AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Individual Rights/Guns

**Duncan v. Beccera, No. 19-55376** (9th Cir. 2020)

 In 2016, by voter referendum, the state of California amended its criminal code in order ban the possession of large-capacity magazines *(LCM), defined as a firearm magazine capable of holding more than ten rounds of ammunition. The previous statute, adopted sixteen years earlier, banned the manufacture, importation, and sale of LCMs, but allowed continued possession of lawfully acquired LCMs. Private, civilian ownership of LCMs for both handguns and rifles is extremely common, and California was one of a handful of states that had adopted laws banning their possession.*

*Virginia Duncan, a gun owner who possessed LCMs, along with several other individuals, filed suit in federal district court seeking an injunction blocking the enforcement of the ban. She won a preliminary injunction, with was affirmed by the federal circuit court. The district court subsequently struck down the statute as a violation of the second amendment of the U.S. Constitution. The state appealed, and a divided circuit court panel again affirmed the trial court and struck down the ban on the possession of LCMs.*

JUDGE LEE.

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The state of California has latitude in enacting laws to curb the scourge of gun violence, and has done so by imposing waiting periods and many other limitations. But the Second Amendment limits the state’s ability to second-guess a citizen’s choice of arms if it imposes a substantial burden on her right to self-defense. Many Californians may find solace in the security of a handgun equipped with an LCM: those who live in rural areas where the local sheriff may be miles away, law-abiding citizens trapped in high-crime areas, communities that distrust or depend less on law enforcement, and many more who rely on their firearms to protect themselves and their families. California’s almost-blanket ban on LCMs goes too far in substantially burdening the people’s right to self-defense. We affirm the district court’s summary judgment, and hold that California Penal Code section 32310’s ban on LCMs runs afoul of the Second Amendment.

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The Ninth Circuit assesses the constitutionality of firearm regulations under a two-prong test. This inquiry “(1) asks whether the challenged law burdens conduct protected by the Second Amendment and (2) if so, directs courts to apply an appropriate level of scrutiny.” *United States v. Chovan* (9th Cir. 2013).

To determine whether the law burdens protected conduct, this court appears to ask four questions. First, as a threshold matter, we determine whether the law regulates “arms” for purposes of the Second Amendment. Second, we ask whether the law regulates an arm that is both dangerous and unusual. If the regulated arm is both dangerous and unusual, then the regulation does not burden protected conduct and the inquiry ends. Third, we assess whether the regulation is longstanding and thus presumptively lawful. And fourth, we inquire whether there is any persuasive historical evidence in the record showing that the regulation affects rights that fall outside the scope of the Second Amendment. If either of these latter questions is found in the affirmative, the law does not burden protected conduct and the inquiry ends.

If a court finds that a regulation burdens protected conduct, then it must proceed to the second prong of analysis and determine the appropriate level of constitutional scrutiny. This, in turn, requires the court to ask two more questions. First, we ask how “close” the challenged law comes to the core right of law-abiding citizens to defend hearth and home. And second, we analyze whether the law imposes substantial burdens on the core right. If a challenged law does not strike at the core Second Amendment right or substantially burden that right, then intermediate scrutiny applies. . . .

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Firearm magazines are “arms” under the Second Amendment. Magazines enjoy Second Amendment protection for a simple reason: Without a magazine, many weapons would be useless, including “quintessential” self-defense weapons like the handgun. *Heller v. District of Columbia* (2008). . . .

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We next determine whether LCMs are arms that fall outside the scope of the Second Amendment. *Heller* provides that some arms are so dangerous and unusual that they are not afforded Second Amendment protection. But not so for LCMs. The record before us amply shows that LCMs are commonly owned and typically used for lawful purposes, i.e., not unusual.

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[N]early half of all magazines in the United States today hold more than ten rounds of ammunition. And the record shows that such magazines are overwhelmingly owned and used for lawful purposes. This is the antithesis of unusual.

That LCMs are commonly used today for lawful purposes ends the inquiry into unusualness. But the record before us goes beyond what is necessary under *Heller*: Firearms or magazines holding more than ten rounds have been in existence — and owned by American citizens — for centuries. . . .

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The state claims that LCMs fall outside the scope of the Second Amendment because they are “most useful in military service.” But that claim misses its mark. The state relies on a Fourth Circuit case in which a sharply divided court held that LCMs are not arms protected by the Second Amendment because they are “most useful in military service.” *Kolbe v. Hogan* (4th Cir. 2017). *Kolbe* remains an outlier, and other circuits have rejected its analysis. . . .

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Some firearm prohibitions are presumptively lawful because of their longstanding nature. *Heller* lists three types of permissible regulations that are presumptively consistent with the Second Amendment: prohibitions on possession by the mentally ill or felons, laws forbidding carriage in sensitive places, and laws that place qualifications on commercial sales of firearms. . . .

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Section 32310 cannot be considered a longstanding regulation that enjoys presumptive legality. As noted above, when the Founders ratified the Second Amendment, no laws restricted ammunition capacity despite multi-shot firearms having been in existence for some 200 years. Only during Prohibition did a handful of state legislatures enact capacity restrictions.10 As the Third Circuit noted, “LCMs were not regulated until the 1920s, but most of those laws were invalidated by the 1970s.”

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The record before us provides no persuasive historical evidence showing that LCM possession is understood to fall outside the scope of the Second Amendment. As discussed above, the historical record shows that LCM restrictions are modern creations.

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*Heller* held that the “core” Second Amendment right is for law-abiding citizens to defend hearth and home. This is a simple inquiry: If a law regulating arms adversely affects a law-abiding citizen’s right of defense of hearth and home, that law strikes at the core Second Amendment right. . . .

Section 32310 strikes at core Second Amendment rights. By banning LCMs everywhere for nearly everyone, it necessarily bans possession of LCMs within the home where protections are “at their zenith.” . . .

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The state essentially invites us to engage in a policy decision that weighs the pros and cons of an LCM ban to determine “substantial burden.” . . . But the Supreme Court in *Heller* took any such policy-balancing notion off the table: “The very enumeration of the right takes out of the hands of government — even the Third Branch of Government — the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges’ assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”

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Turning to whether section 32310 imposes a substantial burden on the Second Amendment, the record makes that answer plainly obvious. Half of all magazines in America are prohibited under section 32310. The state threatens imprisonment if law-abiding citizens do not alter or turn them over. It does not matter that LCMs come standard for guns commonly used for self-defense, or that law-abiding citizens may have owned them lawfully for years or even decades. When the government bans tens of millions of protected arms that are staples of self-defense and threatens to confiscate them from the homes of law-abiding citizens, that imposes a substantial burden on core Second Amendment rights.

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More fundamentally, no court would ever countenance similar restrictions for other fundamental rights. The nub of the state’s position is that even though it bars Californians from owning one of every two magazines in the United States, that restriction is not substantially burdensome because Californians can still possess other magazines. But no court would hold that the First Amendment allows the government to ban “extreme” artwork from Mapplethorpe just because the people can still enjoy Monet or Matisse. Nor would a court ever allow the government to outlaw so-called “dangerous” music by, say, Dr. Dre, merely because the state has chosen not to outlaw Debussy. And we would never sanction governmental banning of allegedly “inflammatory” views expressed in *Daily Kos* or *Breitbart* on the grounds that the people can still read the *New York Times* or the *Wall Street Journal*.

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More broadly, the government’s argument misses the mark because the Second Amendment limits the state’s ability to second-guess the people’s choice of arms if it imposes a substantial burden on the right to self-defense. . . .

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California Penal Code section 32310 cannot withstand strict scrutiny analysis because the state’s chosen method —a statewide blanket ban on possession everywhere and for nearly everyone — is not the least restrictive means of achieving the compelling interests.

[S]ection 32310 provides few meaningful exceptions for the class of persons whose fundamental rights to self-defense are burdened. The scope of section 32310 likewise dooms its validity. Section 32310 applies statewide. It necessarily covers areas from the most affluent to the least. It prohibits possession by citizens who may be in the greatest need of self-defense like those in rural areas or places with high crime rates and limited police resources. It applies to nearly everyone. It is indiscriminating in its prohibition. Nor is the law limited to firearms that are not commonly used for self-defense. These are not features of a statute upheld by courts under the least restrictive means standard.

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Section 32310 fails intermediate scrutiny for many of the same reasons it fails strict scrutiny. Even with the greater latitude offered by this less demanding standard, section 32310’s fit is excessive and sloppy. . . .

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*Affirmed*.

JUDGE LYNN, dissenting.

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California was not the first city or state to ban the possession of large capacity magazines (“LCMs”), and this panel is not the first (even within this Circuit) to address the constitutionality of such bans. A panel of this Court previously affirmed a district court’s refusal to preliminarily enjoin the City of Sunnyvale’s ban on LCMs, and six of our sister Circuits have held that various LCM restrictions are constitutional. *Fyock v. City of Sunnyvale* (9th Cir. 2015). . . .

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California argues that § 32310 does not burden conduct protected by the Second Amendment. Rejecting those arguments, the majority holds that it does. I assume this holding to be correct. As this Court previously held, “our case law supports the conclusion that there must also be some corollary, albeit not unfettered, right to possess the magazines necessary to render those firearms operable.” . . .

. . . . Section 32310 “restricts possession of only a subset of magazines that are over a certain capacity. It does not restrict the possession of magazines in general such that it would render any lawfully possessed firearms inoperable, nor does it restrict the number of magazines that an individual may possess.” *Fyock*. . . . 32310 does not place a substantial burden on core Second Amendment rights because it does not prevent the use of handguns or other weapons in self-defense.

. . . . . Unlike the law at issue in *Heller* . . . —and contrary to the majority’s characterization of California’s law — 32310 does not ban an entire “class” of arms. “LCMs” are not a separate “class” of weapons; they are simply larger magazines. . . .

. . . . The difference between using a handgun versus a rifle for self-defense, for example, is much more significant than the difference between using a magazine that holds eleven rounds versus a magazine that holds ten rounds. For this reason, the prohibition on LCMs is more analogous to a restriction on *how* someone exercises their Second Amendment rights, by restricting the number of bullets a person may shoot from one firearm without reloading. “[L]aws which regulate only the ‘*manner* in which persons may exercise their Second Amendment rights’ are less burdensome than those which bar firearm possession completely.”

Because I would find that § 32310 does not substantially burden the core Second Amendment right, I would apply intermediate scrutiny. . . .

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“When considering California’s justifications for the statute, we do not impose an ‘unnecessarily rigid burden of proof,’ and we allow California to rely on any material ‘reasonably believed to be relevant’ to substantiate its interests in gun safety and crime prevention.” . . .

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. . . . Just like the ban on particular types of ammunition in *Jackson v. City and County of San Francisco* (9th Cir. 2014) was “a reasonable fit for achieving its objective of reducing the lethality of ammunition because it targets only that class of bullet which exacerbates lethal firearm-related injuries,” 32310 is a reasonable fit for achieving the state’s objective because it targets only the types of magazines most likely to present increased risk.

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