PRECEDENT EVIDENCE

*Thomas Jefferson’s metaphor of a “wall of separation between church and state” is a constitutionally justified and appropriate guide for interpreting the language and purpose of the First Amendment’s Establishment Clause.*

**Everson v. Board of Education**

**Majority Opinion: Bus funding okay**

“This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute”

“Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.”

“Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another…No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion.”

* But states can provide services for the general welfare.
* Tie in Gorsuch’s questions. Do we provide services for a man who is Christian or a Christian man? To a building where religion happens to be taught or to a religious institution?

Establishment clause and free exercise clause are

“we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.”

“That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.”

SAYS THIS RULING UPHOLDS WALL METAPHOR

**Dissenting Opinion: Bus funding not okay**

“In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.”

* Could argue that this is INEVITABLE with wall metaphor

Legislation only helps parochial schools, not other private schools, religious or entirely secular.

**Zorach v. Clauson**

**Majority Opinion: Release time program okay**

Asking for complete separation between church and state isn’t as straightforward as it seems. In practice, what amount of separation reaches this threshold? Do the same guidelines for independence satisfy in some situations but not others?

“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other hostile, suspicious, and even unfriendly.”

* Not so sure I agree with the second sentence, but I like the first and third.
* Impossible to have a complete separation between church and state in our current time.

“Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."”

* Places where religion seeps into government and has historical grounding.

“We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds.”

* “these extremes” meaning not providing basic public services and wiping all traces of religion from government halls
* This type of intense seclusion of religion to a tiny sphere cut off from broader society can’t be what the framers envisioned.
* But to allow religion a place in civil society, there must be cooperation with governing authorities in cases like Everson. Teachers end up recognizing some faiths as “duly constituted” and some activities as legitimate spiritual instruction. The influence and role of civic institutions like schools may indirectly wind up furthering religious aims.

“When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.”

**Dissenting Opinion: Release time program unconstitutional**

Would be constitutional if schools simply closed and shut their doors to all, but the current system uses schools as a tool to further religion.

Government put in a position to judge faiths and religious practices.

**Lemon v. Kurtzman**

Precedent allows government to cover costs of school materials and supplies used exclusively for secular instruction in religious schools: “Our decisions from Everson to Allen have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials.”

**Majority Opinion: Teacher salary supplements unconstitutional**

“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.”

* GOOD FOR TEXTUAL ANALYSIS

“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."”’

“Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense…Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.”

Secular purpose, or government has a compelling interest

Primary effect can’t be support or hinderance of religion

Can’t produce excessive entanglement

**Town of Greece v. Galloway:**

**Majority Opinion: Allowing town prayer**

“The case [Marsh v. Chambers] teaches instead that the Establishment Clause must be interpreted “by reference to historical practices and understandings.””

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

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.”

“If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.”

* Acceptable limits on prayer

In choosing prayer givers, the town must only employ a policy of nondiscrimination, and nothing in the constitution compels them to formulaically achieve religious balancing. In fact, the founders would more strongly oppose placing the state in this role.

“So month in and month out for over a decade, prayers steeped in only one faith, addressed toward members of the public, commenced meetings to discuss local affairs and distribute government benefits. In my view, that practice does not square with the First Amendment's promise that every citizen, irrespective of her religion, owns an equal share in her government.”

“[O]ur constitutional tradition, from the Declaration of Independence and the first inaugural address of Washington . . . down to the present day, has . . . ruled out of order government-sponsored endorsement of religion . . . where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ (for example, the divinity of Christ). *[Lee v. Weisman](https://web2.westlaw.com/find/default.wl?mt=Westlaw&db=708&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2033317786&serialnum=1992113978&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=1296C09C&rs=WLW14.04" \t "_top)* [(1992)](https://web2.westlaw.com/find/default.wl?mt=Westlaw&db=708&tc=-1&rp=%2ffind%2fdefault.wl&findtype=Y&ordoc=2033317786&serialnum=1992113978&vr=2.0&fn=_top&sv=Split&tf=-1&pbc=1296C09C&rs=WLW14.04" \t "_top)(SCALIA, J., dissenting).”

“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:**

**Majority Opinion: Bladensburg Cross is Constitutional**

“Although the cross has long been a preeminent Christian symbol, its use in the Bladensburg memorial has a special significance.”

It has become a prominent community landmark, and its removal or radical alteration at this date would be seen by many not as a neutral act but as the manifestation of “a hostility toward religion that has no place in our Establishment Clause traditions.”

“presumption of constitutionality for longstanding monuments, symbols, and practices.”

“First, these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult. . . . Second, as time goes by, the purposes associated with an established monument, symbol, or practice often multiply. . . . Even if the original purpose of a monument was infused with religion, the passage of time may obscure that sentiment. As our society becomes more and more religiously diverse, a community may preserve such monuments, symbols, and practices for the sake of their historical significance or their place in a common cultural heritage. . . . Third, just as the purpose for maintaining a monument, symbol, or practice may evolve, “[t]he ‘message’ conveyed ... may change over time.” . . . [C]onsider the many cities and towns across the United States that bear religious names. . . . [F]ew would argue that this history requires that these names be erased from the map. Fourth, when time’s passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning. A government that roams the land, tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion. . . .”

Cross must be understood in light of that background. That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.

The Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its “separate spher[e].”

**Minority Opinion: Bladensburg Cross violates Establishment Clause**

As I see it, when a cross is displayed on public property, the government may be presumed to endorse its religious content

The Commission’s “[a]ttempts to secularize what is unquestionably a sacred [symbol] defy credibility and disserve people of faith.”

Essay Points:

* 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.

THIS IS A TEST