OPINION **MARSHALL BREGER**

THE CASE OF THE PRAYING COACH

A Gorsuch opinion moves the goalposts on church-state separation.

U.S. Supreme Court Justice Neil Gorsuch

Late last term, the Supreme Court decided a case that fundamentally transformed the relationship between church and state. In *Kennedy v. Bremerton School District*, the Supreme Court found that high school football coach Joseph Kennedy could kneel and pray in public with players on the 50-yard line directly after games. With apparent relish, the court formally rejected the so-called *Lemon* test for church-state entanglement that, in their words, it had "long ago abandoned."

In 1971, *Lemon v. Kurtzman* held that for a law or practice regarding religion to pass constitutional muster, it must have a secular purpose, must not have the "primary effect" of advancing or inhibiting religion and must not foster "excessive government entanglement" with religion. In its place, *Bremerton* proposes a new standard that requires the First Amendment to be interpreted by "reference to historical practices and understandings" and to draw lines that "accord with history and faithfully reflect the understanding of the Founding Fathers."

I have much sympathy for Justice Neil Gorsuch's goal to expand the free exercise of religion. But there are two major problems with his majority opinion. First, the real-world facts of the case bear no relation to the facts used in that opinion. Second, the landscape under the new rules (although still theoretical) will likely harm members of minority religions.

Gorsuch obviously wanted to overturn *Lemon* and make a statement on the culture wars (as he often does). But he apparently could not wait for a case with appropriate facts. Instead, he morphed the facts in the record to provide the fact pattern necessary for his desired result. I teach my law students that this is a no-no. Facts are paramount.

For instance, Gorsuch wrote that the school board offered no evidence that any Bremerton High School football players were pressured to join the coach in prayer. But the principal of the school had testified that the reason he told the coach to desist in the first place was that parents complained that their children did feel pressure. Ninth Circuit Court Judge Morgan Christen pointed out that parents had come forward saying their kids had felt "coerced and pressured [by Coach Kennedy's prayers]." The school district gave evidence that "while attending games may be voluntary for most students, students required to be present by virtue of their participation in football or cheerleading will necessarily suffer a degree of coercion to participate in religious activity when their coaches lead or endorse it." Religious minorities know full well that an authority figure can coerce without intending to. Extensive social science research shows how teenagers, already susceptible to peer pressure, can be swayed by "subtle coercive pressure" from authority figures. Numerous past judges have understood this, but Gorsuch does not seem able to imagine it.

The majority opinion also distinguishes "private" from "public" prayer in a way that defies common sense. Kennedy prayed directly after the game, with the stands mostly full; players from both teams and a group of coaches joined him. He spoke to local papers and posted on Facebook publicizing his desire to continue. The Ninth Circuit judge noted that, though "in various iterations of this case I have heard about the cause of 'brief personal prayer,'" in fact Kennedy had "approached another coach in 2015 asking that he and his players join him in prayer on the football field immediately after the game." Justice Elena Kagan's dissent includes photos of a large group joining Kennedy on the field during "private prayer." With access to the same record, Gorsuch determined Kennedy engaged in a "personal private prayer." Really?

Although Kennedy was undoubtedly still "on the clock" until all players had left the field, Gorsuch points out that school policy allowed staff to take phone messages or greet friends in the stands during the postgame period; thus, to permit these secular activities but not Kennedy's postgame prayer would not be a neutral restriction and would discriminate against his free exercise of religion. One wonders if the court would take the same view if Kennedy's lawyer (or a "faithful" justice) "took a knee" and prayed directly after an oral argument.

Gorsuch suggests that ruling against Kennedy would mean that "schools [could] fire teachers for praying quietly over their lunch, for wearing a yarmul-

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ke to school, or for offering a midday prayer during a break before practice." But a Jewish professor who wears a yarmulke to class is not pressuring others. As the Baptist Joint Committee argued in its amicus brief, students "may notice" what teachers wear or what they say at meals, but "the social context creates little pressure on students to act similarly."

Previous cases such as *Engel v. Vitale* argued that government financing of religious exercises "inserts a divisive influence into our communities." Gorsuch apparently believes that such public religious exercises instead model a sort of peaceable kingdom where students understand that learning how to tolerate speech or prayer of all kinds is "part of learning how to live in a pluralistic society." The prophet Isaiah, at least, understood that this idyllic vision reflected messianic times. In our flawed (a Catholic would say sinful) world, authority figures can coerce without intending to do so.

What will a post-*Bremerton* world look like for Jewish, Muslim or non-believing students? Only the naive believe that the loss of a bright-line rule separating church and state will have no effect on how school districts approach the regulation of religious activities. Many will push the envelope, particularly in largely homogeneous communities. Post-*Bremerton*, the superintendent of Eaton Roads Schools in Michigan has announced that he is "open to the idea of coach-led prayer," and at least three states—Illinois, Alabama and Oregon—are reassessing their no-prayer policies.

Newspapers and courts are already replete with examples of school boards turning a blind eye when teachers use their podium as a pulpit—until a parent complains. Now those complaints may have no recourse in the courts. For many adherents of minority religions, Gorsuch's peaceable kingdom will in fact underscore the feeling that they are and will remain strangers in a strange land. Is this the kind of "pluralistic society" Gorsuch has in mind?

Marshall Breger teaches law at Catholic University.