

**PANDEMIC, PROTEST, AND COMMEMORATION:
SACRED CIVIC EXPRESSION IN TIMES OF NATIONAL GRIEF**

*Angela C. Carmella**

Abstract

*At the service of remembrance on the eve of his inauguration, President Biden said, “To heal, we must remember.” Our public mourning in times like these, filled with staggering numbers of pandemic deaths and shocking numbers of racial killings, indeed involves remembering the many lives lost. We are in the midst of the cultural task of memorializing our grief and crafting a visual landscape for commemoration and reconciliation. The words and images that emerge from our collective sorrow become our sacred civic expression—whether or not they employ explicitly religious language and symbols. This Article will explore the role of the Establishment Clause in setting the contours of permissible governmental involvement in this sacred civic task, when, for instance, a town sponsors a memorial service or dedicates a monument. With the Supreme Court’s decisions in *Town of Greece v. Galloway* (2014) and *American Legion v. American Humanist Assn.* (2019), the jurisprudence is now more open to religious expression that has civic meaning and that reflects the values of pluralism, inclusivity, and non-discrimination. These decisions make it possible for underrepresented groups, particularly people of color, to participate in sacred civic expression as fully as*

* © 2020 Angela C. Carmella. Professor of Law, Seton Hall University School of Law, Angela.Carmella@shu.edu. I am grateful to Paul Hauge, Christopher Lund, William Marshall, Catherine McCauliff, Terri Montague, David Operbeck, and Najarian Peters for comments on earlier drafts, and to Lilly Wofsy, Christina Zarcone, Michael Wuest, and Jaden Jackson for their research assistance. I am also grateful to the Seton Hall Law School administration for summer research support. The views expressed here are solely my own. A small portion of this Article appeared in Angela Carmella, *Commemorating Lives Lost in Times of Pandemic and Protest*, CANOPY FORUM: ON THE INTERACTIONS OF L. & RELIGION (Oct. 2, 2020), <https://canopyforum.org/2020/10/02/commemorating-lives-lost-in-times-of-pandemic-and-protest/>.

dominant groups, so that our remembrances in times of pandemic and protest are as diverse as our communities.

INTRODUCTION

Since the late winter of 2020, the Covid-19 virus has infected over thirty million and killed nearly 550,000 people in the United States.¹ These staggering numbers do not include other costs, like related long-term illnesses and increases in mental health crises, domestic violence, and substance abuse—not to mention widespread business closures.² This public health tragedy and its accompanying economic devastation have fallen disproportionately on people of color.³ Additionally, more police brutality against African Americans in early summer prompted millions to march in numerous Black Lives Matter protests.⁴ Six months later, the nation witnessed a stunning display of the racial double standard as Washington, D.C., stood woefully unprepared for the onslaught of white rioters who stormed the U.S. Capitol.⁵

In times like these of extraordinary national grief and loss, there is much to mourn. During the pandemic, gatherings at private funerals have been severely restricted. But our public mourning and remembrance have been robust. Communities have created spontaneous memorials using street art, murals, candles, flag displays, empty chairs, and large-scale photo projections to

¹ *Tracking the Spread of the Coronavirus Outbreak in the U.S.*, BLOOMBERG (last visited Mar. 25, 2021, 10:31 AM), <https://www.bloomberg.com/graphics/2020-united-states-coronavirus-outbreak/>.

² Todd S. Purdum, *Drive-by Burials and Face Time Farewells: Grief in the COVID Era Will Weigh on the American Psyche for Years to Come*, STAT (Dec. 9, 2020), <https://www.statnews.com/2020/12/09/drive-by-burials-and-facetime-farewells-grief-in-the-covid-era-will-weigh-on-the-american-psyche-for-years-to-come/>.

³ Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist—And In Some Cases Worsen*, NPR (Sept. 23, 2020), <https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen>.

⁴ Larry Buchanan et al., *Black Lives Matter May be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

⁵ Nathalie Baptiste, *How Would the Police Have Reacted if Black People Stormed the Capitol?*, MOTHER JONES (Jan. 7, 2021), <https://www.motherjones.com/politics/2021/01/how-would-the-police-have-reacted-if-black-people-stormed-the-capitol/>.

commemorate those who have died from Covid-19, the fallen health care workers and other essential workers,⁶ and the victims of police

⁶ Nancy Lofholm, *Grand Junction Woman Transforms Coronavirus' Staggering Death Toll Into a Comforting Work of Art*, COLO. SUN (Dec. 16, 2020), <https://coloradosun.com/2020/12/16/rose-petal-covid-memorial-grand-junction/> (Rose Petal Memorial); Steve Dubb, *Absent Official Response, Makeshift Memorials Mark Pandemic's Toll*, NONPROFIT Q. (Dec. 14, 2020), <https://nonprofitquarterly.org/absent-official-response-makeshift-memorials-mark-pandemics-toll/> (thousands of white pennants at D.C.'s RFK stadium; 862 empty chairs on Philadelphia's Independence Mall; heart-shaped rose garlands in NYC); Zachary Small, *Hardly Any 1918 Flu Memorials Exist. Will We Remember COVID-19 Differently?*, NPR (Dec. 8, 2020), <https://www.npr.org/2020/12/08/940802688/hardly-any-1918-flu-memorials-exist-will-we-remember-covid-19-differently> (20,000 square foot mural of masked doctor; thousands of American flags planted on the National Mall; video projections with messages superimposed on surgical masks; noting need for permanent monuments); Cate McQuaid, *Where Are All the Memorials to Americans Killed by COVID-19?*, BOS. GLOBE: CRITIC'S NOTEBOOK (Dec. 3, 2020), <https://www.bostonglobe.com/2020/12/03/arts/where-are-all-memorials-americans-killed-by-covid-19/> (now-erased mural of pediatrician, thousands of origami cranes in Los Angeles); Ian Bogost, *How Will the Future Remember COVID-19?*, THE ATLANTIC (Nov. 24, 2020), <https://www.theatlantic.com/technology/archive/2020/11/what-should-a-covid-19-memorial-be/617137/> (three commissioned art pieces/ideas for monuments); Megan Barber, *What America's First Ad Hoc COVID Memorials Look Like From White Flags in D.C. to Red Felt Roses in Los Angeles*, CURBED (Nov. 13, 2020), <https://www.curbed.com/2020/11/coronavirus-deaths-covid-memorials-remembering-victims.html> (flower wreaths in NYC; Detroit drive-by memorial with billboard-sized images of victims; thousands of flags planted in private yard for every Texan victim; felt rose mural in Los Angeles; thousands of white flags and empty black chairs on D.C. National Mall and D.C. Armory Parade Ground; *ofrenda* and enlarged photos of 50 victims and 500 chairs, each bearing a lit tea candle, at Rose Garden at Arizona State Capitol; wall of broken paper hearts outside the National Center for Civil and Human Rights in Atlanta; *ofrenda* in Passaic, NJ, to honor 500 migrants from Puebla, Mexico, in tristate area who died from COVID); Samantha Melamed, *What Will Memorials to the Pandemic Look Like? A Philly Artist Started with 100,000 Folds*, PHILA. INQUIRER (Oct. 4, 2020), <https://www.inquirer.com/news/philadelphia-memorial-art-pandemic-100000-folds-coronavirus-joanna-hutchinson-20201004.html> (origami pyramids interlocked into urn-like shapes); Colleen Walsh, *Marking the Passing of a Grim Pandemic Milestone for the Nation*, HARV. GAZETTE (Sept. 29, 2020), <https://news.harvard.edu/gazette/story/2020/09/how-do-we-mourn-the-growing-number-of-deaths-from-covid-19/> (COVID memorials, including the newspapers printing victim names and the National Cathedral in DC tolling its bell to mark deaths); Michael T. Luongo, *Coronavirus Memorials Will be Created. The Real Issue is How We Want Our Losses Remembered*, NBC NEWS: THINK (May 24, 2020), <https://www.nbcnews.com/think/opinion/coronavirus-memorials-will-be-created-real-issue-how-we-want-ncna1213101> (pandemic memorials around the world);

brutality.⁷ In addition to physical memorials, many videos and websites have been established to honor the victims and to create a record of the fleeting memorials.⁸ Communities will continue the

Daniella Byck, *An Artist is Projecting Giant Memorials to Covid-19 Victims on Walls All Over DC*, WASHINGTONIAN (Apr. 17, 2020), <https://www.washingtonian.com/2020/04/17/this-dc-artists-projections-are-a-huge-poignant-memorial-to-the-citys-covid-19-victims/>; Bill Parry, *Artist Completes 20,000 Square Foot Memorial for Covid-19 Victims in Flushing Meadows Corona Park*, QNS (May 29, 2020), <https://qns.com/story/2020/05/29/artist-completes-20000-square-foot-memorial-for-covid-19-victims-in-flushing-meadows-corona-park/>; Christopher Knight, *Commentary, U.S. Should Build a Memorial 'Plague Column' for Covid-19, But Where? Hint: Trump*, L.A. TIMES (May 5, 2020), <https://www.latimes.com/entertainment-arts/story/2020-05-05/coronavirus-plague-columns-memorials-trump-tower>; Amber Ferguson, *Covid-19 Victims are Memorialized Across D.C.*, WASH. POST (Apr. 28, 2020), https://www.washingtonpost.com/video/local/covid-19-victims-are-memorialized-across-dc/2020/04/28/b1b6cdeb-00db-4ac8-ae18-1bdb0161cfcc_video.html (projection of remembrances on buildings).

⁷ Kristi Belcamino, *Street Art Honored George Floyd. Now Advocates Want to Preserve It for History*, TWIN CITIES PIONEER PRESS (June 7, 2020), <https://www.twincities.com/2020/06/07/street-art-honored-george-floyd-now-advocates-want-to-preserve-it-for-history/>; Mecca Bos, *Remembering George Floyd Through Minneapolis Public Art: The Local Push to Keep the Visual Story of George Floyd a Black Story*, MEET MINNEAPOLIS CITY BY NATURE (last visited Apr. 15, 2021), <https://www.minneapolis.org/support-black-lives/george-floyd-public-art/>; Jemima McEvoy, *Black Lives Matter Murals Color Streets Across the Country (Photos)*, FORBES (June 16, 2020), <https://www.forbes.com/sites/jemimamcevoy/2020/06/16/black-lives-matter-murals-color-streets-across-the-country-photos/?sh=5c625e867c03>; Stephen Humphries, *How George Floyd and #BlackLivesMatter Sparked a Street Art Revival*, CHRISTIAN SCI. MONITOR (July 24, 2020), <https://www.csmonitor.com/The-Culture/2020/0724/How-George-Floyd-and-BlackLivesMatter-sparked-a-street-art-revival>. The place where George Floyd was killed, 38th and Chicago Avenues, Minneapolis, became a shrine with thousands pouring in to grieve, leaving thousands of mementos. Murals of Floyd there and all over the nation became instantly recognizable world-wide. City officials named the area “George Perry Floyd Jr. Place” and will create a permanent memorial on the site. The area will also be zoned as a cultural district (one of seven).

⁸ “3,000 Faces of COVID” A Christmas Tribute to Families Who Have An Empty Chair, CISION: PR NEWSWIRE (Dec. 22, 2020), <https://www.prnewswire.com/news-releases/3-000-faces-of-covid-a-christmas-tribute-to-families-who-have-an-empty-chair-301197320.html> (tribute video and photo collage); Detroit Free Press, *Detroit Honors COVID-19 Victims in Belle Isle Memorial*, YOUTUBE (Sept. 1, 2020), <https://www.youtube.com/watch?v=mDoeSEyTlFA> (video depicting Detroit drive-by memorial with billboard-sized images of victims); *These Memorials Remind Us of the Americans Lost to Covid-19*, CNN (last visited Jan. 30, 2021), <https://www.cnn.com/videos/us/2020/12/18/covid-memorials-orig-jk.cnn> (video of memorials around the United States); *NYPD COVID-19 Memorial*, NYC.GOV (last

practice of bearing witness to the grief of illness and injustice and will commemorate the tragic deaths in other, more permanent ways, with events and ceremonies, monuments and symbols.⁹ At a Service of Remembrance in Washington, D.C. on the eve of the 2021 inauguration—the first national commemoration of its kind—President Biden remarked poignantly that, “[t]o heal, we must remember.”¹⁰

This public mourning, whether marked by permanent monuments or ephemera, necessarily involves what I call *sacred* civic expression. We express profound loss, anger, and hope together in public, civic spaces—sometimes using non-religious language and symbols and sometimes using the language and symbols of our particular religious communities. In this Article, I contend that the

visited Jan. 30, 2021), <https://www1.nyc.gov/site/nypd/about/memorials/covid-19-memorial.page> (video depicting names, titles, and death-dates of NYPD employees); *Nebraska COVID19 Memorial Wall*, NEB. IMPACT (last visited Jan. 30, 2021), <https://neimpact.org/memorial> (webpage depicting remembrances); *COVID-19 Living Memorial*, SPRINGFIELD-GREENE CNTY. HEALTH (last visited Jan. 30, 2021), <https://www.springfieldmo.gov/5273/COVID-19-Living-Memorial> (website with photos and remembrances).

⁹ Kevin Armstrong & Tracey Tully, *Park With Covid Memorial Is Rising on Site of Former Toxic Dump*, N.Y. TIMES (Dec. 4, 2020), <https://www.nytimes.com/2020/12/04/nyregion/skyway-park-jersey-city-landfill.html> (Jersey City memorial planned, with over 500 trees to be planted in addition to the construction of a memorial wall); Haidee Chu et al., *As Trenches Fill, Plans for Hart Island COVID-19 Memorial Look to Past and Future*, THE CITY (Dec. 11, 2020), <https://www.thecity.nyc/2020/12/11/22170479/hart-island-covid-memorial-new-york-city-potters-field> (possible plans to transform Hart Island into memorial to victims of coronavirus, AIDS epidemic, and the Spanish Flu); Emily Godbey, *Debating Whether There Should Be a COVID-19 Memorial*, U.S. NEWS: THE CONVERSATION (Nov. 27, 2020), <https://www.usnews.com/news/best-countries/articles/2020-11-27/what-will-monuments-to-the-covid-19-pandemic-look-like> (comparing plague monuments to war monuments; issue of permanent monument).

¹⁰ *Tribute Held in Nation’s Capital for Those Lost to the Pandemic*, PBS NEWS HOUR (Jan. 19, 2021), <https://www.pbs.org/newshour/show/tribute-held-in-in-nations-capital-for-those-lost-to-the-pandemic> (lighting ceremony at National Mall Reflecting Pool to remember 400,000 victims). For other nations’ memorials, see Eric Baldwin, *World’s First Large-Scale COVID Memorial Designed for Victims of the Pandemic*, ARCHDAILY (Aug. 19, 2020), <https://www.archdaily.com/945873/worlds-first-large-scale-covid-memorial-designed-for-victims-of-the-pandemic> (“World Memorial to the Pandemic,” to be built in Uruguay, as a large, circular structure overlooking ocean); Julie Bosman et al., *A Nation’s Anguish as Deaths Near 200,000*, N.Y. TIMES (Sept. 21, 2020), at 1 (domestic and international example, including Spain’s eternal flame monument).

words and images that emerge from our grieving, remembering, and monument-making—whether religious or non-religious—are sacred.¹¹ While politicians and policymakers battle over public health solutions, economic recovery, and reforms for racial justice, other Americans will tend to this important cultural task of memorializing national grief and sorrow and crafting images for national atonement and reconciliation. This cultural task will become part of a larger, ongoing, project of making public monuments and civic landscapes more inclusive of the narratives of underrepresented communities.¹²

This Article focuses on the role of the Establishment Clause in setting the contours to religious language and imagery in sacred civic expression. The clause is obviously not applicable to much of this expression: when non-state actors create memorials and hold protests, they are constitutionally protected by freedom of speech, religion, and assembly; it matters not whether their grief is framed in secular or religious terms. But when a *state* actor gets involved in coordinating a sacred civic event—like when a town sponsors a memorial service or commissions or dedicates a monument on government property—the Establishment Clause becomes

¹¹ This is not to be confused with the old European practice of explorers consecrating newly discovered lands for God and king. For discussion, see Mary L. Clark, *Treading on Hallowed Ground: Implications for Property Law and Critical Theory of Land Associated with Human Death and Burial*, 94 KENTUCKY L.J. 487 (2006).

¹² *Webinar: The Future of Monumentality*, NEXT CITY (Jan. 27-28, 2021), <https://nextcity.org/events/detail/the-future-of-monumentality> (Day 1: What is Monumentality? Video at <https://nextcity.org/webinars/view/the-future-of-monumentality-what-is-monumentality>; Day 2: Alternatives to Monumentality, Video at <https://nextcity.org/webinars/view/the-future-of-monumentality-alternatives-to-monumentality>) [hereinafter *The Future of Monumentality*]; Press Release, The Andrew W. Mellon Found., Mellon Foundation Announces Quarter-Billion-Dollar Commitment for “Monuments Project” to Reimagine and Rebuild Commemorative Spaces and Transform the Way History is Told in the United States (Oct. 5, 2020), <https://mellon.org/news-blog/articles/monuments-project/>; see also Isis Davis-Marks, *Virginia Museum Will Lead Efforts to Reimagine Richmond Avenue Once Lined With Confederate Monuments*, SMITHSONIAN MAG. (Dec. 18, 2020), <https://www.smithsonianmag.com/smart-news/virginias-governor-wants-spend-11-million-reinventing-confederate-monument-180976574/> (Virginia Governor in December 2020 proposes budget that sets aside 25 million dollars for Slavery Heritage Site, renovation of Richmond’s Slave Trail, restoration of burial grounds of enslaved people, and re-envisioning Monument Avenue, currently filled with Confederate monuments, to be more racially inclusive).

operative if the remembrance is expressed in religious terms. This Article will explore the extent to which religion can inform our civic commemoration under the current jurisprudence. The clause's central promise of political equality—that religious affiliation not affect one's standing in the political community—will help us to navigate our way through that inquiry.

But the full picture adds another dimension to the discussion. The far deeper crisis of national identity over race has been playing out in a conflict over sacred civic words, place names, and symbols. White supremacists are no longer hidden, as we learned from the 2017 events in Charlottesville.¹³ Confederate monuments, flags, and place names remain ubiquitous.¹⁴ During the height of the 2020 summer protests following George Floyd's murder, some marchers pulled down Confederate statues. In addition, some destroyed images of Founders, symbols of European conquest, and even Christian statues on church property.¹⁵ In reaction, President Trump's June 26 Executive Order promised prosecution of anyone who "destroys, damages, vandalizes, or desecrates a monument, memorial, or statue" or "damages, defaces, or destroys religious property, including by attacking, removing, or defacing depictions of Jesus or other religious figures or religious

¹³ Susan Hayward, *Firsthand Reflections on Charlottesville: On Symbols and Symbolism: The Power of Religion in Protest*, BERKLEY FORUM (Aug. 25, 2017), <https://berkeleycenter.georgetown.edu/responses/on-symbols-and-symbolism-the-power-of-religion-in-protest>.

¹⁴ As of February 2019, there were 1,747 Confederate symbols nationwide. This number includes not only monuments but flags, holidays, commemorative mile markers, and names for schools, military bases, lakes, bridges, roads, counties, municipalities; see *Whose Heritage? Public Symbols of the Confederacy*, S. POVERTY L. CTR. (Feb. 1, 2019), <http://www.splcenter.org/20190201/whose-heritage-public-symbols-confederacy> [hereinafter *Whose Heritage?*].

¹⁵ Alejandra Molina, *Who is St. Junipero Serra and Why are California Protesters Toppling His Statues?*, AM. MAG. (June 22, 2020), <https://www.americamagazine.org/politics-society/2020/06/22/who-st-junipero-serra-and-why-are-california-protesters-toppling-his>; see also Devin Watkins, *U.S. Bishop decries destruction of St. Junipero Serra Statue*, VATICAN NEWS (July 6, 2020), <https://www.vaticannews.va/en/church/news/2020-07/usa-california-bishop-sacramento-decries-serra-statue-destructio.html> (claiming that "Fr. Serra worked under the colonial system but 'denounced its evils and worked to protect the dignity of native peoples,'" quoting Bishop Soto); *Statues of Mary Vandalized in Weekend of Church Attacks*, CATH. WORLD REP. (July 12, 2020), <https://www.catholicworldreport.com/2020/07/12/statues-of-mary-vandalized-in-weekend-of-church-attacks/>.

artwork.”¹⁶ White supremacists have taken to their own form of vandalism, destroying Black Lives Matters murals and banners and defacing Black churches.¹⁷ Yet, despite Trump’s attempt to preserve “our cultural heritage,”¹⁸ some official reckoning has begun: Mississippi finally abandoned the battle emblem of the confederacy within its state flag, the Washington Redskins finally changed the team’s name, and the Senate overrode his veto to the National Defense Authorization Act in late December, thereby creating a process to rename army bases currently named for Confederate generals.¹⁹

The symbols that define us as a nation are fiercely contested precisely because they are considered “sacred.” The compromises the nation made with the post-civil war South elevated its slave heritage to prominence—to the detriment of African Americans—as those symbols signaled and enabled generations of continued subjugation.²⁰ The central promise of racial equality has not been honored. As Michael Gerson, Washington Post columnist and former Bush speechwriter, put it, “This evil—the evil of white supremacy, resulting in dehumanization, inhumanity, and murder—is the worst stain, the greatest crime, of U.S. history. It is the thing that nearly broke the nation. It is the thing that proved

¹⁶ Exec. Order No. 13933, 85 Fed. Reg. 40081 (June 26, 2020). *But see* Jess R. Phelps & Jessica Owley, *Etched in Stone: Historic Preservation Law and Confederate Monuments*, 71 FLA. L. REV. 627 (2019) (overvaluing of permanency of landmark protection and the need for flexibility in re-evaluating past protection decisions).

¹⁷ *Pastor of Black Church Defaced in Protests: ‘An Assault on Our Historical Resolve,’* NPR (Dec. 14, 2020, 7:20 PM), <https://www.npr.org/2020/12/14/946505450/pastor-of-black-church-defaced-in-protests-an-assault-on-our-historical-resolve>; *see also* Nicole Acevedo, *Threats Over Black Lives Matter Mural Prompt Lockdown at Campus in North Carolina*, NBC NEWS (Oct. 10, 2020, 5:18 PM), <https://www.nbcnews.com/news/us-news/threats-over-black-lives-matter-mural-prompts-lockdown-campus-north-n1242830>.

¹⁸ Libby Cathey, *Trump’s History of Defending Confederate ‘Heritage’ Despite Political Risk: Analysis*, ABC NEWS (June 11, 2020, 5:51 PM), <https://abcnews.go.com/Politics/trumps-history-defending-confederate-heritage-political-risk-analysis/story?id=71199968>.

¹⁹ Andrew Duehren, *Senate Overrides Trumps Veto of NDAA Defense Bill*, WALL ST. J. (Jan. 1, 2021), <https://www.wsj.com/articles/senate-overrides-trumps-veto-of-defense-bill-11609529894>; As of Feb. 2019, 114 Confederate symbols had been removed nationwide, *see Whose Heritage?*, *supra* note 14.

²⁰ For a powerful discussion of the legal and cultural grounding of racial superiority/inferiority more generally, *see* Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

generations of Christians to be vicious hypocrites.”²¹ During the January 6th insurrection at the Capitol, rife with the symbolism of white nationalism and conspiracy theories,²² Christian symbols were also on display—crosses, signs with “Jesus Saves,” Christian flags, and Crusades flags.²³

The extremist political ideology of Christian nationalism, encouraged by Trump, makes an absurdly narrow and exclusionary claim to the nation’s sacred civic expression.²⁴ But the current

²¹ Michael Gerson, *Opinion: Ignoring Trump’s Racism Betrays Our Country’s Victims*, WASH. POST (Aug. 1, 2019), https://www.washingtonpost.com/opinions/ignoring-trumps-racism-betrays-our-countrys-victims/2019/08/01/78b9d0e6-b471-11e9-8949-5f36ff92706e_story.html. For historical discussion, see DAVID W. OPDERBECK, *LAW AND THEOLOGY: CLASSIC QUESTIONS AND CONTEMPORARY PERSPECTIVES* 159-85 (2019).

²² Regarding secular symbols, see Kristin Romey, *Decoding the Hate Symbols Seen at the Capitol Insurrection*, NAT’L GEOGRAPHIC (Jan. 12, 2021), <https://www.nationalgeographic.com/history/2021/01/decoding-hate-symbols-seen-at-capitol-insurrection/#close>; Ishaan Jhaveri & Nina Berman, *What We Saw at the Capitol Hill Insurrection*, VICE NEWS (Jan. 12, 2021, 12:19 PM), <https://www.vice.com/en/article/epdmde/what-we-saw-at-the-capitol-hill-insurrection> (describing revolutionary war and neo-confederacy imagery, conspiracy symbolism).

²³ Jhaveri & Berman, *supra* note 22; Elana Schor, *Christianity on Display at Capitol Riots Sparks New Debate*, AP NEWS (Jan. 28, 2021), <https://apnews.com/article/christianity-capitol-riot-6f13ef0030ad7b5a6f37a1e3b7b4c898> (noting the criticism from Christian groups and pastors denouncing this misappropriation of Christian symbols for malevolent, racist purposes).

²⁴ St. Thomas Law School Dean Rob Vischer, quoting Georgetown Professor Paul Miller, says “Christian nationalism is a political ideology that holds that ‘the American nation is defined by Christianity and that the government should take steps to keep it that way to sustain and maintain our Christian heritage.’” Dean Vischer notes that:

When we merge our religious identity with our political identity, we will do anything to ensure that our political tribe prevails. We are no longer debating ideas about which reasonable people can disagree; we are defending Christianity against its enemies . . . When a particular political outcome becomes a tenet of my Christian faith, there’s nothing left to argue about. And when there’s nothing left to argue about, that’s a very dangerous place for democracy to find itself.

Rob Vischer, *What is Christian Nationalism and What is it Not?*, MIRROR OF JUSTICE (Feb. 5, 2021), https://mirrorofjustice.blogs.com/mirrorofjustice/2021/02/what-is-christian-nationalism-and-what-is-it-not.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+blogs%2FIPaj+%28Mirror+of+Justice%29. Vischer notes that

constitutional jurisprudence on religious symbols presents us with the opportunity for a broadly *inclusive* understanding of sacred civic expression—one that invites the narratives of all faiths and all races. Underrepresented and historically disenfranchised groups, including Blacks, Latinos, and Indigenous tribes, know their dignity because of their faith—the very dignity repeatedly denied by governments and private actors. This unwavering knowledge of their dignity creates the impetus for movements for justice and gives meaning to the intense suffering involved in making progress.²⁵ Those iconic marches, speeches, and places of the civil rights movement, which were led by Black church clergy and filled with biblical language, imagery, and insights, are marked as sacred civic moments and hallowed ground.²⁶ The movement and its narratives continue, with the more religiously pluralistic emphasis of the BLM movement²⁷ as well as the emergence of a “Black visual

Christian nationalism is not Christian patriotism. Nor is it Christian political engagement:

We are not a “Christian nation” in the sense that Christian nationalists mean. We are a nation in which our political discourse has long been shaped by Christian values, on both the left and the right. The civil rights movement was infused with Christian images and principles. The progressive push for immigration reform prominently features Christ’s admonition about welcoming the stranger.

Id.; see also Morgan Lee, *Christian Nationalism Is Worse Than You Think*, CHRISTIANITY TODAY (Jan. 13, 2021), <https://www.christianitytoday.com/ct/podcasts/quick-to-listen/christian-nationalism-capitol-riots-trump-podcast.html>; ANDREW WHITEHEAD & SAMUEL PERRY, *TAKING AMERICA BACK FOR GOD: CHRISTIAN NATIONALISM IN THE UNITED STATES* (2020). For self-critique by Christian leaders, see Jack Jenkins, *Christian Leaders Condemn Christian Nationalism in New Letter*, RELIGION NEWS SERV. (Aug. 2, 2019), <https://religionnews.com/2019/08/02/christian-leaders-condemn-christian-nationalism-in-new-letter/>.

²⁵ See, e.g., Robert Joseph Taylor, *Religious Perspectives on the Impact of Race on Health and Social Behaviors Across the Life Course: An Introduction to a Special Issue*, 9 RACE SOC. PROBS. 91-94 (2017) (“Religion and religious institutions have thus been viewed in two very dissimilar ways—as social problems themselves (marginalization of religious minorities), as well as a remedy for the social discrimination and prejudice affecting their communities.”).

²⁶ Gerson, *supra* note 21 (“The Edmund Pettus Bridge is not just another bridge. The balcony outside Room 306 at the Lorraine Motel is not just another balcony.”).

²⁷ Hebah H. Farrag & Ann Gleig, *Far from Being Anti-Religious, Faith and Spirituality Run Deep in Black Lives Matter*, UNIV. OF SO. CAL. DORNSIFE NEWS (Sept. 14, 2020), <https://dornsife.usc.edu/news/stories/3310/spirituality-runs-deep-in-black-lives-matter-movement/>; Hebah H. Farrag, *Responding to Religion and*

public sphere” on social media to bear witness to persons, times, and places that must not be forgotten.²⁸ Latino populations, spurred by faith, have launched reform movements ranging from sanctuary to immigrant justice, sometimes under the banner of Catholic symbols like Our Lady of Guadalupe.²⁹ The Native American story becomes part of sacred civic expression as they demand protection for their sacred mountains and lands, which is also a demand for environmental protection more generally.³⁰ These groups, among countless others, bring their faith to the public and inevitably impact civic symbolic expression. Thus, a bright line that some would propose—confining religion behind a “wall of separation” in order to quiet majoritarian voices—would also result in silencing underrepresented groups and their healing, unifying, and liberative voices.³¹ It is far better to include the texts and images of non-dominant groups within the larger civic story to allow their narratives to flourish—with religious and secular dimensions intact. Such a broadly inclusive range of sacred civic expression advances political equality and more accurately reflects the “our” of our civic landscape.

The current Establishment Clause jurisprudence holds that religious words and symbols can have civic meaning and functions. Recognizing that the state has no competence to create a “non-

Racial Justice: The George Floyd Protests: The Fight for Black Lives is a Spiritual Movement, GEO. UNIV. BERKLEY CTR FOR RELIGION, PEACE & WORLD AFFS. (June 9, 2020), <https://berkeleycenter.georgetown.edu/responses/the-fight-for-black-lives-is-a-spiritual-movement>.

²⁸ ALLISSA V. RICHARDSON, BEARING WITNESS WHILE BLACK: AFRICAN AMERICANS, SMARTPHONES, & THE NEW PROTEST JOURNALISM 151-52 (2020) [hereinafter BEARING WITNESS].

²⁹ See, e.g., Raul A. Reyes, *Our Lady of Guadalupe is a Powerful Symbol of Mexican Identity*, NBC NEWS (Dec. 12, 2016), <https://www.nbcnews.com/news/latino/our-lady-guadalupe-powerful-symbol-mexican-identity-n694216> (as an icon of justice and source of empowerment among Mexican-American women); Mary E. Odem, *Our Lady of Guadalupe in the New South: Latino Immigration and the Politics of Integration in the Catholic Church*, 24 J. AM. ETHNIC HIST. 26, 48-52 (2004).

³⁰ Brian Roewe, *Larger Faith Community Comes to Standing Rock in Solidarity*, NAT'L CATH. REP. (Nov. 7, 2016), <https://www.ncronline.org/blogs/justice/ecocatholic/larger-faith-community-comes-standing-rock-solidarity>; Shauna Long & Siham Zniber, *Judge Orders Dakota Access Pipeline to Shut Down*, EARTHJUSTICE (July 6, 2020), <https://earthjustice.org/news/press/2020/judge-orders-dakota-access-pipeline-to-shut-down>.

³¹ See *infra* Part IV.A.

denominational” faith or even its own “civil religion,”³² the Supreme Court has noted that even intensely religious words and symbols can carry civic meaning because “religious themes provide particular means to universal ends.”³³ That said, the Court also sets forth constraints. In its sacred civic expression, government may not act to: proselytize, advance, or disparage any faith or belief; exclude, coerce, or intimidate based on faith; denigrate another’s faith, threaten damnation, or preach conversion.³⁴ Government meets its constitutional obligations when its sacred civic expression can “assur[e] religious liberty and tolerance for all, avoid[] religiously based social conflict,”³⁵ show respect for pluralism and “for differing views, [and demonstrate] an honest endeavor to achieve *inclusivity and nondiscrimination*.”³⁶ Thus, the Supreme Court has held that, given our long history and contemporary situation of religious pluralism, it is constitutional to permit religious modes of sacred civic expression as long as constraints like these are respected. The jurisprudence eschews a strict separationist approach, which is ever-suspicious of religion’s presence in governmental space; the Court’s approach is indeed a “relaxed” jurisprudence, as compared with the separationist analysis more prevalent in the 1970s and 80s.³⁷

³² *Town of Greece v. Galloway*, 572 U.S. 565, 581 (2014) (“Government may not mandate a civic religion that stifles any but the most generic reference to the sacred any more than it may prescribe a religious orthodoxy.”); *see also* William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 19 (2002) [hereinafter *The Limits of Secularism*]:

[A]ny effort to uncover a national religious core may undermine the benefits of religious pluralism. Some of the social value provided by American religion derives precisely from its disunity. Diverse religious traditions help develop moral choices by allowing differing perspectives to inform public debate. Additionally, diverse religious groups serve as mediating institutions between individuals and government and “act as critical buffers between the individual and the power of the State.” Forging unity in religious identity through government sponsorship or imprimatur undercuts these benefits.

Id. (internal citations omitted).

³³ *Town of Greece*, 572 U.S. at 583.

³⁴ *Id.* at 590.

³⁵ *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2090-91 (2019) (Breyer, J., concurring).

³⁶ *Id.* at 2089 (emphasis added).

³⁷ Steven K. Green, *The “Irrelevance” of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 55-63 (2019).

There are benefits to this relaxed position on sacred civic expression, especially now in times of overwhelming grief. It allows human beings and human communities to lament without requiring a heightened scrupulosity to eliminate religious phrases or images. Prayers and symbols of particular religious traditions, within the constraints noted and in circumscribed settings, can now be used to mark civic moments and to commemorate civic events. This flexibility results from the recognition that religious meanings can develop new layers of meaning through time, context, or circumstance. Significantly, this relaxed jurisprudence recognizes the fluidity between religious and non-religious expression.

This fluidity, or permeability, between the religious and secular is well documented.³⁸ Symbols without societal consensus, those without shared assumptions or expectations that may be ambiguous or hybridized,³⁹ may have no clear social meaning and slide back and forth between religious and secular. In the recent case of *Penkoski v. Bowser*, two white male plaintiffs claimed the D.C. mayor's order to paint the yellow "Black Lives Matter" lettering on 16th St. near the White House involved religious symbols in violation of the Establishment Clause.⁴⁰ They claimed that they were made to feel like second-class citizens. For some, the

³⁸ The religious-secular distinction, how the line is drawn, and whether the distinction is even real, is a matter of great scholarly debate, particularly among religious studies scholars. *See, e.g.*, NINIAN SMART, *THE WORLD'S RELIGIONS* (1998). The scholarly discourse is shifting toward "the need to rethink the very terms 'secular' and 'religious,' their history, their relationship, and their concrete embodiment in American life." Sheila Greene Davaney, *The Religious-Secular Divide: The U.S. Case*, 76(4) SOC. RES.: AN INT'L Q. 1327, 1328 (2009). Citing scholars like Noah Feldman and Charles Taylor, Davaney notes a new historical narrative in which "the religion and the secular were deeply entangled," rather than starkly separate. *Id.* These two categories "have done different work in different times and places. While there have been distinctions between the secular and the religious, there has also been a symbiotic relationship and profound entanglements between the state and religion, the public and the private and the religious and the secular." *Id.* at 1330; *see also* CHARLES TAYLOR, *A SECULAR AGE* (2007). The U.S. Supreme Court has recognized the permeability of religious and secular in its conscientious objector jurisprudence, famously determining that an atheist who disavowed any religious belief simply did not realize that he was indeed religious for purposes of the statutory exemption: he held his moral convictions as strongly as a religious person holds his faith. *Welsh v. United States*, 398 U.S. 333 (1970); *see also* *United States v. Seeger*, 380 U.S. 163 (1965).

³⁹ B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491, 517-18 (2005).

⁴⁰ 486 F. Supp. 3d 219 (D.D.C. 2020).

Black Lives Matter movement is indeed a religious calling,⁴¹ but the lawsuit was a clear attempt to stop the official recognition of the peaceful protest/racial justice narrative in civic space. The district court dismissed on standing grounds, but had it reached the merits, the answer likely would have been no, the installation is not a religious symbol;⁴² but even had it been, the current Establishment Clause interpretation would have credited its clear civic meaning. In this way, a solicitude toward religious-secular permeability and inclusion, rather than separationism, prevents the silencing of non-dominant groups.

Of course, the dangers of governmental involvement continue to exist. Religious separationists have always cautioned against the harms to religious communities and to the polity that can result from mixing religion and government. Politicians might pander to religious groups, winning their support in exchange for religious monuments or displays. Further, the potential for majoritarian exclusion of non-dominant groups remains a concern where those groups are relatively small in number. Moreover, as I have argued elsewhere, government appropriation of religious texts or images for civic or political purposes can easily undermine their integrity as well as the independence of the groups that steward them.⁴³

If religion in the civic realm is to be healing, unifying, and liberative, and not exclusionary, the question then becomes whether the Court's constraints are sufficient to prevent the creation of a sacred civic landscape that excludes or demeans non-dominant groups. Will the current relaxed jurisprudence be capable of responding to the dangers? Will the Court allow latitude when it comes to collective grief, but draw the line at political pandering to religious groups? Will a relaxed jurisprudence ensure inclusion and non-discrimination rather than dominance of some groups and subjugation of others? In short, will the current interpretation of the Establishment Clause advance and not subvert political equality in our sacred civic expression? I contend that the current openness to religious symbolism in governmental spaces—for which

⁴¹ BEARING WITNESS, *supra* note 28, at 110-12; *see also* Farrag, *supra* note 27.

⁴² Private religious meanings ascribed to an object cannot create social meaning. Hill, *supra* note 39, at 519. But the case has been made that the Black Lives Matter movement is a spiritual movement, *see* Farrag, *supra* note 27.

⁴³ Angela C. Carmella, *Symbolic Religious Expression on Public Property: Implications for the Integrity of Religious Associations*, 38 FLA. ST. UNIV. L. REV. 481 (2011) [hereinafter *Symbolic Religious Expression*].

conservatives on the Court have advocated for decades—can indeed advance political equality as it welcomes multiple voices.

The Article is organized as follows. Part I will describe *nonreligious* ways in which Americans express collective grief, as well as hope and joy, through sacred civic expression. Part II will discuss the *religious* ways to voice sacred civic expression—the use of religious symbols and text in the civic space—and related developments in the Establishment Clause jurisprudence responding to this religion-government mix over the last five decades. Part III will describe the current Establishment Clause jurisprudence, focusing on the 2014 decision in *Town of Greece v. Galloway* and 2019 decision in *American Legion v. American Humanist Assn.*, which signaled a relaxation of church-state boundaries. Part IV will explore the possibility that greater inclusion of religious symbols and text in sacred civic expression might promote rather than subvert political equality to the benefit of underrepresented groups. While majoritarian symbols may be favored because “the social context that produces meaning reflects the power structure of the larger society,”⁴⁴ I trust that in time, the inclusion of non-dominant voices will in fact help shift, and will reflect the shift, in power.

PART I. THE NON-RELIGIOUS MODE OF SACRED CIVIC EXPRESSION

A. The Common Understanding of “Sacred” as the Domain of the Free Exercise of Religion by Non-Governmental Actors

The term “sacred” usually refers to a category of events and symbols embedded in religious traditions, communities, and institutions. We locate sacred moments and spaces in the “plural and particularist identities” of religious groups in civil society.⁴⁵ While many of the actions undertaken by these groups can be said to be religiously motivated or even mandated, those events, times, and places that are linked to grief, tragedy, joy, and hope are often considered especially holy and are marked in special ways: practices

⁴⁴ Hill, *supra* note 39, at 521.

⁴⁵ See NANCY L. ROSENBLUM & ROBERT C. POST, CIVIL SOCIETY AND GOVERNMENT 1, 3 (Nancy L. Rosenblum & Robert C. Post eds. 2002); *see also* Carmella, *Symbolic Religious Expression*, *supra* note 43, at 493-94.

surrounding birth, illness, and death that give profound respect to the human body; stories, rites, and reenactments that bind a religious community together; and consecration of physical spaces in both the built and natural environment. Burial grounds, houses of worship, shrines, and ancestral and native lands are hallowed grounds, or have some special status that sets them apart from other places. Likewise, events that are fleeting, like anointing one who is near death or the communal sharing of a holy meal, become sacred moments.

The sacred acts of these confessional communities are often, though not always, protected by a variety of constitutional and statutory provisions.⁴⁶ The Free Exercise and Free Speech Clauses protect religious beliefs, expression, and actions. The Free Exercise Clause specifically protects religious persons and groups from government animus and discrimination.⁴⁷ The Establishment Clause protects religious people and groups from governmental entanglement in religion,⁴⁸ devotional practices in public schools,⁴⁹ favoritism or disability based on religion,⁵⁰ and preferential monetary support.⁵¹ The Free Exercise and Establishment Clauses together protect the autonomy of religious institutions and the selection of church leadership, thereby protecting the community.⁵² Title VII protects religious employees from secular employer discrimination⁵³ and exempts religious employers to allow churches

⁴⁶ The Supreme Court makes no distinction between religiously motivated and “sacred” acts, as it defers to a believer’s characterization of faith as long as it is sincere. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 336, 344-45 (1987) (government cannot determine the church positions that are sufficiently related to a religion’s “core”); *Thomas v. Rev. Bd. Of Indiana Empl. Sec. Div.*, 450 U.S. 707, 715-16 (1981) (“Courts are not arbiters of religious interpretation.”).

⁴⁷ *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993); *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012 (2017); *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018); *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246 (2020).

⁴⁸ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

⁴⁹ *Lee v. Weisman*, 505 U.S. 577 (1992).

⁵⁰ *Larson v. Valente*, 456 U.S. 228 (1982).

⁵¹ *Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 13-16 (1947).

⁵² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012); *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

⁵³ *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); *EEOC v. Abercrombie & Fitch, Inc.*, 575 U.S. 768 (2015).

to favor co-religionists.⁵⁴ The federal Religious Freedom Restoration Act (RFRA) and state counterparts provide more robust free exercise protection, resulting sometimes in exemptions from general laws.⁵⁵ Part of the federal Religious Land Use and Institutionalized Persons Act (RLUIPA) specifically protects prisoner religious exercise.⁵⁶

Sacred spaces enjoy quite a bit of protection in federal and state law. Part of RLUIPA specifically protects all houses of worship and other private church property from discriminatory zoning regulations.⁵⁷ Indeed, this statute has been instrumental in ensuring the siting of religious buildings of minority faiths, particularly mosques, synagogues, and Black churches.⁵⁸ All houses of worship receive additional protection under the Church Arson Prevention Act, passed to respond to the burning of Black churches; religious cemeteries and artifacts receive protection from desecration under various state and federal provisions.⁵⁹ The glaring exception is the indigenous worshipper.⁶⁰ Native Americans whose sacred lands are on federally-owned land are given only access rights so as not to interfere with federal land management, because the government can determine how to use “what is, after all, *its* land.”⁶¹ Outside of this context, however, protections for religious acts on public property, when not already protected by the

⁵⁴ *Amos*, 483 U.S. at 327.

⁵⁵ 42 U.S.C. § 2000bb-1 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁵⁶ 42 U.S.C. § 2000cc-1; *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

⁵⁷ *See, e.g., Guru Nanak Soc’y of Yuba City v. Cnty. of Sutter*, 456 F.3d 978 (9th Cir. 2006).

⁵⁸ *Report on the Twentieth Anniversary of the Religious Land Use and Institutionalized Persons Act*, U.S. DEP’T OF JUSTICE (Sept. 22, 2020), <https://www.justice.gov/crt/case-document/file/1319186/download>.

⁵⁹ Angela C. Carmella, *Land Use*, in BORIS I. BITTKER ET AL., *RELIGION AND THE STATE IN AMERICAN LAW* 504-71 (Cambridge Univ. Press 2015).

⁶⁰ *See, e.g., Order Denying Injunction, Apache Stronghold vs. United States*, No. 21-0050, (D. Ariz. Feb. 12, 2021), ECF No. 57 (court rejects RFRA and Free Exercise Clause claims, among others, as not cognizable despite destruction of tribal lands under federal plan to allow a massive operation of copper ore extraction).

⁶¹ *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 453 (1988) (emphasis in original); *see also* Kristen Carpenter, *Limiting Principles and Empowering Practices in American Religious Freedoms*, 45 CONN. L. REV. 387 (2012).

Free Speech Clause, have received some additional protection under RFRA.⁶²

B. The Sacred as Expressed in Non-Religious Civic Terms

Confessional faith—protected by law as the free exercise of religion—is not the only language for expressing sacred meaning and collective memory.⁶³ There are profoundly sacred moments in the human story that are expressed in non-religious or pre-religious ways or expressed in generalized religious language with no explicit connection to a particular confessional community. Indeed, wherever there is memory, there is the potential for sacred acts and visual landscape: commemorating those who have died, marking tragedies and triumphs, and re-living awe-inspiring or transcendent encounters. And the predominant architectural forms for these commemorations are non-religious: the wall with text or names, the fountain, the triumphal arch, the obelisk, the equestrian statue, to name a few.⁶⁴ The Vietnam Memorial is perhaps one of the holiest sites in the U.S., but it is not overtly religious. It is enough that it names the nearly 60,000 war dead and reminds us of the enormity of the tragedy as it stretches nearly 500 feet. Like a cemetery, it is a place of gathering, mourning, and remembering.

Like religious communities, societies view the human body as special—marking deaths and burials in significant ways.⁶⁵ Like religious groups, civil communities share common meaning and memory, whether they are bound together by political or nonpolitical criteria. And like the buildings, shrines, and lands that are special to religions, the civil community has its significant landmarks in both the built and natural environments. We designate awe-inspiring architecture and natural features to serve as our collective sacred spaces. Such civic reverence transcends patriotism or group identity.

Many places are “consecrated through association with burial and death,”⁶⁶ such as burial grounds, cemeteries, and

⁶² See, e.g., *United States v. Hoffman*, 436 F. Supp. 3d 1272 (D. Ariz. 2020); *United States v. Kelly*, No. CR 2:18-022, 2019 WL 4017424, at *4 (S.D. Ga. Aug. 26, 2019).

⁶³ See generally Clark, *supra* note 11.

⁶⁴ *The Future of Monumentality*, *supra* note 12 (speaker: Paul Ramirez Jonas).

⁶⁵ Dean Clark notes that “the ‘sacred’ is humanistically understood as the ‘inestimable value of human life.’” Clark, *supra* note 11, at 493.

⁶⁶ Clark, *supra* note 11, at 491; see also Mateo Taussig-Rubbo, *Appraising 9/11: ‘Sacred’ Value and Heritage in Neoliberal Times*, 18 U. PA. J. CONST. L. 1179 (2016).

monuments for the military like Arlington National Cemetery or for “persons of transcendent importance.”⁶⁷ These have expanded over the years to include previously excluded groups, like women in the military and abolitionist and civil rights figures. But hallowed ground must go even farther beyond cemeteries for military or notable citizens. There has been increasing (though still insufficient) attention to burial grounds of African Americans (particularly enslaved people) and Native Americans.⁶⁸ As Dean Mary Clark writes, respectful recognition of excluded groups constitutes “rites of incorporation into the public domain of physical access and civic consciousness. These deaths are incorporated into the public experience and collective memory.”⁶⁹ Indeed, she argues that “using law to recognize land’s consecration through association with death and burial, when done in a nondiscriminatory manner, [is] a powerful tool of reparation and empowerment, honoring and enhancing personhood.”⁷⁰ This tool is hotly debated on the issue of the disposal of fetal remains.⁷¹

Sites of tragic deaths are also treated as hallowed ground: for example, the World Trade Center Footprint, with its “uniquely tragic and transcendent significance in our nation’s history,”⁷² and the site of the crash of Flight 93 on that same awful day, September 11, 2001. Places like these and others are etched into collective consciousness and require us to remember: Pearl Harbor, the Murrah Federal Building in Oklahoma City, the Alamo, Gettysburg, the site of the Johnstown Flood, and countless others.⁷³ Gun massacres at schools and other places, hundreds of which now take place each year, continue to warrant commemoration: Sandy Hook, Columbine, Parkland, the Pulse Nightclub, the Las Vegas music festival, the Tree of Life—Or L’Simcha Congregation in

⁶⁷ Clark, *supra* note 11, at 502.

⁶⁸ *Id.* at 514-20.

⁶⁹ *Id.* at 533.

⁷⁰ *Id.* at 534. There are now increasing efforts to broaden the civic landscape to include the narratives of non-dominant, underrepresented groups. See generally *The Future of Monumentality*, *supra* note 12.

⁷¹ Elizabeth Kimball Key, *The Forced Choice of Dignified Disposal: Government Mandate of Interment or Cremation of Fetal Remains*, 51 U.C. DAVIS L. REV. 305 (2017).

⁷² Clark, *supra* note 11, at 510.

⁷³ *Id.* at 511-12.

Pittsburgh, the Emanuel African Methodist Episcopal Church in Charleston.⁷⁴

Places that are neither burial grounds nor the sites of death “but rather constitute reverential space created for memorialization”⁷⁵ also serve as sacred civic expression. The Vietnam Memorial, mentioned above; the Hiroshima Peace memorial, the sites of the Japanese internment camps, the Holocaust Museum, the rare memorial to the pandemic of 1918.⁷⁶ The traveling AIDS quilt—weighing 54 tons with 50,000 memorial panels—and other local memorials express the grief associated with that terrible virus, which claimed over 100,000 lives.⁷⁷

In contrast to permanent monuments, sacred civic expression often takes the form of fleeting events and the remembrances or re-creation of those events. Protests and marches are particularly effective ways to mark the struggles for civil rights, immigrant justice, workers’ rights, women’s issues, pro-life concerns, climate change awareness, and criminal justice reform. The March on Washington in 1963 and the Poor People’s March in 1968 (which Martin Luther King, Jr. planned for August 1968, though he did not live to see it), were powerful sacred civic icons, demonstrating visually the enormity of racial injustice and poverty in America.⁷⁸ Eyewitness film of atrocities like the murder of George

⁷⁴ Jay Jones, *Memorial in Downtown Las Vegas Honoring Victims of October Shooting Rampage*, L.A. TIMES (Sept. 19, 2018), <https://www.latimes.com/travel/la-tr-vegas-memorial-20180919-story.html> (Las Vegas memorials for each of the 58 people killed); see also Elliott C. McLaughlin, *For 23 Years He’s Delivered Crosses after Massacres. This Was the Hardest Week Yet*, CNN (Aug. 2019, updated May 2020), <https://www.cnn.com/interactive/2019/08/us/memorial-crosses-dayton-cnnphotos/index.html> (handmade symbols of all faiths brought to grieving families).

⁷⁵ Clark, *supra* note 11, at 512.

⁷⁶ David Segal, *Why Are There Almost No Memorials to the Flu of 1918?*, N.Y. TIMES (May 14, 2020),

<https://www.nytimes.com/2020/05/14/business/1918-flu-memorials.html>.

⁷⁷ Stephen Hemrick, *AIDS Memorials in the U.S.A.*, GAY & LESBIAN REV. (May–June 2012), <https://glreview.org/article/aids-memorials-in-the-u-s-a/>. The AIDS Quilt has returned to San Francisco, Richard Gonzales, *AIDS Memorial Quilt is Returning Home to San Francisco*, NPR (Nov. 20, 2019), <https://www.npr.org/2019/11/20/781430503/aids-memorial-quilt-is-returning-home-to-san-francisco>.

⁷⁸ His successor, Bishop William Barber, sponsored a digital gathering during the pandemic. *Mass Poor People’s Assembly and Moral March on Washington*, POOR PEOPLE’S CAMPAIGN (June 20, 2020), <https://www.poorpeoplescampaign.org/event/mass-poor-peoples-assembly-moral-march-on-washington/>.

Floyd, and funerals of great leaders or victims of violence and injustice, become sacred civic images.⁷⁹ The Black Lives Matter marches across the nation in June of 2020 involved between 15 and 26 million people;⁸⁰ bright yellow lettering of the movement painted on streets in New York and Washington left behind permanent memorials of the protest. Similar murals were painted on streets all over the nation. A month later, the nation witnessed the sacred iconic final carriage ride bringing Congressman John Lewis' body across the Edmund Pettus Bridge—fifty-five years after he had been beaten by police during a civil rights march at that very spot. Indeed, the current possibility of renaming the bridge after Congressman Lewis evinces the way in which objects can be layered with new and overriding meaning.⁸¹

Lest the reader think that sacred civic expression relates only to grief and injustice, it is critical to note that an entire category relates to places of exceptional beauty in the built and natural environment. Extraordinary architectural, historical, and cultural buildings, neighborhoods, and structures are protected by federal, state, and local historic preservation laws. Awe-inspiring features of the natural world, like the Grand Canyon, Yellowstone, and Muir Woods, are preserved by our national and state parks systems; endangered species and ecosystems that sustain human and animal life are preserved by our environmental laws.⁸² As the late Professor John Nagle reminded us, “The United States has long prided itself for its scenery, which offered an alternative to the cultural treasures of Europe. ‘America's Best Idea’ was to establish national parks, which are monuments to the nation's scenic beauty. Today, courts and legislatures alike act to preserve what they variously describe as scenic areas, visual resources, and viewsheds from things that

⁷⁹ See generally BEARING WITNESS, *supra* note 28.

⁸⁰ See Buchanan et al., *supra* note 4.

⁸¹ Natalia Abrahams, *Honor the Local People of Selma: Edmund Pettus Bridge Moves Closer to Being Renamed*, NBC NEWS (Jan. 19, 2021, 11:46 AM), <https://www.nbcnews.com/news/nbcblk/honor-local-people-selma-edmund-pettus-bridge-moves-closer-being-n1254524>. Edmund Pettus was a Confederate general and leader of the Alabama Ku Klux Klan. Errin Whack, *Who was Edmund Pettus?*, SMITHSONIAN MAG. (Mar. 7, 2015), <https://www.smithsonianmag.com/history/who-was-edmund-pettus-180954501/>.

⁸² John Copeland Nagel, *See the Mojave!*, 89 OR. L. REV. 1357, 1358 (2011). “Congress enacted the California Desert Protection Act (CDPA) of 1994, which seeks to protect the visual beauty of the desert by establishing the Mojave National Preserve, Death Valley National Park, Joshua Tree National Park, and dozens of new wilderness areas.”

could detract from their aesthetic values.”⁸³ I consider these structures, features, and landscapes of the built and natural world to be consecrated spaces—places set apart as signs of civic joy and hope.

With environment being such an important national treasure, it is not surprising that we often view massive environmental destruction as desecration. We commemorate the anniversaries of the Exxon Valdez and BP Deepwater Horizon Oil Spills, the Dust Bowl in Oklahoma, the protests of the South Dakota pipeline at Standing Rock.⁸⁴ Even among our many hazardous waste sites and polluted bodies of water, the most severe disasters are set apart and remembered in order to mark the loss of life and the loss of part of our common home.

Of course, the non-religious and religious overlap in much of sacred civic expression—further evidence of permeability and fluidity between these modes of discourse.⁸⁵ Scores of citizens, religious and non-religious alike, appreciate the spectacular architecture and spiritual message of St. Patrick’s Cathedral and countless other houses of worship—not only the members of the congregations.⁸⁶ Non-religious, government-sponsored military cemeteries contain soldiers’ graves marked by headstones with Latin Crosses and Stars of David and symbols of nearly every

⁸³ *Id.* at 1358-59.

⁸⁴ *EPA and Federal Partners Commemorate 10-year Anniversary of Deepwater Horizon Oil Spill*, ENV’T PROT. AGENCY (Apr. 20, 2020), <https://www.epa.gov/newsreleases/epa-and-federal-partners-commemorate-10-year-anniversary-deepwater-horizon-oil-spill>; Jesse Greenspan, *Seven Deadly Environmental Disasters*, HISTORY (Aug. 30, 2018), <https://www.history.com/news/7-deadly-environmental-disasters>; Bradley Blackburn, *BP Oil Spill: Families Gather to Honor 11 Who Died*, *Express Frustration with BP, Transocean*, ABC NEWS (May 25, 2010), <https://abcnews.go.com/WN/bp-oil-spill-transocean-holds-memorial-11-lost/story?id=10739080>; *Dust Bowl Symposium: Commemorating the 75th Anniversary of Black Sunday*, FACEBOOK (Apr. 18, 2015), <https://www.facebook.com/Dust-Bowl-Symposium-Commemorating-the-75th-Anniversary-of-Black-Sunday-131110372742/>.

⁸⁵ See Davaney, *supra* note 38.

⁸⁶ W. COLE DURHAM & ROBERT SMITH, RELIGIOUS ORG. & THE LAW: § 29:13 (Dec. 2020 update) (Numerous houses of worship are designated as federal, state, and local historic landmarks. There are about 2,000 local landmarks preservation ordinances in the U.S.).

religious affiliation known in the United States.⁸⁷ The house of worship massacres at the Emanuel A.M.E. Church and the Tree of Life Synagogue were horrific events not only for those religious communities themselves but for the wider society, evoking an outpouring of civic grief. The permeability of religious and secular is particularly clear when we consider the civil rights movement's deep roots in Black churches and the Jewish community's long struggle against anti-Semitism and against discrimination for all minorities. These and many other movements are rooted in religious texts and confessional faith but have universal appeal because they speak to the human need for justice, dignity, freedom, equality, and solidarity.⁸⁸ Further, we see that spontaneous outpourings of grief typically involve both religious and non-religious words and symbols: crosses next to hearts and balloons, biblical texts alongside love letters and photos. Such items make up the spontaneous roadside memorials that are created at sites of tragedies, especially where fatal car accidents have occurred.⁸⁹

⁸⁷ *Available Emblems of Belief for Placement on Government Headstones and Markers—National Cemetery Administration*, NAT'L CEMETERY ADMIN., <https://www.cem.va.gov/cem/hmm/emblems.asp> (last visited Mar. 18, 2021) (Over 75 different religious symbols are available.).

⁸⁸ See also Angela C. Carmella, *Progressive Religion and Free Exercise Exemptions*, 68 KANSAS L. REV. 535, 569-73 (2020) (describing faith-based activism on progressive causes, both Protestant and Catholic).

⁸⁹ See Amanda Reid, *Private Sanctification of Public Space: Place, Meaning, and the Visual Argument of the Roadside Cross*, 2 SAVANNAH L. REV. 265 (2015) "These memorials sanctify public space and make it a meaningful private place. In sanctifying the profane, pedestrian roadway, the bereaved are expressing the meaningfulness of the place. The roadside memorial is a site of remembrance, a site of communion, a site of pilgrimage, and a site of warning to others." *Id.* at 272. In a detailed treatment of the profound meaning of these liminal spaces, "The memorial functions both to symbolize the absent loved one and to act as a conduit for maintaining a connection with that person." *Id.* at 274.

Nearly half of the states have adopted some policy regarding the placement of roadside memorials. Policies vary widely: some states expressly permit private markers; a few states allow only state-sponsored markers; a number of states allow local governments to regulate them; and other states expressly prohibit roadside markers. In states where memorials along the roadways are not permitted, state and local officials have an unwritten policy of allowing a memorial to stand unless a complaint is made or it is perceived to be a traffic hazard. While state transportation officials "would prefer not to see them" and

C. Non-religious Sacred Expression: The Flight 93 Memorial

The profound significance of the human body, the community, and the built and natural environment generates moments and spaces that become sacred to the polity. Whether we commemorate death, tragedy, joy or hope, those times and places become de-commodified, that is, valued intrinsically and “owned” by no one.⁹⁰ Surely some of this consecration is the private affair of individuals and groups within civil society. But governments are inevitably involved through the many legal protections offered and the maintenance, management, and/or close supervision of museums, memorials, monuments, cemeteries, and the like.

Predictably, the federal government became involved in creating the Flight 93 National Memorial. The tragic yet heroic circumstances are familiar: after the passengers and crew put up a courageous fight against the terrorists on board, the plane crashed in a field in Shanksville, Somerset County, Pennsylvania. The public outpouring of grief after the crash created an enormous spontaneous memorial at the crash site. Hundreds of thousands of visitors came, leaving crucifixes, trinkets, letters, and other items.⁹¹ Soon after, the federal government began to formalize a national memorial. The site was “committed...as a place of national mourning.”⁹²

The architect selected to design a permanent memorial referred to it as “sacred ground.” Many others did as well, but the meaning was open-ended: “some tied [the term] to recognizable established religions, others more loosely expressive of a

“it is not anything [they] like to see proliferate,” they are generally deferential to the grief and mourning of the bereaved.

Id. at 279-280.

See also Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 NEB. L. REV. 501 (2013); *Am. Atheists, Inc. v. Duncan*, 616 F.3d 1145 (10th Cir. 2010), *amended and superseded on reh'g sub nom. Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010) (“reasonable observer” would see the crosses, erected with the approval of the state of Utah and in remembrance of highway patrolmen, as an “endorsement” of Christianity in violation of the Establishment Clause); *Certiorari later denied in Utah Hwy. Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994, 132 S. Ct. 12 (2011).

⁹⁰ Taussig-Rubbo, *supra* note 66, at 1182.

⁹¹ *Id.* at 1227.

⁹² *Id.* at 1226.

nondenominational civil religion, others were vaguely spiritual.”⁹³ While this terminology may have had intuitive appeal to many, even if indeterminate, it led to some misunderstandings regarding the architect’s intent and even a false accusation that he had employed Islamic symbolism in the design.⁹⁴ Since the federal government has no clear vocabulary for its own “sacred” lands, it employed instead the familiar statutory and policy language of memorials, parks, heritage, history, and nature.⁹⁵ Congress declared the site “heritage” and designated the site a national memorial and a unit of National Park Service (NPS), which triggered an automatic listing on the National Register of Historic Places. NPS abandoned the term “sacred ground” to avoid any confusion with a particular confessional faith and provided clear explanations for each part of the memorial.⁹⁶ The memorial expressed “a sustained emphasis on the theme of nature.”⁹⁷

The ground in Somerset County, Pennsylvania *is* hallowed ground in the sacred civic sense as I have used that term. Although NPS did not refer to the Flight 93 National Memorial as “sacred ground,” the deaths had already consecrated the spot.⁹⁸ The

⁹³ *Id.* at 1227.

⁹⁴ *Id.* at 1192-93.

⁹⁵ *Id.* at 1189-90 (“But the framework of commemoration, heritage and parks was not able to contain the process that followed without challenge. In particular, notions of the sacred and the import of . . . ‘intangible’ value were still to be negotiated and litigated.” *Id.* at 1190).

⁹⁶ National Park Service, *Frequently Asked Questions About the Design*, FLIGHT 93 NAT’L MEM’L PA. (Oct. 28, 2018), <https://www.nps.gov/flni/learn/management/designquestions.htm#:~:text=Is%20t here%20Islamic%20religious%20symbolism,crew%2C%20who%20thwarted%20th e%20terrorists>.

⁹⁷ Taussig-Rubbo, *supra* note 66, at 1194, states:

Calling it sacred clearly meant a variety of things--but not all could be included in the Park Service's plans. [The designer] invoked a notion of sacred that was calm and reflective, and intersected with nature and seasonal change. In response, he was accused of bringing forward a different kind of sacred. Subsequently, this interpretative openness was supplemented by explicit guidance explaining the design's details, and by a sustained emphasis on the theme of nature.

⁹⁸ *The Gettysburg Address*, ABRAHAM LINCOLN ONLINE: SPEECHES & WRITINGS (Nov. 19, 1863), <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm>. Recalling Lincoln’s lines from the Gettysburg Address: “But in a larger sense, we cannot dedicate — we cannot consecrate — we cannot hallow — this ground. The brave men, living and dead, who struggled here, have consecrated it, far beyond our poor power to add or detract.”

spontaneous and later permanent memorial demonstrated that the land had been forever changed and could never again be viewed as a “simple commodity.”⁹⁹ In response to this tragic national event, the government together with many community groups honored those who died using the nonreligious “framework of commemoration, heritage and parks,”¹⁰⁰ while at the same time recognizing that many would view the memorial as a religious site. Indeed, NPS noted that “[t]he crash site should be a place to say a prayer, meditate, or reflect . . .”¹⁰¹

PART II. THE RELIGIOUS MODE OF SACRED CIVIC EXPRESSION

Part I notes that sacred civic expression can be non-religious or religious, and mentioned some of the famous events and places that capture this sense of the sacred using secular categories. In this Part II, I describe some civic events and places that rely more explicitly on religious understandings of the sacred. This should come as no surprise, given the overwhelming religiosity of the population and the tremendous diversity of religious groups. There is significant overlap in the ways that both religious and civic traditions give special attention to the body, the community, and the built and natural environments. The permeability of religious concepts and civic expression is as old as the nation’s founding and stretches back to the first settlers in the 17th century.

Religious categories of commemoration extend into the civic sphere far beyond the particular stories of a given religious group. For example, the civil rights movement was in large part a religious movement—begun in the Black churches of the South—and indeed a vastly ecumenical movement. Dr. Martin Luther King, Jr., was the *Reverend* Dr. Martin Luther King, Jr., who quoted Thomas Aquinas as easily as Abraham Lincoln. The values of human dignity and racial justice, shared by religious and civic groups of all types and enshrined in the post-Civil War amendments, made for a natural alliance. Many sacred civic moments for the nation that define us as a people—like the March on Washington and Rev. King’s “I Have a Dream” speech—are infused with religion. Similarly, other kinds of protest movements that begin as religious

⁹⁹ Taussig-Rubbo, *supra* note 66, at 1227 (The article focuses on the methodology for arriving at the appropriate price to pay the owner of the property for the land in a condemnation action.).

¹⁰⁰ *Id.* at 1190.

¹⁰¹ *Id.* at 1188 (internal quote marks omitted).

or religio-cultural, spill out into the larger society and grow into large-scale political and civic movements that retain religious markings. Consider the Standing Rock protests of Indigenous people trying to stop the construction of the Dakota Pipeline, which would desecrate holy lands and environmental resources. The protest attracted thousands, far beyond the affected tribes.¹⁰²

In addition to protests and movements marked by iconic moments, examples of religious expressions of sacred civic events and places are common. Consider the many types of sacred civic expression that emerge from death and tragedy, like mass shootings or automobile accidents. In such situations, the outpourings of public grief often take religious forms, with prayer services and spontaneous religious memorials.¹⁰³ Crosses often commemorate the war dead¹⁰⁴ or other deaths, like the Cross at Ground Zero. Other times religious expression may mark the significance of the natural or built environment, like a statue of St. Francis in a park,¹⁰⁵ or a mosque preserved as a historic landmark.¹⁰⁶

In contrast to the sacred civic expression that is understood as history or cultural heritage, the explicit inclusion of religious symbolism, imagery, or text renders the Establishment Clause relevant. When a state actor coordinates the sacred civic event—like when a government agency sponsors a memorial service, commissions or dedicates a monument, or curates a display—

¹⁰² Jeff Brady, *Two Years After Standing Rock Protests, Tensions Remain But Oil Business Booms*, NPR (Nov. 29, 2018, 7:20 AM), <https://www.npr.org/2018/11/29/671701019/2-years-after-standing-rock-protests-north-dakota-oil-business-is-booming>; Jacey Fortin & Lisa Friedman, *Dakota Access Pipeline to Shut Down Pending Review, Federal Judge Rules*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/us/dakota-access-pipeline.html>; For Standing Rock Sioux Tribe litigation updates, see *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTH JUST., <https://earthjustice.org/features/faq-standing-rock-litigation> [<https://perma.cc/F2MN-SMJT>].

¹⁰³ See Reid, *supra* note 89.

¹⁰⁴ See, e.g., *Salazar v. Buono*, 559 U.S. 700 (2010); *Am. Legion*, 139 S. Ct. at 2067 (2019); *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011).

¹⁰⁵ *Statutes, FOREST PARK AMENITIES*, <https://www.stlouis-mo.gov/parks/parks/browse-parks/view-park.cfm?parkID=1&parkName=Forest%20Park&amenitySubTypeID=27>.

¹⁰⁶ Mother Mosque of America in Cedar Rapids, Iowa, is the oldest standing mosque in the United States, completed in 1934. It is listed on the State Historical Register and National Register of Historic Places. For more information, see *Iowa: The Mother Mosque of America*, NAT'L PARK SERV., <https://www.nps.gov/articles/mothermosque.htm>.

constitutional constraints may apply if the sacred civic activity is expressed in religious terms. Separationists, both religious and secular, have tried to drastically limit this mode of sacred civic expression. They argue that in the face of grief and tragedy, a church is free to march and protest in public spaces, to hold its own services for its own members in its own house of worship, and to establish a monument with its own symbols on its own property. A city can sponsor a secular ceremony of remembrance and can establish a monument with non-religious symbols on governmental property. Given this division, they wonder why religion must be expressed in the government's sphere at all. The Supreme Court has given a variety of answers since the 1950s, explored below.

A. The Establishment Clause Overview

The Establishment Clause has played a significant role in defining the appropriate degree of religious commemorative expression in sacred civic moments and spaces. Unsurprisingly, interpretation in this area has been immensely contested. Under a messy collection of cases, courts in varying degrees allow or restrain state recognition, endorsement, or usurpation of religious language and imagery. This has been driven by litigation challenging many civic practices. Strict separationists would allow virtually no religion mixed with civic events or symbols.¹⁰⁷ In contrast, strict accommodationists would allow religious events and symbols with the minimalist caveat that government may not coerce or aggressively proselytize citizens to accept or avoid a particular faith.¹⁰⁸

These paradigmatic positions do a disservice to the reality of sacred civic expression, which occurs in both religious and nonreligious modes and the permeable spaces between them. Strict separationists would minimize the very human penchant for public grieving and hoping in religious ways, convinced that *private* outlets for this expression are sufficient. Strict accommodationists understand the human tendency to voice religious sentiments but are unconcerned that to do so in *public* outlets—in governmental spaces or at governmental events—might allow majority voices while effectively excluding non-dominant ones.

¹⁰⁷ See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 694 (Brennan, J., dissenting).

¹⁰⁸ See, e.g., *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part).

Avoiding extremes in Establishment Clause interpretation is necessary for the humanity and humility of sacred civic expression. Proper interpretation might allow the natural human expression of grief and hope, whether employing religious or nonreligious language and imagery. At the same time, proper Establishment Clause interpretation should protect against any form of religious particularism that demeans either citizenship or religion. Recent Establishment Clause jurisprudence on government prayers and religious symbols has begun to cohere around several core principles that might be able to guide reflection in this middle path. But the lead-up to this coherence has been a rocky road.

The Court has had a long and varied relationship with the very concept of religion. At the beginnings of its post-war modern case law, the Court expressed a distinctive mixture of fear, suspicion, and respect that fueled the need to distance state from church¹⁰⁹—and certainly to separate state-sponsored schools from religion. Religion was considered to have a power unlike anything else in human experience. It could be dangerous to the state, to the public treasury, and to outsiders. While the restrictions on religion in public schools have continued to hold firm, over the decades the Court has grown less fearful of religion's impacts, more concerned with efforts to exclude religion from public life and public funding, and more comfortable with religion as to state messaging.¹¹⁰ The Court has found the government's use of many sacred terms and objects consistent with the Establishment Clause by considering them to be: historic, cultural, ceremonial, secularized, diminished in religious intensity by placement within a wider secular context, or non-threatening to religious minorities.¹¹¹ Many symbols of Christianity, and to a lesser extent Judaism, have been allowed at government-sponsored events and in government spaces on these

¹⁰⁹ *Everson*, 330 U.S. at 1.

¹¹⁰ The Supreme Court's interpretation of the Establishment Clause at one time generated many examples of religious exclusion, particularly from state funding of religious schools. Over the decades the Court has worked to reverse of that position away from exclusion and towards inclusion. In a recent case the Court held that any government aid plan that benefits private education must also benefit religious education. See *Espinoza*, 140 S. Ct. at 2246. This shift toward religious inclusion also characterizes the Court's prayer and symbols jurisprudence.

¹¹¹ For a discussion of each of what he terms the artificial secularization critique; the majoritarian dominance critique; the contextual critique; and the traditionalism critique, see Frank S. Ravitch, *Religious Objects as Legal Subjects*, 40 WAKE FOREST L. REV. 1011 (2005) [hereinafter *Religious Objects*].

various justifications.¹¹² At the present time, the jurisprudence allows even language and symbols that are religiously particular and intense (what the Court calls “sectarian”) in governmental events and spaces under certain constraints.¹¹³

The Court is indeed aware of the power and ubiquity of sacred civic expression. But it has had almost no need to address the issue of national grief and sorrow I raise in this Article. It has prohibited: prayer, devotional Bible reading, religious instruction, and a Ten Commandments poster in public schools; and a crèche and a Ten Commandments plaque located prominently inside courthouses. It has upheld: outdoor symbols (a crèche, a menorah, and a Ten Commandments monument) placed alongside or in proximity to other, non-religious symbols; “under God” in the Pledge of Allegiance; legislative prayers by a state-paid chaplain; and legislative prayers by a rotation of predominantly Christian clergy. In none of these circumstances was there an issue of profound grief or tragic injustice, and certainly nothing on the order of President Lincoln’s statements in war-ravaged times, thick with biblical imagery.¹¹⁴

Thus, the Supreme Court’s Establishment Clause jurisprudence has not been forged within the crucible of national grief. In fact, we reach this idea only in the most recent symbols case, which challenged a municipal display of a Latin Cross, which had stood for a century commemorating the deaths of soldiers in World War I. In *American Legion v. American Humanist Assn.*,¹¹⁵ the context of national grief together with the input of the soldiers’ mothers and widows on the memorial’s design provide a powerful historic lens through which the Court views the case. It is not surprising that the Court’s majority, crossing the conservative-liberal divide to include Justices Kagan and Breyer, noted the significance of this national tragedy and voted to preserve the cross on public land, rather than lop off its arms, as the plaintiffs had requested.

¹¹² Note, for instance, that the Ten Commandments are recognized by Jews, Christians, and Muslims. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 894 (Scalia, J., dissenting).

¹¹³ *Town of Greece*, 572 U.S. at 565; *Am. Legion*, 139 S. Ct. at 2067.

¹¹⁴ See e.g., Wilson Huhn, *A Higher Law: Abraham Lincoln’s Use of Biblical Imagery*, IDEAEXCHANGE@UAKRON (2011), https://ideaexchange.uakron.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1082&context=ua_law_publications.

¹¹⁵ *Am. Legion*, 139 S. Ct. at 2067.

B. Establishment Clause: The Jurisprudence of Religion in Government Spaces

The Supreme Court has long recognized the connection between the history of humanity and religious expression of the sacred. In noting the critically important educational goal to teach *about* religion, the Court wrote, “it is a proper, if not an indispensable, part of preparation for a worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that, for good or for ill, *nearly everything in our culture worth transmitting, everything that gives meaning to life, is saturated with religious influences.*”¹¹⁶ Given our profoundly religious culture—even with secular laws and a secular society¹¹⁷—it is not surprising that the Court announced, and continues to assert, “We are a religious people whose institutions presuppose a Supreme Being.”¹¹⁸

At the same time the Court recognized a deep and natural connection between religion and the human story, it took steps in its Establishment Clause interpretation to prohibit prayers and Bible reading in public schools and any other type of school-sponsored religious instruction, devotion, veneration, or confessional faith.¹¹⁹ This was done in recognition of the fundamental independence of church and state, the rejection of forced religious unity, the government’s lack of theological competence, the free exercise rights of students and their families (especially religious minorities), and the impressionability of minors. Thus, the Bible may constitutionally be used only in an

¹¹⁶ *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203, 236 (1948) (Jackson, J., concurring) (emphasis supplied); *see also Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparable from the history of religion.”).

¹¹⁷ “Secular” society refers to one that is based on religious freedom, in which religious leaders and institutions hold no official authority in political decision making.

¹¹⁸ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952); *see also Torcaso v. Watkins*, 367 U.S. 488 (1961) (prohibiting religious tests for state public office).

¹¹⁹ *Sch. Dist. of Abington Twp., v. Schempp*, 374 U.S. 203 (1963) (no Bible reading); *Engel*, 370 U.S. at 421 (no school-sponsored prayer); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (no prayers at public school-sponsored sports events); *Lee*, 505 U.S. at 577 (no prayers at public school graduation ceremony); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (no moment of silence enacted explicitly for prayer in public school); *Stone v. Graham*, 449 U.S. 39 (1980) (no posting of Ten Commandments in public school); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (no teaching biblical creationism in public school).

appropriate study of history, civilization, ethics, comparative religion, literature, and the like.¹²⁰ The Court also prohibited most forms of school aid specifically earmarked for church-sponsored schools on the grounds that taxpayers should not be required to support the religious activities of faith communities. The test announced fifty years ago in *Lemon v. Kurtzman* was initially interpreted to strike many forms of financial aid.¹²¹

But *Lemon* came to be applied to Establishment Clause cases more generally and called into question many governmental references and practices that involved religious text and imagery. Since *Lemon* required laws to have a secular purpose, primary secular effect, and no excessive entanglement with religion, the test could be employed woodenly for strict separationist goals or loosely to meet strict accommodationist goals. One of the biggest challenges was the area of state prayer and symbols. When the Court, in *Marsh v. Chambers*, was faced with a challenge to a state-paid Presbyterian chaplain who offered daily prayers before the Nebraska legislature, it found that legislative prayer was a legitimate long-standing practice, going all the way back to the founders.¹²² History, not *Lemon*, would apply to preserve this practice.¹²³

The Court had other ways of preserving other religious elements in civic life. It had already determined that some practices, like Sunday closing laws, had become secularized and therefore did not pose Establishment Clause issues—even though it was clear that these laws placed difficult burdens on Jews and other Saturday worshippers.¹²⁴ In addition to historic use or secularization, practices were found acceptable because they were part of the

¹²⁰ *Stone*, 449 U.S. at 42.

¹²¹ *Lemon*, 403 U.S. at 602.

¹²² 463 U.S. 783, 790-91 (1983). In the very week that Congress approved the Establishment Clause as part of the Bill of Rights for submission to the states, Congress enacted legislation providing for paid chaplains for the House and Senate. . . .); *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) (“As practiced by Congress since the framing of the Constitution, legislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society.”).

¹²³ See generally Catherine M.A. McCauliff, *Constitutional Jurisprudence of History and Natural Law: Complementary or Rival Modes of Discourse?*, 24 CAL. WEST. L. REV. 287 (1988).

¹²⁴ *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing found to provide a common day of rest, no longer to protect the Sabbath).

nation's cultural heritage or "ceremonial deism"—i.e., important to lending solemnity to an occasion.¹²⁵ The Court used these various and overlapping categories to distinguish the religious civic patrimony and recognize the significant place of religion in the nation's history. In dicta, the Court often noted "examples of references to our religious heritage,"¹²⁶ and "governmental sponsorship of graphic manifestations of that heritage,"¹²⁷ which included "Under God" in the Pledge of Allegiance,¹²⁸ the nation's motto "In God We Trust," the opening of courts with "God Save this Honorable Court," the use of a Bible or other holy books for swearing in officials, the long-held practice of presidential addresses that included religious references, religious geographical names, the Thanksgiving and Christmas holidays, religious works of art in museums, congressional chapels, depictions of Moses and the Ten Commandments at the Supreme Court itself,¹²⁹ and National Days of Prayer and other Presidential Proclamations concerning religious matters. Clearly, the Supreme Court was not about to disturb these many forms of governmentally sponsored civic religiosity. But they were preserved not because they represented heart-wrenching events but because they were routine and commonplace: solemnizing or memorializing America's religious roots.

The Court's significant case law on religious expression in sacred civic space developed in the context of December holiday symbols and Ten Commandments monuments. On a fact-sensitive reading, the Court held a Christmas crèche and a Ten Commandments monument—both located inside courthouses—unconstitutional. The crèche was located at the top of the Grand Staircase in the Allegheny County Courthouse¹³⁰ while the large, gold framed Ten Commandments hung on walls in prominent locations in the McCreary and Pulaski County Courthouses.¹³¹ The crèche, without context, proclaimed "Glory to God in the highest" and could have been sitting inside a house of worship. The framed

¹²⁵ See Marshall, *supra* note 32, at 22-24 (discussing *de minimis* and *de facto* establishment categories).

¹²⁶ *Lynch*, 465 U.S. at 676.

¹²⁷ *Id.* at 677.

¹²⁸ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 4 (2004); *Lynch*, 465 U.S. at 675.

¹²⁹ *Lynch*, 465 U.S. at 676-77.

¹³⁰ See *Cnty. of Allegheny*, 492 U.S. at 578.

¹³¹ *McCreary Cnty.*, 545 U.S. at 851.

biblical text, even though not venerated as a “holy” object,¹³² was still unconstitutional: it was placed inside the courthouses, in a “high traffic area” for no reason other than to endorse religious belief. Even subsequent attempts to contextualize it with secular documents did not save it.

The Court upheld other symbols. In *Lynch v. Donnelly*, a city-owned crèche in a downtown shopping district in Pawtucket, Rhode Island, surrounded by secular symbols of the season, did not offend *Lemon*.¹³³ Nor did a menorah placed next to a large Christmas tree and sign noting religious liberty outside the City-County building in Pittsburgh, in *County of Allegheny v. ACLU*.¹³⁴ In *Lynch*, Justice O’Connor announced the “endorsement” test, which focused on the bedrock principle of political equality: religion should never be relevant to one’s standing in the political community.¹³⁵ A reasonable observer of the symbol, knowing its history and surrounding circumstances, would determine whether the symbol was intended or perceived to endorse (or disapprove) one’s faith. The devotional presentation of the crèche at the top of the Grand Staircase in a courthouse could reasonably be perceived as a governmental endorsement of Christianity in ways that the outdoor tableau of the Pawtucket crèche, surrounded by Santa and a talking wishing well, could not. The analysis of the menorah was more complex: Justice Blackmun thought it was secularized by its proximity to the Christmas tree and sign, both secular symbols; Justice O’Connor maintained that the menorah remained a religious symbol but could not be understood as an endorsement of Judaism given the pluralistic context.

¹³² *Religious Objects*, *supra* note 111, at 1023 (discussing the distinction between “pure” religious objects and “multifaceted” religious objects, and the conclusion that while crèches, crosses and menorahs are the former category, the Ten Commandments fall in the latter).

¹³³ *Lynch*, 465 U.S. at 678 (The Court refused “to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*. In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.”) (emphasis added) (internal citations omitted).

¹³⁴ See *Cnty. of Allegheny*, 492 U.S. at 578.

¹³⁵ *Lynch*, 465 U.S. at 688 (O’Connor, J., concurring) (The Establishment Clause prohibits a “message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”).

The Court in *Van Orden v. Perry* found a Ten Commandments monument constitutional. This one, an outdoor monument containing the biblical text, was set among dozens of monuments at the Texas state capitol; it was one of many similar monuments that had been donated forty years before by a fraternal organization to municipalities all over the country to mark its efforts in combatting juvenile delinquency. Justice Breyer's controlling concurrence noted that the public "considered the religious aspect of the tablets' message as a part of what is a broader moral and historical message reflective of a cultural heritage."¹³⁶ It had never caused social division, but to remove it now would do so.¹³⁷

The lines drawn might seem simple, even a bit intuitive as to outcomes, but the Justices battled fiercely over the doctrinal rationales. Separationists thought all these symbols were unconstitutional, some because the symbols were cheapened by mixing with government and others because they favored a religion at the expense of non-member citizens. Accommodationists wanted to employ a coercion or proselytization test, striking only those symbols to which government demanded assent. In the middle were those, like Justice O'Connor, who thought that America's religious history, vast religious pluralism, and commitment to religious liberty required a multi-factor approach that prioritized political equality.¹³⁸

C. National Grieving through Religious Sacred Expression: September 11th

The tragedy of the September 11th terrorist attacks on the World Trade Towers and the Pentagon and Flight 93's crash resulted in unprecedented national grief. Americans reacted with widespread patriotism, flying millions of flags in the aftermath. Houses of worship held services and special events. Local communities held nonreligious memorial services. But, even had they tried, no one could have contained the religious outpouring of sorrow to houses of worship, and no one could have stripped all religion from the government's memorial services.

¹³⁶ *Van Orden v. Perry*, 545 U.S. 677, 703 (2005) (Breyer, J., concurring).

¹³⁷ *See id.* at 704.

¹³⁸ *See, e.g., Religious Objects, supra* note 111, at 1061-62 (Many jurists and scholars have criticized Justice O'Connor's endorsement test as reflecting majoritarian biases and perspectives . . .). *See generally* Hill, *supra* note 39.

It was widely accepted that both religious and secular modes of sacred civic expression had to be welcomed, whether spontaneous or planned. As noted above, in the immediate wake of the plane crash in Shanksville, Pa., hundreds of thousands of visitors lay items to mark the hallowed ground including crosses, crucifixes, baseball caps, and trinkets of all sorts. And in New York City, public officials were actively "designing religious programs, selecting religious participants, and determining how best to meet their citizens' religious needs."¹³⁹ The prayer service held at Yankee Stadium on September 23, 2001 "gave the devastated families of the victims and others a chance to stand together, weep openly, and reach across religious and cultural lines in an afternoon of shared solace."¹⁴⁰ While there had been other solemn occasions in the stadium, observers noted that "there had never been anything quite like yesterday's gathering, which heard prayers for the missing, affirmations of America's diversity, vows to come back from adversity and pleas for tolerance from a rainbow of clergymen and politicians."¹⁴¹

Professor William Marshall reflected on this prayer service and other vigils and memorial services like it. In his article, *The Limits of Secularism*, he wrestled honestly with the demand for secularism and strict separation and concluded that there are simply times that are sacred, when religion is not only permissible but necessary.¹⁴² In times of national crisis, like the events of

¹³⁹ Marshall, *The Limits of Secularism*, *supra* note 32.

¹⁴⁰ Robert D. McFadden, *A NATION CHALLENGED: THE SERVICE; In a Stadium of Heroes, Prayers for the Fallen and Solace for Those Left Behind*, N.Y. TIMES (Sept. 24, 2001), <https://www.nytimes.com/2001/09/24/nyregion/nation-challenged-service-stadium-heroes-prayers-for-fallen-solace-for-those.html>.

¹⁴¹ *Id.* ("Among the religious dignitaries who spoke were Cardinal Edward M. Egan of the Roman Catholic Diocese of New York, Imam Izak-el Mu-eed Pasha of the Malcolm Shabazz Mosque in Harlem, Rabbi Arthur Schneier, and other Christian, Muslim, Jewish, Sikh and Hindu leaders . . . The crowd rose to its feet when Imam Pasha pleaded for tolerance. 'We are Muslims, but we are Americans,' he declared. 'We Muslims, Americans, stand today with a heavy weight on our shoulder that those who would dare do such dastardly acts claim our faith. They are no believers in God at all.'").

¹⁴² Professor Marshall opens with a powerful example. A teacher cannot lead her class in prayer, but when Christa McAuliffe, the teacher-astronaut on the 1986 Challenger, was killed in the explosion in front of our eyes as the rocket reached for the heavens, a teacher praying in front of her class becomes understandable. Marshall, *supra* note 32, at 11-12. More recent examples include the judge who, after sentencing a white police officer who had killed a black man while he sat in

September 11, a state-sponsored memorial service devoid of religion “would be so stilted and artificial that one would doubt its efficacy in accomplishing its intended goal of community healing.”¹⁴³ Indeed, excluding religion and allowing only secular expressions of grief at such a time of anguished public mourning would have shown “a dogmatic hostility toward religion”¹⁴⁴ and “secularism in the extreme.”¹⁴⁵ He observed that the expressions themselves, rather than the ceremonial language of solemnity or religious heritage, involved authentic faith for collective mourning. Like the funeral for Martin Luther King, Jr., these prayer services brought the public together in a “religion-affirming ritual.”¹⁴⁶ As Professor Marshall notes, our “constitutional commitment to secularism serves to protect, and not displace, our collective religiosity.”¹⁴⁷ Writing at a time when the jurisprudence called for greater church-state separation, he thought some sort of extraordinary circumstances exception should be built into the Establishment Clause for times of national grief.¹⁴⁸

his own apartment, gave the defendant a Bible and spoke to her about salvation. This came after the victim’s brother gave a compassionate statement on forgiveness and asked permission to hug the defendant. Sarah Mervosh & Nicholas Bogel Burroughs, *Amber Guyger’s Judge Gave Her a Bible and a Hug*, N.Y. TIMES (Oct. 4, 2019), <https://www.nytimes.com/2019/10/04/us/amber-guyger-judge-tammy-kemp-hug.html#:~:text=But%20the%20judge%20was%20not,16%2C%20a%20passage%20about%20salvation; Id.> (The act was criticized by some, but “Deborah Rhode, an expert in legal ethics and the director of the Center on the Legal Profession at Stanford Law School, said she believed that Judge Kemp’s behavior stayed within ethical bounds, especially because it came after the sentencing had ended. ‘All the judge did is express some bonds of common humanity, and I don’t think we should be punishing judges for that,’ she said. ‘If anything, our legal system has suffered from an absence of adequate compassion.’”).

¹⁴³ Marshall, *supra* note 32, at n.101.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 31.

¹⁴⁶ *Id.* at n.100.

¹⁴⁷ *Id.* at 33.

¹⁴⁸ *Id.* at 31-32. On the first anniversary of 9/11 in 2002, one citizen challenged the reading of the “Chicago Prayer of Hope, Unity and Remembrance” at a public memorial service. The court dismissed the challenge, on the following reasoning: “Ceremonies to mark the events and honor those who died are an important part of the nation’s collective grieving. The ceremonies help with the healing process of the nation and those who suffered tragic individual losses. The ceremonies allow people to show their patriotism and national pride, and also demonstrate the nation’s solidarity and support for the ongoing actions to eliminate terrorism. *There is an undeniable religious aspect to ceremonies such as this, for people often seek*

The 9/11 Memorial and National Museum in New York City are located on undeniably sacred ground, in the same way Somerset County, Pennsylvania has been hallowed. But perhaps the best-known September 11th *religious* expression of sacred civic life is the Ground Zero Cross. During the recovery efforts, 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 of the rescue workers and other Christians saw this as a sign of hope, a miraculous sign that “God had not abandoned us.”¹⁴⁹ A priest arranged for it to be removed to a nearby place and held services there. People began to come visit it—people of all faiths and no faith. “The Cross at Ground Zero thus came to be viewed not simply as a Christian symbol, but also as a symbol of hope and healing for all persons.”¹⁵⁰

Plans were made to include the Cross in the National Museum at Ground Zero. The museum displays recounted the rescue and recovery process. The Cross was included in a part denoted “Finding Meaning at Ground Zero.” Visitors read on a panel of text: “Workers at Ground Zero struggled to come to terms with the horrific circumstances in which they found themselves.” The text then went on to describe and display the many artifacts, secular and religious, that rescue workers, families, and survivors held onto for hope.¹⁵¹

solace in religion after events as horrific as September 11th. . . . These religious aspects, however, occur separately and apart from any governmental action.” Because the prayer was not government written, “the context of the ceremonies is to commemorate an historic day, not to proselytize.” *Harris v. City of Chicago*, 218 F.Supp.2d 990, 994 (N.D. Ill. 2002) (emphasis supplied).

¹⁴⁹ Rick Hampson, *Ground Zero Cross a Powerful Symbol for 9/11 Museum*, USA TODAY (May 15, 2014), <https://www.usatoday.com/story/news/nation/2014/05/13/911-ground-zero-museum-cross-world-trade-center/8907003/>; see also Sally Jenkins, *9/11 Memorials: The Story of the Cross at Ground Zero*, WASH. POST (Sept. 8, 2011), https://www.washingtonpost.com/politics/911-memorials-the-story-of-the-cross-at-ground-zero/2011/09/07/gIQA2mMXDK_story.html.

¹⁵⁰ *Am. Atheists, Inc. v. Port Auth. of N.Y. and N.J.*, 760 F.3d 227, 234 (2d Cir. 2014).

¹⁵¹ *Id.* at 235-36. The court wrote:

“Of particular relevance to this appeal is a part of the Museum exhibition entitled “Finding Meaning at Ground Zero.” It is here that The Cross at Ground Zero is displayed. The textual panel for this part of the exhibition provides visitors with the following information:

The American Atheists sued the Port Authority of New York and New Jersey over the inclusion of the Cross on the claim that displaying the artifact promoted Christianity in violation of the Establishment Clause and in turn denied atheists equal protection under the law. After summary judgment in favor of the government, the plaintiffs amended the remedy sought, asking that a plaque be placed next to the Cross. They claimed that the Port Authority and the museum foundation “impermissibly promote Christianity in violation of the Establishment Clause and deny atheists equal protection of the laws by displaying The Cross at Ground Zero in the

Workers at Ground Zero struggled to come to terms with the horrific circumstances in which they found themselves. Some sought to counter the sense of utter destruction by holding on to something recognizable, whether a metal bolt or shard of glass or a marble salvaged from the debris. Others, grappling with the absence of survivors and the regular recovery of human remains, found purpose by forging relationships with relatives of a particular victim, carrying a photograph or memorial card to bolster their resolve.

Some questioned how such a crime could have been perpetrated in the name of religion, and wrestled with how a benevolent god would permit the slaughter of thousands of innocent people. Many sought comfort in spiritual counseling, religious symbols, and the solace of ceremonies and ritual.

Some workers turned to symbols of patriotism to reinforce a sense of commitment and community, hanging flags across the site. American flags reinforced a sense of commitment and community, and the repeated promise of “God Bless America” inspired a sense of duty. The words “Never Forget” commanded a pledge of unswerving dedication.

Draft Script for Exhibit, Exh. 4 to Patterson Decl., NSMM 2197. Various of the items referenced in this text are themselves displayed, either actually or photographically. Among these is the American flag that an emergency rescue worker secured from nearby Stuyvesant High School and raised on a remnant of the North Tower antenna to provide inspiration for fellow workers. Also displayed are mementos that ironworkers cut from World Trade Center steel and gave as tokens of comfort to other workers and victims' relatives. These cut-outs have a variety of religious and nonreligious forms, such as the Maltese Cross, the Star of David, a heart, the Twin Towers, and the Manhattan skyline.”

Museum unaccompanied by some item acknowledging that atheists were among the victims and rescuers on September 11.”¹⁵²

Rejecting these constitutional claims, the Court of Appeals for the Second Circuit noted that “the cross comprises a key component of the re-telling of the story of 9/11, in particular the role of faith in the events of the days during the recovery efforts.” Within the “Finding Meaning” section of the Museum, display of The Cross at Ground Zero is accompanied by a textual explanation that acknowledges the importance of the cross to Christians and non-Christians as “a symbol of hope, faith, and healing.”¹⁵³

¹⁵² *Id.* at 233. The plaintiffs argued that not having such a plaque along with the cross “discriminates against atheists by ‘trivializ[ing]’ how non-Christians experienced and coped with the events of September 11.” *Id.* at 245.

¹⁵³ *Id.* at 236-37. The text accompanying the cross at the Museum read as follows:

“The Cross at Ground Zero: Icon of [L]oss, Symbol of Hope Recovered by the New York City Building Construction and Trades Council, Courtesy of the Port Authority of New York and New Jersey.

This intersecting steel column and cross beam was found inside the rubble of 6 World Trade Center on the evening of September 13, 2001. Upon entering the area with members of a search and rescue team, construction worker Frank Silecchia saw this 17-foot tall column, its horizontal arm draped with a heat-infused piece of air-conditioning vent, standing in a field of debris. Moved by the spiritual presence he felt, Silecchia brought the cross shaped steel to the attention of other workers and members of the clergy.

Perceived of as a religious cross by many who saw it, the steel fragment was relocated to the edge of the site near West Street on October 3, 2001, increasing its visibility and access to both workers and visiting family members. The next day, hundreds working on the recovery attended a ceremonial blessing of the cross by Father Brian Jordan, a Franciscan priest ministering to the Ground Zero community.

Individuals of many faiths and belief systems saw the cross as a symbol of hope, faith, and healing.

It didn't matter what religion you were, what faith you believed in ... It was life, it was survival, it was the future.... I would say that it represents the human spirit. That it represents good over evil. That it represents how people will care for each other at the worst moment in their life.

Applying *Lemon*, the court found the display of the Cross to have a secular purpose as “a key component of the *re-telling of the story of 9/11, in particular the role of faith* in the events of the day, particularly during the recovery efforts.”¹⁵⁴ Importantly, it was no longer a venerated object or the locus of religious ceremony, and required no entanglement with religious authorities.¹⁵⁵ The Court of Appeals concluded that, with respect to effect, a “reasonable observer would view the primary effect of displaying The Cross at Ground Zero, amid hundreds of other (mostly secular) artifacts, to be ensuring historical completeness, not promoting religion.”¹⁵⁶

How people can put aside their differences for the greater good.

Richard Sheirer, former Commissioner of New York City's Office of Emergency Management, speaking in 2010 about the Cross at Ground Zero”

(boldface and italics in original).

¹⁵⁴ *Id.* at 239 (quoting from agreement between Foundation and Port Authority) (emphasis added).

¹⁵⁵ *Id.* at 245.

¹⁵⁶ *Am. Atheists, Inc.*, 760 F.3d at 243. Perhaps a more dramatic dispute over a religious-civic symbol has involved a Ground Zero house of worship: the St. Nicholas Greek Orthodox Church, the only building not part of the World Trade Center complex to be completely destroyed during the September 11th attack. The Port Authority, which took over the entire site of destruction, agreed to a land exchange, in which it would buy the church's land and provide a site for a new church building. After an initial agreement in 2008, the Port Authority refused to complete the land exchange. Lawyers writing in support of the church claimed the Port Authority had shown animus toward the church in violation of the First Amendment, among other constitutional violations. Letter from CeCe Heil, Senior Counsel American Center for Law and Justice, to Christopher Ward, Exec. Dir., Port Auth., AM. CTR. FOR L. & JUST. (Jan. 19, 2011), http://media.aclj.org/pdf/stnicholasletterofsupport_20110307.pdf. It was not until 2011 that the dispute was resolved, with the Port Authority agreeing to prepare and pay for the platform on which the church would be built, and the church leaders paying for the building. The church, to be known as St. Nicholas Greek Orthodox Church and National Shrine, now has a long-term lease with the Port Authority with an option to purchase for a nominal price. The building is still not completed, due to construction delays, fundraising difficulties, and a fraud investigation into church finances by the US Attorney's Office in Manhattan and the state Attorney General's Office (which found no fraud). Vivian Lee, *Half-Built St. Nicholas Church on Its Way to a 'Resurrection' After 20 Years*, NY1 SPECTRUM NEWS (July 31, 2020), <https://www.ny1.com/nyc/all-boroughs/news/2020/08/01/st-nicholas-greek-orthodox-church-rebuilding-to-resume-manhattan-nyc>. It is on track for a September 2021 opening. When rebuilt, the church will contain a meditation and bereavement space for visitors of all faiths. See generally Governor Cuomo

The Supreme Court has often used the term “sectarian” religion, referring to intense religious particularism or confessional faith. It is an unfortunate use of a sociological and theological term, which has its own (very different) meanings.¹⁵⁷ Yet the term has intuitive appeal: One can understand the difference between a cross on the one hand, and coins embossed with “In God We Trust” on the other. Most prayers offered at civic events are made to a nondenominational God and are therefore not “sectarian” in the sense that they are not crafted as prayers of a particular confessional creed. And the Ten Commandments, though shared by the three Abrahamic faiths, are sometimes considered “non-sectarian” because of their familiarity and ubiquity.¹⁵⁸ The concern over the “sectarianism” of the Ground Zero Cross was understandable, as the Latin Cross has not been used widely in civic space, nor is it part of the nation’s religio-civic patrimony or ceremonial deism. Even strict accommodationist Justice Kennedy posed, and rejected, the example of a cross atop a government building.¹⁵⁹ But dicta from *Allegheny* had confused the matter,

Announces Start of Construction on St. Nicholas Greek Orthodox Church and National Shrine in New York City, N.Y. ST., <https://www.governor.ny.gov/news/governor-cuomo-announces-start-construction-st-nicholas-greek-orthodox-church-and-national>. Almost ten years after 9/11, a heated controversy arose over the proposed Islamic center and mosque two blocks from Ground Zero, with many New Yorkers vigorously opposed to the location. The question was posed: Should the Islamic organization have been more “sensitive” to the possible message its building would send? Or should it only be a matter of whether the organization has a free exercise right to build? *See, e.g.*, Heather Greenfield, *International Law, Religious Limitations, and Cultural Insensitivity: The Park51 Mosque at Ground Zero*, 25 EMORY INT’L L. REV. 1317 (2011). The Islamic cultural center and mosque did open in 2011. Karen Zraick & Verena Dobnik, *Ground Zero Mosque Opened to the Public Wednesday*, CHRISTIAN SCI. MONITOR (Sept. 22, 2011), <https://www.csmonitor.com/USA/Latest-News-Wires/2011/0922/Ground-zero-mosque-opened-to-public-Wednesday>.

¹⁵⁷ In Christian theology, “sect” is set in opposition “church.” A church is characterized by its affirmation of the world, its inclusivity, and historical creeds. It is, one might say, a “big tent.” But a sect develops in opposition to church, with a tendency toward perfectionism and detachment from the world. *See, e.g.*, *Christianity*, BRITANNICA, <https://www.britannica.com/topic/Christianity/Church-sect-and-mystical-movement>.

¹⁵⁸ Ravitch considers the Ten Commandments a multifaceted, not a pure, religious symbol. Ravitch, *supra* note 111, at 1023.

¹⁵⁹ *Cnty. of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy thought that government would be favoring a specific religion with such symbolic recognition.

leaving some to conclude that compliance with the Establishment Clause required only secularized or non-sectarian symbols.¹⁶⁰

When the Second Circuit ruled the Ground Zero Cross constitutional, it relied on the Supreme Court guidance that the Establishment Clause neither requires secularized religious symbols¹⁶¹ nor “compel[s] the government to purge from the public sphere all that in any way partakes of the religious.”¹⁶² *Town of Greece v. Galloway*, issued one month earlier, explicitly held that sectarian prayers are constitutionally permissible at the beginning of local government meetings. The Court of Appeals, quoting from *Town of Greece*, wrote: “the Constitution no more permits the mandating of ‘a civic religion that stifles any but the most generic reference to the sacred’ than it permits prescribing a religious orthodoxy.”¹⁶³ I now turn to *Town of Greece* and *American Legion*, the two most recent Supreme Court decisions, which have moved the Establishment Clause symbols jurisprudence substantially toward the accommodation of religion.

PART III. A RELAXED JURISPRUDENCE ON RELIGION IN SACRED CIVIC EXPRESSION

Town of Greece and *American Legion*, like *Van Orden*, eschewed reliance on the usual suspects—the *Lemon*, coercion, and endorsement analyses—and have focused instead on the historic practice of legislative prayer and the multiplicity of meanings for religious symbols.¹⁶⁴ The first allows “sectarian” expression, that is, intensely particularistic religious language, in government space. The second accepts the civic meaning of an intensely particularistic religious symbol—the Latin cross—when used in historic commemoration of the war dead. *Town of Greece* corrects any earlier impression that only “watered down,” non-denominational or non-sectarian religion was permitted in governmental spaces. And

¹⁶⁰ *Town of Greece*, 572 U.S. at 579 (discussing “disputed dictum”).

¹⁶¹ *Id.* at 581.

¹⁶² *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring).

¹⁶³ *Am. Atheists, Inc.*, 760 F.3d at 238 (quoting *Town of Greece*, 572 U.S. at 581).

¹⁶⁴ Lisa Shaw Roy, *The Unexplored Implications of Town of Greece v. Galloway*, 80 ALB. L. REV. 877, 882 (2017) [hereinafter *The Unexplored Implications*] (noting that the 3-judge plurality and the concurring justices could not agree on the definition of coercion and so did not overturn the *Lemon* or endorsement tests; however, the opinion’s treatment of *Allegheny* is “an indirect way of repudiating the endorsement test”).

American Legion goes one step further to say that religious symbols associated with an outpouring of national grief over tragic circumstances are capable of acquiring civic meanings.¹⁶⁵

A. *Town of Greece v. Galloway*: “Sectarian” Religion in Civic Life

In contrast to a paid chaplain delivering prayers, upheld decades ago in *Marsh v. Chambers*, the Town of Greece, New York, used a rotation system to invite clergy to pray before the town council meetings each month. Almost exclusively Christian, the clergy often prayed in religiously particular ways—invoking Christ or the Trinity, for instance. The plaintiffs claimed that the Establishment Clause forbade the use of such sectarian language and that the environment was subtly coercive. The Supreme Court rejected the argument that “legislative prayer may be addressed only to a generic God.”¹⁶⁶ Justice Kennedy, writing for the five-Justice majority, wrote, “An insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court’s cases.”¹⁶⁷ He noted that “the contention that legislative prayer must be generic or nonsectarian derives from dictum in [*Allegheny*] that was disputed when written and has been repudiated in later cases.”¹⁶⁸ Moreover, he found that consensus on the meaning of nonsectarian is not possible.¹⁶⁹

¹⁶⁵ I have chosen to treat these cases together because words and images are both powerful vehicles for sacred civic expression in governmental spaces. See, e.g., Claudia Haupt, *Active Symbols*, 55 B.C. L. REV. 821 (2014). (Professor Haupt makes the case for treating them similarly, albeit for the purpose of restricting both classes of symbols: “Do religious *symbols* communicate messages differently than religious *words* in prayer or scripture? Courts have repeatedly dismissed visual representations of religious symbols as merely ‘passive,’ crafting a distinction between the visual and the textual that significantly underestimates the communicative power of the former. This suggests that courts deem visual religious displays less powerful, and therefore, less constitutionally suspect than textual religious messages. Are religious visual symbols more benign than prayer because they are merely ‘passive’? This question—fundamentally important both for Establishment Clause theory and doctrine—remains underexplored in the literature.” *Id.* at 822).

¹⁶⁶ *Town of Greece*, 572 U.S. at 582.

¹⁶⁷ *Id.* at 578.

¹⁶⁸ *Id.* at 579.

¹⁶⁹ *Id.* at 582.

In *Town of Greece* Justice Kennedy noted the compatibility of religious and civic expression.¹⁷⁰ Legislative prayer is meant to solemnize the occasion and particularistic prayers—those that “reflect beliefs specific to only some creeds”¹⁷¹—are able to serve that function. He noted that the tradition reflected in *Marsh* “permits chaplains to ask their own God for blessings of peace, justice, and freedom, that find appreciation among people of all faiths. . . . *These religious themes provide particular means to universal ends.*”¹⁷² Such prayers are capable of “invit[ing] lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing[.]”¹⁷³ Indeed, the purpose and effect of legislative prayer “are to acknowledge religious leaders and the institutions they represent rather than to exclude or coerce nonbelievers.”¹⁷⁴ The rotation prayers were not hollow: they were “nuanced and deeply personal,” not diminished by association with government.¹⁷⁵ But, given Justice Kennedy’s historical concern for psychologically coercive environments,¹⁷⁶ he set out certain constraints: a rotation of clergy prayers must not over time be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.”¹⁷⁷ The practice should not “exclude nonbelievers,”¹⁷⁸ “be a means to coerce or intimidate others,”¹⁷⁹ “denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion.”¹⁸⁰

Two dissents, one penned by Justice Breyer and one by Justice Kagan, each affirm the idea of a prayer rotation; neither adopts a separationist stance. All the dissenters joined Justice

¹⁷⁰ See generally Roy, *supra* note 164.

¹⁷¹ *Town of Greece*, 572 U.S. at 583.

¹⁷² *Id.* at 583. (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 591.

¹⁷⁵ *Id.* at 582.; see Roy, *supra* note 164, at 887 (noting how the Court recognizes the imperative that religion not be degraded when it mixes with government).

¹⁷⁶ *Lee*, 505 U.S. at 577.

¹⁷⁷ *Town of Greece*, 572 U.S. at 583 (quoting *Marsh v. Chambers*, 463 U.S. 783, 794-95 (1983)).

¹⁷⁸ *Id.* at 591.

¹⁷⁹ *Town of Greece*, 572 U.S. at 590 (quoting *Marsh*, 463 U.S. at 794-95).

¹⁸⁰ *Id.* at 583. For an example of governmental favoritism of Christians, Jews, and Muslims over Hindus, Sikhs, Native Americans, Wiccans, and others, see generally *Williamson v. Brevard Cnty.*, 928 F.3d 1296, 1299, 1311-12 (11th Cir. 2019) (holding an invocation policy that restricted prayers to monotheistic believers unconstitutional).

Kagan’s opinion,¹⁸¹ which rejects Justice Kennedy’s notion that the sectarian content of prayers can be universalizable, arguing that they instead have “the potential to both exclude and divide.”¹⁸² Towns could instruct clergy in prayer rotations to offer nonsectarian prayers,¹⁸³ which would comply with norms of political equality, ensuring “pluralism and inclusion.”¹⁸⁴

Justice Breyer’s dissent sets out a formula for ensuring that prayer rotations are “sufficiently inclusive.”¹⁸⁵ In the case itself, the town easily could have invited clergy of religious minority communities—particularly by reaching out to the synagogues just outside the town’s borders—to ensure that over time the prayer rotation represented the religious diversity of its citizens. The town “failed to make reasonable efforts to include prayer givers of minority faiths, with the result that, although it is a community of several faiths, its prayer givers were almost exclusively persons of a single faith.”¹⁸⁶ While Justice Kagan did not join Justice Breyer’s opinion, she made a similar point in her dissent: “Greece’s Board did nothing to recognize religious diversity: In arranging for clergy members to open each meeting, the Town never sought...to involve, accommodate, or in any way reach out to adherents of non-Christian religions. ... [T]hat practice does not square with the First Amendment’s promise that every citizen, irrespective of her religion, owns an equal share in her government.”¹⁸⁷

B. *American Legion v. American Humanist Assn.*: “Sectarian” Symbols with Civic Meaning

Traditionally, crosses have not been considered capable of representing civic life.¹⁸⁸ Unlike the routine religio-civic patrimony,

¹⁸¹ *Town of Greece*, 572 U.S. at 615 (Kagan, J., filed a dissenting opinion, in which Ginsburg, Breyer, & Sotomayor, JJ., joined).

¹⁸² *Id.* at 636 (Kagan, J., dissenting).

¹⁸³ *Id.* at 632 (Kagan, J., dissenting) (“Priests and ministers, rabbis and imams give such invocations all the time; there is no great mystery to the project.”).

¹⁸⁴ *Id.* at 616 (Kagan, J., dissenting).

¹⁸⁵ *Id.* at 610 (Breyer, J., dissenting).

¹⁸⁶ *Id.* at 615 (Breyer, J., dissenting).

¹⁸⁷ *Id.* at 616 (Kagan, J., dissenting).

¹⁸⁸ *See, e.g., Gonzales v. N. Twp. of Lake Cnty.*, 4 F.3d 1412 (7th Cir. 1993) (holding a crucifix for honoring heroic deeds of servicemen in public park unconstitutional). Also, consider the disputes over municipal seals. *See, e.g., ACLU of Ohio v. City of Stow*, 29 F. Supp. 2d 845, 851 (1998) (the court held that because one of four quadrants in the seal had a cross and a book, “a ‘reasonable observer,’ when looking

the cross represents an intensely religious moment for Christians and is undoubtedly a confessional symbol.¹⁸⁹ Yet, despite this sectarian symbol on public property, a total of seven justices held that the Peace Cross did not violate the Establishment Clause.¹⁹⁰ Justice Alito, when writing for the 5-Justice majority,¹⁹¹ asserted

at the Stow seal on official documents, vehicles, etc., would conclude that there is some official connection between the city and Christianity. This is precisely what the Constitution of the United States prohibits.”); *see also* *Robinson v. City of Edmond*, 68 F.3d 1226 (10th Cir. 1995) (an argument for the historical depiction of the importance of the Catholic Church in settling the Southwest failed the endorsement test); *see also* *Harris v. City of Zion*, 927 F.2d 1401, 1415 (7th Cir. 1991) (holding use of Latin cross, dove carrying branch, and phrase “God Reigns” in municipal seal as unconstitutional); *see also* *Kuhn v. City of Rolling Meadows*, 927 F.2d 1401, 1415 (7th Cir. 1991) (enjoining image of church with Latin cross from use in municipal seal). *But see* *Murray v. City of Austin*, 947 F.2d 147, 158 (5th Cir. 1991) (cross in municipal seal is not unconstitutional). *See generally*, Lindsey H. Emerson, *An Artifact or a Memorial?: The Latin Cross and the Establishment Clause*, 85 MISS. L.J. 471 (2016).

¹⁸⁹ For discussion of whether the Latin Cross can have meanings beyond religion, *see* Ravitch, *supra* note 111, at 1024 (considering a cross to be a “pure” religious symbol); Haupt, *supra* note 165, at 858 (noting “Federal courts have consistently interpreted the Latin cross to be a religious symbol”; collecting cases); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. 1211, 1211 (2011) (idea that a cross can represent all war dead “can be made only from deep inside a Christian worldview. Unthinking Christians may intend a cross to honor all the war dead, but that does not create any sensible theory by which the cross actually honors non-Christians.”).

¹⁹⁰ Justices Thomas and Gorsuch concurred only in the judgment and refused to analyze the symbol itself. Justice Thomas noted that the cross was clearly constitutional because there was no “actual legal coercion” in connection with the display. *Am. Legion*, 139 S. Ct. at 2095. (Thomas, J., concurring). He also echoed *Town of Greece* in saying that text and symbols need not be nonsectarian, and in doubting that courts could even determine such a thing. *Id.* at 2096-97. Justice Gorsuch focused on the question of standing, noting that the Court has never adopted “offended observer” standing. *Id.* at 2098. (Gorsuch, J., concurring). Justice Gorsuch agreed with the plurality’s finding that “longstanding monuments, symbols and practices” are “presumptively constitutional.” *Id.* at 2102 (quoting from *id.* at 2082). But he was unconvinced that one could determine the meaning of “longstanding.” He therefore noted approvingly Justice Kavanaugh’s concurrence, which interprets the Court’s analysis as a history-and-tradition test. *Id.* at 2092. (Symbols within a national tradition, even if recent, would be constitutional).

¹⁹¹ *Id.* at 2094 (Kagan, J., concurring). Justice Kagan did not join Part II-A or II-D, in which the 4-justice plurality (Alito, Kavanaugh, Breyer, JJ., and Roberts, C.J.) counsels against the applicability of *Lemon* in symbols cases and looks to the importance of historical practices. She is not prepared to join because she continues

that religious symbols like the Peace Cross can acquire civic meaning. In my view, the context of national grief over the loss of life in World War I made it possible to understand the Peace Cross in civic terms; it not only commemorated soldiers who had died in that war but was the product at the time of an intense and near-contemporaneous outpouring of sorrow. Like the many rows of crosses marking American graves in Europe, “it is unsurprising that the committee [planning the memorial] adopted a symbol so widely associated with that wrenching event.”¹⁹² One mother commented that “our memorial cross is, in a way, [her son’s] grave stone.”¹⁹³ On the memorial were the names of local men killed and the words of patriotism and service: endurance, courage, valor, devotion. Other war memorials have since been added in the vicinity. Justice Alito concluded that for a century, the Peace Cross “has *expressed the community’s grief* at the loss of the young men who perished, its thanks for their sacrifice, and its dedication to the ideals for which they fought.”¹⁹⁴ He noted the existence of religious symbols in Holocaust memorials and a recent Native American veterans memorial, significant because they too commemorate tragic deaths.¹⁹⁵

Justice Alito asserts that symbols are indeterminate and can acquire multiple meanings—including civic meaning—over time and through context and circumstance. In a part of the opinion joined by a majority, he notes the difficulty in discerning a symbol’s original purpose, as well as the fact that “purposes associated with an established monument, symbol, or practice often multiply.”¹⁹⁶ In addition to its meaning as a war memorial, for instance, the Peace Cross had “become a prominent *community landmark*.”¹⁹⁷ A symbol’s message may change over time, where “religiously expressive monuments, symbols, and practices...become embedded features of a community’s landscape and identity. The community may come to value them without necessarily embracing their

to appreciate *Lemon* as a useful test in certain circumstances and wants to retain a case-by-case approach regarding historical practices. *Id.* at 2094 (Kagan, J., concurring).

¹⁹² *Am. Legion*, 139 S. Ct. at 2076.

¹⁹³ *Id.* (The impetus for the memorial came from mothers of deceased soldiers.).

¹⁹⁴ *Id.* at 2074 (emphasis supplied).

¹⁹⁵ *Id.* at 2090.

¹⁹⁶ *Id.* at 2082.

¹⁹⁷ *Id.* at 2074.

religious roots.”¹⁹⁸ (This is especially true where memorials and monuments honor important historical figures for whom religion was significant.) Consider the fact that the Fraternal Order of Eagles, the donor of the Ten Commandments monument, associated it not with confessional faith but with moral rules for society that would help address juvenile delinquency; some religious symbols thus become important as part of a “common cultural heritage.”¹⁹⁹ Just as Justice Breyer was concerned that removal of the *Van Orden* monument would send a message of hostility and threaten division, so Justice Alito thought the removal or radical alteration of the Peace Cross could be seen by many not as a neutral act but as the manifestation of “a hostility toward religion that has no place in our Establishment Clause tradition.”²⁰⁰

Five members of the *American Legion* Court—including Justice Kagan and Justice Breyer, who had dissented in *Town of Greece*—agreed that the Peace Cross, while a Christian symbol, took on an additional secular meaning through its association with World War I and that over time, gained civic importance. “It has become part of the community.”²⁰¹ Nothing surrounding its selection or maintenance suggested any deliberate disrespect on religious grounds. Instead, unity was on display: at the memorial’s dedication, a priest gave an invocation and a Baptist minister the benediction, a show of respect for pluralism at that time; further, the monument itself named of all soldiers killed, Black and White, at a time of great racial tensions.²⁰² All five concluded that “[f]or some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark.”²⁰³

American Legion builds upon the constitutional constraints set out in *Town of Greece*. In Part II D, Justice Alito’s plurality opinion (joined by Justices Breyer and Kavanaugh and Chief Justice Roberts) sets out the underlying values of the Establishment Clause: our tradition requires “respect and tolerance for differing views, an honest endeavor to achieve *inclusivity and*

¹⁹⁸ *Am. Legion*, 139 S. Ct. at 2084.

¹⁹⁹ *Id.* at 2083.

²⁰⁰ *Id.* at 2074 (quoting *Van Orden*, 545 U.S. 677, 704 (2005) (Breyer, J., concurring)).

²⁰¹ *Id.* at 2089.

²⁰² *Id.*

²⁰³ *Id.* at 2090.

nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.”²⁰⁴ Monuments, symbols, and practices with religious elements but with a longstanding history and accretion of civic meaning are able to comport with these values. Justice Kagan does not join II D because, as she explains in her separate concurrence, she “does not want to sign on to any broader statements about history’s role in Establishment Clause analysis.”²⁰⁵ But she expressly notes that:

I find much to admire in this section of the opinion—particularly, its emphasis on whether longstanding monuments, symbols, and practices reflect ‘respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans.’ Here, as elsewhere, the opinion shows sensitivity to and respect for this Nation’s pluralism, and the values of *neutrality and inclusion* that the First Amendment demands.²⁰⁶

Thus, five justices found the Peace Cross had not offended these inclusion and non-discrimination constraints.

Justice Breyer’s concurrence, which Justice Kagan joins, further explicates these values: the Religion Clauses “assur[e] religious liberty and tolerance for all, avoid[] religiously based social conflict, and maintain[] that separation of church and state that allows each to flourish in its ‘separate sphere.’”²⁰⁷ They conclude that the Peace Cross threatens none of these values. It commemorates local soldiers, has itself and in context a secular, patriotic message, and does not disparage or exclude other religious groups. A more contemporary effort to erect divisive religious symbols would pose a different case, “[b]ut those are not the circumstances presented to us here, and I see no reason to order this

²⁰⁴ *Am. Legion*, 139 S. Ct. at 2089 (emphasis supplied).

²⁰⁵ *Id.* at 2094 (Kagan, J., concurring).

²⁰⁶ *Id.* (emphasis supplied) (internal quote, *id.* at 2089). Although Justice Alito’s opinion Part II-D commands only a 4-justice plurality, Justice Kagan’s admiration for the emphasis on inclusion and nondiscrimination means that this concept enjoys majority support. *Id.* at 2089.

²⁰⁷ *Id.* at 2091 (internal citations omitted). Justice Breyer makes clear that no single test controls interpretation of the Establishment Clause.

cross torn down simply because other crosses would raise constitutional concerns.”²⁰⁸

For this majority—conservative and liberal coalition that it is—there is nuance and a conciliatory tone. No harsh calls for separation or for a coercion prerequisite. In short, despite there being an intensely religious symbol, this majority understands that it can have more than an exclusively religious meaning. In contrast, the dissenters, Justice Ginsburg joined by Justice Sotomayor, conclude that the governmental maintenance of the Peace Cross “elevates Christianity over other faiths,” using a “starkly sectarian message.”²⁰⁹ They reject the possibility that a sectarian symbol can be a universal symbol of sacrifice for non-Christian soldiers who fought and died.²¹⁰

C. *Town of Greece* and *American Legion*: Contemporary Civic Events and Spaces

Town of Greece obviously applies to contemporary government meetings, but *American Legion* focuses on a religious symbol from the past. Will these decisions together lay the foundation for new commemorative events and monuments in the post-Covid era? Or will lower courts restrict *American Legion* to the plurality’s “presumption of constitutionality for longstanding monuments, symbols, and practices”?²¹¹ Justice Alito did note the differences between retaining older monuments, symbols, and practices and “erecting or adopting new ones.”²¹² Further, Justices Kagan and Breyer would not have supported the cross if it “had been erected only recently rather than in the aftermath of World War I,” which they thought would “likely... prove divisive.”²¹³ For them, such contemporary efforts to erect divisive religious symbols “would raise constitutional concerns.”²¹⁴

Nonetheless, I contend that *American Legion* has much to say about new displays because the constitutional values set forth to constrain symbolic expression were not history-bound and apply

²⁰⁸ *Id.* at 2091 (emphasis omitted).

²⁰⁹ *Am. Legion*, 139 S. Ct. at 2104 (Ginsburg, J., dissenting).

²¹⁰ *Id.* at 2107-08. For the dissent, it is a message of exclusion, that those not represented by the cross “are outsiders, not full members of the political community.” *Id.* at 2106.

²¹¹ *Id.* at 2082.

²¹² *Id.* at 2085.

²¹³ *Id.* at 2091 (Breyer, J., concurring).

²¹⁴ *Am. Legion*, 139 S. Ct. at 2091.

to any contemporary display. Justice Alito built the *American Legion* coalition on the notion that not only time but also context and circumstance can create social meaning beyond exclusive religious meaning—a widely accepted understanding of how symbols carry multiple meanings. Justice Alito 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.’”²¹⁵ Even Justices Breyer and Kagan are open to context and circumstance and a careful case-by-case analysis, which would determine whether a symbol was in fact divisive and whether it comported with the values of inclusion, nondiscrimination, and pluralism. Furthermore, Justice Gorsuch’s concurrence voiced concern over how to determine if a symbol is in fact old or new, and suggested that newer symbols surely can be constitutional if consistent with “national traditions.”²¹⁶ New symbols of underrepresented groups would fall squarely within the nation’s long civil rights tradition in sacred civic expression, which is deeply connected to the American legal commitment to non-discrimination, equality, inclusion, and pluralism.²¹⁷ All of this signals a recognition that some new religious monuments and

²¹⁵ *Id.* at 2090.

²¹⁶ “[I]t’s hard not to wonder: How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror?” He concludes that whether old or new monuments, the test (from *Town of Greece*) is whether the practice is consistent with the nation’s traditions. *Am. Legion*, 139 S. Ct. at 2102 (Gorsuch, J., concurring).

²¹⁷ Of the four Federal Courts of Appeals that have applied *American Legion*, three have involved longstanding symbols or practices. *Freedom From Religion Found., Inc. v. Cnty. of Lehigh*, 933 F.3d 275 (3d Cir. 2019) (county seal Latin cross); *Perrier-Bilbo v. United States*, 954 F.3d 413 (1st Cir. 2020) (oath with “so help me God”); *Kondrat’Yev v. City of Pensacola*, 949 F.3d 1319 (11th Cir. 2020) (Latin cross monument). But the Seventh Circuit recently found that an outdoor nativity scene at a county courthouse—which it did not consider to be a long-standing practice—nonetheless did not violate the Establishment Clause. *Woodring v. Jackson Cnty.*, 986 F.3d 979 (7th Cir. 2021). The nativity scene had been displayed annually for the last fifteen years. The court concluded that *American Legion* required it to analyze the nativity scene under *Town of Greece*, that is, to interpret the clause “by reference to historical practices and understandings.” *Town of Greece*, 572 U.S. at 576. So rather than ask whether a practice is old, the court asked whether the crèche fit into a long national tradition of nativity scenes depicting the historical origins of Christmas. Given the description of this long tradition in *Lynch*, 465 U.S. at 668, the court found the display constitutional.

memorials might similarly claim to be multilayered with universal civic messages. Indeed, the September 11th Ground Zero Cross gained multiple layers of meaning not by the passage of time but because of its tragic context and circumstances.

Just as *American Legion* could be broadly or narrowly understood, *Town of Greece* could be cabined to its legislative prayer context or understood more broadly to allow sectarian language more generally at public events. Recall that Justices Kagan and Breyer in their dissents, though against sectarian prayers, voiced no argument with a rotation by which nonsectarian prayers would be permitted before the local governing body—as long as the clergy rotation reflected the diversity of the community. Combining the ideas from both majority and dissent creates something akin to a public forum, open to prayer-givers (and their religious prayers) as long as they are representative of the community. In this way a local government can ensure that the forum is inclusive and managed in a nondiscriminatory way.²¹⁸ Note how the majority's allowance of sectarian language at a government event, together with the dissent's emphasis on an array of clergy that are representative of the religious affiliations of the citizenry, looks strikingly similar to the September 11th Prayer Service held at Yankee Stadium, which Professor Marshall agreed was, and had to be, explicitly religious and broadly representative of multiple faith traditions.

Taken together, *Town of Greece* and *American Legion* portend a new openness to religious expression in sacred civic space. Currently, with a majority of the Court sympathetic to religious symbols more generally, even if on a variety of theories, the jurisprudence will likely continue to move in this direction. In the context of national mourning over the pandemic deaths and grave racial injustices, this openness allows the expression of grief by all sorts of communities, dominant and non-dominant, religious and non-religious. They will be able to craft images and hold ceremonies in governmental spaces without the concern that religious words or images must be omitted, so long as they act within the confines of the constraints that demand respect for others.

PART IV. TOWN OF GREECE AND AMERICAN LEGION: IMPLICATIONS FOR SACRED CIVIC EXPRESSION

This new jurisprudential approach, which is more open and welcoming to religious modes of sacred civic expression, comes at a

²¹⁸ See *Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 797 (1995).

time when the institutions supporting the public arts have begun to actively engage underrepresented and historically disenfranchised groups.²¹⁹ Prompted by the grave racial injustices on vivid display in the summer of 2020, foundations, states, and municipalities are rethinking the civic landscape (and the processes that generate it) to ensure that it is more inclusive of non-dominant narratives.²²⁰ Of course, these efforts have already been underway in many parts of the country, but they have taken on a new urgency.²²¹ This movement for racial inclusivity also comes at a time when individuals and institutions committed to civic life are devising ways to commemorate lives lost to Covid-19. These trends are interrelated, as people of color have been especially hard hit by Covid-19. Thus, we are poised to make our sacred civic expression more inclusive of all communities as we share our collective sorrows.

The confluence of three phenomena—a relaxed establishment jurisprudence, the commitment to more inclusive civic landscape, and the need to express collective grief—is significant because religion is central to the narratives, symbolism, and community life for many non-dominant groups. Public events and civic art created by these communities will reflect the importance of religion—a house of worship, a holy book, a religious image, sacred language, spirituality—within their narratives. The accommodationist position of *Town of Greece* and *American Legion* allows the diversification of civic events and spaces without silencing the religious elements of non-dominant narratives. In this way, all groups participate in and benefit from a broadly inclusive civic landscape that honors both religious and non-religious modes of sacred civic expression, subject of course to the constitutional boundaries set out in these decisions.

As the civic stage broadens to include historically disenfranchised groups, the arts themselves are becoming more diverse, using ephemera as well as permanent structures, such as

²¹⁹ See sources cited *supra* note 12.

²²⁰ *The Future of Monumentality*, *supra* note 12 (speaker: Justin Garrett Moore, AICP, NOMA). Note that this movement will typically involve government actors and property, and so the Establishment Clause will apply to displays with religious elements.

²²¹ Official removal of confederate symbols has been under way, see *supra* notes 14-19 and accompanying text; Laura Vozzella, *Northam Can Remove Lee Statue in Richmond, Judge Rules*, WASH. POST (Oct. 27, 2020), https://www.washingtonpost.com/local/virginia-politics/richmond-judge-lee-statue-removal/2020/10/27/6fe87166-1893-11eb-82db-60b15c874105_story.html.

panels, banners, and temporary installations for public display.²²² One can see this emphasis on ephemera in the many physical and multi-media exhibits that have characterized public mourning in the Covid-19 era.²²³ Commissioning and dedicating one central monument, to represent a community, stands to become a less common way to engage in sacred civic expression; new forms of civic expression will co-exist alongside long-standing monuments, often challenging and disrupting them.²²⁴ And even when one community monument is planned, the processes for determining who will be honored, and how, will be more equitable and inclusive,²²⁵ and no longer the sole domain of the “arts patron” class. Indeed, the movement to remove or contextualize Confederate symbols has already shown the effects of more inclusive decision making. Consider Freedom Park in Raleigh, North Carolina.²²⁶ Through a grassroots effort with broad support and fundraising underway, this beautiful new park will serve as a memorial to enslaved people.²²⁷ This is particularly significant because it sits in the state capital, which is heavily Confederate monument territory; the park will challenge and disrupt those monuments.²²⁸ As with much of our civic landscape, this memorial park will not use religious elements, but is nonetheless sacred as it recalls the grave injustices of slavery, the people who suffered, and their hope for freedom.

As for the sacred civic activity that is explicitly religious, there is an obvious paradox: this *progressive* movement in reimaging an inclusive civic landscape is being aided by a largely *conservative* judicial movement—one that has been interested in preserving traditional prayers and symbols. Because of the constitutional demand for treating religions equally, this jurisprudential movement will result in the protection of not only the sacred civic expression of majorities but also of underrepresented communities whose civic activism has been, and continues to be, deeply rooted in faith traditions. Separationists have long thought that the best way to protect religious and other minorities was to remove or prohibit majoritarian words and images

²²² *The Future of Monumentality*, *supra* note 12.

²²³ See *supra* note 6 and accompanying text.

²²⁴ *The Future of Monumentality*, *supra* note 12 (speaker: Salamishah Tillet).

²²⁵ *Id.* (speaker: Marvin Rees, Mayor of Bristol, England).

²²⁶ *Id.* (speaker: Zena Howard, FAIA); *Home*, NORTH CAROLINA: FREEDOM PARK, <https://ncfmp.nationbuilder.com/>.

²²⁷ *Id.*

²²⁸ *Id.*

from government space. But now we see the emergence of a new jurisprudential paradigm of inclusion, rather than exclusion, of preserving old words and images and adding new ones—all within significant constraints.

A. The Centrality of Political Equality in Establishment Clause Interpretation

Preventing any type of religious caste or tiered citizenship system has been a concern since the Establishment Clause was incorporated, when the entire Court agreed that the clause prohibited denominational preference.²²⁹ It was certainly Justice O'Connor's concern when she crafted the "endorsement test," which she framed not in terms of church-state relations but in terms of political equality for people of all religions and no religion: The core promise of the Establishment Clause is that religion should never be relevant to one's standing in the political community.²³⁰ No faith should become so identified with the government that its members have superior citizenship and others second-class citizenship. The debates surrounding this core principle are about how to best achieve it, and we have a messy collection of cases, sometimes excluding and other time accommodating religion.

While *Town of Greece* and *American Legion* are heavy on the accommodationist end, they nonetheless announce constraints to ensure political equality. Government can never coerce in religious matters.²³¹ Further, the text, images, symbols, and the like cannot proselytize, advance, disparage, exclude, intimidate, or denigrate another faith.²³² They should respect pluralism and avoid social conflict and division.²³³ In short, religious language and symbols should be inclusive and non-discriminatory.²³⁴ Yet how is it possible for religious words and images that come from "plural and particularist" communities—which are, by definition, exclusionary—to be considered inclusive? The Court resolves the tension by finding that some language and symbols can be inclusive and non-discriminatory when gathered in something akin to a public forum, in which many religious voices are represented, or

²²⁹ *Everson*, 330 U.S. at 1; *Larson*, 456 U.S. at 228.

²³⁰ *Lynch*, 465 U.S. 668, 687-88 (O'Connor, J., concurring).

²³¹ *Town of Greece*, 572 U.S. at 590.

²³² *Id.* at 583, 590-91.

²³³ *Am. Legion*, 139 S. Ct. at 2089.

²³⁴ *Id.* at 2089, 2091, 2094.

when they have gained (by time, context, or circumstance) a civic meaning apart from their confessional statement.

The issue of political equality is now at its zenith with respect to racial minorities, with an urgent critique that a racial caste system exists, hidden in plain sight. Both racial and religious issues of second-tier citizenship merge when we consider our civic symbolism: what language and imagery represent our diversity? Are there symbols that unite and not divide? At a time when many are questioning the inclusion of Confederate symbols and names in the nation's sacred civic patrimony, some argue that the constitutional accommodation of Christian symbols reinforces racial division. Professor Caroline Mala Corbin argues that Christian prayers and symbols speak to Christian nationalists, an ideological movement that promotes America as a Christian nation and, often, a white Christian nation.²³⁵ Professor Corbin contends that upholding the prayers and process in *Town of Greece*²³⁶ panders to Christian nationalism and upholding the Peace Cross in *American Legion* “even if only inadvertently . . . can both reflect and contribute to Christian nationalism.”²³⁷ Thus the argument is that when government associates itself with such language and images, it risks equating being an American with being white and Christian, and concomitantly reaffirms a lower caste system of non-Christians and people of color. Despite its sweeping breadth, the argument has a basis in fact, given Trump's unconscionable encouragement of racial division and Christian nationalist rhetoric.²³⁸

²³⁵ Caroline Mala Corbin, *Christian Legislative Prayers and Christian Nationalism*, 76 WASH. & LEE L. REV. 453 (2019) [hereinafter *Legislative Prayers*]; Caroline Mala Corbin, *Commentary: Christian Nationalism and the Bladensburg Cross*, TAKE CARE (Mar. 25, 2019), <https://takecareblog.com/blog/christian-nationalism-and-the-bladensburg-cross> [hereinafter, *Bladensburg Cross*]; see also *supra* note 24.

²³⁶ *Legislative Prayers*, *supra* note 235, at 463 (“Christian prayers by governmental entities both reflects and exacerbates this phenomenon.”). I am more sympathetic to Professor Corbin's critique as to a new phenomenon of legislative prayers offered not by clergy or a legislative chaplain but by the legislators themselves, which surely signals second-class citizenship for non-members of the represented faiths. Cf. *Bormuth v. Cnty. of Jackson*, 870 F.3d 494, 497–99 (6th Cir. 2017) (en banc) (finding the practice constitutional) with *Lund v. Rowan County*, 863 F.3d 268, 275 (4th Cir. 2017) (en banc) (finding the practice unconstitutional).

²³⁷ *Legislative Prayers*, *supra* note 235. (“Even if not specifically motivated by Christian nationalism, the government's Latin cross monument still advances, or suggests sympathy for, a Christian nationalist ideology (and will be reasonably seen by many as doing so).”)

²³⁸ See Vischer, *supra* note 24.

The argument thus calls for a separationist reading of the Establishment Clause on the assumption that religious and racial minorities are harmed, not helped, by accommodation. But I argue that a separationist approach would have the unintended consequences of excluding the narratives of religiously and racially marginalized groups, to their detriment. In the context of pandemic and protest, the resistance to religious symbols in government spaces ignores the need to allow communities, especially non-dominant ones, 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. The separationist argument has long been made that “the social context that produces meaning reflects the power structure of the larger society. The meaning discerned from the [religious] displays will have a majoritarian bias.”²³⁹ This contention supports the exclusion of religious symbols from government property in order to protect minorities, but it ignores the fact that *permitting* the entrée of minority narratives can disrupt that social context and power structure.

Here is an example. In Greenville, North Carolina, a vibrant African-American community destroyed by urban renewal fifty years ago is being remembered with a memorial placed within a new city park. The anchor of that uprooted neighborhood was the Sycamore Hill Missionary Baptist Church. The designers of the memorial involved former residents and active church members “to address the neighborhood’s demise and to find a healing solution to redress decades of displacement.”²⁴⁰ The memorial space 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

²³⁹ Hill, *supra* note 39, at 521.

²⁴⁰ *Greenville Town Commons, Sycamore Hill Gateway Plaza*, PERKINS&WILL (2020), <https://perkinswill.com/project/greenville-town-common-sycamore-hill-gateway-plaza/> [hereinafter *Greenville Town Commons*]; *Greenville Council Gives Go Ahead for Sycamore Hill Gateway Plaza*, WITN.COM (Sept. 14, 2017, 10:42 PM), <https://www.witn.com/content/news/Greenville-Council-gives-go-ahead-for-Sycamore-Hill-Gateway-Plaza-444570593.html#:~:text=Project%20staff%20say%20they%20chose,project%20with%20a%20new%20architect.>

maintain the quality of light that connects the visitor to create a serene and spiritual ambiance.²⁴¹

This memorial is placed on one acre of city land, at a cost to taxpayers of almost two million dollars. The city's Black community worked for eleven years to get the city to recognize the need to publicly mourn the loss of this church and neighborhood.²⁴²

This memorial's stunning design beautifully recalls the significance of a place of worship to a community that was unjustly uprooted. But it does employ overtly religious symbolism: stained glass and "pews" serve to reanimate the vacant church site and create an intentionally spiritual atmosphere, all paid for with taxpayer money.²⁴³ Under the current establishment jurisprudence, this effort falls well within—indeed epitomizes—the very definition of inclusion and non-discrimination. No court would 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 existence and contributions of the entire displaced community. Remembering this Black church and surrounding community is part of the wider movement in public arts and civic spaces to include the narratives of heretofore invisible communities, to showcase the heroic deeds and great institutions that existed and exist among diverse groups. And when religion is part of the narrative, it is spoken, not silenced. This sacred civic expression is precisely what results whether we mourn the death of individuals or of a neighborhood. 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 into "the public experience and collective memory."²⁴⁴

²⁴¹ *Greenville Town Commons*, *supra* note 240. This project was discussed in *The Future of Monumentality*, *supra* note 12 (speaker: Zena Howard, FAIA).

²⁴² Elizabeth Johnson, *Memorial Honors Historic African American Community* (May 12, 2020), http://www.piratemedial.com/news/article_9d66cd2a-9763-11e9-a5d7-a7375e3ee377.html.

²⁴³ WWLP Digital First, *Hidden History: Sycamore Hill Baptist Church*, 22NEWS WWLP.COM. (Jan. 15, 2018, 12:36 P.M.), <https://www.wwlp.com/news/hidden-history-sycamore-hill-baptist-church/>; *see also* Sycamore Hill Gateway Plaza, GREENVILLE: NORTH CAROLINA, <https://www.greenvillenc.gov/government/recreation-parks/sycamore-hill-gateway-plaza>.

²⁴⁴ Clark, *supra* note 11, at 533.

Consider, too, religious symbols that already have a history: A statue of Jesus was painted black during the Detroit riots of 1967, and has become a symbol of racial harmony in the community. Could the seminary where it sits loan that statue of Black Jesus to the city in memory of those who have died in the continued struggles against racism?²⁴⁵ Or could the church that houses the Shrine of the Black Madonna, the “iconic painting that turned a Detroit Church into a social and political force,” loan the piece to the city to honor Black lives?²⁴⁶ Could Detroit place these items on a list of civic heritage? Could a municipality award a monument commission to an artist or sculptor proposing to create something like these images? Asked differently, would such governmental actions threaten political equality or advance it?

Dean Mary Clark has noted that in the past, the Establishment Clause was used to prevent nonwhite burial site protection.²⁴⁷ Native Americans found themselves without protection because protection might violate the Establishment Clause as favoring or endorsing indigenous religion.²⁴⁸ Under a more relaxed jurisprudence, protection of the practices and narratives of Indigenous tribes more fully meets the goal of political equality.

Thus, I contend that the jurisprudential move toward accommodation rather than enabling majoritarian exclusion of minority faiths and races will facilitate the inclusion of underrepresented and historically disenfranchised groups into our sacred civic expression. Viewed through the lens of political equality, *Town of Greece* and *American Legion* break new ground.

²⁴⁵ Nicquel Terry, *Black Jesus Statue one of the Most Iconic '67 Landmarks*, DETROIT NEWS (July 21, 2017), <https://www.detroitnews.com/story/news/religion/2017/07/21/black-jesus-statue-landmark/103908276/>.

²⁴⁶ Niraj Warikoo, *Detroit's Black Madonna Turned Into Social, Political Force*, DETROIT FREE PRESS (Apr. 28, 2017), <https://www.freep.com/story/news/local/michigan/detroit/2017/04/27/detroit-shrine-black-madonna/100947864/>.

²⁴⁷ Clark, *supra* note 11, at 517-18, 528.

²⁴⁸ *Id.* But note that federal protections of Native American sacred sites and practices have withstood Establishment Clause challenges brought by groups that wanted recreational access to sacred lands and that sought to invalidate restrictions on the public's enjoyment of public lands, *see* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814 (10th Cir. 1999); Nat. Arch & Bridge Soc'y v. Alston, 209 F. Supp.2d 1207 (D. Utah 2002), *affirmed* 98 Fed. Appx. 711 (10th Cir. 2004) (unpublished); Shawna Lee, *Government Managed Shrines: Protection of Native American Sacred Sites Worship*, 35 VALP. UNIV. L. REV. 265 (2000).

None of the justices employed a separationist approach in *Town of Greece* in order to avoid second-class citizenship. The majority and dissent split on whether legislative prayers can be sectarian and whether the town did enough to get a fair mix of clergy in the rotation, but no one said that a prayer rotation could not be constitutional. Further, in *American Legion*, a majority of the Court invoked the values of inclusion and nondiscrimination, in service to political equality, as the animating values of the Establishment Clause. In both cases, majorities believed that religious words and images can be compatible with the values of inclusion and nondiscrimination. Most significantly, these decisions conclude that *political equality is achievable by inviting more, not less, religion in sacred civic expression*. This jurisprudence supports the larger societal goal of bringing the sacred civic icons of non-dominant groups into our common spaces.

B. The Potential for Divisiveness

Despite my optimism with respect to strides toward a more inclusive civic landscape, the critique of separationists remains important.²⁴⁹ My own work on the Establishment Clause has taken a separationist perspective, cautioning religious groups to steward their religious symbols free of government involvement²⁵⁰ and arguing for fundamental limits to religious exercise.²⁵¹ But the context of the pandemic and racial injustice has compelled me to reconsider, at least with respect to the symbols jurisprudence. In my view, the inevitable involvement of government in commemoration, together with the permeability of secular and

²⁴⁹ Many scholars have cautioned against religion in public spaces because of the harm that can result to the faith itself. See Frederick Mark Gedicks & Pasquale Annicchino, *Cross, Crucifix, Culture: An Approach to the Constitutional Meaning of Confessional Symbols*, 13 FIRST AMEND. L. REV. 71 (2014) (“Religion’s conceding and cooperating with government in the desacralizing of sacred symbols will only dilute the authentic testimony of religions and believers who are already estranged from Western culture.” *Id.* at 71); Perry Dane, *Prayer is Serious Business: Reflections on Town of Greece*, 15 RUTGERS J.L. & RELIGION 611, 628 (2014) (“But if the purpose of official prayer is not (ahem) to pray, then all the lesser purposes the Court allows, including lending ‘gravity to public business,’ are merely playacting - using and abusing religion for secular ends.”).

²⁵⁰ Carmella, *supra* note 43.

²⁵¹ Angela C. Carmella, *Catholic Thought on the Common Good: A Place for Establishment Clause Limits to Religious Exercise*, 15 U. ST. THOMAS L.J. 546 (2019).

religious modes of civic expression, makes separation not only unrealistic but exclusionary.

The issue that does persist is the potential divisiveness of religious symbols. Justice Breyer has long been concerned with social division and civic peace, deferring to long-standing monuments in order not to send a message of hostility toward religion, which could create the very division the clause seeks to avoid.²⁵² New monuments, symbols, and practices pose a different issue. Here we can imagine that a town government pandering to, or captured by, a religious group could attempt to 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 could inflame tensions with citizens of other religions or no religion at all. The worst-case scenario would be the aggressive use of sectarian images by white Christian nationalists, neo-pagan white supremacists, or any other extremist religious ideology that made an exclusionary claim to government property and forums. Such ideologies run directly counter to *American Legion's* insistence on inclusion and non-discrimination. They also run directly counter to our constitutional commitment to eliminating racial discrimination.

The constraints set out in *Town of Greece* and *American Legion* must do the work in cases like these. Government may not act to: proselytize, advance, or disparage any faith or belief; exclude, coerce, or intimidate based on faith; denigrate another's faith, threaten damnation, or preach conversion.²⁵³ Government meets its constitutional obligations when its sacred civic expression can "assur[e] religious liberty and tolerance for all, avoid[] religiously based social conflict,"²⁵⁴ show respect for pluralism and "for differing views, [and demonstrate] an honest endeavor to achieve *inclusivity and nondiscrimination*."²⁵⁵ The examples shown violate all of these constraints: they exclude others and reject pluralism. They are

²⁵² Even the removal or covering up of more recent monuments can create tensions. For a description of the outcry from the parents of the soldiers killed, after County Commissioners covered over the "ichthus" symbol on a Desert Storm Memorial, see Jodie Jackson, Jr., *Ichthus Reappears on Desert Storm Memorial*, COLUMBIA DAILY TRIB. (Missouri) (June 5, 2015), <https://www.columbiatribune.com/article/20150605/news/306059935>.

²⁵³ *Town of Greece*, 572 U.S. at 590.

²⁵⁴ *Am. Legion*, 139 S. Ct. at 2090-91 (2019) (Breyer, J., concurring).

²⁵⁵ *Id.* at 2089 (emphasis added).

discriminatory and demeaning toward other faiths and other racial identities. I suspect that the doctrinal development of these boundaries—which become the vehicle to ensure political equality—will become the focus of the post-*American Legion* jurisprudence.

CONCLUSION

We must recognize the fluidity between religious and secular expressions of grief in times of national tragedy. Both are sacred. Americans have begun to seek ways to commemorate the pandemic and protests of 2020 and 2021, and a big part of those efforts will involve government coordination of events and government locations for monuments, both permanent and ephemeral. The current Establishment Clause jurisprudence is open to sacred civic expression that contains religious, even sectarian, words and images. Such a relaxed jurisprudence has the benefit of allowing an authentic outpouring of collective grief without artificial limits on religious content, yet still providing significant constitutional constraints.

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. This relaxed jurisprudence, grounded in inclusivity and nondiscrimination, is expansive enough to accommodate far more than traditional religious prayers and symbols. It can encompass the sacred civic expression of underrepresented communities whose narratives have been, and continue to be, deeply rooted in faith traditions. Energized by the wider public arts movement to remake our civic landscape into one that reflects our diversity, those narratives can become more widespread and the promise of political equality more achievable.