

# Preface

Law and religion scholarship relating to the First Amendment is broad and diverse. There are many wonderful and brilliant people engaged in this field, and as one might expect given the broad array of issues and concerns that arise under the religion clauses, there is a great deal of disagreement over any number of issues. It is remarkable, however, that so many divergent theorists and judges agree on one major premise. That premise is that religion clause jurisprudence is in a state of disarray and has been for some time. Most attribute this state of affairs to courts basing decisions on the wrong principles, using the wrong—or too many—legal tests, or favoring one side or the other in the debate.

My reason for writing this book is that I believe much of this disarray is a function of the interpretive presumptions and methodologies used by the courts in religion clause cases. Particularly, I will argue that both hard originalism and neutrality are illusory in the religion clause context, the first because it cannot live up to its promise for either side in the debate and the second because it is simply impossible in the religion clause context. Yet these two principles have been used in almost every Supreme Court decision addressing religion clause questions. This book is an attempt to look underneath these devices to find the other bases that may be driving the Court and commentators. Some of these bases such as liberty, equality, separation, and accommodation are openly discussed by courts and commentators, while others lie underneath the surface. Yet even the surface principles are generally justified based on the illusion of neutrality or arguments for determinate original intent.

My hope is to engage in a descriptive analysis of the various principles of religion clause interpretation and determine which ones are merely illusion and which ones actually add something of substance to the debate. The principles that add something will function as modes of religion clause interpretation that ebb and flow based on context. My assertion is simple: the use of various narrow principles that ebb and flow based on context will lead to more consistency and more interpretive transparency than reliance on broad but illusory principles. I realize that some may

question this assertion and my belief that the descriptive is more important than the normative in framing religion clause jurisprudence, but I do not see how any normative framework can be expected to accomplish the goals of its advocates without a better descriptive understanding of the interpretive process. After discussing this process throughout the bulk of the book, I will propose a normative framework for religion clause cases, but I hope that readers will take the descriptive seriously regardless of whether they agree with my normative approach.

The illusion of objectivity has cast its power over religion clause cases and has led to a tortured jurisprudence. Supreme Court justices have often been the masters of this illusion. By exposing the illusion, we can hopefully foster a better jurisprudence and allow all sides in the debate to partake more of substance than shadow.

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“A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause,” 38 *Georgia Law Review* 489 (2004).

“The Supreme Court’s Rhetorical Hostility: What Is “Hostile” to Religion Under the Establishment Clause?” 2004 *Brigham Young University Law Review* 1031 (2004) (symposium).

“Religious Objects as Legal Subjects,” 40 *Wake Forest Law Review* 1011 (2005).

“Some Thoughts on Religion, Abstinence Only, and Sex Education in the Public Schools,” 26 *Children’s Legal Rights Journal* 48 (2006) (symposium).