# RIGHTS AND THE RELIGION CLAUSES

FRANK S. RAVITCH*

## ABSTRACT

*This Essay argues that a fundamental shift in the conceptualization of rights has taken place under the religion clauses as a result of the Supreme Court's move toward formal neutrality and tradition analysis. This shift has affected the perception of rights under both the Establishment Clause and the Free Exercise Clause. The result is that doctrines and principles that were once designed, at least in part, to navigate religious pluralism and protect religious minorities have given way to doctrines and principles that have the effect of favoring dominant religions and religious entities. The impact of this shift, which is rarely analyzed as a discreet concern, will have lasting consequences.*

## INTRODUCTION

The story of rights under the religion clauses of the First Amendment is dramatic, with unexpected—and often unexplained—plot twists. Courts in the first half of the twentieth century set the stage for this interpretive drama.[1] The judicial players



* Professor of Law, Michigan State University College of Law.

1. *See, e.g.*, Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (reinforcing separation between church and state as the test under the Establishment Clause and striking down Champaign, Illinois released-time program, which offered religion classes to students who chose to take them, while students who opted out of them were required to leave the classroom and go to another part of the school building); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (incorporating the Establishment Clause through the Fourteenth Amendment and declaring separation of church and state to be the general rule in Establishment Clause cases, while upholding a Ewing Township, New Jersey law subsidizing bus fares for parochial school students); Murdoch v. Pennsylvania, 319 U.S. 105 (1943) (upholding rights of Jehovah's Witnesses to proselytize and sell goods for religious purposes without being criminally liable for breach of the peace under state law; decision based heavily on the Free Speech Clause and the Free Exercise clause); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (requiring

appeared to be focused on the rights of religious minorities,[2] fears of religious divisiveness,[3] a somewhat artificial conception of individualism,[4] and, of course, a strong hint of pragmatism.[5] Originalism provided the legal justification for many of these early decisions,[6] but the decisions may have been justifiable on other grounds as well.[7] Unfortunately, the early players in this drama failed to foresee that by using a highly questionable notion of originalism to justify an otherwise plausible approach, they would set the stage for later players to use equally questionable history to undo the substantive protections the early players sought to create.[8]

Without openly changing many lines of doctrine, later courts have completely shifted the emphasis of the early decisions.[9] Through the use of formalism and traditionalism, the substantive focus has shifted and is now more protective of dominant religious groups (at least as a practical matter),[10] has little focus on religious divisiveness,[11] uses a

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exemption from flag salute requirement under school board resolution because of free speech and free exercise concerns); Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause and upholding the rights of Jehovah's Witnesses to proselytize door-to-door under the First Amendment more generally).

2. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403–04, 406, 409 (1963); Engel v. Vitale, 370 U.S. 421, 428–29 (1962); *McCollum*, 333 U.S. at 216–17 (Frankfurter, J., concurring); *Barnette*, 319 U.S. at 641.

3. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 622–23 (1971) (discussing religious divisiveness analysis under the Establishment Clause).

4. *See, e.g.*, FRANK S. RAVITCH, MASTERS OF ILLUSION: THE SUPREME COURT AND THE RELIGION CLAUSES 56, 68–69 (N.Y. Univ. Press 2007).

5. *Id.* at 84–86, 94–95.

6. *See generally Everson*, 330 U.S. 1 (focusing on the intent of the framers regarding separation of church and state in both the majority and concurring opinions); *Engel*, 370 U.S. 421 (arguing that the framers were aware of, and concerned about, government sponsored prayer based on earlier experience with the Book of Common Prayer and other practices in England).

7. RAVITCH, *supra* note 4, at 47–105.

8. *Id.* at 2–6.

9. *Compare* Lemon v. Kurtzman, 403 U.S. 602 (1971) (focusing seriously on divisiveness within entanglement analysis and also recognizing that in appropriate cases purpose and effects analysis can govern), *with* Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (ostensibly using the *Lemon* framework as modified in Agostini v. Felton, 521 U.S. 203 (1997), but excluding analysis on divisiveness and ultimately shifting focus solely toward issues of facial neutrality and private choice).

10. *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1662 (1989) ("[I]n giving the American civil religion content, the courts run the risk of favoring traditional and majority religions."); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 498–523 (2004) (asserting that *Zelman*'s formal neutrality approach has the practical effect of favoring dominant religious entities in a given geographic area).

11. *See Zelman*, 536 U.S. at 662 n.7; *Agostini*, 521 U.S. at 233–34 (rejecting the "divisiveness based" entanglement under the original *Lemon* framework).

somewhat artificial notion of communitarianism,[12] and has substituted its own brand of pragmatism.[13] Thus, a new troupe has come along and altered the backdrop for the story.

When it comes to the story of the Court, rights, and the religion clauses, it appears that "[a]ll the world's indeed a stage, [a]nd we are merely players, [p]erformers and portrayers, [e]ach another's audience outside the gilded cage."[14] Those inside the gilded cage, however, have profoundly changed the substance of the play without changing too many lines, and as a result, the notion of rights under the religion clauses has experienced a fundamental shift. If this were only a play, the gut-wrenching twists and turns would be entertaining and perhaps thought-provoking. Of course, it is not simply a play, and the rights of real people and the substantive content of major constitutional provisions are at stake and have been throughout the drama.

This Essay focuses on the shift over the last twenty-five years from religion clause doctrine heavily focused on religious divisiveness, and at least ostensibly, on the rights of those outside dominant religious traditions in the United States, to one focused on formalism and traditionalism that ends up inuring to the benefit of the religious "haves" in society and sometimes diminishes the rights of the religious "have nots." Part I will provide a brief overview of the doctrinal evolution under the religion clauses over the last sixty years and how this evolution has affected rights concepts under those clauses. Part II will explore the effect that the increased implementation of the formal-neutrality doctrine has had on conceptions of rights under the religion clauses. Part III will explore the effect of traditionalism on rights under the religion clauses. The Essay suggests that we have come full circle from the early cases that seemed concerned with concepts of religious divisiveness and the protection of religious minorities to a place where the religion clauses primarily work to the benefit of more dominant religious groups in our society, even though such results may be driven more by a misguided formalism than an intent to benefit any religious group or groups. The focus herein will be on the shifting conception of rights

12. *See generally* Van Orden v. Perry, 545 U.S. 677 (2005) (plurality opinion) (relying on common history, religious heritage, and legal heritage in Texas to uphold display of Ten Commandments monument on state capitol grounds).

13. RAVITCH, *supra* note 4.

14. RUSH, *Limelight*, *on* MOVING PICTURES (Island/Mercury Records 1981).

under the religion clauses between the early modern cases and the current jurisprudence.

## I. DOCTRINAL SHIFTS AND THE TRANSFORMATION OF RIGHTS

Reading the early Free Exercise Clause and Establishment Clause cases, one finds it hard to escape the notion that there was a deep concern, and sometimes significant debate, over the role of religious pluralism and religious diversity in society.[15] Putting aside for the moment the legal justifications for these decisions—most often originalism and neutrality[16]—one can see in the early school prayer cases,[17] the early funding cases,[18] and the early attempts to deal with religious expression under the Free Speech Clause, and to a lesser extent the Free Exercise Clause,[19] a pervasive focus on the rights of religious minorities and nonbelievers, as well as a focus on navigating religious pluralism in an increasingly regulatory state.[20] Given the apparent need to justify outcomes in these cases, such issues often played a back seat role to debates over the Framers' intent and neutrality under the religion clauses.[21] The concerns about navigating religious pluralism, however, seemed to affect various justices' notions of original intent and neutrality.[22]

I have written elsewhere about the significant problems with the use of original intent and the concept of neutrality by both the current and earlier courts.[23] Here, the focus will be on the conception of rights

15. *See supra* notes 3–5 and accompanying text.

16. *See supra* notes 6–7 and accompanying text.

17. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

18. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947); Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Lemon v. Kurtzman, 403 U.S. 602 (1971).

19. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

20. RAVITCH, *supra* note 4, at 13.

21. *Id.* at 2–36.

22. Anti-Catholicism also may have affected some justices' views of these issues. *See generally* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (Harvard Univ. Press 2004) (2002) (recounting the evolution of the early separatist movement and the activities of others such as the anti-Catholic nativists); Mitchell v. Helms, 530 U.S. 793, 828–29 (2000) (plurality opinion) (noting the abominable, but sadly effective, anti-Catholic influence on the opposition to funding sectarian schools from the late 1800's to more recent times). Clearly such a motivation is wholly inconsistent with concerns regarding religious pluralism and religious rights more generally. It does not render void, however, the rulings that promote rights for religious minorities because anti-Catholicism, where it occurred, represented a vitriolic and unjustifiable exception to this general concern in many of the earlier decisions.

23. RAVITCH, *supra* note 4, at 2–36.

embodied in religion clause jurisprudence. Concerns about rights are embodied not just in specific cases but in lines of cases and the principles used to support those decisions.

One of the first questions is whether it is appropriate to talk about rights in the Establishment Clause context. Some commentators argue that the Free Exercise Clause is an individual rights clause,[24] but the Establishment Clause is not because it was created as a mechanism to protect state establishments from federal interference,[25] or as a structural provision governing the relationship between religion and the federal government (and later, state governments).[26] These arguments are certainly plausible as a matter of original intent, but for present purposes, they are beside the point. Significantly, this Essay focuses on the shifting conception of rights within the religion clause jurisprudence, and many, if not most, of the cases involve either an individual assertion of rights or individuals or organizations bringing claims for a perceived violation of the rights of all citizens.[27] This Essay addresses the shift in focus on rights within the jurisprudence in this area, and for present purposes, we must take that jurisprudence on its face.

Cases involving religious expression under the Free Speech Clause, and to a lesser extent the Free Exercise Clause, reflect concerns about majoritarian dominance over the rights of religious outsiders. Most notable among these cases is the U.S. Supreme Court's decision in *West Virginia State Board of Education v.*

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24. Donald A. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part I, the Religious Liberty Guarantee*, 80 HARV. L. REV. 1381, 1389 (1967) (The tension between the two religion clauses "requires a value judgment as to which one is to become dominant when there is a conflict—the one premised on a vital civil right, or the one premised on an outmoded eighteenth century political theory").

25. *Id.*

26. Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 3–4 (1998).

27. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (involving a civil liberties group that brought suit claiming violation of the Establishment Clause based on courthouse displays of the Ten Commandments); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (involving families that brought suit to end several practices that allegedly violated the Establishment Clause; the ultimate issue to come before the Court concerned prayer at football games); Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990) (involving Native American church members who brought suit based on Free Exercise Clause after they were denied unemployment benefits because of their ritual use of peyote); Sherbert v. Verner, 374 U.S. 398 (1963) (involving a Seventh Day Adventist who brought suit under the Free Exercise Clause after being denied unemployment benefits because the plaintiff was a Saturday Sabbatarian and, thus, could not work on Saturdays).

*Barnette*.[28] In a famous passage from that opinion, Justice Jackson wrote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[29]

The ideals expressed in this passage from *Barnette* were reflected in numerous decisions under the Establishment and Free Exercise clauses from the 1940's to the early 1980s,[30] although there were certainly a few cases that might be considered significant exceptions to this general principle.[31] Thus, by reading the early school prayer decisions,[32] the early aid cases,[33] and several Free Exercise cases,[34] one can see the Court explicitly or implicitly grappling with the question of majoritarianism in a religiously diverse society within a system where government action is pervasive.[35] Separationism was the mechanism the Court used to navigate religious pluralism under the Establishment Clause, and accommodationism was the mechanism under the Free Exercise Clause.[36]

There were exceptions to this trend, to be sure—most notably the Sunday closing cases under the Free Exercise Clause and the Establishment Clause, and *Zorach v. Clauson*, which involved a released-time program in the New York City public schools.[37] But

28. 319 U.S. 624 (1943).

29. *Id.* at 638.

30. *See supra* notes 1–2 and accompanying text.

31. McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing law under the Establishment Clause); Braunfeld v. Brown, 366 U.S. 599 (1961) (upholding Sunday closing law under the Free Exercise Clause); Zorach v. Clauson, 343 U.S. 306 (1952) (upholding released-time program, despite seeming violation of the ruling in *Ill. ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) only four years earlier).

32. *See, e.g.*, Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

33. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1 (1947); *McCollum*, 333 U.S. 203; Lemon v. Kurtzman, 403 U.S. 602 (1971).

34. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

35. *See, e.g.*, *McCollum*, 333 U.S. at 216–17 (Frankfurter, J., concurring) (addressing questions of religious diversity and religious pluralism). *See also* RAVITCH, *supr*a note 4 (addressing questions of religious diversity and religious pluralism).

36. RAVITCH, *supra* note 4, at 72–105.

37. *See generally* Zorach v. Clauson, 343 U.S. 306 (1952).

*Zorach*, and particularly Justice Douglas's role in writing for the majority, may be explainable by the era in which it was decided, that is, at the height of McCartheyism.[38] The Sunday closing cases would seem to be inconsistent with the broad ideals of earlier cases such as *Barnette* and later cases granting exemptions to generally applicable laws under the Free Exercise Clause, such as *Sherbert v. Verner* and *Wisconsin v. Yoder*.[39] For example, *Braunfeld v. Brown*,[40] which dealt with Sunday closing laws under the Free Exercise Clause, was consistent with decisions in the latter half of the nineteenth century, which countenanced laws written with the intent to force religious minorities to accept the dominant values of society.[41]

Of course, this is not to say that these exceptions to the general rule were inherently right or wrong as interpretations of the religion clauses. Rather, they were glaring exceptions to the general focus on protecting religious outsiders from a government often controlled by more dominant religions and conceptions of religion. They represent reasoning that would later become more prevalent.[42]

The question of minority rights versus majority will, or rights, depending on how one views it, was out in the open in many of the early cases. The famous school prayer cases, *Engel v. Vitale*[43] and *School District of Abington Township v. Schempp*, provide great examples.[44] In those cases, the debate between the majority and concurring opinions and Justice Stewart's dissenting opinions is

38. *See* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 61 (1996) ("At least part of the explanation for this dramatic tilt toward separationism [after *Zorach*] lies, I think, in the relative demise of domestic anti-communism during the interval between *Zorach* and *Engel*."). *Cf.* Michael E. Smith, *The Special Place of Religion in the Constitution,* 1983 SUP. CT. REV. 83, 105 (1983) (asserting that Justice Douglas' opinion in *Zorach* "may have been an oddity, reflecting political ambition or some other personal impulse").

39. *See generally Sherbert*, 374 U.S. 398; *Yoder*, 406 U.S. 205; W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

40. 366 U.S. 599 (1961).

41. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). *See also* Keith E. Sealing, *Polygamists Out of the Closet: Statutory and State Constitutional Prohibitions Against Polygamy are Unconstitutional Under the Free Exercise Clause*, 17 GA. ST. U. L. REV. 691, 710–20 (2001) (noting anti-Mormon bias underlying cases like *Reynolds*); Elijah L. Milne, *Blaine Amendments and Polygamy Laws: The Constitutionality of Anti-Polygamy Laws Targeting Religion*, 28 W. NEW ENG. L. REV. 257 (2005) (examining anti-Mormon bias evident in cases like *Reynolds*).

42. Zelman v. Simmons-Harris, 536 U.S. 639 (2002); Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990).

43. Engel v. Vitale, 370 U.S. 421 (1962).

44. Sch. Dist. v. Schempp, 374 U.S. 203 (1963).

fascinating.[45] The majority and concurring opinions focused on the effect of school prayer on those who opposed it, while Justice Stewart focused on the free exercise concerns of the more dominant group who wanted it.[46] Yet, in *Braunfeld*, the Sunday closing case decided under the Free Exercise Clause, it was Justice Stewart who argued that to deny an exemption to Saturday Sabbatarians was to favor the dominant religious culture to the disadvantage of religious minorities.[47] Although the majority argued that upholding the Sunday closing law might have the effect of harming religious minorities, that was not its purpose.[48] These debates demonstrate the possibility that concerns over minority rights might come to the fore under one religion clause, but the rights of more dominant religions may hold sway under the other, and the possibility that some justices might view the concerns of religious minorities more strictly under one clause than the other.

Reading the cases from *Barnette* through the 1970s, one is struck both with the consistency of explicit or implicit rights concerns and the tendency toward what was often a reasonable pragmatic resolution of these concerns (excluding the Sunday closing cases) justified by questionable historical or neutrality based arguments.[49] This disjunction between some of the major concerns the Court addressed through the doctrine of separationism in the Establishment Clause context and accommodationism in the Free Exercise Clause context, and the justification for those doctrines, has led to a great deal of criticism.[50] More importantly, it has allowed a fundamental shift in the consideration of rights under the religion clauses. After all, if earlier Courts openly relied primarily on history and neutrality to justify separationism, what was to keep a later Court from disputing that history and altering the concept of neutrality to promote a very

45. *Compare Engel*, 370 U.S. at 421–36, *and id.* at 437–34 (Douglas, J., concurring), *and Schempp*, 374 U.S. 203–30 (1963), *and id.* at 230–304 (Brennan, J., concurring), *and id.* at 305–08 (Goldberg, J., concurring), *with Engel*, 370 U.S. at 444–50 (Stewart, J., dissenting), *and Schempp*, 374 U.S. at 308–20 (Stewart, J., dissenting).

46. *Compare Engel*, 370 U.S. at 421–36, *and id.* at 437–44 (Douglas, J., concurring), *and Schempp*, 374 U.S. at 203–30 (1963), *and id.* at 230–304 (Brennan, J., concurring), *and id.* at 305–08 (Goldberg, J., concurring), *with Engel*, 370 U.S. at 444–50 (Stewart, J., dissenting), *and Schempp,* 374 U.S. at 308–20 (Stewart, J., dissenting).

47. Braunfeld v. Brown, 366 U.S. 599, 616 (1961) (Stewart, J., dissenting).

48. *Id.* at 603–07.

49. RAVITCH, *supra* note 4, at 2–6, 13–21, 84–86, 101–03, 165–66.

50. *Id.* at 2–12, 72–105.

different concept of religious rights and religious freedom?[51] Enter the Rehnquist Court.[52]

## II. FORMAL NEUTRALITY

The shift towards formal neutrality under the religion clauses did not occur all at once. The seeds that sprouted into the current dominant role of formal neutrality in the aid context were planted in a few decisions in the 1980s. These decisions were viewed by many at the time (and today) as inconsistent with earlier precedent.[53] The area where formal neutrality, aided by free speech doctrine, has most consistently taken hold since the 1980s is the question of equal access to government facilities by religious groups on the same terms as other private entities.[54] Before long, similar analysis was applied to exemptions to generally applicable laws under the Free Exercise Clause,[55] and in the context of government aid to private individuals, where a wide range of secular and religious entities were available for which the aid could be used.[56] Moreover, girded by free speech analysis, formal neutrality was applied to private religious speech on government property.[57] Still, in the area of school prayer and other religious content in the public schools, formal neutrality has not taken hold.[58] Additionally, formal neutrality has not dominated analysis of government displays of religious symbols,[59] although a focus on the "traditions" of the nation has become more dominant in such cases, as examined below in Part III.

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51. *Id.* at 2–6, 13–36.

52. Of course, the later portion of the Burger era also reflected this shift, although not to the same degree and across the wide array of issues later seen during the Rehnquist Court.

53. *See generally* Bowen v. Kendrick, 487 U.S. 589 (1988); Mueller v. Allen, 463 U.S. 388 (1983).

54. Examples of equal access cases involving public or limited public forums on government property include *Good News Club v. Milford Cent.* Sch., 533 U.S. 98 (2001), *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981).

55. Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872 (1990).

56. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993); Witters v. Wash. Dept. of Services for Blind, 474 U.S. 481 (1986).

57. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995).

58. *See, e.g.*, Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Lee v. Weisman, 505 U.S. 577 (1992).

59. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844 (2005) (holding that the county's religious purpose behind displaying a series of Ten Commandment exhibits violated the Establishment Clause); Van Orden v. Perry, 545 U.S. 677 (2005) (plurality opinion) (relying on "tradition" approach to uphold Ten Commandments monument on the state capitol grounds); *id.* at 698–705 (Breyer, J., concurring) (relying, in part, on the same).

For those who are not familiar with the concept of "formal neutrality," it generally refers to a formalistic analysis of government action *vis-a-vis* religion, which tends to stress the facial neutrality of government actions, even where the real world effects of those actions overwhelmingly benefit or harm religious interests.[60] Thus, in the government aid context, formal neutrality focuses on the facial neutrality of an aid program and the existence of private choice (which is itself determined in a formalistic way).[61] In the Free Exercise Clause exemption context, the focus is on laws of "general applicability" regardless of the impact that those laws have on religious practices.[62] This is aided by a strict dichotomy between religious belief, which is absolutely privileged, and religious practice, which is subject to generally applicable laws.[63]

The impact that formal neutrality has had on the rights calculus under the religion clauses, especially in the free exercise and funding areas, has been significant. When combined with the use of the traditionalism approach, formal neutrality has ushered in an era, in which the earlier concern about religious outgroups has been turned on its head. At least as a de facto matter, the doctrine greatly favors those from dominant and socially recognized religious traditions (or potentially nonreligious traditions).[64] The religious "haves," who are generally considered in the creation of relevant legislation and who are demographically better situated to take advantage of the newly opened funding forums, are in a much better position than the religious "have nots," who, as Justice Scalia has recognized, are left to the whims of the legislative process.[65] For example, compare Justice Jackson's passage from *West Virginia State Board of Education v. Barnette* explaining that the Bill of Rights' purpose was to "withdraw certain subjects from the vicissitudes of political controversy"[66] to the following quotation from Justice Scalia, writing for the majority in *Employment Division v. Smith*,[67] a case involving exemptions to "generally applicable" laws under the Free Exercise Clause:[68]

60. *See* Ravitch, *supra* note 10, at 498–523.
61. Zelman v. Simmons-Harris, 536 U.S. 639, 652 (2002).
62. Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 890 (1990).
63. *Id.* at 876–80.
64. *See* Ravitch, *supra* note 10.
65. *See infra* notes 67, 68, 69 and accompanying text.
66. 319 U.S. 624, 638 (1943).
67. *Employment Div. v. Smith*, 494 U.S. 872.
68. *Id.*

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.[69]

The doctrine of formal neutrality all but erases any focus on the effects of government action.[70] Of course, if one is concerned about protecting the rights of religious individuals and groups in a pluralistic society, including religious minorities and nonbelievers, as the earlier decisions seemed to be, it is natural to balance interests and focus on the effects of government action.[71] The mechanism of facial neutrality and "private choice" in the funding context,[72] and the mechanism of the "general applicability" of laws and the belief–practice dichotomy in the free exercise context[73] work to promote a contextual formalism that can overwhelm any check on even the most serious skewing of aid and rights toward dominant religious entities and beliefs.[74] Of course, in the context of exemptions to generally applicable laws under the Free Exercise Clause, a number of cases after *Sherbert* and *Yoder*, but before the open use of formal neutrality as the main doctrinal approach, limited the effect of the balancing approach set

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69. *Id.* at 890.

70. Zelman v. Simmons-Harris, 536 U.S. 639, 698–707 (2002) (Souter, J., dissenting); *see* Ravitch, *supra* note 10, at 513–23.

71. Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, the Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 267 (2003) ("Under the Establishment Clause, religious minorities would welcome a stronger focus on the effects of governmental actions, whether under the guise of a reinvigorated *Lemon* effects prong or under some other appellation.").

72. *Zelman*, 536 U.S. at 652.

73. *Employment Div. v. Smith*, 494 U.S. at 895–96. The term "belief–practice dichotomy" as used in this Essay refers to the distinction drawn by courts between religious beliefs, which are privileged, and religious practices which are subject to generally applicable laws regardless of the impact those laws have on the practice. *Id.* at 876–80. Numerous legal and theology scholars have pointed out the problems with using this artificial distinction in determining free exercise rights. *See, e.g.*, STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE 248, 49 (1997) (arguing this dichotomy reflects a Protestant bias); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1114–15 (1990) ("The conclusion that the clause protects conduct as well as speech or belief would seem to follow from its very words: 'exercise' means conduct. The point . . . is important because the Supreme Court originally held the opposite."). The reality is that for many practice-oriented religions the line between belief and practice is an artificial, unrealistic, or nonexistent one. NAOMI W. COHEN, JEWS IN CHRISTIAN AMERICA: THE PURSUIT OF RELIGIOUS EQUALITY 94–99 (1992).

74. RAVITCH, *supra* note 4, at 13–36.

forth in *Sherbert*.[75] While the *Sherbert–Yoder* approach to free-exercise exemptions may have never lived up to its potential for protecting religious freedom, especially for those whose religious practices are outside dominant religious perceptions, the potential for such protection remained in the test. The Court's current formal-neutrality approach, however, removes even the potential for robust free exercise rights.

Under the Establishment Clause, the move away from a focus on the effects of state action means that only the most obvious religiously motivated behavior can be checked in contexts where formal neutrality has been applied. Even then, some current justices would eschew reliance on the motivation of government actors as well.[76] With the departure of Justice O'Connor from the Court, it is possible that formal neutrality, and/or traditionalism, may come to dominate even cases where the government seems to be clearly endorsing or supporting religion. In the Free Exercise Clause context, the use of formal neutrality has basically entrenched in doctrine the Court's failure to address the questionable presumptions about religion that underlie the belief–practice dichotomy—assumptions that suggest a questionable distinction between religious belief and religious practice.[77] By their very nature, formalistic tests do not

75. In the post-*Yoder* federal context, the reality was that the Court continually narrowed the range of cases where exemptions could be mandated. *See, e.g.*, Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) (denying request to protect sacred Native-American ritual sites from a government project); O'Lone v. Estate of Shabazz, 482 U.S. 342, 350–53 (1987) (declaring that a Muslim prisoner can be prevented from attending religious services at prison when on work detail outside prison, even if prisoner has no choice but to be on work detail); Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (deeming acceptable the requirement that Orthodox Jewish military psychologist be required to remove a yarmulke in indoor military settings despite serious religious objections); Bowen v. Roy, 476 U.S. 693, 712 (1986) (denying Native Americans' request that their daughter not have a social security number, despite serious religious concerns); United States v. Lee, 455 U.S. 252, 261 (1982) (requiring Amish employer to pay social security tax despite religious objection).

76. *See, e.g.*, McCreary County v. ACLU of Ky., 545 U.S. 844, 902–03 (2005), (Scalia, J., dissenting) ("I have urged that *Lemon*'s purpose prong be abandoned, because . . . even an *exclusive* purpose to foster or assist religious practice is not necessarily invalidating. But today's extension makes things even worse. By shifting the focus of *Lemon*'s purpose prong from the search for a genuine, secular motivation to the hunt for a predominantly religious purpose, the Court converts what has in the past been a fairly limited inquiry into a rigorous review of the full record. Those responsible for the adoption of the Religion Clauses would surely regard it as a bitter irony that the religious values they designed those Clauses to *protect* have now become so distasteful to this Court that if they constitute anything more than a subordinate motive for government action they will invalidate it.").

77. *See Smith*, 494 U.S. at 876–80 (delineating between privileged religious beliefs and religious practices which are governed by "valid and neutral law[s] of general applicability").

respond well to shifting contexts,[78] and in a nation with thousands of religious traditions and a massive regulatory state, context controls everything.[79]

So, what specific effects has the shift toward formal neutrality had on rights and rights discourse under the religion clauses? First, it is now clear that no matter how overwhelming the benefits to religious entities, even to specific religious entities, so long as there is private choice and facial neutrality, such benefits are acceptable even if used to proselytize.[80] Moreover, when addressing private choice, the existence of actual choice—at least within the private entities available—is essentially irrelevant.[81] It may soon be the case that the rights of the religious providers to access a funding forum outweigh the impact such "choices" may have on religious outsiders.[82]

Second, in the equal-access context, it is already clear that the rights of religious groups, including groups representing dominant religious traditions, outweigh the rights of those who are concerned about proselytizing on government property.[83] In the latter context, there is serious analysis of the existence of a public forum and serious concern about discrimination against religious individuals and entities only where religious groups are excluded.[84] Inherent in the equal access cases is a balancing between the rights of people of less dominant faiths or no faith at all and those of the faith seeking access to the forum. The recognition of the rights of the latter group does not affect the rights of the former in the same way that formal neutrality does in the aid and free exercise contexts.[85] Of course, even in the

78. RAVITCH, *supra* note 4, at 13–36.

79. *Id.* at 20, 51, 157.

80. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002).

81. *See* Ravitch, *supra* note 10, at 513–23.

82. *See, e.g.*, Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 152 (2003); Sarah Waszmer, Note, *Taking it out of Neutral: The Application of* Locke*'s Substantial Interest Test to the School Voucher Debate*, 62 WASH. & LEE L. REV. 1271, 1281–82 (2005); Ian Bartrum, Note, *Paradise Lost: Good News, Charitable Choice, and the State of Religious Freedom*, 27 VT. L. REV. 177, 215 (2002).

83. *Compare* Good News Club v. Milford Cent. Sch., 533 U.S. 98, 106–08 (holding that a public school violated a Christian club's free speech rights by preventing it from using school space for an after hours meeting), *with id.* at 130–34 (Stevens, J., dissenting), *and id.* at 134–45 (Souter, J., dissenting).

84. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395–97 (1993) (declaring unconstitutional a public school district's refusal to allow film series screening, because the sole reason for the denial was the religious content of the programming); Widmar v. Vincent, 454 U.S. 263, 277 (1981) (averring that by denying religious groups access to facilities, a state university fundamentally violated the Constitution).

85. Ravitch, *supra* note 10, at 526–31.

equal-access context, the mechanism of formal neutrality may be ill-equipped to deal with those situations where dominant religious entities are favored or endorsed in the public forum.[86]

Finally, in the free-exercise context, exemptions to generally applicable laws are not mandated even when accommodation would be simple and state action affects fundamental religious practices.[87] The interests of religious individuals whose faith includes religious practices are legally subservient to the broader society's interest in the general applicability of laws.[88] Any redress instead must come from the political process.[89]

None of this is to say that the results in any of these cases are inherently right or wrong, or that the use of formal neutrality in the equal access context, where free speech concerns are inextricably connected to religion clause issues, is inappropriate.[90] Rather, the question here is how the focus on formal neutrality reconceptualizes rights under the religion clauses. When used along with the traditionalism approach discussed below in Part III, formal neutrality often subordinates the rights of religious minorities and nonbelievers to those of dominant religions under the religion clauses.[91] This is the exact opposite of the rights concepts used by earlier courts.

Compare, for example, the analyses in *State of Illinois ex rel. McCollum v. Board of Education*[92] and *Lemon v. Kurtzman*,[93] with that of *Zelman v. Simmons-Harris*.[94] In *McCollum*, a case involving a released-time program in Champaign, Illinois,[95] Justice Frankfurter, concurring on behalf of himself and Justices Jackson, Rutledge, and Burton, summed up the concerns of most of the decisions between 1940 and the late 1970s:

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86. *See Good News Club*, 533 U.S. at 130–34 (Stevens, J., dissenting); *id.* at 134–45 (Souter, J., dissenting).

87. David E. Steinberg, *Rejecting the Case Against the Free Exercise Exemption: A Critical Assessment*, 75 B.U. L. REV. 241, 309–10 (1995).

88. *See* Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 879 (1990) (proclaiming constitutional a law that negatively impacts a religious practice but is applied neutrally).

89. *Id.* at 890.

90. RAVITCH, *supra* note 4, at 190 (suggesting that the equal access cases were correctly decided primarily because of free speech concerns and concerns about placing religion at a disadvantage in social discourse).

91. *Id.* at 13–36, 75–76; Feldman, *supra* note 71, at 273.

92. 333 U.S. 203, 212 (1948).

93. 403 U.S. 602, 622–23 (1971).

94. 536 U.S. 639, 662–63 (2002).

95. *McCollum*, 333 U.S. at 222–31 (Frankfurter, J., concurring).

> The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom . . . . Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.
>
> . . . . [T]he growth of the secular school encountered the resistance of feeling strongly engaged against it. But the inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups. And such sects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.[96]

Similarly, in *Lemon*, a case involving government aid to religious schools,[97] Justice Burger, writing for the majority, addressed divisiveness and religious conflict in the context of entanglement and in a manner that seemed to focus heavily on the real effects of government aid where "relatively few" sects benefit:

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.
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> . . . . [I]n Walz we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.[98]

Separationism was the mechanism used to address these concerns about religious pluralism and divisiveness in the early decisions, but as Noah Feldman has recognized, the decisions were a product of their

96. *Id.* at 216–17.
97. *Lemon*, 403 U.S. at 606–11.
98. *Id.* at 622–23 (internal citation omitted).

times and an increasing focus on equality concerns.[99] I assert that these concerns about religious pluralism, the rights of religious individuals and groups, and religious divisiveness in the political process were the underlying force behind the Court's approach until the latter part of the 1980s. Moreover, a balancing approach had emerged, which focused on the real world implications of government activity. This approach enabled the Court to address the highly contextual dynamics raised by such concerns. Even without separationism, the Court would have found a way to address these concerns, but separationism and the illusion of historical certainty provided the Court with a ready mechanism to protect these interests.[100]

Despite the seemingly obvious focus on divisiveness in earlier decisions, the Rehnquist Court later excluded focus on religious divisiveness from analysis in aid cases.[101] Compare the previous two quotations and that of Justice Jackson above with the following excerpt from Justice Rehnquist's majority opinion in *Zelman v. Simmons-Harris*, commonly referred to as the "school voucher" case:

> The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller*, "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."[102]

Regarding divisiveness Justice Rehnquist, responding to Justice Breyer's dissenting opinion, wrote:

> Justice Breyer would raise the invisible specters of "divisiveness" and "religious strife" to find the program unconstitutional. It is unclear exactly what sort of principle Justice Breyer has in mind, considering that the program has ignited no "divisiveness" or "strife" other than this litigation. Nor is it clear where Justice

99. *See generally* NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT (Farrar, Straus and Giroux 2005); Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002).

100. RAVITCH, *supra* note 4, at 2–6, 72–86.

101. Zelman v. Simmons-Harris, 536 U.S. 639, 662 n.7 (2002); Agostini v. Felton, 521 U.S. 203, 233–34 (1997).

102. *Zelman*, 536 U.S. at 658.

> Breyer would locate this presumed authority to deprive Cleveland residents of a program that they have chosen but that we subjectively find "divisive." We quite rightly have rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs . . . .[103]

What is amazing about this analysis, in light of the concerns of earlier courts, is that the voucher program in *Zelman* resulted in 96.6 percent of voucher students attending religious private schools representing only one or two sects, and that the voucher amounts were likely to continue to exclude private secular schools and other religious schools.[104] Moreover, virtually all secular choices were public under the Court's analysis and, thus, the result seems to suggest that the Court will consider public options as choices even where virtually all funding goes to private entities, or even where all funding going to private entities goes to one sect within a community.[105] Whether this is good or bad analysis under the Establishment Clause, it certainly is not neutral,[106] nor does it address the pluralism concerns of earlier courts in any serious way.[107] The one saving grace of Rehnquist's analysis is that it considers the plight of some religious families who were frequently excluded from the calculus under earlier decisions.[108] However, the focus on formalism and ultimately the political process does not suggest that such consideration motivates the formal-neutrality approach. To the extent it does, it would now seem that such individuals and families—who were often artificially excluded under the old approach—may be the beneficiaries of significant government largesse to the exclusion of religious minorities and nonbelievers who might utilize the private options to better their temporal lives, but only at the risk of their eternal futures.[109]

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103. *Id.* at 662 n.7.
104. *Id.* at 698–707 (Souter, J., dissenting).
105. *See* Ravitch, *supra* note 10, at 518–19.
106. *Id.* at 513–23.
107. *See supra* notes 28–36, 89–100 and accompanying text.
108. RAVITCH, *supra* note 4, at 72–73. *Cf.* Thomas C. Berg, *Slouching Towards Secularism: A Comment on* Kiryas Joel School District v. Grumet, 44 EMORY L.J. 433, 442 (1995) ("[M]aintaining church/state separation or religious liberty requires treating religion quite differently from other activities, a result inconsistent with equal treatment . . . . [S]eparationist efforts to shelter [government] from religious influence . . . are bound to push religion into a smaller and smaller corner of public life, violating both religious liberty and the equal status of religion with other ideas.").
109. RAVITCH, *supra* note 4, at 13–36, 72–73.

All of this demonstrates a fundamental change within the broader shift toward an equality focus that has occurred over the last hundred years or so.[110] That shift is from a focus on individual and group rights based on the real effect of government action to a focus on a formalistic approach that takes little account of the real world impact of government programs and activities, even where they significantly favor one or two sects in a given community.[111] In the end, the formal-neutrality approach leaves such concerns to the political process, the very process earlier courts were concerned might cause divisiveness and promote the will of dominant religions over less politically powerful religions.[112]

## III. TRADITION[113]

The "tradition" argument has been used along with, and sometimes instead of, neutrality arguments.[114] Yet the tradition approach is problematic for a number of reasons, the most fundamental of which will be discussed here. The approach uses selected excerpts from historical patterns, and frequently gets even those wrong. For example, when the Court used the "traditions" approach to uphold a nativity scene displayed in a park by the city of Pawtucket, Rhode Island, it relied in part on the religious heritage and traditions of our nation.[115] Yet there is no long-standing history of displaying nativity scenes on public property, even as part of larger Christmas displays. In fact, given the anti-Catholicism that was rampant throughout most of our "historical traditions," one would hardly expect to find such a practice.[116] Anti-Catholicism, anti-Mormonism, and anti-Semitism were longstanding "traditions" in our nation,[117] and most broad-based government recognition of religion

110. *See generally* FELDMAN, *supra* note 99 (discussing the broader shift from a focus on liberty of conscience to equality concerns); Feldman, *supra* note 99 (stating that the main aim of current Establishment Clause jurisprudence is to ensure equal protection for religious minorities).

111. *See* Ravitch, *supra* note 60, at 513–23.

112. *See supra* Parts I and II.

113. Parts of this section have been adapted from RAVITCH, *supra* note 4, at 75–76.

114. *See* Van Orden v. Perry, 545 U.S. 677, 683 (allowing the display of monument inscribed with the Ten Commandments in part due to the strong religious traditions of the United States); *id.* at 698 (Breyer, J., concurring in the judgment).

115. Lynch v. Donnelly, 465 U.S. 668, 676 (1984).

116. HAMBURGER, *supra* note 22, at 201–19 (addressing the role of anti-Catholicism in separationist history).

117. *See generally id.* (providing a history of anti-Catholicism in the United States); HAROLD E. QUINLEY & CHARLES Y. GLOCK, ANTI-SEMITISM IN AMERICA (The Free Press

would have hardly included these groups—at least not in a positive way—yet the Court certainly does not give these traditions weight. One would hardly expect the Court to allow a small Protestant-dominated town to include a display demeaning the "Bishop of Rome" as part of its celebration of a religious holiday on the ground that it is part of our nation's longstanding tradition of anti-Catholicism.

The point is that handpicking historical traditions to support an argument suffers a flaw that even hard-originalism does not. Under originalism, there is no reason to presume those traditions are binding as society changes, although perhaps they may be one relevant factor to consider ("hard-originalism" presumes the intent of the Framers should be binding). Moreover, many unsavory traditions could be or have been used by the Court in similar ways, such as the tradition of segregation,[118] harsh corporal punishment in the schools,[119] and gender inequality.[120] These traditions are products of their time and place and have changed over time.[121] The Court uses the religious traditions argument based on statements of various political figures throughout United States history, but ignores the many contrary statements made by historical figures and the historical and sociological data that suggest these statements either had a different cultural meaning at different times or were not in synch with the every day activities of most citizens.[122] Therefore one finds a dual problem of misinterpreting

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1979) (discussing anti-Semitism); Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 LOY. U. CHI. L.J. 121, 121 (2001) (discussing "societal attitudes toward Roman Catholicism"); Michael N. Dobkowski, *American Anti-Semitism: A Reinterpretation*, 29 AM. Q. 166 (1977) (discussing anti-Semitism); Milne, *supra* note 41, at 263–71 (discussing early anti-Mormon sentiment and the legislative attacks on Mormon polygamy); Sealing, *supra* note 41, at 710–20 (emphasizing the anti-Mormon nature of nineteenth century polygamy cases).

118. *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (declaring constitutional a state regulation mandating the racial segregation of railway cars).

119. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 659–65 (1977) (upholding corporal punishment in public schools in part because of its long tradition).

120. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) ("[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

121. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76 (1971) (invalidating legislation which gave "a mandatory preference to members of either sex over members of the other"); Brown v. Bd. of Educ., 347 U.S. 483, 495–96 (1954) (prohibiting racial segregation in public schools).

122. *See* Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 796 (2005) ("The framers used terms and phrases familiar to the late eighteenth century, and frequently employed rhetoric that was intentionally vague or duplicitious [sic] . . . . Therefore, the precise meanings of recorded statements may be ambiguous at best."); Steven K. Green, *Of Misnomers and Misinformation*, FED. LAW. Sept.,

traditions and selectively applying them outside their cultural and historical context.

Moreover, the overarching question is whether such traditions are even a valid basis for interpretation.[123] I have elsewhere questioned the use of hard-originalism in the religion clause context given the conflicting historical accounts, but although sometimes used in tandem with originalism, tradition arguments may be even more problematic to legitimate because they lack the originalist self justification that the intent of the framers should be binding.[124] To say, as the tradition approach does, that the practices and/or intent of society should be binding simply begs the question: Which society, current, past, or some combination of both, is the appropriate indicator.[125] Moreover, traditionalism presumes that a clear meaning can be gleaned from past traditions that may have had very different meanings and may have served different functions in their time.[126]

Even if one were to focus on the broad religious heritage of the nation rather than the specific tradition in question[127]—an odd approach given that some specific traditions, such as displaying nativity scenes, may conflict with broad aspects of the allegedly

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1999, at 38, 38 ("The originalist approach elevates the significance of isolated statements—usually taken out of context and laden with 18th century terminology and biases—over the more general themes and aspirations of the period and subsequent developments in understandings and attitudes toward constitutional rights."). *See generally* Derek H. Davis & Matthew McMearty, *America's "Forsaken Roots": The Use and Abuse of Founders' Quotations*, 47 J. CHURCH & ST. 449 (2005) (correcting certain misinterpretations concerning the founders' religious views).

123. *See* JOHN H. ELY, DEMOCRACY AND DISTRUST 60–63 (Harvard University Press 1980) (noting that the "moral climate" of an age is difficult to ascertain and is so often invoked as to be rendered meaningless). *See generally* Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U. MIAMI L. REV. 101 (2002) (arguing that fundamental rights should not be determined by analyzing whether traditionally that right has been protected).

124. RAVITCH, *supra* note 4, at 2–6, 75–76.

125. Timothy L. Hall, *Sacred Solemnity: Civic Prayer, Civil Communion, and the Establishment Clause*, 79 IOWA L. REV. 35, 50–51 (1993) ("The relative youth of these major symbols of American civil religion suggests that the Court cannot simply nod its head to the tradition of civic religiosity and expect that what is old and familiar will practice quiet and sedentary ways. Civil religion continues to experience the same regular revivals as traditional religion. Revival calls upon the faithful to demonstrate that a present faith is not simply the token of a religious past, but a life-changing reality of today."); Michele Hyndman, *Tradition Is Not Law: Advocating a Single Determinative Test for Establishment Clause Cases*, 31 T. MARSHALL L. REV. 101, 123 (2005) ("The tradition argument is unworkable because it does not define what constitutes a tradition. It relies on the subjectivity of judges, and it does not account for changes in society.").

126. RAVITCH, *supra* note 4, at 75–76.

127. Hall, *supra* note 125.

unified national religious heritage[128]—one would have to somehow demonstrate just what this unified national religious tradition is. In other words, even at the broadest levels, gleaning a national religious tradition divorced from the often unsavory customs to which these broader traditions were often connected seems a self-defeating task.[129] Moreover, even if one were to miraculously divine a coherent set of religious traditions from our national history, such traditions would have had different meaning when embedded in their eras[130] and may have little connection to today's society. Ironically, the simple act of applying such supposedly unified traditions to today's society may undermine the very reasons such traditions were prevalent earlier.[131]

Of course, when the question of rights is raised, the tradition approach would seem to have a ready answer: the dominant views of religion in society win unless the dominant perspective has traditionally chosen not to favor itself. This is, of course, a fundamental shift from the concerns of earlier Courts,[132] and, in fact, embraces the position of the few justices who dissented from this earlier line of reasoning.[133] The tradition approach shifts the focus away from religious divisiveness, the earlier Courts' notion of religious pluralism, and relies on a sense of religious community and tradition that does not resonate with those excluded from such community and tradition.[134] When combined with formal neutrality, the tradition approach completes a fundamental shift under the religion clauses from a focus on effects, diversity, divisiveness, and individual rights, to one that favors the demographically dominant, minimizes the real effects of government action, and creates a unitary religious heritage that never existed.

## CONCLUSION

Over the last sixty years, we have witnessed the birth of a religion clause doctrine that was heavily influenced by concerns over religious pluralism, divisiveness, and the role of religious minorities and

128. RAVITCH, *supra* note 4, at 75–76.
129. *Id*. *See supra* notes 125–126 and accompanying text.
130. *See supra* notes 125–126 and accompanying text.
131. *See supra* note 125.
132. *See supra* notes 8–13 and Part I.
133. Engel v. Vitale, 370 U.S. 421, 444–45 (1962) (Stewart, J., dissenting); Sch. Dist. v. Schempp, 374 U.S. 203, 308 (Stewart, J., dissenting); Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 238–39 (1948) (Reed, J., dissenting).
134. *See supra* notes 125–126 and accompanying text; RAVITCH, *supra* note 4, at 75–76.

nonbelievers in our society. We have also witnessed the virtual death of that doctrine at the hands of formal neutrality and traditionalism. This shift in the conceptualization of rights under the religion clauses has led from a doctrine concerned about religious outgroups and nonbelievers to one where such concerns are, at best, an afterthought. Some areas, such as public school prayer, curricular decisions, and religious symbolism, still seem to focus on the rights of religious minorities and nonbelievers. But even in these areas, changes on the Court and a renewed focus on traditionalism may come to dominate. The irony is that, by relying on the dual illusions of historical truth and neutrality, the earlier Courts set the stage for later courts to undo substantive protections by simply challenging or altering the historical or neutrality-based analysis. By failing to rely directly on the rights principles with which it seemed concerned, the earlier Court set the stage for the destruction of those rights through the use of a very different conception of history and neutrality—a conception that is even more questionable than the earlier one, but which now dominates jurisprudence under the religion clauses.