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The Supreme Court's Rhetorical Hostility: What Is "Hostile" to Religion Under the Establishment Clause?

*Frank S. Ravitch**

I. INTRODUCTION

The use of the term "hostile" to describe the treatment of a person, idea, or entity generally implies that there is some negative intent or feeling involved—that is, that the treatment is actually *hostile*. Yet when the United States Supreme Court has used that term in connection with government entities' treatment of religion, the Court has failed to adequately explain what it means by "hostility."¹ Recent decisions indicate the Court has presumed that the failure of government entities to follow the dictates of formal neutrality is sometimes hostile to religion,² although the Court has

* Associate Professor of Law, Michigan State University College of Law. This Article is based, in part, on a presentation given as part of the Association of American Law Schools Section on Law and Religion panel at the Association's annual meeting that took place in Atlanta, Georgia, in January 2004. I am grateful for the comments and questions raised by my fellow panelists Tom Berg, Fred Gedicks, Steve Gey, and Brett Scharffs, and for those raised by members of the audience. Special thanks also go to Brett Scharffs for arranging and chairing the panel.

1. *See, e.g.*, *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion) (suggesting that the dissent "seemingly . . . reserve[s] special hostility for those who take their religion seriously"—apparently because the dissent did not apply formal neutrality—but without explaining further why this is hostility); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (explaining that the viewpoint discrimination under the facts of the case "would risk fostering a pervasive bias or hostility to religion," without explaining how viewpoint discrimination based on an erroneous interpretation of the Establishment Clause, but not on antagonism toward religion, would risk fostering hostility as opposed to bias against religion); *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9 (1989) (noting that "government may not be overtly hostile to religion," without explaining what would constitute such hostility).

2. *Mitchell*, 530 U.S. at 827–28 (plurality opinion); *Rosenberger*, 515 U.S. at 845–46; *cf.* *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion) ("[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."). *But see* *Locke v. Davey*, 124 S. Ct. 1307, 1313–14 (2004) (holding that it is not hostile to religion to deny funding for training as a minister under a generally applicable funding program).

never seriously attempted to justify this characterization. The Supreme Court's use of the term in the Establishment Clause context thus appears to be only rhetorical. If the Court uses a powerful term such as "hostility," however, it should do so only when actual hostility is involved.

The Court's rhetorical use of hostility is consistent with its recent tendency toward formalism in religion clause analysis.³ The problem is that the trend has led to a doctrine that is based on unstated principles. Yet the Court attempts to substantiate this doctrine with different concepts, such as "neutrality" and "hostility," which are mostly rhetorical. In several important contexts, the Court has begun to use bright-line tests that seem to depart from earlier precedent but derive significant support from concepts and terminology that the Court never adequately justifies or explains.⁴

In cases such as *Mitchell v. Helms*,⁵ the Court uses the term "hostility" without ever defining it or connecting it to hostile motives. It seems the Court applies the label of "hostility" to justify a result, but because the Court applies it to situations that may have little to do with "hostility" as commonly understood, the Court's rhetoric may turn into a blunt instrument to cast even mildly separationist doctrine and policies as hostile—and thus violative of the Court's new formal neutrality principle. This has an Alice-in-Wonderland-like impact, as Justices use the term "hostility" in situations where there is no hostility, and then, based on that term, find that the government action is not neutral, when the Court's

3. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a voucher program in which more than ninety-six percent of tuition vouchers went to religious schools, where the bulk of the seats were available to voucher students, because the program was facially neutral and allowed parents to "choose" where to send their children); *Mitchell*, 530 U.S. at 793 (plurality opinion) (holding that facial neutrality is the primary test for judging the constitutionality of a government program through which equipment was lent to schools, including religious schools); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (holding that exemptions to laws of "general applicability" are not mandated by the Free Exercise Clause). *But see* *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (applying the less formalistic endorsement, coercion, and *Lemon* tests to hold prayer at public high school football games unconstitutional).

4. See, e.g., Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 490–513 (2004) (criticizing the Court's shift to a formalistic neutrality approach in Establishment Clause cases and asserting that the Court utterly fails to explain how its approach is *neutral* or how neutrality can exist in religion clause disputes).

5. 530 U.S. 793 (2000).

neutrality concept has little to do with neutrality, if neutrality is even possible in this context.⁶ Interestingly, the Court's use of hostility in its most recent funding decision, *Locke v. Davey*,⁷ suggests a limit to this trend, but the Court's brief discussion of hostility in that case seems to conflict with the use of the same concept in other cases.

Significantly, this Article is not an entry in the long-standing debate over whether separationism and/or secularism are biased against religion.⁸ While I disagree with those in the debate who automatically equate bias or bad effects with hostility toward religion, this article is not an attempt to either defend or refute the role of separationist principles in the Establishment Clause context. It does, however, suggest that those who equate separationism with bias against religion should stick with the concept of bias (whatever its merits across issues) and use the concept of hostility only when there is evidence of actual hostility as discussed below. Part II of this Article will provide background on the Court's use of the concept of hostility and some of the concerns raised by the Court's approach. Part III will analyze the Court's use of hostility under the Establishment Clause and suggest that the Court has moved toward equating separationist motives with hostility. While this connection may be accurate in some limited contexts, the Court has not seriously attempted to explain it. Part IV will assert that hostility toward religion is a real concern that needs to be addressed but that the lack of formal neutrality is not adequate proof of this hostility.

6. I have argued that it is not. *See generally* Ravitch, *supra* note 4.

7. 124 S. Ct. 1307 (2004). *Locke* will be discussed in greater detail in the next section of this Article. *See infra* pp. 1036–38.

8. I would suggest that in some contexts they are. For a discussion of this debate, see, for example, PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002) (discussing the history of separation and suggesting that separationism has historically been connected to hostility toward religion); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (Univ. N.C. Press, rev. ed. 1994) (discussing the history of separation and its role in protecting religion and religious freedom); Douglas Laycock, *The Many Meanings of Separation*, 70 U. CHI. L. REV. 1667 (2003) (reviewing Hamburger's book and suggesting that Hamburger oversimplifies the justifications for separation); *see also*, Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 B.C. L. REV. 1111, 1117–25 (2002) (addressing the relationship between neutrality and separation and further addressing various views of separation).

II. BACKGROUND

In recent years the Court has used the concept of hostility toward religion primarily in cases involving equal access,⁹ but the concept is also finding its way into the government aid context.¹⁰ In both these realms, the Court (or a plurality of Justices) has in essence said that failure to treat religious entities and individuals like all other entities and individuals is hostile toward religion. Thus, the Court seems poised to treat hostility and lack of formal neutrality¹¹ as two sides of the same coin.

I have argued elsewhere that the current Court's notion of formal neutrality is an empty concept because neutrality does not and cannot exist, at least not in the Establishment Clause context.¹² In contrast, hostility toward religion can exist, and thus, it is a different kind of concept than neutrality: whereas neutrality makes an untenable universal claim,¹³ hostility does not. Of course, the fact

9. *See, e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 845–46 (1995) (ruling that a university cannot deny funding to a religious student newspaper if it allows other non-school-sponsored student groups and publications access to such funding); *Bd. of Educ. of Westside Cmty. Schs. v. Mergens ex rel. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion) (upholding the Equal Access Act, which requires that public secondary schools give religious, political, and other groups access to meet at school facilities if other non-curriculum-related student groups are given access).

10. *See, e.g.*, *Mitchell*, 530 U.S. at 827–28 (suggesting that the exclusion of religious schools from a government program that provided loaned equipment to qualifying schools is hostile to religion).

11. Formal neutrality requires that there be facial neutrality of government action—the government cannot intentionally favor or discriminate against religion or a specific religion. In the context of government aid—financial or otherwise—there must also be private choice, which requires that the aid flows literally or figuratively through the hands of private individuals before reaching a religious institution or organization. *See Zelman v. Simmons-Harris*, 536 U.S. 639, 649–53 (2002).

12. Ravitch, *supra* note 4, at 498–513; *see also* STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 96 (1995) [hereinafter SMITH, *FOREORDAINED FAILURE*] (“The foregoing discussion suggests that the quest for neutrality, despite its understandable appeal and the tenacity with which it has been pursued, is an attempt to grasp at an illusion.”); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 316 (1987) (“[O]ur attempts to say what neutrality means turn out to be indeterminate and deeply ambiguous.”).

13. Ravitch, *supra* note 4, at 498–513 (suggesting that the concept of neutrality makes an inherent universal claim); *cf.* SMITH, *FOREORDAINED FAILURE*, *supra* note 12, at 97 (“The impossibility of a truly ‘neutral’ theory of religious freedom is analogous to the impossibility, recognized by modern philosophers, of finding some outside Archimedean point . . . from which to look down on and describe reality.”).

that hostility can exist does not mean that the Court's use of the concept is accurate—this Article argues that it is not. Inaccuracy in the use of the term “hostility” was less problematic in earlier decisions in which the Court did not connect the term to formal neutrality, although a strong argument can be made that earlier Courts did not take hostility toward religion as seriously as they took religious favoritism.¹⁴ Still, the Court has long held that “hostility” toward religion is prohibited by the First Amendment.¹⁵ Yet the Court has done a poor job of defining “hostility” and the current Court's choice of definition has little to do with real hostility.¹⁶ Since “hostility” has generally served as a tangential rhetorical justification for decisions, this concern has been little explored.

This is not simply a debate over semantics because terms such as “hostility” and “neutrality” represent concepts (however poorly defined) that the Court uses to justify its decisions. If the Court's “hostility” is not *hostile* and its “neutrality” is not *neutral*, the Court's approach must rest on some other footing. By failing to define and explain that footing, the Court forces those who question its approach to spar with shadows.

The oft-cited argument that the Court has simply chosen a baseline for neutrality does not solve the problem because there is no neutral place from which to create that baseline.¹⁷ Thus, even though hostility toward religion can be real, the Court's evolving concept of hostility is problematic because the Court's apparent baseline for hostility is the lack of neutrality, which itself has no adequate

14. This has been reflected in a great deal of scholarship that has suggested that liberalism (or secularism) is *hostile* to religion when it attempts to keep public discourse and public life primarily secular. See, e.g., Edward McGlynn Gaffney, Jr., *Hostility to Religion, American Style*, 42 DEPAUL L. REV. 263, 268–70, 298, 300–03 (1992); Frederick Mark Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671, 671–74, 678–86, 693–96 (1992). I agree with these authors that a pervasive favoring of secular principles in all public contexts can be biased against (some would say for) religion, but while such bias may be unconstitutional in some circumstances, it is not generally based on hostility. See *infra* Parts III–IV.

15. See, e.g., *Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) (“We agree of course that the State may not establish a ‘religion of secularism’ in the sense of affirmatively opposing or showing hostility to religion . . .”).

16. Of course, the same could be said of the Court's earlier definitions, but it is the potency of the concept when combined with formal neutrality that makes the current Court's experimentation with the concept troubling. See *infra* notes 18–42 and accompanying text.

17. Ravitch, *supra* note 4, at 493–94; see also Steven D. Smith, *The Restoration of Tolerance*, 78 CAL. L. REV. 305, 319–24 (1990) (critiquing the argument that neutrality requires a baseline and rejecting neutrality as an empty ideal).

baseline. Using a concept that itself has no adequate baseline as a baseline for hostility simply removes the problem by one degree; it does not solve it.

Recent cases supply examples of the Court's subtle but forceful use of the concept of hostility in the Establishment Clause context. The Court's use of the concept seems to be evolving (or devolving) over time. In *Mitchell v. Helms*,¹⁸ a case involving a government program that lent educational equipment to public and private schools, including religious schools, a plurality of the Court held:

The pervasively sectarian recipient has not received any special favor, and it is most bizarre that the Court would, as the dissent seemingly does, reserve special hostility for those who take their religion seriously, who think that their religion should affect the whole of their lives, or who make the mistake of being effective in transmitting their views to children.¹⁹

The plurality simply assumed that the position of the respondents and the dissenting Justices in *Mitchell* reserved "special hostility for those who take their religion seriously," without identifying any actual government hostility to religion.²⁰ There are, of course, many possible reasons for the position taken by the respondents and the dissenting Justices short of hostility. It is one thing to challenge a doctrine—based on that doctrine's history—that was born of actual hostility toward a religion,²¹ but quite another to assert that those who adhere to a doctrine do so out of "special hostility" when that doctrine has evolved over the years to serve other purposes.

More recently, in *Locke v. Davey*,²² the Court suggested that not every government decision to deny funding based on the religious interests of funding recipients is hostile to religion. In *Locke*, the Court held that the State of Washington could deny funding under a

18. 530 U.S. 793 (2000).

19. *Id.* at 827–28 (plurality opinion). The plurality later noted the abominable, but sadly effective, anti-Catholic influence on the opposition to funding sectarian schools from the late eighteenth hundreds to more recent times—a true example of hostility toward religion (or a specific religion). *Id.* at 828–29 (plurality opinion). For further discussion of this animus, see *infra* notes 61–71 and accompanying text.

20. *Id.* at 827–28 (plurality opinion).

21. For an interesting, but highly critical, discussion of the history and evolution of separationist doctrine, see HAMBURGER, *supra* note 8.

22. 124 S. Ct. 1307 (2004).

facially neutral scholarship program to a student who planned to use that funding for ministerial training.²³ The state denied the funding because to provide it would have violated the state constitution's equivalent of the Establishment Clause, a clause that is broader than its federal counterpart.²⁴ The state did allow students under the program to use the scholarships at any accredited college or university, including religious institutions.²⁵ Thus, the state only precluded funding for training in devotional theology. Joshua Davey asserted that the denial of funding violated his rights under the Free Exercise Clause. The Court noted the tension between the two religion clauses in such cases but held both that there is some "play in the joints" between the two clauses and that a state decision not to fund training for the clergy fell within this play.²⁶ The holding was limited to training in devotional theology and thus did not address the broader question of whether a state could deny funding to religious institutions generally under a facially neutral funding program.

Interestingly, the *Locke* Court used the term "hostility" several times in the opinion.²⁷ For example, the Court noted: "That a State would deal differently with religious education for the ministry than with education for other callings is . . . not evidence of hostility toward religion."²⁸ The Court also noted that the fact that the state allowed the scholarships to be used at religious institutions, so long as the student is not training for the clergy, supports the argument that the denial of the scholarship in Davey's case was not evidence of hostility.²⁹ It is important to note that the *Locke* Court seemed to

23. *Id.* at 1309.

24. *Id.* at 1312.

25. *Id.* at 1310.

26. *Id.* at 1311–12, 1315.

27. *Id.* at 1313–14.

28. *Id.* at 1313.

29. *Id.* at 1314–15. It is interesting that Justice Scalia's dissenting opinion in *Locke*, which Justice Thomas joins, accuses the state of discriminating against religion, *id.* at 1319–20 (Scalia, J., dissenting), but does not use the term "hostility" in a context relevant to this Article. Justice Scalia does use the term in an unrelated context. *See id.* at 1316 (Scalia, J., dissenting) ("One can concede the Framers' hostility to funding the clergy specifically . . ."). Justice Scalia is clear that such discrimination need not be the product of animus in order to be problematic. *Id.* at 1318–20 (Scalia, J., dissenting). This might simply be a result of the parameters of the *Locke* case itself, or it could reflect an intentional decision to use more precise concepts in addressing the disadvantaging of religion or religious perspectives. This Article suggests, *infra* Parts III–IV, that focusing on discrimination rather than hostility would be a

connect hostility with animus, as this article suggests is appropriate,³⁰ although the Court was not clear about this. Yet it is hard to gel the Court's approach to the concept of hostility in *Locke* with its use of that concept in cases like *Mitchell*, *Rosenberger*, and *Mergens*, none of which involved proof of animus toward religion.³¹ If *Locke* signals a move toward defining "hostility" in some concrete way that has something to do with actual hostility, this would be a welcomed development. This is unlikely, however, given the limited context and holding in *Locke* and the Court's general failure to define the concept in other recent cases.

In *Good News Club v. Milford Central School*³² and *Rosenberger v. Rector and Visitors of the University of Virginia*,³³ the Court held that the refusal to allow religious organizations to use public-school property for meetings and the denial of funding for a religious student publication, respectively, were viewpoint discrimination. Neither of these cases is exceptional in the free-speech context as there is ample support for the notion that the exclusion of religious entities from a public or limited public forum is content and/or viewpoint discrimination,³⁴ although both cases applied that concept to situations not addressed in prior opinions.³⁵

positive step because it is possible to engage in disparate treatment based on establishment or other concerns without being hostile toward religion. Yet both Justices Scalia and Thomas were members of the *Mitchell* plurality and have used the ill-defined concept of hostility elsewhere, so it is unlikely that Justice Scalia's dissenting opinion in *Locke* signals an intent to abandon the hostility concept in other contexts.

30. See *infra* Part IV.

31. See *supra* notes 18–20 and accompanying text; *infra* notes 33–42 and accompanying text.

32. 533 U.S. 98 (2001) (ruling that a Christian group focused on children in an elementary school must be given access to a school building for meetings if other non-curriculum-related student groups are given access).

33. 515 U.S. 819 (1995) (holding that a university cannot deny funding to a religious student newspaper if it allows other non-school-sponsored student groups and publications access to such funding).

34. See, e.g., *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that the exclusion of a church from using school facilities at night to show a film was unconstitutional); *Widmar v. Vincent*, 454 U.S. 263 (1981) (ruling that a religious student group is entitled to use university facilities that are open to other student groups).

35. *Good News Club*, 533 U.S. at 106–07 (applying a free-speech argument developed in the secondary and postsecondary education context to prohibit the exclusion of an elementary-school religious club from a common school building that included the elementary school); *Rosenberger*, 515 U.S. at 829–30 (applying the public-forum argument developed in the government property context to a government funding program that provided funding for student publications).

Interestingly, in both cases the government entities asserted that they were motivated by Establishment Clause (or related state law) concerns; the Court, however, treated their actions as hostile to religion.³⁶ In each case the Court cited *Board of Education of Westside Community Schools v. Mergens* ex rel. *Mergens*,³⁷ in which the plurality held, “if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion.”³⁸ The *Mergens* plurality, quoting Justice Brennan’s concurring opinion in *McDaniel v. Paty*,³⁹ further defined what it meant by “hostility”:

The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.⁴⁰

The *Mergens* plurality seems to have assumed that the exclusion of a religious student club would constitute such a government-imposed disability and, at least implicitly, that such would be the intent. Yet, there are many possible reasons for such treatment that have nothing to do with hostility toward religion.⁴¹

It is important to note that the Court has not used the concept of hostility in all of its recent Establishment Clause decisions. The decisions in which it has used that concept, however, suggest that it is poised to use its rhetorical hostility in tandem with the doctrine of

36. *Good News Club*, 533 U.S. at 106–07; *Rosenberger*, 515 U.S. at 829–30.

37. 496 U.S. 226 (1990).

38. *Id.* at 248 (plurality opinion).

39. 435 U.S. 618 (1978).

40. *Mergens*, 496 U.S. at 248 (plurality opinion) (internal quotation marks omitted) (quoting *McDaniel*, 435 U.S. at 641 (Brennan, J., concurring in the judgment)).

41. I would add that even though excluding the group may not have been *hostile*, it could, and should, be found unconstitutional regardless of the Equal Access Act. The reason for this lies in the Free Speech Clause, however. If government creates a public or limited public forum and denies access to religious groups while allowing other groups to meet, government places religion at an unfair disadvantage in the marketplace of ideas. *See generally*, *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that a school district could not make its building available to groups discussing family issues from a variety of perspectives and deny access only to those wishing to discuss such issues from a religious perspective). As I have argued elsewhere, however, there are important reasons for limiting this analysis to the Equal Access context. Ravitch, *supra* note 4, at 524, 526–28, 530–31, 570–71.

formal neutrality that it has developed in recent decisions;⁴² thus, the concept may come to occupy an important place in the Court's Establishment Clause jurisprudence.

III. THE SUPREME COURT'S EVOLVING DEFINITION OF HOSTILITY

In the recent cases where the Court has referred to "hostility," the Court may be suggesting that the effect of separationist policy is hostile to religion—that is, separationist policy has a disparate impact that negatively affects religion or a specific religion. While this is perhaps accurate, it is ironic, since the Court refused to consider the impact of the programs in question when defining "neutrality" in cases where policies had a positive impact on religion.⁴³ Is it possible that the Court will not consider the impact of government actions when those actions give religion, especially more dominant religions, a substantial benefit⁴⁴ and yet will consider the impact when the government attempts to prevent such disparate negative results?⁴⁵

Still another possibility is that the Court has equated disparate treatment with hostility.⁴⁶ This too is problematic because government entities engaged in disparate treatment, and parties who advocate for such treatment in Establishment Clause cases, may be motivated by many concerns that do not involve hostility toward

42. Compare the Court's analysis of effects in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), with the plurality's use of hostility in *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion). *But see* *Locke v. Davey*, 124 S. Ct. 1307, 1313–14 (2004) (holding the denial of state funding to a student pursuing a devotional-theology degree constitutional, even under a formally neutral program, but limiting the holding to training in devotional theology).

43. *See e.g.*, *Zelman*, 536 U.S. 639; *see id.* at 687–88, 695–708 (Souter, J., dissenting) (suggesting that the Court glossed over the impact of the voucher program, which could not have been upheld if the Court had seriously looked at its effects); *see also* Ravitch, *supra* note 4, at 513–16, 520–23 (suggesting that the *Zelman* Court has taken any serious analysis of the effects of government programs out of the "effects test").

44. *See* Ravitch, *supra* note 4, at 513–23 (suggesting that the impact of the program upheld in *Zelman* was to provide a substantial benefit to religion, especially to larger sects with established religious schools or the means of, and interest in, establishing such schools).

45. Implicit in the Court's holding in *Zelman* is the possibility that the neutrality principle will be violated if religious organizations or individuals are denied access to open government funding programs, even if the reason for the denial is a concern that religious entities will receive a disproportionate benefit if such access is granted. *But see Locke*, 124 S. Ct. 1307 (holding that a state has the ability to deny access to funding for training as a minister under an otherwise available government scholarship program).

46. This is apparently what a plurality of the court did in *Mitchell*, 530 U.S. at 827–28 (2000) (plurality opinion).

religion.⁴⁷ In fact, in some cases they may be motivated by a belief that such treatment protects religion or that it recognizes religion's special place in our constitutional system.⁴⁸ Whether such assertions are accurate or not, they do not evince hostility toward religion.⁴⁹ Given that earlier Courts recognized valid reasons for treating religion differently, even "less favorably" in some contexts, the current Court's evolving notion of hostility may be quite different from that of earlier Courts.

If the Court's implication of hostility relates only to the negative effects of the government action in aid and equal-access cases, rather than actual hostility on the part of government actors, the Court has created an interesting Establishment Clause doctrine indeed. The Court will overlook massive disparate favoritism of dominant religions (especially in the aid context),⁵⁰ yet easily overturn government action that has the effect of disfavoring religion.⁵¹ If, on the other hand, the Court is relying on the idea that government entities are singling out religion for unfavorable treatment, then it needs to explain why that treatment is problematic in light of the Court's earlier decisions that relied on separationist principles. Ironically, the Court uses the concepts of neutrality and hostility to

47. The biggest concerns may be: (1) fidelity to constitutional values, which until recently had a more separationist bent, *see* *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 102–05 (2001); *id.* at 131–34 (Stevens, J., dissenting) (noting that when a school district denied access to a religious club due to concerns that the club would engage in religious instruction and proselytization, the district's motivation seemed to be compliance with state law and Establishment Clause concerns); and (2) an intent to protect religion from the "impurity" of government, a concern that some have traced to Roger Williams, *see* LEVY, *supra* note 8, at 183–85.

48. *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947) (holding that religious liberty can best be achieved by "a government . . . stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group"); *see also* *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948) (holding the same); LEVY, *supra* note 8, at 183–85 (noting the same).

49. *See infra* notes 76–80 and accompanying text.

50. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a city voucher program that ultimately sent millions of dollars in tuition to local religious schools—94.6% of voucher students attended religious schools—and such schools were primarily of only one or two denominations).

51. *See* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995). *But see* *Locke v. Davey*, 124 S. Ct. 1307 (2004) (suggesting that an exception to this approach exists when a state denies funding for training as a minister, but not clarifying whether the exception goes beyond such limited circumstances).

avoid doing so. The separationist approach, as used in some contexts, *might* be wrong, but it is not inherently *hostile*.

The Rehnquist Court is certainly not the first to use the concept of hostility to describe the exclusion of religious entities from broad programs, but it is the first to place such immense faith in the concept of formal neutrality. It is the combination of the Court's use of formal neutrality and the potential expansion of the Court's use of hostility to undermine separation-driven arguments without directly confronting them that makes the Rehnquist Court's recent use of hostility troubling. It is not that modern separationist arguments or motivations are inherently correct, but rather that calling them hostile to religion, and dismissing them as a result, demonstrates a complete lack of legal or intellectual rigor and tells us nothing about the merits of those arguments. The Court's use of the term in *Locke* may be a step in the right direction because the Court appears to equate hostility with animus, but as was already explained, *Locke* is unclear about this and may be quite limited because of the facts involved.⁵²

So what does the Court's evolving use of the concept of hostility tell us about the meaning of that term in the Establishment Clause context? First, it seems that hostile motives are certainly not a requirement for a finding that something is hostile toward religion. Second, much of what earlier Courts said about the Establishment Clause and its meaning—i.e., favoring a separationist approach⁵³—now apparently falls under the rubric of hostility toward religion.⁵⁴ Some scholars have long equated strong separationism with hostility,⁵⁵ and the current Court apparently agrees. Yet, did those

52. See *supra* notes 22–31 and accompanying text.

53. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (developing a test for Establishment Clause cases based heavily on separationist principles); *McCullum*, 333 U.S. at 211 (using Thomas Jefferson's metaphor of "a wall of separation between church and state" to interpret the Establishment Clause); *Everson*, 330 U.S. at 16.

54. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 827–28 (2000) (plurality opinion) (holding that treating religion differently in the context of government aid programs manifests hostility toward religion); *Rosenberger*, 515 U.S. at 829 (denying government funds to a student newspaper under a generally open funding program because the paper's proselytizing message is viewpoint discrimination, and Establishment Clause concerns are not adequate to justify such viewpoint discrimination).

55. See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 124–25 (1992); see also Gedicks, *supra* note 14, at 671, 674, 693–94

who opposed the aid in *Mitchell*, or the officials at the University of Virginia in *Rosenberger*, act out of hostility toward religion, out of respect for the First Amendment, out of concern for some entirely different reason, or out of concern for some combination of these reasons? If the argument is simply that a facial distinction between religious and other entities is inherently hostile toward religion, using the term “hostility” seems to add little more than a rhetorical justification.

IV. ACTUAL HOSTILITY AND THE ESTABLISHMENT CLAUSE

The Court’s failure to adequately define its notion of hostility does not mean that hostility toward religion does not exist. The question is how “hostility” should be defined under the Establishment Clause. Should purpose, effect, or both, be relevant to this question? The answer matters because the Court has been relatively consistent in holding that government cannot discourage religion without violating the Establishment Clause (although it has been quite lax in defining what would discourage religion).⁵⁶ Scholars have also argued that discouragement of religion, not just encouragement, can violate the Establishment Clause.⁵⁷ Of course, the question remains as to what constitutes hostility, what constitutes discouragement, and whether the two are the same thing. This section asserts that hostility is a form of discouragement, but that discouragement is a broader concept.

I am generally suspicious of placing a great deal of weight in a dictionary when defining terms that have important legal meaning, but the power and impact of the term “hostility” when used to describe government action *vis-à-vis* religion suggests that the

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56. For a good example of an older case suggesting this, see *Zorach v. Clauson*, 343 U.S. 306 (1952). For a good example of a newer case suggesting the same, see *Mitchell*, 530 U.S. at 793 (plurality opinion).

57. See, e.g., Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1001–02 (1990) (“[T]he religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . But I must elaborate on what I mean by minimizing encouragement and discouragement. I mean that religion is to be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible.” (footnote omitted)); Ravitch, *supra* note 4, at 544–49 (arguing that religion should neither be facilitated nor discouraged by government).

commonly understood meaning of that term—essentially hostile intent or general antagonism—is the best starting place for a workable definition under the Establishment Clause. When the Court uses the term “hostility” to justify its reasoning, people may draw on the commonly understood meaning of that term absent an alternative definition, which, as noted above, the Court has not provided.⁵⁸ The Oxford Desk Dictionary defines “hostility” as (1) “being hostile; enmity” and as (2) “acts of warfare.”⁵⁹ It defines “hostile” as (1) “of an enemy” and as (2) “unfriendly; opposed.”⁶⁰ Obviously, “hostility” suggests hostile intent or, at the very least, an antagonistic state of mind. This definition is consistent with the general use and understanding of the term in society at large.

Therefore, when the Court uses the term “hostility” to describe government action toward religion or a religious entity (or to describe the position of the dissenting Justices), the implication is that there is some hostile intent on the part of government or other actors. As noted above, such intent may be entirely absent in the contexts where the Court uses the term “hostility,” unless one is willing to treat an intent to uphold perceived constitutional duties as hostile toward religion⁶¹ or claim that disparate treatment not motivated by hostile intent is hostile toward religion.⁶²

To be considered “hostile toward religion,” a party’s actions should involve some actual hostile intent or attitude toward religion *qua* religion or toward a specific religious entity. There are some obvious examples of this in recent Court decisions. For example, the actions of the city of Hialeah in *Church of the Lukumi Babalu Aye v. City of Hialeah* (a Free Exercise Clause case)⁶³ are an excellent example of actual hostility toward religion. The city set up a system of ordinances that were designed to affect only Santerian animal sacrifice.⁶⁴ The city’s actions were taken against a backdrop of professed enmity by some city residents, and even some city officials,

58. *See supra* notes 1, 3–6 and accompanying cases.

59. THE OXFORD DESK DICTIONARY, AMERICAN EDITION 271 (Laurence Urdang ed. 1995).

60. *Id.*

61. *See supra* notes 18–21 and accompanying text.

62. This is apparently what the Court has been doing. *See supra* notes 18–21, 32–41 and accompanying text.

63. 508 U.S. 520 (1993).

64. *Id.* at 524–28.

toward the Santeria faith and its practice of animal sacrifice.⁶⁵ The ordinances were found to violate the Free Exercise Clause because they demonstrated discrimination against a particular religion,⁶⁶ but they might have also violated the Establishment Clause because the city seemingly engaged in hostile action designed to discourage religion (in this case a particular religion).⁶⁷

The plurality opinion in *Mitchell v. Helms* provides another example of actual hostility toward religion when it discussed the anti-Catholic animus connected to the movement for Blaine amendments—state constitutional provisions modeled after a failed amendment to the U.S. Constitution that would have banned funding to religious schools.⁶⁸ There is little doubt that the movement behind these amendments, and at least some of the motivation behind early separationism, was highly influenced by anti-Catholic and, to a lesser extent, anti-ecclesiastical sentiment.⁶⁹ At that time, the so-called Blaine amendments were motivated, at least in part, by hostility toward religion, and they were certainly designed to discourage the growth of the Catholic-school movement,⁷⁰ which itself evolved in part as a response to the Protestant domination of the common schools and ultimately the early public schools.⁷¹

Yet today there are other principles that may support the substance of the so-called Blaine amendments and separationism more generally.⁷² The motivations of state officials who currently support such “no aid” amendments, and of parties who sue to

65. *Id.*

66. *Id. passim.*

67. See *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (“[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.”).

68. 530 U.S. 793, 828–29 (2000) (plurality opinion); see also HAMBURGER, *supra* note 8, at 321–28, 335–42 (explaining that both before and after Senator Blaine’s failed attempt to amend the U.S. Constitution to prohibit any government funding of religious schools, there was a strong movement, heavily influenced by anti-Catholic animus, that agreed with Senator Blaine’s proposal).

69. See generally HAMBURGER, *supra* note 21 (recounting the evolution of the early separationist movement and the activities of groups such as the anti-Catholic nativists).

70. See *supra* note 19 and accompanying text.

71. See LLOYD P. JORGENSEN, *THE STATE AND THE NON-PUBLIC SCHOOL 1825–1925*, at 83–85 (1987); FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS 5* (1999).

72. This can be seen in any number of articles defending the value of separationism. See, e.g., Green, *supra* note 8.

prevent government funding of religious entities, may have nothing to do with enmity or hostility toward religion generally or a specific religion.⁷³ The Court's rationale in *Locke v. Davey* supports this. While the Court held that the state constitutional provision in question was not a Blaine amendment,⁷⁴ the Court acknowledged that the state's denial of funding for ministerial training was not hostile toward religion.⁷⁵ Given the definition of "hostility" above, however, it is hard to understand why the same conclusion would not apply to denials of funding or access in cases such as *Mitchell* and *Rosenberger*, even if the denial is unconstitutional for other reasons.

Of course, the above examples demonstrate hostility toward a specific religion or specific religions, but some have suggested that separationism leads to a purging of religious views more generally, and is thus *hostile* toward religion.⁷⁶ The broader relationship between religion and public life is complex and beyond the scope of this Article, but despite my concern that strict separationism may be unconstitutional and bad policy, it is not inherently *hostile* toward religion. In fact, some of its strongest supporters have been concerned with protecting religion.⁷⁷

Thus, whether or not current separationist-oriented doctrines and principles are proper interpretations of the Establishment Clause, calling them hostile toward religion is nothing more than a rhetorical slap or verbal barb. The Court and some scholars derive support and power from using the term, but the term adds nothing of substance to their arguments. Unless the government entity denying funding or access or the party challenging government action demonstrates a negative intent or attitude toward religion generally or a specific religion, there is no proof of hostility toward religion. Disparate treatment in this context does not equate to hostility because those

73. See *Mitchell*, 530 U.S. at 912–13 (Souter, J., dissenting).

74. *Locke v. Davey*, 124 S. Ct. 1307, 1314 n.7 (2004).

75. *Id.* at 1313–14.

76. See STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 106–23 (1993); Gedicks, *supra* note 14, at 674, 678–82, 693–96 (connecting the distinction between public and private aspects of religion in cases and society at large to the broader liberal tradition). See generally NEUHAUS, *supra* note 55.

77. See Gaffney, *supra* note 14, at 302 (noting that leading separationist Leo Pfeffer was not "in any real sense hostile to religion" and that in fact Pfeffer "is a devout Jew who is convinced that religion will thrive—even that it can only thrive—when it does not enjoy the benefit of government subsidies").

engaging in that treatment are often motivated by constitutional concerns or concerns for avoiding divisiveness in the community, rather than hostility toward religion.⁷⁸

Moreover, in the absence of hostile intent, disparate impact must be analyzed as an *effect* of government action, rather than as its purpose. I strongly advocate an approach to the Establishment Clause that takes effects seriously, whether those effects favor religious entities or disfavor them.⁷⁹ The Court, however, writes off effects that seem to favor religion in cases like *Zelman*, yet puts great weight in effects that seem to disfavor religion in cases like *Mitchell* and *Rosenberger*.⁸⁰ It is possible that the Court sees this apparent conflict but does not view it as such, thus intending its doctrine to require serious examination of effects when those effects harm religious entities, but not when they favor such entities.⁸¹ However, this remains unclear.

IV. CONCLUSION

The Court has not relied heavily on the concept of hostility in its recent Establishment Clause decisions, but the concept has had an impact. Given the Court's recent focus on formal neutrality in a number of contexts, such as government aid and equal access, the concept of hostility may take on more importance. Because of its narrow holding, *Locke v. Davey* does not clearly point in one direction or the other with regard to the Court's future use of the hostility concept. When the Court has attempted to use the concept of hostility in recent years, it has done so only in a rhetorical sense: it presumes that the lack of formal neutrality is hostile toward religion. Yet this is not an adequate or accurate definition of "hostility."

78. See *supra* notes 70–71 and accompanying text.

79. Ravitch, *supra* note 4, at 544–73.

80. Compare *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding a voucher program in which 94.6% of voucher funds went to religious schools that represented only a few denominations), with *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (holding that exclusion of religious schools from a general government program supporting the loan of educational equipment because the religious schools are "pervasively sectarian" reflects hostility toward religion and is unconstitutional), and *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (suggesting that the exclusion of a religious student newspaper from a general funding program would disfavor religious viewpoints and is therefore unconstitutional).

81. This is consistent with the approach taken by some scholars. See, e.g., NEUHAUS, *supra* note 55.

Disparate impact and even disparate treatment (depending on the motivation for that treatment) are not necessarily evidence of hostility toward religion.