TEXT, STRUCTURE, HISTORY

**Text and Structure:**

**\*\* REMEMBER to tie everything back to the Wall Metaphor\*\***

Vagueness of the phrase “Congress shall make no law respecting an establishment of religion”

* “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.” Burger in Lemon v. Kurtzman
* Say that historical context can partially elucidate its meaning but doesn’t provide perfect clarity and often introduces new questions to consider.

There are other examples in the constitution where limits on Congressional power are detailed very explicitly, why not here?

* Could be that framers couldn’t agree on more specific wording. Federalists and Republicans dueled over this issue of how to mix or separate the spheres of religious and political life. In leaving out specific details, the framers propound a central governing ideal – the independence of church and state – but leave successive generations to uphold it with their own express limitations.

We see governmental authority construed broadly in other parts of the Constitution, like the General Welfare and Necessary and Proper clauses.

* One could easily foresee a situation in which government, thinking it’s acting within its Constitutional mandate, enacts a policy that another entity perceives as violating the Establishment Clause.
* Unspecific language granting wide governing authority to fulfill its Constitutional duties, coupled with opaque language regarding the limits with regard to religion, doesn’t square with the “wall of separation” metaphor and points towards a more murky boundary.

Necessary and proper: Article 1, Section 8. P. 23 para. 42

General welfare: Article 1. Section 8. P. 22 para. 25

**History:**

The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy. With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed. Among the offenses for which these punishments had been inflicted were such things as speaking disrespectfully of the views of ministers of government-established churches, nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them.

Bill for Establishing Religious Freedom:

“Be it therefore enacted by the General Assembly, That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, add by argument to maintain, their opinions in matters of religion, and that the same shall in nowise diminish, enlarge, or affect their civil capacities.”

“That it is time enough for the rightful purposes of civil government, for its offices to interfere when principles break out into overt acts against peace and good order”

Notes on the State of Virginia:

“Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only.”

“On the contrary, their harmony is unparalleled, and can be ascribed to nothing but their unbounded tolerance, because there is no other circumstance in which they differ from every nation on earth. They have made the happy discovery, that the way to silence religious disputes, is to take no notice of them.”

“Difference of opinion is advantageous in religion. The several sects perform the office of a censor morum over such other…if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the State to be troubled with it.”

A Memorial and Remonstrance on Freedom and Conscience:

“Such a Government will be best supported by protecting every citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any sect to invade those of another.”

Evils that the 1st Amendment aimed to guard against (may point towards wall of separation)

* Refer to supplemental readings from 2/17

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

* Wanted to ensure that government wouldn’t push people towards or away from particular religions.
* But also wanted to create a society tolerant towards religion, where each sect could provide spiritual fulfillment to followers and welcome new members who shared their beliefs.
* Founders wanted each person to find their source of spiritual fulfillment, and the best way to achieve this goal was to create a tolerant society friendly towards religion where “reason and free inquiry” would allow religions to flourish.

\*\* Caveat that some regulation was allowed \*\*

Founding generation was familiar and comfortable with some limited mixing between religious and political life.

* Government recognizing religious holidays (Danbury Baptist letter)
* Religious symbols and references present in government halls and practices thought to be innocuous
* Chaplain and legislative prayer

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