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*FEATURE ARTICLE*

**BACK ON THE BOOKS:  
THE ILLINOIS SILENT  
REFLECTION AND STUDENT  
PRAYER ACT**

*by* **BRENDAN BRASSIL**

**T**he people of the United States have long struggled with the words enshrined in the First Amendment: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .”<sup>1</sup> The debate over the meaning of this clause has taken many forms throughout our nation’s history, yet much of the discussion in recent years has centered on the

role of religion in public schools. In Illinois, the Silent Reflection and Student Prayer Act is currently fueling this debate.

In 1969, the Illinois legislature passed a law allowing a “brief period of silence” in public schools.<sup>2</sup> The statute stated, “In each public school classroom the teacher in charge *may* [italics added] observe a brief period of silence.”<sup>3</sup> Originally, the statute was optional, with the decision whether or not to observe a moment of silence placed entirely within the teacher’s discretion. As a result, it was largely ignored.<sup>4</sup>

The law remained untouched and mostly forgotten until 1990, when the state legislature renamed it “The Silent Reflection Act.”<sup>5</sup> The legislature again re-titled the act “The Silent Reflection and Student Prayer Act” in 2002.<sup>6</sup> It also added language defining “student prayer” within the meaning of the statute, taking care to point out that the prayer would be voluntary and “not sponsored, promoted or endorsed in any manner by the school.”<sup>7</sup>

Despite these changes, the law still remained relatively inconspicuous, as observing the period of silence was still optional. Then, in 2007, the Illinois legislature overrode a veto by Governor Rod Blagojevich to pass an amendment that would immediately precipitate controversy.<sup>8</sup> The amendment removed the word “may” and replaced it with “shall”, thereby making mandatory what was once optional:

In each public school classroom the teacher in charge *shall* observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.<sup>9</sup>

#### THE HISTORY OF SCHOOL PRAYER AND MOMENT OF SILENCE LAWS

The topic of school prayer has been a source of acrimonious constitutional debate for many years. Yet, for a long period of our country’s history, government sponsored prayer in public school was widely accepted and practiced.<sup>10</sup> When a challenge to that tradition was finally brought before the U.S. Supreme Court, the debate that had been simmering for some time finally boiled over.

The Supreme Court has taken on the issue of school prayer multiple times throughout the twentieth century.<sup>11</sup> Many of the Court's landmark cases came during the Civil Rights era of the 1960s, such as *Engel v. Vitale* and *Abington School District v. Schempp*.<sup>12</sup> *Engel* declared unconstitutional New York schools' practice of reciting a prayer at the beginning of each school day, even though it was voluntary and non-denominational.<sup>13</sup> The Court cemented its ruling the following year in *Abington*, where it declared school-sponsored Bible readings to be unconstitutional.<sup>14</sup>

The ruling in *Abington* was extremely controversial at the time. For example, in 1962, a Gallup poll had shown 79 percent of the public favoring religious observances in public schools.<sup>15</sup> Shortly after, "34 states, including Illinois, enacted moment of silence laws."<sup>16</sup> However, despite the perceived public fervor swirling around the issue at the time, the Illinois law eventually faded from the public consciousness.<sup>17</sup>

The last of the landmark Supreme Court cases that decided this issue came in 1971 with *Lemon v. Kurtzman*.<sup>18</sup> The decision produced a three-pronged *Lemon* test.<sup>19</sup> First, the statute must have a secular purpose: the stated purpose must be sincere and not a "sham."<sup>20</sup> Second, it must not principally inhibit or advance religion.<sup>21</sup> Third, it must not cause "an excessive government entanglement with religion."<sup>22</sup> The test has been used ever since to evaluate laws under the Establishment Clause.<sup>23</sup> The Supreme Court has made its message explicit on school-sponsored prayer: it is unconstitutional.<sup>24</sup>

In 1985, the Supreme Court decided its only true moment of silence case, *Wallace v. Jaffree*. The Court applied the *Lemon* test and overturned an Alabama law similar to the one challenged in Illinois because the legislative history revealed it "was not motivated by any clearly secular purpose - indeed, the statute had *no* secular purpose."<sup>25</sup> Since *Jaffree*, the *Lemon* test has been applied to moment of silence laws in lower courts with varying results.<sup>26</sup>

Despite what many still see as a circuit split and general confusion, in 2002 the Supreme Court denied certiorari to a Virginia moment of silence law, possibly to allow the lower courts to hash the issue out amongst themselves.<sup>27</sup>

THE *SHERMAN* DECISION

Robert Sherman, the father of a student in Buffalo Grove, Ill., felt that the law was an affront to the separation of church and state protected by the U.S. Constitution.<sup>28</sup> Sherman filed suit on behalf of his daughter, Dawn Sherman, and a certified class of students against Illinois State Board of Education Superintendent Christopher Koch and Township High School District 214.<sup>29</sup>

In January 2009, Judge Robert Gettleman of the Northern District of Illinois granted Sherman's motion for summary judgment and ordered an injunction against the law.<sup>30</sup> Judge Gettleman stated, "The plain language of the Statute. . . suggests an intent to force the introduction of the concept of prayer into the schools. This is where the Statute crosses the line and violates the Establishment Clause."<sup>31</sup>

After examining the legislative history, he concluded the stated purpose was a "sham" and thus it failed the first prong of the *Lemon* test.<sup>32</sup> He then ruled that the statute also failed the second prong of the *Lemon* test because "its primary effect is to advance or inhibit religion", in part because the statute favored silent prayer over other forms of prayer from various religious traditions that require movements or speech.<sup>33</sup>

In October 2010, the Seventh Circuit Court of Appeals reversed the district court in a two to one decision and lifted the injunction.<sup>34</sup> The Court of Appeals, also using the *Lemon* test, found that there was a secular purpose, it neither advanced nor inhibited religion, and there was no entanglement with religion.<sup>35</sup> Shortly after, Sherman filed a motion for an en banc rehearing of the case, which was subsequently denied.<sup>36</sup> Sherman has petitioned the case to the Supreme Court and is currently awaiting their response.<sup>37</sup>

## THE PROPONENTS AND CRITICS OF THE ILLINOIS LAW

The Illinois law was supported through court proceedings by 17 other states with similar laws, as well as the Alliance Defense Fund, the Illinois Family Institute, and WallBuilders, Inc., among others.<sup>38</sup> The proponents of the law say that the law has a secular purpose of calming the children by "still[ing] the tumult of the playground and start[ing] a day of study."<sup>39</sup>

Further, supporters of the law argue that the courts should defer to the stated legislative purpose as instructed by Supreme Court precedent.<sup>40</sup> And even if some legislators were motivated by religion, they claim, “[W]hat is relevant is the legislative purpose of the statute, not the possibly religious motives of the legislators who enacted the law.”<sup>41</sup> As for prayer in the title, the law’s supporters insist that its function is to make it “abundantly clear to school administrators, teachers, parents, and students what they can do during the moment of silence.”<sup>42</sup>

There are many critics of the law, most notably the ACLU, which has filed multiple amicus briefs in the case. The opponents say the stated purpose is a disguised attempt to bring prayer into the classroom, citing both the text’s explicit references to prayer and legislative history as evidence.<sup>43</sup> The critics say the actual intent of the legislature is to promote religion to “impressionable children in a compulsory school environment.”<sup>44</sup>

In the alternative, the law favors “religions that embrace momentary, silent prayer” while discriminating against religions which require either spoken words or a variety of postures, such as Islam, Buddhism, Hinduism. This would be an unconstitutional effect as it would be tantamount to a government endorsement of certain religions.<sup>45</sup>

Adam Schwartz, an ACLU attorney who worked on the case, says that while there are many states with moment of silence laws, “Illinois is an outlier because it says you only have two options.”<sup>46</sup> He said the legislature has “effectively told the students that we want you to think about whether to pray or undertake the very unattractive and narrow alternative and think about the anticipated activities of the day.”<sup>47</sup> As for calming the kids, Schwartz said, “There is no evidence to support that claim. And even if there was evidence, it is subordinate to the primary religious purpose.”<sup>48</sup>

#### THE LAW IN PRACTICE

Some of the controversy surrounding the law has been due the statute’s vagueness. The law requires a “moment of silence”, but gives no instruction on how long that period should be, how it should be implemented, or what the penalty is for the failure to comply.<sup>49</sup>

At Lakes Community High School in Lake County, Ill., the moment of silence is held just after the students finish the pledge of allegiance.<sup>50</sup> The moment is just ten seconds.<sup>51</sup>

Sara Quinn, a 14-year-old Lake County freshman, said that she thinks about what she always does during every moment of silence: the events of September 11, 2001.<sup>52</sup> Another student, Prince Miles, a 17-year-old, pondered whether “I’m missing an assignment or homework.”<sup>53</sup>

Some students did, however, seize the opportunity to pray during the moment of silence. Caleb Stevenson, a senior, said, “It’s a cool opportunity to get back to thinking about God during the school day at a public school.”<sup>54</sup>

As of April 2011, the law has only recently been put back into place. Principal Bill Wiesbrook at Naperville Central High said, “Most people are kind of reacting like I am; they’re just kind of shrugging their shoulders, and I mean, 10 or 15 seconds of silence doesn’t do much.”<sup>55</sup> He has not yet received a complaint from any student or parent regarding the law.<sup>56</sup>

#### WHAT’S NEXT?

The rancorous debate continues in schools and courts of Illinois and in many other states across the country with similar laws. There is currently a bill in the Illinois General Assembly that,<sup>57</sup> if passed, would remove prayer from the title, make observance again optional, and leave the silent reflection activity—prayer or otherwise—up to the student.<sup>58</sup> In every case, whether in opposition or in support of these laws, public opinion is not the litmus test for constitutionality.

The Supreme Court may still choose to weigh in on the issue and attempt to clear the muddled waters surrounding these moment of silence laws. Alternatively, the voters of Illinois can express their disapproval or give their endorsement of the law at the voting booth. For the time being, however, the Seventh Circuit’s decision will stand and that means the Illinois Silent Reflection and Student Prayer Act is back on the books.

## NOTES

- 1 U.S. CONST. amend. I.
- 2 ILL. REV. STAT. 1969, ch. 122, § 771.1.
- 3 105 ILL. COMP. STAT. 20/1 (2007).
- 4 Telephone Interview with Adam Schwartz, senior staff attorney, ACLU of Illinois (Mar. 24, 2011).
- 5 *Sherman v. Twp. High School Dist. 214*, 594 F. Supp. 2d 981, 984 (N.D. Ill. 2009).
- 6 P.B. L. ACT 92-832, eff. Jan. 1, 2003.
- 7 105 ILL. COMP. STAT. 20/5 (2007)
- 8 The letter issued to the Illinois Senate by Governor Rod Blagojevich accompanying his veto states: "Prayer plays an important part in the lives of many people. It certainly does in mine. I believe in prayer. I believe in the power of prayer. I also believe that our founding fathers wisely recognized the personal nature of faith and prayer, and that is why the separation of church and state is a centerpiece of our constitution, our democracy and our freedoms. The law in Illinois today already allows teachers and students the opportunity to take a moment for silent thought or prayer, if they choose to. I believe this is the right balance between the principles echoed in our constitution, and our deeply held desire to practice our faith. As a parent, I am working with my wife to raise our children to respect prayer and to pray because they want to pray - not because they are required to. For this reason, I hereby veto and return Senate Bill 1463." *available at* <http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB1463&GA=095&GAId=9&SessionID=51&DocTypeID=SB&DocNum=1463>. Veto overridden by Senate on Oct. 3, 2007 and by House on Oct. 11, 2007.
- 9 105 ILL. COMP. STAT. 20/1 (2007).
- 10 BRUCE J. DIERENFIELD, *THE BATTLE OVER SCHOOL PRAYER: HOW Engel v. Vitale Changed America 182-83* (Lawrence: University of Kansas Press 2007).
- 11 *Engel v. Vitale*, 370 U.S. 421 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).
- 12 *Engel*, 370 U.S. 421; *Schempp*, 374 U.S. 203.
- 13 *Engel*, 370 U.S. at 425.
- 14 *Schempp*, 374 U.S. at 223.
- 15 THOMAS C. REEVES, *THE EMPTY CHURCH: DOES ORGANIZED RELIGION MATTER ANYMORE* 129 (Free Press 1998).
- 16 Brief for Texas, et al. as Amici Curiae Supporting Defendant-Appellant, *Sherman v. Koch*, 623 F.3d 501 (2009) (No. 09-1455), 2009 WL 3459283.
- 17 Schwartz, *supra* note 4.
- 18 *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
- 19 *Id.* at 612.
- 20 *Id.*; *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987).
- 21 *Lemon*, 403 U.S. 602 at 612.
- 22 *Id.* at 613.
- 23 *See Id.*
- 24 *See Engel; Abington, supra* note 11.
- 25 *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (emphasis in original).
- 26 *See Sherman v. Koch*, 623 F.3d 501 (7th Cir. App. 2010); *Bown v. Gwinnett County Sch. Dist.*, 112F.3d 1464 (11th Cir. 1997) (upheld moment of silence finding violation of *Lemon*); (*Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001) (upheld law which was found to have only slight entanglement with religion); (*Croft v. Perry*, 562 F.3d 735 (5th Cir. 2009) (upheld

amendments to Texas law that allow students to “reflect, pray, meditate or engage in any other silent activity”). *But see May v. Cooperman*, 780 F.2d 240 (3rd Cir. 1985) (invalidated law because the court found no secular purpose); *Doe v. School Bd. of Ouachita Parish*, 274 F.3d 289 (C.A.5 La.2001) (overturned law after amendment removed the word “silent” as an attempt to introduce verbal prayer.)

27 *Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001).

28 *Sherman*, 594 F.Supp.2d at 985.

29 *Id.*

30 *Id.*

31 *Id.* at 986.

32 *Id.* at 989.

33 *Id.* at 990.

34 *Sherman v. Koch*, 623 F.3d at 520.

35 *See Id.*

36 Order, No. 07 C 6048, available at <http://www.robsherman.com/news/pdf/MomentOfSilence/EnbancDenied.pdf>.

37 Petition for a Writ of Certiorari, *Sherman*, 623 F.3d 501 (2011) (No. 07 C 6048), available at <http://www.robsherman.com/news/briefs/StudentPrayerAct/DawnsPetition.pdf>.

38 Brief for Texas, *supra* note 18; Brief for WallBuilders, Inc. as Amicus Curiae of Defendant-Appellant, *Sherman v. Koch*, 623 F.3d 501, (2009) (No. 09-1455). WallBuilders, according to their website, is “a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built.”

39 Brief for Texas, *supra* note 18 at 1-2.

40 *Id.* at 2.

41 *Id.* at 6, citing *Croft v. Gov. of Tex.*, 562 F.3d 735, 749-50 (5th Cr. 2009).

42 *Id.* at 10.

43 *See* Brief of ACLU as Amicus Curiae Supporting of Affirmance of the District Court, *Sherman v. Koch*, 623 F.3d 501 (2009) (No. 09-1455). The legislature amended the law to include prayer in the title and dropped an amendment which would have removed all references to prayer. Additionally, they cited 2007 amendment to make the law mandatory. Illinois Senate sponsor Kimberly Lightford was quoted as saying, “Here in the General Assembly we open every day with a prayer and Pledge of Allegiance. I don’t get a choice about that. I don’t see why students should have a choice.” In evaluating a secular purpose, the Supreme Court has held that it “must be sincere; a law will not pass constitutional muster if the secular purpose articulated by the legislature is merely a sham.” *Wallace*, 472 U.S. 38 at 64.

44 Amicus Brief of ACLU at 16.

45 *Id.* at 22

46 Schwartz, *supra* note 4.

47 *Id.*

48 *Id.*

49 *Sherman*, 594 F.Supp.2d at 990.

50 Tara Malone, ‘Moment of silence’ in schools off to quiet start, WGNTV, Jan. 18, 2011, available at <http://www.wgntv.com/news/chibrknews-momentofsilence-in-illinois-sc-01182011,0,1977719.story?track=rss>.

51 *Id.*

52 *Id.*

53 *Id.*

54 Yasmin Gentry & Ayesha Habib, *Moment of silence reinstated in Ill. public schools*, CENTRAL TIMES, Feb. 23, 2011, *available at* <http://www.centraltimes.org/featured/2011/02/23/moment-of-silence-reinstated-in-ill-public-schools/>.

55 *Id.*

56 *Id.*

57 H. 0293, 97th Gen. Assem., Reg. Sess. (IL. 2011), *available at* <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=293&GAID=11&DocTypeID=HB&SessionID=84&GA=97>.

58 *Id.*