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Symposium:

Foreword

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The *Ohio State Law Journal* has chosen an important and timely topic for this special issue. The relationship between government and religion is the subject of a vigorous debate in our country. Some, including the President of the United States and many in Congress, feel strongly that the traditional wall between church and state should be broken down. The President has advocated a constitutional amendment returning organized prayer to the public schools. The Attorney General has even suggested that we reconsider whether the Bill of Rights, including the first amendment, should limit the actions of the states at all.

At various times in our history, certain groups in our society have mounted an attack on basic constitutional values. To our great credit as a nation founded on the principle of individual liberty, the Bill of Rights remains intact despite two hundred years of sometimes bitter domestic political struggles and periodic national crises. It is true that the country has sometimes failed to respect individual rights. The internment of Japanese-Americans during World War II stands as a black mark in our constitutional history. Nevertheless, it is striking that no fundamental constitutional guarantee has ever been repealed through the amendment process in our history. I believe the public will again reject attempts to change radically our constitutional principles.

The current efforts to break down the wall between church and state have largely focused on the controversial issue of prayer in public schools. In *Wallace v. Jaffree*[1] the Supreme Court struck down an Alabama statute providing for a moment of "meditation or voluntary prayer." Proponents of restoring prayer in public schools have cited this decision as evidence that a constitutional change is warranted. However, the Court found that the state statute was unconstitutional, not because voluntary prayer or a moment of silence conflicts with the first amendment, but because the express purpose of the statute was to promote religious prayer in schools. The Court expressly reaffirmed the right of a young person to pray silently during a moment of silence.

Despite the Court's decision, the Senate Judiciary Committee recently reported favorably a proposed constitutional amendment which provides:

> Nothing in this Constitution shall be construed to prohibit individual or group silent prayer or reflection in public schools. Neither the United States nor any State shall require any person to participate in such prayer or reflection, nor shall they encourage any particular form of silent prayer or reflection.[2]

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1. 105 S. Ct. 2479 (1985).
2. S.J. Res. 2, 99th Cong. (Oct. 5, 1985).

The problem with this amendment is that it goes much further than simply allowing silent prayer in schools, conduct already permitted under the Constitution. This amendment would have the effect of promoting organized prayer and related religious exercises in the public schools as well as allowing teachers and other school officials to conduct them. The Committee report accompanying the bill makes it quite clear that public school officials would be expected to become involved in establishing rules for how the prayer exercise is to be conducted and that such outward manifestations of religious faith such as rosary beads, skullcaps, and written prayer cards could be used. Moreover, the school officials are expected to establish rules allowing students to leave the room during the prayer exercise.

By introducing organized prayer into the public schools, the government would inevitably create a difficult conflict for very young children who may be in a religious minority. Forcing an eight-year-old child to remain silent or to leave the room while the other children engage in silent prayer is invariably embarrassing and coercive, no matter how sensitive the teacher or how careful the law is to prohibit coercive conduct. The result would be to involve government too deeply in encouraging religion at the expense of individual freedom.

An even more radical idea is one suggested by the Attorney General and advocated by some conservative groups: abandoning the "incorporation doctrine," which holds that the key guarantees of the Bill of Rights apply to the states as well as the federal government. In *Gitlow v. New York*[3] the Supreme Court first stated that the first amendment applies to the states as a fundamental liberty protected by the fourteenth amendment. Without this bedrock constitutional principle, state legislatures would be free to enact laws supporting and even requiring religious activity, such as religious tests for public office and organized religious services in public schools.

Two hundred years ago, Thomas Jefferson wrote to the Danbury Baptist Association:

> I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.

The complexity and pluralistic nature of American society make it inevitable that the courts will continue to struggle with defining the appropriate line between the actions of the state and the practice of religious beliefs. But it is essential for a country, whose touchstone has been the freedom of the individual, that we not stray from Jefferson's basic point: religion in our country is a private rather than a governmental activity. The Constitution guards against government involvement in religion. At the same time, it guarantees to the individual the maximum freedom possible to practice his or her religious beliefs. I believe that the great majority of the American public continues to cherish the first amendment and that we will not set a fundamentally different course two hundred years after the ratification of the Bill of Rights.

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3. 268 U.S. 652 (1925).