Pastor, Church & Law

FIFTH EDITION

SUPPLEMENT

Updated July 2022

Editor's Note: *In June of 2022, the US Supreme Court delivered a decision in* Kennedy v. Bremerton School District, 597 U.S. ___ (2022). *Part of the decision included overturning a decades-old test that the Court previously announced in* Lemon v. Kurtzman, 403 U.S. 602 (1971) *for establishment clause cases.*

The updates in the following sections of Pastor, Church & Law, Fifth Edition, *reflect this development and should be noted by readers.*

Exemption from Military Duty (§ 3.05—page 86)

Under the so-called *Lemon* test, which the Court later overturned in a 2022 decision, a program did not violate the First Amendment's nonestablishment of religion clause if: (1) it had a secular legislative purpose; (2) its principal or primary effect neither advanced nor inhibited religion; and (3) it did not create excessive entanglement between government and religion (learn more about the legal standard now used for deciding establishment clause cases in Chapter 12).

Transferring Church Property (§ 7.05—page 443)

Under this test, first announced in a 1971 decision, but later overturned in a 2022 decision, a law or government practice challenged as an establishment of religion would be valid only if it satisfied the following three conditions—a secular purpose, a primary effect that neither advanced nor inhibited religion, and no excessive entanglement between church and state (learn more about the legal standard now used for deciding establishment clause cases in Chapter 12).

Application to Religious Organizations (§ 8.12.01—page 667)

It evaluated the constitutionality of the section 702 exemption on the basis of a three-part test it devised in 1971 (but which was later overturned through a 2022 ruling). Under this test, a law challenged on the basis of the nonestablishment of religion clause was permissible only if it satisfied three requirements—(1) it had a clearly secular purpose, (2) its primary effect neither advanced nor inhibited religion, and (3) it did not result in an excessive entanglement between church and state (learn more about the legal standard now used for deciding establishment clause cases in Chapter 12).

Regulation of Charitable Solicitations (§ 9.02—page 803)

The "tripartite" establishment clause analysis formulated by the Court in the *Lemon* case (which has been since overturned) was deemed inapplicable to this context, since that analysis was "intended to apply to laws affording a uniform benefit to all religions, and not to provisions, like the . . . fifty percent rule, that discriminate among religions."

Chapter 12: The Present Meaning of the First Amendment Religion Clauses (page 1141)

CHAPTER SUMMARY

The previous chapter addressed the importance of the Supreme Court's interpretation of the First Amendment religion clauses. In this chapter, the Court's current interpretation of the religion clauses is addressed.

In 1971, the Court held that a law or government action challenged on the basis of the "Establishment Clause" will be constitutional only if it meets all of the following three conditions: (1) a clearly secular purpose, (2) a primary effect that neither advances nor inhibits religion, and (3) no excessive entanglement between government and religion. This test often was referred to as the "tripartite" establishment clause test (also known as the *Lemon* test). In 2022, the Court overturned the test and said cases should be decided through interpreting the establishment clause "by reference to historical practices and understandings."

In many respects, even when *Lemon* was still considered good law, the Court tended to decide establishment clause cases based on history and tradition. To illustrate, in 1984, the Court upheld the constitutionality of a nativity scene on public property during the Christmas season even though such displays might not pass the then-existing tripartite test. The Court was satisfied that the display reflected a deeply held and widely accepted religious tradition that did not advance or establish religion in a substantial way.

In evaluating whether a particular law or government action violates the "Free Exercise" Clause, the Supreme Court has formulated the following two rules: first, government may never interfere with an individual's right to believe whatever he or she wants. Second, in deciding whether or not a government law, regulation, or practice that burdens religiously motivated conduct violates the Free Exercise Clause, various principles apply. For example, "generally applicable criminal prohibitions" that burden religiously motivated conduct do not violate the Free Exercise Clause. Such prohibitions are presumptively valid and need not be supported by a compelling state interest.

In other free exercise cases, the courts must consider (i) whether the activity was motivated by and rooted in legitimate and sincerely held religious belief, (ii) whether the activity was unduly and substantially burdened by the government's action, and (iii) whether the government has a compelling interest in limiting the religious activity that cannot be accomplished by less restrictive means.

The Lemon Test (§ 12-01.01, page 1144):

> ***Key point 12-01.1*** *For decades, the most commonly applied test for evaluating the validity of a law or government practice under the First Amendment's nonestablishment of religion clause was the three-part "Lemon" test. Under this test, a law or government practice that conveyed some benefit on religion would be considered constitutional if it (1) had a clearly secular purpose; (2) had a primary effect that neither advanced nor inhibited religion; and (3) did not foster an excessive entanglement between church and state. All three parts of the test needed to be met in order for the law or practice to be deemed constitutional. In 2022, the US Supreme Court overturned this test*[1]*, largely because the Court itself said it often criticized or ignored the test. Going forward, the Court said cases should be decided through interpreting the establishment clause "by reference to historical practices and understandings."*
>
> **Caution.** The Court concluded that "[i]n the last two decades, this Court has often criticized or ignored *Lemon* [and] in place of *Lemon* . . . this Court has instructed that the Establishment Clause must be interpreted by reference to historical practices and understandings." To illustrate, in 1983 the Court upheld the constitutionality of legislative chaplains, in part because of historical understandings.[2] The Court surveyed the history of legislative chaplains, observing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country," and that

---

[1] Kennedy v. Bremerton School District, 597 U.S. ___ (2022).

[2] Marsh v. Chambers, 463 U.S. 783 (1983).

this practice "coexisted with the principles of disestablishment and religious freedom." The Court found it especially relevant that the first Congress, which drafted the First Amendment religion clauses, adopted the policy of selecting a chaplain to open each session with prayer:

> It can hardly be thought that in the same week members of the First Congress voted to appoint and to pay a chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the establishment clause of the Amendment to forbid what they had just declared acceptable. In applying the First Amendment . . . it would be incongruous to interpret the clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the Federal Government.

This evidence would conclusively establish the legitimacy of legislative chaplains to all but the most doctrinaire disestablishmentarians, or to those who adhere to a "progressive understanding" of constitutional provisions. To illustrate, in a dissenting opinion in the *Kennedy* decision, Justice Brennan urged the Court to disregard history and the original purpose of the First Amendment in favor of what he considered to be a more enlightened view of the proper place of religious exercise. Of course, one of the deficiencies of such an approach is that once the moorings of history are abandoned, any substitute standard is itself immediately vulnerable to revision. Thus, condemnations of decisions that have departed from the *Lemon* decision, like those by Justice Brennan and others, are hollow and unprincipled.