

RUTGERS JOURNAL OF LAW & RELIGION
THIRTEENTH ANNUAL DONALD C. CLARK, JR. SYMPOSIUM
ZOOM CONFERENCE CALL

APPEARANCES OF MODERATORS

VIA ZOOM

Christian M. Velez-Vargas (Editor-in-Chief)
Angela C. Carmella (Professor of Law, Seton Hall University
School of Law)

TRANSCRIPT

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MR. VELEZ-VARGAS: Good evening and welcome to the 13th Annual Donald C. Clark, Jr. Program in Law & Religion. My name is Christian Velez-Vargas, and I am the Editor-in-Chief for the RUTGERS LAW JOURNAL OF LAW AND RELIGION.

Before I can get started, I would like a few honorable mentions: I see that we have Dean Swedloff, Professor Roger Clark, Professor Dane, and Donald Clark on the zoom call today. Welcome and thank you for attending our program.

Later on today, I will be introducing Professor Angela Carmella from the Seton Hall University School of Law, in the topic of *Pandemic, Protest, and Commemoration: Sacred Civic Expression in Times of National Grief*. On behalf of the JOURNAL, I would like to dedicate this symposium to the far too many lives that were lost and affected by the COVID-19 pandemic and the senseless racial killings of members in the African American and Asian communities. Our hearts go to you and we will continue to pray for healing, justice, and peace.

The RUTGERS JOURNAL OF LAW AND RELIGION (RJLR) is the world's first online legal JOURNAL dedicated to the study of the dynamic interaction between law and religion. The RJLR is proud to provide a global forum devoted to scholarly discussion and illumination of this cultural intersection.

Founded in 1999, the RJLR rapidly gained international recognition for its unique perspective and groundbreaking expositions. The RJLR publishes controversial and current articles

relating law and religion. The RJLR stems from the realization that as the world becomes figuratively smaller—and secular constructs such as law become more complex—an understanding of the role of religion within this transformation has become more crucial than ever. The goal of the RJLR is to explore how law impacts different religions, and reciprocally, how various religions impact the law.

We, as a JOURNAL, have faced many challenges throughout the academic year. Notwithstanding, the online adjustment with regard to trainings, accessing library materials, and spending endless hours formatting bluebook citations, I would truly be remiss if I did not have an opportunity to thank our executive board and staff editors for making this possible. I want you to know that this is going to be our first published symposium and we are on track of publishing the most issues in our JOURNAL's history for a single year. We have officially published four issues and we are on track to finalize a fifth one in May.

I would like to take a moment by calling their names and bring recognition to their roles: Managing Editors Weston Dennen and Rachel Reyner, Associate Managing Editors James Lee and Jonathan Rava, Lead Articles Editor Daniel Moeller, Lead Research & Writing/Communications Editor Marilyn Porcaro, Lead Notes Editor Alan Reyderman, Lead Nuremberg Editor William Olson, Lead New Developments Editor Elise Bavazzano, Associate Staff Editors Aubrey Gemmell-Nunez, Adina Heinstein, Thomas Stavola, Staff Editors Jaclyn Alston, Atilla Azami, Samuel Cousin, Dawn Ericksen, Cesar Hernandez Villanue, Matthew Kountz, Shelby McCarty, Gianna McDevitt, Barry Mermelstein, Stephanie Mignogna, Mumbi Ngugi, Marissa Pembroke, Tamirah Robinson, Nicholas Rollo, Tisha Sylvia, Robert Walker.

I also wanted to separately offer a special thanks to our Lead Business & Marketing/Alumni Relations Editors, Lauren Bess and Jessica Injaian, for helping me in preparation for the event and making this possible. I also offer a special thanks to Robert from RCIT for helping me with the technical functions for the program.

And, of course, last but not least, our faculty advisor Professor Perry Dane, our mentor Donald Clark, and guest lecturer Professor Carmella. Please allow me to read their biographies:

Perry Dane is a Professor of Law at the Rutgers Law School and the faculty advisor to the JOURNAL. He is a graduate of Yale College and the Yale Law School. Professor Dane was previously on the faculty of the Yale Law School and served as a law clerk to William J. Brennan, Jr., Associate Justice of the United States

Supreme Court. His research and teaching interests include religion and the law, constitutional law, comparative constitutionalism, conflict of laws, and legal pluralism.

Donald C. Clark, Jr. '79 formerly served as General Counsel of the United Church of Christ, a Protestant religious denomination comprised of over one million members and some 5,200 local churches throughout the United States. In this capacity, Mr. Clark advised the church, clergy, and lay leaders on a wide range of legal issues, and he regularly appeared in the courts throughout the country to represent the legal interests of his clients. Before joining the church in this role, Mr. Clark served as a litigation partner in some of Chicago's most esteemed law firms. His pro bono work includes post-conviction representation of a death-row inmate in Alabama, where he successfully obtained a reversal of the sentence and capital-murder conviction. His true crime memoir on this experience, entitled "Summary Judgment," will be published in September 2021. Mr. Clark is also the co-producer of *The Encounter on Broadway* and other entertainment ventures like the Chicago Magic Lounge. Furthermore, Mr. Clark is also a producer of the play "When Harry Met Rehab," soon premiering at Chicago in November 2021.

A graduate of Princeton University, Harvard Law School, and Harvard Divinity School, Angela C. Carmella joined Seton Hall Law faculty in 1988 after practicing law in Boston. In 2019, Professor Carmella was named the James B. and Anita L. Ventantonio Board of Visitors Research Scholar in recognition of her extensive scholarship in the fields of Religion and the First Amendment, Religious Land Use, Religious Church-State Theories, and Catholic Social Teachings. She is the co-editor, with Michael McConnell and Robert Cochran, of *CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT*. She is a member of the Religious Liberty Committee of the Religious Freedom Center of the Freedom Forum Institute and serves on the Editorial Board of the *JOURNAL OF CHURCH AND STATE*. Professor Carmella has shared her expertise on the Religion Clauses with the Law School's Center for Religiously Affiliated Non-Profit Corporations, has been a Visiting Scholar and Lecturer at Harvard Divinity School and a Fellow of Harvard's Center for the Study of Values in Public Life, and delivered an Alpheus T. Mason Lecture in Constitutional Law and Political Thought at Princeton University.

Now, without further ado, please give a warm welcome to Professor Angela Carmella:

PROF. CARMELLA: Thank you so much, Chris.

Good evening everyone: Deans, Faculty, Students, and Special Guests. I'm honored to be presenting this lecture for the Donald C. Clark, Jr. program in law and religion. My special thanks to Mr. Clark for creating the opportunity for scholars to share thoughts on important issues of the day. And, of course, my great thanks to Chris Velez-Vargas for his tremendous leadership and vision for the RUTGERS JOURNAL OF LAW AND RELIGION, and to him and the JOURNAL staff for their excellent work. And finally, my thanks to my law and religion colleague and advisor to the JOURNAL, Professor Perry Dane, whose scholarship on the Religion Clauses remains among the most thoughtful and enduring work in the field.

My talk is about how we commemorate death. You probably don't need to be reminded that this past year has been a time of extraordinary national grief and loss. In the United States alone, the COVID-19 virus has infected 31 million and killed more than 560,000 people. These are staggering numbers that don't even recognize other impacts—illness, isolation, disruption, unemployment. And all of it has fallen disproportionately on people of color, with a death rate double that of whites. On top of that, last summer we witnessed heinous acts of police brutality against African Americans. When George Floyd's name was added to that already long list of names of Blacks killed in encounters with police, the dam broke, and tens of millions of Americans from all races and religions marched in Black Lives Matter protests all across the country. And it continues, with the killing just two days ago of Daunte Wright just a few miles from where George Floyd died.

So many deaths and so much injustice to mourn; so many lives to honor. These events cry out for commemoration in ritual and symbol, in collective recognition of our shared humanity. Indeed, our first national commemoration of Covid deaths came inexcusably late, on the eve of inauguration. You may recall it: President Biden held a moving Service of Remembrance with prayer, hymns, and a stunning display of candles at the Reflecting Pool at the National Mall. But long before this national event, local commemorations have been on-going and robust. Spontaneous Covid memorials have cropped up, even as early as last spring; planned memorials, though temporary, have been solemnly installed.

In Detroit, we saw billboard-sized images of Covid victims; in DC and in other cities, thousands of white pennants. In LA,

thousands of origami cranes; in Atlanta, a wall of broken hearts; in Colorado, a Rose Petal Memorial. In Queens, we saw a 20,000 square foot mural of a masked doctor painted on a parking lot and visible as an aerial view; in DC and other cities, thousands of empty chairs. In other places, rows and rows of American flags, or photos of victims projected onto the sides of buildings or monuments. This visual landscape of sorrow has been replicated in private yards, at houses of worship, along roadsides, in town parks and municipal buildings all over the country—with street art, murals, candles, flags, photos and tea lights. Services of remembrance have been held; church bells have tolled.

In a similar way, race-based killings have been commemorated. The place in Minneapolis where George Floyd was killed became a shrine, with thousands pouring in to grieve, leaving behind thousands of mementos. Murals of Mr. Floyd there and all over the nation became instantly recognizable world-wide. So did Black Lives Matter murals, painted on streets across the nation. These and other murals, including murals of Mr. Floyd's life, created a record of the lives lost. In all of these efforts, in both pandemic and protest, talented artists and craftspeople have come forward to create. Community leaders and lots of people who care deeply about their neighbors have done their share too.

Throughout the nation we find ourselves in the midst of the important cultural task of memorializing grief and sorrow. Communities will continue to commemorate lives lost in more permanent ways, with events and ceremonies, monuments and symbols. Jersey City was the first to announce plans for a permanent remembrance: a new park, a memorial wall, and 500 trees (one for each resident who died). NYC is planning a memorial, although the location is not settled. And Minneapolis will create a permanent memorial on the site where George Floyd was killed.

This need to commemorate lives lost to tragic death has become all-too-common, especially with mass shootings. Columbine, Sandy Hook, Parkland, the Pulse Nightclub, the Tree of Life Synagogue in Pittsburgh, and the Emanuel African Methodist Episcopal Church in Charleston; and just few weeks ago, killings in Atlanta and Boulder.

I have a name for this public mourning, whether permanent, or temporary, or spontaneous, and whether done by private people or officially sponsored by towns and cities: I call it sacred civic expression. It is sacred because remembering lives lost marks the incalculable value and meaning of those lives. It is part of civic life

because our expression of loss and hope shows the kind of society we want in the future, rather than a society that assumes tragedy needs no marking because it is simply part of the way things are.

By “sacred” I don’t mean “religious” in the way we normally use that word. When we grieve suffering and death, the words and images that emerge are sacred, whether or not we employ religious texts or symbols. The Vietnam Memorial in D.C. is not religious, but it is a holy site for the nation. Like a cemetery, it names 60,000 war dead; stretching nearly 500 feet, it reminds us of the enormity of the tragedy. Death has special significance in both religious communities *and* in the civil community: for both, there are consecrated spaces, shrines, lands. Indeed, the civic landscape of pandemic and protest has been a mixture of religious and secular: crosses next to hearts and photos; hymns and candles next to images of raised fists. When we are in this place of national sorrow, the border between religious and non-religious expression becomes notoriously indeterminate and permeable.

I’m interested in this idea of the sacred because my field, the Religion Clause, draws a sharp distinction between religious and secular, especially in connection with the Establishment Clause of the First Amendment: Government shall make no law respecting an establishment of religion. This clause is commonly understood to require the “separation of church and state.” Certainly, there are dangers when government mixes with religion—dangers to both government and to religion. But as every Establishment Clause decision has noted, no total separation is possible, nor desirable.

The Establishment Clause applies to government action—like when a town sponsors a memorial service or commissions a monument to commemorate lives lost to Covid or racial injustice. Much of the symbolism emerging from this past year has been non-religious, some clearly religious. What does the Establishment Clause have to say on the matter?

Before we get into the symbols jurisprudence, I think it’s important to note that the law of the Establishment Clause has not been forged in the crucible of grief. Much of the acceptable religious symbolism is focused on the ceremonial, or on acknowledging historical practices: prayers at the start of a legislative session, coins inscribed with “In God We Trust,” the words “under God” in the pledge of allegiance.

In its symbols cases, the Court has upheld *outdoor* religious symbols—a nativity scene, a menorah, and a Ten Commandments monument. Each of those had been placed in proximity to other,

non-religious symbols. In contrast, the Court has prohibited a creche and a Ten Commandments plaque that had been located prominently *inside* a courthouse—not surprising, given that a courthouse is the location of core government functions.

In these cases, the Court employed a variety of approaches. Was there a secular purpose for the display? What was its message? Was government endorsing one religion and disfavoring others? Did the context or location of the display affect the message? Was the display divisive? Or would removing the display be divisive? Separationists are typically the more liberal leaning justices on the court. They tended to see the symbols in a negative light, as harmful to religious minorities, as threatening to political equality by creating a second-class citizenship. In contrast, accommodationist are typically the more conservative leaning justices. They focused on whether coercion was involved. If no one was forced to assent to the symbol on pain of some legal penalty, no violation was found. And so the debate continued. So no, the origins of our jurisprudence did not emerge from responses to grief.

But we are not without guidance as to how to remember and honor lives lost. Twenty years ago, our public grief after September 11th gave rise to lots of sacred civic expression, with services and memorials in towns throughout the country. Some were private, others governmental.

First is the city-sponsored memorial service held in Yankee Stadium only 12 days after the towers fell. It was an extraordinary prayer service with numerous clergy representing Catholic, Protestant, Muslim, Jewish, Hindu, Sikh, Greek Orthodox and other faiths. My colleague in the church-state area, Professor William Marshall, is typically an opponent of religion in government events and spaces. But he remarked at the time that with grief so raw, only a *religious* service could have brought about community healing. It's not normally the case that city officials design a religious program, select clergy, and figure out how to meet the religious needs of the citizens. But Professor Marshall agreed that the city *had* to do this, that it *had* to include and affirm faith; excluding it at such a time would have shown a dogmatic hostility toward religion.

Second is the Flight 93 Memorial. We recall the heroism of those on the plane that crashed in Shanksville PA. The immediate, spontaneous show of sorrow was a mixture of religious and non-religious items and trinkets placed there. The federal government soon became involved in overseeing plans for a permanent National

Memorial. There is a wall of names, and a tower of windchimes. The architect originally referred to the project as “sacred ground,” but since the government has no clear vocabulary for the “sacred,” more familiar language was chosen: the language of memorials, parks, heritage, history, nature. Even so, the National Park Service recognized that the deaths had already consecrated this spot and explicitly acknowledges that the site should be a place for prayer, meditation, and reflection.

Third is the National Museum at Ground Zero, which tells the story of the tragic day and the rescue and recovery efforts. The museum houses what is known as the Cross at Ground Zero. During the recovery, a rescue worker discovered a column and cross beam from one of the towers that had fallen and twisted into the shape of a Latin cross. Many Christians saw this as a sign of hope, that God had not abandoned them. Even people of other faiths and no faith visited the cross. It is included in the exhibit on “finding meaning at Ground Zero,” in which thousands of artifacts are displayed, both religious and secular, and stories are shared.

The inclusion of the cross was challenged as a violation of the Establishment Clause, but the federal appeals court said that the cross was part of the story of *how some people used faith to cope with the tragedy*. Even though the Establishment Clause interpretation has not emerged in the context of sorrow, courts have understood that a religious symbol might be layered with additional meaning in this context of grief and hope, and can be part of the bigger narrative.

We now find ourselves in the midst of another major cultural undertaking of crafting a sacred civic landscape to commemorate half a million lives lost in the pandemic as well as lives lost because of deeply embedded racial injustice. September 11th suggests a framework for civic expression that is open to the religious, the secular, and the indeterminacy between them.

In addition to this current moment of necessary commemoration, I will highlight for your consideration two other significant and related trends. First, is the larger project of making public monuments and civic spaces more inclusive to incorporate the narratives of historically excluded communities; additionally, there is a new openness to religious symbolism under the Establishment Clause. So the need for commemoration and inclusion and a more plausible accommodation of both come together in a unique way at this moment. Let me explain.

This larger project of making public civic space more inclusive means incorporating the narratives of excluded communities, both historically marginalized as well as immigrant groups: Black, Latinx, Indigenous, Asian, Muslim, Jewish—indeed, all racial, ethnic, and religious minorities. This is an attempt to provide a more accurate representation of American history and contemporary life, and to rebalance power—since public art tells us whose stories matter. Recently, most media attention has been given to attempts *to get rid of* Confederate monuments throughout the south—some by force, but mostly through official channels, and to rename army bases. Well, in addition to efforts to remove symbols of white supremacy, there are efforts to *build up* a racially inclusive civic landscape. A profound change is occurring: private foundations and local and state governments are getting on board to help arts organizations, artists, and craftspeople *reimagine* and *rebuild* commemorative spaces that reflect our history and contemporary society.

These efforts to diversify our sacred civic expression started long before the pandemic, albeit slowly over last 30-40 years, with an increasing recognition of women and minority figures, and some protection of burial grounds of Native Americans and of African Americans (particularly enslaved people). But the Black Lives Matter protests from last summer created a moral demand for more immediate representation and justice. Now there is real momentum and real money behind more inclusive public art. The Mellon Foundation alone has committed \$250 million to fund projects all over the country. Another \$156 million will be coming from 16 foundations to support Black, Latinx, Asian and Indigenous arts organizations. These amounts are unprecedented, as is the urgency. But these efforts are not only intended to increase participation in the arts themselves, but also to increase participation in the decision-making processes that determine the images and locations of public art in the civic landscape. Note too that public art is now less about the commissioning of one major monument—and more likely to take the shape of multiple displays and installations, ephemeral works like banners and panels, some on a rotating basis, all of which will allow the telling of multiple narratives in our diverse society. Public art in one or more of these forms might replace a Confederate monument or show up alongside it, challenging and disrupting its meaning. Of course, this isn't limited to the south—the whole nation desperately needs a richer, more diverse civic landscape.

This inclusion of historically excluded groups into the civic landscape is strikingly significant to national self-understanding. In the words of Professor Mary Clark, it brings these narratives into the “public domain of physical access and civic consciousness.” Especially where it concerns death, the respectful commemoration of excluded groups can be “a powerful tool of reparation and empowerment, honoring and enhancing personhood.” Identities are retrieved and preserved. The lives being remembered “are incorporated into the public experience and collective memory.”

Here’s an example: Congressman John Lewis, who as a young man and Civil Rights leader, was severely beaten during the Bloody Sunday march across the Edmund Pettus Bridge in Selma, Alabama. Pettus was a confederate general and leader of the Alabama Ku Klux Klan. Congressman Lewis took one last ride over that bridge after his death last year. Now the bridge may be renamed for him. What a powerful statement! Imagine how much more can be accomplished by intentionally including the narratives of excluded communities throughout our civic landscape.

In addition to the public arts growing more inclusive, I’d like to highlight another significant trend: the recent evolution in the Supreme Court’s interpretation of the Establishment Clause. It is no secret that the Court has grown more conservative in general, now with a 6-justice majority, and in particular with respect to its interpretation of the religion clauses. And under the Establishment Clause that usually means accommodation of Christian prayer and symbols in governmental space. Yet the Court’s most recent case recognizes the need for symbolism that advances *pluralism, non-discrimination, and inclusion*. So, here’s the paradox I see: this more relaxed jurisprudence can work in favor of the progressive goal of a more inclusive civic landscape. That’s because so many marginalized groups are rooted in a religion. It is highly likely that some elements of design and reflection in those new public art installations will be explicitly religious.

Think of the Black Church and its role in civil rights. Think of Native Americans—whose life and sacred lands and ceremonies are inseparable. Consider communities at the southern border and devotion to Our Lady of Guadalupe. Think of the centrality of church, temple, mosque, and synagogue for so many ethnic, racial, and religious minorities. Indeed, half of the Catholics in the U.S. identify as Hispanic/Latinx. For underrepresented groups, faith ensures deep knowledge of dignity; and that knowledge has been the source of movements for justice. The faith-based knowledge of

one's dignity has given meaning to the intense suffering of being dispossessed and disenfranchised—and gives motivation to work toward justice and equality for everyone. In order to include diverse narratives in the specific commemoration of deaths, as well as in the broader civic landscape, the stories told will have to be holistic and coherent. The stories will have to include religion.

The Court's openness to religious language and symbolism in government spaces is founded upon the notion that religious symbols can be indeterminate and fluid, that sometimes a religious symbol can be freighted with multiple meanings, including a civic meaning. The Court has held that even intensely religious symbols, like a cross, are capable of having civic meaning—*particularly in the context of tragic death*. That broader civic meaning promotes values of respect, inclusion, nondiscrimination, and pluralism.

Of course, the Court sets out constraints. Let's say a town is sponsoring a Covid service of remembrance or is commissioning a public arts installation. If prayer or religious symbolism will be involved, the town must be sure that its sponsored activity does not proselytize, advance, or disparage any faith or belief; that it does not exclude, coerce, or intimidate based on faith; that it does not denigrate another's faith, threaten damnation, or preach conversion. The town meets its constitutional obligations when its sacred civic expression can assure religious liberty and tolerance for all, when it avoids social conflict, when it shows respect for pluralism and differing views, and when it demonstrates an honest endeavor to achieve *inclusivity and nondiscrimination*.

This interpretation of the Establishment Clause accommodates prayer and religious symbolism in certain circumstances. It is a relaxed jurisprudence, in contrast to a stricter separation that would presumptively exclude religion from such spaces. There's no question that we must respect a basic separation and independence of government from any religious control, and vice versa; and I've been a separationist in my work, even on this topic, cautioning religious groups to steward their religious symbols and sacred spaces without government involvement. However, in the context of commemorating deaths, I fear that excluding the religious from sacred civic activity would have severe consequences: it would silence the healing, unifying, and liberative voices of historically marginalized communities that have faith at their core.

I'd like to use the African American community and the Black Church as an example of why I find great value in a relaxed Establishment Clause that recognizes religion within sacred civic

expression. Professor Henry Lewis Gates, Jr., in his recent PBS series on “The Black Church” takes us through its 400-year history and the centrality of the church to the community’s identity and to the civil rights movement. Dr. Martin Luther King, Jr., was the *Reverend* Dr. Martin Luther King, Jr. And in his Letter from a Birmingham Jail, he quoted Thomas Aquinas as easily as he quoted Abraham Lincoln. Indeed, the sacred civic expression of the Civil Rights movement exemplified the inextricable connections between religion and civic values: justice, human dignity, freedom, equality, love, mercy, non-violent resistance—the commingling of religious and democratic values for political, social, and economic equality. All working together, in the same direction. Those iconic marches, speeches, and places of the civil rights movement were led by Black clergy and infused with biblical language, imagery, and insights. These events and places are marked as sacred civic moments and hallowed ground. It became a vastly ecumenical movement. Those who bore witness to the 1960s marches and speeches and violent government repression—both the participants and those who documented the events—have created images now seared into our collective consciousness. The monuments and other memorials that have emerged from the Civil Rights movement—honoring Rosa Parks, Martin Luther King, Jr. and others have only begun to make the civic landscape more inclusive. Civil Rights leader and Congressman John Lewis was also an ordained Baptist minister, and worried that not enough people realized that the movement was built on deep-seated religious convictions.

With a more inclusive civic landscape and a more accommodating Establishment Clause, the centrality of the Black Church can be celebrated in government spaces. I’ll offer an example. Fifty years ago, in Greenville, North Carolina, a vibrant African American community was destroyed by urban renewal. It is now being remembered with a memorial on an acre of land within a new city park. The *anchor* of that uprooted neighborhood was the Sycamore Hill Missionary Baptist Church. The designers of the memorial—Black architects [at Perkins & Will]—involved former residents and active church members “to address the neighborhood’s demise and to find a healing solution to redress decades of displacement.” The memorial space, unveiled last August, is located on the church’s former site and is described this way:

Towering stained glass walls will rise from the ground on the original footprint of the church following the pattern of original

walls, windows, and bell tower. Park benches that recall church pews will be placed in the space that was once the church sanctuary. Existing trees surrounding the space maintain the quality of light that connects the visitor to create a serene and spiritual ambiance.

The city's Black community worked for eleven years to convince the city of the need to publicly mourn the loss of this church and neighborhood.

This memorial's stunning design beautifully recalls the significance of a place of worship to a community that was unjustly uprooted. The story of this Black church and surrounding community is told in a holistic way, showcasing heroic deeds and great institutions, and commemorating loss and despair. But it does employ overtly religious symbolism: stained glass and "pews" serve to re-animate the vacant church site and create an intentionally spiritual atmosphere. The project cost 1.9 million tax dollars.

Does this installation violate the Establishment Clause? Of course, you couldn't build a church on public property with tax dollars. But under the current establishment jurisprudence, I contend that this symbolic reproduction of the *memory* of the church falls well within—indeed epitomizes—the very definition of inclusion and non-discrimination. No court should be troubled by the explicit religiosity of the symbolism; it is layered with civic meaning as well, because the design recalls not only the faith of the church but the life and contributions of the entire displaced community. Political equality is not threatened by the memorial: government demeans no one's faith and preaches no creed. The inclusion of religious symbolism allows the full incorporation of this Black community's narrative—church and all—into what Professor Mary Clark calls "the public experience and collective memory."

The recent cases for Establishment Clause law are *Town of Greece v. Galloway* in 2014, which involved legislative prayer, and *American Legion v. American Humanist Association* in 2019, which involved religious symbols. In both, the Court has become far more accommodationist and far more open to non-coercive expressions of religion, even to sectarian ones. (By sectarian I mean religiously particularistic as opposed to generalized or generic.) Of course, the ideas were already embedded in earlier cases, but they have been woven together in a new way.

The Court had decided back in the 1980s that the practice of having a paid chaplain open every session of a state legislature with a prayer was constitutional. But the Town of Greece, in New York state, had a different system. It used a rotation system, inviting

different clergy to pray to open each month's Town Council meeting. Clergy were almost exclusively Christian, and they prayed sectarian prayers—invoking Christ or the Trinity, for instance. The plaintiffs claimed that the Establishment Clause prohibited the use of such sectarian language and that the environment was subtly coercive. Justice Kennedy, writing for the majority, rejected the idea that legislative prayer had to be nonsectarian, addressed only to a generic God. He found that consensus on the meaning of nonsectarian is not possible.

In *Town of Greece* Justice Kennedy noted the compatibility of religious and civic expression. Chaplains ask their own God for blessings of peace, justice, and freedom, which can be appreciated by those outside of their faiths. He wrote, "*These religious themes provide particular means to universal ends.*" That's because these religious themes—peace, justice, freedom—are also civic themes.

But given Justice Kennedy's historical concern for psychologically coercive environments, he set out constraints (to which I've alluded): this rotation of clergy prayers must not be "exploited to proselytize or advance a belief, or to disparage any other faith or belief." The practice should not "exclude nonbelievers," "be a means to coerce or intimidate others," "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." In other words, the values in the prayers had to be about temporal matters on our common life as residents, as citizens.

The dissenters accepted the practice of legislative prayer but bristled at the notion it could be sectarian. Most fascinating, however, was the reaction of Justice Breyer and Justice Kagan to the nearly exclusive Christian clergy in the rotation. In separate dissents they noted that most of the clergy were Christian, not because the town's population was only Christian but because the invitation list was too narrow. Many residents belonged to synagogues in nearby towns. Had the town clerk simply looked to houses of worship outside the Town of Greece, she would have found these and other non-Christian communities. So the prayer rotation could have been more representative of the religious diversity of the town. It reminded me of the September 11th prayer service at Yankee stadium, where public officials intentionally created a broadly ecumenical event, broadly representative of the religious diversity of the suffering community.

Five years after the *Town of Greece* decision, the Court decided *American Legion v. American Humanist Association*. It held

7-2 that a Latin Cross at a busy intersection in Bladensburg, Maryland did not violate the Establishment Clause. The cross had been installed in 1924 as a memorial to those men from the area who had served and died in the Great War. Justice Alito, writing for the majority, asserted that symbols, even sectarian ones like a cross, are indeterminate and can acquire multiple meanings—including civic meanings—over time and through context and circumstance. The cross had become a community landmark. The cross, Justice Alito wrote, “has expressed the community’s grief at the loss of the young men who perished . . . and its dedication to the ideals for which they fought.” The words inscribed on the cross are not words of faith, but of military service: endurance, courage, valor, devotion.

Justices Kagan and Breyer—known as liberal justices—joined Justices Alito, Kavanaugh and Chief Justice Roberts—three conservatives to make up the majority. Justices Gorsuch and Thomas only concurred in the judgment. But the five in the majority determined that the continued location of the cross did not threaten the Establishment Clause’s values. The cross’ presence had not threatened religious liberty or tolerance and had not created division. For a hundred years it had never been used to disparage or exclude religious groups. This five-person majority does not speak in terms of coercion or separation. There is a conciliatory tone. Justice Kagan didn’t join every part of the opinion, but all five emphasized the need for religious symbols to reflect an honest endeavor to *achieve inclusivity and nondiscrimination and respect pluralism*. Evidence of inclusion was not lost on them: the monument names all those killed, Black and White, at a time when the Klan had tremendous influence in Maryland and racial tensions ran high. The dedication ceremony included prayers by a Catholic priest and a Baptist minister, wildly ecumenical for 1924.

This decision is quite different in tone and nuance from the earlier cases about nativity scenes and Ten Commandments monuments. In my view, the difference is the context of national grief over the war and the particularly intense local outpouring in the town of Bladensburg. There is a recognition that when dealing with immense sorrow, religious symbols can help to tell the story. This is the case in Bladensburg, and likewise at Ground Zero.

The decision in American Legion involves a century old monument, but I think it applies to *new* creations like the Sycamore Hill Baptist Church memorial. I admit that a plurality of the justices agreed on a presumption of constitutionality for longstanding monuments, symbols, and practices. Further, Justices

Kagan and Breyer assumed that a new cross would likely prove divisive, and I'm sure that could be the case. Nonetheless, *American Legion* has much to say about new displays because the constitutional values of inclusion, nondiscrimination, and pluralism are quite contemporary and not history-bound. The *American Legion* 5-person coalition is built on the notion that not only time but also context and circumstance can create social meaning. And this social meaning can move beyond exclusive religious meaning—a widely accepted understanding of the indeterminacy of symbols and the capacity for multilayering.

The Court notes approvingly of a new memorial to Native American veterans that will contain religious imagery of a steel circle “to represent ‘the hole in the sky where the creator lives.’” It mentions a 20-year-old Star of David monument in South Carolina, that honors victims of the Holocaust. Even Justice Kagan and Justice Breyer are open to context and circumstance and a careful case-by-case analysis, which would determine whether a new monument was in fact divisive and whether it comported with the values of inclusion, nondiscrimination, and pluralism. Furthermore, Justice Gorsuch’s concurrence noted how hard it is to determine whether a symbol is in fact old or new, and suggested that newer symbols should be constitutional so long as they are consistent with “national traditions.” Well surely, the new public art of historically excluded groups would fall squarely within the nation’s long civil rights tradition in sacred civic expression. This is especially true for the monuments like the Sycamore Hill Baptist Church, which honors the memory of an African American community unjustly displaced.

So to recap, we are in the midst of a confluence of three trends: first, the strong desire to commemorate lives lost to Covid and to race-based killing. Second, a new commitment from private and state institutions supporting the public arts to actively engage marginalized and historically disenfranchised groups to tell their stories. And finally, a relaxed establishment jurisprudence that gives latitude to the content of commemoration narratives—especially when those narratives reflect the importance of religion.

But there remains an issue to address: looming over all of this is the reality of Christian nationalism. This ideology promotes America as a Christian nation and, typically, a white Christian nation. Andrew Whitehead and Samuel Perry, in their recent book on the topic [*Taking America Back for God*], note that it is about “preserving or returning to a mythic society,” “in which white,

native born mostly Protestants maintain control over access to society's social, cultural, and political institutions, and 'others' remain in their proper place." We all got a lesson in this ideology watching Trump's unconscionable encouragement of racial division and use of Christian nationalist rhetoric. Many Christians were appalled by the ubiquity of Christian symbols at the January 6 insurrection: crosses, banners, Bible verses. As Whitehead and Perry explain, this ideology is not about religious devotion: it is about retaining or getting power in the public sphere.

The Civil Rights movement, and laws passed in response to it, intended to eradicate racial discrimination and any racial caste system. At the same time, the Establishment Clause has been directed toward preventing any type of *religious* caste or tiered citizenship system based on religion. Indeed, a core promise of the Establishment Clause is that no faith should become so identified with the government that its members have superior citizenship and others second-class citizenship.

Racial and religious issues of second-tier citizenship merge when we consider the movement of white Christian nationalism: it claims both a racial and religious privilege. Another church-state colleague, Professor Caroline Mala Corbin, argues that cases like *Town of Greece* and *American Legion* inadvertently reinforce this ideology, *reflecting and contributing* to Christian nationalism. Allowing Christian prayers and a cross in government space can bolster the religious privilege. Critics like Professor Corbin call for a separationist reading of the Establishment Clause on the assumption that religious and racial minorities are harmed, not helped, by accommodation. Indeed, the separationist argument has long been made to protect religious minorities, and I have often embraced it. But it ignores the fact that *accommodating* minority religious narratives can in fact disrupt the predominantly white civic landscape. This is what the Sycamore Baptist church memorial does. And in the context of commemoration, a separationist approach would exclude the full narratives of religiously and racially marginalized groups. Communities need to be able to grieve and lament in ways that are authentic to them, without barriers being erected to silence their words and images if those happen to be (or appear to be) religious.

We also have to be careful that the Establishment Clause not be used intentionally as a way for whites to intimidate minority communities. Recently, two white men claimed that a Black Lives Matter mural violated the Establishment Clause. You may recall

that D.C. Mayor Muriel Bowser had ordered the yellow lettering be painted on a street near the White House. The plaintiffs said this was a religious symbol—the religion of secular humanism. And that it made them feel like second class citizens. The lawsuit failed on standing grounds, but it was a clear attempt to stop the official recognition of the peaceful protest/racial justice narrative in civic space. A relaxed, accommodationist jurisprudence protects the narrative and doesn't require that we clearly identify the nature of the mural. Is the mural a religious symbol? Is Black Lives Matter a religious movement? Well, like the civil rights movement—yes and no. Black Lives Matter contains significant elements from Christian and African religions, and many of its followers view it as a spiritual movement. But even if the mural could be understood as religious, it is also a *civic symbol*, a claim for justice and equality for Blacks. The potential chilling effect of Establishment Clause litigation is eliminated with an accommodationist reading.

But what about social conflict? Does an accommodationist position mitigate divisiveness, or does it invite it? Let's imagine that a town government is pandering to, or captured by, a religious group. Imagine the aggressive use of sectarian images by white, Christian nationalists, or neo-pagan white supremacists, or any other extremist religious ideology. The town might rely on Town of Greece and American Legion to justify the placement of that group's symbols on government property or prayers during government-sponsored events. This would surely inflame tensions with citizens of other religions or no religion at all.

But such ideologies run directly counter to the Court's insistence on inclusion and non-discrimination, on the respectful treatment of other faiths. They also run directly counter to our constitutional commitment, still unrealized, to eliminating racial discrimination. The constraints set out in *Town of Greece* and *American Legion* must do the work in cases like these. The use of religious symbols in a way meant to intimidate others violates all of the constraints: they exclude others and reject pluralism. They are discriminatory and demeaning toward other faiths and other racial identities. These constraints are the boundary markers for ensuring political equality. I suspect that the doctrinal development of these boundaries will become the focus of the post-*American Legion* jurisprudence.

In closing, I note that the Court's conservative narrative for many decades has emphasized that sacred symbols, both civic and religious, are historical and traditionalist. But the grieving families

who have lost loved ones to COVID-19 and the anguished protesters who have lost generations to racial injustice will create sacred symbols of their own, producing new icons as well as reinterpreting old ones, adapting both religious and non-religious modes of expression. The relaxed jurisprudence, grounded in inclusivity and nondiscrimination, is expansive enough to accommodate far more than traditional religious prayers and symbols. It will encompass the sacred civic expression of marginalized communities whose narratives have been, and continue to be, deeply rooted in faith traditions. In this way it is a bit of a paradox—a conservative approach in support a progressive movement. Those narratives can become widespread because they will be energized by the wider public arts movement to remake our civic landscape into one that reflects our diversity. The promise of political equality can become more achievable. And our remembrances can become more unifying, liberating, and healing.

MR. VELEZ-VARGAS: We will now open the floor for questions. Professors, Deans, and guests, we ask that you please allow the students to have the first few questions. Please utilize the raise hand function and either Professor Carmella or I can call on you individually. Please feel free to utilize the chat function too.

[We have omitted this portion from the publication.]

MR. VELEZ-VARGAS: If anyone wishes to stay or say hello, I will stay on the call with Professor Carmella. To everyone else, we are truly grateful for your participation and for attending our Annual Clark Program. We hope that you will enjoy reading our upcoming publications and that you have enjoyed our program. Take care everyone, and good night!