LEAVING DISESTABLISHMENT TO THE POLITICAL PROCESS

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INTRODUCTION

Last term, the Supreme Court decided *Greece v. Galloway*, a case about prayer at town meetings. The Court upheld the prayer scheme, which is what most expected. There were no big surprises, no sea change in the law. The Supreme Court made it somewhat more difficult for plaintiffs to challenge legislative prayers, though the door remains open, if just a crack.

If *Galloway* is important, it is not for what it holds but for what it signals about the future of the Establishment Clause. Academics are prone to overreading cases—seeing portentous omens where others see only dirty tea leaves. But let me play the role of provocateur. Let me suggest that *Galloway* does have a message and that message is this: The Establishment Clause is pretty much done.

This sounds annoyingly overwrought, so let me clarify a bit. It is not that the Establishment Clause no longer means anything—or even that the Roberts Court will cut the Establishment Clause back significantly. Despite repeated invitations and concrete opportunities,
the Court has refused to make sweeping changes to the Establishment Clause. Of course, the future will surely see changes. Now that Justice Kennedy has replaced Justice O'Connor as the swing vote, the Court will probably be more accepting of government-sponsored religious symbols and evenhanded funding of religious institutions. But the middle of the Court seems profoundly uninterested in a general rollback of the Establishment Clause. The bar on government-sponsored religion in public schools will remain more-or-less absolute. And outside public schools, the Court will continue to restrict government-sponsored religion to a few discrete areas and regulate it pretty heavily within those areas. The Establishment Clause is safe, at least for the most part. So when I suggest that the Establishment Clause is pretty much done, I mean something different.

I

The Establishment Clause is a constitutional provision with a teleology. Its natural ambition, its built-in goal, is the end we conveniently call disestablishment—the abolition of all the religious preferences associated with the old established churches of Western Europe. But disestablishment is more of a process than an object. Disestablishment did not happen in 1689 with Locke’s *Letter Concerning Toleration*; it did not happen in 1789 with the passage of the First Amendment; it did not happen in 1833 when Massachusetts abandoned the final vestiges of its formally established church; it did not happen in 1868 with the passage of the Fourteenth Amendment; it did not happen in 1947 with *Everson*, or in 1962 with *Engel*. Those

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3. Most vulnerable are (1) the restraints on direct funding imposed by *Mitchell v. Helms*, 530 U.S. 793 (2000), where Justice Kennedy did not join Justice O'Connor's limiting concurrence, and (2) the restraints on religious symbols established in *McCreary County v. ACLU*, 545 U.S. 844 (2005), which were supported by Justice O'Connor but not by Justice Kennedy.

4. This statement is not uncontroversial; it requires a defense against those who would argue that the Establishment Clause is neutral on disestablishment, in the sense that it left intact establishments of religion created by state governments. See STEVE D. SMITH, THE RISE AND DECLINE OF AMERICAN RELIGIOUS FREEDOM 49–62 (2014); *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring). It is true, of course, that the Establishment Clause left state establishments alone, but that is not at all the same as being neutral on disestablishment. For a longer explanation of this point, see Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 241–43 (2004).


things advanced the cause of disestablishment but did not accomplish it. For there were many elements to an established church, and those elements had to be removed one by one. Disestablishment has taken centuries. But it would be better to say that disestablishment is taking centuries. We are not done yet.

The principal driver of disestablishment has always been religious diversity. As religious diversity grows, so too does the thirst for disestablishment. As the range of religious disagreement expands, things formerly agreed upon lose their consensus. The Elizabethan Settlement saw the Anglican Church try, sometimes genuinely, to tolerate within itself the entire range of then-existing religious opinion. But the Puritans in seventeenth-century England were just too disagreeable, as were the Baptists and Presbyterians in eighteenth-century Virginia. The battles they engendered brought the most obvious and restrictive features of the classic establishments—tax support and mandatory attendance—to a close.

This still held out the possibility of a pan-Protestant alliance, organized around the government still being able to teach religious truth; the early-19th-century public schools taught a watered-down kind of generic Protestantism that had wide-ranging appeal. But newly arriving Catholic immigrants struggled against this, and the resulting controversies dashed hopes that government could instill Christianity without controversy. And this century has brought our country only further down this road. Increasing religious diversity has frustrated every attempt to close ranks. Even if Protestants and Catholics could agree on daily school readings from the New Testament, what about Jews? Even if all of them could agree on Ten Commandments displays, what about Hindus, Buddhists, and nonbelievers?

For most of American history, the Supreme Court had no role in any of these developments. The Court did not regularly start hearing

8. See, e.g., Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105, 2131–81 (2003) (noting the central elements of the established Anglican church in England were (1) government control over the doctrines, structure, and personnel of the state church; (2) mandatory attendance at the religious worship services of the state church; (3) public financial support of the state church; (4) prohibition of religious worship in other denominations; (5) the use of the state church for civil functions, such as marriage; and (6) the limitation of political participation to members of the state church).
Establishment Clause cases until 1947. But over the past seventy years, the Court has become the principal expositor and enforcer of the Establishment Clause. And while there have been periods of decline and periods of vacillation, the long arc of judicial intervention has bent toward greater and greater disestablishment.

And at least for some, this gave rise to a set of largely unstated expectations. The Court might resist temporarily, but disestablishment’s natural gravity would ultimately prove inexorable. The Court would bring the Establishment Clause to its completion; it would write the final chapter of disestablishment. It would overrule the decisions allowing holiday displays and Ten Commandments displays; it would invalidate the phrase “under God” in the Pledge of Allegiance and maybe even “In God We Trust” on the currency; it would overrule its decision sanctioning legislative prayer. This might take decades; it might take more. And last of all the cases to be overruled would be the Court’s 1961 decision in McGowan v. Maryland, the Sunday-closing-law case. Five centuries after Luther and three centuries after Locke, Pennsylvanians would finally be free to hunt on Sundays.

But that is not the future of the Establishment Clause. We do not know what that future will be exactly, but it will not be that. A bit depends, of course, on the future composition of the Court. But even deep changes in the Court’s personnel will not change the basic point. Thirty years ago, there were three votes to overrule Marsh v. Chambers. Now there are none. Strict separationists have always had trouble counting to five; now we have trouble counting to one.

The meaning of old cases will change and new developments will generate new cases. But there is a feeling now unlike before—a feeling that we stand at the end of the Establishment Clause. The Court will not take us much further along this path. Perhaps, oddly enough, this too is a consequence of America’s increasing religious

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9. See supra text accompanying note 6 (citing Everson).
13. See infra note 55 and accompanying text (discussing Justice Kagan’s agreement with Marsh).
pluralism. Perhaps the Court thinks nonbelievers are now sufficiently numerous and powerful to protect themselves. There is truth to that. But there is another side too—America is religiously heterogeneous at the national level, but is often quite homogenous at the local level. There are dangers with leaving disestablishment to the political process.

II

To understand *Galloway*, it helps to begin not with its facts but with the Supreme Court’s 1983 decision in *Marsh v. Chambers*.14 *Marsh* involved a challenge to Nebraska’s practice of having a permanent chaplain open legislative sessions with prayer.15 The challenge was not far-fetched. The Court had interpreted the Establishment Clause to prohibit government from favoring religion for decades, and legislative chaplaincies seemed a clear violation of that principle.16 But in a six-to-three decision, the Supreme Court upheld Nebraska’s practice, making a small but important exception to its stated rule of religious neutrality. This exception, the Court explained, was just so clearly implied by history.17 The First Congress approved the Establishment Clause, but it also hired chaplains.18

While *Marsh* accepted legislative prayer, it also suggested limits. In one part of the opinion, the Court said that legislative prayer could not be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.”19 In another, the Court approvingly noted how Nebraska’s chaplain had stopped using specifically Christian language in his prayers after a complaint.20 So *Marsh* seemed to impose a limit on prayers—they could not be too denominational—but the Court never explained exactly where the line should be drawn.

In the thirty years after *Marsh*, lower courts looked for that line in a variety of cases presenting all kinds of facts. *Galloway* turned out to be the one the Supreme Court took. Not all the facts in *Galloway*
were agreed upon, but the general outline is clear. Located in upstate New York, the Town of Greece began inviting local clergy to offer prayers before meetings starting in 1999.\textsuperscript{21} Until 2007, all the clergy were Christian ministers and their prayers frequently referred to Jesus Christ and frequently encouraged the audience to join in.\textsuperscript{22} After complaints, the prayer-givers became more diverse—a Wiccan priestess gave a prayer, as did the head of a Bah’ai congregation and a Jewish layperson.\textsuperscript{23} The Town even said that atheists and agnostics could sign up to give invocations, though it did not publicize that fact.\textsuperscript{24} But the vast majority of prayers involved Christian language. And after 2009, for reasons that are not entirely clear, only Christian clergy were involved in offering prayers.\textsuperscript{25}

Both sides brought straightforward arguments. The plaintiffs saw this arrangement as overly coercive and unduly sectarian. The Town was not just supporting religion in general but Christianity in particular, and attendees were forced either into praying or appearing to pray.\textsuperscript{26} The Town said this was unfortunate but inevitable. In a town made up mostly of Christians, most prayers inevitably would be Christian, unless the government started acting as a kind of censor.\textsuperscript{27}

Earlier work of mine has stressed how both sides are fundamentally right, and how legislative prayer ends up being a kind of zero-sum game for religious liberty.\textsuperscript{28} Listeners deserve to be protected from their government making religious statements with which they disagree. But protecting them requires speakers to change the ways they pray. It is a classic catch-22, rooted in a simple undeniable fact: We live in a world where people have different religious beliefs. Some do not pray. And those who do pray do so in different ways; they pray to Gods that they do not see as the same God. In that world, there is no way for the government to pray in a way that satisfies everyone. This has always been a central problem with the government practicing religion: Whose religion will it

\textsuperscript{22} Id.
\textsuperscript{23} Id. at 1817.
\textsuperscript{24} Id. at 1816.
\textsuperscript{25} The Court explores the facts in Galloway, Id. at 1816–18. Additional details can be found in Christopher C. Lund, Legislative Prayer Goes Back to the Supreme Court, SLATE, Aug. 15, 2013, http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/the_supreme_court_will_have_another_chance_to_decide_when_government_can.html.
\textsuperscript{26} Galloway, 134 S. Ct. 1811 at 1819–20.
\textsuperscript{27} Id. at 1814, 1817.
\textsuperscript{28} See Lund, supra note 18, at 1029–30.
practice?

This has led to some difficult choices for local governments who choose to have legislative prayer. Recent history provides cases of excluded speakers, alienated listeners, interrupting protestors (sometimes sent to prison), censorship and editorial control, inflamed citizenry, retaliation, and political spillover. In one under-the-radar example that developed at the same time as Galloway, a referendum put it to the voters to decide whether the City Council should continue its policy allowing prayers mentioning Jesus Christ. Twelve thousand votes were cast—76 percent in favor of allowing references to Christ, 24 percent opposed. Maybe we accept these kinds of developments as inevitable consequences of legislative prayer’s sometimes positive role in the history of this country, but these are some uncomfortable things we have to accept.

III

Galloway is not a terribly surprising decision. Most expected the Court to uphold the prayer scheme. The Second Circuit’s judgment seemed vulnerable from the moment it was issued. The die was probably cast when certiorari was granted, or at least when the Obama Administration entered the case on the Town’s side.

And Galloway is not terribly groundbreaking either. The Court makes it more difficult for plaintiffs to challenge legislative prayer schemes, but it works strenuously to limit the consequences of its decision. Justice Kennedy writes the majority opinion for five Justices. He concludes that the prayers are constitutional, because they are neither overly sectarian nor overly coercive. It is enough that the Town opened the prayer opportunity up to all denominations, and allowed anyone to say anything. It does not matter that prayers ended up overwhelmingly Christian—that was not the Town’s fault. It does not matter that attendees may have felt pressured to join the prayers—they had no objective reason to feel pressured. This holding is not shocking. It is, in fact, pretty much what the Obama

Administration had urged, and what some lower courts had held before *Galloway*.

Now the Court leaves the door open. The Justices repeatedly caution that some prayer schemes might cross the constitutional line. But the Court clearly means to make it more difficult to bring these cases. *Marsh* had said that legislative prayers could not “proselytize or advance any one, or to disparage any other, faith or belief.”

Consider the differences between that and the majority opinion in *Galloway*: “[T]he course and practice over time [must show] that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.”

Notice the subtle changes there—the addition of the phrases “course and practice” and “over time,” the use of words like “denigration” instead of “disparagement,” “damnation” instead of “advancement,” “preaching conversion” instead of “proselytizing.”

While the Court is clear about its desire to raise the bar, it is profoundly unclear on where exactly it means to set it. The Court offers a multitude of vague and slightly inconsistent phrases. As per above, the Court condemns invocation practices that “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.”

But at another point, the Court says that the issue is whether there is “a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose.” Is there a difference there? Later on, the Court says there would also be a problem “if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person’s acquiescence in the prayer opportunity.” But then, sentences later, the Court rephrases the same concerns in a slightly different way, asking whether the government “allocated benefits and burdens based on participation in the prayer,” “received [citizens] differently depending on whether they joined the invocation,” “signal[ed] disfavor toward nonparticipants,” or “suggest[ed] that their stature in the community was in any way diminished” by not participating.

There certainly is a common core here, but it’s not clear which of the things (if any) is

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34. *Id.*
35. *Id.* at 1824.
36. *Id.* at 1826.
37. *Id.*
supposed to be the touchstone. All the Court will say is that each is a “fact-sensitive” inquiry.\footnote{Id. at 1825 (“The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed.”).}

The predictable result is that no one has any idea where the line is. And this may be an intended result too. The Court wants to set the bar high enough to discourage plaintiffs from bringing these suits, but the absence of any bar whatsoever would only encourage abuses by defendants. When the goal is to paralyze both sides, it is best to have an unclear test. The Court knows this from experience. This is precisely what the Court did in its cases about holiday displays and Ten Commandments monuments.\footnote{Ten years ago, the Court decided two cases involving Ten Commandments displays, upholding one and striking down the other. \textit{See} McCreary County v. ACLU, 545 U.S. 844 (2005); \textit{Van Orden v. Perry}, 545 U.S. 677 (2005). Twenty years earlier, the Court was similarly divided in two cases involving holiday displays. \textit{See} \textit{County of Allegheny v. ACLU}, 492 U.S. 573 (1989); \textit{Lynch v. Donnelly}, 465 U.S. 668 (1984).}

One intriguing aspect to the decision is the way the Court handles the issue of state action. The best single fact for the Town—a fact that they smartly stressed at every critical juncture—was how prayer-givers were selected. It looked almost like a public forum. The Town did not pick and choose among clergy, so the fact that the prayers happened to be overwhelmingly Christian came as a natural consequence of the Town’s religious demographics. Preventing overly denominational prayers, the Town stressed, would mean either manipulating the clergy-selection process or censoring prayers.

The claim of censorship takes beautiful advantage of the blur that sometimes exists between private and state action. At bottom, no one really doubts that Greece is responsible for these prayers. (That is, of course, why the Establishment Clause applies here in the first place.) So there is state action. But the state action is quite dim; the prayers have private aspects too. This both gives respectability to the claim of censorship and muddies the waters conceptually. The Town is involved enough that ordinary folks attending meetings will know that the government stands behind these prayers, but the Town stays out of it enough to provide plausible deniability of that fact.

This sounds like a novel feature of \textit{Galloway}, but it is actually a recurring feature of modern Establishment Clause cases. Think of the cross in \textit{Salazar v. Buono},\footnote{559 U.S. 700 (2010).} which was on government property but had been erected by (and later was transferred to) private parties;
think of the student election in *Santa Fe Independent School District v. Doe*,\(^{41}\) or the invited rabbi in *Lee v. Weisman*.\(^{42}\) Government masks its role enough that courts instinctively think of the religious activity as private and any interference as entanglement and censorship. But out of court, government can let the mask drop. One sees this in *Galloway* itself. The Court is obviously troubled by the censorial implications of the plaintiff’s argument.\(^{43}\) But now that state and local governments have their holding on the Establishment Clause issue, they can freely go back to policies where the state action is more pronounced. Now largely freed of content restrictions, local officials can simply pray themselves and forget about inviting in outside clergy or residents. This may be happening already.\(^{44}\)

Another striking part of *Galloway* is the Court’s rhetoric. There is a bit of irony here. Over the years, when the left was winning these cases, liberal Justices would be attacked by conservatives for being far too confident in their judgments about what endorses religion, how alienated people feel because of endorsements of religion, and so on.\(^{45}\) The Court’s opinion here is equally confident, though just on the other side. Here's the majority opinion on the issue of whether the prayers coerce nonbelievers into participating:

> It is presumed that the reasonable observer is acquainted with this [historical] tradition [behind legislative prayer] and understands that its purposes are to lend gravity to public proceedings and to acknowledge the place religion holds in the lives of many private citizens, not to afford government an opportunity to proselytize or

\(^{41}\) 530 U.S. 290 (2000).


\(^{43}\) Justice Kennedy repeatedly says that censorship is not constitutionally required. But at one point, he goes further and implies that censorship is actually forbidden: “Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.” *Galloway*, 134 S. Ct. at 1822–23. The word “must” in that sentence jumps off the page, although the Court surely does not mean all that it would imply.

\(^{44}\) See John Ramsey, *Board Changes Prayer Policy*, RICHMOND TIMES-DISPATCH (VA), July 24, 2014, available at 2014 WLNR 2016299 (noting how the county used to allow clergy from monotheistic denominations, but now “[instead of swinging open the doors to people of all faiths, the county instead will experiment with allowing only supervisors to open meetings with a prayer or moment of silence”).

force truant constituents into the pews. 46

In other words, you may feel coerced by the fact that the people with the legal power to approve your zoning variance are watching you pray from thirty feet away, but you are acting unreasonably because no reasonable person would feel that way. Or take this one:

Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. 47

But the Court cannot hope to control social conventions this way! Nonbelievers feel the way they feel; their actions will be interpreted as they will by the other people in the room. No one’s sentiments will be controlled by the opinions of the Supreme Court of the United States.

All of these points matter, but they matter much less if Galloway’s import is restricted to legislative prayer. This raises the question: What importance does Galloway have for the larger Establishment Clause? Since Marsh, the shared understanding has been that whatever the Court does with legislative prayer has basically no relevance to other Establishment Clause issues. 48 Galloway tries to push against that. Justice Kennedy says legislative prayer can no longer be treated as a kind of historical carve-out. 49 This suggests Establishment Clause jurisprudence will have to be overhauled so as to square it with the Framers’ approval of congressional chaplaincies. 50 But at the same time, Justice Kennedy’s opinion goes to great lengths to not address any topic other than legislative prayer—the Court delicately avoids saying anything that would create ripple effects on the Court’s approach to school prayer, symbols, or financial aid to religion.

So Justice Kennedy says that Marsh cannot be treated as a carve-out, even as he continues to treat Marsh as a carve-out. But he is right not to take his own advice. For whatever principle the Court ends up adopting as its general approach to the Establishment Clause, Marsh

46. Galloway, 134 S. Ct. at 1825.
47. Id. at 1827.
49. Galloway, 134 S. Ct. at 1819 (“Marsh must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.”).
50. Justice Kennedy says this directly at one point: “Any test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.” Galloway, 134 S. Ct. at 1819.
by necessity will continue to be treated as a carve-out. The Court’s problem with legislative prayer always comes back to this: There are many possible principled versions of the Establishment Clause, but the congressional chaplaincies are inconsistent with every single one. Justice Thomas and Justice Scalia, for instance, conceive of the Establishment Clause quite narrowly. In a separate opinion in Galloway, they reiterate their longstanding view that the Establishment Clause applies only in cases of “actual legal coercion.”

But the congressional chaplaincies are actually legally coercive! Congress’s chaplaincies are paid by taxes, and everyone agrees taxes are coercive. The majority’s opinion recognizes the problem; its only response is that “the cost of [a congressional] chaplain’s salary imposed a vanishingly small burden on taxpayers.” But what does that mean? A small enough tax doesn’t trigger the Establishment Clause? The $500 salary for a congressional chaplain in 1789 translates to about $13,000 in today’s dollars. There were 3 million people in the country in 1789, and around 300 million people today. So this is very rough, but a government expenditure of $1.3 million today would have the same order of effect as the 1789 Congress’s expenditure of chaplain funds. Could Virginia pass a Bill Establishing a Provision for Teachers of the Christian Religion, as long as the government expenditure is less than a million dollars?

This is all silly, of course; none of this will happen. But the reason why none of this will happen is that the Court will continue to treat the congressional chaplaincies as *sui generis*. Knowing that it cannot succeed, the Court will not try very hard to square legislative prayer with the rest of its Establishment Clause jurisprudence.

Galloway demonstrates that little has changed on the conservative side of the Court. The greater change is on the liberal side. Justice Kagan’s dissent eloquently advances the interrelated values of pluralism and inclusion in arguing against the constitutionality of the Town’s policy. But the most striking part of her dissent is what it does

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51. “[I]t is actual legal coercion that counts,” including “coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” Galloway, 134 S. Ct. at 1837–38 (Thomas, J., concurring).

52. Id. at 1819 (majority opinion).

53. On the other hand, there is Madison: “[T]he same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.” James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in *5 The Founders’ Constitution* 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987).
not say. Thirty years ago, three Justices would have declared the practice of legislative prayer unconstitutional "tout court." No one on the current Court feels that way. Not only would the dissenters not overrule Marsh, Justice Kagan goes out of her way to say that she agrees with it. Sixty years ago, in a case almost no one now remembers, Justice Douglas made this statement: "We are a religious people whose institutions presuppose a Supreme Being." Justice Kagan's dissent quotes this line approvingly—although she shrewdly leaves off the "institutions presuppose a Supreme Being" part of it. Of all the lines in Galloway, that was perhaps the most surprising. It suggests that even the liberal Justices are mostly content with the present boundaries of the Establishment Clause, and are willing to leave further changes to the political process. But how that will go, and what it will mean, are questions only the future can answer.

55. Galloway, 134 S. Ct. at 1841–42 (Kagan, J., dissenting) ("I agree with the Court's decision in Marsh . . . upholding the Nebraska Legislature's tradition of beginning each session with a chaplain's prayer." (citation omitted)).