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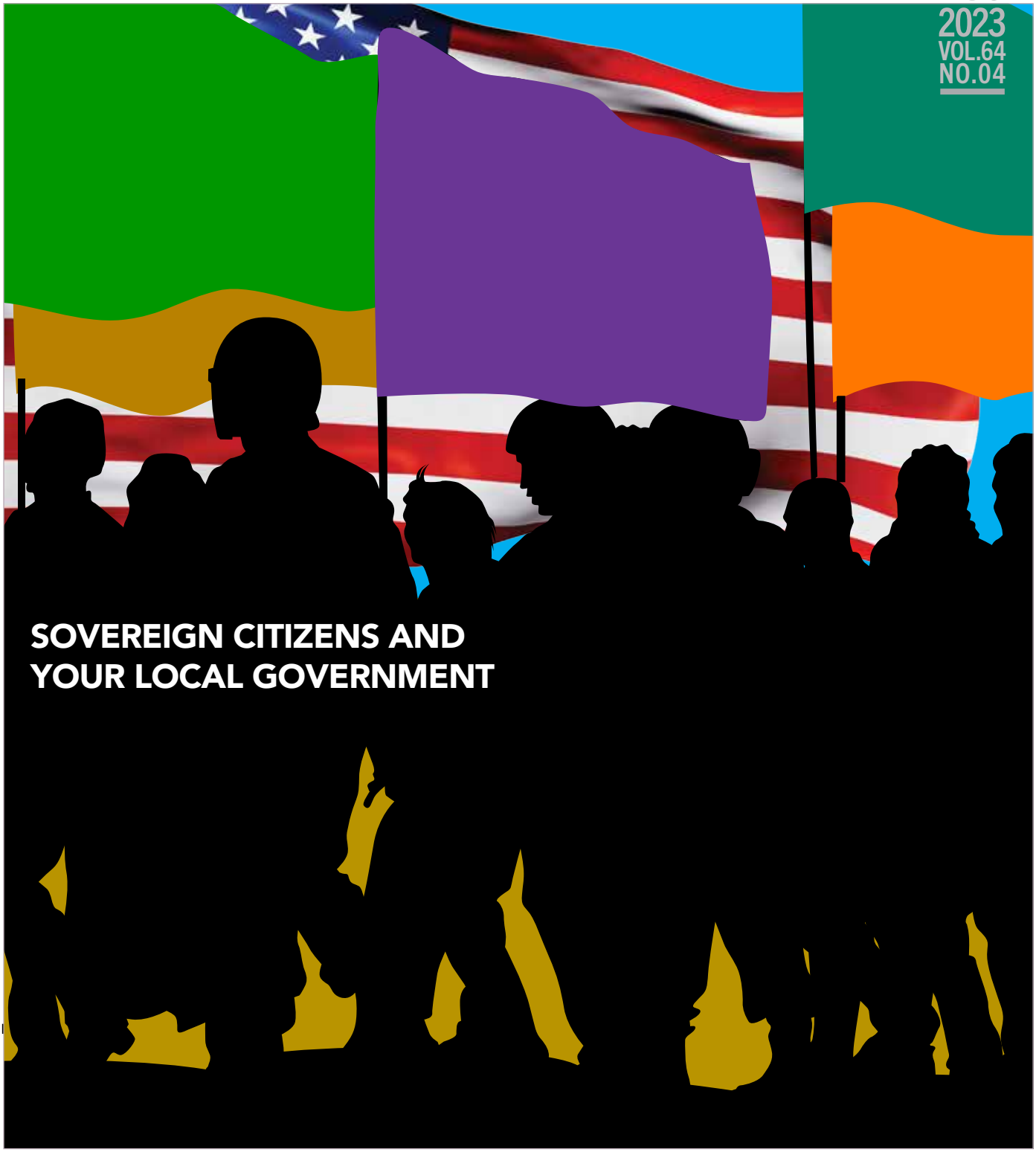

SOVEREIGN CITIZENS AND YOUR LOCAL GOVERNMENT

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Monumental Uncertainty: The Supreme Court, Sectarian Symbols, Statues, and Cities

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From honoring significant community members to memorializing local soldiers and public safety officers, from celebrating seasonal festivities to commemorating historic events, statues, displays, and monuments offer a myriad of messages to residents and visitors of towns and cities throughout the United States. With the diversity and multiculturalism of twenty-first century America, municipalities and their local governments are rightfully sensitive to the messages sent from, and the symbols included within, such statues—whether historic or newly proposed. Indeed, one area of such sensitivity, caution, and uncertainty for local governments is the use of ostensibly religious or sectarian symbols on taxpayer funded or publicly located statues.

Local governments rightly view the use of religious symbolism on public statues with a degree of caution based on the American philosophy of "separation of church and state," which is rooted in the Establishment Clause of the First Amendment. The Establishment Clause states simply, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," and it was incorporated against the states (and their local subdivisions) with the Supreme Court's *Everson v. Board of Education* decision in 1947.[1] Local governments' caution—and, perhaps, aversion—to religious symbols on public statues is exacerbated by the uncertainty and ongoing legal debate about when a statue violates the Establishment Clause. This uncertainty has grown in recent years with the United States Supreme Court's decision in *American Legion v. American Humanist Association*.[2]

This article intends to explore issues and strategies for local governments to contemplate when funding, constructing, or placing new statues with seemingly religious imagery. To do so, this article will, first, review *American Legion*; second, identify the unanswered questions from that case and possible legal tests which can be gleaned from it for evaluating new statues; third, determine which of those legal tests best comports with the Supreme Court's most recent Establishment Clause jurisprudence in *Kennedy v. Bremerton School District*;[3] and, fourth, offer practical strategies for local governments when considering new statues or monuments with religious or sectarian symbols.

Case Summary: *American Legion v. American Humanist Association*

Four years ago, in *American Legion*, the Supreme Court ruled 7-2 that a longstanding cross in Maryland which honors forty-nine servicemen from the Bladensburg, Maryland area killed in World War I, did not violate the Establishment Clause. The Court concluded that the Christian-cross shaped war memorial on public land and maintained with public funds did not violate the Establishment Clause because the statue had acquired other secular meanings over time.[4]

Standing since 1925, the cross was first devised in 1918 by a planning committee of county residents to honor the area soldiers who died in World War I.[5] The planning committee decided on a Latin Cross for the statue—in particular—because it was a well-known symbol of the war, "referencing the seemingly endless rows of small white crosses used to temporarily mark the graves of fallen soldiers overseas."[6] When the planning committee ran out of money to complete the statue, the American Legion took over in 1922 and finished the project in 1925.[7]

In 2014, the American Humanist Association ("AHA") filed suit and claimed the statue with its Latin Cross design violated the Establishment Clause because it was on public land and supported by public funds. The American Legion intervened to defend the statue.[8] During the litigation, the AHA suggested that the statue be moved to another less central location on private land, or be redesigned into a "non-religious slab or obelisk."[9]

The Federal District Court sided with the American Legion because

the monument served a secular purpose of honoring World War I. The District Court concluded that this secular purpose satisfied the first prong of the three-pronged "Lemon" test announced in *Lemon v. Kurtzman*; the remaining two prongs were satisfied because "a reasonable observer aware of the Cross's history, setting, and secular elements would not view the Monument as having the effect of impermissibly endorsing religion," and the "maintenance of the memorial did not create the kind of continued and repeated government involvement with religion that would constitute an excessive entanglement." [10]

On appeal, the Fourth Circuit Court of Appeals reversed the District Court. Specifically, the Circuit Court found that the statue failed the second prong of the Lemon test—the effects prong—because a reasonable observer would find the ownership and the maintenance of the statue with public funds to be an endorsement of Christianity.[11]

When the case reached the Supreme Court, three issues were presented to the Court: (1) was the statue, with its display of religious symbolism, constitutionally permitted on public land; (2) could the statue be maintained with public funds; and (3) was the Lemon test the proper legal standard for reviewing the well-established statute?[12]

Upon review, the Supreme Court ruled that the statue did not violate the Establishment Clause. On its way to upholding the constitutionality of the statue, though, the Court issued seven varying opinions. For instance, a majority argued that there was a "presumption of constitutionality" for historical monuments featuring religious symbolism because such statues take on a secular meaning over time and become part of the cultural heritage.[13] Meanwhile, four justices proposed a replacement test for the Lemon test, and Justices Ginsburg and Sotomayor dissented on the basis that the majority opinion eroded government's religious neutrality.[14]

Unanswered Questions

The Supreme Court's fractured opinion in *American Legion* left two critical questions for local governments—and government at all levels—to consider when dealing with similar statues in their communities. First, what religious or sectarian symbols are constitutionally permissible with new statues that are publicly financed or placed on public property? And, second, what legal test should be used to analyze the constitutionality of new statues? Simply put, the answer to the second inquiry will undoubtedly inform the answer to the first.

American Legion made clear that its "presumption of constitutionality" applied to longstanding statues, monuments, and practices, rather than new statues.[15] The Court, however, failed to provide any new guidance for Establishment Clause cases going forward. Thus, lower courts and local government attorneys lack a clear test for determining whether a newly proposed statue with religious or sectarian symbols violates the Establishment Clause. Nevertheless, from the justices' varying opinions in *American Legion* and other academic proposals, there are several possible tests for evaluating the constitutionality of new statues with religious symbols that may become controlling Supreme Court precedent in the future.

Justice Neil Gorsuch argued in his concurring *American Legion* opinion that the Court should apply the test from *Town of Greece v. Galloway* when examining statues for possible Establishment Clause violations.[16] Justice Gorsuch noted that this test could be used regardless of a statue's age, which avoids the problem of determining when a statue is "old enough" to withstand an Establishment Clause claim.[17] The Gorsuch-endorsed *Town of Greece* test specifically examines if a challenged statue or practice is supported by the country's tradition and history, thereby making it consistent with the Establishment Clause. For example, the relevant tradition in *Town of Greece* was legislative prayer dating back to the drafting of the Bill of Rights. This historic tradition and practice of legislative prayer, according to the Court, supported the constitutionality of the town board's opening benediction, as well as the town's nondiscrimination policy regarding who could offer the prayer.

In his concurring opinion in *American Legion*, Justice Brett Kavanaugh proposed a separate, new test for reviewing Establishment Clause claims. As an alternative to the Lemon test, Justice Kavanaugh proposed that if a government practice is not coercive and "(i) is rooted in history and tradition; or (ii) treats religious people, organizations, speech, or activity equally to comparable secular people, organizations, speech, or activity; or (iii) represents a permissible legislative accommodation or exemption from generally applicable law," the Establishment Clause has not been violated.[18] In other words, Justice Kavanaugh's test offers three individual paths by which a governmentally supported statue or practice may survive an Establishment Clause challenge.

Justice Kavanaugh offered his new test only after dismissing the use of the Lemon test in future Establishment Clause cases.[19] It is not clear, however, that *American Legion* abandoned the Lemon for use when examining new statues with religious symbolism. As noted, *supra*, *American Legion* dealt particularly with older statues and

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even noted "that retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones."[20] Thus, it is possible that the Lemon test may still be used to review the constitutionality of new statues. To satisfy the Lemon test, the government conduct at issue: (1) must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion.[21]

Besides the legal tests that can be gleaned from the opinions in *American Legion* or the conceivable survival of the Lemon test, another possibility is that the constitutional review of new statues with religious symbolism will rely upon a new, yet-to-be-announced legal test. For instance, one legal author has theorized that the four considerations described in *American Legion* to reject the use of the Lemon test for long-standing statues, "may provide criteria to determine whether a new symbol passes constitutional muster."[22] These four considerations are a statue's original purpose, whether the statue has gained a secular purpose, the message associated with the statue, and whether the rejecting the statue will not appear neutral.[23]

Elsewhere another legal commentator has suggested a "mirror-image" test for Establishment Clause claims, linked to the relatively stable test associated with the Free Exercise Clause.[24] Under the "mirror-image" test, courts "could look to what the Free Exercise clause prevents the government from prohibiting or burdening to craft an equal and opposite doctrine regarding what the Establishment Clause prevents the government from mandating or compelling."[25] For example, as equal and opposite of the Free Exercise Clause, the mirror-image test for Establishment Clause claims would not allow the government to "grant subsidies or privileges based expressly on recipients' religious affiliations" or "act purely on a veiled intent to compel religious observances."[26] In total, any one of several legal tests could be adopted for use in examining Establishment Clause issues with new statues.

Understanding *American Legion* after *Bremerton*

While the topic of publicly supported statues with religious or sectarian symbolism has not been addressed by the Supreme Court since *American Legion*, the Court's recent decision in *Bremerton* provides critical insight into which test most likely will be used to examine new statues that are challenged under the Establishment Clause. In *Bremerton*, the Court held that an Establishment Clause violation does not automatically follow whenever a public school or other government entity fails to censor the private religious speech of an employee—specifically, prayer on the field by a football coach.[27]

Significantly for the analysis of statues—particularly new statues facing Establishment Clause challenges—the Court also noted that that it "long ago abandoned Lemon and its endorsement test offshoot" for Establishment Clause cases.[28] The Court further reiterated that the Establishment Clause does not "compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious."[29] Finally, Justice Gorsuch, writing for the majority, clearly embraced the test found in *Town of Greece*, which—as noted *supra*—he had previously recommended in *American Legion*, and explained:

> In place of Lemon and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings. The line that courts and governments must draw between the permissible and the impermissible has to accord with history and faithfully reflect the understanding of the Founding Fathers. An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some exception within the Court's Establishment Clause jurisprudence.[30]

In sum, while *American Legion* did not answer the question of how new statues with religious elements would be examined for an Establishment Clause violation, *Bremerton* suggests that, despite numerous possibilities, the future of Establishment Clause jurisprudence lies with the historical test developed in *Town of Greece*.

Practical Strategies for Local Governments

Based on the uncertainty regarding new statues after *American Legion* and the possible clarity offered recently by *Bremerton*, local governments that are considering funding, constructing, or placing new statues with religious or sectarian symbols should consider the following points. First, to avoid any risk, simply avoid using any religious or sectarian symbols on statues that will be publicly funded or placed on public property--a seemingly simple strategy, but one that likely may not always be available if an elected representative insists on a particular design.

Second, a local government could attempt a maneuver whereby it funds a possibly problematic statue and places it on municipal land, but then sells the land and statue to a private operator. After funding and construction, this strategy should eliminate a local government's exposure to an Establishment Clause violation, but it may prove ineffective if an aggrieved party with proper standing seeks an injunction during the funding stage.

Third, a local government, when considering a new statue or even reviewing newer statues with conceivably religious aspects, can either remove the sectarian symbol from the design or remove it from the recently placed statue. This approach may not prove particularly appealing to

members of the community or its elected representatives, but it is an option. What's more, based on *American Legion*, this approach should be taken with caution because of the Court's warning to avoid actions that may not appear neutral. Thus, many people may be alarmed by the erasure of religious symbolism and may not find the local government's action particularly even-handed.

Fourth, based on *American Legion* and *Bremerton*, a local government can proceed with a new, religiously suggestive statue so long as the design is not coercive, does not discriminate, and is rooted in the nation's history and tradition. Following such a test and related case-law guidance, local governments can seemingly support statues with religious symbolism that are keeping with the country's traditions and history. For example, the long-standing tradition of using crosses to commemorate local police officers or soldiers who have given their lives in the line-of-duty is permissible.[31] Moreover, the Court's emphasis on non-coercion and non-discrimination suggests that local governments should avoid new statues only if they compel, coerce, or intimidate a reasonable person into religious observance; and local governments should avoid "systematic preference or discrimination" in favor of or against one religion.[32] Avoiding systematic preference or discrimination does not mean, however, that a new statue cannot be associated with a particular religion or faith, or that religious balancing is required.[33] Indeed, both *American Legion* and *Town of Greece* suggest that symbols from a certain religion may be used as long as a local government maintains a policy of non-discrimination and makes an honest endeavor to achieve inclusivity within the community.

Conclusion

Because *American Legion* explicitly separated long-standing statues from new statues, a legal test for analyzing newly proposed statues with religious or sectarian symbols was not immediately obvious. Nevertheless, the varying opinions from *American Legion* and subsequent developments with Establishment Clause jurisprudence provide some additional guidance. Thus, whether a local government wishes to avoid sectarian statues completely or include some religious aspects in new designs, strategies exist to avoid constitutional risk. ML

Notes

1. 330 U.S. 855 (1947).
2. 139 S. Ct. 2067 (2019).
3. 2022 WL 2295034 (U.S. June 27, 2022)
4. 139 S. Ct. 2067 (2019).
5. *Id.*
6. Columbia University Global Freedom of Expression, American Legion v. American Humanist Assn., https://globalfreedomofexpression.columbia.edu/cases/american-legion-v-american-humanist-assn/ (last visited July 1, 2022); see also James C. Kozlowski, Longstanding Historic Cross Constitutional Challenge, National Recreation and Park Association Magazine (Sept. 1, 2019), https://www.nrpa.org/parks-recreation-magazine/2019/september/longstanding-historic-cross-constitutional-challenge/ (last visited July 1, 2022).
7. 139 S. Ct. 2067, 2074 (2019).
8. *Id.* at 2078.
9. *Id.*
10. 403 U.S. 602 (1971); James C. Kozlowski, *Longstanding Historic Cross Constitutional Challenge,* National Recreation and Park Association Magazine (Sept. 1, 2019), https://www.nrpa.org/parks-recreation-magazine/2019/september/longstanding-historic-cross-constitutional-challenge/ (last visited July 1, 2022) (internal quotations omitted).
11. Columbia University Global Freedom of Expression, American Legion v. American Humanist Assn., https://globalfreedomofexpression.columbia.edu/cases/american-legion-v-american-humanist-assn/ (last visited July 1, 2022).
12. 139 S. Ct. 2067 (2019).
13. *Id.* at 2082.
14. *Id.*
15. *Id.* at 2103.
16. 572 U.S. 565 (2014).
17. 139 S. Ct. at 2102.
18. *Id.* at 2093.
19. *Id.*
20. *Id.* at 2085.
21. Lemon v. Kurtzman, 403 U.S. 602 (1971).
22. Lisa Shaw Roy, *The Replacement Campaign: Monuments and Symbols*, 56 Tulsa L. Rev. 255, 273 (2021).
23. Am. Legion, 139 S. Ct. at 2085.
24. First Amendment: Leading Case, 133 Harv. L. Rev. 262 (2019).
25. *Id.*
26. *Id.*
27. Kennedy v. Bremerton Sch. Dist., 2022 WL 2295034, at *13 (U.S. June 27, 2022).
28. *Id.*
29. *Id.* (internal citations omitted).
30. *Id.* (internal citations and quotations omitted).
31. Henry C. Whitaker, *Religious Seasonal Decorations in Federal Government Buildings*, GSA Memorandum (January 15, 2021).
32. *Id.*
33. *Id.*

