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Supreme Court ruling on prayer undercuts longstanding precedent: Mark R. Brown

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COLUMBUS, Ohio -- With the fuss about the Supreme Court's decision last month to unravel abortion rights, a more sweeping and dangerous opinion was handed down by the court last Monday. In Kennedy v. Bremerton School District, Justice Neil Gorsusch ruled that a public school football coach possessed a First Amendment right to pray on the 50-yard line surrounded by players and parents.

While this result was expected from what has become the most pro-Christian Supreme Court in more than 50 years, a key piece of Gorsuch's reasoning was a bit of a surprise. Gorsuch and his pro-religion majority overturned a 1971 Supreme Court opinion, Lemon v. Kurtzman, which encapsulated almost 100 years' worth of cases interpreting and applying the First Amendment's Establishment Clause.

That clause, which states that government "shall make no law respecting an establishment of religion," was interpreted in Lemon to prohibit government from purposely or effectively supporting

religion. This interpretation was drawn, in part, from President Thomas Jefferson's assurance in 1802 (in a letter to the Danbury Baptist Association in Connecticut) that the Establishment Clause erected a "wall of separation" between church and state.

Using Lemon, the court routinely invalidated forced prayer in public schools, at graduations and even at football games. Proselytizing by teachers, in particular, was prohibited. Parents and their children were left free to choose their own spiritual paths.

In place of the overturned Lemon test, Gorsuch insisted that "the Establishment Clause must be interpreted by reference to historical practices and understandings." It must be applied in "accord with history and faithfully reflect the understanding of the Founding Fathers."

While the original understanding, Gorsuch claims, prevents government from "mak(ing) a religious observance compulsory," "coerc(ing) anyone to attend church," and "forc(ing) citizens to engage in a formal religious exercise," it does not prohibit coaches (or teachers, one assumes) from leading their students in prayer.

Gorsuch's interpretation of the Establishment Clause's original understanding is far from certain. In 1791 when the First Amendment was ratified, after all, several states continued to actively support Christian faiths through what many would call coercive means. Throughout the new states, for instance, Jews were denied political rights. Dissident Christians, meanwhile, were also punished. As Stanford Professor Michael W. McConnell explains in a 2003 article, in New England the "establishment" of anti-Anglican, Calvinist beliefs survived "well into the nineteenth century," adding that, "Anglican ministers who refused to violate

their oaths were dunked, beaten, stripped, tarred and feathered, and driven from their pulpits."

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If Gorsuch is correct, none of this ever happened; or at least it was not coercive. Applying Gorsuch's new test, these practices should again be constitutional under the Establishment Clause. Only Lemon's broader analysis, after all, banned them. Original understanding and historical practices, to be sure, are relevant, but they cannot by themselves provide answers. Lemon delved deeper. Gorsuch's myopic "history and original understanding" approach refuses to do so.

Will states be allowed by the court to return to their founding practices and coerce members of disfavored Christian denominations and non-Christians? Will government again be allowed to take sides in spiritual matters?

Justice Sonia Sotomayor, joined by two other justices on the court, thinks so. Speaking for the three liberals in dissent, she worried that the opinion's overturning of Lemon not only "calls into question decades of subsequent precedents," but also "sets us further down a perilous path in forcing States to entangle themselves with religion, with all of our rights hanging in the balance."

“The effects of the majority’s new rule,” Sotomayor added, “could be profound. The problems with elevating history and tradition over purpose and precedent are well documented.”

One can only hope that Sotomayor is wrong. For if she is correct, the court could be leading the country back to its founding principle of religious persecution.

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