ESSAY OUTLINE

**Textualism, Structure, Historical Context**

\*For constitutional fidelity approach, need to establish some type of original meaning and/or intent, which is supported by text, structure, and history\*

Contrast between religion clauses, and those that give expansive authority like General Welfare and Necessary and Proper

Evils the founders were protecting against

Limited wording

“A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.”

Failure to more explicitly outline boundaries between church and state

Tolerance at the time of limited mixing of government and religion

“three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."”’

Recognition that religion plays a core role in American life and that Americans are a fundamentally religious people.

“The Congress that drafted the First Amendment would have been accustomed to invocations containing explicitly religious themes of the sort respondents find objectionable.”

History and early rulings recognize the power of the state to regulate religious conduct but not belief

Create an environment of openness to all religions, so that the most compelling may flourish

Discuss what a complete separation of church and state would’ve looked like to founding generation versus current circumstance.

**Precedent**

From Everson v. Board:

* Court rules that government can provide services for the general welfare, and it’s okay for religious organizations to benefit too.
* This seems inline with some of the framers sentiments about creating a space where religion can flourish and providing equally for all regardless of religiosity, but it seems discordant with other beliefs that government should provide no support to religious organizations
* How do we draw the line between providing services to a man or organization that happens to be religious, versus a religious man or organization? GORSUCH concurrence
* Competition between general welfare and establishment clauses. Cannot be easily resolved.

From Zorach v. Clauson:

* The only way to preserve the wall metaphor is in striking down the statute.
* But doing so would promote a notion of strict separation between church and state in which case the most basic services might be denied (not what was envision be the framers).
* So in the spirit of constitutional fidelity, the program must be allowed. This puts governmental actors in the constitutionally murky water of recognizing some duly constituted faiths and legitimate religious activities.
* No great choice, but the constitutional fidelity one is more inline with the constitution’s intent

Lemon v. Kurtzman:

Town of Greece v. Galloway

The Court found the prayers in [*Marsh*](https://web2.westlaw.com/find/default.wl?rs=WLW14.04&pbc=1296C09C&vr=2.0&findtype=Y&rp=%2ffind%2fdefault.wl&sv=Split&fn=_top&tf=-1&ordoc=2033317786&mt=Westlaw&serialnum=1983131402&tc=-1) consistent with the First Amendment not because they espoused only a generic theism but because our history and tradition have shown that prayer in this limited context could “coexis[t] with the principles of disestablishment and religious freedom.”

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“To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.”

* This opinion says, in the same breath, that overtly religious prayer at legislative sessions is constitutionally acceptable, but that governmental limits on that prayer are unacceptable and too heavy an involvement of the state in religious affairs.
* How such competing sentiments can be explained with a “wall of separation” is inconceivable.

“Once it invites prayer into the public sphere, government must permit a prayer giver to address his or her own God or gods as conscience dictates, unfettered by what an administrator or judge considers to be nonsectarian.”

“None of this means that Greece's town hall must be religion- or prayer-free. . . . What the circumstances here demand is the recognition that we are a pluralistic people too.”

* Irreconcilable with the points made in Kennedy’s opinion that government has limited authority to oversee content of prayers, and should have no business in striking a “desirable” balance of faiths.

Essay points:

* History and case law suggest that government-endorsed religious references and sentiments can be acceptable and even desirable, which undermines the wall analogy.
* But prohibitions on the government’s ability to supervise these materials suggests a hard division between church and state.
* These two conflicting sentiments regarding the limits of the relationship between church and state are incompatible with the “wall” metaphor, which suggests a straightforward understanding of each’s role and their relationship.
* Perhaps this is overly critical – indeed, the framers were accustomed to religious invocations seeping into political life.
* Even assuming this presence of prayer fits neatly into the wall metaphor, which feels like a stretch, the government is then confronted with a constitutionally unwinnable choice: supervise the choice of religious speakers and their prayers or threaten citizens’ perception that the government “belongs to one and all, irrespective of belief”

American Legion v. American Humanist:

* If, as the majority opinion suggests, some symbols, monuments, or practices can lose or gain religious purpose or “message” with the passage of time and changing attitudes of the community, then it’s possible for something once on one side of the “wall” to later be on the other.
* This suggests that either there is no wall but rather a porous border, or perhaps there is a wall but it’s intermittently torn down and rebuilt as new generations interpret the constitution’s meaning.
* This case presents another “damned if you do, damned if you don’t” situation for the Government. Tearing down the monument is constitutionally questionable because the cross serves a legitimate secular purpose, so it’s removal would be entirely related to its religious content which some would see as a targeted assault against Catholicism. On the other hand, the cross undoubtedly embodies Catholic ideals, and display of this symbol on government property could easily read as an endorsement of these beliefs.
* All justices in the majority agreed the case hinged on a few piece of historical context, and the addition (or omission) of one or two key facts could’ve turned the result. Such fickle decision making far from suggests the existence of a wall, but rather some loose boundary with well traveled pathways to and from each side.