class New Jersey seeks to protect."¹⁴¹ Where the *Dale* majority cast its holding as a defense of beleaguered dissenters against rapacious majoritarian norms,¹⁴² the Justice lamented the Court's empowerment of a powerful private association to attack with impunity a disadvantaged minority population.

Justice Stevens's dissent in *Van Orden v. Perry* offers additional evidence of his concerns about the coercive pressure that private

134. See, e.g., *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 4–5, 18 (1988) (rejecting a facial challenge to a municipal regulation that barred racial and gender discrimination by certain private clubs); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 539–44 (1987) (rejecting a private organization's challenge to application of a state statute that required it to accept female members); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612 (1984) (same).

135. 530 U.S. 640, 663 (2000) (Stevens, J., dissenting).

136. *Id.* at 644.

137. See *id.* at 685 (Stevens, J., dissenting) (citation omitted).

138. *Id.* at 664 (Stevens, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

139. *Id.* at 688 (Stevens, J., dissenting).

140. *Id.* at 696 (Stevens, J., dissenting).

141. *Id.* at 700 (Stevens, J., dissenting).

142. See *id.* at 660 ("[I]t appears that homosexuality has gained greater societal acceptance. But this is scarcely an argument for denying First Amendment protection to those who refuse to accept these views. The First Amendment protects expression, be it of the popular variety or not." (citations omitted)).

membership associations can exert in civil society.¹⁴³ The case arose at the intersection of a civil society trifecta: religion, a private membership association, and a state government. At issue was the constitutionality of a monument on the Texas state capitol grounds that displayed the text of the Ten Commandments. The Fraternal Order of Eagles had donated the monument to the state. Justice Stevens described the situation in a way that called critical attention to the linkage: “God, as the author of [the monument’s] message, the Eagles, as the donor of the monument, and the State of Texas, as its proud owner, speak with one voice for a common purpose—to encourage Texans to abide by the divine code of a ‘Judeo-Christian’ God.”¹⁴⁴ For Justice Stevens, that unified effort amounted to a singularly hazardous commingling of institutional authority.

3. BUSINESS CORPORATIONS ASSERTED TO PERFORM CIVIL SOCIETY INTERMEDIARY FUNCTIONS

Business corporations ordinarily play a limited role in discussions of civil society because they operate in the distinct sphere of the market.¹⁴⁵ In condemning campaign finance regulations, however, members of the Court’s laissez-faire majority have portrayed corporations as serving the intermediary function between the people and government that civil society advocates ordinarily ascribe to churches, associations, and political parties.¹⁴⁶ Justice Scalia, dissenting in *McConnell v. Federal Election Commission*,¹⁴⁷ derided campaign finance regulations for “prohibit[ing] the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort.”¹⁴⁸ In contrast, Justice Stevens and Justice O’Connor, writing jointly for the majority, began their analysis with a scathing denunciation of corporate and other moneyed influences on the political process, weaving the history of legislative and judicial efforts to curb that influence into a powerful narrative of popular resistance to concentrated private power.¹⁴⁹ Less than a decade

143. 545 U.S. 677, 734 n.35 (2005) (Stevens, J., dissenting) (citing *Engel v. Vitale*, 370 U.S. 421, 431 (1962)).

144. *Id.* at 722 (Stevens, J., dissenting).

145. See Tushnet, *supra* note 100, at 394 (contrasting civil society institutions with market institutions).

146. See *supra* note 90 and accompanying text.

147. 540 U.S. 93 (2003).

148. *Id.* at 248 (Scalia, J., concurring in part and dissenting in part).

149. See *id.* at 114–22.

later, the *McConnell* dissenters parlayed personnel changes on the Court into a sharp turn in the law in *Citizens United v. Federal Election Commission*,¹⁵⁰ which struck down federal restrictions on corporate political expenditures.¹⁵¹ The newly minted majority in that case claimed primary concern for the legal plight of “small corporations without large amounts of wealth,”¹⁵² but it still invoked Justice Scalia’s higher-rolling complaint from *McConnell* that the challenged regulations “muffle[d] the voices that best represent the most significant segments of the economy.”¹⁵³ Justice Stevens, now in dissent, continued to emphasize “the distinction between corporate and human speakers” and to insist that “[t]he financial resources, legal structure, and instrumental orientation of corporations raise legitimate concerns about their role in the electoral process.”¹⁵⁴

Institutional media corporations arguably serve a more palpable civil society intermediary function than ordinary business corporations. Media corporations inform the people about government behavior, thereby enabling popular resistance to government hegemony.¹⁵⁵ In two majority opinions separated by almost twenty years, Justice Stevens manifested a strong preference for a disaggregated, participatory media model over a model of institutional intermediation. *FCC v. Pacifica Foundation*¹⁵⁶ presented a radio station’s First Amendment challenge to a fine imposed for the station’s violation of federal “indecent” regulations.¹⁵⁷ Justice Stevens, writing for the majority, extolled the FCC’s role in protecting ordinary citizens from the otherwise inescapable decisions of commercial broadcasters.¹⁵⁸ Two decades and one communications revolution later, Justice Stevens spoke for the Court in emphatically denying Congress’s ham-handed initial effort to regulate “indecent” speech on the Internet. In *Reno v. ACLU*,¹⁵⁹ the government sought to liken the challenged provisions of the

150. 130 S. Ct. 876 (2010).

151. *Id.* at 906.

152. *Id.* at 907.

153. *Id.* (alteration in original) (quoting *McConnell*, 540 U.S. at 257–58 (Scalia, J. concurring in part and dissenting in part)).

154. *Id.* at 930 (Stevens, J., dissenting).

155. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527–42 (discussing the importance of a free press in informing the public about abuses of government power).

156. 438 U.S. 726 (1978).

157. *Id.* at 729–34.

158. See *id.* at 748–50 (emphasizing the broadcast media’s “uniquely pervasive presence in the lives of all Americans” and easy accessibility for children).

159. 521 U.S. 844 (1997).

Communications Decency Act to the FCC's action in *Pacifica*.¹⁶⁰ In rejecting the comparison, Justice Stevens celebrated the "vast democratic forums of the Internet," whose "relatively unlimited, low-cost capacity for communication of all kinds" allowed "any person with a phone line [to] become a town crier"¹⁶¹ As in other civil society contexts, Justice Stevens in these media cases saw potential threats to personal freedom not just in government power but in private institutional power as well.

4. RACIAL AFFINITY ASSOCIATIONS: AN EXCEPTION THAT PROVES THE RULE

Various racial affinity associations, including organizations that litigate or lobby on behalf of racial groups or their members, perform important roles in maintaining and strengthening civil society. Such associations provide counterweights to government authority, give people vehicles for participation in civic life, and model alternatives to dominant modes of social organization.¹⁶² Accordingly, Justice Stevens's approach to the constitutional claims of racial affinity associations might seem to undercut this Article's thesis about his wariness of powerful civil society institutions. His majority opinion in *NAACP v. Claiborne Hardware Co.*¹⁶³ sustained the NAACP's First Amendment challenge to a state court's imposition of civil liability for the organization's arguably coercive tactics in enforcing a commercial boycott.¹⁶⁴ Similarly, his dissenting opinion in *Adarand Constructors, Inc. v. Peña*¹⁶⁵ disdained an equal protection challenge to a federal minority set-aside program for which racial affinity associations had advocated.¹⁶⁶ Upon closer examination, however, Justice Stevens's solicitude for racial affinity associations reflects a distinction between racial identity and other characteristics (such as partisan identification, voluntary membership, and religion) that define civil society

160. *Id.* at 864.

161. *Id.* at 868–70. Justice Stevens delivered his most forceful defenses of expressive freedom in cases that involved individual speakers, often of modest means, as opposed to powerful institutional speakers. See generally Gregory P. Magarian, *The Pragmatic Populism of Justice Stevens's Free Speech Jurisprudence*, 74 *FORDHAM L. REV.* 2201 (2006).

162. I limit my discussion of "racial affinity associations" to associations of minority racial group members. "White power" groups present different issues for civil society and constitutional law.

163. 458 U.S. 886 (1982).

164. *Id.* at 911–13, 931.

165. 515 U.S. 200 (1995).

166. See *id.* at 264 (Stevens, J., dissenting).

institutions. That distinction reinforces the importance across Justice Stevens's civil society jurisprudence of concerns about factionalism and coercion.

In his early years on the Court, Justice Stevens criticized affirmative action programs in public education¹⁶⁷ and government contracting¹⁶⁸ as special interest boondoggles. His criticism of racial affinity associations' advocacy for affirmative action echoed the theme of anti-factionalism that I have emphasized in his civil society jurisprudence. He portrayed racial set-asides as “[g]rants of privilege on the basis of characteristics acquired at birth” tantamount to the royal preferences for noblemen that precipitated the French Revolution.¹⁶⁹ Pressing that comparison, he derided affirmative action programs as elitist, asserting that “those who are the most disadvantaged within each class are the least likely to receive any benefit from the special privilege.”¹⁷⁰ Most pointedly, he condemned racial preference programs for “reinforc[ing] habitual ways of thinking in terms of classes instead of individuals,” thereby “foster[ing] intolerance and antagonism against the entire membership of the favored classes.”¹⁷¹ Justice Stevens's early criticisms of affirmative action also resonate with the anti-coercion theme of his civil society opinions. He directly equated racial identity with partisan political identification, suggesting that racial set-aside programs amounted to patronage arrangements.¹⁷² This same comparison animated early opinions in which he expressed skepticism about racial vote dilution claims.¹⁷³ He also voiced serious concern

167. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 408, 418 (1978) (Stevens, J., concurring in part and dissenting in part) (arguing that federal law clearly barred racial preferences in all federally funded programs).

168. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 514–15 (1989) (Stevens, J., concurring) (arguing that the Equal Protection Clause of the Fourteenth Amendment barred a municipal set-aside program for minority-owned contractors); *Fullilove v. Klutznick*, 448 U.S. 448, 532, 554 (1980) (Stevens, J., dissenting) (arguing that the equal protection principle of the Fifth Amendment's Due Process Clause barred a federal set-aside program for minority-owned contractors).

169. *Fullilove*, 448 U.S. at 533 (Stevens, J., dissenting).

170. *Id.* at 538 (Stevens, J., dissenting).

171. *Id.* at 547 (Stevens, J., dissenting).

172. See *Croson*, 488 U.S. at 516 n.9 (Stevens, J., concurring) (“[R]acial patronage, like a racial gerrymander, is no more defensible than political patronage or a political gerrymander.”); *Fullilove*, 448 U.S. at 541–42 (Stevens, J., dissenting) (criticizing the role of the Congressional Black Caucus in enacting federal racial set-asides).

173. See *City of Mobile v. Bolden*, 446 U.S. 55, 83 (1980) (Stevens, J., concurring) (dismissing black voters' challenge to an at-large system of municipal representation on the ground that the system represented a valid political choice by the majority). On vote dilution, like affirmative action, Justice Stevens later articulated a position much more sympathetic to the claims of historically disadvantaged racial

about racial preference programs' harmful effects on "the disadvantaged class of white contractors," many or most of which presumably had played no role in putting minority-owned businesses at a competitive disadvantage.¹⁷⁴

Justice Stevens's subsequent, dramatic reversal on affirmative action appears to reflect his reconsideration of the view that racial affinity associations undesirably promoted factionalism and coercion. By the time of *Adarand*, he had come to believe that constitutional solicitude for racially grounded claims was defensible, and perhaps necessary, to relieve historically disadvantaged groups of entrenched social and political burdens.¹⁷⁵ "There is no moral or constitutional equivalence," he declared, "between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination."¹⁷⁶ These same insights animate Justice Stevens's earlier majority opinion in *Claiborne Hardware*. "The black citizens named as defendants in this action," he explained, "banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."¹⁷⁷ These sympathetic opinions acknowledge the factional and coercive dangers of the NAACP's boycott¹⁷⁸ and of racial set-aside programs.¹⁷⁹ The Justice treated racial affinity associations sympathetically not because they avoided factionalism and coercion, but because they deployed those forces to overcome, rather than perpetuate, established structures of social and political power. In contrast, he appears to have viewed religious organizations, private membership associations, and the major political parties—but not, notably in this context, minor political parties¹⁸⁰—as entities whose greater social or political power rendered

groups. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 677–78 (1993) (Stevens, J., dissenting) (contending that the Equal Protection Clause bars states only from gerrymandering electoral districts in order to disadvantage minority groups, not from drawing gerrymanders designed to benefit minority groups).

174. *Croson*, 488 U.S. at 516.

175. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 261–62 (1995) (Stevens, J., dissenting).

176. *Id.* at 243 (Stevens, J. dissenting).

177. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907 (1982).

178. See *id.* at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action.").

179. See *Adarand*, 515 U.S. at 242 (Stevens, J., dissenting) ("Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification.").

180. See *supra* note 133 and accompanying text (discussing Justice Stevens's distinctive solicitude for minor political parties' constitutional interests).

their factional and coercive tendencies unacceptably dangerous and/or insufficiently justifiable.¹⁸¹

Justice Stevens's approach to the constitutional claims of various civil society institutions reveals a consistent pattern that requires us to situate his treatment of religious claims in a broader context. He did not see in religion a unique source of constitutional concern; rather, religion represented one important instance of a broader concern about civil society. Formulating and substantiating that descriptive insight accomplishes this Article's principal goal. However, Justice Stevens's jurisprudence of religion in particular remains a distinctive source of interest. Viewing his approach to religion in the broader context of his approach to civil society institutions allows for novel analysis of his positions on Establishment Clause and Free Exercise Clause disputes. The final part of this Article briefly assesses and critiques, in this fresh light, Justice Stevens's religion jurisprudence.

III. JUSTICE STEVENS'S RELIGION JURISPRUDENCE RECONSIDERED

My examination of Justice Stevens's approach to religion as one component of his civil society jurisprudence demonstrates that he did not view religion as a distinctive sphere of inquiry, let alone a distinctive object of disdain. Justice Stevens emerges as neither a separationist nor a neutralist on religion, but rather a complicated hybrid.¹⁸² He fits the separationist model because he advocated a strong degree of separation between religion and the public sphere. At the same time, he expressed an important sort of neutrality by not treating religious entities any differently than he treated a wide range of comparable institutions within civil society. My analysis of Justice Stevens's religion jurisprudence discredits the dominant view that he

181. Justice Stevens's somewhat ambivalent attitude toward the autonomy claims of Indian tribes, which combine some characteristics of sub-federal governments and racial affinity associations, may reflect this same dichotomy. On one hand, he tended to construe tribal sovereignty narrowly, and accordingly he viewed tribal sovereign immunity claims skeptically. *See, e.g., Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 764–66 (1998) (Stevens, J., dissenting) (arguing that the Court should limit the tribal sovereign immunity doctrine to transactions on Indian land and suggesting deeper problems with the doctrine). On the other hand, he took seriously some tribal claims of entitlement to protection from state burdens. *See, e.g., City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 222–27 (2005) (Stevens, J., dissenting) (arguing that a period of non-Indians' occupying certain tribal lands did not negate a Tribe's immunity from taxes on those lands).

182. *See* discussion *supra* notes 78–82 and accompanying text (discussing separation and neutrality as categories in religion jurisprudence).

harbored a bias against religion.¹⁸³ To understand what Justice Stevens was doing in religion cases, we need to ask different questions.

This Article's descriptive insight suggests that two inquiries should guide normative evaluations of Justice Stevens's religion jurisprudence. First, does the Justice's consistent skepticism toward powerful civil society institutions' constitutional autonomy claims, based on his deep concerns about coercion and factionalism, make normative sense as a general matter? Second, to the extent his skepticism does make normative sense, does it apply to religious claims and claimants with sufficient force to vindicate his positions in religion cases? I answer the first question differently as to Justice Stevens's anti-coercion principle, which I find persuasive, and his anti-factionalism principle, which I find more problematic. That divergence leads me to answer the second question differently as to his opinions on the Establishment Clause, where the anti-coercion principle plays the leading role, and his opinions on the Free Exercise Clause, which depend solely on the anti-factionalism principle.

A. Anti-coercion and the Wisdom of Justice Stevens's Establishment Clause Jurisprudence

Justice Stevens's civil society jurisprudence embodies a strong concern that civil society institutions will use increased increments of constitutionally grounded autonomy to exercise coercive authority over individuals. He saw socially harmful coercion in political parties' capacity to deny public employment and dictate voting behavior; in private membership associations' power to exclude or expel members based on members' immutable characteristics; and in religious organizations' ability to impose their norms on believers and, in some circumstances, nonbelievers. Justice Stevens's wariness of private coercive authority, as I have shown, forms the primary basis for his strongly separationist viewpoint in Establishment Clause cases.¹⁸⁴ The anti-coercion principle strikes me as normatively persuasive in general and salient for Establishment Clause disputes in particular. I therefore take a favorable view of Justice Stevens's Establishment Clause jurisprudence.

Coercion of individuals by institutions is inherently undesirable, because coercion constrains individual liberty and undercuts human dignity. Coercion for its own sake is never a good thing. Most of us would agree that some coercion has desirable consequences, but our

183. See discussion *supra* notes 62–77 and accompanying text.

184. See discussion *supra* notes 33–48 and accompanying text.

inevitable disagreements about the nature and scope of desirable coercion counsel in favor of a legal presumption against coercion. State coercion of individuals presents the classic problem of constitutional rights. The civil society debate complicates the problem by interposing private institutions between the individual and the state.¹⁸⁵ Although the government may wield uniquely potent and broad coercive authority, many private institutions possess ample coercive power to warrant attention in constitutional analysis.¹⁸⁶ Civil society advocates argue that judicial solicitude for private institutional coercion empowers institutions to advance individuals' interests.¹⁸⁷ This argument suffers from three critical deficiencies. First, it recognizes no basis or need for limiting private institutional coercion, and it therefore calls on courts to license that coercion without constraint or accountability. Second, it fails to acknowledge that private institutional coercion can harm people in the same ways state coercion does and that, accordingly, state constraints on private institutional autonomy sometimes do more good than harm. Third, it demands boundless deference to private institutional leaders' potentially self-serving accounts of individual members' (and other people's) interests. Civil society advocates' inability to overcome these difficulties derails their defense of private coercion as a justification for civil society institutions' constitutional autonomy claims and confirms the value of Justice Stevens's anti-coercion principle as a check against private institutional power.

Civil society advocates argue that civil society institutions need broad coercive authority—power to punish, to repress, and to ostracize—in order to discipline their members, maintain distinctive institutional identities, and participate effectively in public debates.¹⁸⁸ Michael McConnell insists that “[g]enuine pluralism requires group difference, and maintenance of group difference requires that groups have the freedom to exclude”¹⁸⁹ Abner Greene similarly argues that legal allowances for private institutions to suppress speech and to

185. The relationship between individual and institutional interests has especially interesting implications for First Amendment free speech theory. In particular, preferences for focusing free speech protection on individuals or institutions distinguish autonomy-based free speech theories and various sorts of communal and/or instrumental theories along lines that often defy expectations. Examination of this dynamic will await a future article.

186. For an elaboration of this point in the First Amendment free speech context, see generally Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101 (2004).

187. *See id.* at 134–35.

188. *See id.* at 133–34.

189. McConnell, *supra* note 86, at 466.

discriminate based on race maintains “a certain agnosticism about virtue [that] is not only healthy, but also fitting with the broad anti-foundationalism of our constitutional culture.”¹⁹⁰ These justifications for institutional coercion sweep in a mighty and indiscriminate arc. Private institutions, in contrast to government, enjoy double-width constitutional protection for their exercises of power: they lack constitutional obligations, and they can assert constitutional rights to protect their authority. Civil society advocates want courts to expand that protection toward a far horizon, constitutionally insulating from legal restraints all manner of institutional coercion. As Justice Stevens recognized, private institutions should enjoy some latitude to coerce: political parties need power to discipline party officers who deviate from the party’s policies,¹⁹¹ and religious institutions need autonomy to hire only believers for ministerial jobs.¹⁹² But to remove all legal constraints from political parties’ insistence on the partisan fealty of employees or contractors, or from broad-based membership associations’ exclusion of women or gays, pushes constitutional solicitude for private institutional power to absurd and destructive extremes.

Advocacy of private coercive authority resonates strangely with civil society advocates’ (and for that matter liberals’) wariness of state coercive authority. Why should we promote the least normatively attractive feature of state power as the linchpin of a private counterweight to state power? Civil society advocates underestimate the extent to which coercion by civil society institutions can, in different ways and to varying degrees, replicate the effects of state coercion. At the same time, they overstate the “statist” character of legal constructs, like anti-discrimination laws, that embody the same sorts of socially constructive values (though not necessarily the same particular socially constructive values) that civil society institutions advance. Why, from the standpoint of resistance to prevailing norms and authorities, is the Boy Scouts’s discrimination against gays in *Dale* less troubling than a state’s enforcement of anti-discrimination law against the Boy Scouts? Did a society that continues to indulge numerous forms of discrimination against gay men and lesbians really need the Boy

190. Abner S. Greene, *Civil Society and Multiple Repositories of Power*, 75 CHI.-KENT L. REV. 477, 483 (2000).

191. See *Branti v. Finkel*, 445 U.S. 507, 517–18 (1980) (acknowledging the legitimacy of political loyalty requirements for certain policymaking employees).

192. See *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 329–30 (1987) (majority opinion joined by Justice Stevens upholding a federal statutory allowance for religious employers to hire only co-religionists for certain positions).

Scouts's litigating posture, as John McGinnis argues, in order to "discover" homophobia?¹⁹³ Anti-discrimination laws facilitate minority interests against the majority as surely as civil society institutions do, and judicial licenses for private institutions to discriminate accordingly have at best ambiguous implications for minority interests. Moreover, civil society institutions do not always embody the separate "repositories of power"¹⁹⁴ that civil society advocates imagine. The government plays an unavoidable role in constituting civil society institutions. Some institutions become ossified and resistant to change, reducing them to additional layers of insulation for the political and social status quo. John Inazu displays some flexibility when confronting these challenging dynamics. While advocating extremely strong norms of autonomy for civil society institutions, Inazu acknowledges that some institutions' primacy in society justifies legal constraints on their coercive authority.¹⁹⁵

Civil society advocates insist that institutional leaders' claims about their need to exercise unfettered coercive authority should conclusively bind courts. Rick Hills derides "judicial efforts to psychoanalyze associations" as inconsistent with "the institutional complexity of associations' representation of their members," a dynamic that often lies "beyond the ken of courts and legislatures"¹⁹⁶ Rob Vischer likewise maintains that anything less than complete judicial deference to institutional leaders' coercive ambitions undermines the "mediating tension" between the group on one side and the state and the individual on the other, subordinating the institution's values to those of the state and/or the individual.¹⁹⁷ These arguments make sense on their own terms, but they ignore the insight, familiar from the study of political parties, that institutions have multiple identities—in particular, distinct managerial and representative identities—that counsel different analytic and regulatory approaches in different contexts.¹⁹⁸ Andrew Koppelman, for example, makes a strong case that the Boy Scouts's government-

193. See McGinnis, *supra* note 89, at 528, 531–34 (positing certain private associations' central role in discovering social norms and then analyzing the Boy Scouts as such an association); see also Vischer, *supra* note 54, at 971 (suggesting that the Boy Scouts provide "parents [opposed to homosexuality] at least one forum in which their views hold sway . . .").

194. See generally Greene, *supra* note 190.

195. See INAZU, *supra* note 85, at 14–17; see also Vischer, *supra* note 54, at 1004–07 (acknowledging the need for state intervention in cases of involuntary participation in associations and in cases of harm to nonmembers).

196. Hills, *supra* note 85, at 207.

197. Vischer, *supra* note 54, at 971–73.

198. See discussion *supra* note 109 and accompanying text (discussing political parties' multiple identities).

supported virtual monopoly over certain services leaves members with no way to contest the leadership's demand for unchecked power to practice anti-gay discrimination.¹⁹⁹ Meanwhile, the leadership's homophobic policies impose harsh externalities on the gay youth whom the organization ostracizes.²⁰⁰ Civil society institutions need space to define themselves, but our legal system should not issue sweeping licenses for institutions to derogate individuals' autonomy and dignity based on nothing more than posturing by their leaders.

In the face of these obstacles, Hills attempts a frontal assault on the sort of anti-coercion norm that animates Justice Stevens's civil society jurisprudence. Hills argues that anti-coercion theories of rights inevitably undermine the interests of institutions, because anti-coercion theories conceptualize individuals as above and beyond institutional affiliations or obligations.²⁰¹ In particular, he derides the idea that meaningful institutional authority can ever depend on the consent of constituent individuals.²⁰² In my view, Hills gives unrealistically pure accounts of both anti-coercion norms and institutional authority, which leads him to describe an artificially stark opposition between individual and institutional interests. One can—and Justice Stevens's civil society jurisprudence appropriately does—make allowances for institutional authority in a conception of individual freedom from undue coercion. Hills advocates displacing the anti-coercion principle with what he calls an institutional theory of rights, which would insulate institutional authority from legal constraints within what he conceives as jurisdictionally proper boundaries.²⁰³ This approach excessively privileges both institutional power and institutional perspectives, completely obscuring the human values that define institutions' reasons for being and individuals' reasons for identifying with institutions. In contrast, Justice Stevens's determination to constrain civil society institutions' coercive power reflects careful consideration of the tension between individual dignity and institutional authority.

Justice Stevens's anti-coercion principle straightforwardly justifies his separationist views on the Establishment Clause. The Establishment Clause prevents religious organizations from engaging in socially

199. See Koppelman, *supra* note 104, at 48–53.

200. See *id.* at 43–47.

201. See Hills, *supra* note 85, at 156–60 (critiquing anti-coercion theories of rights).

202. See *id.* at 161–65 (critiquing theories of individual consent to institutional authority).

203. See *id.* at 175–96 (explaining and defending Hills's institutional theory of rights).

harmful coercive behavior.²⁰⁴ The major trope of separationism, the image of a “wall of separation” between the government and religion,²⁰⁵ frames the Establishment Clause as a barrier against both state coercion of believers and religious coercion of nonbelievers. Professor Kathleen Sullivan’s vivid description of the Establishment Clause as a “settlement . . . of the war of all sects against all”²⁰⁶ likewise portrays the Establishment Clause as deterring aggression. Justice Stevens’s Establishment Clause opinions express the same sort of idea. When he wrote for the majority in *Santa Fe Independent School District v. Doe* that a public high school could not use student surrogates to deliver a school-supported prayer at a school football game, he shielded socially vulnerable adolescents from the imposition of religious orthodoxy.²⁰⁷ When he wrote to oppose the creation of a sect-specific public school district in *Board of Education of Kiryas Joel Village School District v. Grumet*, he emphasized children’s interest in having some opportunity to assess critically their parents’ religious choices.²⁰⁸ When he dissented from the Court’s approval of a state-sponsored Ten Commandments display in *Van Orden v. Perry*, he condemned the toxic cooperation of the state and a private association in encouraging public adherence to sectarian doctrine.²⁰⁹ In all of these settings, Justice Stevens demonstrated the same humane instincts and sophisticated awareness of power dynamics that led him to resist autonomy claims of the major political parties²¹⁰ and powerful private membership associations²¹¹ while endorsing similar claims by minor

204. I believe the Establishment Clause provides a distinctive constitutional basis for constraining coercive behavior by religious organizations. Others would disagree. See, e.g., Vischer, *supra* note 54, at 981–82 (arguing, in a discussion of legal restrictions on proselytizing, that religion-specific legal constraints unfairly disadvantage religion). In any event, Justice Stevens’s general anti-coercion principle, as manifest across his civil society jurisprudence, can support his Establishment Clause jurisprudence without resort to any special constraints the Establishment Clause might place on religious organizations.

205. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1879)).

206. Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199 (1992).

207. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000); see also discussion *supra* notes 38–41 and accompanying text.

208. See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 711 (1994) (Stevens, J., concurring); see also discussion *supra* notes 17–20, 46–47, and accompanying text.

209. See *Van Orden v. Perry*, 545 U.S. 677, 709–12 (2005) (Stevens, J., dissenting); see also discussion *supra* notes 25–29, 44–45, and accompanying text.

210. See *supra* Part II.B.1.

211. See *supra* Part II.B.2.

political parties²¹² and racial affinity associations.²¹³ Justice Stevens's separationist approach to the Establishment Clause appropriately undercuts religious organizations' efforts to exercise socially harmful coercive authority against believers and nonbelievers alike.

B. Anti-factionalism and the Failings of Justice Stevens's Free Exercise Clause Jurisprudence

Justice Stevens's anti-factionalism principle presents substantially greater normative problems than his anti-coercion principle.²¹⁴ The anti-factionalism principle, as I have shown, forms the primary basis for the Justice's Free Exercise Clause jurisprudence, particularly in the contentious line of cases that deal with mandatory religious accommodation claims.²¹⁵ The issue of mandatory religious accommodation raises serious constitutional and practical concerns. In particular, a strong doctrine of mandatory accommodations is not easy to implement fairly or to administer effectively.²¹⁶ But Justice Stevens's unduly rigid concern about factionalism, and his ultimate failure to distinguish religious accommodation claims from other types of autonomy claims raised by civil society institutions, led him to what I consider an unwarranted wholesale rejection of mandatory accommodations.²¹⁷

212. See discussion *supra* notes 130–33 and accompanying text.

213. See *supra* Part II.B.4.

214. Nothing in my criticisms of Justice Stevens's anti-factionalism principle undercuts my confidence in his Establishment Clause opinions. As I have discussed, the anti-coercion principle suffices to justify the Justice's Establishment Clause jurisprudence. See discussion *supra* notes 33–48 and accompanying text. Moreover, as this section explains, I find his anti-factionalism least persuasive in its application to religious individuals, who bring most Free Exercise Clause claims, as opposed to religious organizations, whose actions or positions undergird effectively all Establishment Clause controversies. See discussion *infra* notes 224–28 and accompanying text.

215. Justice Stevens had no more difficulty than any other member of the Court in sustaining the other major sort of Free Exercise Clause claims, which challenge direct discrimination against religion. See discussion *supra* note 72 and accompanying text.

216. See Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 178–85 (1995) (discussing the Court's inconsistency in administering a system of mandatory accommodations prior to 1990).

217. Given our society's advanced state of value pluralism, the Court should recognize mandatory accommodation claims grounded in deeply held conscientious convictions beyond traditional theistic belief systems. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1282–1301 (1994) (proposing

Coercion, as discussed above, is intrinsically undesirable, although it can be justified based on its consequences.²¹⁸ Factionalism, in contrast, may be either intrinsically undesirable or desirable, depending on the context. Civil society institutions certainly can increase factionalism, notwithstanding Professor John McGinnis's gerrymandered account of civil society institutions as anti-factional bulwarks against "special interests."²¹⁹ But the factional qualities of civil society institutions can bring tremendous benefits for liberal democracy. Leading free speech scholars have argued that First Amendment doctrine should take account of the different sorts of value that various institutions add to public discourse.²²⁰ Civil society advocates have embraced this institutional approach as a basis for validating civil society institutions' distinctive identities as sources of novel, challenging ideas.²²¹ I find some of their claims for civil society institutions' value misplaced or overblown; for reasons discussed above, I oppose insulating civil society institutions from legal restraints on coercive power.²²² But civil society advocates are right to extol the diversity of perspectives that civil society institutions bring to public debate and to press for a democratic discourse that exploits that diversity. Political parties (minor as well as major), private membership associations, and religious organizations play leading roles in developing, debating, and promoting ideas that enrich public debate. We should take care to prevent any institutions from growing so

an expansive approach to accommodations under the Free Exercise Clause based on a principle of "equal regard"). I believe a statute such as the RFRA would provide a more effective vehicle than the Free Exercise Clause for such a broadly inclusive approach to accommodation. See Gregory P. Magarian, *How to Apply the Religious Freedom Restoration Act to Federal Law Without Violating the Constitution*, 99 MICH. L. REV. 1903, 1978–88 (2001). Justice Stevens soundly rejected statutory as well as constitutional grounds for mandatory accommodations. See discussion *supra* notes 17–19 and accompanying text.

218. See, e.g., discussion *supra* note 185 and accompanying text.

219. McGinnis, *supra* note 89, at 490. McGinnis ascribes to Tocqueville the idea that "while political factions try to use government coercion for their own ends, civil associations organize to meet the common goals of their members." *Id.* at 491. That distinction, however, ignores the range of contemporary institutions that aim both to influence government policy and to perform other functions on behalf of their members.

220. See, e.g., C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 HARV. C.R.-C.L. L. REV. 1, 2–3 (1998) (advocating an institutionally distinct approach to First Amendment review of campaign finance regulation); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1260 (2005) (advocating institutional analysis across First Amendment doctrine).

221. See, e.g., Horwitz, *supra* note 86, at 84–91 (adapting the concept of "First Amendment institutionalism" to analysis of civil society institutions).

222. See *supra* Part II.A.

powerful as to crowd out opposing viewpoints and exert disproportionate influence over the debate. That danger, in my view, counsels against treating business corporations as legitimate political intermediaries between the people and the government.²²³ But as long as a diverse and dynamic range of civil society institutions can flourish, the factional differences among those institutions constitute a strength of civil society, not a danger.

Justice Stevens's anti-factionalism principle differs from his anti-coercion principle because, where private institutional coercion mirrors state coercion, private institutional factionalism deviates from and resists state power, and for that matter concentrated private power. Even as the anti-coercion principle prevents civil society institutions from replicating the socially harmful effects of state coercion, the anti-factionalism principle can coerce people away from their chosen associations and toward a stultifying nationalism. Thus, while discouraging coercion by civil society institutions enhances people's aggregate freedom from coercive authority, discouraging factionalism in civil society institutions makes people more vulnerable to coercive authority. That insight might lead some to accuse Justice Stevens of harboring a deeply rooted nationalism that compelled individual submission to coercive state authority. Such an accusation, however, fails to resonate beyond this Article's discussion of the Justice's Free Exercise Clause jurisprudence. Most individual rights claims in constitutional law simply challenge government actions, without the complicating presence of private institutional intermediaries. During his decades on the Court, Justice Stevens distinguished himself as a historically steadfast defender of personal freedoms against state power.²²⁴ When he did endorse government authority in rights cases, as in the other sorts of civil society cases this Article has discussed, he frequently saw the challenged government action as a lesser evil than either concentrated private power²²⁵ or judicial manipulation of constitutional doctrine.²²⁶ His moments of straightforward deference to government power over individuals in contentious rights cases were

223. See discussion *supra* notes 145–54 and accompanying text.

224. Justice Stevens's voluminous writings in free speech cases make up one formidable chapter of his credentials as a champion of individual rights. See generally Magarian, *supra* note 161 (analyzing Justice Stevens's free speech jurisprudence).

225. See, e.g., *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 930–31 (2010) (Stevens, J., dissenting) (arguing that a First Amendment bar against regulation of corporate money in political election campaigns undermines the openness and integrity of the political process).

226. See, e.g., *Bush v. Gore*, 531 U.S. 98, 123, 126–27 (2000) (Stevens, J., dissenting) (rejecting the Court's unprecedented application of the Equal Protection Clause to end state recounts in a presidential election).

few, far between, and *sui generis*.²²⁷ In contrast, his numerous dissents in favor of individual rights, often on the losing end of eight-to-one decisions, figure prominently in his legacy.²²⁸ The narrow failing of Justice Stevens's anti-factionalism principle consists in not recognizing where and how private institutional autonomy can advance individual rights.

Even if Justice Stevens's anti-factionalism principle made normative sense in the abstract, it would make a poor basis for summarily rejecting religious accommodations under the Free Exercise Clause. Whereas Justice Stevens's Establishment Clause opinions follow straightforwardly from his anti-coercion principle,²²⁹ issues of mandatory religious accommodations veer off at odd angles from his anti-factionalism principle. Two prevalent elements of mandatory accommodation doctrine pose especially acute difficulties for an anti-factionalism analysis.

First, minority religious belief systems stand to benefit disproportionately from a doctrine of mandatory religious accommodations. Minority religions have special value as elements of civil society, because they provide alternatives to dominant viewpoints. Minority religions also have special vulnerability to hostility or simple ignorance of political and social majorities. When Justice Stevens joined in the Court's evisceration of the mandatory accommodation doctrine in *Employment Division v. Smith*,²³⁰ I believe he took insufficient account of the differences between minority religions and larger, more broadly influential religious organizations, which have a greater capacity to exert the sort of disruptive factional influence that concerned him. A regime of mandatory accommodations can bring minority believers closer to equal footing with adherents of religions whose interests the political majority routinely facilitates. Such leveling of the field, which I have called egalitarian accommodation,²³¹ resonates

227. To take the most notorious example, Justice Stevens's dissents in the flag-burning cases did not underwrite justification of government censorship in any other area of his First Amendment jurisprudence. See *United States v. Eichman*, 496 U.S. 310, 319 (1990) (Stevens, J., dissenting); *Texas v. Johnson*, 491 U.S. 397, 436 (1989) (Stevens, J., dissenting).

228. For example, Justice Stevens's dissent in *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (maintaining that state bans on gay sex violated principles of substantive due process), provided the template for the historic decision almost two decades later that overruled *Bowers* and held state bans on gay sex unconstitutional, see *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003) (endorsing the analysis of Justice Stevens's *Bowers* dissent).

229. See discussion *supra* notes 204–13 and accompanying text.

230. 494 U.S. 872 (1990).

231. Magarian, *supra* note 217, at 1992–95 (positing the legal viability of egalitarian accommodations).

with interests that earned Justice Stevens's sympathy in other contexts. His free speech jurisprudence stands apart in its era for its powerful emphasis on inequalities in the distribution of excessive opportunities.²³² In some of the very lines of civil society cases that resonate thematically with his religion decisions, his protagonists—resisters against patronage arrangements,²³³ marginalized voters,²³⁴ victims of private discrimination²³⁵—pursued equal treatment and fought institutional coercion in ways that his own Free Exercise Clause jurisprudence would seem to disdain as undesirably factional. Indeed, most of the cases in which Justice Stevens favored religious claimants involved minority religions,²³⁶ just as he showed greater sympathy for minor political parties' constitutional autonomy claims than for the major parties' ostensibly parallel claims.²³⁷ Justice Stevens's anti-coercion principle manifests his strong awareness of the social inequities that imbalances of power can foster. His anti-factionalism analysis of free exercise accommodations, in contrast, reflects a failure to recognize how legal burdens on minority religious believers can embody just such an inequity.

Second, mandatory religious accommodation cases differ from the other sorts of civil society disputes I have examined in that most accommodation claims assert the interests of individuals rather than institutions.²³⁸ Individuals who seek accommodations typically identify with some organized religion, and religious organizations support their claims. But the claimants' desires for accommodation arise from their distinctive life situations, and they often seek accommodations that only their peculiar combinations of beliefs and circumstances render valuable. *Goldman v. Weinberger*, the case in which Justice Stevens argued that forcing the Air Force to let a Jewish doctor wear a yarmulke would exacerbate religious divisions and erode military discipline,²³⁹ provides an example. The claimant belonged to a religion whose ceremonial garb did not protrude or obtrude, and he worked for an especially restrictive employer. Few people could raise comparable

232. See discussion *supra* note 149.

233. See discussion *supra* notes 112–23 and accompanying text.

234. See discussion *supra* notes 124–33 and accompanying text.

235. See discussion *supra* notes 134–42 and accompanying text.

236. See discussion *supra* notes 67–75 and accompanying text.

237. See discussion *supra* notes 124–33 and accompanying text.

238. Important exceptions to this statement certainly exist. See, e.g., *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (rejecting, on federalism grounds, a statutory accommodation claim brought by a church under the federal Religious Freedom Restoration Act).

239. See *Goldman*, 475 U.S. 503, 512–13 (1986) (Stevens, J., concurring); discussion *supra* notes 9–14 and accompanying text.

claims. Allowance for such distinctive, low-cost religious exemptions, which I have called idiosyncratic accommodations,²⁴⁰ poses no serious danger of exacerbating factionalism. Individuals cannot easily constitute factions of one, and individuals whose legal interests arise from unusual convergences of circumstances do not generally advance the factional interests of their groups. Even if we extended Justice Stevens's concern about factionalism to block only those individual autonomy claims that might advance collective factional interests—such as mandatory accommodation claims that stood to benefit large groups of believers in kind—we would encroach excessively on individuals' interests, as distinct from institutional interests, in the freedom of association.²⁴¹

Justice Stevens's treatment of mandatory religious accommodation claims deserves criticism not, as the conventional critique asserts, because he singled religion out for special treatment, but because he failed to recognize how mandatory accommodation claims differ from other constitutional autonomy claims advanced by civil society institutions, including religious organizations. Some might cite this failure as a ground for reviving the charge that Justice Stevens harbored a bias against religion. Religious accommodation cases, they would argue, fit so uncomfortably within his broader analysis of civil society that his disfavor for accommodation claims must betray antipathy toward religious believers. But Justice Stevens's anti-factionalism analysis of mandatory religious accommodation, whatever its flaws, simply echoes his emphasis on anti-factionalism in other areas of his civil society jurisprudence, including Establishment Clause disputes.²⁴² Religion stands formally apart from other civil society institutions in constitutional law because the First Amendment states two distinct but related principles that push religion toward the foreground of constitutional concern while bifurcating the requisite legal analysis. This structural complexity gives the Free Exercise Clause affinities with the Establishment Clause on one side and with individual rights doctrines on the other. Justice Stevens appears to have viewed the Free Exercise Clause more as a matter of religion than as a matter of rights, a view that led him to develop his views on free exercise accommodation in the inhospitable habitat of his civil society

240. See Magarian, *supra* note 217, at 1995–97 (positing the legal viability of idiosyncratic accommodations).

241. Compare *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (holding that a political association had a First Amendment interest in protecting against a government demand for the identities of its members), with *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (holding that an individual member of the same association had a First Amendment interest in withholding from a government inquiry the fact of his membership).

242. See discussion *supra* notes 25–32 and accompanying text.

jurisprudence. Nothing about that cognitive process appears calculated, let alone sinister. Indeed, legal advocates for religion often conflate the two Religion Clauses when they argue that the Establishment Clause merely buttresses the Free Exercise Clause in protecting believers from government-imposed burdens.²⁴³ Like those advocates, Justice Stevens saw the two Religion Clauses as aspects of one problem, and like them, he accordingly got one side of the problem right and the other side wrong.

CONCLUSION

Anyone who cares about religion and constitutional law should reject the canard that Justice Stevens harbored a bias against religion or religious believers. Certainly he expressed little sympathy for religious claims and claimants in contentious constitutional disputes. But his opinions in those cases resonate with his opinions in a variety of parallel cases involving the major political parties, private membership associations, and business corporations asserted to perform social intermediary functions. In all of these settings, Justice Stevens expressed a consistent viewpoint: Concerns about coercion and factionalism should cause us to limit the autonomy that constitutional doctrine recognizes for powerful institutions of civil society. Commentators who question Justice Stevens's religion jurisprudence should confront those underlying concerns and assess both their general normative attractiveness and their particular salience for religion cases. Anti-coercion played a stronger role than anti-factionalism in the Justice's Establishment Clause opinions, and I think the viability of his concern about private coercion, in general and as to Establishment Clause disputes in particular, validate his Establishment Clause jurisprudence. In contrast, anti-factionalism primarily animated the Justice's opinions in contentious Free Exercise Clause cases, and I think the hazards of condemning factionalism, in general and as to free exercise accommodation claims in particular, undermines his Free Exercise Clause jurisprudence. Whatever the force of my normative conclusions, this Article's descriptive insights should inform future assessments of Justice Stevens's religion jurisprudence. We should approach his legacy as thoughtfully and responsibly as he approached his work.

243. See discussion *supra* note 35 and accompanying text.