The Lower Federal Courts and the Second Amendment:

What Constitutes a Reasonable Regulation?

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In this essay I will discuss at some length the recently issued decision in Duncan v. Becerra (2019), a case decided by Judge Roger Benitez of the United States District Court for the Southern District of New York on 4 April, 2019. In this remarkable decision Judge Benitez struck down California’s recently passed ballot measure that banned possession of firearms magazines with a capacity of more than ten rounds. Roughly one week later Judge Benitez held a press conference at which he announced that he would be temporarily suspending the enforcement of his decision while the California Attorney General appealed the decision to a panel of judges for the 9th Circuit Court of Appeals. In his statement he noted that “The court understands that thoughtful and law-abiding citizens can and do firmly hold competing opinions on firearm magazine restrictions. These concerns augur in favor of judicial deliberation. There is an immeasurable societal benefit of maintaining the immediate status quo while the process of judicial review takes place” (Casiano, 2019: 2).

The people of California, in November of 2016, passed a ballot initiative (Proposition 63) that banned possession of large-capacity firearms magazines (defined in this case as more than ten rounds). In June of 2017 Judge Benitiz issued a preliminary injunction against California’s Attorney General, Becarra, enjoining him from enforcing said ban because it was very likely that the ban violated the 2nd Amendment, the due process clause of the 5th Amendment, and that same amendment’s takings clause. A three-judge panel for the 9th Circuit Court of Appeals then upheld that ruling as not abusive of a federal trial court’s discretion on such issues. Then Judge Benitez issued his final ruling in the case, Duncan v. Becerra (2019), ruling that yes, indeed, Proposition 63, insofar as it banned possession of high-capacity firearms magazines, did indeed violate various provisions of the U.S. Constitution—first and foremost, of course, the 2nd Amendment.

What I want to accomplish here is a review and critique of Judge Benitez’s opinion in the instant case—and in so doing I hope to generate some useful insights into how we might think about the 2nd Amendment and gun control laws in a post-Heller and –McDonald America. In D.C. v. Heller (2008), of course, the U.S. Supreme Court held, for the first time, that the 2nd Amendment protects not only the members of well-organized state militias to bear firearms, it also protects every citizen’s right to possess them. And this landmark ruling was applied to the states (and therefore local governments) in McDonald v. Chicago (2010). The issue at hand quickly became, for the lower federal courts, how exactly is the individual right to keep and bear arms to be evaluated against the right of governments to impose reasonable regulations on this right? And the Court itself offered relatively little guidance on this question, other than a vague reference to the obvious argument that all rights can be regulated in reasonable fashion by the government.

What most federal courts have done, in the wake of both Heller and McDonald, is to articulate two applicable standards that can be used to evaluate state, local, and federal gun control laws. If a gun control law strikes at the very heart of the right to keep and bear arms, then the legal test to be applied is that of strict scrutiny—does the government have a compelling interest in issuing this regulation, and are they achieving this compelling interest in as narrow a fashion as possible? Let us say, for example, that a city decided to ban possession of all handguns. That would be an easy example of a law that strikes at the very essence of the right to keep and bear arms. A reviewing court would then ask two questions of that government—do you have a compelling interest in this ban and, if yes, is that ban the least restrictive method of achieving said interest? The bias here, of course, would be against such gun control laws.

If, on the other hand, a gun control statute was less invasive of the right to keep and bear arms—let’s say, for example, that a government decided to require a 10-day waiting period on firearms purchases, and during those ten days a background check would be performed by the applicable governmental authority. That would probably be judged to NOT strike at the core of the right to keep and bear arms, and the applicable legal standard would be that of intermediate scrutiny—does the government have an important interest that is being substantially advanced by the law in question? This legal standard, of course, is designed to be more forgiving towards gun control laws passed by democratically elected bodies at whatever level of government.

Judge Benitez, put on the court by President George W. Bush, is a Cuban American conservative who, during his nomination process, was described by an ABA (American Bar Association) investigator as “arrogant, pompous, condescending, impatient, short-tempered, rude, insulting, bullying, unnecessarily mean, and altogether lacking in people skills” (San Diego Union-Tribune, 2004: 1). The ABA, in fact, gave him a “not qualified” rating. He nevertheless went onto the federal bench for the District Court for the Southern District of California.

Judge Benitez begins his analysis of the ban on high-capacity gun magazines by quoting, pretty far out of context, a passage from Senator Ted Kennedy’s comments during the Senate’s confirmation hearing for Clarence Thomas back in 1987. Judge Benitez prefaces Kennedy’s very broad comments about the importance of the courts in protecting and defending individual rights by telegraphing his conclusion in the instant case: “Individual liberty and freedom are *not* outmoded concepts” (Duncan, 2019: 1). I suspect that Judge Benitez was, and still is, incensed by Judge Bork’s treatment by the U.S. Senate from back in the day, and is using this material as a way to troll the liberal political establishment.

Benitez then recounts several stories of ordinary people fighting back against armed intruders via the use of firearms. In each case the homeowner was a woman, and in one it was a single mother and her kids. And in each case the homeowner ran out of ammunition and was unable to reload. There can be no doubt that these are factual stories. But of course one is left to wonder why Judge Benitez told these particular stories and not other stories that might be equally factual. One can only infer that telling other stories (such as, for example, cases where a gun in the home is used to commit suicide, or is used against a family member, either intentionally or mistakenly, or is found by child who then accidentally kills themselves, etc.) might undercut the broader narrative that Benitez wants to communicate here—that the best solution to a bad guy with a gun is a good guy, or gal, with a gun. To Benitez’s credit he does note that the data reveal that the plurality of armed home invasions take place in residences occupied by single mothers with their children.

Benitez emphasizes that the 2nd Amendment protects, among other things, the right to use firearms to protect “hearth and home” (4). He also points out that law enforcement cannot be in all places at all times in terms of providing protective services to we the people, and too often, in cases of armed home invasions, they only arrive in time to clean up the scene of the crime and start gathering evidence. As such, he argues, it behooves the courts to interpret the 2nd Amendment as broadly as possible.

Notably, Judge Benitez then argues that “government may gain compliance from its people by forcibly disarming all” (5). He footnotes this claim by referencing the infamous Nazi ban on firearms possession by Jews after the “horrific Night of Broken Blass” (5). This seems a bit much for the case at hand, and the employment of such fiery and loose rhetoric might fit better coming from, let’s say, the mouth of Sean Hannity or perhaps the leader of the National Rifle Association.

Benitez acknowledges the terrible impact of mass shootings in America, but expresses concern that these stories receive far more media attention than the more common cases of ordinary citizens fighting off armed intruders in their homes. In the judge’s estimation, if a citizen believes that they can better protect themselves by owning and using a gun magazine holding more than ten rounds of ammunition, that is a judgement that the government may not second-guess without violating the 2nd Amendment as it has been interpreted by the Supreme Court in both Heller and McDonald.

Judge Benitez also takes issue with the dense thicket of legal language governing high-capacity magazines in California. He concludes, after reviewing the many applicable regulations, that it is “enough to make an angel swear” (12). No doubt, albeit I suspect that this analysis would apply to state, local, and federal laws and regulations in general. Anyhow, Benitez interprets this legal complexity as putting California’s regulations on high capacity magazines in violation of the due process clause of the 5th Amendment. One is forced to wonder here if this might be highly selective application of the due process clause, and if perhaps the vast majority of laws and regulations aimed at a wide variety of issues might be similarly legally defective under this level of review.

I should emphasize here that the plaintiffs challenging California’s gun control law are seeking summary judgement—a standard of view that heavily favors the defendant, since such a legal motion cannot be granted unless there are no issues of material fact and the law decisively favors the plaintiff, even when the evidence and the law are to be construed in a way most generous to the defendant. In short, the legal standards for summary judgement are designed to apply only in extraordinary circumstances, since the issuance of such a judgement assumes that there is no factual or legal ambiguity in a dispute. And yet, despite Judge Benitez’s later statement that “thoughtful and law-abiding citizens can and do firmly hold competing opinions on firearm magazine restrictions” (2019), he reaches the conclusion that in the instant case there are no ambiguities at all, and that the law and the facts decisively favor the plaintiff’s claim that California’s gun control measure violates the U.S. Constitution.

Judge Benitez next seeks to determine the appropriate legal standard to use in this case vis-à-vis the 2nd Amendment. He seizes upon Justice Kavanaugh’s *dissent* to argue that the applicable standard is that of what he calls the “simple” Heller test: “Is the firearm hardware commonly used? Is the hardware commonly owned by law-abiding citizens? Is the hardware owned by those citizens for lawful purposes?” (15). If the answer to all three questions is “yes,” then the test is over and the hardware in question is protected. He concludes that “The simple test applies because a magazine is an essential mechanical part of a firearm. The size limit directly impairs one’s ability to defend one’s self” (15). It is not, in his view, a close question. The gun control law in question clearly and unequivocally violates the 2nd Amendment.  
 Benitez does suggest that perhaps (but only perhaps) a ban on, let’s say, magazines holding 100 rounds, or 50 rounds, or even 30 rounds, MIGHT survive the simple Heller test, since such magazines are probably unusual—but he also cautions that the state in the instant case presented no credible evidence on this particular issue.

Judge Benitez slaps down the state’s argument that high-capacity magazines conjoined with a gun or rifle are so lethal that the regulation in question is reasonable by making the Hayekian argument that yes, indeed, these weapons ARE lethal, but the 2nd Amendment protects exactly this lethality, since it doesn’t “exist to protect the right to bear down pillows and foam baseball bats” (21).

Benitez then takes what I consider to be a cheap shot at the statute by arguing that apparently the state considers a magazine holding eleven rounds to be too lethal, but one holding ten rounds is fine. That is really the nature of laws and regulations in general—lines often have to be drawn, and anywhere you draw that line will be subject to the exact same critique—that the line is somewhat arbitrary. Why is the drinking age, for example, 21? Why not twenty years and seven months and three days? Why not 22? And on and on and on. His argument, on its face, seems fair enough, but it is a universally applicable critique of many laws and regulations—and if applied in similar fashion across the board, it’s hard to see how many of these other statutes could survive the same level of review.

Benitez next argues that the slippery slope of gun regulation must be stopped in the instant case: “Artificial limits will eventually lead to disarmament. It is an insidious plan to disarm the populace” (22). Again, as before, this strikes me as the kind of rhetoric more befitting a pundit on either AM radio or Fox News/The Daily Caller/Breitbart rather than the kind of argument we might expect from a federal judge. Perhaps, one is tempted to speculate, Judge Benitez is addressing an audience of one, where that audience member has the power to elevate Benitez from his current position to a spot on the 9th Circuit Court of Appeals.

A further example of the hyperbolic approach employed by Judge Benitez can be found in his claim that the California statute in question “disenfranchises approximately 39 million state residents” (34). That seems like a Trumpian exaggeration akin to the claim that the inauguration of our sitting President was the largest ever. It strikes me as unlikely in the extreme that 39 million Californians currently own, or want to own, one or more high-capacity magazines for their firearms. In fact, based on what we know about gun ownership trends in the U.S., the trajectory is for fewer and fewer Americans to own firearms, while those who do own guns possess more and more of them. So what we are really talking about is probably a very small subset of 39 million people.

Judge Benitez acknowledges that the 9th Circuit Court of Appeals utilizes the more standard interpretation of Heller and McDonald. That is, federal courts in cases like this use the same three levels of tests used under the 14th Amendment’s equal protection clause: Strict scrutiny, intermediate scrutiny, and rational review. And generally speaking most courts settle on the use of intermediate scrutiny to evaluate gun control laws. That is, the burden of proof is on the government to demonstrate an important interest that is substantially advanced by the law in question. Benitez opines that “It is an overly complex analysis that people of ordinary intelligence cannot be expected to fully understand” (36). He concludes that it is the wrong test, but also argues that “the statute fails anyhow” (ibid).

Benitez concludes that the law in question actually falls under the strict scrutiny standard, assuming, that is, that one is determined to discard the appropriate standard (the simple Heller test). The ban on high-capacity magazines strikes at the very core of the 2nd Amendment right to keep and bear arms for self-defense, and it imposes a severe burden on that right. As such, the state must demonstrate a compelling interest that is advanced as narrowly as possible. And this the state fails to do. They neither advance a compelling interest nor do they do so in a way that is narrowly tailored.

Benitez, in making the case that strict scrutiny is the second-best test to use here, argues that “When a major earthquake causes power outages, gas and water-line ruptures, collapsed bridges and buildings, and chaos, the burden of a 10-round magazine limit is severe. When food distribution channels are disrupted and sustenance becomes scarce while criminals run rampant, the burden of a 10-round limit is severe” (40). Dang. Very “Blade Runner” of the judge here. If he sees “Bird Box” or “A Quiet Place” or “The Road” he is gonna LOSE it. Under the scenarios he sketches out here, it can be hard to see how the government could even justify restrictions on things like armored tanks, nuclear weapons, anthrax, etc. Hey, when civilization slides south, we the people will need to protect ourselves by any means necessary!

Judge Benitez is mildly troubled by a precedential case in the 9th Circuit, Fyock, but dismisses this holding (where a local ordinance banning high capacity magazines was upheld using intermediate scrutiny) by arguing that it is a “fact-bound” case that can be distinguished from the instant case (42). It’s a very old trick that lawyers and judges use when confronted with an inconvenient precedent—they distinguish it from their case by arguing that the fact pattern is significantly different. Maybe, but then again, if we take this distinguishing logic to the end of the legal road then ALL precedential cases are fact-bound and unique in and of themselves.

I should also note here that Fyock was a case where a trial court’s decision to use intermediate scrutiny when evaluating a ban on high-capacity magazines was upheld on appeal. Notably, of course, the standard used on appeal is whether or not the trial court abused their discretion in reaching legal conclusions in a case—and the appellate court found that the trial court did not abuse their discretion in settling on intermediate scrutiny as the appropriate standard. So Benitez is right to not accord the 9th Circuit Court’s decision in Fyock decisive weight, albeit I do think the appellate decision has at least some precedential weight, contra Benitez’s claim that it has no weight at all.

Benitez concedes that the state of California DOES advance an important government interest, but they do not do so in a way that substantially advances that interest. That is, even IF the applicable standard is that of intermediate scrutiny (which he opposes with every fiber of his being, but he wants to cover all the bases here in case his decision is appealed), the statute in question still fails. There is not, he concludes, a “reasonable fit” (45) between the government’s objective and the method used to advance that interest. In fact, Benitez opines, the state actually presents a very thin evidentiary argument that makes the case for the other side: “The AG’s evidence demonstrates that mass shootings in California are rare, and its criminalization of large capacity magazine acquisition and possession has had no effect on reducing the number of shots a perpetrator can fire” (51).

Judge Benitez wants to make it abundantly clear that the court owes no great deference to the judgement of the California legislature for two reasons: One, the bulk of the ban on high capacity magazines came via a ballot measure, and ballot measures are not governed by the general principle of courts being pretty deferential to legislative bodies. And two, even though part of the statute indeed comes from the legislature, that doesn’t mean that courts cannot hold the government to a high level of proof on the issue of reasonable fit—and the state fails, utterly, to make the case that there is a reasonable fit between the ban and their admittedly important interest in protecting we the people from mass shootings.

Judge Benitez, in reviewing the recommendations that came from the tragic shooting at Sandy Hook shooting, does acknowledge that banning incendiary and armor-piercing bullets is actually a good idea—but that same commission’s conclusion that a ban on high-capacity magazines is also a good idea fails to specify an exact size limitation.

Judge Benitez concludes his epic opinion in Duncan by killing the victim a third time. That is, it wasn’t enough to conclude that the law in question violated the due process clause and the 2nd Amendment. Benitez, determined to ensure that California’s gun control law is good and dead, administers a third kill shot. The law, he argues, also violates the 5th Amendment’s protections for private property. In short, the ban on not only the purchase but also possession of high-capacity magazines allows the state to forcibly dispossess people of any magazines capable of holding more than ten rounds.

It is not true, Benitez argues correctly, that the state exercising is police powers somehow insulates it from the takings provisions of the 5th Amendment. And the clause here, he argues, is very straightforward—the state wishes to force the surrender of legally acquired (pre-ban) high-capacity magazines for public use—which is permissible, but only if the government provides “just compensation” for said acquisition. And this the law fails to provide for.

Boom—three strikes and the state ban on the acquisition and possession of high-capacity gun magazines is out.

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