

Second Amendment Skirmish

One-man Constitutional Convention Stephen Reinhardt re-invents the Bill of Rights, deleting what he dislikes.

M A R K S . P U L L I A M

“A well-regulated Militia, being necessary to the security of a free State, *the right of the people to keep and bear Arms, shall not be infringed.*”

THIS, THE text of the Second Amendment, contains the most disputed 14 words in the entire U.S. Constitution — a dispute recently, and flamboyantly, displayed by the Ninth Circuit Court of Appeals. Does the Second Amendment confer an individual right to bear arms, as a bulwark against tyranny, or is it a collective right that applies only to state-run militias, to ensure their ability to suppress anarchy and rebellion? A large and growing number of constitutional law professors say the right is “individual” (including liberal guru Laurence Tribe), a view also held by U.S. Attorney General John Ashcroft and the Fifth Circuit Court of Appeals. The U.S. Supreme Court, however, and perhaps surprisingly, has never squarely decided the issue. In a remarkable recent rhetorical exchange within the Ninth Circuit, led on the “collectivist” side by the notorious (but indefatigable) leftist Stephen Reinhardt and on the “individual” side by libertarian Alex Kozinski, the differences between these positions were starkly presented, in terms rarely seen in judicial decisions.

The ruling, in *Silveira v. Lockyer*, upheld California’s sweeping ban on so-called “assault weapons” (in less inflammatory parlance, semi-automatic rifles with a magazine capable of holding more than 10 rounds, or having certain cosmetic features, a definition broad enough to include competition guns used by Olympic shooting teams). The ruling concluded that the Second

Amendment “protects the people’s right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use.” According to author Stephen Reinhardt, the framers of the Second Amendment were not trying to protect the rights of citizens as a check against tyrannical government (think Minutemen), but to empower the state equivalent of the BATF to suppress the Randy Weavers of the colonial era. Therefore, the nine individuals who sued to challenge California’s gun ban lacked “standing” to oppose the law because they had “no legally protectable interest under the Second Amendment.” In other words, gun owners cannot even go to court to protect their rights, because they have none. Under the reasoning of *Silveira v. Lockyer*, the Second Amendment is devoid of meaning as a practical matter, and would permit the government (state or federal) to ban private possession of all firearms, even those used exclusively for hunting or self-defense.

IN ADDITION to this controversial conclusion, which was consistent with prior Ninth Circuit precedent (*Hickman v. Block* in 1996), Reinhardt’s December 5, 2002, decision in *Silveira v. Lockyer* was notable for several reasons:

(1) it was excessively long, even by the verbose standards of contemporary judicial opinions, with 58 portentous footnotes and, altogether, filling more than 40 pages in the official reporter, an unnecessary effort when there is existing Ninth Circuit precedent on point;

(2) Reinhardt’s belabored historical exegesis was marred by citations to the “research” of former Emory University history Professor Michael Bellesiles, whose revisionist screed — *Arming America* — on the extent of colonial era gun ownership (rare, he falsely posited),

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THE FRONT LINE

Recall – yea or nay?

The recall ... Is it good? Will it work? These questions occupy the attention of conservative grass roots leaders, with advocates holding forth passionately, both pro and con. Will Feinstein run? Will booting out Gray Davis help or hurt Republicans? Might the GOP — and the state — be better off, they ask, leaving Davis atop the cauldron of swirling troubles and bubbling crises his tenure has produced?

The Democrats chose this guy to represent them, it is said, and the voters picked the Democrats' choice. Several conservative leaders see advantages in letting voters experience the full consequences of their decision to sanction four more years of Davis-dominated one-party rule. The result, it is argued, will lead to Republican gains lasting decades.

But then, others ask whether California can survive three more years of Gray Davis. He is inept, they say, corrupt, and vindictive, a sort of trifecta of bad character traits for a political leader. He is regarded as near legendary in his ability to transform simple problems into yawning catastrophes — electricity, the budget, workers' compensation, and, now, an emerging pension crisis. His reputation for failure is

hardening to diamond-grade imperviousness. What responsible Party, it is asked, could possibly fail to take every possible step to save the state?

Interestingly, few people seem to think the possibility of Davis surviving a recall election warrants serious consideration. The debate concerns itself almost exclusively with what to expect when, if the recall qualifies, the voters turn him out.



But — while organizational and activist leaders carry on this debate — the grass roots rank and file are doing what they do: being active, promoting the recall. At press time, the effort was already reportedly most of the way to its goal. It now seems safe to say the voters will vote on a Davis recall. The questions remaining are *when*: in a fall special, or as part of next March's Primary (the Primary's much larger likely Democrat turn-out favoring Davis)? and *what* will the election mean for California politics and

the conservative movement?

A note of caution for Republicans of the anti-recall, let-them-stew-in-the-mess-they've-made school: the Sacramento Democrats are busy changing election rules, trying to cut off Republican gains before they happen. Several recently-passed bills are designed to permit Democrats to challenge close elections, asking their judge friends to set them aside, potentially turning California into one perpetual Florida imbroglio, with disastrous consequences, they believe, perhaps justifiably, for Republicans.

So perhaps grass roots activists following their instinctive preference for action are on the right path to save their Party. Political outsiders' tactical job is always to stir up the comfortable establishment, and nothing could fill that order more thoroughly than a first-time-in-history gubernatorial recall, no matter what the outcome.

And anyway, nothing devalues political potency like inaction, especially in out-of-power parties. With the recall, Republicans (along with a lot of non-Republican Californians) are doing something, keeping busy, involved, making themselves relevant. In the end, the voters will still have the final word on Gray Davis's political fate and that of the state.

Let grass roots democracy take its course.

CPR