LOOKING THROUGH AN ORIGINALISM LENS TO RESOLVE THE LEGISLATOR-LED PRAYER CIRCUIT SPLIT

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INTRODUCTION

The First Amendment to the United States Constitution prohibits Congress from making a law "respecting an establishment of religion, or prohibiting the free exercise thereof."[2] However, there is "tension between forces favoring liberty—liberty of worship and other forms of religious expression and activity, and forces favoring another value enshrined in the first amendment—the separationist value embodied in the establishment clause."[3] This tension has led to a disagreement between the Fourth and the Sixth Circuits as to whether legislator-led prayer violates the Establishment Clause.[4] Until the Supreme Court or Congress resolves this conflict, this pattern of inconsistency will likely continue.

This Note explores the issue of whether legislator-led prayer violates the Establishment Clause through the lens of originalism. Legal Scholars have written on an originalist perspective of the Establishment Clause[5] and the Fourth and Sixth Circuits' disagreement when it comes to legislator-led prayer;[6] however, no one has looked at how the legislator-led prayer issue would be resolved when looked at with an originalist perspective. This Note explains why it is necessary that the Supreme Court grant certiorari on this issue and predicts how it would rule on this topic based on prior decisions from Justice Neil Gorsuch, a self-proclaimed originalist.[7]

Part I provides a brief overview of the Establishment Clause and the originalist method used for interpreting the U.S. Constitution. Part II describes and evaluates judicial constitutional interpretations of the Establishment Clause. Justice Gorsuch's past opinions on religious freedom are examined, relevant Supreme Court precedents are explored and a distinction between prayer in the legislature and prayer in public schools is made, and the circuit courts' contradictory rulings concerning legislator-led prayer is discussed. Finally, Part III explains why the Supreme Court should grant certiorari to resolve the split and uses Gorsuch's interpretation of originalism in its determination of whether legislator-led prayer does, in fact, violate the Establishment Clause.

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[2] U.S. CONST. amend. I.

[3] Kenneth W. Starr, *The Establishment Clause*, 41 OKLA. L. REV. 477, 480 (1988).

[4] John Gavin, *Praying for Clarity: Lund, Bormuth, and the Split Over Legislator-Led Prayer*, 59 B.C.L. REV. E. SUPP. 103 (2018).

[5] Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727 (2009); Vincent Phillip Munoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006).

[6] Gavin, *supra* note 4, at 104–06.

[7] Ed Pilkington, *Originalism: Neil Gorsuch's Constitutional Philosophy Explained*, THE GUARDIAN (Feb. 2, 2017, 6:00 AM), https://www.theguardian.com/law/2017/feb/02/originalism-constitution-supreme-court-neil-gorsuch [https://perma.cc/7Q4X-83VW].

I. ORIGINALIST INTERPRETATION OF THE ESTABLISHMENT CLAUSE

This section focuses on looking at the Establishment Clause through an originalism lens. This section specifically looks at Justice Gorsuch's interpretation of originalism and his response to critics that cite the law's indeterminacy as support for judges inserting their own moral convictions into decisions.

A. An Overview of Originalism

Originalism is the idea that judges should adhere to the original public meaning of the constitutional text as opposed to making interpretations on a case-by-case basis.[8] In order to change how the Constituion is interpreted, originalists point to the amendment process outlined in Article Five of the U.S. Constitution as the appropriate avenue for such change.[9] Judges who identify as originalists typically reject the notion of a "living constitution" because they do not believe that judges have the authority to "impose their own values on the nation."[10] For instance, one of Justice Gorsuch's former law clerks noted the emphasis that he placed upon finding the original meaning of the Constitution by consulting historical sources.[11] Gorsuch "called the 'history test,' as 'perceived by its advocates,' a 'comparatively objective approach.'"[12] Justice Gorsuch also emphasizes the importance to the Founders of the separate roles of the judiciary and the legislature.[13] In his view, judges should not legislate from the bench by deciding "cases based on their own moral convictions or the policy consequences they believe might serve society best."[14] Instead, Gorsuch believes that judges should look backward, examine the text of the Constitution, and determine how a reasonable person at the time the document was written would have interpreted the law.[15]

In looking backward, originalist judges acknowledge that there are historical constraints on the judicial power that they wield.[16] Originalists recognize that judges must "say what the law is, rather than what it ought to be; to remain cognizant of the limited authority of the judge within our system of separated powers; and to adhere faithfully to proper methods so as to give meaning to the law."[17] Justice Gorsuch's

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[8] *What is Originalism? Hearings on the Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the U.S.,* 115th Cong. 575 (2017) (Statement of Lawrence B. Solum, Carmack Waterhouse Professor of Law Georgetown University Law Center).

[9] *Id.* at 576.

[10] *Id.*

[11] Pilkington, *supra* note 7; Susan Burgess, *A Fine Romance: Keith Whittington's Originalism and the Drama of U.S. Constitutional Theory*, 35 LAW & SOC'Y REV. 931, 933 (2001) ("[O]riginal meaning is discoverable through the founders' documents, records of drafting conventions, popular debates during ratification, and other relevant contemporaneous commentary.").

[12] Max Alderman, Duncan Pickard, *Justice Scalia's Heir Apparent: Judge Gorsuch's Approach to Textualism and Originalism*, 69 STAN. L. REV. ONLINE 185, 186 (2017) (citing NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICUIDE AND EUTHANASIA 19 (2006)).

[13] Honorable Neil M. Gorsuch, *2016 Sumner Canary Memorial Lecture: Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia*, 66 CASE W. RES. L. REV. 905, 912 (2016).

[14] *Id.* at 906.

[15] *Id.*

[16] Stephen Markman, *Originalism and Stare Decisis*, 34 HARV. J. L. & PUB. POL'Y 111, 113 (2011).

[17] *Id.* at 114.

judicial restraint and strict adherence to *stare decisis* is consistent with originalism.[18] Despite the fact that some critics argue that originalism and *stare decisis* conflict, the opposite is actually true.[19] Though an "originalist Supreme Court would gradually move the law away from precedents that are inconsistent with the constitutional text . . . great movements of this kind are gradual—and they give the democratic process an opportunity to react."[20]

Moreover, Justice Gorsuch thinks that applying the principles of originalism to judicial interpretation is the appropriate way to resolve cases, and he is quick to respond to critics that poke holes in that method of judicial interpretation.[21] To those that contend that the exclusive use of "traditional tools of text, structure, history, and precedent" will lead to indeterminable results and sometimes a judge's own moral convictions are required, Justice Gorsuch counters that the indeterminacy in the law has been exaggerated.[22] In fact, he supports that the indeterminacy in the law has been overstated by noting:

> [I]n the Supreme Court, a Justice voices dissent in only about 50 cases per year. My law clerks reliably inform me that's about 0.014% of all cases. Focusing on the hard cases may be fun, but doesn't it risk missing the forest for the trees? And doesn't it also risk missing the reason why such a remarkable percentage of cases are determined by existing legal rules? The truth is that the traditional tools of legal analysis do a remarkable job of eliminating or reducing indeterminacy.[23]

Justice Gorsuch advocates for originalism by rationalizing that limiting the range of possible outcomes leads to more clearly defined laws.[24] Therefore, the low percentage of cases where a Justice voices dissent suggests that there is a correlation between the traditional tools of judicial interpretation that are currently employed and the low amount of cases that result in divided opinions in the Supreme Court.[25] Justice Gorsuch notes that the tendency to focus on this fragment of enigmatic cases causes critics to overlook the vast amount of cases that are determined by existing legal rules.[26] In fact, he contends that using the traditional tools of judicial interpretation limits indeterminacy by creating "a stable and predictable set of rules people are able to follow."[27] Gorsuch analogizes this method of deciding cases to

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[18] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring) ("[T]he principle of *stare decisis* was one 'entrenched and revered by the framers' precisely because they knew its importance as a weapon against . . . tyranny.").

[19] Solum, *supra* note 8, at 576.

[20] *Id.*

[21] Sveen v. Melin, 138 S. Ct. 1815, 1827 (2018) (Gorsuch, J., dissenting) (noting that the Supreme Court's Contracts Clause test "seems hard to square with the Constitution's original public meaning."); Gorsuch, *supra* note 13, at 915.

[22] Gorsuch, *supra* note 13, at 915.

[23] *Id.* at 916–17.

[24] *Id.* at 917.

[25] *Id.* at 916–17.

[26] *Id.* at 917.

[27] *Id.*

"pull[ing] from the same toolbox," which inevitably limits the scope of possible outcomes.[28]

B. The Role of History in Establishment Clause Interpretation

The use of history as a central tool of judicial interpretation is an important component of an originalist understanding of the Constitution.[29] More so, history "particularly matters in the Establishment Clause context, as it has since the 1830s . . . because, for both originalists and non-originalists, it offers valuable guidance for the interpretive process [and] the Supreme Court considers it to be significant."[30]

History's vital role in the Supreme Court's Establishment Clause interpretation may be explained by noting that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment." [31] Arguably, the reason that history plays such a vital role in Establishment Clause interpretation is that "failure to rely on original understanding or intent, as demarcated by historical understanding, leaves Establishment Clause interpretation at the mercy of judicial predilection."[32] This rationale for using history as a tool in Establishment Clause adjudication is the same justification that is used for advancing originalism, that "[o]riginalism leads to consistency, predictability, and, most important for originalists, judicial fidelity to the text rather than to a judge's own ideological predilections."[33] Perhaps the most enticing aspect of history as a tool for judicial interpretation, which originalism undoubtedly shares, is its objectivity. History essentially functions as an "independent and apolitical source of information."[34]

II. JUDICIAL INTERPRETATION

This section gives a brief history of the related judicial decisions including Justice Gorsuch's past opinions on religious liberty and his trend toward a loose interpretation of the Establishment Clause. Then, this section discusses the Supreme Court precedent that is relevant to the legislator-led prayer analysis and the contradictory rationales that have resulted in a split between the Fourth and the Sixth Circuit.

A. Gorsuch's Past Opinions on Religious Liberty

This section focuses on Justice Gorsuch's prior decisions on religious liberty during his tenure as a judge for the Tenth Circuit and his time as an Associate Justice

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[28] *Id.*

[29] Ethan Bercot, *Forgetting to Weight: The Use of History in the Supreme Court's Establishment Clause*, 102 GEO. L. J. 845, 850 (2014).

[30] *Id.*

[31] Everson v. Bd. of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J. dissenting).

[32] Bercot, *supra* note 29, at 851–52.

[33] Steven K. Green, *"Bad History": The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1736 (2006).

[34] *Id.* at 1728.

on the U.S. Supreme Court. A CNN news article noted that "[o]ne of the most striking and potentially controversial features of Gorsuch's jurisprudence is his overarching commitment to religious freedom as both a constitutional and statutory right – even in contexts in which the Supreme Court had previously been less sympathetic to such claims."[35] "In fact, [Justice] Gorsuch once stated that 'the law. . . doesn't just apply to protect popular religious beliefs: it does perhaps its most important work in protecting unpopular religious beliefs, vindicating this nation's long-held aspiration to serve as a refuge of religious tolerance.'"[36]

i. Justice Gorsuch's Tenth Circuit Opinions

During Justice Gorsuch's tenure as a judge for the Tenth Circuit, he argued on behalf of public religious displays in cases where the public display was not government speech.[37] For instance, he wrote the dissent from the denial of rehearing en banc in *Green v. Haskell County Board of Commissioners,* a case where a Tenth Circuit panel applied the endorsement test and ruled that a Ten Commandments display outside a county courthouse had to be removed because it violated the Establishment Clause.[38] First, Justice Gorsuch illuminated that the court's application of the endorsement test was in direct conflict with other circuit courts and the Supreme Court.[39] Then, he found that the county's display of the Ten Commandments monument was not indicative of the preference of one religion over another.[40] In fact, Justice Gorsuch reasoned, "it should be enough that there is no indication that county officials had any sort of policy by which they discriminated among proposed monuments based on the message they communicate."[41] Justice Gorsuch's dissent also demonstrates his adherence to *stare decisis*, which is a principle he identifies as important to the framers' of the U.S. Constitution.[42]

Similarly, in *American Atheists, Inc. v. Duncan*, Justice Gorsuch wrote a dissent from the denial of rehearing en banc of a case where roadside crosses that memorialized fallen troopers were found to be unconstitutional.[43] There, the Tenth

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[35] Steve Vladeck, *Hobby Lobby and Executive Power: Gorsuch's key rulings*, CNN (Feb. 1, 2017), https://www.cnn.com/2017/01/31/politics/hobby-lobby-executive-power-gorsuch-key-rulings/index.html [https://perma.cc/J9PC-QJJR].

[36] Robert Barnes, *Neil Gorsuch Naturally Equipped for his Spot on Trump's Supreme Court Shortlist*, THE WASH. POST (Jan. 28, 2017), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-naturally-equipped-for-his-spot-on-trumps-supreme-court-shortlist/2017/01/28/91b00a46-e49b-11e6-a453-19ec4b3d09ba_story.html?utm_term=.4946e4301c96 [https://perma.cc/7RKQ-AT78].

[37] *See* Summun v. Pleasant Grove City, 499 F.3d 1170, 117–78 (10th Cir. 2017) (McConnell, J., dissenting).

[38] Green v. Haskell Cty Bd of Comm'rs, 574 F.3d 1235, 1243–49 (10th Cir. 2009) (Gorsuch, J., dissenting); James Y Xi, *Justice Gorsuch and the Establishment* Clause, 69 STAN L. REV. ONLINE 125, 126 (2016–2017) ("The endorsement test, which the Supreme Court has sporadically applied through the years, asks whether a reasonable observer would conclude that the government, in erecting the display, had either (1) the purpose or (2) the effect of conveying a message of endorsement or disapproval of religion." (internal footnotes omitted)).

[39] *Green,* 574 F.3d at 1243 (Gorsuch, J., dissenting).

[40] *Id.* at 1248.

[41] *Id.*

[42] *See supra* note 18.

[43] American Atheists v. Davenport, 637 F.3d 1095, 1107–11 (10th Cir. 2010) (Gorsuch, J., dissenting).

Circuit panel struck down a Utah policy allowing public roadside crosses because a hypothetical reasonable observer could mistakenly believe the crosses symbolized an endorsement of religion.[44] Like in *Green*, Justice Gorsuch found the panel's hypothetical reasonable observer to be unreasonable.[45] In his dissent, he stated:

> It is undisputed that the state actors here did *not* act with any religious purpose; there is *no* suggestion in this case that Utah's monuments establish a religion or coerce anyone to participate in any religious exercise; and the court does not even render a judgment that *it thinks* Utah's memorials *actually* endorse religion. Most Utahans . . . don't even revere the cross . . . [and nevertheless] the court strikes down Utah's policy *only* because it is able to imagine a hypothetical 'reasonable observer' who *could think* Utah means to endorse religion — even when it doesn't.[46]

Justice Gorsuch's dissenting opinions in both instances demonstrate his belief that a government endorsement of religion alone is not enough to violate the Establishment Clause.[47] Instead, there must be an element of coercion.[48] This belief reflects an originalist perspective because it is representative of how a reasonable person at the time that the Constitution was written would have interpreted the law.[49] The Founding Fathers were troubled "that the government had sought to compel adherence to one religion or, in some colonies, one of several religions, and that the government had sought to restrain adherence to the others. The establishment clause and free exercise clauses arose out of these very problems."[50] Further, Justice Gorsuch joined Judge Kelly's dissent in *American Atheists* where she argued that requiring the government to take away religious significance from public displays or secularizing the message would "evince hostility towards religion, which the First Amendment unquestionably prohibits."[51] Justice Gorsuch endorsement of the dissent suggests concern about the coercion that could potentially arise from secularization.

ii. Justice Gorsuch Joins Supreme Court Opinions Favoring the Free Exercise Clause

The Establishment Clause is accompanied by the Free Exercise Clause, which prohibits Congress from hindering the free exercise of religion.[52] Since Justice Gorsuch was appointed to the Supreme Court in 2017, he has been faced with several opportunities to influence cases relating to religious freedom. Justice Gorsuch joined

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[44] *Id.* at 1101 (majority opinion).

[45] *Id.* at 1107 (Gorsuch, J., dissenting) ("Our court has now repeatedly misapplied the 'reasonable observer' test, and it is apparently destined to continue doing so until we are told to stop.")

[46] *Id.* at 1110.

[47] Xi, *supra* note 39, at 129 ("Indeed, that Judge Gorsuch thinks the reasonable observers concocted by the panels in *Green* and *Davenport* were decidedly "*un*reasonable" is good evidence of this.").

[48] Davenport, 637 F.3d 1095, 1110 (Gorsuch, J., dissenting).

[49] *See supra* note 13.

[50] Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 939 (1986).

[51] Davenport, 637 F.3d 1095, 1103 (Kelly, J., dissenting from the denial of rehearing en banc).

[52] U.S. CONST. amend. I.

opinions that favored the free exercise of religion and used originalist principles to resolve the questions presented.

First, Justice Gorsuch joined the majority opinion, concurring in part, in *Trinity Lutheran Church v. Comer*.[53] There, the court held that the church's rights were violated under the Free Exercise Clause because the state program denied a religious school funding to resurface a playground.[54] The Court references history to guide its resolution of the conflict concerning the Constitution's Religious Clauses.[55] For example, the Court recalls when a legislator, nearly 200 years ago, argued for a bill to stop the State from disqualifying Jews from public office solely on the basis of religion.[56] The legislator said:

> If, on account of my religious faith, I am subjected to disqualifications, from which others are free, . . . I cannot but consider myself a persecuted man . . . . An odious exclusion from any of the benefits common to the rest of my fellow-citizens, is a persecution, differing only in degree, but of a nature equally unjustifiable with that, whose instruments are chains and torture.[57]

This is illustrative of the government coercion present in the case: conditioning a benefit on surrendering the free exercise of religion.[58] Here, Trinity Lutheran is forced to decide between enjoying an available benefit and retaining status as a religious institution. The Court's holding makes clear that such a choice is contrary to the Free Exercise Clause.[59]

Secondly, originalism similarly aided the resolution of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, where the Court held that religious objections to same-sex marriage is a protected view.[60] Justice Gorsuch joined the opinion in full but also authored a concurrence, where he deemed the Commission's finding of the plaintiff's religious beliefs "offensive," to be a "judgmental dismissal of a sincerely held religious belief," and "antithetical to the First Amendment."[61] Justice Gorsuch stresses that the Constitution protects all religious exercises, "not just popular religious exercises from the condemnation of civil authorities."[62] Further, he disapproves of the Commission's lack of consistency in decision-making, which evidences a failure to act neutrally.[63] This disapproval can likely be attributed to the originalist belief that decision makers should avoid following his or her personal "predilections[.]"[64] After all, originalism promotes consistency because "value

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[53] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012 (2017).
[54] *Id.* at 2024.
[55] *Id.*
[56] *Id.*
[57] *Id.* (internal citations omitted).
[58] *Id.* at 2021–22.
[59] *Id.*
[60] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018).
[61] *Id.* at 1734.
[62] *Id.*
[63] *Id.* at 1736.
[64] Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3 (1971).

choices are attributed to the Founding Fathers, not to the Court."[65] Justice Gorsuch demonstrates his adherence to this originalist principle when he states, "the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise."[66]

Justice Gorsuch's writings on the Free Exercise Clause do not depart from James Madison's belief "that the free exercise of religion was a matter of right rather than of toleration or grace."[67] Though it is not necessary to know the mental state of the Framers, looking back at history can be helpful in determining the Constitution's original public meaning– how a reasonable person at the time that the Constitution was written would have interpreted the law.[68] Therefore, Justice Gorsuch's interpretation of the Free Exercise Clause in the aforementioned cases is consistent with the tenet of originalism to not depart from the original public meaning of the constitutional text.[69]

B. Supreme Court Cases that are Relevant in the Legislator-Led Prayer Analysis

An examination of Supreme Court precedents that relate to prayer in public forums is demonstrative of the Court's tendency to defer to historical practice (a central element of originalism) when confronted with an Establishment Clause question.[70]

First, in *Engel v. Vitale*, the Supreme Court determined that encouraging public school students to recite a nonsectarian prayer before the school day is inconsistent with the Establishment Clause.[71] The Court noted that the prayer "does not amount to a total establishment of one particular religious sect to the exclusion of all others" but cautioned, "in the words of James Madison, the author of the First Amendment: '[I]t is proper to take alarm at the first experiment on our liberties.'"[72] However, prayer in the legislature is inherently different from prayer in public schools because both the setting and the participants involved are easily distinguishable. For instance, the *Engel* opinion demonstrates that the Supreme Court "feared that individuals, specifically young and impressionable schoolchildren, might be compelled to engage in religious activities against their will or against their parents' desires. Peer and group pressure could be equally as coercive as official compulsion."[73] Legislators and the general public, however, do not fit that characterization because, unlike schoolchildren, they are not being compelled to be present for the exercise. In *Widmar v. Vincent*, the Supreme Court held that a university's refusal to allow a student group to use facilities solely because of its religious affiliation violated the

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[65] *Id.* at 4.

[66] *Masterpiece Cakeshop*, 138 S. Ct. at 1737 (Gorsuch, J., concurring).

[67] Philip A. Hamburger, *Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 927 (1992).

[68] *See* Solum, *supra* note 8, at 576.

[69] *Id.* at 575.

[70] Gavin, *supra* note 6, at 112.

[71] Engel v. Vitale, 370 U.S. 421, 424 (1962).

[72] *Id*. at 436.

[73] Starr, *supra* note 3, at 481.

Free Exercise Clause.[74] The Court reasoned that, "University students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[75] More analogous to university students than schoolchildren, legislators and the general public should be able to appreciate the State's policy of neutrality toward religion.

Then, in *Marsh v. Chambers*, the Supreme Court established that the constitutionality of government-funded chaplains opening legislative sessions with prayer should be evaluated according to historical practice.[76] The Court used originalism in resolving the question presented and looked back to the custom of prayer in government settings during the time that the Bill of Rights was written.[77] Justice Burger, delivering the Court's opinion stated, "clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."[78] So, the 1791 federal legislature's acts of authorizing the hiring of a chaplain and engaging in chaplain-led prayer before meetings reflect its intent that such action complied with the Establishment Clause.[79]

Thirty years after the Supreme Court's decision in *Marsh*, it ruled in *Town of Greece v. Galloway* that a legislative session could be opened with a nonsectarian prayer or a sectarian prayer led by guest clergy.[80] The Court began by noting that the Town of Greece prayer practice was consistent with the historical practice and tradition of Congress and other state legislatures.[81] Then, the Court held that the Establishment Clause is not violated as long as the practice is not discriminatory against minority faiths and the prayers are not coercive to those who wish not to participate.[82] The U.S. Supreme Court adhered to the original public meaning of the constitutional text by deferring to historical practice in order to resolve the Establishment Clause question presented.[83]

C. The Split Among the Circuits

Now, the issue of whether a lawmaker's sectarian prayer violates the Establishment Clause has arisen and has resulted in a circuit split between the Fourth and the Sixth Circuit. The Fourth Circuit reasoned in *Lund v. Rowan County* that prayer practice led by legislators causes the government to identify with Christianity and risks excluding minority faiths.[84] Three Rowan County residents filed suit against their Board of Commissioners, alleging that the Board violated the

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[74] Widmar v. Vincent, 454 U.S. 263, 276.
[75] *Id.* at 274 n.14 (1981) (citing Tilton v. Richardson, 403 U.S. 672, 685–86 (1971)).
[76] Marsh v. Chambers, 463 U.S. 783, 793 (1983).
[77] *Id.* at 788.
[78] *Id.*
[79] *Id.* at 790.
[80] Town of Greece v. Galloway, 572 U.S. 565, 59–92 (2014).
[81] *Id.* at 575–76.
[82] *Id.* at 586–87.
[83] Gavin, *supra* note 6, at 110–11.
[84] Lund v. Rowan Cty., N.C., 863 F.3d 268, 272 (4th Cir. 2017) (en banc).

Establishment Clause when elected commissioners opened their official meetings with a prayer.[85] The District Court reasoned that "the policy inherently discriminates and disfavors religious minorities"[86] and it issued a summary judgment in the residents' favor.[87] The District Court pointed out that the representation of only the five Commissioner's faiths created an implicit bias against religions not represented by the Commissioners.[88] On appeal, the Fourth Circuit reversed the decision, finding that the prayers were, in fact, constitutional.[89] The Fourth Circuit heard the case en banc and affirmed the District Court's decision, holding that a county Board of Commissioners' practice of opening its sessions with sectarian prayers violated the Establishment Clause when offered only by the elected commissioners.[90]

The en banc Fourth Circuit panel said that legislator-led prayer violated the Establishment Clause because the prayer practice excluded minority faiths by identifying the government with Christianity.[91] The panel particularly took issue with the fact that the Commissioners, all of whom were Christian, were the only individuals who offered the prayers.[92] In fact, if you were not on the Board, then you were not permitted to offer a prayer.[93] The content of the prayers was "invariably and unmistakably Christian in content. Over the five-and-a-half years for which video recordings are available, 97% of the Board's prayers mentioned 'Jesus,' 'Christ,' or the 'Savior.'"[94]

The Fourth Circuit did not take an originalist approach when it ruled that legislator-led prayer violates the Establishment Clause, as it failed to consider the original public meaning of the constitutional text. If the court had made that historical inquiry, the evidence would have revealed that legislator-led prayer, as opposed to legislative prayer, is a tradition in Congress and state legislatures.[95] Further, the Fourth Circuit erroneously concluded that Rowan County's invocation practice fell outside of the minister-oriented legislative prayer practice described in Town of Greece.[96] The statement is misguided because the Supreme Court made clear in *Town of Greece v. Galloway*, that the "government must permit a prayer giver to address his or her own God as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian."[97] Moreover, "in the general course legislative bodies do not engage in impermissible coercion merely byexposing constituents to prayer they would rather not hear and in which they need not participate."[98] Therefore, absent legal coercion, it follows that legislators should

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[85] Lund v. Rowan Cty., 103 F. Supp. 3d 712, 713–15 (M.D.N.C. 2015).
[86] *Id.* at 723.
[87] *Id.* at 734.
[88] *Id.* at 723.
[89] Lund v. Rowan Cty., 837 F.3d 407, 411 (4th Cir. 2016).
[90] Lund, 863 F.3d at 272.
[91] *Id.* at 272.
[92] *Id.*
[93] *Id.* at 273.
[94] *Id.*
[95] Rowan Cty. v. Lund, 138 S. Ct. 2564, 2564–65 (2018) (Thomas, J., dissenting from denial of certiorari).
[96] *Id.* at 2566.
[97] Town of Greece v. Galloway, 572 U.S. 565, 582 (2014).
[98] *Id.* at 590.

be permitted to open legislative sessions by leading prayers.[99] The Fourth Circuit's disregard for the historical tradition of legislator-led prayer is inconsistent with the tenets of originalism.

In direct contradiction with the Fourth Circuit's holding in *Lund*, the Sixth Circuit held that legislator-led prayer does not violate the Establishment Clause in *Bormuth v. County of Jackson*.[100] First, the Court held that the prayer practice is consistent with our country's history and tradition.[101] The Court also decided that the practice of having the general public "assist in solemnizing the meetings by rising and remaining quiet in a reverent position" was decidedly not coercive.[102] The Court noted the fact that there did not seem to be evidence of discrimination against minority faiths.[103] In fact, it stated:

> But we do know that Commissioners of different faiths, or no faith, may be elected . . . The religious faiths of periodically elected officials—including Jackson County's Commissioners—are dynamic, not static . . . Were Mr. Bormuth elected to the Jackson County Board of Commissioners, he could freely begin a legislative session with an invocation of his choosing, under the religion-neutral Jackson County prayer practice.[104]

This denominational neutrality advances the argument that legislator-led prayer complies with the Establishment Clause because people with minority faiths are not barred from leading a prayer that reflects their belief system if they are elected by the public. The Commissioners most likely are comprised of variations of the Christian faith because they are representative of the faiths of the community at-large; often people choose to elect a person who is a reflection of his or her own religious beliefs and moral convictions.[105]

III. THE SUPREME COURT SHOULD USE ORIGINALISM TO RESOLVE THIS CONFLICT

Though the Supreme Court released an opinion regarding prayer in government gatherings in *Town of Greece,* there are conflicting rulings regarding legislator-led prayer, like seen in *Bormuth*.[106] In order to attain judicial consistency, the Supreme Court needs to revisit the issue of prayer in government gatherings to achieve uniformity across the circuit courts. The Supreme Court declined to resolve this circuit split earlier this year; however, Justices Thomas and Gorsuch dissented from

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[99] *See id.*

[100] Bormuth v. Cty. of Jackson, 870 F.3d 494, 498 (6th Cir. 2017).

[101] *Id.* at 503.

[102] *Id.* at 517.

[103] *Id.* at 512.

[104] *Id.* at 513.

[105] *Id*. (We do not know the religious faiths of the . . . Jackson County Commissioners. The nine "Christian" Commissioners may have included Roman Catholics, Southern Baptists, Mormons, Quakers, Episcopalians, Lutherans, Mormons, Methodists, and others.)

[106] *Id.* at 498.

the denial of certiorari.[107] In Justice Thomas' dissenting opinion, which Justice Gorsuch joined, he began by stating that the Supreme Court's precedent on legislative prayer is focused on "whether a government practice is supported by this country's history and tradition."[108] Next, Thomas argued:

> For as long as this country has had legislative prayer, legislators have led it. Prior to Independence, the South Carolina Provincial Congress appointed one of its members to lead the body in prayer . . . . Several States, including West Virginia and Illinois, opened their constitutional conventions with prayers led by convention members instead of chaplains . . . . The historical evidence shows that Congress and state legislatures have opened legislative sessions with legislator-led prayer for more than a century . . . . In short, the Founders simply "did not intend to prohibit a just expression of religious devotion by the legislators of the nation, even in their public character as legislators."[109]

The idea that denominational neutrality is not violated as long as the government remains *formally* neutral seems to be a predominant theme that is generally consistent throughout most of Justice Gorsuch's opinions concerning religion.[110] Moreover, much of Gorsuch's authorship also demonstrates his belief that mere government endorsement of religion is not enough on its own to violate the Establishment Clause.[111] Further, Justice Gorsuch's propensity to take a strong view of free exercise principles by writing decisions in favor of the free exercise of religion shows that it is likely that he would give weight to an argument that prohibiting legislators from leading prayer during legislative sessions interferes with their ability to freely exercise their religious beliefs. Additionally, the relevant Supreme Court precedent reveals the trend of the Supreme Court to defer to historical practice when confronted with an Establishment Clause question.[112] Those facts along with Gorsuch joining Thomas' dissent indicates he would advocate for allowing legislator-led prayer, as long as there was no coinciding policy of discrimination.

An originalist interpretation based on Justice Gorsuch's understanding of "original meaning" would require looking at the past to determine the original intent of the Establishment Clause.[113] This historical inquiry would reveal that the First Amendment does not prohibit legislator-led prayer. The long-lasting implications of that kind of judicial interpretation would likely be an increase in government support for religion in general, along with more religious participation in government. A

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[107] Melissa Quinn, *Supreme Court declines case involving prayer before NC county board meetings*, WASHINGTON EXAMINER (Jun. 28, 2018, 10:47 AM), https://www.washingtonexaminer.com/policy/courts/supreme-court-declines-case-involving-prayer-before-nc-county-board-meetings [https://perma.cc/5S3W-W2GZ].

[108] Rowan Cty. v. Lund, 138 S. Ct. 2564, 2564 (2018) (Thomas, J., dissenting from denial of certiorari).

[109] *Id.* at 2566.

[110] Xi, *supra* note 38, at 130.

[111] Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1248 (10th Cir. 2009) (Gorsuch, J., dissenting); Xi, *supra* note 38, at 130 ("As Judge Gorsuch explained in Green, the government does not impermissibly favor one religion over another simply by displaying a religious symbol of one faith.").

[112] Gavin, *supra* note 4, at 111–12.

[113] Pilkington, *supra* note 7.

Justice Gorsuch originalist interpretation should be applied to resolve this circuit split because such an interpretation necessitates adherence to the Establishment Clause's original meaning rather than allowing the alternative: judges inserting their own personal moral convictions to resolve the matter.[114] When a judge inserts his or her own personal values onto the nation, the separation of powers principle is threatened. The Founders of this country "viewed the principle of separation of powers as the absolutely central guarantee of a just Government."[115] This is evidenced by the fact that the Constitution grants the judicial branch "judicial power," not legislative power.[116] This means that the role of judges is to interpret the law using objective tools of judicial interpretation; the Constitution does not give judges the authority to legislate from the bench.

CONCLUSION

The Supreme Court should grant certiorari to resolve the legislator-led prayer circuit split so that uniformity is achieved among the circuit courts. The legislator-led prayer analysis is centered on the Establishment Clause. Based on prior Justice Gorsuch opinions and authorship, he would find the Sixth Circuit's holding in *Bormuth v. County of Jackson* persuasive and hold that the legislator-led prayer practice is consistent with our country's history and tradition. A Justice Gorsuch originalist interpretation of the Establishment Clause should be applied to resolve the circuit split because it will ensure adherence to the original public meaning of the constitutional text.[117] Mere government endorsement of religion is not enough on its own to violate the Establishment Clause; there must be an element of coercion present that is lacking under the circumstances.[118]

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[114] Green, *supra* note 33, at 1736.
[115] Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).
[116] U.S. CONST. art. III, § 1.
[117] *See* Solum, *supra* note 8, at 575.
[118] Green v. Haskell Cty. Bd. of Comm'rs, 574 F.3d 1235, 1248 (10th Cir. 2009) (Gorsuch, J., dissenting).