

# THE MYTH OF THE LIBERAL NINTH CIRCUIT

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The popular image of the Ninth Circuit, often expressed in the news media, is that it is a far left court that is reversed more often than any other circuit in the country.<sup>1</sup> This is simply wrong. In the October 2002 Term, the Supreme Court reversed the lower court in seventy-four percent of all of the cases it decided.<sup>2</sup> The Supreme Court reversed the Ninth Circuit in seventy-five percent of the cases coming from that court.<sup>3</sup> The year before, during the October 2001 Term, the statistics were almost identical: the Supreme Court reversed the lower courts seventy-five percent of the time and the Ninth Circuit was reversed seventy-six percent of the time.<sup>4</sup> Among all federal circuits, the Ninth Circuit is almost exactly at the median among circuits in reversal rates.

During the October 2002 Term, some of the Supreme Court's most important decisions affirmed the Ninth Circuit. For instance, in *Brown v. Legal Foundation of Washington*,<sup>5</sup> the Supreme Court

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1. See, e.g., Charlotte Allen, *Pledge of Allegiance; "Under God": An 'Injury' with Almost No Victims*, L.A. TIMES, Oct. 5, 2003, at M3 ("The 9th Circuit is famous for its loopy, ultra-liberal rulings that run against the grain of other federal courts and are often overturned by the Supreme Court.")

2. See Marcia Coyle, *2002-2003 Term: Supreme Court Review*, NAT'L L.J., Aug. 4, 2003, at S1.

3. See *id.*

4. See Marcia Coyle, *2001-2002 Term: Supreme Court Review*, NAT'L L.J., Aug. 5, 2002, at C1.

5. 123 S. Ct. 1406 (2003).

affirmed an en banc decision of the Ninth Circuit which had upheld the constitutionality of state interest on lawyer trust account programs.<sup>6</sup> In *Nevada Dept. of Human Resources v. Hibbs*,<sup>7</sup> the Court affirmed a Ninth Circuit holding that state governments may be sued for violating the Family and Medical Leave Act.<sup>8</sup> Moreover, when the Supreme Court reverses the Ninth Circuit, it often is in a 5-4 decision, as in *Lockyer v. Andrade*,<sup>9</sup> where the Court reversed a Ninth Circuit decision granting a writ of habeas corpus to a person who had been sentenced to life in prison, with no possibility of parole for fifty years, for shoplifting \$153 worth of videotapes.<sup>10</sup>

Nevertheless, focusing on reversal rates is misleading and irrelevant. The Supreme Court reviews only a very tiny proportion of Ninth Circuit cases.<sup>11</sup> More importantly, it is not the role of an intermediate court of appeals to predict what the High Court ultimately does. It is wrong to equate a reversal with a mistake by the lower court. The Supreme Court gets the final word, but that does not mean that its rulings are "right" and reversed lower courts are "wrong." The issues that are decided by the Supreme Court are inherently close and difficult questions about which reasonable jurists can and do disagree. Several years ago, there was a Term in which the Supreme Court reversed a very high percentage of Ninth Circuit cases. Then Ninth Circuit Chief Judge Procter Hug remarked, "The Supreme Court had a bad year that year."

To be sure, there are some judges now serving on the Ninth Circuit who are more liberal than any on the current Supreme Court. There is not a William Douglas or a William Brennan or a Thurgood Marshall on the nation's highest court. But the Ninth Circuit has judges like Stephen Reinhardt and Harry Pregerson who are quite liberal.<sup>12</sup> On the other hand, people often forget that, for every

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6. *See id.*

7. 123 S. Ct. 1972 (2003).

8. *See id.*

9. 123 S. Ct. 1166 (2003).

10. *See id.*

11. *See Breakup of the 9th U.S. Circuit Court: Hearing on H.R. 1203 Before Comm. on House Judiciary Subcomm. on Courts, the Internet and Intellectual Prop.*, 107th Cong. (2002) (statement of Judge Sidney R. Thomas, Ninth Circuit Court of Appeals).

12. *See generally* Jason Hoppin, *Ninth Circuit Reversed Three Times in One Day*, THE RECORDER, Nov. 5, 2002, at 1 (naming Judge Harry Pregerson

liberal on the Ninth Circuit, there is a judge who occupies the exact opposite place on the ideological continuum. Conservative judges such as Diarmuid O'Scannlain and Andrew Kleinfeld are just as conservative as judges Reinhardt and Pregerson are liberal.<sup>13</sup> Likewise, for every moderate liberal on the Ninth Circuit, like William Fletcher, there is a moderate conservative like Pamela Rymer.<sup>14</sup> Moreover, many of the judges are unquestionably moderates, who cannot be seen as leaning left or right.

Consequently, the identity of the panel is enormously important in the Ninth Circuit. When someone tells me that they are about to argue a case before the Ninth Circuit, I immediately ask, "Who is the panel?" But this is so in virtually every circuit in the nation; every circuit has judges across the political spectrum and the identity of the bench is enormously important in determining the outcome of many cases. Nor is this new or to be lamented. The identity of the judges always has mattered and especially so in these deeply ideologically divided times. There is no way to construct a human system in which value choices must be made that will not depend on who occupies the positions.

In this foreword, I want to illustrate my thesis by pointing to both the conservative and the liberal sides of the Ninth Circuit in the last year. I have no doubt that the outcome in these high profile cases might well have been different if only the "luck of the draw" had produced different panels. As the remainder of this Loyola Law Review issue discusses a number of recent Ninth Circuit cases, I want to illustrate my thesis by pointing to a few of the cases, likely among the most high profile of the last year: those concerning the

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as "one of the Ninth Circuit's most liberal jurists"); David G. Savage, *The Nation Justices to Test Refusal to Hire over Drug Use*, L.A. TIMES, Feb. 25, 2003, at A12 (describing Judge Stephen Reinhardt as the "liberal leader of the 9th Circuit").

13. See generally Maura Dolan, *The Recall Campaign*, L.A. TIMES, Sept. 20, 2003, at A16 (stating that Judges Reinhardt and Pregerson are "considered among the most conservative members of the 9th Circuit").

14. See generally Jason Hoppin, *Abortion Foes Lose on 1st Amendment*, THE RECORDER, May 17, 2002, at 1 (stating that Judge Pamela Rymer is considered to be a moderate); *The Year of the Obstructionists with Senate Stalling: Clinton Should Push His Court Nominations*, L.A. TIMES, Sept. 9, 1996, at B4 ("William Fletcher, a Boalt Hall law professor nominated to California's 9th Circuit, has been widely praised for his . . . moderate leanings.").

detainees in Guantanamo Bay, Cuba; the California recall election; the meaning of the Second Amendment; and the Pledge of Allegiance.

My greatest fear is that the myth of the liberal Ninth Circuit might influence, consciously or unconsciously, some judges on that court to be more cautious and more conservative in their rulings. I have long believed that the constant conservative attacks on the "liberal press" have caused the media to bend over backwards to prove that it is not liberal. Similarly, I worry that the human beings who serve as judges of the Ninth Circuit may want to show that they are not liberal by being more conservative in their rulings, especially in high profile cases.

### I. HARDLY A LIBERAL COURT

As a lawyer who often handles civil liberties and civil rights cases before the Ninth Circuit, I have been astounded to hear it described as an activist left-wing court. To illustrate, I want to discuss two cases in which I was co-counsel, which were among the Ninth Circuit's most high profile decisions of the year.

In *Coalition of Clergy v. Bush*,<sup>15</sup> the Ninth Circuit held that a coalition of clergy members, lawyers, and professors did not have standing to argue that the United States Government is violating American and international law in its treatment of detainees in Guantanamo.<sup>16</sup> The usual rule is that individuals only may assert their own rights in a federal court and cannot present the claims of others, of third parties.<sup>17</sup> But the Supreme Court repeatedly has held that the ban on third-party standing is prudential, not constitutional.<sup>18</sup> As a prudential standing rule, Congress, by statute, can override it and authorize third-party standing.<sup>19</sup>

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15. 310 F.3d 1153 (9th Cir. 2002).

16. *See id.*

17. *See, e.g.,* Warth v. Seldin, 422 U.S. 490, 499 (1975) ("The plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.").

18. *See* United Food & Commercial Workers v. Brown Group, 517 U.S. 544, 557 (1996); Warth, 422 U.S. at 499.

19. *See, e.g.,* Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316, 328 (1999) (Congress has eliminated any prudential concerns by enacting a specific statute that authorizes standing); Bennett v. Spear, 520 U.S. 154, 162 (1997) ("unlike their constitutional counterparts, [prudential standing

That is exactly what Congress did in 28 U.S.C. § 2242. The statute could not be clearer in authorizing third-party standing; it states that a habeas corpus petition can be filed “by the person for whose relief it is intended *or by someone acting in his behalf*.”<sup>20</sup> There are no qualifiers or limits within the statute.<sup>21</sup> Congress’s obvious concern was that the government might arrest people and hold them without access to the courts. Unless it is possible to bring a habeas corpus petition on their behalf, no relief would be possible and there would be no way to insist that the government follow the law.

The Coalition of Clergy, Lawyers, and Professors filed a habeas corpus petition in the United States District Court for the Central District of California, alleging that the United States Government violated basic principles of international human rights law by forcibly removing prisoners of war from Afghanistan, transporting them to Guantanamo, and holding them indefinitely in small outdoor cages.<sup>22</sup> They alleged that the United States Government is violating the requirements of both the United States Constitution and treaties binding on the United States by continuing to hold these individuals in Guantanamo Bay without any semblance of due process.<sup>23</sup> The habeas petition alleged that the prisoners in Guantanamo Bay have no access to the courts.<sup>24</sup> The Government never disclosed the prisoners’ identity; never provided attorneys to them; never gave them means for filing an action on their own behalf.<sup>25</sup>

The United States Court of Appeals for the Ninth Circuit, however, affirmed the dismissal of the case on the ground that the members of the Coalition of Clergy lack a relationship with the detainees.<sup>26</sup> The court stated:

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requirements] can be modified or abrogated by Congress”); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 387 (3d ed. 2000) (“Congress may by statute eliminate prudential standing concerns.”).

20. 28 U.S.C. § 2242 (2002) (emphasis added).

21. *See id.*

22. *See* Verified Petition for Writ of Habeas Corpus ¶¶ 3–5, *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002), *aff’d in part, vacated in part*, 310 F.3d 1153 (9th Cir. 2002).

23. *See id.* ¶¶3–4.

24. *See Coalition of Clergy*, 310 F.3d at 1156.

25. *See id.*

26. *See id.* at 1162.

We accept the Coalition's concern for the rights and welfare of the detainees at Camp X-Ray as genuine and sincere. Nevertheless, it has failed to demonstrate any relationship with the detainees, generally or individually. We therefore must conclude that even assuming the detainees are unable to litigate on their own behalf and even under the most relative interpretation of the "significant relationship" requirement the Coalition lacks next-friend standing.<sup>27</sup>

There are several flaws with the court's conclusion. First, the statute, section 2242, does not contain any such requirement of a close relationship. Where the statutory language is clear, as it is here in permitting this habeas petition, there should be no need for further analysis.<sup>28</sup>

Second, the Supreme Court never has interpreted section 2242 as requiring a close relationship. No Supreme Court case ever has held that section 2242 allows habeas petitions to be brought on behalf of others only when there is a close relationship between the petitioner and the detained individual. In fact, even the Supreme Court decision relied on by the district court does not state such a requirement. In *Whitmore v. Arkansas*,<sup>29</sup> the Court articulated the requirements for "next friend" standing:

First, a next friend must provide an adequate explanation—such as the inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action. Second, the next friend must be truly dedicated to the best interests of the person on whose behalf he seeks to litigate and it has been further suggested that a next friend must have some significant relationship with the real party in interest.<sup>30</sup>

In other words, *Whitmore v. Arkansas* states just two requirements: (1) an adequate explanation for why the real party in

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27. *Id.* at 1153, 1162–63.

28. See *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 2000) ("If the statutory language is clear, we need look no further than that language in determining the meaning of the statute."); *Hellon & Assocs., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992).

29. 495 U.S. 149 (1990).

30. *Id.* at 163–164.

interest cannot appear on his own behalf; and (2) the next friend being dedicated to the best interests of the person on whose behalf the petition is brought.<sup>31</sup>

Here, the petitioners should have sufficient standing because the two requirements for “next friend” under *Whitmore v. Arkansas* are satisfied.<sup>32</sup> But the Court of Appeals takes the language from *Whitmore*, that it has been “suggested” that there be a close relationship, and turns it into a rigid requirement.<sup>33</sup> No Supreme Court decision has ever dismissed a “next friend” standing for lack of a close relationship when the two requirements stated in *Whitmore* were met.

Third, no Ninth Circuit case prior to *Coalition of Clergy v. Bush* has ever denied next friend standing in a situation where the individuals were being held without access to the courts. The court relied on language in *Massie ex rel. Kroll v. Woodford*,<sup>34</sup> that “the next friend [have] some close relationship” with the petitioner.<sup>35</sup> But in *Massie*, the court dismissed the habeas petition because the prisoner could present his own petition, if he so desired, in federal court.<sup>36</sup> *Massie* involved a journalist who filed a habeas corpus petition on behalf of a man on death row who chose not to challenge his impending execution.<sup>37</sup> This Court stressed that there was no need for next friend standing because the prisoner could bring his own habeas corpus petition.<sup>38</sup> Obviously, the facts in *Massie* are distinguishable from this situation in which individuals from a foreign nation are being held without access to lawyers and to the courts.

Indeed, every Ninth Circuit case that has rejected “next friend” standing involves a situation in which the individual was deemed able to bring the petition for him or herself.<sup>39</sup> Thus, the language in

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31. See *id.* at 163–64.

32. See *Coalition of Clergy*, 310 F.3d at 1162–63.

33. See *id.* at 1159, 1161–62.

34. 244 F.3d 1192 (9th Cir. 2001).

35. *Id.* at 1194.

36. See *id.* at 1193–94.

37. See *id.* at 1195.

38. See *id.* at 1196.

39. See, e.g., *Brewer v. Lewis*, 989 F.2d 1021 (9th Cir. 1993) (mother lacked standing to bring habeas petition for her son because she failed to provide meaningful evidence that her son was incompetent to appear on his

*Massie* about the need for a close relationship is merely dictum that describes a situation not relevant to that case. Neither the Government nor the district court point to a single case in which a court denied “next friend” standing for those representing prisoners who lacked access to the courts.

Even more astounding is Judge Marsha Berzon’s concurring opinion.<sup>40</sup> She wrote separately to say that the court did not need to address whether a significant relationship is always necessary and were the court to address that question, she “would be inclined to hold that a significant relationship is not always necessary.”<sup>41</sup> Judge Berzon said that the Coalition of Clergy failed to show the Guantanamo detainees’ lack of access to the courts, and that the Coalition failed to try communicating with them.<sup>42</sup>

No one is allowed to visit the detainees in Guantanamo because travel to Cuba is illegal and Guantanamo is a closed military base. Those being held are not accorded any means of communication and the government has refused to provide them attorneys.<sup>43</sup>

The detainees are individuals from a foreign nation, most of whom likely do not speak English. They have no access to the courts in any way whatsoever. The absence of any lawsuit by the vast majority of them shows the flaw in Judge Berzon’s argument. Why would those detainees in cages bring no challenge? Certainly it is not that they are pleased with their captivity. One prisoner yelled at a reporter being given a tour around the perimeter of the Guantanamo base:

We need the world to know about us. We are innocent here in this place. We’ve got no legal rights. Nothing. So can

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own behalf); *Wilson v. Dixon*, 256 F.2d 536 (9th Cir. 1958) (habeas petition denied because of failure to allege why inmate could not bring his own petition).

40. See *Coalition of Clergy*, 310 F.3d at 1165 (Berzon, J., concurring).

41. *Id.* at 1153, 1165 (Berzon, J., concurring).

42. See *id.* at 1166–68 (Berzon, J., concurring).

43. See Paisley Dodds, *U.S.: No Lawyers for War Captives*, N.Y. TIMES, Apr. 17, 2002 (“In its latest rebuff to the demands for an independent body to decide the legal status of captives held here, the United States and detainees have no right to lawyers, and can be held as long as the U.S.-led war on terrorism lasts.”).

somebody know about us? Can you tell the world about us?<sup>44</sup>

Those being held in cages in Guantanamo have not filed suit because the government will not allow them to communicate with lawyers and because they have no way to file a lawsuit on their own.

Judge Berzon and the majority expressed great concern that the Petitioners did not communicate directly with those in Guantanamo.<sup>45</sup> But the judges offered no explanation for how Petitioners could do this. Travel by Americans to Cuba is prohibited. Even if Petitioners went to Cuba, Guantanamo is closed to the public. There is obviously no chance that Petitioners would be allowed access to the detainees. Moreover, there is no way to communicate with them because their names have not been released. Surely, the failure to communicate directly with the detainees cannot be used to support the government's motion to dismiss when it is the government that is preventing all communication.

Under the literal language of the habeas statute, and its clear purpose in allowing next friend standing, the court should have accorded standing to the Coalition of Clergy to sue on behalf of those being held in Guantanamo. At the very least, the case belies the view that the Ninth Circuit is a liberal activist court.

The other case that I want to discuss, which belies the image of a liberal Ninth Circuit, is its most visible case of the last year: *Southwest Voter Registration Educ. Project v. Shelley*.<sup>46</sup> California voters signed petitions to hold a recall election for the Governor of California.<sup>47</sup> Shortly after the Lieutenant Governor of California, in accord with the state Constitution, set the recall election for October 7, 2003, civil rights organizations—the Southwest Voter Registration Education Project, the Southern Christian Leadership Conference of Greater Los Angeles, and the National Association for the Advancement of Colored People, California State Conference Branches—filed a lawsuit challenging the use of punchcard

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44. Katharine Q. Seelye, *A Nation Challenged: Captives; An Uneasy Routine at Cuba Prison Camp*, N.Y. TIMES, Mar. 16, 2002, at A8.

45. See *Coalition of Clergy*, 310 F.3d at 1162, 1165.

46. No. 03-56498, 2003 WL 22175955 (9th Cir. Sept. 23, 2003).

47. See *id.*

machines in some counties of California while other counties used far better voting technology.<sup>48</sup>

Voters in six California counties, comprising forty-four percent of the State's population, used punchcard voting machines.<sup>49</sup> The evidence in the record of the case was clear that these machines were far less reliable than all other voting systems used throughout the state. For example, the Declaration of Henry Brady<sup>50</sup> stated:

The use of punchcards will significantly increase the rate of residual votes (i.e., invalid ballots) as compared to other technologies. Comparing punchcard counties versus non-punchcard counties in California in 2000 demonstrates that the residual vote rate is 1.34 percent higher in punchcard counties . . . . [C]ounties using punchcards have, on average, a residual vote rate about one and one-half percentage points higher than those using other systems.<sup>51</sup>

In other words, those who voted in the counties using punchcard systems—Los Angeles, Mendocino, Sacramento, San Diego, Santa Clara, and Solano—had a substantially greater likelihood that their votes did not count than those in all other counties in the state. Dr. Brady explained that in light of the projected voter turnout, approximately 40,000 votes cast in these counties will not be counted, which could have been larger than the margin of victory in this unprecedented election.<sup>52</sup> Indeed, the Secretary of State had “decertified” punchcard machines and prohibited their use after March 1, 2004.<sup>53</sup>

The plaintiffs claimed that this discrepancy in voting means both violates the right to vote for those whose ballots are not counted and denies equal protection to those who live in counties using punchcard

48. *See id.*

49. *See Southwest Voter Registration Educ. Project v. Shelley*, No. 03-56498, 2003 WL 22119858, at \*\*1, 4 (9th Cir. Sept. 15, 2003), *rev'd on reh'g en banc*, 2003 WL 22175955 (9th Cir. Sept. 23, 2003).

50. Robson Professor of Political Science and Public Policy, University of California, Berkeley.

51. Decl. of Henry Brady at 3, ¶ 9, *Southwest Voter Registration Educ. Project v. Shelley*, No. 03-56498, 2003 WL 22001185 (C.D. Cal. Aug. 20, 2003) (No. 03-56498), *rev'd*, 2003 WL 22119858 (9th Cir. Sept. 15, 2003), *rev'd on reh'g en banc*, 2003 WL 22175955 (9th Cir. Sept. 23, 2003) [hereinafter Declaration of Henry Brady].

52. *See id.* at 13, ¶ 44.

53. *See Southwest Voter Registration Educ. Project*, 2003 WL 22175955.

systems because of the greater likelihood that their ballots will be discarded.<sup>54</sup> As the Supreme Court explained in *Gray v. Sanders*:<sup>55</sup> “The Court has consistently recognized that all qualified voters have a constitutionally protected right to cast their ballots and have them counted . . . . *Every voter’s vote is entitled to be counted once. It must be correctly counted and reported.*”<sup>56</sup> The Court explained that this “conception of political equality [stems] from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments.”<sup>57</sup> Relying on these basic principles, the United States Supreme Court in *Bush v. Gore*<sup>58</sup> held that treating similar voters differently within a state violates equal protection because “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”<sup>59</sup> Yet, it is indisputable that many who live in counties using punchcard machines did not have their vote “counted once,” or “correctly counted and reported”; many had their ballots treated differently from others in the state solely because of the accident of their residency.

In addition to this equal protection violation, the plaintiffs contended that the punchcard systems discriminate against minority voters.<sup>60</sup> Counties using punchcard systems have substantially more citizens of color than counties using other systems.<sup>61</sup> Moreover, Dr. Brady explains that “minorities have much higher residual vote rates than non-minorities in punchcard counties.”<sup>62</sup> Thus, eliminating punchcard machines would have “reduce[d] the especially high residual vote rates among minorities compared to non-minorities by about one to two percentage points.”<sup>63</sup>

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54. *See id.*

55. 372 U.S. 368 (1963).

56. *Id.* at 380 (emphasis added) (internal quotations and citations omitted).

57. *Id.* at 381.

58. 531 U.S. 98 (2000).

59. *Id.* at 104–05.

60. *See Southwest Voter Registration Educ. Project v. Shelley*, No. 03-56498, 2003 WL 22175955 (9th Cir. Sept. 23, 2003).

61. *See* Declaration of Henry Brady, *supra* note 51, at 3, ¶ 10. *See generally* <http://quickfacts.census.gov/qfd/states/06/06037.html> (population statistics by county).

62. Declaration of Henry Brady, *supra* note 51, at 12, ¶ 40.

63. *Id.* at 10, ¶ 37.

Any voting practice which ensures that minorities have a greater chance than Whites of their votes not being counted violates section 2 of the Voting Rights Act.<sup>64</sup> As the Supreme Court explained, section 2 prohibits “any . . . practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities.”<sup>65</sup> As the Ninth Circuit Court recently stated, “Section 2 plainly provides that a voting practice or procedure violates the [Voting Rights Act] when a plaintiff is able to show, based on the *totality of circumstances*, that the challenged voting practice results in discrimination on account of race.”<sup>66</sup> The evidence was that punchcard machines will have exactly this effect, causing proportionately more voters of color to be denied the right to have their votes counted.<sup>67</sup>

On August 20, 2003, the United States District Court for the Central District of California ruled against the plaintiffs and issued an order and opinion denying their request for a preliminary injunction.<sup>68</sup> However, on September 15, 2003, a three judge panel of the United States Court of Appeals for the Ninth Circuit reversed the District Court and ruled in favor of the plaintiffs.<sup>69</sup> The panel found that it would violate equal protection to treat similar voters in California differently solely based on the accident of geography.<sup>70</sup> The panel relied heavily on the Supreme Court’s decision in *Bush v. Gore* to support its conclusion.<sup>71</sup>

A Ninth Circuit judge, *sua sponte*, requested a vote as to whether en banc review should be granted.<sup>72</sup> The court announced on Friday, September 19, 2003, that it would hear the case en banc.<sup>73</sup> The hearing was held on Monday, September 22, and the decision

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64. See 42 U.S.C. § 1973 (2000).

65. Thornburgh v. Gingles, 478 U.S. 30, 43 (1986).

66. Farrakhan v. Washington, 338 F.3d 1009, 1017 (9th Cir. 2003).

67. See Declaration of Henry Brady, *supra* note 51, at 3, ¶¶ 9–12.

68. See Southwest Voter Registration Educ. Project v. Shelley, No. 03-56498, 2003 WL 22001185 (C.D. Cal. Aug. 20, 2003).

69. See *id.*

70. See *Southwest Voter Registration Educ. Project*, 2003 WL 22119858, at \*27.

71. See *Southwest Voter Registration Educ. Project*, 2003 WL 22175955 (relying on *Bush v. Gore*, 531 U.S. 98 (2000)).

72. See *Southwest Voter Registration Educ. Project*, 2003 WL 22176200.

73. See *id.*

reversing the District Court was announced the next day at 9:00 a.m. The court, in a per curiam opinion without dissent, reversed the panel.<sup>74</sup>

The en banc decision disagreed with the panel's conclusion that equal protection was violated primarily on the grounds that it could not be said that the District Court abused its discretion in denying a preliminary injunction.<sup>75</sup> The entirety of the Ninth Circuit's discussion of the equal protection claim was the following statement:

We have not previously had occasion to consider the precise equal protection claim raised here. That a panel of this court unanimously concluded the claim had merit provides evidence that the argument is one over which reasonable jurists may differ. In *Bush v. Gore*, the leading case on disputed elections, the court specifically noted: 'The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections.' We conclude the district court did not abuse its discretion in holding that the plaintiffs have not established a clear probability of success on the merits of their equal protection claim.<sup>76</sup>

In other words, the Ninth Circuit reversed the panel's conclusion about equal protection solely on the ground that the District Court did not abuse its discretion. However, this is flat out inconsistent with the Court's statement earlier in its opinion:

The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law. Thus we have held that an order 'will be reversed only if the district court relied on an erroneous legal premise or abused its discretion.'<sup>77</sup>

The law in the Ninth Circuit is clear that the issues of law underlying a district court's decision denying a preliminary

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74. See *Southwest Voter Registration Educ. Project*, 2003 WL 22175955.

75. See *id.* at \*3.

76. *Southwest Voter Registration Educ. Project*, 2003 WL 22175955, at \*3 (citations omitted).

77. *Id.* at \*2.

injunction are reviewed *de novo*.<sup>78</sup> The Ninth Circuit thus was wrong in overruling the panel's equal protection analysis based solely on the standard of review. It was inappropriate to affirm the District Court for not abusing its discretion when the Court of Appeals was required to face the question of whether, as a matter of law, the District Court erred in its equal protection analysis. The Ninth Circuit offered no analysis whatsoever of why the three judge panel was wrong in its conclusion that equal protection would be violated by using punchcard machines in some counties and better technology in other places.

The Ninth Circuit then went on to consider the Voting Rights Act claim.<sup>79</sup> The court said: "Plaintiffs have made a stronger showing on their Voting Rights Act claim."<sup>80</sup> However, the Ninth Circuit rejected this based on its balancing of the equities involved:

We therefore must determine whether the district court abused its discretion in weighing the hardships and considering the public interest. In this case, hardship falls not only upon the putative defendant, the California Secretary of State, but on all the citizens of California, because this case concerns a statewide election. The public interest is significantly affected . . . . Interference with impending elections is extraordinary and interference with an election after voting has begun is unprecedented. If the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election's proceeding on the announced date. Time and money have been spent to prepare voter information pamphlets and sample ballots, mail absentee ballots, and hire and train poll workers. Public officials have been forced to divert their attention from their official duties in order to campaign. Candidates have crafted their message to the voters in light

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78. See *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000); *Brookfield Communications, Inc. v. W. Coast Entm't Corp.*, 174 F.3d 1036, 1046 (9th Cir. 1999); *Foti v. City of Menlo Park*, 146 F.3d 629, 634-35 (9th Cir. 1998).

79. See *Southwest Voter Registration Educ. Project*, 2003 WL 22175955.

80. *Id.* at \*3.

of the originally-announced schedule and calibrated their message to the political and social environment of the time. They have raised funds under current campaign contribution laws and expended them in reliance on the election's taking place on October 7. Potential voters have given their attention to the candidates' messages and prepared themselves to vote. Hundreds of thousands of absentee voters have already cast their votes in similar reliance upon the election going forward on the timetable announced by the state. These investments of time, money, and the exercise of citizenship rights cannot be returned. If the election is postponed, citizens who have already cast a vote will effectively be told that the vote does not count and that they must vote again. In short, the status quo that existed at the time the election was set cannot be restored because this election has already begun.<sup>81</sup>

There are several flaws in this argument. First, there is no doubt that a federal court has the power to order that constitutionally adequate voting machines be used and to delay the election, if necessary, until they are available. The Supreme Court has expressly stated: "If time presses too seriously, the District Court has the power appropriately to extend the time limitations imposed by state law."<sup>82</sup>

In fact, the Supreme Court repeatedly has approved delaying an election when it is necessary to ensure compliance with the Voting Rights Act. The Court stated: "If a voting change subject to section 5 has not been precleared, section 5 plaintiffs are entitled to an injunction prohibiting implementation of the change."<sup>83</sup> Similarly, in *Clark v. Roemer*<sup>84</sup> the Supreme Court stated that "[t]he District Court

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81. *Id.* (citations omitted).

82. *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 (1972).

83. *Lopez v. Monterey County, California*, 519 U.S. 9, 20, 22 (1996) (reversing failure to enjoin a California county election even though "simply enjoining the elections would leave the County without a judicial election system").

84. 500 U.S. 646 (1991).

should have enjoined the elections.”<sup>85</sup> Other courts have likewise enjoined elections and election procedures.<sup>86</sup>

Second, the Ninth Circuit undoubtedly is correct that there would have been additional costs to delaying the election. But what the court failed to explain is why these were more important than protecting the fundamental right to vote, especially for minority voters under the Voting Rights Act. The Ninth Circuit stressed that a delayed election would not be the same as one on October 7. The problem with this argument is that it means that the choice is between two elections: one on October 7, with voting machines that surely will not count a significant number of votes, or an election on a later day when constitutionally adequate voting systems could have been in place in all of the counties. Thus, under the Ninth Circuit’s analysis, there is a choice between two unique moments in time: one with, and the other without, punchcard voting machines; one with, and the other without, a denial of equal protection and a violation of the Voting Rights Act. The public interest is better served by the latter, an election on the recall and the two ballot initiatives that best ensures that every person’s ballot will be counted.

*Bush v. Gore* powerfully demonstrates that the judiciary must be involved in the election process, even when it means that a court essentially will decide a presidential election, to ensure that the requirements of equal protection are met. No one denied that delaying an election, especially one attracting as much media attention as the recall election, is an extraordinary remedy. But it is an essential remedy, which serves the public interest, when the alternative is an election in which it is known in advance that 40,000 votes, primarily of minority voters, will not be counted.

At the very least, decisions like those in *Coalition of Clergy v. Bush* and *Southwest Voter Registration Educ. Project v. Shelley*

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85. *Id.* at 655; *See also Lopez*, 519 U.S. at 20, 22. (reversing failure to enjoin a California county election even though “simply enjoining the elections would leave the County without a judicial election system”).

86. *See, e.g., Garza v. County of Los Angeles*, 918 F.2d 763, 777 (9th Cir. 1990) (noting that “[a] motions panel . . . entered an order which had the effect of staying the County’s election procedures pending our decision”); *Haith v. Martin*, 618 F. Supp. 410, 414 (E.D.N.C. 1985) (enjoining election of superior court judges in the absence of pre-clearance for changed election procedures), *aff’d without opinion*, 477 U.S. 901 (1986).

refute the claim that the Ninth Circuit is an overwhelmingly liberal court.

## II. THE MORE LIBERAL SIDE OF THE NINTH CIRCUIT

Probably the two most important liberal decisions from the Ninth Circuit in the past year were the cases involving the Pledge of Allegiance and the meaning of the Second Amendment. In *Nedow v. United States Congress*,<sup>87</sup> the Ninth Circuit held that the words “under God” in the Pledge of Allegiance violated the Establishment Clause in public schools.<sup>88</sup> The Ninth Circuit, in a 2-1 decision, had earlier ruled in the case that the words “under God” in the Pledge of Allegiance infringed the Establishment Clause.<sup>89</sup> The panel, however, *sua sponte*, issued an amended superseding opinion.<sup>90</sup> The revised opinion focused exclusively on the public school context.<sup>91</sup>

The court applied the test from *Lemon v. Kurtzman*,<sup>92</sup> and held that having teachers lead the recitation of the Pledge containing the words “under God” violated the Establishment Clause.<sup>93</sup> The court explained that there was coercion on children, just as with voluntary prayer in schools.<sup>94</sup> The court said that the statement in the Pledge that the United States is a nation “under God” is a profession of religious belief, namely a belief in monotheism.<sup>95</sup>

Although the decision has been enormously controversial, the Ninth Circuit was correct. Imagine if the Pledge said, “One Nation under Jesus.” Surely few would deny that such a phrase would violate the Establishment Clause. The phrase, “one Nation under God,” is just as offensive to those who do not believe in a theistic God as the phrase “one nation under Jesus” is to non-Christians. Nor is it an answer that this is just ceremonial religion, like the words “In God We Trust” on money or the statement, “God save this honorable

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87. 328 F.3d 466 (9th Cir. 2003).

88. *See Id.* at 490; *see also* 4 U.S.C. § 4.

89. *See Nedow v. U.S. Cong.*, 292 F.3d 597, 612 (9th Cir. 2002), *amended by* 328 F.3d 466 (9th Cir. 2002), *cert. granted*, *Elk Grove Unified Sch. Dist. v. Nedow*, 2003 WL 2134177 (U.S. Oct. 14, 2003).

90. *See Nedow*, 328 F.3d at 482–90.

91. *See id.*

92. 403 U.S. 602 (1971).

93. *See Nedow*, 328 F.3d at 488.

94. *See id.* at 486–87.

95. *See id.*

Court” before Supreme Court sessions. The difference is that no one is asked, let alone pressured, to recite those phrases; children in public school are pressured to state the Pledge of Allegiance each day.

Moreover, the Ninth Circuit was correct to apply the *Lemon* test. In *Lemon*, the Court declared: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”<sup>96</sup> A law is unconstitutional if it fails any prong of the *Lemon* test. Although some Justices have criticized the *Lemon* test,<sup>97</sup> the Supreme Court has not overruled it and continues to apply it in determining whether government actions violate the Establishment Clause.<sup>98</sup> The Ninth Circuit, of course, continues to follow and apply the *Lemon* test.<sup>99</sup>

Under the *Lemon* test, the words “under God” in the Pledge of Allegiance are clearly unconstitutional. There is no secular purpose to reciting such religious words. In fact, the phrase “one nation under God” was added to the Pledge of Allegiance in 1954 as part of the Cold War fight against “godless communism.”<sup>100</sup> Nor is there a secular effect to having students recite the words “under God.” Some Justices, such as Justice O’Connor, have emphasized whether the government is “symbolically endorsing” religion in determining what is an impermissible effect of advancing religion.<sup>101</sup> Having the government ask students to recite the words “under God” is a clear message of government endorsement for religion. Children do feel

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96. *Id.* at 612 (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

97. *See, e.g.*, *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment).

98. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 232 (1997).

99. *See, e.g.*, *Amer. Family Ass’n v. City & County of San Francisco*, 277 F.3d 1114, 1121 (9th Cir. 2002); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 948 (9th Cir. 1999).

100. *See* David G. Savage, *The Nation; High Court to Consider “One Nation, Under God” Petition*, L.A. TIMES, Sept. 29, 2002, at A1.

101. *See* *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573, 627 (1989) (O’Connor, J., concurring in part and concurring in the judgment) (“As a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, ‘that government must not . . . [convey] a message that religion or a particular religion is favored or preferred.’”).

pressure to recite the Pledge and the words “under God,” just as they feel pressure to participate in school prayers.<sup>102</sup>

Another major liberal victory in the Ninth Circuit in the last year was in *Silveira v. Lockyer*.<sup>103</sup> The case involved a challenge to the California Assault Weapons Control Act that significantly strengthened restrictions on possession, use, and transfer of assault weapons.<sup>104</sup> The Ninth Circuit upheld the law and discussed the meaning of the Second Amendment in a lengthy opinion.<sup>105</sup> The court said that the Second Amendment right to “bear arms” guarantees the right of the people to maintain effective state militias, but does not provide any type of individual right to own or possess weapons.<sup>106</sup> The court concluded that federal and state governments have the authority to enact prohibitions and restrictions on the use and possession of firearms, subject only to generally applicable constitutional constraints, such as due process and equal protection.<sup>107</sup> The court said that the Second Amendment imposes no limit on dangerous weapons such as assault rifles.<sup>108</sup>

In *Nordyke v. King*,<sup>109</sup> other judges of the Ninth Circuit went out of their way, in dicta, to express their disagreement with the views expressed in *Silveira*.<sup>110</sup> *Nordyke* involved a suit by gun show promoters challenging a county ordinance prohibiting possession of firearms on government property.<sup>111</sup> The Ninth Circuit upheld the ordinance and rejected the constitutional challenge; the court said that prohibiting gun shows regulated commercial transactions, not speech.<sup>112</sup> Judge Gould, “specially concurring,” expressed his disagreement with the decision in *Silveira*, and said that he believes

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102. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992) (invalidating school prayers, in part, because of inherent coercion).

103. 312 F.3d 1052 (9th Cir. 2002), *reh'g en banc denied*, 328 F.3d 567 (9th Cir. 2003).

104. See *id.*

105. See *id.* at 1060–87.

106. See *id.* at 1086–87.

107. See *id.* at 1087.

108. See *id.*

109. 319 F.3d 1185 (9th Cir. 2003).

110. See *id.* at 1192 n.4.

111. See *id.* at 1187–88.

112. See *id.* at 1189–91.

that the Second Amendment protects an individual's right to possess firearms.<sup>113</sup>

There is no doubt that the judges in *Silveira* went out of their way to issue a broad opinion on the meaning of the Second Amendment. First, the judges assumed that the Second Amendment applies to state and local governments, an assumption unwarranted by any Supreme Court or Ninth Circuit precedent. No court ever has held that the Second Amendment is incorporated into the due process clause of the Fourteenth Amendment. The easiest way for the Ninth Circuit to have disposed of the Second Amendment challenge to the state law would have been to hold that the provision only applies to the federal government. Second, the last decision of the United States Supreme Court concerning the Second Amendment, *United States v. Miller*,<sup>114</sup> expressly held that the provision does not safeguard an individual's right to have firearms.<sup>115</sup> No Supreme Court decision has reconsidered this holding, and that should have been sufficient to decide the case. Third, even if the Second Amendment protects an individual right, it surely is not absolute. Restrictions on who has assault weapons would be justified no matter how the Second Amendment is interpreted. A petition for certiorari was filed in the Supreme Court in June 2003, and the Court will announce whether it will be hearing the case in the fall of 2003.

### III. CONCLUSION

It is difficult to generalize or even find themes in the work of any court of appeals, let alone one that consists of 26 judges with active status and numerous senior judges. Yet, the media constantly generalizes and portrays the Ninth Circuit as a liberal court out of the mainstream. By any measure, this is simply wrong. Statistics show that the Ninth Circuit is not reversed more than the national average for Supreme Court reversal of lower courts. Moreover, in its most high profile cases sometimes it rules in a fashion liberals would applaud, but sometimes it decides in a way that conservatives would favor. The only accurate generalization that can be made about the

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113. *Id.* at 1192–98 (Gould, J., specially concurring).

114. 307 U.S. 174 (1939).

115. *See id.* at 178.

Ninth Circuit is that its judges are ideologically diverse and the outcome of cases often depends on the identity of the panel.

