4-6-2015

The Religious Geography of Town of Greece v. Galloway

Paul Horwitz
University of Alabama - School of Law, phorwitz@law.ua.edu

THE RELIGIOUS GEOGRAPHY OF *TOWN OF GREECE V GALLOWAY*

Paul Horwitz[*]

[Forthcoming in 2014 *Supreme Court Review*]

To attempt to come to terms with American religious history apart from its geographical dimensions . . . is to risk missing something crucially important.[1]

INTRODUCTION

Americans are obsessed with history. That's especially true for American lawyers, constitutional lawyers not least among them. Of course there are practical reasons for this obsession, including the age of the Constitution itself. As long as some form of originalism remains important to judicial or scholarly interpretation of the Constitution, moreover, there are strategic reasons for any constitutional lawyer to take an interest in historical questions. But history alone is an insufficient interpretive guide. Among other things, in a word, we might consider geography.

This is certainly true for the study of American religion and religious freedom. Martin Marty, a leading figure in that field, has noted "American religionists' . . . obsession with time over space"—with a temporal, rather than a spatial, understanding of American religion and religious pluralism.[2] The fixation with history is equally apparent in judicial decisions and legal scholarship dealing with church-state law. Many of the key decisions of the United States Supreme Court dealing with the Religion Clauses center on grand historical narratives, as much mythical as real,[3] that purport to dictate the shape of the law in this area.[4] Fueled both by the cases and by their own

[*] Gordon Rosen Professor, University of Alabama School of Law. Jared Searls provided fine research assistance and the University of Alabama School of Law offered generous financial support. I thank Marc DeGirolami, Chad Flanders, Rick Garnett, Mark Rosen, Richard Schragger, and Steven Smith for comments on a draft.

[1] Edwin Scott Gaustad and Philip L. Barlow, *New Historical Atlas of Religion in America* xxii (Oxford 2001).

[2] Martin E. Marty, *Religion and Republic: The American Circumstance* 198 (Beacon 1987).

[3] See, for example, Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 S Ct Rev 119, 137-42.

[4] See, for example, *Reynolds v United States*, 98 US 145 (1878); *Everson v Board of Education of Ewing Township*, 330 US 1 (1947).

needs and interests, many scholars are equally focused on the lessons history holds for Religion Clause adjudication.[5]

While many judges and legal scholars continue to focus rather single-mindedly on history, scholars of American religion itself have long since shifted focus. A half-century ago, the American religious historian Sidney Mead famously observed: "Americans have never had time to spare. What they did have during all their formative years was space—organic, pragmatic space—the space of action."[6] In modern scholarly lingo, Mead called on religious scholarship to take a spatial turn:

> The story of America is the story of uprooted emigrant and immigrant people, ever moving rapidly onward through space so vast that space came to take precedence over time in the formation of their most cherished ideals, chief of which has been the ideal of freedom. But since the freedom of space did not appeal to all in the same way, there was created a strange mingling of attitudes toward the predominant conception of freedom . . . . The "story of religion in America" must be reinterpreted in this general context.[7]

Since then, a substantial body of scholarship has emerged that examines religion—including both the past and the present of American religion—in *spatial* as well as temporal terms. In the description of a leading text, "the lens of geography is useful in considering interactions between religion and diverse realms of human activity as expressed in social space."[8] As an "integrative" discipline (like law), geography "provides an effective framework for analyzing the connection of religious belief to other spheres of thought and action at diverse scales."[9]

Legal scholarship has shown some interest in taking the spatial turn.[10] It has made scattered appearances in constitutional scholarship.[11] With a few

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[5] See, for example, Symposium, *The (Re)turn to History in Religion Clause Law and Scholarship*, 81 Notre Dame L Rev 1697 (2006).

[6] Sidney E. Mead, *The Lively Experiment: The Shaping of Christianity in America* 5 (Harper and Row 1963).

[7] Id at 15.

[8] Roger W. Stump, *The Geography of Religion: Faith, Place, and Space* 6 (Rowman & Littlefield 2008). For another introduction to the geography of religion, see Chris C. Park, *Sacred Worlds: Introduction to Geography and Religion* (Routledge 1994). Key early work in the field of geography of religion includes David E. Sopher, *Geography of Religions* (Prentice-Hall 1967), and Yi-Fu Tuan, *Humanistic Geography*, 66 Annals Ass'n Amer Geographers 271 (1976).

[9] Stump, *The Geography of Religion* at 6 (cited in note 8).

[10] See, for example, Nicholas Blomley, David Delaney, and Richard T. Ford eds, *The Legal Geographies Reader* (Blackwell 2001); Irus Braverman, Nicholas Blomley, David Delaney, and Alexandre Kedar eds, *The Expanding Spaces of Law: A Timely Legal Geography* (Stanford 2014).

[11] See, for example, Joseph Blocher, *Selling State Borders*, 162 U Pa L Rev 241 (2014); Allan Erbsen, *Constitutional Spaces*, 95 Minn L Rev 1168 (2011); Timothy Zick, *Constitutional Displacement*, 86 Wash U L Rev 515 (2009); Timothy Zick, *Speech Out of Doors: Preserving First Amendment Liberties in Public Places* (Cambridge 2008).

valuable exceptions, however,[12] and despite the spatial turn in American religious scholarship itself, law and religion scholars have not yet taken full advantage of the insights that a geographical orientation might offer their subject.

The Supreme Court's decision in *Town of Greece v Galloway*[13] offers a good reason to change course. In *Galloway*, the Supreme Court did two things. First, all of the Justices agreed that the Court should reaffirm the decision in *Marsh v Chambers*,[14] which upheld the Nebraska legislature's practice of offering opening prayers. Second, by a 5–4 vote, the Court applied *Marsh* to uphold a similar practice, one that included openly sectarian prayers, before meetings of a town board.[15]

From a historical perspective, *Galloway* was not terribly interesting. It did not add much more detail than *Marsh* itself provided. From a doctrinal perspective, *Galloway* was interesting in two respects. First, it was interesting for what it did *not* do. It did not do away with any of the Establishment Clause tests governing the use of religious speech or symbols by government. In particular, it did not, as has long been anticipated, deliver the coup de grâce to the endorsement test for Establishment Clause violations.[16] Second, the Court indicated that it would give history greater weight in future Establishment Clause cases. The majority opinion, written by Justice Anthony Kennedy, made clear that "it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted."[17] This is an important development; but, notwithstanding the excitement that greeted it,[18] it is not clear how far-reaching it will be.

Galloway is, however, an excellent subject for geographically inflected analysis. The extension of *Marsh* from state legislatures to individual town boards is not an immense step doctrinally, but it certainly is spatially. As Justice Elena Kagan noted in the case's principal dissenting opinion, it in-

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[12] See especially Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 Tex L Rev 583 (2011); Adam M. Samaha, *Endorsement Retires: From Religious Symbols to Anti-Sorting Principles*, 2005 S Ct Rev 135; Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 Harv L Rev 1810 (2004); Mark D. Rosen, *The Radical Possibility of Limited Community-Based Interpretation of the Constitution*, 43 Wm & Mary L Rev 927 (2002); Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in in the Aid of Community*, 77 Tex L Rev 1129 (1999). Although I disagree with many of his substantive conclusions, I am particularly indebted to Richard Schragger's important article on localism and the Religion Clauses, which had a great influence on Part III.B of this article.

[13] 134 S Ct 1811 (2014).

[14] 463 US 783 (1983).

[15] See *Galloway*, 134 S Ct at 1819-25.

[16] See Samaha, 2005 S Ct Rev at 137 (cited in note 12).

[17] *Galloway*, 134 S Ct at 1819.

[18] See Eric Rassbach, Town of Greece v Galloway: *The Establishment Clause and the Rediscovery of History*, 2014 Cato S Ct Rev 71, 71 (2013-2014) (arguing that *Galloway*, with its "embrace" of history, "marks a major inflection point in the development of the law of the Establishment Clause").

volves a very different set of factual and practical considerations than does legislative prayer in the state legislatures.[19] And those differences, when viewed through the lens of religious geography, present a good occasion to think about a number of perennial problems in American church-state relations and the law of the Establishment Clause.

Part I of this Article offers a summary, interspersed with analysis, of *Town of Greece v Galloway*. Part II focuses on one aspect of the majority opinion and the principal dissent: the differences—and, in some respects, the striking similarities—in their competing visions of American religious pluralism. Part III offers an introduction to some basic animating concepts of religious geography, and examines *Galloway* from two geographical perspectives: the role of *region* in the study of American religious pluralism and its influence on the opinions in the case, and the failure of the majority to fully confront the role of the *local* in the life and law of the Establishment Clause.

I. *GALLOWAY*: FIVE OPINIONS IN SEARCH OF A CHURCH-STATE SETTLEMENT

The town of Greece, in Monroe County, New York, dates back to 1822.[20] Once an agricultural community, today it is a "residential suburb" of the neighboring upstate city of Rochester, with a 2010 population of about 96,000.[21]

In 1999, John Auberger, the town supervisor, added opening prayers to the town's monthly board meetings. The move was inspired by Ausberger's experience with prayers in the county legislature.[22] Ausberger wrote that he found those prayers to be "a thoughtful practice," a "kind of humbling of ourselves, before making decisions that would ultimately impact our whole community."[23]

The town had no written prayer policy. Town officials said anyone could give the invocation, including non-Christians and atheists; but the town did not publicize the opportunity to deliver invocations.[24] Before 2007, the employees responsible for finding prayer-givers relied variously on a chamber of commerce directory of religious organizations, a list of those who had previously given the invocation, the list of religious groups

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[19] *Galloway*, 134 S Ct at 1846-47 (Kagan dissenting) (comparing and contrasting the practices in the Nebraska state legislature and at Town of Greece board meetings).

[20] See The Town of Greece, *All About Greece*, online at http://greeceny.gov/aboutgreece.

[21] Id.

[22] See *Galloway*, 134 S Ct at 1816.

[23] John Auberger, *The Problem With Prayer in Greece, NY*, 7 Faith and Justice 14, 14 (2014), online at http://www.alliancedefendingfreedom.org/content/docs/FnJ/FnJ-7.1.pdf. *Faith and Justice* is a publication of the Alliance Defending Freedom, which represented the Town of Greece in the legislative prayer litigation.

[24] See *Galloway v Town of Greece*, 732 F Supp 2d 195, 197-200 (WDNY 2010).

in the local weekly newspaper, and some additional notes.[25] One employee testified that she believed she was only supposed to invite individuals and groups "located within the Town of Greece."[26]

A map produced during the litigation showed that most of the groups on the lists maintained by the Town of Greece were located within its borders. It showed no Jewish synagogues, Mormon temples, or Baha'i groups within those borders. A Buddhist temple and a Jehovah's Witnesses church were located in Greece, but neither appeared on the town's lists.[27]

All the prayers given at town board meetings between 1999 and 2007 were Christian.[28] Many referred to Jesus Christ, or ended the prayer "in Jesus' name."[29] For the most part, however, the substance of the prayers was fairly standard for such civic occasions.[30] The town offered no guidance to the prayer-givers about the content of the invocations and did not review the prayers in advance.[31]

The plaintiffs, Susan Galloway and Linda Stephens, complained to the board about its invocation practices in the fall of 2007. Following those complaints, the town invited representatives of the Jewish and Baha'i faiths to offer the invocation, and a Wiccan priestess asked and was permitted to do so as well.[32] The plaintiffs nevertheless filed suit, alleging that the practice violated the Establishment Clause by "preferring Christians over other prayer givers and by sponsoring sectarian prayers."[33] They sought an order limiting invocations to "inclusive and ecumenical prayers."[34]

The district court upheld the practice. It found insufficient evidence that the town had "intentionally excluded non-Christians from giving prayers at Town Board meetings."[35] The overwhelmingly Christian nature of the invocations simply "reflect[ed] the fact that there are comparatively few non-Christian organizations in the Town."[36] The prayers were not required to be strictly nonsectarian, and did not improperly engage in religious proselytization.[37]

The Second Circuit reversed, in an opinion by Judge Guido Calabresi.[38] Reading the decision in *Marsh* in light of subsequent glosses placed on it,

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[25] Id. at 197-200.
[26] Id at 200.
[27] Id at 203.
[28] *Galloway*, 134 S Ct at 1816.
[29] *Galloway*, 732 F Supp 2d at 203.
[30] A large sample of invocations is provided in Joint Appendix, *Town of Greece v Galloway*, 2013 WL 3935056, *26a-143a (2013).
[31] *Galloway*, 134 S Ct at 1816.
[32] Id at 1817.
[33] Id.
[34] Id at 1817.
[35] *Galloway*, 732 F Supp 2d at 217.
[36] Id at 239.
[37] See id at 241-43.
[38] *Galloway v Town of Greece*, 681 F3d 20 (2d Cir 2012).

the court concluded that while "legislative prayer does not *necessarily* run afoul of the Establishment Clause,"[39] prayers that "invok[e] particular sectarian beliefs *may*, on the basis of those references alone, violate the Establishment Clause."[40] It applied a form of endorsement test, asking "whether the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs."[41]

A combination of factors doomed the practice. First, whatever its intent, the town's practice had not "*result[ed]* in a perspective that is substantially neutral amongst creeds."[42] In particular, its failure to look outside the town borders when searching for prayer-givers ignored the fact that the town's residents might belong to faiths "that are not represented by a place of worship within the town." Second, given the volume of sectarian prayers at the meetings, the town was obliged to warn the prayer-givers not to promote their own faith or disparage others.[43] Finally, the town had not adequately policed the format of the invocations; they often appeared to be given directly to the public on *behalf* of the board, with the expectation that the public would participate in them, rather than given *to* the board.[44]

The Supreme Court reversed, in an opinion by Justice Kennedy. There was no chance that the Court would overrule *Marsh v Chambers*.[45] The real question in the case was whether the Court would eliminate the endorsement test,[46] a version of which Judge Calabresi had employed in his decision for the Second Circuit. Often criticized,[47] the test was widely predicted

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[39] Id at 26.

[40] Id at 27 (emphasis added), discussing *County of Allegheny v ACLU Greater Pittsburgh Chapter*, 492 US 573 (1989).

[41] Galloway, 681 F3d at 29.

[42] Id at 31 (emphasis added); see also id at 32 ("We ascribe no religious animus to the town or its leaders. . . . But when one creed dominates others—regardless of a town's intentions—constitutional concerns come to the fore.").

[43] Id at 32.

[44] *Galloway*, 681 F3d at 32-34.

[45] Strikingly, the Obama Administration's brief in the Supreme Court sided with the Town of Greece and did not urge reconsideration of *Marsh*. See Brief for the United States as Amicus Curiae Supporting Petitioner, *Town of Greece v Galloway*, 2013 WL 3990880 (2013); Nelson Tebbe and Micah Schwartzman, *The Puzzle of Town of Greece v Galloway*, SCOTUSblog, Sept. 24, 2013, online at http://www.scotusblog.com/2013/09/symposium-the-puzzle-of-town-of-greece-v-galloway/.

[46] See, for example, *Lynch v Donnelly*, 465 U S 668, 687-95 (1984) (O'Connor concurring); *County of Allegheny*, 492 US at 574; *Santa Fe Independent School District v Doe*, 530 US 290, 308 (2000); *McCreary County v ACLU*, 545 US 844, 860 (2005) (folding endorsement considerations into a variant of the test in *Lemon v Kurtman*, 403 US 602 (1971)).

[47] Classic critical treatments include Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich L Rev 266 (1987), and Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J L & Pol 499 (2002). For defenses of the endorsement test, see, for example, William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind L J 351, 355 (1991); Alan Brownstein, *A Decent Respect for Religious Liberty and Religious Equality: Justice O'Connor's Interpretation of the Religion Clauses of the First Amendment*, 32 McGeorge L Rev 837 (2001).

to be on its way out after the departure of its creator, Justice Sandra Day O'Connor.[48] That is not the Roberts Court's typical approach, however,[49] and it is not what it did here, although there is at least one significant doctrinal move in the majority opinion.

That move came in the Court's discussion of *Marsh v Chambers*. *Marsh* has long been treated as "carving out an exception" to standard Establishment Clause tests, which could be read as prohibiting legislative prayer.[50] Indeed, for those who dislike *Marsh*, thinking of it in those terms—as a narrow "historical easement" over the usual terms of Establishment Clause law—is a form of damage control, which helps limit *Marsh*'s application in other cases.[51]

Justice Kennedy rejected this account. Recourse to additional Establishment Clause doctrine was "unnecessary" in *Marsh*, he wrote, because "history supported the conclusion that legislative invocations are compatible with the Establishment Clause."[52] He continued:

> *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation. The case teaches instead that the Establishment Clause must be interpreted by reference to historical practices and understandings. . . . *Marsh* stands for the proposition that it is not necessary to define the precise boundary of the Establishment Clause where history shows that the specific practice is permitted. . . . The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures.[53]

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[48] See, for example, Samaha, 2005 S Ct Rev at 137 (cited in note 12); Erwin Chemerinsky, *The Future of Constitutional Law*, 34 Cap U L Rev 647, 665-66 (2006).

[49] For an interesting discussion, see Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 Colum L Rev 1861 (2014) (discussing the virtues of the Supreme Court "pruning but not abolishing" its precedents); see also id at 1863 n2 (collecting examples of criticisms of the Roberts Court for what some have called "stealth overruling" of Supreme Court precedent); Barry Friedman, *The Wages of Stealth Overruling (with Particular Attention to* Miranda v Arizona*)*, 99 Geo L J 1 (2010).

[50] *Marsh*, 463 US at 796 (Brennan dissenting). I have elsewhere described *Marsh* and similar cases as "historical easements" over the Establishment Clause. See Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* 233-34 (Oxford 2011).

[51] Horwitz, *The Agnostic Age* at 233-34 (discussing legislative prayer and other practices, such as the use of the motto "In God We Trust" on coins or the phrase "one nation under God" in the Pledge of Allegiance, in those terms) (cited in note __). See also *Marsh*, 463 US at 795 (Brennan dissenting) (suggesting that the Court's "limited [historical] rationale should pose little threat to the overall fate of the Establishment Clause").

[52] *Galloway*, 134 S Ct at 1818.

[53] Id at 1819. The Court has made a similar move in some recent free speech cases. See *United States v Stevens*, 559 US 460, 471 (2010) (holding that the Court will not recognize new categories of so-called "low-value speech" unless the proposed category involves "historically unprotected" speech); see also *Brown v Entertainment Merchants Association*, 131 S Ct 2729, 2734 (2011) (to avoid the application of the rule of content neutrality, government must provide "persuasive evidence that a novel restriction on

This is hardly the end of the Court's analysis. Indeed, the remainder of the opinion refers more often to current doctrine than to historical materials. It is unlikely that the Court will abandon its standard repertoire of Religion Clause tests. It is thus too early to say that *Galloway* "marks a major inflection point in the development of the law of the Establishment Clause."[54]

But it *is* surely true that the decision signals an important change in "the treatment of history in Establishment Clause cases."[55] Rather than treat *Marsh* as a historically based exception to the doctrinal rules that govern most Establishment Clause cases, it treats Establishment Clause *doctrine* as a supplement. That doctrine enters in only where history runs out. Any public religious practice that is well settled in American history should need no further doctrinal justification.[56]

The likely target of this passage is a narrow set of governmental practices: those that are generally associated with American civil religion. Those practices have been the source of recent political and jurisprudential controversy, such as the litigation over the recitation in public schools of the Pledge of Allegiance.

As the Court's abortive and unconvincing attempt to address that issue shows,[57] there is general agreement on the Court that "civil religion" practices should not be disturbed, either because they are actually constitutional or because striking them down would be too politically costly. But there has been little agreement on *how* to uphold them. The result, in the Pledge case at least, was a splintered set of opinions, with no consensus on anything besides the result.

This is the probable significance of the "historical-categorical" approach announced in *Galloway*. It provides a blueprint for rejecting at least some challenges to civil religion practices. That seems to be the import of a later passage in the opinion, in which Kennedy writes:

> The prayer opportunity in this case must be evaluated against the backdrop of historical practice. As a practice that has long endured, legislative prayer has become part of our heritage and tradition, similar to the

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content is part of a long (if heretofore unrecognized) tradition of proscription"). One commentator has called this a "historical-categorical" approach to low-value speech doctrine. *Leading Cases*, 126 Harv L Rev 196, 202 (2012). See also Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 Wash L Rev 445, 460-61 (2012) (discussing this phenomenon).

[54] Rassbach, 2014 Cato S Ct Rev at 71 (cited in note 18).

[55] Id at 89.

[56] See also *Galloway*, 134 S Ct at 1834 (Alito concurring) ("[T]he Court of Appeals appeared to base its decision on one of the Establishment Clause "tests" set out in the opinions of this Court, but if there is any inconsistency between any of those tests and the historical practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.") (citation omitted).

[57] See *Elk Grove Unified Sch Dist v Newdow*, 542 US 1 (2004) (holding, on novel grounds, that the plaintiff father lacked standing to challenge the state law requirement of a teacher-led Pledge of Allegiance on his own behalf and as his daughter's "next friend").

> Pledge of Allegiance, inaugural prayer, or the recitation of "God save the United States and this honorable Court" at the opening of this Court's sessions.[58]

In short, and despite Kennedy's insistence elsewhere in *Galloway* that the imposition of civil religion is forbidden by the Constitution,[59] the historical approach announced by *Galloway* provides a one-size-fits-all method that will allow the Court to easily reject future challenges to the standard practices of American civil religion, without repeating the the difficulties that arose in the Pledge case. Never mind that this passage casually mixes together genuinely long-established practices, such as prayer at inaugural ceremonies, with far more recent practices, such as the insertion of religious language into the Pledge.[60] The Court appears to have settled on a way to uphold these practices on historical grounds.[61]

From here, the Court proceeded to reject the plaintiffs' two primary claims. First, the Court flatly rejected the plaintiffs' "insistence on nonsectarian or ecumenical prayer as a single, fixed standard" in legislative prayer cases.[62] Historically, this standard was inconsistent with a long practice of sectarian references in legislative prayers in Congress.[63] Doctrinally, the Court rejected as dictum a suggestion to the contrary in the Court's endorsement-oriented decision in the holiday display case, *County of Allegheny*.[64]

The Court rejected the plaintiffs' argument that the town board should have reviewed the invocations in advance or provided mandatory guidelines for their content. General Establishment Clause principles bar the government from weighing in on questions of religious truth[65] or involving itself deeply in religious matters and, thus, approving or disapproving particular religious messages.[66]

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[58] *Galloway*, 134 S Ct at 1825.
[59] See id at 1822.
[60] See, for example, Act of June 14, 1954, ch. 297, 68 Stat. 249 (adding the words "under God" to the Pledge of Allegiance); Steven B. Gey, *"Under God," the Pledge of Allegiance, and Other Constitutional Trivia*, 81 NC L Rev 1865, 1875 -79(2003) (noting the Cold War origins and purposes of the alteration of the Pledge).
[61] *Galloway*, 134 S Ct at 1819.
[62] Id at 1820.
[63] Id at 1821, 1823-24.
[64] Id at 1821-22, discussing *County of Allegheny*, 463 US at 603 (arguing that "[t]he legislative prayers involved in *Marsh* did not violate this principle [that government practices cannot demonstrate allegiance to a particular religious sect or creed] because the particular chaplain had removed all references to Christ.") (quotation marks and citation omitted).
[65] See generally Horwitz, *The Agnostic Age* (cited in note 50); Andrew Koppelman, *Defending American Religious Neutrality* (Harvard 2013).
[66] *Galloway*, 134 S. Ct. at 1821-22, citing, among other cases, the Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church & School v EEOC*, 132 S Ct 694, 705-06 (2012).

The opinion also described the nature and purpose of acceptable legislative prayer practices. Kennedy's language here was sweeping, prescriptive, and faintly pious, with echoes of the thin public religiosity of the Eisenhower era.[67] Legislative prayers are "meant to lend gravity to the occasion and reflect values long part of the Nation's heritage."[68] Proper legislative prayer "is solemn and respectful in tone [and] invites lawmakers to reflect upon shared ideals and common ends before they embark upon the fractious business of governing."[69] As long as such practices "provide particular means to universal ends," it doesn't matter that individual prayers are "given in the name of Jesus, Allah, or Jehovah."[70]

The Court imposed *some* limits. A couple of the invocations given at town board meetings in Greece fell outside the acceptable range of civic piety directed at "universal ends." One "lamented that other towns did not have 'God-fearing' leaders."[71] Another, which was delivered after the plaintiffs had complained about Greece's practice, criticized the objectors as "a 'minority' who are 'ignorant of the history of this country.'"[72] Kennedy conceded that such prayers "strayed from the rationale set out in *Marsh*,"[73] but held that "*Marsh* . . . requires an inquiry into the prayer opportunity as a whole, rather than into the contents of a single prayer."[74] Viewed as a whole, the invocations in the Town of Greece did not demonstrate "a pattern of prayers that over time denigrate, proselytize, or betray an impermissible government purpose."[75] But he warned:

> If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort. That circumstance would present a different case than the one presently before the Court.[76]

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[67] See Gary Scott Smith, *Faith and the Presidency: From George Washington to George W. Bush* 254 (Oxford 2006) (quoting Eisenhower's famous statement, "Our form of government has no sense unless it is founded in a deeply felt religious faith[,] and I don't care what it is."). Mark Massa calls this an era in which religion in American public life entailed "high visibility and almost contentless theology." Mark S. Massa, *Catholics and American Culture: Fulton Sheen, Dorothy Day, and the Notre Dame Football Team* 130 (Crossroads 1999) (emphasis omitted). For discussion, see Paul Horwitz, *Religion and American Politics: Three Views of the Cathedral*, 39 U Memphis L Rev 973, 978 (2009).

[68] *Galloway*, 134 S Ct at 1823.

[69] Id at 1823.

[70] Id at 1823.

[71] Id at 1824 (citation omitted).

[72] Id at 1824 (citation omitted).

[73] *Galloway*, 134 S Ct at 1824.

[74] Id at 1824 (citing *Marsh*, 463 US at 794-95).

[75] Id at 1824.

[76] Id at 1823.

This passage accomplishes three things. First, by demanding proof of a *pattern* of impermissible prayer practices, it raises the bar for plaintiffs challenging legislative prayers. Second, notwithstanding the opinion's stated preference for historical certainty over the kind of ambiguity and discretion that critics attributed to the endorsement test,[77] it gives a reviewing court a substantial amount of discretion.[78] Third, it allows the Court, in future cases, to step in and impose its particular vision of legislative prayers, and their unifying civic purpose, against outliers.[79] Given that *Galloway* makes clear that legislative prayers are permitted not only in Congress and the fifty states but in a vast number of local bodies as well,[80] outliers there will surely be.

Alabama provides a hell of an example. The Alabama Public Service Commission is a statewide elected body that sets oversees rate-setting for various utilities. Its president, Twinkle Cavanaugh, invited a friend, a Baptist minister, to give an invocation at one meeting in which he first "poll[ed] those present to see who believed in God," and then directly addressed the Lord: "We've taken you out of our schools and out of our prayers. We have murdered your children. We've said it's okay to have same-sex marriage. We have sinned and ask once again that you forgive us for our sins."[81] Cavanaugh forcefully defended the prayer.[82]

It is safe to say that this kind of prayer is unlikely to be unusual, for Cavanaugh and at least some other elected officials and bodies. At least some local politicians will surely, from time to time, see invocations as an opportunity to practice a divisive form of local politics, not to ensure that "people of many faiths [are] united in a community of tolerance and devo-

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[77] See, for example, Choper, 18 J L & Pol at 520 (cited in note 47).

[78] Not incidentally, it also makes a hash of Justice Kennedy's insistence that the Court stay out of the job of "supervisor[ ] and censor[ ] of religious speech." *Galloway*, 134 S Ct at 1822.

[79] See, for example, Richard H. Pildes, *Is the Supreme Court a "Majoritarian" Institution?*, 2010 S Ct Rev 103 (agreeing with the general conclusion that the Court is often responsive to majoritarian views but warning against excesses in this scholarship); Adam Samaha, *Low Stakes and Constitutional Interpretation*, 13 U Pa J Const L 305, 309 (2010); Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus 2009); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 453 (Oxford 2004); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J Pub L 279 (1957).

[80] See, for example, Marie Wicks, *Prayer is Prologue: The Impact of* Town of Greece *on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings* (working paper 2014), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547761.

[81] Hunter Stuart, *Alabama Government Agency Holds Prayer Against Abortion, Gay Marriage*, Huffington Post, July 25, 2013, online at http://www.huffingtonpost.com/2013/07/25/alabama-prayer-gay-marriage_n_3651756.html.

[82] Kristen Hwang, *Twinkle Cavanaugh stands by controversial prayer at Public Service Commission meeting*, AL.com, July 31, 2013, online at http://blog.al.com/breaking/2013/07/twinkle_cavanaugh_adresses_pra.html.

tion."[83] Although the requirement of a *practice* of doing so makes it harder to win such claims, *Galloway* makes clear that at least some members of the Court woulg gladly intervene in such cases. Any apparent federalism or experimentalism in the *Galloway* opinion is skin deep.

The Court concluded its treatment of the "sectarian prayer" issue with another significant statement. It rejected the Court of Appeals' view that the Town of Greece had erred because its process of selecting prayer-givers, which "was limited by the town's practice of inviting clergy almost exclusively from within the town's borders," resulted in a massive "preponderance of Christian clergy" giving the invocations at board meetings.[84] Justice Kennedy wrote:

> The town made reasonable efforts to identify all of the congregations located within its borders . . . . That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths. So long as the town maintains a policy of nondiscrimination, the Constitution does not require it to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing.[85]

I return to this point below.[86]

The second major argument by the plaintiffs relied on Justice Kennedy's expansive version of the coercion test.[87] Speaking only for himself, Chief Justice Roberts, and Justice Alito, Justice Kennedy rejected the contention that Greece's practice "coerces participation by nonadherents."[88] He emphasized that the coercion test is "a fact-sensitive one." But, in keeping with the opinion's enhanced attention to history, he also stressed that "[t]he prayer opportunity in this case must be evaluated against the backdrop of histor-

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[83] *Galloway*, 134 S Ct at 1823. See also Paul Horwitz, *Learning From Bedrosian, Cavanaugh, and Town of Greece v Galloway*, PrawfsBlawg, May 7, 2014, online at http://prawfsblawg.blogs.com/prawfsblawg/2014/05/learning-from-bedrosian-cavanaugh-and-town-of-greece-v-galloway.html; Christopher C. Lund, *Legislative Prayer Goes Back to the Supreme Court*, Slate, Aug. 15, 2013, online at http://www.slate.com/articles/news_and_politics/jurisprudence/2013/08/the_supreme_court_will_have_another_chance_to_decide_when_government_can.html (noting, among other examples, the case of a small California town that considered banning denominational prayers; "[i]n response, a citizens' group purchased billboard space on nearby highways and threatened to display each council member's vote under one of two columns—"For Jesus" and "Against Jesus."); Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn L Rev 972, 974-76, 1045-46 (2010).

[84] *Galloway*, 681 F3d at 31.

[85] *Galloway*, 134 S Ct at 1824.

[86] See Part III.B.

[87] See generally *Lee v Weisman*, 505 US 577 (1991).

[88] *Galloway*, 134 S Ct at 1824.

ical practice," including its finding that "legislative prayer has become part of our heritage and tradition, part of our expressive idiom."[89]

Although the facts showed that the invocations were often "directed . . . squarely at the citizens" and invited their personal participation,[90] Kennedy asserted: "The principal audience for these invocations is not, indeed, the public but lawmakers themselves."[91] Absent a "pattern and practice of ceremonial, legislative prayer. . . to coerce or intimidate others," he refused to find coercion in the simple fact that some audience members were offended or felt "excluded or disrespected" by the prayer practice: "Offense . . . does not equate to coercion."[92] Unlike the graduation ceremony in *Lee v Weisman*, the audience here was composed mostly of adults; they were free to enter or leave at any time, or to skip the invocation entirely.[93]

Justice Alito, joined by Justice Scalia, filed a concurrence responding to Justice Kagan's dissent, which it accused of combining a "niggling" central complaint with sweeping rhetoric that could have broad effects.[94] Kagan's criticisms of Greece's prayer practice, Alito complained, would lead logically to the conclusion that "prayer is *never* permissible prior to meetings of local government legislative bodies."[95] By rejecting many common practices, he argued, the dissent would, at best, permit "perfunctory and hidden-away prayer" by legislative bodies, and at worst lead litigation-averse local governmental bodies to treat "local government [as] a religion-free zone."[96]

More directly than Kennedy, Alito also stressed the importance of the fact that local legislative bodies have more limited resources than Congress or state legislatures, and that their prayer practices will reflect this. The dissent complained that the town had done an inadequate job of seeking invocations by representatives of different faiths. For Alito, this boiled down to

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[89] Id at 1825.

[90] Id at 1848 (Kagan dissenting).

[91] Id at 1825. Again signaling his potential willingness to act in other cases, he added, "The analysis would be different 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." Id at 1826 (emphasis added). Presumably, given the careful use of language here, no constitutional violation would occur if a *prayer-giver* "directed the public to participate" or castigated "dissidents" in the audience. If this happened habitually, however, one assumes Justice Kennedy might act.

[92] Id at 1826.

[93] *Galloway*, 134 S Ct at 1827. Curiously, Justice Kennedy closed his discussion of the coercion argument with a flat contradiction of an earlier statement in the same section of the opinion. He had previously said legislative prayers were primarily intended not for the public but for the legislators, "who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." Now, however, he described ceremonial prayers as having the "purpose and effect of acknowledge[ing] religious leaders and the institutions they represent"—like some kind of introduction of the special guests at a club banquet—not of excluding nonbelievers. See id at 1825, 1827. Not much turns on this inconsistency, but it reflects poorly on the coherence of the opinion.

[94] Id at 1829, 1831 (Alito concurring).

[95] Id at 1831.

[96] Id at 1831, 1832.

the view that "[t]he town's clerical employees did a bad job in compiling the list of potential guest chaplains."[97] But whatever failings the town's employees had manifested were "at worse careless, and . . . not done with discriminatory intent."[98] With greater care, the employee might have "realized that the town's Jewish residents attended synagogues on the Rochester side of the border" and added those temples to the invitation list.[99] The Court should not make a federal case out of the failure to do so.

Similarly, local clergy lack the experience of the pros in Congress or the state legislatures. If the prayer-givers here faced the public rather than the board or began their invocations with "Let us pray," Alito said, they were simply behaving in a way that is "commonplace and for many clergy, I suspect, almost reflexive."[100] Tellingly, he exclaimed, "If prayer is not allowed at meetings with those characteristics, local government legislative bodies, unlike their national and state counterparts, cannot begin their meetings with such a prayer" at all.[101] Alito argued that the Court should recognize the "informal, imprecise way" in which "small and medium-sized units of local government" work. Provided that it did not act with discriminatory intent, "then a unit of local government should not be held to have violated the First Amendment simply because its procedure for lining up guest chaplains does not comply in all respects with what might be termed a 'best practices' standard."[102] In short, given the importance of legislative prayer, the Court should cut local officials some slack in their implementation of prayer policies.

Justice Thomas, joined in part by Justice Scalia, filed a concurrence to reiterate his position that "the Establishment Clause is 'best understood as a federalism provision'" that applies to Congress and allows individual state establishments of religion.[103] Even if the Establishment Clause were properly read as having been incorporated against the states, he argued, the result here should not change, because the conduct at issue bore "no resemblance to the coercive state establishments that existed at the founding."[104]

Justice Kagan, joined by Justices Ginsburg, Breyer, and Sotomayor, filed the principal dissent in the case.[105] Like the majority, her opinion re-

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[97] Id at 1830.
[98] *Galloway*, 134 S Ct at 1831 (Alito concurring).
[99] Id.
[100] Id at 1832.
[101] Id at 1832.
[102] Id at 1831.
[103] Galloway, 134 S Ct at 1835 (Thomas concurring in part and concurring in the judgment), quoting *Newdow*, 542 US at 50.
[104] *Galloway*, 134 S Ct at 1837 (Thomas concurring in part and concurring in the judgment).
[105] Justice Breyer filed a short solo dissent as well to "emphasize several factors that I believe underlie the conclusion that, on the particular facts of this case, the town's prayer practice violated the Establishment Clause." Id at 1839 (Breyer dissenting). For present purposes, the most significant factor pointed to in his opinion was the town's decision to "limit[ ] its list of clergy almost exclusively to representatives of houses of worship situated within Greece's town limits," despite the proximity of houses of worship,

flects a particular vision of "the" American church-state settlement, and indeed of American political identity itself. [106] She announces it in an extended passage at the outset of the dissent:

> Our Constitution promises that [Americans] may worship in their own way, without fear of penalty or danger, and that in itself is a momentous offering. Yet our Constitution makes a commitment still more remarkable—that however those individuals worship, they will count as full and equal American citizens. A Christian, a Jew, a Muslim (and so forth)—each stands in the same relationship with her country, with her state and local communities, and with every level and body of government. So that when each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American.[107]

Strikingly, Justice Kagan quickly disclaimed any interest in revisiting the Court's decision in *Marsh v Chambers*.[108] This represented a departure from her liberal predecessors on the Court, three of whom dissented in *Marsh*.[109] Justice Brennan, for example, argued in *Marsh* that legislative prayer by *any* state legislature violated the Establishment Clause and was "not saved either by its history or by any of the other considerations suggested in the Court's opinion."[110] In contrast, Justice Kagan asserted that *Marsh* lends to legislative prayer "a distinctive constitutional warrant by virtue of tradition," and declared that the Court was right to uphold Nebraska's practice.[111]

Nevertheless, Kagan argued, a town board meeting differs from state legislative proceedings. Individual members of the public can interact with board members, "often on highly individualized matters."[112] A different standard must perforce apply.[113] The board must "exercise special care to ensure that the prayers offered are inclusive—that they respect each and

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such as several Jewish temples, "just outside its borders, in the adjacent city of Rochester." Id at 1839, 1840. As a result, "although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith." Id at 1841.

[106] See Part II.

[107] *Galloway*, 134 S Ct at 1841 (Kagan dissenting); see also id at 1851 ("In this country, when citizens go before the government, they go not as Christians or Muslims or Jews (or what have you), but just as Americans (or here, as Grecians)"), 1854 ("When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another").

[108] Id at 1841-42.

[109] See *Marsh*, 463 US at 795 (Brennan dissenting) (joined by Justice Marshall), 822 (Stevens dissenting).

[110] Id at 796 (Brennan dissenting).

[111] *Galloway*, 134 S Ct at 1845 (Kagan dissenting).

[112] Id at 1845.

[113] Id at 1849 (town board must meet its own set of "constitutional requirements").

every member of the community as an equal citizen."[114] This, Greece's town board failed to do. Its prayers were directed at the public, not the board members, and those prayers were too "explicitly Christian."[115] These factors "remove this case from the protective ambit of *Marsh* and the history on which it relied."[116] It is allowed to have prayers, but it must "take especial care to ensure that the prayers . . . seek to include rather than serve to divide."[117]

In practical terms, this means that one of two things ought to have happened here. The town could have issued prayer-givers advance instructions to "speak in nonsectarian terms, common to diverse religious groups."[118] Or it could have allowed sectarian prayer, *if* it took care to to "invite[ ] clergy of many faiths to serve as chaplains."[119] This makes it sound as if Kagan is concerned only with *process*—as if a good-faith effort to invite speakers of different faiths to give the invocation would "transform[ ]" "even sectarian prayer" into something constitutional.[120] A footnote in her dissent, however, suggests that the town must also guarantee a fair *result* where sectarian prayers are involved.[121] In any event, Kagan argued, the town here fell short of *any* acceptable process or result. The majority, she charged in closing, failed to properly appreciate "the multiplicity of Americans' religious commitments, along with the challenge they can pose to the project—the distinctively American project—of creating one from the many, and governing all as united."[122]

II. KENNEDY, KAGAN, AND "THE" AMERICAN RULE OF RELIGIOUS PLURALISM

Kennedy and Kagan agreed that *Galloway* called for "fact-sensitive" analysis.[123] Moreover, there was little significant disagreement between them as to interpretive method. Both agreed that history and tradition were the primary interpretive tool here.[124] One might therefore conclude that the

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[114] Id at 1845.
[115] Id at 1848.
[116] *Galloway*, 134 S Ct at 1849 (Kagan dissenting).
[117] Id at 1850.
[118] Id at 1851.
[119] Id at 1851.
[120] Id.
[121] *Galloway*, 134 S Ct at 1845 n2 (Kagan dissenting) ("[I]n this citizen-centered venue, government officials must take steps to *ensure*—as none of Greece's Board members ever did—that opening prayers are inclusive of different faiths, rather than always identified with a single religion."). See also id at 1851 (suggesting that, under conditions in which sectarian prayer is permitted, "one month a clergy member refers to Jesus, and the next to Allah or Jehovah," and so on).
[122] Id at 1853.
[123] Id at 1825; see also id at 1838 (Breyer dissenting), 1851-52 (Kagan dissenting).
[124] See for example, id at 1845 (Kagan dissenting) ("I agree with the majority that the issue here is 'whether the prayer practice in the Town of Greece fits within the tradition long followed in Congress and the state legislatures.'") (quoting *Galloway*, 134 S Ct at 1819).

disagreement in *Galloway* was mostly fact-driven. But there is more to it than that.

The true fundamental disagreement between them concerns the competing visions of American religious pluralism that animate their opinions. It is this disagreement that helps us properly understand *Galloway*. A consideration of that disagreement leads in turn to the broader questions of religious geography that are the focus of this article. Those larger questions also ultimately offer insights into two more opinions in this case, those of Justices Thomas and Alito.

It is worth stressing first what the majority opinion and the principal dissent have in *common*.[125] As distant as they are on many points of law and fact, they share a common denominator: both are monistic and nationalist in orientation. In other words, each opinion presents a single vision of American religious pluralism, one that is meant to apply uniformly across the United States.

For Justice Kennedy, the vision is one of active, public, but friendly *American* religiosity, an American religiosity that is in equal measure hallowed and hollowed by tradition. That it is public, and that it may be active—full-throated in tone, sectarian in content—is clear from his opinion. He treats legislative prayer with great approval, calling it a "benign acknowledgment of religion's role in society."[126] He insists on the value of allowing chaplains at official events "to express themselves in a religious idiom."[127] That idiom can be sectarian, not just "generic."[128] People are entitled to use public proceedings as an opportunity to "show respect for the divine in all aspects of their lives and being."[129]

Thus, prayer isn't just permissible: it is a positive good. But it is a particular kind of public good. It serves an essentially civic purpose. It is about unifying the nation, albeit through sectarian language, and hallowing the public affairs of a democratic republic. It "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher degree, and expresses a common aspiration to a just and peaceful society."[130] There may be an element of religion for religion's sake in these prayers. But in Kennedy's account, there is, centrally, a *civic* element as well. Thus, in

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[125] Consider Perry Dane, *Prayer is Serious Business: Reflections on* Town of Greece, Rutgers J L & Religion *28 (forthcoming), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2535931 ("Justice Kennedy's majority opinion and Justice Kagan's dissent are much more alike than either author seems to have supposed," in that neither "really treats prayer as serious business—serious theological business," and both "reduce civic prayer to essentially political declarations of identity").

[126] *Galloway*, 134 S Ct at 1819.

[127] Id at 1820.

[128] Id at 1820-21.

[129] Id at 1823.

[130] *Galloway*, 135 S Ct at 1818. *See also id* at 1823 (prayer at the beginning of a legislative session "is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage, . . . [to] invite[ ] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing").

describing congressional prayers, he writes, "[T]heir purpose is largely to accommodate the spiritual needs of lawmakers *and* connect them to a tradition dating to the time of the Founders."[131] Their goal is to "provide particular means to universal ends."[132] Those universal ends have to do with the *civic* virtues attendant upon governing, not with the personal *religious* goals of worship or salvation.

For Kennedy, legislative prayer is necessarily *civil* as well as civic. Prayer must be "solemn and respectful in tone," inviting reflection "upon *shared* ideals and *common ends*."[133] It aims to realize the principle of "e pluribus unum"—to show that "people of many faiths may be united in a community of tolerance and devotion."[134] Thus, notwithstanding Kennedy's assertion that neither legislators nor courts should scrutinize or impose conditions on the content of individual prayers, he emphasizes that there must be "an inquiry into the prayer opportunity as a whole," to ensure that the process of selecting and holding legislative prayers ensures reasonable equal access to the opportunity to pray.[135] And not the process alone: the *content* of the prayers is also open to scrutiny. A recurring practice of prayers, no matter how sincere and devout, that "denigrate nonbelievers or religious minorities, threaten damnation, [ ] preach conversion," or "betray an impermissible government purpose" may require judicial intervention.[136]

Perry Dane has written of Kennedy's description of permissible purposes for legislative prayer in *Galloway*: "Conspicuously missing in this list . . . is the most obvious purpose of genuine prayer—to pray."[137] This may be too harsh but is surely close to the mark. Although it disclaims any interest in having legislators or judges "act as supervisors and censors of religious speech,"[138] the Court in fact assigns itself this very role. It does so in the interest of serving what Justice Kennedy thinks is the *right* kind of legislative prayer: prayer that respects religious differences but puts them to work to achieve "values that count as universal."[139] Sectarian references to God are acceptable only if God agrees to play nice and work well with others. If God has another message—that Democrats are sinners, that Republic policies stink in the nostrils of the Almighty, that some "divisions along religious lines"[140] are important and true and call upon us to bear witness to them—the Lord can deliver it somewhere else.

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131 Id at 1826 (emphasis added).
132 Id at 1823.
133 Id (emphasis added).
134 *Galloway*, 134 S Ct at 1823.
135 Id at 1824; see also id at 1831 (Alito concurring) ("I would view this case very differently if the omission of [the] synagogues were intentional.").
136 Id at 1823, 1824.
137 Dane, Rutgers J L & Religion at *18 (cited in note 125).
138 *Galloway*, 134 S Ct at 1822.
139 Id at 1823.
140 Id at 1819.

Compared to the vision of religious pluralism offered by the dissent, this may be a "thick" form of religious diversity, as Chad Flanders has suggested.[141] But *only* compared to the dissent. By normal standards, this is not "no holds barred" prayer.[142] To the contrary, it is a highly constrained and distinctively American sort of prayer, offered in "a kind of optimistic and voluntaryistic spirit."[143]

In contrast, Flanders is quite right to call the vision of American pluralism offered in Justice Kagan's dissent a "thin" version of religious diversity.[144] Like Kennedy's version of religious pluralism, hers serves a particular version of what she sees as a single American creed. Like Kennedy, Kagan sees this "distinctively American project" as one of "creating one from the many, and governing all as united."[145] Like Kennedy—and unlike the dissenters in *Marsh*—she does not believe that project requires the elimination of religion from legislative proceedings.[146]

Nevertheless, there are some differences in Kagan's conception of that American project, and many differences in how she would achieve it. The key message of her vision of American identity is summed up by the telling phrase, "*only as Americans*": "When the citizens of this country approach their government, they do so only as Americans, not as members of one faith or another."[147]

Of course there is something right about this. Kagan is speaking of the duties and benefits of citizenship as such, not all aspects of the citizen's life. Still, any language referring to citizens as being "*only*" Americans, especially in this context, calls to mind a decades-old complaint of religiously devout Americans: that they have been subjected to a set of public rules that require them to "bracket" their political selves from the "essential aspects of one's very self."[148] It calls to mind, too, the response that devoutly religious

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[141] Chad Flanders, *Religious diversity, thick and thin*, SCOTUSblog, May 6, 2014, online at http://www.scotusblog.com/2014/05/symposium-religious-diversity-thick-and-thin/.

[142] Id.

[143] Marty, *Religion and Republic* at 245 (cited in note 2).

[144] Flanders, *Religious diversity* (cited in note 141).

[145] *Galloway*, 134 S Ct at 1853 (Kagan dissenting).

[146] Although, unlike Kennedy, Justice Kagan has little that is *positive* to say about the practice upheld in *Marsh*. She agrees, apparently, with the Court in *Marsh* that legislative prayer is "a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh*, 463 US at 792; see *Galloway*, 134 S Ct at 1845 (Kagan dissenting). Beyond this, however, she has nothing else to say in justification of the practice, and mostly accepts it not for its own sake but because it "has a constitutional warrant by virtue of tradition." Id at 1844.

[147] *Galloway*, 134 S Ct at 1854 (Kagan dissenting); see also id at 1841 ("[W]hen each person performs the duties or seeks the benefits of citizenship, she does so not as an adherent to one or another religion, but simply as an American."), 1845 (repeating the phrase "only as Americans").

[148] Michael J. Perry, *Morality, Politics, and Law: A Bicentennial Essay* 181 (Oxford 1988); see also Sanford Levinson, *The Multicultures of Belief and Disbelief*, 92 Mich L Rev 1873, 1875-76 (1994) (book review) (finding similarities between Perry's complaint and those of one of the books under review, Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (BasicBooks 1993)).

people give to this requirement: that this kind of bracketing, if it is possible at all, constitutes a kind of "annihilat[ion]" of key aspects of one's self.[149]

It is, no doubt, easy to be unfair to Justice Kagan's point here.[150] I stress again my assumption that Kagan means only that one's religion should not be a cause of good or bad treatment at the hands of government, *not* that one cannot or must not be publicly religious. Nevertheless, there is something remarkably tone-deaf in her language. If this were a different case, involving a different aspect of one's identity, one might wonder what it means to speak to government as "only an American." One expects not to be treated differently by government because of one's gender, for example. But one need not therefore assume that it is possible to attain a state of pure "American-ness" that involves not having a gender at all. Even for those devoutly religious Americans who oppose legislative prayer altogether, Kagan's language is bound to rankle, and to recall past battles over the seeming requirement that one bring an "unencumbered self" to one's civic activities.[151]

Kagan also differs from the majority in the rules she believes must govern legislative prayer if it is to be consistent with the "distinctively American project." Those rules are determinedly—and relentlessly—egalitarian.[152] They leave the town with one of two choices.[153] It may insist that *all* the invocations given are nonsectarian. Or, whatever the actual religious makeup of the audience, it may require a constant turnover of faiths among those giving the invocation. Only in those circumstances may gov-

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[149] Perry, *Morality, Politics, and Law* at 181 (cited in note 148).

[150] Especially because, as Perry Dane points out, Kagan does state that individual responses to the invocations given at town meetings and other legislative proceedings "reveal[ ] a core aspect of identity—who that person is and how she faces the world." *Galloway*, 134 S Ct at 1853 (Kagan dissenting); see Dane, *Prayer is serious business*, Rutgers J L & Religion at *16 (cited in note 125) (commending Kagan for recognizing "that religious particulars matter and that religion can constitute a 'core aspect of identity'"). It is striking, nevertheless, that Kagan's recognition of this fact appears only in a discussion of the possibility of audience members' negative reactions to prayer, and nowhere else. It certainly does not seem to have shaken her conviction that one can talk meaningfully about a citizen being "only an American."

[151] Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 66 (Belknap 1996). See also Michael J. Sandel, *Political Liberalism*, 107 Harv L Rev 1765, 1774 (1994) (book review) ("Why should our political identities not express the moral and religious and communal convictions we affirm in our personal lives? Why insist on the separation between our identity as citizens and our identity as moral persons more broadly conceived?"), 1793-94 ("[D]emocratic politics cannot long abide a public life as abstract and decorous, as detached from moral purposes, as Supreme Court opinions are supposed to be. A politics that brackets morality and religion too completely soon generates its own disenchantment. . . . [Political liberalism's] vision of public reason is too spare to contain the moral energies of a vital democratic life.").

[152] See *Galloway*, 134 S Ct at 1852 (Kagan dissenting) (calling the town board's approach to legislative prayer "determinedly—and relentlessly—noninclusive"). See also iId at 1841 (describing the animating vision of her dissent as one of "religious equality"). The move on and off the Court from a focus on *liberty* as the lodestar of the Religion Clauses to a primary concern with *equality* is itself significant, although it is not the primary concern of this Article. Consider Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 Cal L Rev 673 (2002).

[153] Not, as she writes, "multiple ways." *Galloway*, 134 S Ct at 1851 (Kagan dissenting).

ernment see fit to allow those giving the invocation to mention the name of their deity or deities, or to add any meaningful religious content to their remarks.[154] In short, it can either regulate religious speech, demanding that each speaker "tone down [his or her] particular faith,"[155] or it can ensure that both the process and the result of the legislative prayer process observe a kind of lockstep diversity.

Given the uncertainties inherent in the second option—what if the invitations don't yield a diverse range of speakers? What *is* a sufficiently diverse range of speakers? Will a court impose any additional restrictions on what those speakers say?—a government body facing such a choice might well take option one, the insistence on nonsectarian prayer, in the interest of avoiding litigation. Thus, as a practical matter Kagan's approach might quickly reduce to a system of so-called "ceremonial deism" and little else.[156]

These are significant differences with the majority, to be sure. Ultimately, however, I find both opinions unsatisfying.[157] Although Kennedy and Kagan's opinions have been labeled as "thick" and "thin" versions of religious pluralism, respectively,[158] both seem rather thin. Neither writer offers an especially rich account of prayer, legislative or otherwise. Both rely on "armchair psychology."[159] For Kennedy, this leads to the placid assumption that religious minorities will welcome sectarian prayers at legislative sessions "as historically benign parts of our common expressive idiom."[160] For Kagan, the armchair psychology has less to do with her assumption that sectarian prayers may "exclude and divide,"[161]and more to do with her incuriosity about whether an insistence on nonsectarian prayer will have the same divisive effect on religiously devout Americans, and her confidence that it is possible for an individual to approach the government as "only an American."

Judges are not novelists. It is less important that they write rich, imaginative opinions than that they provide stable and workable resolutions of disputes.[162] But it is hardly clear that either opinion accomplishes *that* goal either. When will a prayer practice cross the line into an impermissible

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[154] Id at 1850-51.
[155] Flanders, *Religious diversity* (cited in note 141).
[156] Id; see also, for example, Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L Rev 1545, 1549 (2010) (defining ceremonial deism as involving governmental invocations of God that are of a longstanding nature and whose "religious impact is minimal and nonsectarian").
[157] For similar sentiments, see generally, for example, Dane, Rutgers J L & Religion (cited in note 125); Flanders, *Religious diversity* (cited in note 141).
[158] See Flanders, *Religious diversity* (cited in note 141).
[159] Dane, Rutgers J L & Religion at *17 (cited in note 125).
[160] Id.
[161] *Galloway*, 134 S Ct at 1851 (Kagan dissenting). This is Dane's complaint. See Dane, *Prayer is serious business,* Rutgers J L & Religion at *17 (cited in note 125).
[162] See, for example, Frederick Schauer, *Opinions as Rules*, 62 U Chi L Rev 1455, 1455-56 (1995).

"course and practice" of denigration or proselytization?[163] What is the dividing line between sectarian and nonsectarian language?[164] When does a pattern of sectarian prayer by different faiths meet the requirement of being sufficiently "inclusive?"[165] The residue of uncertainty left behind by both opinions is something else they have in common.

The most important common point between the majority and the principal dissent, however, is that each opinion offers a single vision of American religious pluralism. Both insist that the circumstances of legislative prayer vary greatly and that any judicial resolution of such disputes is "fact-sensitive."[166] But neither seems to think that American religious pluralism *itself* is subject to any variation. The American religious historian Bret Carroll has written that "the religious meaning of the national space is as multiform and as much the stuff of public pluralistic wrangling as the religious culture within it, varying from individual to individual, group to group, locality to locality, and region to region."[167] Both Kennedy and Kagan simultaneously ignore and exemplify this point. Each attempts to declare definitively *the* meaning of American religious pluralism: *the* rules that govern it, *the* responses that citizens will have to different regimes, *the* "distinctively *American* project" that it represents.[168] In attempting to invest American religious pluralism with "a single authoritative meaning,"[169] neither stops to reflect that there may be no such meaning. It is little wonder that neither opinion feels true to life, or that neither seems likely to resolve the legislative prayer controversy. It is to this point—to the role of geography in church-state relations, and the diversity of American religious pluralism—that I now turn.

III. LAW, RELIGION, AND GEOGRAPHY IN *GALLOWAY* AND ELSEWHERE

Eric Rassbach has written that *Galloway* marks the rise of a new principle in Religion Clause interpretation, in which "the historical background of the religion clauses serves to delineate their scope today."[170] If so, *Galloway*'s emphasis on religious history calls to mind a warning delivered long before the American Revolution: "For as Geography without History seemeth a carkase without motion[,] so History without Geography wander-

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[163] *Galloway*, 134 S Ct at 1823.
[164] Id at 1851 (Kagan dissenting).
[165] Id at 1845 n2.
[166] Id at 1825; see also id at 1851-52 (Kagan dissenting), id at 1838 (Breyer dissenting).
[167] Bret E. Carroll, *Worlds in Space: American Religious Pluralism in Geographic Perspective*, 80 J Am Acad Religion 304, 341 (2012). I am grateful to Professor Sarah Barringer Gordon for first pointing me to this valuable article.
[168] *Galloway*, 134 S Ct at 1853 (Kagan dissenting).
[169] Carroll, 80 J Am Acad Religion at 335 (cited in note 167).
[170] Rassbach, 2014 Cato S Ct Rev at 74 (discussing *Hosanna-Tabor*, 132 S Ct 694) (cited in note 18).

eth as a Vagrant without a certaine habitation."[171] *Galloway* purports to give a historical account of legislative prayer and its relation to American church-state law. What is missing from that account, however, is a sense of American religious pluralism as a *spatial* phenomenon, not just a temporal one. Without that spatial sense, the opinions in this case are rendered incomplete and unpersuasive.

Religious studies scholars have long recognized the value of exploring the "complex relationships between religion and the geographical motifs of space and place."[172] "Geographical perspectives, focusing on the concepts of space and place," says a leading text on religion and geography, "are crucial in understanding essential aspects of religion as an expression of human culture."[173] A burgeoning literature has "provid[ed] substantial insights into humanity's diverse religious traditions and their relationships with the geographical contexts within which they have developed."[174]

Religious historians also recognize the importance of geography. Writing fifty years ago, Sidney Mead argued that those who seek to understand the "lively experiment" in religious liberty in the United States must focus on space, not just time. Compared to the centuries of development in European history, Mead wrote, "[t]here really was not much time in America for the traditionally antagonistic religious groups to learn to live together in peace."[175] What they *did* have was space—"practically unlimited geographical and social space," space "so vast that space came to take precedence over time in the formation of their most precious ideals," including religious liberty.[176] Just as different spatial circumstances suggested different models of religious and political coexistence, so different individuals, groups, and sects reacted differently to the opportunities and challenges that this vast new space represented. The result was "a strange mingling of attitudes toward the predominant conception of [religious] freedom"[177]—a *variety*, not a unity, of conceptions of American religious freedom. In the years since Mead wrote, a substantial literature has engaged those questions.[178] This literature studies the historical importance of American "religious geogra-

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[171] Captain John Smith, *Generall Historie of the Bermudas* (1624), quoted in Edwin S. Gaustad, *The Geography of American Religion*, 30 J Bible & Religion 38, 38 (1962) (citing Goldwin Smith, *The Heritage of Man* 464 (Charles Scribner's Sons 1960)).
[172] Stump, *The Geography of Religion* at 4-5 (cited in note 8).
[173] Id at 6.
[174] Id at 5.
[175] Mead, *The Lively Experiment* at 13 (cited in note 6).
[176] Id at 7, 14-15.
[177] Id at 15.
[178] See, for example, Shelby M. Balik, *Rally the Scattered Believers: Northern New England's Religious Geography* (Indiana 2014); Gaustad and Barlow, *New Historical Atlas of Religion in America* (cited in note 1); Bret E. Carroll, *The Routledge Historical Atlas of Religion in America* (Routledge 2000); David Chidester and Edward T. Linenthal, *American Sacred Space* (Indiana 1995); Robert Orsi ed, *Gods of the City: Religion and the American Urban Landscape* (Indiana 1999).

phy":[179] the ways in which Americans' religious practices, and their social and legal structures, were shaped and reshaped in response to the physical and political landscapes they inhabited.

Religious geography and its effects on American religious pluralism are visible at a number of levels, or "geographical scales."[180] This part focuses on developments in American religious geography at two levels: regional and local. Both help shed light on the various opinions in *Galloway*.

A. Regionalism and Competing Models of American Religious Pluralism

The use of regions has been a linchpin of studies in American religious geography since the 1960s.[181] Their usefulness as a measure of American religious life has been questioned from the outset. [182] People move in and out of these regions constantly; religious traditions themselves evolve, and wax and wane in popularity. The nature and number of faiths and cultures in the United States has exploded since the elimination of national origin quotas in the Immigration and Nationality Act of 1965.[183] Some argue that even if American geographical regions were once culturally distinct, they have been smoothed over by a "national cultural convergence" that has blurred the distinctions between different regions.[184]

The notion of American religious regionalism is thus imprecise and imperfect, and should be approached with caution. Its creators admitted this, warning that any geographical schema that attempts to represent "the enormous complexity of U.S. religious history" involves a significant, even dangerous, degree of generalization.[185] Nevertheless, regionalism remains a popular device among scholars of the history and geography of American religious pluralism, and has picked up subsequent empirical support.[186]

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179 Balik, *Rally the Scattered Believers* (cited in note 178).

180 Stump, *The Geography of Religion* at 223-24 (cited in note 8); see also Lily Kong, *Mapping 'New' Geographies of Religion: Politcs and Poetics in Modernity*, 25 Progress Hum Geog 211, 226 (2001); Tracy Neal Leavelle, *Geographies of Encounter: Religion and Contested Spaces in Colonial North America*, 56 Am Q 913, 928 (2004); Carroll, 80 J Am Acad Religion at 317 (cited in note 167).

181 See Bret E. Carroll, *Reflections on Regionalism and U.S. Religious History*, 71 Church Hist 120, 120 (2002); Carroll, 80 J Am Acad Religion at 318 (cited in note 167). The subject is generally traced back to an article by the American cultural geography Wilbur Zelinsky, and a historical atlas by the American religious historian Edwin Scott Gaustad. See Wilbur Zelinsky, *An Approach to the Religious Geography of the United States: Patterns of Church Membership in 1952*, 51 Annals Ass'n Am Geographers 139 (1961); Edwin Scott Gaustad, *Historical Atlas of Religion in America* (Harper & Row 1962).

182 See generally Laurie F. Maffly-Kipp, *Putting Religion on the Map*, 94 J Am Hist 522 (2007).

183 Pub L No 89-236, 79 Stat 911, amending INA §201 *et seq*, codified as amended 8 USC §1151 *et seq*.

184 William M. Newman and Peter L. Halvorson, *Atlas of American Religion: The Denominational Era, 1776-1990* 30 (AltaMira 2000).

185 Carroll, 71 Church Hist at 121 (cited in note 181), quoting Gaustad, *Historical Atlas of Religion in America* at x (cited in note 181).

186 See Carroll, 71 Church Hist at 122-26 (cited in note 181).

The picture of American religious regions has also been filled out significantly by a multiyear project conducted by the Leonard E. Greenberg Center for the Study of Religion in Public Life at Trinity College, in Hartford, Connecticut. Aided by the empirical work of the American Religious Identification Survey, this project, called "Religion by Region," has resulted in a series of edited collections that provide a deep statistical, demographic, and cultural analysis of American religious life at a regional level.[187] The Religion by Region project is highly relevant to an analysis of the Court's decision in *Town of Greece v Galloway*. It suggests, Bret Carroll writes, that

> the nation's religious regions are definable not only by their demographic profiles but by distinct, geographically and culturally conditioned styles of *pluralism*—characteristic kinds of alliances and tensions among the worlds occupying the regional spaces.[188]

Below, I summarize the standard picture of American religious regions, and each region's model of American religious pluralism. The reader is again duly cautioned that these regions, although useful, are neither precise nor scientific. Another important aspect of religious geography—the distinction between different localities, such as cities, suburbs, and towns—is elided here, although I take it up below. I then consider the implications of the regional picture of American religious pluralism for the main opinions in *Galloway*.

The *Middle Atlantic* region consists of New York, New Jersey, Pennsylvania, Delaware, Maryland, and the District of Columbia. It is home to a greater proportion of Catholics and Jews than the nation as a whole. Its Christian population is composed largely of mainline denominations; only here and in New England do mainline Protestants significantly outnumber evangelical denominations. It is marked by "strong links between religious

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[187] See Andrew Walsh and Mark Silk, eds, *Religion and Public Life in New England: Steady Habits, Changing Slowly* (AltaMira 2004); Randall Balmer and Mark Silk eds, *Religion and Public Life in the Middle Atlantic Region: The Fount of Diversity* (AltaMira 2006); Philip Barlow and Mark Silk eds, *Religion and Public Life in the Midwest: America's Common Denominator?* (AltaMira2004); Jan Shipps and Mark Silk eds, *Religion and Public Life in the Mountain West: Sacred Landscapes in Transition* (AltaMira 2004); Patricia O'Connell Killen and Mark Silk eds, *Religion and Public Life in the Pacific Northwest: The None Zone* (AltaMira2004); Wade Clark Roof and Mark Silk eds, *Religion and Public Life in the Pacific Region: Fluid Identities* (AltaMira 2005); Charles Reagan Wilson and Mark Silk eds, *Religion and Public Life in the South: In the Evangelical Mode* (AltaMira 2005); William Lindsey and Mark Silk eds, *Religion and Public Life in the Southern Crossroads: Showdown States* (AltaMira 2005). The work is summarized in a helpful additional volume by the project's director and associate director. See Mark Silk and Andrew Walsh, *One Nation, Divisible: How Regional Religious Differences Shape American Politics,* paperback ed. (Rowman & Littlefield 2011). I draw heavily on that book, as well as the descriptions in Bret Carroll's superb article on American religious geography, in this section. See Carroll, 80 J Am Acad Religion at 318-27 (cited in note 167). For the sake of economy, I have tried to keep footnotes to a minimum and to corral them at the end of each paragraph.

[188] Carroll, 80 J Am Acad Religion at 319 (emphasis added) (cited in note 167).

and ethnic identity." Its characteristic form of religious pluralism is one of negotiated coexistence between ethnocultural groups: a "functioning ecology in which each community finds its niche under an umbrella of shared values." It features "a tradition of ecumenical cooperation and interfaith undertakings" between the major groups. The classic mid-century description of "tri-faith" American religious pluralism, made famous by Will Herberg's book *Protestant-Catholic-Jew*, is really just the Middle Atlantic model writ large.[189]

New England consists of Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine. Once the base of strict Puritan Christianity, it is now "the least Protestant region of the country." More important than its Puritan past is the Protestant-Catholic tension that burst onto the scene in the nineteenth century as a result of Irish immigration to the region. That tension produced this region's own model of religious pluralism: not the mid-Atlantic regime of intercultural cooperation, but the establishment of "geographically parallel religious worlds," separate enclaves with duplicate sets of social institutions. Under this regime, religion belongs "at the level of the individual, the family, and the voluntary religious community." Within the "democratic public realm, . . . citizens [do] not impose sectarian demands on one another[,] in order to preserve civic peace." This is the pluralism of the 1960 presidential election, and John F. Kennedy's half-sincere, half-strategic insistence that religion play no role in public life. It is the same vision that led the Supreme Court in the early 1960s to strike down school prayer.[190]

The *South* consists of Virginia, West Virginia, Kentucky, the Carolinas, Georgia, Florida, Alabama, and Mississippi. It is heavily evangelical in orientation; even mainline Protestantism tends to adopt a more evangelical tilt in this region. It is a region of self-declared culture warriors, defenders of "traditional religious values" against the forces of secularism and cultural change. Perceived as a powerful threat by secularists and liberals, from its own perspective it is culturally, religiously, and "spatially on the defensive."[191]

"The *Southern Crossroads*—Louisiana, Texas, Arkansas, Oklahoma, and Missouri—looks like the South plus Roman Catholics." Its Catholic population is twice that of the South. Much of the remainder is evangelical, including Pentecostal, Holiness, and Charismatic denominations. It is the

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189 *See* Silk and Walsh, *One Nation, Divisible* at 2-3, 15-40 (cited in note 187); Will Herberg, *Protestant-Catholic-Jew* (Doubleday, 1960); Carroll, 80 J Am Acad Religion at 319-20 (cited in note 167).

190 *See* Silk and Walsh, *One Nation, Divisible* at 3-4, 41-62, 211-12 (cited in note 187); Carroll, 80 J Am Acad Religion at 326 (cited in note 167); *Engel v Vitale*, 370 US 421 (1962); *Abington School District v Schempp*, 374 US 203 (1963).

191 *See* Silk and Walsh, *One Nation, Divisible* at 5-6, 63-84 (cited in note 187); Carroll, 80 J Am Acad Religion at 324-25 (cited in note 167).

region with the fewest members of minority faiths. Historically a region of "political and religious clashes of pronounced intensity," it retains that intensity today across a range of social and religious issues, including a fierce attachment to the lowering of the wall between church and state. It shares the South's political and social views. But it lacks the South's gentility and approaches flashpoint issues, including church-state conflicts, with the gloves off. Its "harder-edged culture-warriors," in both religion and politics—figures like James Dobson of Louisiana and Tom DeLay of Texas—spearheaded much of the national culture war of the 1990s and 2000s.[192]

California, Hawaii, and Nevada comprise the *Pacific*. Its religious mix is unique in many respects. For example, survey data suggest that "more residents of the Pacific identify with Eastern religions than with any of the mainline Protestant denominations," although the number of both is still relatively small. It is the region with the second highest proportion of the population that identifies with no religion at all. It is a region of "loosened" and "eclectic" religious commitments, in which many individuals freely adopt elements of various faiths in a piecemeal fashion, or simply create views and practices of their own. Particularly in the last several decades, it has been home to an increasing number of committed conservative Protestants. But there is no dominant faith in the region, and no historical tradition of a dominant faith. (In the 1950s, only 3 percent of the public schools in western states engaged in "Bible readings and devotional practices," compared to 77 percent in the South.) The Pacific culture is one of "liquid modernity": of fluidity and "obligatory tolerance and individualism."[193]

Even more visibly than regions like New England, the approach to religious pluralism of the other two western regions is deeply dependent on the land—in this case, the land's *natural* features as well as its social characteristics. These regions thus provide a different and important approach to religious pluralism.

The *Pacific Northwest*—Oregon, Washington, and Alaska—is vast and variegated. Its religious makeup is noteworthy for the large number of "unchurched" individuals claiming no affiliation to a particular denomination, and for containing the largest number of Americans claiming no religious affiliations of *any* kind. This has earned it the sobriquet "the None Zone." It has a substantial Catholic population and a substantial number of evangelical Christians. Unlike in the South, however, they are more likely to be Pentecostal or nondenominational Christians than Baptists. These demographic and physical attributes have led to two particularly noteworthy responses.

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[192] See Silk and Walsh, *One Nation, Divisible* at 6-7, 85-108, 214-15 (cited in note 187); Carroll, 80 J Am Acad Religion at 325-26 (cited in note 167).

[193] See Silk and Walsh, *One Nation, Divisible* at 7-9, 109-34 (cited in note 187); Carroll, 80 J Am Acad Religion at 321-22 (cited in note 167); Wade Clark Roof, *Pluralism as a Culture: Religion and Civility in Southern California*, 612 Annals Am Acad Polit & Soc Sci 82 (2007). The phrase "liquid modernity" comes from Zygmunt Bauman, *Liquid Modernity* (Blackwell 2000).

First, the "fragility of the individual sectarian enterprises" has led to a tradition of "ecumenical and interfaith cooperation," a necessary "pooling [of] moral and financial resources." Second, there is a substantial regional divide between the urbane "nones" in the western parts of the region and the more religious, conservative, traditionalist Christians on the eastern side. These religious dissenters from the norms of cities like Seattle or Portland comprise a kind of "evangelical counterculture." One writer has suggested that it should be seen not as a "separate sectarian world in permanent confrontation with the surrounding culture," but as "a dissenting parallel community" of its own.[194]

The *Mountain West*—Arizona, New Mexico, Utah, Idaho, Colorado, Wyoming, and Montana—is the nation's "preeminent oasis, or archipelago, region." It features a few urban communities, isolated within vast unpopulated spaces. Other regions, such as the Middle Atlantic, require modes of pluralism that allow different faiths to coexist in the the same small space. The different communities in the Mountain West do not, and have come up with three different models of pluralism instead. Taken together, they constitute a "'libertarian' variety [of pluralism] in which each spiritual community stak[es] out its own turf.'"[195]

The "Catholic heartland" of Arizona and New Mexico experienced conflicts over control of public institutions like the schools—controlled here by Catholics. After court rulings mandated strict separationism within the public schools, it responded by developing rival private school systems. It has also been the site of repeated conflicts with Native American tribes over access to sacred sites. The mountainous regions of Colorado, Wyoming, and Montana, rather than being characterized by any particular faith *or* any form of interfaith cooperation, are the sites of multiple "scattered enclaves." Those include both Native American reservations and non-native enclaves. Prominent examples include Boulder and Colorado Springs, "two cities separated by less than 100 miles but spiritually worlds apart": the first awash in both secularism and Eastern or syncretic spirituality, the second a hub for conservative evangelical groups such as Focus on the Family. Finally and most famously, there is the "Mormon corridor" of Utah and Idaho, dominated by the Church of Jesus Christ of Latter-day Saints. It is arguably "the only part of the United States that today possesses a de facto if not a de jure religious establishment."[196]

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[194] See Silk & Walsh, *One Nation, Divisible* at 9-10, 135-55 (cited in note 187); Carroll, 80 J Am Acad Religion at 324 (cited in note 167). For further discussion of the evangelical counterculture of the Pacific Northwest, see James K. Wellman, Jr, *Evangelical vs. Liberal: The Clash of Christian Cultures in the Pacific Northwest* (Oxford 2008).

[195] Carroll, 80 J Am Acad Religion at 322 (cited in note 167) (quoting Mark Silk, *Defining Religious Pluralism in America: A Regional Analysis*, 612 Annals Am Acad Polit & Social Sci 64, 78 (2007)).

[196] For this and the previous paragraph, see Silk and Walsh, *One Nation, Divisible* at 10-11, 157-79 (cited in note 187); Carroll, 80 J Am Acad Religion at 322-25 (cited in note 167).

The *Midwest*, a sort of common denominator for the nation as a whole, may "provid[e] the model for religion in American public life in the twenty-first century." It consists of a large number of states—Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota, Iowa, the Dakotas, Kansas, and Nebraska—lacking the common ties of other regions. It is as religiously and ethnically diverse as the Middle Atlantic region, but "different geographic conditions have generated differences of both religious demography and pluralistic style." It is a "[s]olidly pluralistic" region, lacking either a single dominant faith or deep rivalries between different faiths. At the same time, it is not subject to the privatizing impulses of New England politics. It features "a tradition of tolerant religious pluralism, high rates of religious adherence, and folkways that place considerable stress on the public value of religion." It favors a state that is religiously neutral; unlike New England, however, it is favorably disposed toward religiosity *in* public. This partly reflects the greater presence of evangelical Christianity in the Midwest, with an accompanying focus on common, publicly pronounced values and virtues. But Midwestern evangelicals are more moderate in their public expressions of faith than their southern co-religionists.[197]

Two key observations emerge from this account of the "array of geographically defined pluralisms" that help define American life. [198] These observations apply across what might be called social, geographical, political, and historical space. They not only help reveal the nature of current conditions in American religious and public life. They also reflect changing legal and political arrangements concerning church-state relations over the past several decades, roughly since the Supreme Court incorporated the Establishment Clause against the states.[199] These observations fill in this article's analysis of *Galloway*. They help explain why the primary contending opinions in that case come off as thin, unsatisfactory, and unlikely to achieve lasting consensus in American church-state relations.

The first point should be obvious from the preceding regional survey. Nevertheless, it is routinely overlooked in American church-state scholarship. That field focuses heavily on the decisions of federal courts, especially the Supreme Court.[200] Those heavily nationalist, centralized sources are supplemented by slices of founding-era history, and by abstract theorizing

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[197] See Silk and Walsh, *One Nation, Divisible* at 11-12, 181-204, 224-32 (cited in note 187); Carroll, 80 J Am Acad Religion at 320-21 (cited in note 167).

[198] Carroll, 80 J Am Acad Religion at 327 (cited in note 167).

[199] *See Everson v Bd. of Education*, 330 US 1 (1947).

[200] This is a general problem in constitutional law scholarship. *See, e.g.,* Richard A. Posner, *Against the Law Reviews*, Legal Affairs, Nov/Dec 2004, online at http://legalaffairs.org/issues/November-December-2004/review_posner_novdec04.msp (lamenting the undue focus in the law reviews on the Supreme Court and the relatively few decisions it issues each year, and legal scholarship's comparative neglect of lower court decisions). I acknowledge the irony of saying so in this particular venue.

about religious liberty.[201] The literature tends toward generalized statements about "American religious pluralism" that treat the nation and its religious and political culture as a single, unparticularized whole.[202] Although law and religion scholars are aware that different American colonies "developed distinctive patterns of dealing with difference,"[203] they view the historical narrative as moving toward a single, final rule or regime of American pluralism. They have been incurious about the extent to which those distinctive approaches, while evolving considerably, remain in place today. This is precisely the conclusion that the regional account of American religious pluralism suggests.

The regional account also says something important about the variety and nature of those versions of pluralism. They tend to take a number of specific forms, adapted to the demographic, denominational, and political mix of each region, its history, and its landscape. They include the religious pluralism regimes, such as those of the Middle Atlantic or New England, that we are most familiar with and that form the basis of standard judicial and scholarly accounts of religious pluralism in the context of the Establishment Clause. The Middle Atlantic's regime involves peaceful coexistence, with openly religious language permitted and welcomed. New England's consists of peaceful coexistence under a rule discouraging or forbidding religious language in the public square.

As our regional survey suggests, however, there are other regimes. One we might call a "sorting" approach to religious pluralism.[204] The Mormon corridor offers an example: the use of migration (and expulsion) and "geographical distance" to establish a distinctive "society in the west that actualized [the Mormons'] highest theology and governed their everyday lives."[205] Another is the "enclave" strategy, as in Oregon or Colorado: the establishment of separate communities, each reflecting the religious views and social preferences of its residents. Still another we might call, drawing on the Dutch experience, "pillarization": the creation of parallel sets of institutions serving different religious and other communities, living side by

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[201] *See* Paul Horwitz, *Freedom of the Church Without Romance*, 21 J Contemp Legal Issues 59, 92-93 (2013) ("[M]ost scholarship on law and religion, including much of the best of it, privileges ideas over interests. It invokes history, but it tends to emphasize intellectual history rather than a more jaundiced and institutionally focused historical analysis. It is also top-heavy with theory. In our field, a page of Rawls often outweighs a volume of financial or demographic data.").

[202] *See* Paul Horwitz, *Demographics and Distrust: The Eleventh Circuit on Graduation Prayer in* Duval v Adler County, 63 U Miami L Rev 835, 881-87 (2009); Schragger, 117 Harv L Rev at 1813-19 (cited in note 12).

[203] Diana L. Eck, *A New Religious America: How a "Christian Country" Has Now Become the World's Most Religiously Diverse Nation* 37 (HarperOne 2001).

[204] See Samaha, 2005 S Ct Rev 135 (cited in note 12).

[205] Silk and Walsh, *One Nation, Divisible* at 164 (cited in note 187).

side in the same larger community.[206] At one time, this was New England's answer to religious conflict.

The second observation comes from the conclusion to Silk and Walsh's summary of the Religion by Region project. There, they argue that our understanding of the "national narrative" of American church-state relations may be altered and enriched by what we have learned about American religious regionalism.[207]

On this view, the various "postwar dispensations" that have characterized American attempts to come to terms with religious diversity, and establish rules and norms (political and legal) to manage our pluralism, did not come about by happenstance. Nor did they come directly from early American history, by way of some oracle sitting on the Supreme Court,[208] or from some effort to obtain "constitutional meaning . . . by interpreting the materials in accordance with the best available political-moral theory."[209] Rather, and by whatever mechanism, those dispensations have come from, or bear a remarkable resemblance to, our regional models of pluralism. Some of those models have been influential mostly at a political or cultural level. At other times, they have been expressed more directly in the legal regimes that defined the Establishment Clause in different postwar periods.

The 1950s regime, for example, has been characterized as one of relative religious unity and peacefulness. Its spirit was captured in Herberg's *Protestant-Catholic-Jew*, a classic picture of a "tri-faith America"[210] that was publicly pious without being riven by sectarian division, largely because of its focus on "Judeo-Christianity."[211] This settlement manifested in

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[206] See, for example, Stephen V. Monsma & J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* 56-60, 84-85 (Rowman & Littlefield, 2d ed 2009).

[207] Silk and Walsh, *One Nation, Divisible* at 205 (cited in note 187).

[208] See, for example, *Everson*, 330 US at 8-15 (offering a stylized picture of the "background and environment of the period in which [the] constitutional language [of the Establishment Clause] was fashioned and adopted," replete with references to "freedom-loving colonials," "aborren[t]" practices, and the "dramatic climax" of the Virginia legislative debate over the tax levy for the support of religious ministers).

[209] Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 Harv L Rev 1869, 1901 (2009) (book review).

[210] See Kevin M. Schultz, *Tri-Faith America: How Catholics and Jews Held Postwar America to its Protestant Promise* (Oxford 2011).

[211] See, for example, Anna Su, *Separation Anxiety: The End of American Religious Freedom?*, 30 Const Comment 127, 138-39 (2015) (book review). Eisenhower's famous statement, "Our government has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is," comes from this period. As Andrew Koppelman observes, the line that followed this one is less remembered, but it is fully consistent with the equation of religious pluralism with the dominant Judeo-Christian triumvirate: "With us of course it is the Judeo-Christian concept[,] but it must be a religion that all men are created equal." Andrew Koppelman, *Corruption of Religion and the Establishment Clause*, 50 Wm & Mary L Rev 1831, 1885 (2009) (quoting Mark Silk, *Spiritual Politics: Religion and America Since World War II* 40 (Touchstone 1988)). See also Silk, 612 Annals Am Acad Polit & Soc Sci at 67 (noting that the phrase "Judeo-Christian" was popularized in a series of conferences held at Columbia University, of which Eisenhower later served as president, and that Eisenhower's famous remarks were delivered in an address to the Manhattan-based Freedoms Foundation) (cited in note 195).

various legal actions formalizing an openly, if thinly, religious American creed—in the amended Pledge of Allegiance, in the insistence that "In God We Trust" be stamped on our coins, and in the placement of Ten Commandments displays on government property.[212] Those actions would pose doctrinal dilemmas for future Courts.[213] At the time, however, they were simply the accepted religious, political, *and* legal landscape of the era.

As Silk and Walsh point out, the vision of American religious pluralism that undergirded these practices was strikingly similar, if not identical, to the Middle Atlantic approach to pluralism. The tri-faith settlement was not equally relevant or applicable everywhere in the nation. To the contrary, it little resembled demographic or political conditions in many parts of the country. Nevertheless, the Middle Atlantic settlement defined the culturally and politically dominant themes of the era at a national level. Its model of "distinct ethnoreligious communities[,] minding their own business in reasonable harmony" with one another, provided a useful "image of the several separate but equal tribes of American religion pulling together against the common Communist foe."[214]

When this regime gave way, it was succeeded by the modern New England approach to pluralism: the view that "religion should be kept clear of the political fray, that the civic order functions best when religion is confined to the private sphere of individuals and faith communities."[215] The nation's demographic makeup had not changed overnight. But the New England dispensation suited the times. In particular, it suited a presidential candidate, John Kennedy (himself a New Englander), who needed to convince Protestants that his Catholicism was irrelevant to his role as president.[216] In addition to political and cultural dominance, this settlement became dominant on the Supreme Court. Beginning with its rulings striking down school prayer,[217] the Court struck down a number of pietistic public practices compatible with the earlier, Middle Atlantic-oriented approach to pluralism but incompatible with the New England regime.[218] "[T]he ideolo-

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[212] *See* Frederick Mark Gedicks & Roger Hendrix, *Uncivil Religion: Judeo-Christianity and the Ten Commandments*, 110 W Va L Rev 275, 282-83 (2007).

[213] See, for example, *Van Orden v Perry*, 545 US 677 (2005) (examining a challenge to a Ten Commandments display on state property); *Newdow*, 542 US 1 (getting rid of a challenge to the requirement that school children say the Pledge of Allegiance, including the "under God" language). As I suggested above, this is the difficulty that Justice Kennedy attempts to dispel for good in *Galloway*, by giving the Court's advance blessing to any public religious practice that it adjudges to be sufficiently longstanding to form part of our "heritage and tradition." *Galloway*, 134 S Ct at 1825 ("As a practice that has long endured, legislative prayer has become part of our heritage and tradition, part of our expressive idiom, similar to the Pledge of Allegiance, inaugural prayer, or the recitation of 'God save the United States and this honorable Court' at the opening of this Court's sessions.").

[214] Silk and Walsh, *One Nation, Divisible* at 211 (cited in note 187).

[215] Id at 211.

[216] Id at 211; *see also* Horwitz, 39 U Memphis L Rev at 978-95 (cited in note 67).

[217] See *Engel*, 370 US 421; *Schempp*, 374 US 203.

[218] See Gedicks & Hendrix, 110 W Va L Rev at 283 & n53 (citing other examples) (cited in note 212).

gy of church-state separationism in fact reached its high-water mark during the Kennedy era."[219]

Other regional approaches to American religious pluralism have corresponded to changing views and trends in other periods of postwar history. For example, the rise of the Religious Right from the mid-1970s through today, with an accompanying increase in confrontationalism over religion and its public role,[220] suggests a challenge to the prior pluralism regimes from a Southern, and ultimately a more aggressive Southern Crossroads, perspective.[221] The Southern Crossroads approach continues to influence American political culture. But Silk and Walsh argue that the election of Barack Obama, who is more openly religious than a figure like Kennedy but less insistently sectarian than some of his opponents or predecessors, indicates the national ascendancy of the Midwestern model of religious pluralism.[222] Despite the strictures she would place on legislative prayer, it may be that Justice Kagan's eagerness to affirm it, rather than reject it as earlier liberal Justices did, buttresses this thesis.

Clearly, one should not accept this analysis unskeptically or apply it too mechanically. Among other things, Silk and Walsh do not explain clearly how and why particular regional settlements came to the fore in particular eras. The story they offer is arguably too neat, too cute. Nevertheless, they provide a compelling case for the conclusion that there is "an abiding geography of American religion."[223] It manifests itself in particular regional cultures and approaches to pluralism that move in and out of prominence at the national level.

Many writers, including legal scholars, think about religious pluralism only at the national level. They treat the various regimes that have characterized national culture and politics—the separationist model, the civil religion model, the forceful "Christian nation" model, and so on—as representing a *unitary* form of American pluralism, rooted in American history but unrooted from particular places. Each model has its champions; each champion assumes that the goal is the triumph of the "right" model of American religious pluralism. The regional story of American religious pluralism that we have examined here, and the fact that each transient national regime has corresponded to a particular regional model of pluralism, casts doubt on the entire enterprise, and on this entire way of thinking about American religious pluralism.

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219 Silk and Walsh, *One Nation, Divisible* at 212 (cited in note 187).

220 See generally Steven P. Miller, *The Age of Evangelicalism: America's Born-Again Years* (Oxford 2014).

221 *See* Silk and Walsh, *One Nation, Divisible* at 215 (noting the ultimate passage of leadership roles in politics and within politically active religious organizations from Southerners to individuals from states within the Southern Crossroads region) (cited in note 187).

222 Id at 226.

223 Gaustad, 30 J Bible & Religion at 38 (cited in note 171).

In short, it is a mistake to conclude that any given regime that has been hailed as *the* correct form of American religious pluralism is the final, definitive answer to the American church-state dilemma. It is also wrong to conclude that any such regime draws its authority directly from Founding-era historical sources, or from abstract theories of religious liberty. Rather, we should see each proposed model of American religious pluralism or church-state relations as just one of many *regional* regimes. Each is likely to come in and out of national prominence, briefly appearing to be *the* solution to American church-state relations but eventually being challenged or supplanted by some other region's approach.

This lesson applies directly to the Supreme Court's decision in *Galloway*. It suggests that there is a significant obstacle to the monistic, nationalizing project pursued, albeit with different results, by both Justice Kennedy and Justice Kagan and their brethren in *Galloway*, with the customary—and solitary—exception of Justice Thomas.

In their own way, both Kennedy and Kagan seek to present and entrench a single vision of American pluralism, one that results in a single correct model of legislative prayer. Each one, as it turns out, resembles one or more of the regional regimes that have competed for national prominence. In his confidence that legislative prayer—even if it turns out to be primarily Christian—will help "lawmakers to transcend petty differences in pursuit of a higher purpose," and that sectarian but generic religious language can "provide particular means to universal ends,"[224] Justice Kennedy draws heavily on the language and ideas of the Middle Atlantic settlement. In his statement that "willing participation in civic affairs can be consistent with a brief acknowledgment of [ ] belief in a higher power,"[225] he sounds like a latter-day Eisenhower, insisting on the importance of a vague but essentially Judeo-Christian "deeply felt religious faith" in public life.[226]

Justice Kagan's approach resembles a combination of the Midwestern and New England settlements. Her apparent endorsement of legislative prayer evokes the Midwestern faith in the importance of public religiosity in expressing our common values. At the same time, the stringent rules she would impose on legislative prayer suggests a deeper fear that public religiosity will inevitably "divide [Americans] along religious lines."[227] That is the New England strain in her dissent.

The point is not that one or the other approach is right or wrong. Each has its share of wisdom. It is that each represents just one of many possible church-state settlements. A regional examination of American religious life leads inexorably to the conclusion that "American religious pluralism can be understood as in fact consisting of *an array* of geographically defined

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224 *Galloway*, 134 S Ct at 1818, 1823.
225 Id at 1827-28.
226 Horwitz, 39 U Memphis L Rev at 978 (cited in note 67).
227 *Galloway*, 134 S Ct at 1854 (Kagan dissenting).

pluralisms."[228] As long as these different pluralisms are ingrained in the history and culture of different regions, there is little chance that any one of them will command the permanent allegiance of all Americans. On the ground, American religious pluralism is too varied—by history, geography, culture, and circumstances—for all Americans, whatever their region, to subscribe to a single, final solution to the problem of American religious diversity and church-state conflict.[229] It is unsurprising that both Kennedy and Kagan's proposals, despite the confidence with which each is put forward, come off as thin, incomplete, and unconvincing.

B. Local American Religious Pluralism: Urbanity, Homogeneity, and Borders

Our geographical account of *Galloway* now shifts from the regional to the local: to "the cities, towns, and neighborhoods where interreligious encounters are most immediate," and where "what is at stake in the pluralist dynamic is felt most directly."[230] Here, religious geography's lesson is simple, subtle, and essential: "[R]eligious groups do not simply exist in space; they also imagine and construct space in terms related to their faith."[231] The legal lesson is similar: "[Religiously] identified space interacts with [religion]-neutral legal doctrine and public policy to enforce" religious dominance and its exclusionary effects.[232]

Figuratively and literally, these lessons intersect with *Galloway* at an imaginary line on a map: the line dividing the Town of Greece, as a political jurisdiction, from the places where *some* of its people—an identifiable religious minority—worship. That imaginary line is crucial for the outcome in *Galloway*.

We begin with a preliminary point, one that is well-known but often overlooked.[233] As I have argued, discussions of American religious diversity are often highly general in nature. They describe the United States as a whole as religiously diverse, without delving much into how those faiths are

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[228] Carroll, 80 J Am Acad Religion at 327 (emphasis added) (cited in note 167).

[229] Consider Marty, *Religion and Republic* at 247 ("Whatever happens, however, it seems clear that not all human needs can be met by secular interpretation and private faith, by tri-faith or conventional denominational life, or by a common national religion. New particularisms will no doubt continue to arise, to embody the hopes of this 'people of peoples.'") (cited in note 2).

[230] Carroll, 80 J Am Acad Religion at 327 (cited in note 167); see also John C. Blakeman, *The Religious Geography of Religious Expression: Local Governments, Courts, and the First Amendment*, 48 J Church & St 399, 399-401 (2006).

[231] Stump, *The Geography of Religion* at 23 (cited in note 8).

[232] Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 Harv L Rev 1841, 1845 (1994).

[233] For previous efforts to address it, see Horwitz, 63 U Miami L Rev at 881-92 (cited in note 202); Paul Horwitz, *Of Football, "Footnote One," and the Counter-Jurisdictional Establishment Clause: The Story of* Santa Fe Independent School District v Doe, in Richard W. Garnett and Andew Koppelman eds., *First Amendment Stories*, at 481, 500-10 (Foundation 2011).

distributed.[234] The story is quite different on the ground. Some locales *are* incredibly religiously diverse. Elsewhere, a single religion—or even a denomination—dominates, with only a few members of minority faiths present.[235]

In the former condition, which represents the condition of urbanity in places like New York, Los Angeles, or Chicago, religious diversity may produce tension and conflict.[236] But it is also more likely to lead to cooperation and negotiation.[237] There will always be exceptions.[238] But the more religiously diverse a locality is, the less likely it is that any single faith will be politically dominant. Rather, it is far more likely that all religious (and non-religious) stakeholders will broker an inclusive compromise. In areas that are *completely* homogeneous, peace may be achievable for the opposite reason: with no minorities to be dissatisfied or disadvantaged, the local practice will satisfy everyone.

Still, the former state of affairs only applies in the metropolis, and the latter is almost entirely hypothetical. The reality is that many locations are neither completely heterogeneous nor completely homogeneous. Rather, they are *overwhelmingly* religiously homogeneous, dominated by one faith but always with *some* religious minorities.

Religious minorities in such locales may find that they live in the worst of all possible worlds. They will be confronted by practices that exclude or disadvantage them, and subject to both legal and extralegal harassment if they dare come forward and object.[239] Courts may step in when such conduct occurs—*if* a plaintiff can be found and convinced to step forward—ending the harassment and halting the offending public religious practice. But doing so may in turn leave the majority with its own sense of injury, and further exacerbate existing conditions of religious conflict.[240]

The solution is unclear as a matter of first principles. Some favor a decentralized approach that would allow each jurisdictions to establish its own

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[234] Horwitz, 63 U Miami L Rev at 882 (cited in note 202).

[235] *See id* at 886.

[236] See Schragger, 117 Harv L Rev at 1814 (arguing that "the American experiment in pluralism is only truly tested under conditions of urbanity") (cited in note 12).

[237] See Roof, 612 Annals Am Acad Polit & Soc Sci at 93 (noting that religious leaders serving the immigrant communities of southern California are "well-educated urban leaders who appreciate diversity, openness, and the necessity of cooperation") (cited in note 193).

[238] *See, e.g., Bronx Household of Faith v Board of Educ. of City of New York*, 750 F 3d 184,188-89 (2nd Cir 2014) (recounting "long-running litigation" in which the New York City Board of Education repeatedly refused to accommodate a religious group seeking equal access to school facilities on weekends); Douglas Laycock, *Voting With Your Feet is No Substitute for Constitutional Rights*, 32 Harv J L & Pub Pol 29, 41-42 (2009) (discussing this case and noting that the litigation had been in progress for some fifteen years as of the date of publication of that article).

[239] See, for example, Horwitz, 63 U Miami L Rev at 887-88 (offering examples) (cited in note 202); Horwitz, *The Story of* Santa Fe Independent School District at 488, 495, 502, 504) (same) (cited in note 233).

[240] See, for example, Samaha, 2005 S Ct Rev at 147 (cited in note 12).

practices.[241] Others argue that the Establishment Clause should be read to favor an "anti-sorting" principle, under which the goal is to encourage the dispersal rather than the concentration of religious faiths in any particular jurisdiction. On this view, "national standards for religious liberty would be better than local political discretion and the resulting policy variance."[242] In contrast to both of these options, I have argued that, despite the resurgence of the view that the Establishment Clause forbids *federal* religious establishments but not state or local ones,[243] conditions on the ground suggest that "the Establishment Clause might be better understood, at least in the modern era, as being more properly concerned with state and local establishments of religion than with federal establishments of religion."[244]

For now, the answer to that question is unimportant. What *is* important is that Establishment Clause doctrine does not formally recognize the problem. Doctrine in this area is indifferent to the "institutional scale" and location of government action. As Richard Schragger has observed, it assumes that the same rule applies, no matter the size, scale, or nature of the governmental actor involved.[245]

The result is cases like *Galloway*. The Court paid lip service to the notion that the Establishment Clause inquiry must be "fact-sensitive," giving attention to "both the setting in which the prayer arises and the audience to whom it is directed."[246] In reality, it showed little interest in the question whether a town board ought to be treated differently than Congress or a state legislature for purposes of a challenge to legislative prayer. Any curiosity it had on this question was satisfied by the citation of a scintilla of evidence that legislative prayer by local governmental bodies also "has historical precedent."[247] Nor was it curious to discover what the nature and effect of these practices has been for religious minorities, whether it has eased or provoked local political division along religious lines, or anything else. Neither Justice Kennedy's majority opinion nor Justice Kagan's principal dissent, moreover, so much as *mention* Justice Thomas's opinion, which at least discussed the issue, albeit strictly on originalist and federalist grounds. Whatever the answer to the question how to address "the role of the local in the doctrine and discourse of religious liberty"[248] should be, it must at least be acknowledged and addressed directly.

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[241] See, for example, Schragger, 117 Harv L Rev at 1815-16 (cited in note 12).
[242] Samaha, 2005 S Ct Rev at 138 (cited in note 12).
[243] In *Galloway*, that argument is advanced (as usual) by Justice Thomas, writing alone on this point. See *Galloway*, 134 S Ct at 1835 (Thomas concurring in part and concurring in the judgment).
[244] Horwitz, 63 U Miami L Rev at 891 (cited in note 202); see also Horwitz, *The Story of* Santa Fe Independent School District at 504-08 (cited in note 233).
[245] *See* Schragger, 117 Harv L Rev at 1813, 1816-17 (cited in note 12).
[246] *Galloway*, 134 S Ct at 1825.
[247] Id at 1819.
[248] Schragger, 117 Harv L Rev at 1813 (cited in note 12).

Town of Greece v Galloway poses another interesting issue at the level of the local in religious and political geography. This issue concerns the boundaries of the Town of Greece itself. The resources for analyzing this issue do not come from religious geography. They come from the field of legal and political geography more generally.[249] In particular, scholarly treatments of the relationship between religious geography and Establishment Clause doctrine may learn a great deal from the study of the relationship between geography and race. A number of scholars have recognized the importance of the similarities and differences between race and religion, although that work has been mostly intermittent and preliminary in nature.[250] Here, I draw primarily on the work of Richard Thompson Ford, who has employed the political geography literature to examine the relationship between race and the drawing of political boundaries.[251]

One of Ford's central points is that legal boundaries, like the lines that demarcate a political jurisdiction such as the Town of Greece, are often taken as givens—as natural, necessary, or both. We must organize our affairs somehow, after all. We do so by drawing lines, and then assigning votes, representation, responsibility for providing public services, and other markers of legal and political rights and duties according to those lines. Sometimes we treat those boundaries as mere creations—as "'governmental technique[s]'"[252]—albeit valuable ones.[253] At other times, we treat boundaries as *real* things, not arbitrary creations but necessary consequences of the land and our place in it: "We imagine that the boundaries that define local governments . . . are a natural and inevitable function of geography and of a commitment to self-government or private property."[254]

Where race is concerned, Ford writes, these views of political geography, and the ability to toggle between them, can "justify [political or] judicial failures to consider the effect of boundaries and space on racial segrega-

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[249] For useful resources, see Blomley, Delaney, and Ford eds, *Legal Geographies Reader* (cited in note 10); Braverman et al eds, *Expanding Spaces of Law* (cited in note 10).

[250] See, for example, Joy Milligan, *Religion and Race: On Duality and Entrenchment*, 87 NYU L Rev 393 (2012); Pamela S. Karlan, *Taking Politics Religiously: Can Free Exercise and Establishment Clause Cases Illuminate the Law of Democracy?*, 83 Ind L J 1 (2008); Mary Anne Case, *Lessons for the Future of Affirmative Action from the Past of the Religion Clauses?*, 2000 S Ct Rev 325; Tseming Yang, *Race, Religion, and Cultural Identity: Reconciling the Jurisprudence of Race and Religion*, 73 Ind L J 119 (1997); Thomas C. Berg, *Religion, Race, Segregation, and Districting: Comparing* Kiryas Joel *with* Shaw/Miller, 26 Cumb L Rev 365 (1996); Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L Rev 2059 (1996); Jesse H. Choper, *Religion and Race Under the Constitution: Similarities and Differences*, 79 Cornell L Rev 491 (1994); Kenneth L. Karst, *Law's Promise, Law's Expression: Visions of Power in the Politics of Race, Gender, and Religion* (Yale 1993).

[251] See especially Ford, 107 Harv L Rev 1841 (cited in note 232).

[252] Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, 97 Mich L Rev 843, 846 (1999), quoting *Holt Civic Club v City of Tuscaloosa*, 439 US 60, 72 (1978).

[253] *See* Ford, 107 Harv L Rev at 1857 ("Legal boundaries are . . . [often] imagined to be either the product of aggregated individual choices or the administratively necessary segmentation of centralized governmental power.") (cited in note 232).

[254] Id.

tion."[255] *Milliken v Bradley*[256] provides a useful illustration. There, the Supreme Court held that a district court school busing remedy designed to address de jure racial segregation in Detroit's public schools could not extend to the predominantly white suburban school districts ringing the city. It achieved this outcome by treating those political boundaries as demarcating two entirely separate, autonomous political units, and the suburban districts as thus being disconnected from the de jure segregation that had occurred in Detroit itself.

But those lines were not drawn by accident or as a result of the demands of physical space. They were a product of deliberate white flight from Detroit, and of the willingness of government to draw political lines in a way that would reflect, if not actively accommodate, that phenomenon. A single governmental entity—the state of Michigan—was ultimately behind the drawing of jurisdictional lines in this manner. By "fail[ing] to examine the motivation for the position of local jurisdictional boundaries," the Court allowed—even encouraged—the entrenchment of segregation in both communities.[257]

Galloway, too, involves an invisible line, a political boundary, that turns out to be significant—or, in another sense, oddly insignificant—to the outcome in the case. One of the plaintiffs in *Galloway* was Jewish,[258] and it is unquestioned that Greece had Jewish residents. But the town never invited any representatives of local synagogues to give the invocation. Instead, the invocations remained almost uniformly, explicitly Christian.[259] A number of Jewish synagogues were located just outside the boundaries of the town, in Rochester.[260] Although the town argued that the overwhelmingly Christian nature of the invocations was simply "the result of a random selection process," it was obvious to the Second Circuit that limiting invitations to pray to individuals and groups within the town's borders was hardly "random," given the certainty that the town's residents might "hold religious beliefs that are not represented by a place of worship within the town."[261]

That conclusion is surely correct. But it did not detain the Court in *Galloway*. For Justice Kennedy, it sufficed that the town "made reasonable efforts to identify [and invite] all of the congregations located within its bor-

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[255] Id.
[256] 418 US 717 (1974).
[257] *See id* at 1875-76.
[258] *Galloway*, 732 F Supp 2d at 196.
[259] After the plaintiffs had begun complaining and taken legal action, the town eventually invited a "Jewish layman" to deliver an invocation. *See id* at 219 n41. As it turns out, the plaintiffs also found that prayer objectionable. *See id* at 209.
[260] See, for example, *Galloway*, 681 F3d at 24. A MapQuest search for local synagogues, combined with an examination of the official boundaries of the Town of Greece, available online at http://greeceny.gov/files/Ward%20Map/2014%20Town%20of%20Greece%20Ward%20Map.pdf, confirms the presence of local synagogues and suggests that two local synagogues were located a mere four and a half miles outside the town lines.
[261] *Galloway*, 681 F3d at 31.

ders."[262] The Constitution, he said, as if the matter were obvious, "does not require [the town] to search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing."[263]

As with *Milliken*, this begs the question. Why, given the facts, was it "reasonable" to treat the town's official boundaries as an acceptable limit for issuing invitations to prayer-givers? Even if one takes for granted that a line must be drawn somewhere, why treat this *particular* line on the map as the stopping point? The town's jurisdictional lines are significant, to be sure. But they are not natural. They were drawn; they could be redrawn. The *Galloway* Court invests the political boundary of Greece with a disproportionate constitutional significance. Other local facts, like the location of the synagogues where Greece's Jews worship and the resulting failure to invite any rabbis to give the invocation, are treated as unfortunate but necessary casualties of this invisible jurisdictional line. It may not be a wholly arbitrary line. But that does not make it the *right* line.

For that matter, it is not *necessarily* an innocent one. As Alan Brownstein has observed, it is common "[o]utside of large urban and suburban centers" for religious minorities to build a house of worhip in one town, "with the understanding that this congregation will serve the religious needs of adherents who live in neighboring communities as well."[264] That practice may simply reflect the need to find a geographically central location for a synagogue or other house of worship in a region in which religious minorities will find themselves dispersed in small numbers throughout the villages, towns, and suburbs that dot that area. In other cases, it may be an artifact of an older tradition of residential segregation, which at one time was aimed at religious and ethnic groups such as Jews, as well as racial groups.[265] Justice Kennedy displays no doubt whatsoever of the constitutional sufficiency of the town's jurisdictional lines as the basis for its decision whom to invite to give the invocation. He should.

The most interesting and thoughtful discussion of political boundaries in *Galloway* comes not from Kennedy, but from Justice Alito's concurrence. Alito is especially concerned with ensuring that the practice of holding opening prayers at town meetings not be derailed by the "informal, imprecise way" in which "small and medium-sized units of local government" conduct their operations.[266] Requiring more care and greater "exactitude,"

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[262] *Galloway*, 134 S Ct at 1824.
[263] Id.
[264] Alan Brownstein, Town of Greece v Galloway: *Constitutional Challenges to State-Sponsored Prayers at Local Government Meetings*, 47 UC Davis L Rev 1521, 1532 (2014).
[265] See, for example, Garrett Power, *The Residential Segregation of Baltimore's Jews: Restrictive Covenant or Gentleman's Agreement?*, Generations, Fall 1996, at 5. In a brief blog post, Mark Tushnet has wondered whether a similar phenomenon might have been at work in that corner of New York state at one time. *See* Mark Tushnet, *An Unexplored Fact in Galloway*, Balkinization, May 7, 2014, online at http://balkin.blogspot.com/2014/05/an-unexplored-fact-in-galloway.html.
[266] Galloway, 134 S Ct at 1831 (Alito concurring).

he complains, would "pressure towns to forswear altogether the practice of having a prayer before meetings of the town council."[267] The fact that the synagogues in the area were located across the town line in Rochester sufficed, in his view, to explain the town's failure to issue invitations to those houses of worship. It should not "be held to have violated the First Amendment" simply because it did not "comply in all respects with what might be termed a 'best practices' standard."[268]

This is a fascinating passage. Alito's basic point—small towns do not have all the resources, staff, or experience that larger governmental units, certainly including Congress and the state legislatures, have—is surely correct. Why this fact demands the abandonment of rigorous constitutional standards is quite another matter. But that, in essence, is Alito's conclusion. Anything less than a deliberate attempt to discriminate should be forgiven, lest a town be required to forego the practice of having sectarian legislative prayers.[269]

Of all the justices writing in *Galloway*, Alito is the most sensitive to "the scale of government action and to the fact that local governments and state and federal governments are differently situated with respect to their citizens."[270] In the end, however, the tail wags the dog in his opinion. He is far more concerned about maintaining sectarian legislative prayer in small and medium-sized towns than he is interested in considering the problems involved in doing so. He disdains the imposition of "best practices," lest they interfere with those towns' prayer practices; but he says little or nothing about what, in the circumstances, might constitute good practices, or even reasonable ones.

If he had, he might have had considered the possibility—one that is bound to be common across the United States—that a town's political boundaries may have nothing to do with its religious makeup, and that many communities may be ringed by houses of worship that serve a community but lie outside its political boundaries. Indeed, it might have occurred to him that sometimes, however innocent the current actors may be, this phenome-

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[267] Id.

[268] Id.

[269] See id (noting that the town's manner of putting together a list of invitees "was at worst careless, and it was not done with a discriminatory intent").

[270] Schragger, 117 Harv L Rev at 1892 (cited in note 12). Justice Thomas's concurrence argues for the importance of federalism considerations in Establishment Clause jurisprudence, but his approach is rather a blunt instrument that is not especially well-suited to showing genuine sensitivity to the truly "local." See id at 1817-18. And, of course, Justice Kagan's dissent is concerned with the specific nature of the proceedings before the town board in Greece, where citizens are more likely to interact directly with, and sometimes petition, members on matters of individual concern. See *Galloway*, 134 S Ct at 1847 (Kagan dissenting). Apart from an interest in the nature of the town board's *proceedings*, however, she is not otherwise especially interested in its location, or in its potentially limited capacity to marshal the same resources in planning its prayer practices that Congress or a state legislature might have. She is, in short, more interested in the *what* than the *where* of different governmental bodies.

non might be an artifact of past efforts to keep religious minorities, or their houses of worship, outside those jurisdictional lines.

What might this phenomenon demand in practice? Should it have required the Court to reject altogether the possibility of local legislative prayer, or to impose on local communities the kinds of demanding tests that Justice Alito fears could never be satisfied? Although I personally believe that a proper reading of the Establishment Clause casts doubt on the propriety of legislative prayer at any level of government,[271] I think that, assuming that legislative prayer continues to exist, it is possible to come up with standards for its exercise that do not render it impossible for local governmental bodies to maintain such a practice. The answer is not the extreme deference—almost indifference—that Alito's concurrence suggests should govern in such cases. Nor is it the rather blunt binary choice that Justice Kagan's dissent offers, in which legislative prayer must remain rigidly nonsectarian, or government can allow sectarian invocations only if it ensures an unspecified degree of religious diversity as the *outcome* of its prayer practices.[272]

Rather, the solution to the dilemma of local religious pluralism is exactly what one would expect from a geographically aware approach, one that is "attentive to the local quality of church-state relations," as Richard Schragger has urged.[273] In judging the constitutionality of particular local legislative prayer practices, courts—and, more importantly, the governments that craft these policies in the first instance—should rely on actual local conditions and demographics, not on political boundaries. In deciding whom to invite to give invocations, local governmental bodies should look to what its citizens actually *believe*, not to the location of their houses of worship (if any). Most obviously, if a substantial number of houses of worship are located just outside its official boundaries, it should recognize the obvious significance of that fact and invite someone from those groups to give the invocation. It should not treat their location as a basis for excluding them from consideration altogether. It need not require all invocations to be nonsectarian; indeed, a policy that did so, but that failed to ask anyone other than representatives of the local majority faith to give those invocations, would be just as indifferent to local conditions as the Town of Greece's policy was. What it *must* do is make some effort to actually ascertain the reli-

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[271] See Horwitz, *The Agnostic Age* at 233-34 (cited in note 50).

[272] Indeed, it is not clear that Kagan's binary solution is an especially appropriate remedy to the problem outlined in the text. Imagine a community, somewhat like Greece, in which the religious minority is not invited to give the invocation because its houses of worship are located outside the town's boundaries, but the invocations that *are* given—always by members of the majority religion in that community—are resolutely nonsectarian. This state of affairs would appear to be permissible under Kagan's dissent. But it would not address the real problem, and I doubt that the nonsectarian nature of the prayers would wholly mitigate the justified sense of exclusion on the part of the religious minority in that community.

[273] Schragger, 117 Harv L Rev at 1892 (cited in note 12).

gious makeup of the community and spread its invitations to a wide swath of those faiths, as well as those who are not religious believers at all.

This is a simple enough prescription. On a superficial level, it may appear to raise Justice Alito's concern that it would demand greater resources than many local communities have. On closer examination, however, I do not believe it does. To the contrary, such a standard relies on precisely the resource that local governments, which stand in a closer, more intimate relation to their citizens, most possess: local knowledge. A genuinely small political community need not look to surveys or census data to determine the backgrounds and preferences of its people; whatever resources it lacks, it ought to have this kind of knowledge in spades. A larger community, on the other hand—recall that Greece's population was close to 100,000 people—can be expected to have less local knowledge than that, but greater resources. It has a larger number of representatives and a greater number of employees. It is not beyond their capacity to call around; to ask those local ministers that they *do* know for contacts in the interfaith community; or for representatives to seek constituent input. And even the knowledge that one lives in a bedroom community with close to a hundred thousand residents, one that lies just outside a larger city, is a form of local knowledge in itself. That fact alone counsels doing more than relying on hand-me-down lists or depending on the local jurisdictional boundaries. It suggests that the presence of synagogues or other houses of worship just a few miles away is a good reason to issue an invitation to those places. At a minimum, it suggests that when a community is too large to rely on local individual knowledge, *some* form of public notice or outreach may be required to achieve a properly diverse list of invitees. Greece did not even do that.[274]

Contrary to Justice Alito's fears, the kinds of things that a community may do to ensure that the nature of its own religious population is reflected in its public practices are not necessarily costly, demanding, or resource-intensive. They truly do simply require local knowledge. What is not allowed is utter indifference to local conditions, or—which is much the same thing—a reliance on political boundaries that local residents know are not truly representative of the demographics of the community. It should be relatively easy, and certainly not impossible, for a community to meet such standards. That the Town of Greece did not should be treated as evidence that it was, at the least, less than properly concerned to reflect the town's religious diversity. In those circumstances, and for reasons having less to do with the sectarian nature of the prayers that resulted than from the fact that it was so careless about putting together a policy that reflected the actual religious identity of the town, Greece's prayer policy was rightly subject to a serious constitutional challenge.

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[274] See *Galloway*, 681 F3d at 23 (noting that the town acknowledged its failure to publicize to town residents the existence of the opportunity to give invocations at board meetings).

As it is, one may conclude that Justice Alito's opinion, of all the opinions in *Galloway*, most clearly addresses "the role of the local" with respect to the constitutional permissibility of legislative prayer—and that, for all the reasons he gives, the Court should have reached the opposite conclusion in the case.

CONCLUSION

The outcome of *Town of Greece v Galloway* was unfortunate, in my view, but not surprising. It is hardly a shock that a majority of the current Court is willing to affirm the constitutionality of legislative prayer at different levels of government. Certainly *Marsh*'s fate was never in doubt—although it is striking that, where it was once possible to muster three votes on the Court to hold that legislative prayer is unconstitutional, now even the dissenters in *Galloway* are unwilling to challenge that practice. If there is an important doctrinal move in the opinion, it has less to do with this particular controversy than with what Justice Kennedy's opinion, with its reliance on history and its statement embracing a wide range of practices, such as the Pledge of Allegiance and inaugural prayer, as "part of our expressive idiom," says about the chances of future challenges to American civil religious practices.[275] Many of those practices are nowhere near as ancient as legislative prayer. Nevertheless, *Galloway* suggests that none of them is going anywhere. That's not really much of a surprise.

Viewed through a geographical lens, however, *Galloway* is more interesting. A look at the religious geography of the United States—at both a regional and a local level, both as a historical matter and within contemporary American life—says more than mere doctrine can about both American religious pluralism and our attempts to deal with it at a political and legal level.

It conveys at least three lessons. It suggests that we might do better to think not of *one* single American church-state settlement, one definitive nationally applicable approach to questions of religious pluralism, but rather in terms of an array of American religious *pluralisms*. It urges us to think more carefully about the role of local jurisdictions in Establishment Clause law: to recognize the many salient social and geographical differences between towns, cities, states, and other subunits of government, and not to rely too heavily on jurisdictional lines to resolve Establishment Clause cases, when the circumstances make clear that there is sometimes little correspondence between jurisdictional lines and the lived reality of religious pluralism. Finally and more broadly, it suggests that law and religion scholarship should ease up on its obsession with Founding-era history or abstract theory, stripped in both cases of geographical context, and take more account of the role played by space and place in American religious pluralism. If we con-

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[275] *Galloway*, 134 S Ct at 1825.

tinue to take the conventional approach, we "risk missing something crucially important" about our subject.[276] Law and religion, like American religious history and religious studies before it, could benefit from a spatial turn.

[276] Gaustad and Barlow, *New Historical Atlas of Religion in America* at xxii (cited in note 1).