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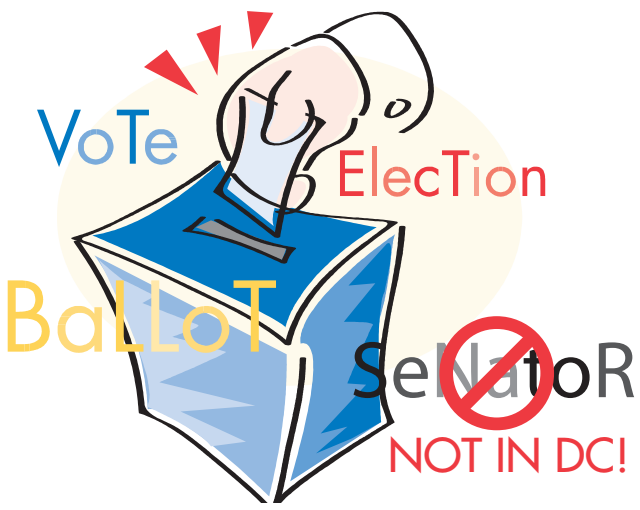
Everyone's Voice is Heard— Not So Much in Washington, DC

by Phyllis Raybin Emert

The philosophy of a democracy is that every citizen's vote counts, right? Tell that to the residents of our nation's capital.

For more than two hundred years, the federal income tax-paying residents of Washington DC have not been allowed to vote for representatives or senators in the U.S. Congress. In fact, district citizens only began voting in presidential elections in 1964 after the 23rd amendment to the U.S. Constitution was ratified, and it wasn't until 1971 that they elected a non-voting representative to the U.S. House of Representatives. In addition, Washington, DC residents were able to vote for their own mayor and city council in 1973, a right they had not had since the 19th century.

The voting status of district residents raises many questions. Did the Founding Fathers intend to **disenfranchise** these people or was it an oversight? Is it a constitutional or political issue, and what part, if any, does Congress play in remedying the situation? This issue is currently being hotly debated in our nation's capital.



Why a separate capital?

The writings of James Madison, one of the original Founding Fathers and considered the Father of the Constitution, may offer a clue as to why the District of Columbia exists at all. The story goes that in 1783 when the Continental Congress was meeting in Philadelphia, a few hundred angry soldiers, who had not been paid for their service in the Revolutionary War, protested outside Independence Hall. James Madison noted that the unpaid veterans were "wantonly pointing their muskets to the windows of the halls of Congress." Frightened members requested protection from the militia of the state of Pennsylvania, but the state refused. Congress suspended activities and reassembled in New Jersey. According to numerous historians, this incident convinced the Founding Fathers that the seat

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Protecting the Rights of Dead Celebrities

by Barbara Sheehan

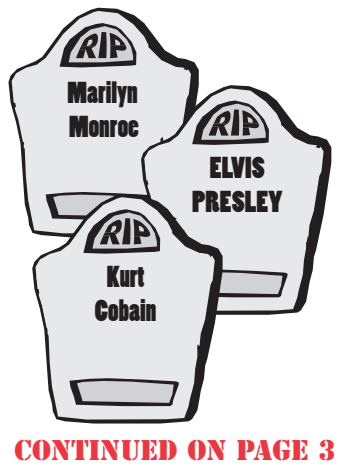
Usually when someone dies, his or her will is read and unless the will is contested that is pretty much the end of it. When a celebrity dies, it can sometimes be a little more complicated depending on how famous the person was and the potential to continue making money after his or her death.

Licensing a celebrity's image after his or her death can be big business. *Forbes Magazine* reported that the members of its 2008 list of the 13 top-earning dead celebrities brought in a whopping $194 million. Elvis Presley topped the list, earning $52 million last year.

Who has the right to cash in on a dead celebrity's "rights of publicity?" Currently, there are no federal laws governing this area of the law, so the matter lies in the hands of the states. While some states, like New Jersey, have no particular statutes in place to address the rights of dead celebrities, others, like California, impose strict protections for fallen stars.

Battling for Marilyn

The issue of publicity rights came to light in 2007 with two lawsuits—one in New York and one in California—brought against the estate of Marilyn Monroe and CMG Worldwide, Inc. The blonde bombshell comes in at number nine on the Forbes list, earning $6.5 million in 2008 and according to *The Wall Street Journal* has earned her estate an estimated $30 million since her death in 1962. Monroe left her estate to her acting coach, Lee Strasberg. After his death, the estate fell to his widow, Anna, who enlisted CMG to oversee the licensing of Monroe's image.



The heirs of two photographers, Milton Greene and Sam Shaw, both of whom photographed Monroe over her lifetime,

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Do Moments of Silence Equal Prayer?

by Barbara Sheehan

Does requiring that students observe a moment of silence inject religion into schools and cross the boundaries that separate church and state? According to recent news reports, some in Illinois believe it does.

In October 2007, the Illinois Legislature passed a law requiring schools to observe a daily moment of silence. Specifically, the Silent Reflection and Student Prayer Act requires each teacher to "observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day," as an "opportunity for silent prayer or for silent reflection

on the anticipated activities of the day." That law replaced earlier legislation that made the moment of silence optional but not mandatory. The law sparked a lawsuit and a heated debate on how far the state legislature can push school policies that may be perceived as suggesting religion.

The lawsuit

In the same month that the law was passed, an outspoken radio host named Robert Sherman filed a lawsuit in federal court on behalf of his daughter, a high school freshman at Illinois' Buffalo Grove High School. In the suit, Sherman claimed that the law violated the First Amendment by imposing religion in public schools.

"What we object to is Christians passing a law that requires the public school teacher to stop teaching during instructional time, paid for by the taxpayers, so that Christians can pray," Sherman told *USA Today*.

In addition to questions raised by Sherman, others have expressed concern that the Illinois law is unconstitutionally vague. There was a lot of confusion as to how schools would implement the law, said Kimberly Small, assistant general counsel for the Illinois Association of School Boards. The law, she said, did not give any guidance or direction and also gave "lots of latitude," perhaps even opening the door for teachers to use that time to engage in their own personal platforms, Small noted.

Since Sherman filed his suit, a federal judge in Illinois has applied the lawsuit to all Illinois schools, making the case a class action lawsuit. The court imposed a ban preventing all schools in the state from enforcing the moment of silence mandate.

This ban followed a waiting period, in which the judge in the case gave Illinois schools several weeks to voice their opinions on the

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Washington, DC

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of the federal government should be under federal control and not dependent upon any individual state for protection.

Professor Mark S. Weiner of Rutgers Law School—Newark stated, "There are excellent arguments for why placing the seat of the new federal government within an exclusively federal district was incredibly wise. It's very important that the land in which the national government is located not be under the control of any state. If it were," said Professor Weiner, "the state could exercise undue influence on the national government and could undermine its ability to function."

Article I, Section 8, Clause 17 of the U.S. Constitution, referred to as the "District Clause," reads: "The Congress shall have Power…To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States…"

Several states in the north and the south offered land for the location of the federal government and all guaranteed an independent jurisdiction free from the interference of any state. In 1790, Alexander Hamilton and Thomas Jefferson agreed to a southern site for the capital along the Potomac River and in return, the "new federal government would assume the states' Revolutionary War debt…" Maryland and Virginia gave 10 square miles to establish the capital and federal district between Alexandria and Georgetown. Residents of the district, no longer citizens of any state, were still able to vote in their previous state's elections until December 1800, when the national government moved to its permanent site. It was at this time that district voters became disenfranchised, because Congress made no provision for them to vote.

Maryland and Virginia gave 10 square miles to establish the capital and federal district between Alexandria and Georgetown

What were the founders thinking?

When Alexander Hamilton realized that the residents of the new seat of government did not have representation in Congress, he proposed an amendment that would grant them voting rights when the district achieved a certain size. This amendment did not pass and the extent of opposition by members of Congress is not known.

Kenneth Bowling, a historian at George Washington University and author of *The Creation of Washington, DC,* told *The Washington Post,* "The Constitutional Convention overlooked it [DC voting rights]. They had to organize the entire government! They certainly weren't going to pay a lot of attention to the federal district when it didn't even exist yet."

John P. Elwood, an official at the Justice Department, disagrees with Bowling and testified before a Senate Judiciary Committee in May 2007 on the subject. "Framers and their contemporaries clearly understood that the Constitution barred congressional representation for district residents," Elwood testified. He stated that the U.S. Constitution notes that only residents of states can have representation in Congress and the district is not a state.

In an article for the American Constitution Society for Law and Policy, attorneys Richard P. Bress and Lori Alvino McGill wrote, "Based on everything we know about the Framers, it seems quite implausible that they would have purposefully deprived the residents of their capital city of this most basic right," and "the result of an inadvertent omission…can be remedied by congressional action."

Professor Weiner has a different view. "The Founding Fathers absolutely intended that district residents would not be represented in Congress," he declared. "The Founders believed that the permanent population of the district would be quite small, and that as a practical matter those few permanent residents would have their interests protected by their physical proximity to the national government itself."

The district is not a state

Much of the opposition's argument to giving residents of DC a representative in government is that it is not a state. In 1800, Washington, DC's population was about 14,000, comprised of more than 10,000 whites, about 800 free blacks and more than 3,200 slaves. By 1870, after the Civil War and the **abolition** of slavery, the black population of the district had increased to more than 40,000, about one-third of the total population. Today, there are nearly 600,000 people living in Washington DC According to a July 2008 U.S. Census Bureau report, Washington, DC has almost as many residents as Vermont (621,270) and more than Wyoming (532,668).

When the Constitution was ratified in 1789, it stated that "the people of the several states" were entitled to vote. In an editorial for *The Washington Post*, Kenneth Starr, dean of Pepperdine Law School, and Patricia M. Wald, retired chief judge of the U.S. Court of Appeals for the District of Columbia, wrote, "In 1789, all U.S. citizens lived in a state. It was not until 1801…that district residents lost their federal voting rights. There is no reason to believe the framers intended for this to happen. And in any case they gave Congress power to address the problem."

In a policy essay titled, "No Right is More Precious in a Free Country: Allowing Americans in the District of Columbia to Participate in National Self-Government," which was published in the Harvard Journal on Legislation, Senator Orrin Hatch, of Utah, wrote, "I believe that this principle of popular sovereignty is so fundamental to our Constitution, the existence of the franchise (the right to vote) so central, that it ought to govern absent actual evidence that America's founders intended that it be withheld from one group of citizens…America's founders intended that district residents retain the franchise and be represented in Congress. They demonstrated that intention, as well as their acceptance of legislation as an appropriate means to that end, by providing for congressional representation of district residents between 1790 and 1800 even though they no longer resided in a state…what was done by statute in 1790, and then undone by statute in 1800, can be redone by statute today."

Professor Weiner disagrees and noted, "the Founders expected the district to remain an exclusively federal enclave and for Congressional representation to take place exclusively through the states…The framers definitely did not believe that Congress could grant the district the same status as a state…that change could only be made by changing the Constitution itself…I believe it would be illegitimate for Congress to attempt to remedy the situation through legislation. It's very important to be faithful to the Constitution, even though doing so may lead to outcomes with which we might personally disagree."

Efforts to give representation to district residents

According to a 2007 Congressional Research Service report, which Senator Hatch cites in his essay, "as early as 1801 (one year after the federal capital was established) citizens of what was then called the Territory of Columbia voiced concern about their political disenfranchisement." More than 150 constitutional amendments addressing the disenfranchisement of DC voters have been introduced in Congress since the late 19th century. Only one, in 1978, the DC Voting Rights Amendment, received the two-thirds vote necessary in the House and the Senate to pass it on to the states for consideration. The Amendment would have granted representation to the district in both houses of Congress, treating it as a state. Three-quarters of the state legislatures (38) would have needed to ratify the Amendment within seven years. When time expired in 1985, only 16 states had ratified the proposed amendment.

In April 2007, a bill that would have granted DC one representative in the House of Representatives, but none in the Senate, and treated the district as a congressional district, not as a state, was passed in the House. The bill also provided for an additional representative from the state of Utah, for which it was entitled according to the 2000 Census.

The bill passed the Senate Committee on Homeland Security and Government Affairs by a vote of nine to one, however, on September 18, 2007 a small group of senators blocked the bill from being debated on the Senate floor by **filibustering** (delaying legislative action with continued speechmaking). The vote for the bill was 57-42, three votes shy of the 60

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Protecting the Rights

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brought the lawsuits. The heirs wanted to license the Monroe photographs, some of which are the most famous shots of her. CMG maintained that it and the Monroe estate own her rights of publicity, including any photographs of her.

The New York and California courts both ruled in favor of the heirs, stating that Monroe's rights of publicity "died when she did and, therefore, her estate did not own Monroe's name, voice, image and/or likeness."

"If the right didn't exist in 1962, she couldn't have owned it, and therefore, she couldn't have passed it on," Jane Ginsburg, a professor of trademark law at Columbia Law School told National Public Radio (NPR).

David Strasberg, Lee and Anna's son, said on NPR, "How can a celebrity's legacy be protected, and who can do that? Our contention has been that the person that they entrust their estate to is the person who should be able to protect them."

California Dead Celebrities Bill

In response to the lawsuits, California state Senator Sheila Kuehl, a former child star, proposed a bill that would retroactively grant publicity rights to individuals specified in a celebrity's will. In October 2007, California Governor Arnold Schwarzenegger, a celebrity in his own right, signed the "Dead Celebrities Bill" into law and it went into effect in January 2008. At the time of the bill's signing, California already had a law protecting deceased celebrities.

Under the previous law, celebrities who died after December 31, 1984, could pass on their publicity rights—or in essence the right to charge a fee for the commercial use of their image—to their heirs. The new law goes even further. It extends protection to stars that passed away within the last 70 years and gives the beneficiaries of these dead celebrities the right to retroactively demand payment for the commercial use of their images.

In other words, heirs to these estates can now demand payment for the commercial use of their celebrities' likeness even before the law took effect. Where publicity rights are concerned, "likeness" could include anything from a photograph of the celebrity to "pretty much anything that conjures up the image of the personality," according to an article in *Art Business News*.

What does California's law mean?

What does this all really mean, and what impact does it have for people who are alive today? The answer is twofold. First, there are the monetary considerations and then there are the more personal aspects.

Family members of famous individuals may not want to see their relatives' names or likeness associated with certain things, noted Ronald Bienstock, who practices entertainment and intellectual property law in Hackensack. For example, say you are a relative of the late Elvis Presley. How would you feel if you saw his image or likeness portrayed in a way that you found unsavory or even offensive, or used for a product that you know Elvis would have rejected if he were alive? Wouldn't you want a say in how his name is represented?

Which laws govern?

Because there are no federal laws on this issue and state laws differ about how the publicity rights of late celebrities are treated, which laws govern?

Generally, the courts look to the state where the celebrity died, or lived most of his or her life as a famous person, and the laws of that state apply, said Marc Friedman, an attorney who practices intellectual property and technology law in New York.

Deceased celebrities who considered "home" Washington, Indiana or California are protected well when it comes to publicity rights. In fact, Indiana has the most comprehensive law, which provides that a celebrity's right of publicity survives 100 years after his or her death. Other states, including New Jersey and New York, have no laws governing a celebrity's right of publicity after death. New Jersey lawmakers had proposed the Celebrity Image Protection Act, which dealt with the images of dead celebrities, however, the bill was withdrawn from consideration in 2008.

So why is it that some states protect the rights of dead celebrities and others do not? In deciding how to deal with this matter, there are two basic philosophies that states may apply, according to an *Entertainment Law Digest* article, written by John Branch and Dave Green, both intellectual property attorneys in Seattle.

The first philosophy lumps publicity rights with privacy rights. In this case, a celebrity's right to publicity is tied to the person's life and essentially dies along with the celebrity. The other theory, the *Entertainment Law Digest* article noted, classifies publicity rights with property rights. In this instance—as is the case in California—"states are more likely to find that this 'property' continues to exist after a celebrity's death and descends to his or her heirs or beneficiaries of a will or trust, in a manner similar to a copyright."

Which state laws prevail?

One only need pick up a copy of *People* magazine to recognize that many celebrities own multiple houses and move multiple times throughout their lives. In these instances, which state's laws apply?

When there is a question or conflict, the state with the "paramount interest" typically prevails, says Friedman. For the Monroe estate, the star's primary residence became of critical importance with the passage of California's "Dead Celebrities Bill." If Monroe were deemed a California resident, her estate stood to cash in considerably by charging licensing fees to photographers and archives that own images of Monroe and license them for commercial use. For years, Monroe's estate had collected these fees.

The reason the courts sided with the heirs of Greene and Shaw was that Monroe died in 1962, more than 20 years before California's first dead celebrity law took effect. Therefore, the original California law did not apply to Monroe, and the heirs were not obligated to pay her estate.

When Governor Schwarzenegger signed the latest dead celebrities bill granting protection to celebrities who had died as far back as 70 years ago, Monroe was now potentially covered by its protections; and her estate sought to recover the monetary benefits. This raised a new question.

Was Monroe a resident of California, where the protections applied, or New York, where they didn't? In a widely reported ruling, a federal court decided last spring that Monroe was a resident of New York and was therefore not entitled to the protections afforded by the California law.

2008 Top-Earning Dead Celebrities

1. Elvis Presley
2. Charles M. Schultz
3. Heath Ledger
4. Albert Einstein
5. Aaron Spelling
6. Dr. Seuss
7. John Lennon
8. Andy Warhol
9. Marilyn Monroe
10. Steve McQueen
11. Paul Newman
12. James Dean
13. Marvin Gaye

Source: *Forbes Magazine*

Even though Monroe owned a home in California, which was the site of her death, Monroe's estate itself had previously declared New York as her primary residence reportedly to avoid California inheritance taxes. The court essentially ruled that Monroe's estate could not change her state of residence to suit its financial best interests. Monroe's estate has challenged that decision but to date has been unsuccessful.

What's next?

The Monroe estate's next best hope, perhaps, is that the Empire State will adopt legislation similar to California's. A measure has been considered in the New York Legislature but no vote has been taken on it and there has been strong opposition to the legislation by the publishing industry.

The Association of American Publishers, the Author's Guild and Magazine Publishers of America claim the legislation would be a violation of First Amendment rights. In a statement, Magazine Publishers of America stated the legislation "would cause grave harm to the magazine industry by potentially preventing publishers from using images of deceased celebrities in their publications, including photographs from their own archives."

For now, there remains what Friedman calls a "quilt of state legislation" governing the area of publicity rights for dead celebrities. It is an area Friedman says will likely remain in the realm of state law, as it falls outside of copyright law, which is under federal domain. To the extent that in certain circumstances the issue of publicity rights implicates a brand, federal or state trademark laws could apply. Generally, however, privacy issues are governed by state law.

Silence CONTINUED FROM PAGE 1

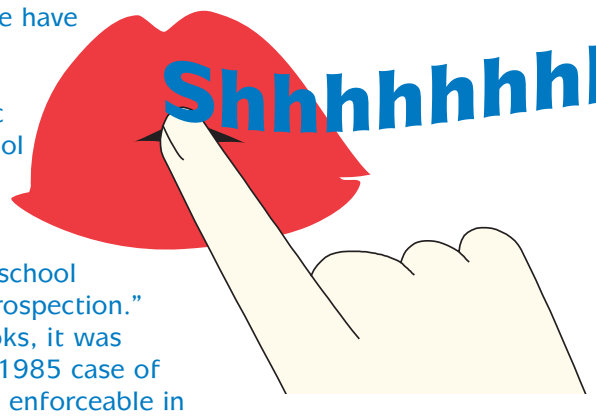
matter. According to a July 2008 Illinois School Board news bulletin, only one district responded. That district's superintendent stated, "We oppose the Silent Reflection and Student Prayer Act because it imposes an unnecessary and unworkable state mandate which serves no educational purpose."

What does the law say?

So, when it comes to religion in schools, what does the law say? And, how have other schools handled the moment of silence issue?

Specifically, the U.S. Constitution's establishment clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof…"

Just how moments of silence fit into this issue leaves room for interpretation. Therefore, different states and school boards have set their own policies. According to the National Conference of State Legislatures, many states have some kind of legislation on the books allowing for a moment of silence in some form or another. Some of these have been challenged.



Take New Jersey, for example. According to the law, "Principals and teachers in each public elementary and secondary school of each school district in this state shall permit students to observe a one-minute period of silence to be used solely at the discretion of the individual student, before the opening exercises of each school day for quiet and private contemplation or introspection."

While this law can still be found on the books, it was declared unconstitutional by the courts in the 1985 case of *May vs. Cooperman* and is therefore no longer enforceable in New Jersey. In the view of the courts, the New Jersey law "lacked a secular purpose and was deemed a backdoor attempt to mandate a moment for prayer," noted Mike Yaple, a spokesman for the New Jersey School Boards Association.

Similarly, in West Virginia, the state's policy providing for a period of silence at the start of each school day for personal and private contemplation, meditation or prayer was deemed unconstitutional in 1985. Still, in other states like Texas, the courts have upheld the schools' observance of a moment of silence.

After a 2003 Texas law allowing children to "reflect, pray, meditate or engage in any other silent activities" for one minute at the start of each school day was challenged in 2006, the Texas court ruled that the law was constitutional and concluded that the "primary effect of the statute is to institute a moment of silence, not to advance or inhibit religion."

Likewise, in Virginia, a law passed in 2000 that required public schools to reserve 60 seconds each morning for students to "meditate, pray or engage in silent activity." A federal appeals court upheld the law. In 2001, the U.S. Supreme Court declined to hear a case challenging that court's ruling.

Can students pray on their own?

Clearly, some states have set aside designated moments of silence. But what about those states and schools that have rejected this practice? Can students still take a moment to meditate or pray?

The U.S. Supreme Court ruled in the 1962 landmark case known as *Engel v. Vitale* that they can—as long as the school does not sanction the prayer. In *Engel*, the parents of several public school students in New Hyde Park challenged a recommended New York Board of Regents prayer that stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country. Amen."

While students were not required to recite the prayer, the school day began with the recitation of the prayer every morning. The parents were supported in their cause by several organizations, including the American Ethical Union, the American Jewish Committee and the Synagogue Council of America.

After being upheld by lower courts, the U.S. Supreme Court concluded that the prayer violated the First Amendment of the U.S. Constitution. In *Engel*, the Court essentially held that students can pray on their own in school, but the school itself cannot promote or lead this prayer.

Coaching prayer

The idea of school-led prayer became the subject of a case that arose a couple of years ago in New Jersey concerning a high school football coach in East Brunswick who conducted locker-room prayers with his players before games. After some students reportedly complained that they were uncomfortable with this practice, the school told the coach, Marcus Borden, that he had to stop. Borden sued the school.

In April 2008, the Third Circuit Court of Appeals upheld the school's prohibition of the coach's practice, finding that "a reasonable observer would conclude that Borden was endorsing religion when he engaged in these acts."

Again, this ruling should not be interpreted to mean that no prayer is allowed in school; only that it cannot be sanctioned by a coach, teacher or administrator. In fact, it is not uncommon for students to gather around the flagpole and say a prayer together, for example before or after school, noted Yaple.

Yaple said schools can set reasonable time, place and manner restrictions on when students pray or engage in religious activities. He also noted that schools cannot discriminate against religious clubs that may wish to use school facilities for meetings or gatherings. In other words, if a school opens its doors for business groups or the Boy Scouts, it must also open them for religious clubs as well.

Back to Illinois

Given all the controversy, is it really worth establishing a moment of silence if students can pray on their own? Some people believe it is.

Andy Norman, a Chicago attorney and a member of the Christian Legal Society, commented on Illinois' Student Reflection and Student Prayer Act to the Christian NewsWire, "There is a valid secular purpose underlying the law, which is to provide each student with a moment of calm, private reflection at the start of the day," Norman said. "The Supreme Court has held that students do not shed their constitutional rights at the schoolhouse door. The law enacted in Illinois comports with the Constitution, allowing for a daily routine of silent prayer or reflection in the classroom that does not endorse religion, yet accommodates free expression."

Others, like Sherman and his supporters, adamantly disagree with this assessment. Among them is the American Civil Liberties Union (ACLU) of Illinois, which is supporting Sherman in his quest to defeat the moment of silence law. Colleen Connell, executive director of the ACLU of Illinois, told *The Los Angeles Times* that her office heard a "steady stream of complaints, from teachers to parents to students" after the Illinois law mandating a moment of silence took effect.

"We've heard about a principal telling students to remember veterans in their prayers or private reflections," Connell said. "We've heard that teachers fold their hands and bow their heads, perhaps inadvertently, but sending a message to the kids that they should be praying."

With the law now silenced by the court, Illinois legislators are reportedly revisiting the legislation and considering revisions that might make it more acceptable, including reverting back to an optional moment of silence and removing the word "prayer" from the law's wording.

Washington, DC CONTINUED FROM PAGE 2

votes or three-fifths needed for **cloture**, which would have ended the filibustering and moved the Senate to a vote.

In a press statement, Ilir Zherka, executive director of DC Vote, an advocacy organization dedicated to securing full voting representation in Congress for DC residents, stated, "We are outraged that a minority of senators…prevented the majority from voting on our bill. [They] chose to filibuster a bill extending democracy at home at a time when they are pushing for democracy in Iraq…This is the first filibuster of a voting rights bill since the era of segregation."

Latest hurdle

In March 2009, Congress was poised to pass a DC voting rights bill similar to the 2007 version, however, an amendment to the legislation that would have **repealed** Washington, DC's ban on handguns and semiautomatic weapons stalled its progress. The Senate passed the bill, with the gun amendment, by a 62-36 vote. A vote on the bill in the House, however, has been postponed so that the gun issue may be debated.

DC Council members were angered by the last minute addition to the legislation. One council member told *The Washington Post*, "I refuse to accept any link between guns and the vote. We were elected by the people to represent their views. That's the decision we made and it should stand." Another council member contended that the district should "just keep fighting until we are a state."

According to its website, DC Vote is working with members of Congress to bring a "clean DC Voting Rights Act, free of harmful amendments, to a swift vote in the House and on to President Obama's desk."

The gun issue aside, Professor Weiner believes that a constitutional amendment is the way to change the voting situation, and that "the most obvious solution would be to make the district the 51st state of the union."

abolition — putting an end to something.

cloture — a procedure to stop debate in a legislative body so that a vote can be taken.

disenfranchise — to deprive of a privilege or right.

filibuster — an attempt to block legislation or a judicial appointment by prolonged speaking.

repealed — revoked. A law that is repealed has been withdrawn or cancelled and is no longer a law.

sovereignty — supremacy of authority over a defined area or population.