

The Swerve to “Guns Everywhere:” A Legal and Empirical Evaluation

John J. Donohue¹

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Abstract

Over the past forty years, there has been an astonishing shift in the American legal landscape on the issue of carrying of concealed handguns outside the home. At the start of that period most states – with strong Republican backing -- either prohibited or at least regulated the practice. Today, the large majority of states confer the “right-to-carry” with little or no restriction, and many argue, with limited but increasing judicial support, that there is an individual right under the Second Amendment to carry guns outside the home. One argument used to justify this development was that good guys with guns would quickly thwart mass shootings in the U.S., yet since the end of the federal assault weapons ban in 2004, deaths from mass shootings have been rising sharply – even as lawful gun toting has increased substantially. Moreover, a growing body of evidence suggests that allowing expanded gun access outside the home has elevated violent crime. This paper discusses the empirical evidence on these issues and argues that courts considering constitutional decisions that may impose large social costs in terms of increased gun massacres and violent crime should reflect on this evidence in interpreting the Second Amendment.

There has been a profound shift in the legal landscape concerning firearms over the last forty years. Before then, substantial state restrictions – even complete prohibitions -- on gun carrying were quite common and they enjoyed considerable support among Republican voters and politicians. Today, there is a strong “guns everywhere” element in almost all states, and Republicans – or at least Republican politicians -- feel compelled to articulate and advance this mission.

No current Republican office holder would have the temerity to state “I have never believed in the general practice of carrying weapons,” while praising state gun control laws in Congress. But NRA President Karl T. Frederick, 1920 Olympic gold-medal winner for marksmanship and then lawyer, so stated while testifying in support of the 1934 federal gun control act. He went on to articulate a belief that today’s NRA and Republican office holders would find horrifying: “I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.”

¹ Thanks to Theodora Boulouta, Trevor Hastie, and Rob Tibshirani for helpful comments and suggestions on aspects of this paper.

Today the denunciations of communist leanings would abound if Alexandria Ocasio Cortez were to proclaim: “There’s no reason why on the street today a citizen should be carrying loaded weapons.” Guns are “a ridiculous way to solve problems that have to be solved among people of good will.” The pro-gun forces would thunder scornful attacks against anyone who could spout such anti-American nonsense. But this proclamation came from Ronald Reagan in May 1967.²

The renowned conservative Republican and former Chief Justice of the U.S. Supreme Court Warren Burger [told](#) PBS’ News Hour in late 1991 that the Second Amendment “has been the subject of one of the greatest pieces of fraud, I repeat the word fraud, on the American public by special interest groups that I have ever seen in my lifetime.” Burger was dismayed at the attempts to thwart reasonable gun control measures with what he considered to be phony and absurd interpretations of the Second Amendment. Despite acknowledging that he was “a gun man. I have guns. I have been a hunter ever since I was a boy,” Burger continued: “Someone asked me recently if I was for or against a bill which was pending in Congress calling for five days waiting period. I said ‘Yes, I’m very much against it. It should be a 30-day waiting period, ‘till they find out why this person needs a handgun or a machine gun.’”³

A similar sentiment was captured in the remarks of former Nixon solicitor general Erwin Griswold, when he stated: “To assert that the Constitution is a barrier to reasonable gun laws, in the face of the unanimous judgment of the federal courts to the contrary, exceeds the limits of principled advocacy. It is time for the NRA and its followers in Congress to stop trying to twist the Second Amendment from a reasoned (if antiquated) empowerment for a militia into a bulletproof personal right for anyone to wield deadly weaponry beyond legislative control.” These remarks came from a ‘lifelong Republican with a background of Midwest conservatism,’ who ‘is built like a granite block and is just as inflexible in his conceptions of basic rectitude.’”⁴

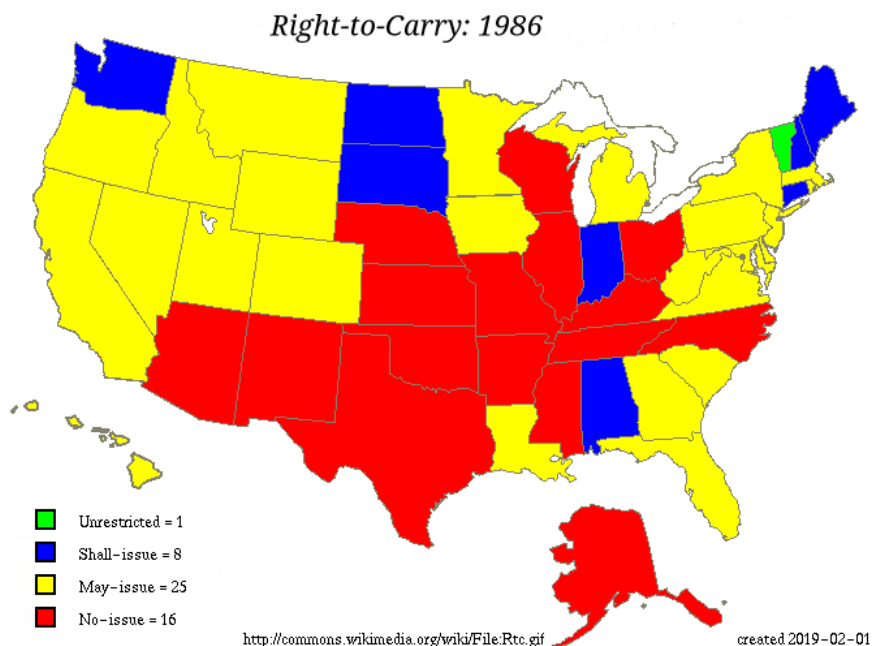
By the mid-1970s, 45 states and the District of Columbia either banned concealed carry of firearms, or restricted it to those who could establish themselves to be an appropriate candidate for a concealed carry permit. As late as 1986, 16 states completely prohibited private gun carrying and all but eight required some government scrutiny to determine if someone should be allowed to carry a gun outside the home. (See Figure 1.)

² https://www.salon.com/2013/01/23/7_uncovered_quotes_that_reveal_just_how_crazy_the_nras_become/
Indeed, Ronald Reagan was also in favor of the Brady bill that was named after his former press secretary who took a bullet to the head during the attempted assassination of Reagan by John Hinckley.

³ <https://www.berkshireeagle.com/stories/burger-saw-through-the-gun-fraud,422093>

⁴ Dennis Hevesi, “Erwin Griswold Is Dead at 90; Served as Solicitor General,” *The New York Times*, 21 November 1994.

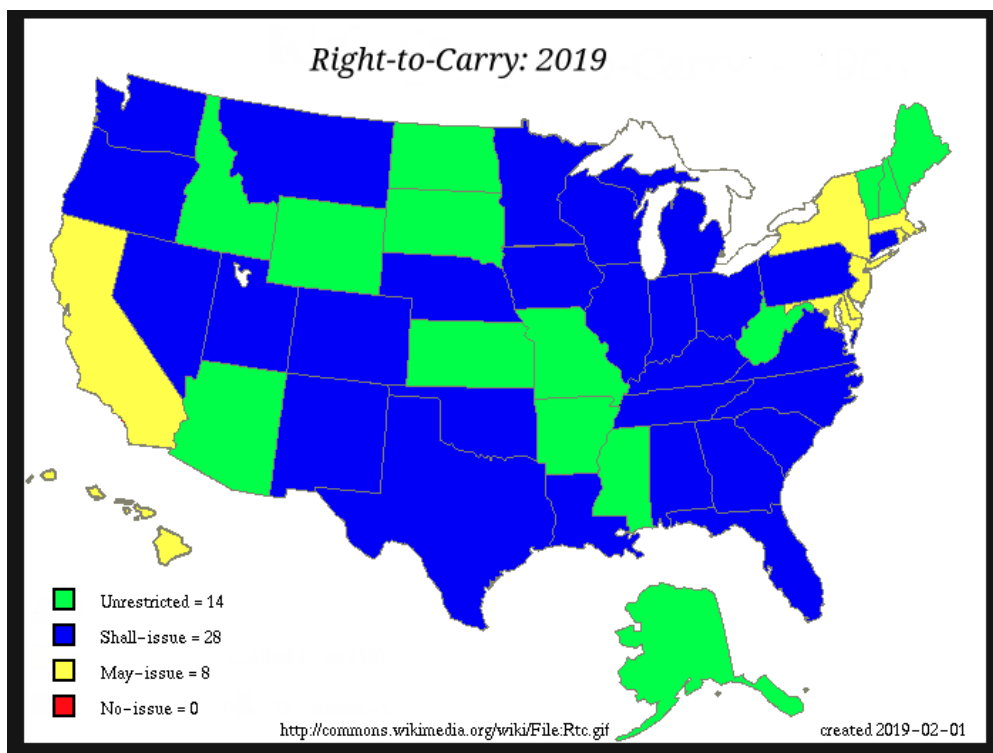
Figure 1



Jump to today and all state prohibitions on gun carrying have been eliminated and Figure 2 shows the 14 states that had removed all restrictions on who can carry within the state at the time this article was first being drafted. Since then Kentucky and Oklahoma have also become “permitless carry” states. So, for example, any 19 year old in Missouri is allowed to carry a concealed weapon without securing a permit, establishing good character or any need for a weapon, or having any training in its use. When the University of Missouri tried to enforce its 60 year old ban of guns on campus to avoid having armed 19 year olds in the classrooms and roaming its campus, it was sued – and the Missouri Attorney General argued that the Constitution called for overturning the ban. On November 18, 2019, the trial court sustained the ban but the fact that the University of Missouri had to spend considerable resources to hire expert witnesses and a private law firm (since the typical defense by the state Attorney General was absent) and go through a trial to sustain a gun ban on a university campus that has been in place for this long indicates the changed world we live in today.⁵ The implicit tax on wise policy that

⁵ The Court held that the gun ban was subject to strict scrutiny but found that the University had made a sufficient showing to withstand strict scrutiny under the Missouri constitution. The Court noted that University of Missouri Police Chief Doug Schwandt graduated first in his class from the police academy, was trained at the FBI Academy at Quantico, and is a firearms enthusiast and accomplished marksman, having received the highest marksmanship score of anyone in his police academy class and having served as a firearms instructor. Based on this wealth of knowledge in addition to his 40 years of experience in law enforcement, the Chief testified that he was

Figure 2



gun interests now impose on state and local governments and public universities is not inconsiderable, prompting many to go along with allowing promiscuous access to guns that officials are confident will be socially harmful.

I. Stopping Mass Shootings

A. Myth and Reality

One of the alleged benefits of this shift to unrestricted rights to carry guns outside the home is that the threat of public mass shootings would be greatly reduced.⁶ Not only would the good


"unequivocally" opposed to changing the gun ban, because guns on campus "would have nothing but adverse impacts in countless ways." Chief Schwandt testified that "when guns are stolen, and guns are stolen all the time out of cars, they are used in crimes," adding that was "not my assumption. That's my experience." He further testified that an active shooter scenario is "already a very extremely challenging arena now in the law enforcement community" and that changing the Rule would "make[] it more complex and make[] it even more difficult." Moreover, as I testified and the judge found, every element of the opposing statistical expert's testimony was consistent with the police chief's opinion that guns on campus would elevate violent crime. *State of Missouri v. Mun Choi*, Circuit Court of Boone County, Missouri (Nov. 18, 2019).

⁶ John Lott originally advanced this argument, and the NRA made it a rallying cry after the killing of 26 at Sandy Hook Elementary School in Newtown, Connecticut in December 2012.

guys with guns quickly end any threat once a shooting started, but the realization that their homicidal visions would not be achieved would greatly discourage any such criminal conduct.

The gun lobby tries to encourage this way of thinking, since it advances a very benign, even heroic, vision of gun toters that can usefully be invoked against any efforts to enact gun safety measures. It also promotes sales to those looking for what might seem to be an easy path to an elevation in status as the hero who thwarts a crime. The advertisement shown in Figure 3 tries to convey the sense of the wholesome gun carrier who will provide a protective shield to all those around him.

Figure 3

A photograph of a young man with short brown hair, smiling at the camera. He is wearing a blue t-shirt and has a grey backpack strap visible over his right shoulder. The background is plain white.

**I CARRY A
CONCEALED FIREARM.**

I take my firearm
into "GUN FREE" zones
FOR YOUR PROTECTION.
(It's called Civil Disobedience.)

I won't be a victim,
And I won't let you
be a victim either.

**TAKE THE PLEDGE!
use the hashtag
#CCW247**

But the smiling visage can distract from the broader reality of the consequences of the dramatic expansion of gun carrying in the United States. Whatever element of the imaginary advertisement is useful for thinking about this shift in policy, it is perhaps more instructive to consider actual cases that can provide a more complete picture. For example, as Figure 4 indicates, one very real downside of the guns everywhere movement is the resulting impact on accidental deaths. The Figure shows a six-year-old girl who was killed in the family car outside of Atlanta in April 2019 when her *younger* brother grabbed a gun from the car's center console on the way to his baseball game and shot his sister in the head.⁷

⁷ <https://www.ajc.com/news/breaking-news/breaking-year-old-girl-dies-days-after-accidental-shooting-paulding-county/E7UeP5AijlUqfbq8lXRqcl/#>. See also, <https://www.washingtonpost.com/crime-law/2019/02/04/year-old-found-loaded-gun-shot-his-pregnant-mother-face-police-say/> (4-year-old boy accidentally shoots his pregnant mother after finding a loaded handgun in their suburban Seattle home in February 2019); <https://www.local10.com/news/local/2019/12/12/child-accidentally-shoots-mother-in-fort-lauderdale-parking-lot/> (young child shoots mother with gun found in car as they sit with another small child in a store parking lot in Fort Lauderdale on December 12, 2019); https://www.state-journal.com/coroner-woman-fatally-shoots-younger-sister-in-pikeville/article_b8b2472c-68ba-5cef-af78-f56837ba02ce.html (16-year-old Gabrielle May McCoy was accidentally killed by her 18-year-old sister at her home as they examined a gun in Kentucky in June 2019); <https://www.newsweek.com/michigan-ypsilanti-township-shooting-home-intruder-husband-wife-washtenaw-county-sheriffs-office-1449213> (husband kills wife thinking she is an intruder in Michigan in July 2019); <https://apple.news/AwSBRoQlfR1CH3ayRhuORjQ> (man shot and killed on roof in Florida after co-worker accidentally fires gun exiting truck in May 2019); <https://people.com/crime/mom-of-boy-2-who-fatally-shot-himself-with-gun-he-thought-was-a-toy-gets-sentenced-to-24-years/> (2 year old Colorado boy kills himself with mother's gun in Colorado in October 2018); <https://www.local10.com/news/local/2019/12/11/man-saves-his-dog-from-attacking-dog-with-gunshot-also-shoots-fellow-owner/> (Florida man shoots black lab attacking his dog and then shoots black lab's owner in the abdomen as she runs to restrain her dog in December 2019).

Lax parental control over guns also facilitates mass shootings, as was dramatically shown in Newtown, Connecticut but also in numerous other school shootings, such as the May 2018 high school shooting in Santa Fe, Texas, in which a 17-year-old student used his father's shotgun and revolver to kill 8 students and 2 teachers. http://dmarkanderson.com/CAP_Laws_and_Juvenile_Homicides_12_1_18.pdf. Similarly, in January 2018, a 15-year-old student used his step-father's weapon to kill "two classmates and hit a dozen others with gunfire, methodically firing a handgun inside a crowded atrium at his rural Kentucky high school" until he ran out of bullets. Note also that a restriction on magazine size would likely have been highly beneficial in this case. <https://apnews.com/8dd0b081ed07484cb62e624613bd8d2b>; <https://www.wuky.org/post/families-sue-parents-kentucky-school-shooting-suspect#stream/0>

Figure 4

A 6-year-old girl has died after being shot by her 4-year-old brother

Kelly and her brother were going to his baseball game with their mother when the boy retrieved a handgun from the car's center console, and the 4-year-old accidentally discharged it.

The accidental shooting happened about 6 p.m. inside a car parked in the driveway of a home outside Atlanta. (April 2019)

"Our hearts break for this family and we hope God puts his healing hands around them during this difficult time," Sheriff Gary Gulledge said in a statement Thursday morning.

No charges will be filed in the case, Henson said.



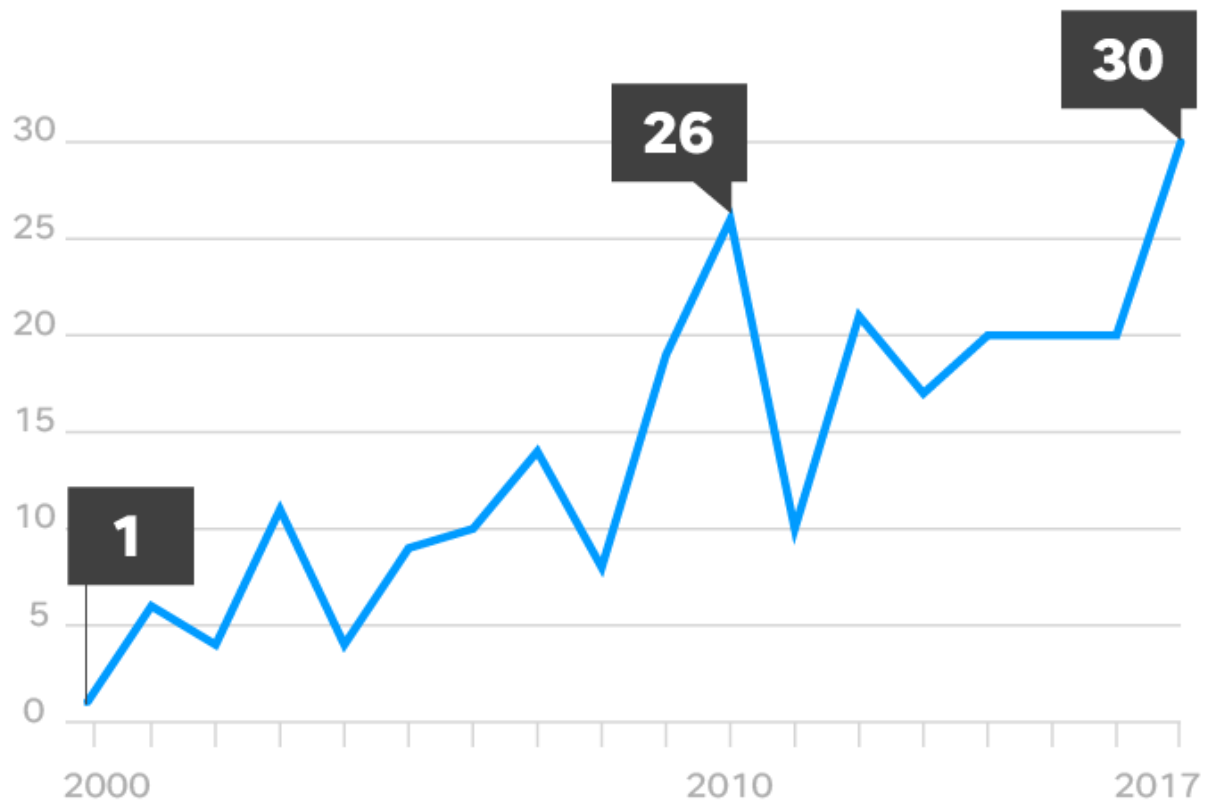
Moreover, the Figure 3 vision of the protective shield afforded by gun carriers is at odds with the empirical evidence. FBI data shows a remarkable surge in active shooter incidents even as the number of law-abiding citizens strolling along with concealed weapons in tow has risen sharply. As reflected in Figure 5: "In 2017 there were 30 separate active shootings in the United States, the largest number ever recorded by the FBI during a one-year period."⁸ The FBI noted that while armed security and police were able to stop mass shooters, armed civilians rarely played any positive role in these deadly episodes. Indeed, in the 160 active shooter incidents over the period from 2000-2013 covered in the report, no private citizen who was not armed security or active duty military played any positive role in these incidents.⁹ Moreover, even when police did need to intervene to stop a mass shooting, this was a dangerous task. In almost half of the episodes where police fired upon a mass shooter, one or more officers was shot or killed (see footnote 37 below). The smiling gun toter of the gun advertisement is a far cry from the reality of dealing with a modern-day mass shooter, possibly equipped with far more lethal firepower than one would have in a concealed carry holster.

⁸ James Silver, et al, "A Study of the Pre-Attack Behaviors of Active Shooters in the United States," June 2018. <https://www.hsdl.org/?abstract&did=812282>.

⁹ One private citizen who was active duty military did kill a shooter in 2008 at a bar in New Mexico, although it is not clear in that case if his intervention occurred after the shooting was already completed. For comparison, 21 of the 160 active shooters were stopped by unarmed civilians.

Figure 5

Active shooter incidents on the rise, with 2017 topping all years since 2000.



SOURCE FBI data and the FBI's report on active shooter incidents in the United States in 2016 and 2017

B. The Importance of the Federal Assault Weapons Ban

Indeed, important work by Louis Klarevas¹⁰ not only highlighted the dramatic increase in public mass shootings but also suggested that the constraining influence on those deaths was not gun carrying by private citizens but the federal assault weapons ban, which had been in place from 1994-2004. To further probe this finding, Theodora Boulouta and I culled through the Mother Jones Mass Shooting Database to shed light on the alarming increase in gun massacres (in which a shooter killed at least six individuals in public over a 35-year period, not including crimes of armed robbery, gang violence, or domestic violence) since the end of the federal assault weapons

¹⁰ Louis Klarevas, *Rampage Nation: Securing America from Mass Shootings* (Amherst, NY: Prometheus 2016).

ban.¹¹ Figure 6 shows the number of incidents of such gun massacres and the deaths resulting therefrom.¹² The Figure reveals a number of important points.

First, cases of public mass shootings in which six or more individuals die have been growing sharply over the last 15 years – a period when the legal ability to carry guns outside the home has increased dramatically. There is certainly no indication that this expanded gun toting has slowed the growth in these gun massacres.

Second, one sees that the number and deadliness of these mass shootings dropped during the ten years of the federal assault weapons ban from September 1994 through 2004 and rose sharply after the federal ban was lifted.¹³ Although the number of incidents is too limited to highlight the 25 percent drop in gun massacres, the 40 percent drop in overall fatalities during the period of the federal ban is noteworthy.

On its face, this is plausible since for that decade mass killers could not simply waltz into a gun store and buy an assault weapon with a large capacity magazine, as they can do in most of the U.S. today.¹⁴ On the other hand, Figure 6 also notes that overall violent crime dropped by roughly 14 percent during the decade of the federal assault weapons ban. This raises the question of whether the decline in gun massacres and deaths was simply part of a larger drop in crime. The short answer is no.

After the federal ban lapsed in 2004, the gun industry was able to flood the market with increasingly more powerful weapons that allow mass killers to kill ever more quickly with predictable results. The decade after the ban elapsed saw a 266 percent increase in mass shooting incidents and a 347 percent increase in fatalities, even as overall violent crime continued downward (again reflected in Figure 6). In other words, our independent assessment confirms the pattern first revealed by Louis Klarevas: gun massacres fell during the assault weapons ban and rose sharply when it was removed in 2004.

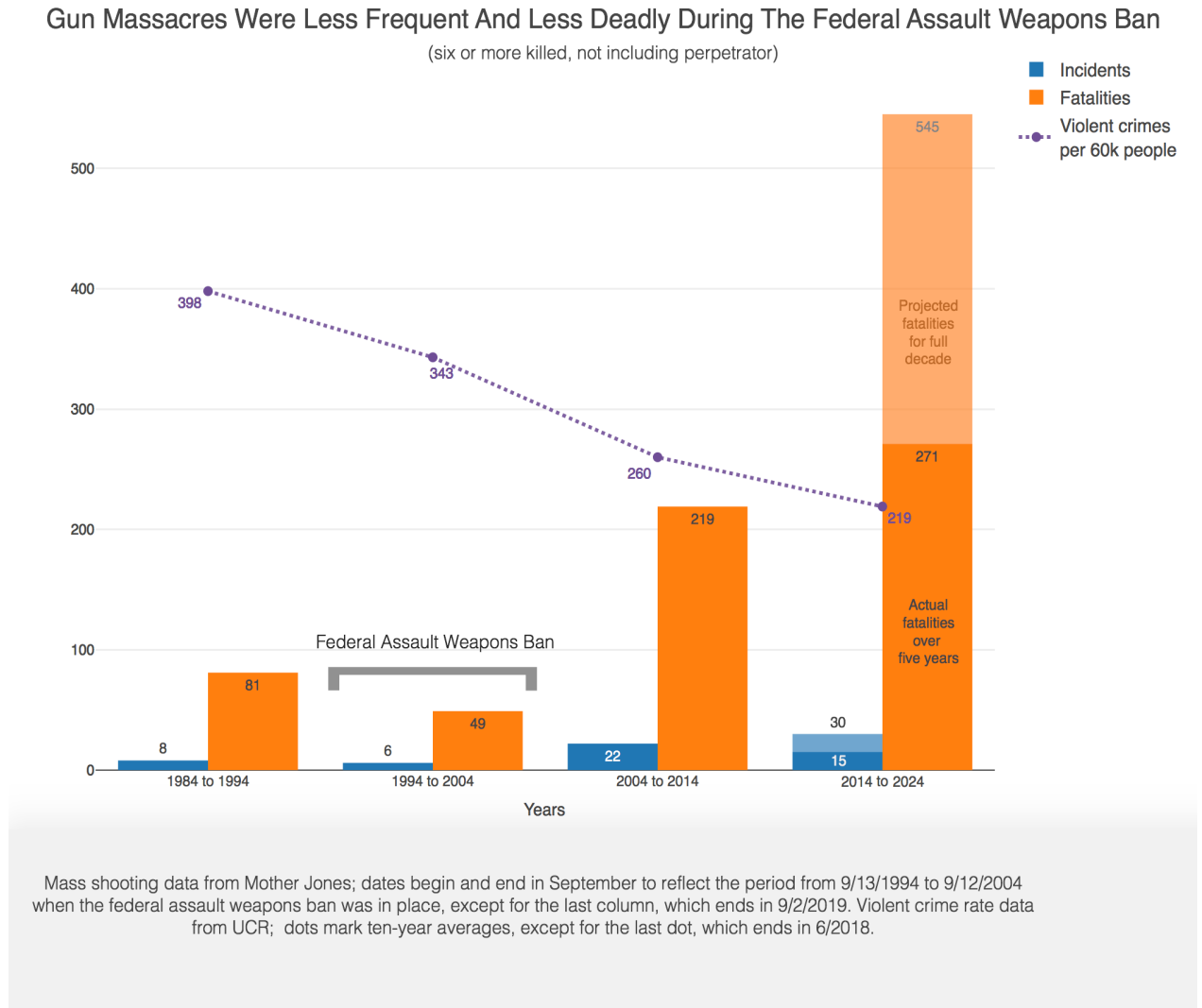
¹¹ Mother Jones has compiled a comprehensive listing and description of mass shootings from 1982 to the present. See, <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/>. See, John Donohue and Theodora Boulouta, “That Assault Weapon Ban? It Really Did Work,” The New York Times, September 4, 2019. <https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html>

¹² Figures 6 and 9-11 are replicated from John Donohue and Theodora Boulouta, “The Assault Weapon Ban Saved Lives,” *Stanford Law School Legal Aggregate Blog*, October 15, 2019, <https://stanford.io/2MWNsrV>

¹³ The Federal Assault Weapons Ban took effect September 13, 1994, and expired on September 13, 2004, due to a sunset provision that enabled the law to lapse after President George W. Bush reneged on his campaign promise to support retention of the federal ban.

¹⁴ Only 7 states and the District of Columbia ban assault weapons and all of them plus Colorado and Vermont restrict the permissible size of the ammunition magazines.

Figure 6



What has happened since 2014 is even more alarming. In five years, the number of fatalities in these gun massacres has already topped the previous high that occurred during the entire decade after the federal assault weapon ban was removed. This murderous leap has occurred at the same time that overall violent crime persisted on a downward trend, as the dotted line in Figure 6 confirms. If we continue at the post-2014 pace until 2024, the last column of Figure 6 shows that we will have an order of magnitude increase in gun massacre deaths over a 20-year period.¹⁵

¹⁵ We followed Klarevas' six-death criterion for our definition of a gun massacre, and simply note that the numbers of mass shootings would be substantially larger using alternative definitions, such as the Gun Violence Archive definition of *four individuals wounded by gunfire in a single incident*. Using that more capacious definition, there have been 366 mass shootings in the first 318 days of 2019, killing 408 and injuring 1477. <https://www.insider.com/number-of-mass-shootings-in-america-this-year-2019-8>

Indeed, there is no reason to think that this ghastly upward trend will abate without concerted governmental effort. Every year the gun industry increases the deadliness of its weaponry, trying to promote sales by facilitating the number of rounds that can be quickly fired with as much deadly consequence as possible through high velocity and tumbling projectiles.¹⁶ In 2016, the *New York Times* polled 32 gun policy experts about 30 measures that might address the problem with mass shootings. On an effectiveness scale ranging from 1 (not effective) to 10 (highly effective), the highest average score of 6.8 was for both an assault weapons ban and a ban on high-capacity magazines.¹⁷

It should be immediately clear that the percentage of mentally ill Americans did not drop substantially during the 10 years of the federal assault weapon ban and then suddenly rise rapidly when the ban was lifted. Mental illness is clearly not driving the alarming growth in fatalities from gun massacres.

In addition to the growing deadliness of the weaponry, the 2005 passage of a federal immunity statute provided additional stimulus to mass public shootings. This statute eliminated the threat of lawsuits that likely would have deterred gun industry advertisements designed to play on the weaknesses of troubled young men into believing that their perceived grievances could be remedied if only they possessed the latest assault weaponry. The deeply troubled 20-year old Adam Lanza used a Bushmaster rifle – advertised under the slogan “Consider Your Man Card Reissued” – to kill 26 at Sandy Hook Elementary School in 2012. No other industry is allowed to act so recklessly without facing legal challenge.¹⁸

[574 mass shootings](#), killing 596 Americans and injuring 2,315 more in the 555 days between the February 14, 2018 Parkland High School shooting and August 24, 2019.

¹⁶ Heather Sher, “What I Saw Treating the Victims From Parkland Should Change the Debate on Guns,” *The Atlantic*, February 2018, <https://www.theatlantic.com/amp/article/553937/> (An emergency room doctor describes the far more deadly impact of being shot with an AR-15 than a handgun). See also “What Makes the AR-15 so Deadly?” https://www.cbsnews.com/news/ar-15-used-mass-shootings-weapon-of-choice-60-minutes-2019-06-23/?utm_source=The+Trace+mailing+list&utm_campaign=03aba70497-EMAIL_CANON_4_7_2018_COPY_02&utm_medium=email&utm_term=0_f76c3ff31c-03aba70497-112411265. A very careful study of files of 511 gunshot victims kept by the Boston Police Department revealed survivability from gunshot wounds varied considerably based on attributes of the weapon and ammunition that generated the wound. The authors calculated that switching to the less deadly firearm options could reduce the homicide rate substantially. Anthony A. Braga and Philip J. Cook, “The Association of Firearm Caliber With Likelihood of Death From Gunshot Injury in Criminal Assaults,” *JAMA Netw Open*. 2018;1(3):e180833. doi:10.1001/jamanetworkopen.2018.0833.

¹⁷ Similarly, according to a 2017 Pew Research Center poll, 68 percent of adults favor banning assault weapons, and 65 percent would ban high-capacity magazines. file:///Users/jjd/Downloads/It%E2%80%99s_time_to_brin_g_back_the_assault_weapons_ban_gun_violence_experts_say.pdf. Support for these proposals has risen since 2017. https://www.pewresearch.org/fact-tank/2019/10/16/share-of-americans-who-favor-stricter-gun-laws-has-increased-since-2017/?utm_source=The+Trace+mailing+list&utm_campaign=0a9bee760d-EMAIL_CAMPAIGN_2019_10_26&utm_medium=email&utm_term=0_f76c3ff31c-0a9bee760d-112411265

¹⁸ Although recently the U.S. Supreme Court did allow a case brought by families of victims of the Sandy Hook massacre to proceed with discovery against the gun manufacturer, Remington. The suit alleges that by selling and marketing the Bushmaster assault rifle to civilians, the company violated Connecticut unfair-trade-practices laws. The plaintiffs hope to benefit from an exception under the federal Protection of Lawful Commerce in Arms

Figure 7 – Bushmaster Assault Rifle Advertisement



Figure 8 - Newtown Shooter Adam Lanza



Act, which can overcome gun manufacturer and seller immunity from lawsuits “resulting from the criminal or unlawful misuse” of guns by others when the company knowingly violated state or federal law governing the sale of guns, and that violation led to the harm at issue. *Remington Arms Co. v. Soto*, Petition for certiorari denied, <https://www.scotusblog.com/case-files/cases/remington-arms-co-v-soto/> (November 12, 2019).

Figure 9 illustrates the average number of fatalities in each mass shooting for the same four periods shown in Figure 6. The pattern is the same: fatalities per incident fell during the federal assault weapon ban and have risen sharply thereafter. With the weaponry available to citizens getting increasingly more potent and plentiful, the average number of people who die in every incident has increased by 90 percent since the decade after elimination of the assault weapons ban. Assault weapons and/or high capacity magazines were used in all 15 gun massacres since 2014; all 271 people who died in gun massacres since 2014 were killed by weaponry prohibited under the federal assault weapons ban.

The 19-year-old killer of 17 at Parkland High School¹⁹ and the recent Dayton shooter²⁰ possessed traits that would have been disqualifying in our competitor nations from access to any firearm, let alone an AR-15 style weapon.²¹ In the U.S., however, there was virtually no impediment to their acquiring such weapons to commit mass murder. Indeed, in most states even having an outstanding arrest warrant for murder is not a bar to purchasing assault weapons or other firearms.²² The common NRA claim that we should “just enforce the gun laws we have” makes

¹⁹ The school was so concerned with the behavior of Nikolas Cruz that he was searched for weapons every morning before school. Needless to say, this is not the profile of someone that judicious government authorities would readily grant a request for a license to have a firearm. <https://nypost.com/2019/07/26/parkland-shooter-was-searched-for-weapons-every-morning-before-school/>; <https://www.sun-sentinel.com/local/broward/parkland/florida-school-shooting/fl-ne-nikolas-cruz-threat-assessment-20190124-story.html>

²⁰ The warning signs for the Dayton shooter screamed out that this was a person who should not have access to weapons. <https://www.cnn.com/2019/08/05/us/connor-betts-dayton-shooting-profile/index.html>. Being kicked out of school for having a “hit list” of people he wanted to kill or rape would ordinarily be frowned upon by those evaluating fitness to have a gun. Indeed, almost every mass shooter except the Las Vegas shooter showed dramatic signs that they should not be near weapons, but of course many of the people who should have understood these signs did nothing and sometimes even failed to perceive danger. For example, Nancy Lanza actually seemed to believe it was good that her disturbed son Adam should have access to firearms. She paid with her life, but 26 other families also were destroyed because of her mindless enthusiasm for guns and gross misperception of their protective power.

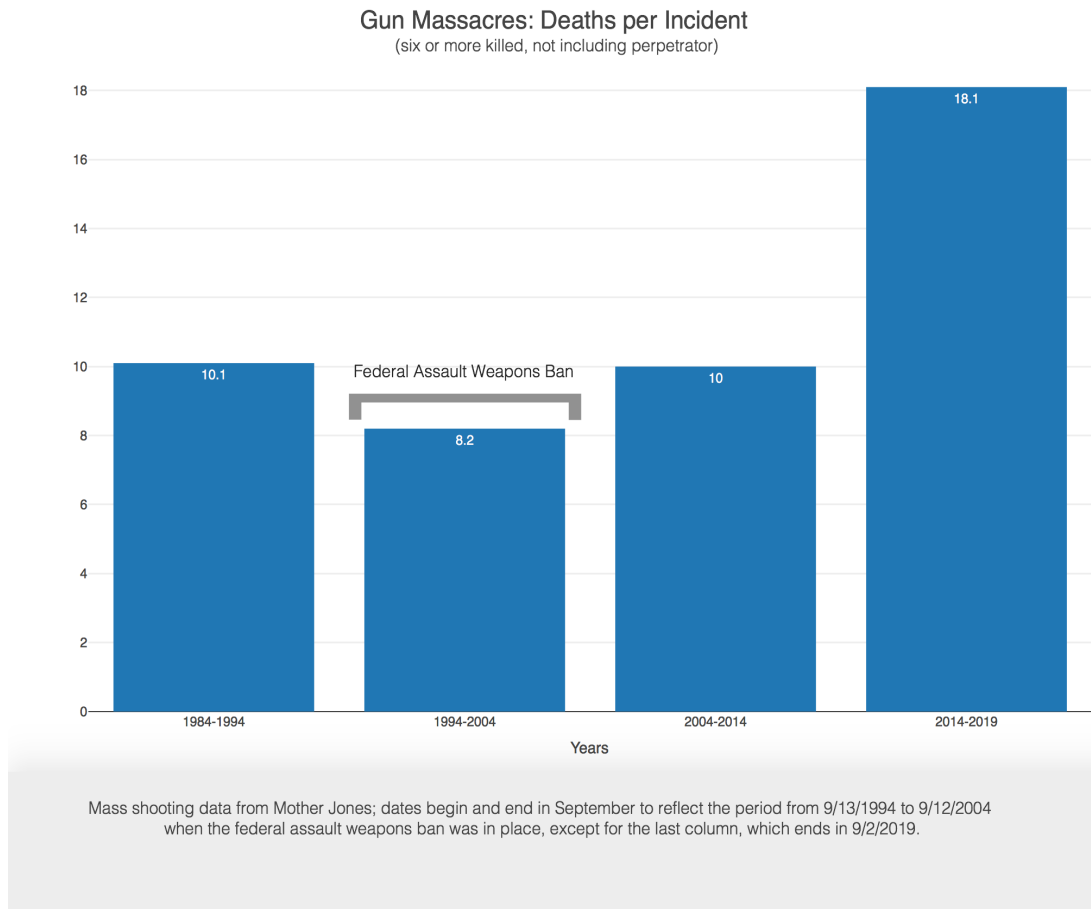
The mother of the mass killer at Umpqua Community College in Oregon had a similar benevolent view of her son’s fascination with guns despite her knowledge of his struggles with mental illness and the fact that he had once threatened her with a shotgun. She boasted online of how their arsenal would keep them safe from intruders and sneered at legislative efforts by “lame states” directed at gun safety: “I keep two full mags in my Glock case. And the ARs & AKs all have loaded mags. No one will be ‘dropping’ by my house uninvited without acknowledgement.” <https://www.nytimes.com/2015/10/06/us/mother-of-oregon-gunman-wrote-of-keeping-firearms.html?smid=pl-share>; Julie Turkewitz, Oregon Gunman Smiled, Then Fired, Student Says, N.Y. Times (Oct. 9, 2015), <http://www.nytimes.com/2015/10/10/us/roseburg-oregon-shooting-christopher-harper-mercero.html> (noting eight students and a professor were killed in an attack in Oregon in October 2015).

²¹ <https://theconversation.com/how-us-gun-control-compares-to-the-rest-of-the-world-79490>

²² As one article notes, “the existence of an arrest warrant [for murder is not] enough to deny the sale or transfer of a firearm to an individual, according to a statement provided by the National Instant Criminal Background Check System division at the FBI.” <https://www.houstonchronicle.com/news/politics/texas/article/Can-a-person-with-an-arrest-warrant-for-murder-14474293.php>.

little sense when the gun laws we have are so weak and porous – in large part because of the NRA.

Figure 9



Not surprisingly, this evidence was discomfiting to those who resist efforts to reduce gun massacres through appropriate legislative steps. One day after our piece appeared in the *New York Times*, Jacob Sollum responded in the libertarian journal *Reason* that the evidence that gun massacre deaths declined during the decade of the federal assault weapons ban is “suspiciously selective,” because Figures 6 and 9 defined gun massacres to be those public mass shootings in which at least six individuals were killed by the gunman.²³

²³ <https://reason.com/2019/09/05/a-suspiciously-selective-logically-shaky-analysis-of-mass-shooting-data-claims-the-federal-assault-weapon-ban-really-did-work/>

But there was nothing suspicious or selective in our “gun massacre” definition, which was taken from the afore-mentioned important work of Louis Klarevas that identified a pattern that was suggestive that the federal assault weapons ban had suppressed these deaths and its removal had revived them. Since one hallmark of science is replicability, I asked Theodora Boulouta to see if we could investigate the robustness of Klarevas’ finding using an alternative database, using our own judgments about what constituted a public mass shooting that would follow some of the insights from recent FBI work on active shooter incidents in the U.S. Figures 6 and 9 not only vindicated Klarevas’ finding but indeed even strengthened it by including the latest five years of data.

One can almost hear the voices at *Reason* cry out: “But all you have shown is that Klarevas is the one who is guilty of this devious selective definition.” Unfortunately, the truth is even more unsettling for the libertarians and the gun lobby. Whether one looks at shootings defined by at least six deaths, at least five deaths, or at least four deaths, the same patterns we see in Figures 6 and 9 still hold.

As one can see in Figure 10, gun deaths fell by almost 30 percent during the decade of the AWB and then rose sharply using Sollum’s preferred definition of at least four killed in the public mass shooting. Moreover, in Figure 11, one also sees fatalities per episode restrained during the AWB. In fact, while Sollum thought one should use a more inclusive definition of gun massacres, it is actually useful to see the results from using a more restrictive definition that only looks at gun massacres in which, say, at least ten individuals were killed by the shooter.

Figure 10

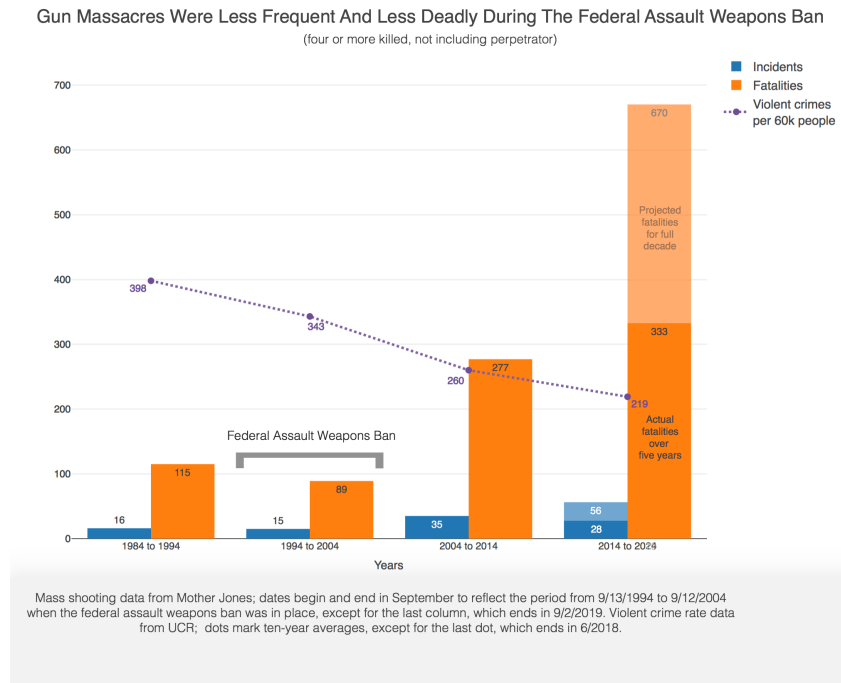
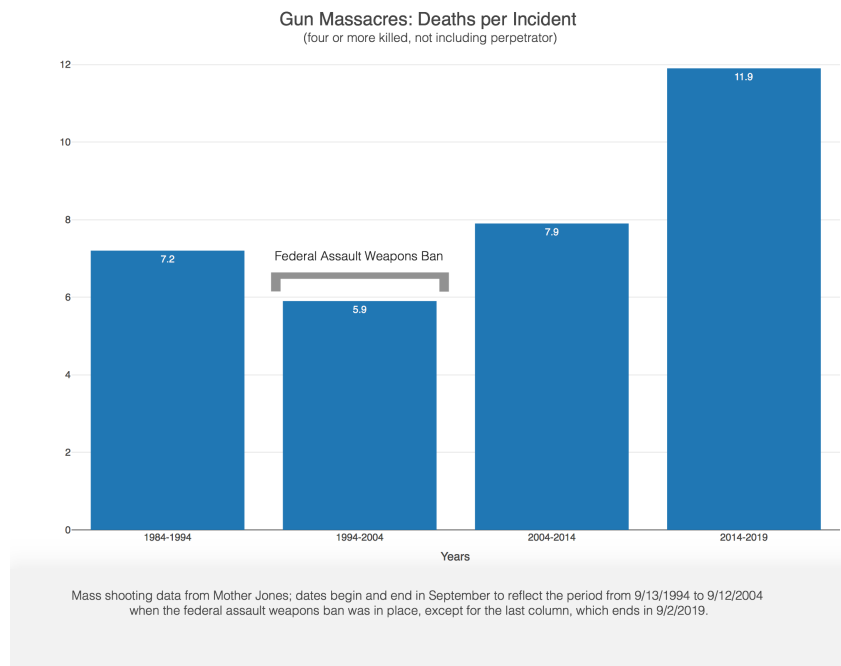


Figure 11



In fact, there were no such high-fatality public shootings by a lone gunman in the decade of the federal assault weapons ban.²⁴ In the decade after the ban ended, the U.S. suffered through 6 of these horrific killings, and in the last *five* years we have suffered through 10 such massacres causing 231 deaths (compared to the 13 by two shooters at Columbine during the federal assault weapon ban *decade*).²⁵

This research highlights the causal mechanism -- the restraining of the ability of weaponry to rapidly kill -- that explains why the federal assault weapons ban was effective and why its elimination has facilitated more deaths in public mass shootings. When the government imposes wise restraints on the ability to kill wantonly and voluminously, the number of deaths from these traumatic mass shootings will fall. Of course, with less lethal weaponry available to those who would commit mass murder, fewer cases make it across any given threshold since the most dangerous weapons help an ambitious mass killer to get over the bar.

The *Reason* article does inadvertently make two rather good points, which its author would likely be unhappy to learn. First, the author buttresses the point that the gun lobby did try to dampen the effectiveness of the assault weapons ban by restricting the array of weapons that would come within its prohibition. One confused commenter on our article thought he had issued a fatal blow by pointing out that he has two rifles -- an AR-15 (pictured in Figure 12²⁶) and a Mini-14 (also pictured²⁷) -- and only the AR-15 was a prohibited assault weapon under the previous federal assault weapons ban.

But this point fails for two reasons. First, imagine that you are one of the typical feckless, deeply troubled males who feels powerless and hopeless who might be inclined to engage in a public mass shooting to finally proclaim their manliness. In other words, someone like Adam Lanza or the Parkland shooter or so many others mass killers. Gun industry imagery is very moving to such troubled young men, and if one of them was trying to assert his power and manliness, which of these two guns do you think the budding mass killer would gravitate towards -- the AR-

²⁴ The only double-digit mass shooting in that decade was the Columbine massacre, which involved two shooters who killed 13. In the decade *prior* to the assault weapons ban there were two double-digit mass public shootings that killed 37, and we specifically omit two other killings from this pre-ban period that appear in some other counts. First, we omit the San Ysidro, California McDonald's massacre of July 1984 that killed 21 because it occurred a few weeks before our September 1984 cutoff. We also omit the Jacksonville, Florida GMAC massacre in 1990, which is often listed as a double-digit killing because the killer killed 11 individuals and then himself but two of those murders occurred the day before and we don't include the death of the perpetrator in our accounting.

²⁵ It should be stressed that the cost of mass shootings goes far beyond the horrific deaths and injuries and destroyed families to impose substantial psychological costs on the community, survivors and often the nation and beyond. See, Maya Rossin-Slater et al, "Local Exposure to School Shootings and Youth Antidepressant Use" (2019), and "My son survived Sandy Hook. It's changed me as a parent," *The Washington Post*, December 13, 2019, <https://www.washingtonpost.com/lifestyle/2019/12/13/i-cry-high-school-meets-how-sandy-hook-changed-me-parent/>.

²⁶ <https://tinyurl.com/y5wkmohd>.

²⁷ <https://tinyurl.com/y5lqfp45>.

15 or the Mini-14? There is a reason that assault weapons are advertised under slogans like “Consider your Man card reissued,” while the Mini-14 is not.

Figure 12: AR-15 (top picture) and a Mini-14 (below)



Indeed, if you scan the entire Mother Jones data base using the most expansive definition of at least four killed that the *Reason* magazine implicitly endorsed, one learns that no public mass shooting in the U.S. has ever used a Mini-14 since the start of the federal assault weapons ban in 1994. Indeed, there was even a mass shooting where the killer brought one along but opted not to use it, instead using a 12-gauge shotgun to kill 5.²⁸ Mass killing in America is typically about more than just killing a lot of people; it is also about asserting one's power when one feels utterly hopeless and powerless. The Mini-14 may do fine in achieving the first goal but it seems to be far less appealing on the second dimension – even though it has become popular in the states that have assault weapons bans that do not extend to it.²⁹

So the first point is that even if these two guns functioned identically in every mechanical respect, it could still make sense to ban the first and not the second, since we would be depriving the mass killer of his preferred vehicle to live out some final homicidal fantasy.³⁰ I am still willing to grant the thrust of the point though that a renewed assault weapons ban should be more functionally capacious since at least some mass shooters may simply turn to the next best alternative. This concern might suggest that anything that approximates the deadliness and capacity to facilitate mass murder of an AR-15 should be removed from civilian usage, apart from carefully restricted shooting ranges.³¹

But the second reason that the claims in the *Reason* magazine article are completely misguided is that they fail to recognize the key point that the federal assault weapons ban limited the size of gun magazines to ten rounds. The Las Vegas shooter could not have shot as many individuals as he did in eleven minutes without having access to high-capacity magazines, and this is the reason that virtually all the deaths from gun massacres in the last five years have come from weapons

²⁸ <https://www.nytimes.com/2003/07/09/us/man-kills-5-co-workers-at-plant-and-himself.html>

²⁹ “The Mini-14 is particularly favored in states with so-called assault weapons bans, which ban semi-automatic rifles with pistol grips and detachable magazines. Although the Mini-14 has detachable magazines it has a more traditional rifle grip.” (<https://nationalinterest.org/blog/buzz/meet-ruger-mini-14-rifle-most-underappreciated-gun-planet-45607>).

³⁰ See, Jessica Vomiero, “Florida school shooting: Why AR-15-style rifles keep showing up in U.S. mass shootings,” (discussing why “the military appearance of the AR-15 has a lot to do with its prevalence in mass shootings”), <https://globalnews.ca/news/4027629/ar-15-style-rifle-mass-shootings-united-states-florida/>.

³¹ For those who think that AR-15's and the like are simply recreational toys, I would advise them to read the Defense Department reports on why the gun was chosen for battlefield use in Vietnam. Essentially, the speed of fire and devastating injuries inflicted by the AR-15 make it one of the most effective mass killing technologies available – even when restricted to only semi-automatic operation, which is actually the customary battlefield mode of fire. In fact, the Army's own Field Manual states that semi-automatic fire is the “most important firing technique during fast-moving, modern combat,” noting, “It is surprising how devastatingly accurate rapid semi-automatic fire can be.” Tim Dickinson, “All-American Killer: How the AR-15 Became Mass Shooters' Weapon of Choice,” *Rolling Stone*, February 22, 2018, <https://www.rollingstone.com/politics/politicsfeatures/all-american-killer-how-the-ar-15-became-mass-shooters-weapon-of-choice-107819/>. See also, Heather Sher, “What I Saw Treating the Victims From Parkland Should Change the Debate on Guns,” February 22, 2018, <https://www.theatlantic.com/amp/article/553937/> (a doctor describing the greater survivability of a wound from a typical 9mm handgun bullet than from the far more lethal round of an AR-15 rifle).

equipped with such magazines.³² The ten-year ban on such magazines sharply drove up their price and limited their availability so it is not surprising that even when public mass shootings occurred, the body count was curtailed during the decade of the ban, as Figures 7 and 11 confirmed.³³ The *Reason* magazine comparison of an assault weapon and a Mini-14 simply ignores that you can kill more people and limit the chance for escape and counterattack with a larger magazine. Thus, *both* weapons are now more dangerous than they were during the period of the federal assault weapons ban.³⁴

But at least isn't it helpful that Texas has recently taken further steps to curtail restrictions on where guns can be carried so that these mass shootings can be quickly stopped? The NRA is correct that "good guys with guns" can play a very positive role in ending these mass shootings but misguided on who they think the good guys are. They are called "the police." In fact, the graphics in Figures 6 and 9-11 would have been even more dramatic without the greater resources and improved police response aimed to stop mass shootings that has developed in the last fifteen years.

Armed and well-trained police showed their effectiveness in quickly ending a number of recent mass shooting episodes – although sadly not until many had been killed or severely injured (because of the increasing deadliness of modern weaponry). So for example in August 2019 police started shooting at the Dayton, Ohio shooter 20 seconds after he opened fired and 12 seconds later they killed him, but not before he fatally shot nine people and wounded 17 others.³⁵ A few days earlier, the Gilroy, California Garlic Festival shooting was stopped within a minute leaving 3 dead and 17 injured (after 3 police officers fired 18 rounds, hitting the nineteen-year-old shooter several times, before he killed himself).³⁶ Certainly, one couldn't expect untrained private citizens to do better than the police in these cases, so it is clear that further steps are needed to reduce the probability of active shooter episodes and the deadliness of those that occur.

³² Stephen Paddock killed 58 concertgoers at a Las Vegas concert and injured nearly 1,000 others on October 1, 2017. <https://www.npr.org/2019/01/29/689821599/fbi-finds-no-motive-in-las-vegas-shooting-closes-investigation>.

³³ During the federal assault weapons ban, the percentage of guns seized by police that had high-capacity magazines dropped substantially and then rebounded sharply once the ban was lifted in late 2004, according to analysis of Virginia police data by the Washington Post. <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/22/AR2011012204046.html>.

³⁴ It is worth recalling that in the attack on Congresswoman Gabby Giffords in 2011, her assailant was tackled when he went to reload another high-capacity magazine into his weapon. Nine year old Christina-Taylor Green, who was waiting to meet the Congresswoman, [was killed by the 13th shot](#) – hence, beyond the 10 round limit of the expired federal assault weapons ban. See also, [2008 Tennessee shooting](#) where the church shooter who killed two and wounded six was tackled and stopped while trying to reload and [1998 Oregon shooting](#) where the 15 year-old school shooter was stopped after killing two and wounding 22 after he emptied his 50 round high-capacity magazine.

³⁵ ["Ohio Shooter Hit 26 People in Half a Minute," Associated Press](#). August 13, 2019.

³⁶ Nicholas Bogel-Burroughs (August 2, 2019). ["Gilroy Gunman Fatally Shot Himself After Killing 3 at Garlic Festival"](#). *New York Times*.

What is striking is that while the number of mass shootings rises, we see so little of any helpful role played by private gun carriers, despite the large and growing number of carrying permits. This is not surprising because these events unfold quickly, and even trained individuals have difficulty intervening against a homicidal killer with an assault weapon (recall the security guard at Parkland high school who did not move toward the shooter). A high proportion of the time that police engage such shooters they themselves will be shot or killed,³⁷ so private individuals with guns who try to intervene face challenging odds (and have at times paid with their lives for doing so with no benefit to the public). Recall that the police officer who charged into a crowded bar to stop the Thousand Oaks massacre was struck by 6 bullets — 5 fired by the gunman and 1 fatal shot fired by a California Highway Patrol officer. Moreover, the first person killed by that gunman was the armed security guard in the bar.

It is also worth remembering that almost all of the mass shooters from Columbine, Sandy Hook, Aurora theatre shooting, Fort Hood, Washington Navy Shipyard, Isla Vista, Orlando nightclub, Las Vegas, Parkland High School, Virginia Beach, and the three recent episodes in Gilroy, El Paso, and Dayton met the NRA definition of “law abiding citizens”—until they became mass killers. Much more needs to be done to keep guns — particularly the most lethal weaponry — away from such good guys.

II. The Impact of RTC Laws

My study with coauthors Abhay Aneja and Kyle Webber examining the impact of right to carry laws raised another concern: whatever benefit might come from gun carrying by private citizens seems to be more than offset by overall increases in violent crime. A number of recent studies have found that permissive gun carrying leads to higher rates of homicide, and there is little question it leads to enormous increases in gun thefts that can further stimulate criminal activity. Indeed, while gun carrying has shown no ability to reduce robberies, states that adopt right to carry laws see increases in the percentage of robberies committed with a gun.

The combination of the huge number of guns and lax regulation poses a significant challenge for law enforcement. Just as American criminals shoot faster because of the dangers posed by an armed population, so do the American police, who legitimately fear the prospect of facing an armed assailant. As a result, American police officers kill at far higher levels than their counterparts in other affluent nations. Consider this striking fact: *in the first 24 days of 2015*, police in the US fatally shot 59 individuals, which was greater than the comparable number of 55 shot by police in England and Wales, combined, *over the past 24 years*.³⁸ A well-regulated militia may be necessary to the security of a free state, but promiscuous and unregulated possession of firearms — including assault weapons with high capacity magazines — leads to many socially harmful consequences.

³⁷ The FBI report on active shooter incidents from 2000-2013 found that “Law enforcement suffered casualties in 21 (46.7 percent) of the 45 incidents where they engaged the shooter to end the threat. This resulted in 9 officers killed (4 of whom were ambushed in a shooting) and 28 wounded.”
[file:///Users/jjd/Downloads/\(U\)_ActiveShooter021317_17B_WEB%20\(1\).PDF](file:///Users/jjd/Downloads/(U)_ActiveShooter021317_17B_WEB%20(1).PDF).

³⁸ <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries>

But Figure 6 also shows that violent crime trended down over the last 35 years. Surely the increased gun carrying is responsible for that benign trend? Again, the simple answer is no.

A. Panel Data Analysis of RTC Laws

While some early work in the late 1990s claimed to find that right-to-carry laws did reduce violent crime,³⁹ a report issued in 2005 by the National Research Council using data through 2000 showed that with the tools and data available at that time, the statistical models were too fragile to provide a clear picture of the impact of RTC laws on crime. In the last decade, though, a growing body of evidence points in exactly the opposite direction from the early papers that suggested RTC laws might have benefits greater than their costs.

A quick examination of the long-term changes in crime shows that simple claims that more guns lead to less crime should be given little credence. For example, Figure 13 depicts percentage changes in the violent crime rate over a 38-year period for three groups of states: those that never adopted RTC laws, those that adopted RTC laws sometime between 1977 and before 2014, and those that adopted RTC laws prior to 1977. It is noteworthy that the 42.3 percent drop in violent crime in the nine states that never adopted RTC laws is almost an order of magnitude greater than the 4.3 percent reduction experienced by states that adopted RTC laws during the 38-year period.⁴⁰

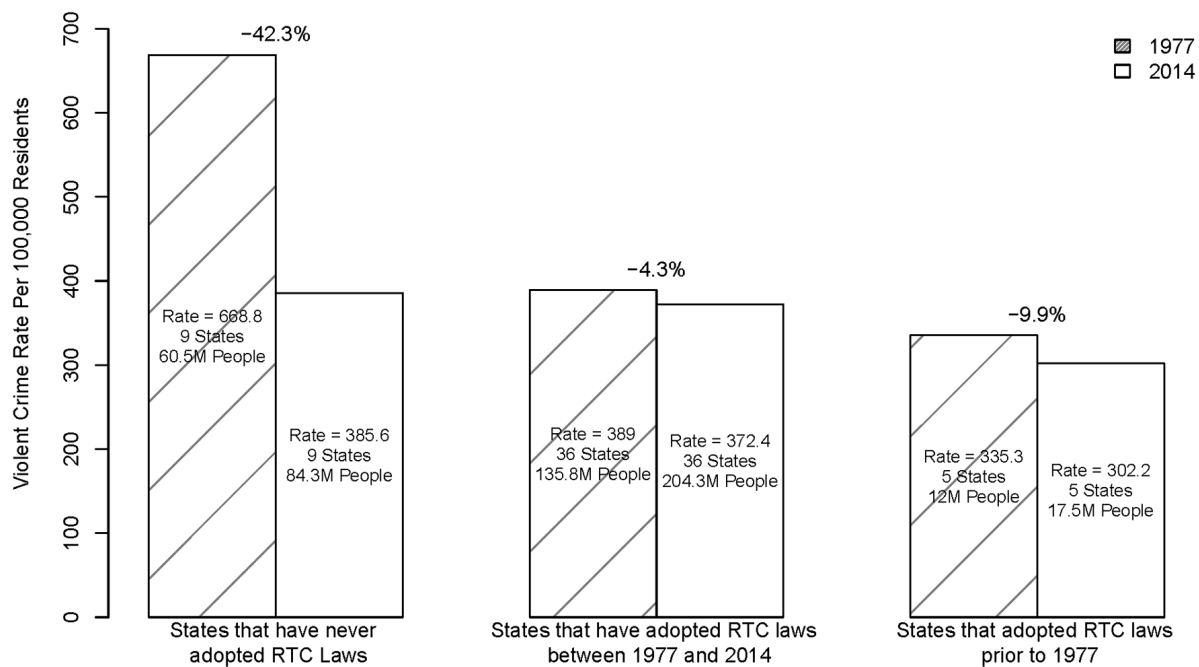
The standard econometric tool that tries to control for other factors that may be influencing crime over the period of state adoption of RTC laws is called a panel data model with state and year fixed effects. The early work by John Lott and others was marred by at least two econometric shortcomings that were common in applied econometric papers prior to around 2004. Before that time, most researchers failed to adjust their standard errors properly and hence exaggerated the statistical significance of their findings. Early researchers were also less aware of or at least attentive to the concern that pronounced crime trends prior to adoption could badly bias panel data estimates of the impact of RTC laws. Both of these problems, coupled with the far less complete data that was available at that time, undermined the work of those who thought that RTC laws might be beneficial.

³⁹ See Lott and Mustard.

⁴⁰ The following discussion draws on the empirical analysis presented in John J. Donohue, Abhay Aneja, and Kyle Webber, Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis, 16 *J. Empirical Legal Studies* 198, 200 (2019)(hereafter “DAW (2019)”).

Figure 13

The decline in violent crime rates has been far greater in states with no RTC laws, 1977–2014.⁴¹



Source: DAW (2019).

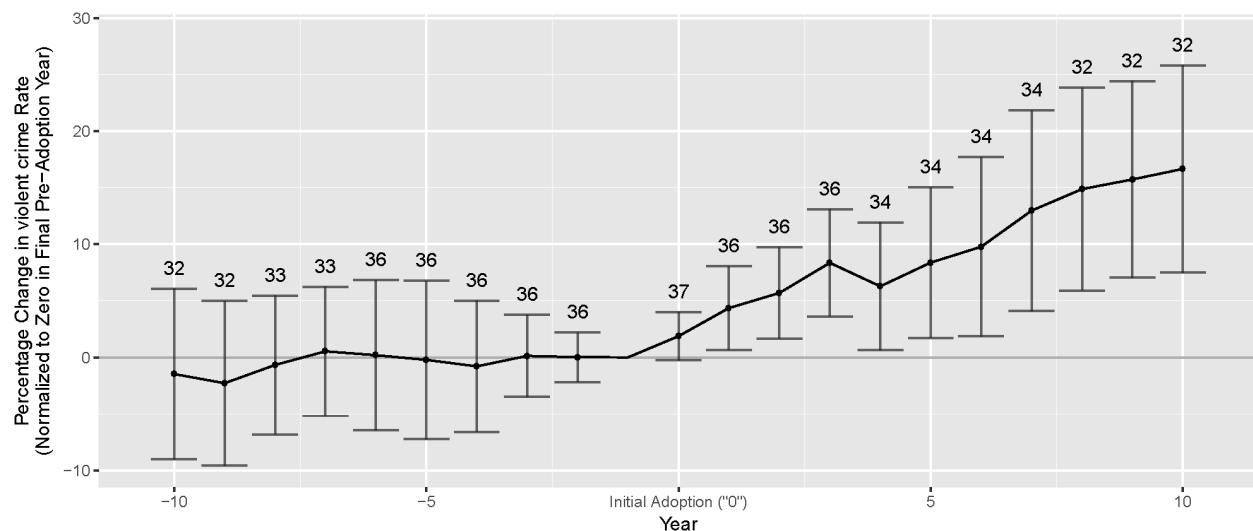
Donohue, Aneja and Webber (“DAW”) benefits from the advances in econometric practice and the more complete data and finds that on average RTC laws are associated with a roughly 9 percent higher rate of violent crime. This panel data model properly adjusts its standard errors (through clustering) and controls for an array of variables that might be thought to influence crime in each state, such as levels of incarceration, police, income, poverty and unemployment rates, beer consumption, demographics, and the percentage of state population living in metropolitan statistical areas. This estimate is highly statistically significant, with a standard error that was less than one-third the size of the 9 percent point estimate.

What about the concern that unexplained trends in violent crime prior to adoption could be obscuring the true impact of RTC laws on crime? Essentially the panel data model is a difference-in-differences estimator which tells us what happened to violent crime after RTC adoption compared to states that did not adopt RTC laws. If the trends in crime had previously been the same – that is, both sets of states showed “parallel trends” -- and then that pattern is altered after RTC adoption, one has evidence that RTC laws influenced the path of crime.

⁴¹ Reprinted from Figure 1 in DAW (2019).

Figure 14 highlights the near perfect parallel trends in the ten years prior to adoption.⁴² Once the RTC law is in place we see a gradual increase in crime that rises to above 15 percent higher after 10 years. This is not a trivial crime increase since a plausible estimate of how much crime reduction would flow from doubling our prison population is in the neighborhood of 15 percent. In other words, if one wanted to have an RTC law but restrain violent crime through increased incarceration to the level that would exist without having an RTC law in place, one would roughly have to double the state prison population, thereby incurring high social costs in both monetary and human terms.

Figure 14: The impact of RTC laws on violent crime, DAW model, 1979–2014.



NOTE: We regress crime on dummies for pre- and post-passage years and DAW covariates. Reference year is year before adoption and adoption year is first year with RTC in place at any time, meaning that in states that adopt after January 1, this will capture only a partial effect of RTC laws. We display the 95 percent confidence interval for each estimate using cluster-robust standard errors and show the number of states that contribute to each estimate.

Source: DAW (2019).

While panel data analysis has been the workhouse of empirical evaluation of the impact of various state law changes, it is obviously not a perfect or infallible tool. Ideally, one would like to have a randomized experiment with enough states being randomly assigned to one set of policies and another group of states assigned to an alternative policy. Without random assignment, one relies on the various control variables to capture other influences on violent crime, and there is always some uncertainty whether a rich enough array of such controls has been used.

⁴² Essentially, the fact that the dark line to the left of the initial year of RTC law adoption is flat and close to zero tells us that our panel data model is well-behaved in that 1) it correctly predicts that RTC laws have no effect on violent crime before they are adopted, and 2) the trends in crime are similar for adopting and non-adopting states in the years prior to RTC adoption.

B. Synthetic Control Analysis of RTC Laws

The limitations in panel data analysis led Harvard economist Alberto Abadie and his coauthors to develop a newer technique that has already gained widespread acceptance, called a synthetic control analysis. DAW implemented this approach for 33 RTC adoptions occurring over three decades throughout the country. For each adopting (“treated”) state, the synthetic control approach finds a weighted average of other states (“a synthetic control”) designed to serve as a good counterfactual for the impact of RTC laws because it had a pattern of crime similar to that of the adopting state prior to RTC adoption (and was roughly comparable in other important dimensions).⁴³ By comparing what actually happened to crime after RTC adoption to the crime performance of the synthetic control over the same period, we generate estimates of the causal impact of RTC laws on crime.

Figure 15 shows the synthetic control graph for violent crime in Texas over the period from 1977 through 2006 (10 years after the adoption of Texas’s RTC law). The solid black line shows the actual pattern of violent crime for Texas, and the vertical line indicates when the RTC law went into effect. Implementing the synthetic control protocol identifies three states that generate a good fit for the pattern of crime experienced by Texas in the pre-1996 period. These states are California, which gets a weight of 57.7 percent owing to its similar attributes compared to Texas, Nebraska with a weight of 9.7 percent, and Wisconsin with a weight of 32.6 percent. One of the advantages of the synthetic control methodology is that one can assess how well the synthetic control (call it “synthetic Texas,” which is identified in Figure 15 by the dashed line) matches the pre-RTC-passage pattern of violent crime to see whether the methodology is likely to generate a good fit in the 10 years of postpassage data. Here the fit looks rather good in mimicking the rises and falls in Texas violent crime from 1977–1995. This pattern increases our confidence that synthetic Texas will provide a good prediction of what would have happened in Texas had it not adopted an RTC law.

⁴³ The synthetic control method attempts to generate representative counterfactual units by comparing a treatment unit (i.e., a state adopting an RTC law) to a set of control units across a set of explanatory variables over a preintervention period. The algorithm searches for similarities between the treatment state of interest and the control states during this period and then generates a synthetic counterfactual unit for the treatment state that is a weighted combination of the component control states.

Figure 15: Estimated Effect of 1996 Texas RTC Law on Violent crime rate – Using Synthetic Control Analysis

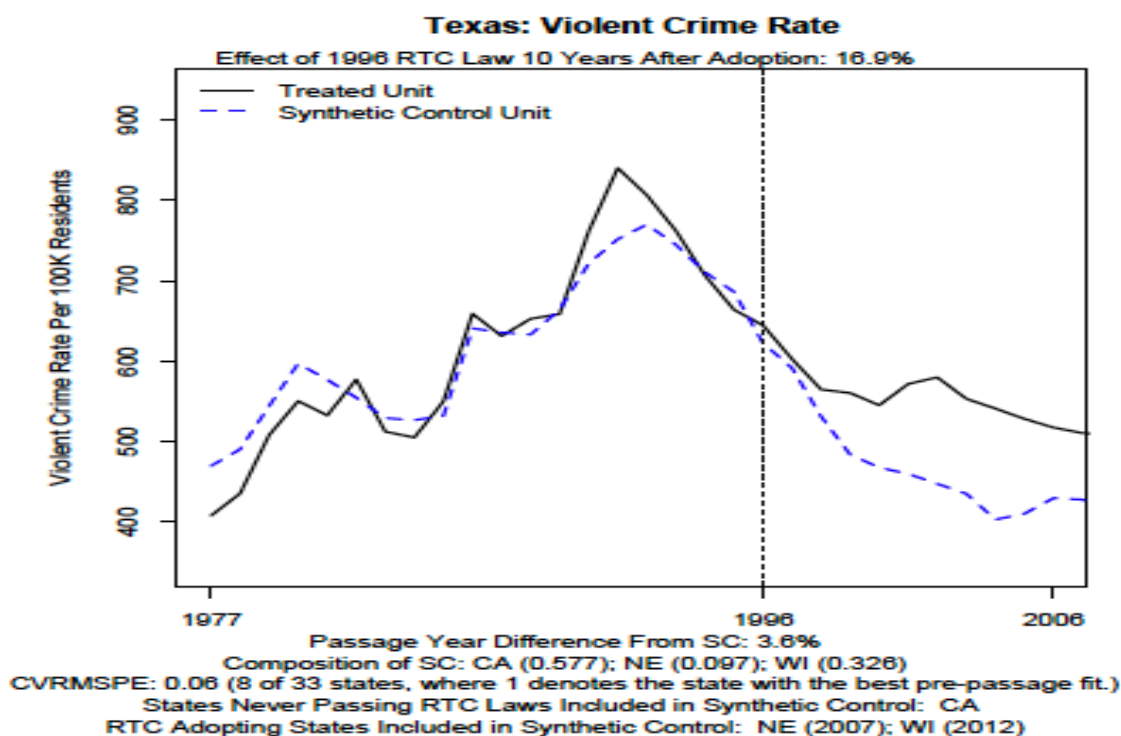


Figure 15 reveals that both Texas and synthetic Texas (the weighted average violent crime performance of the three mentioned states) show declining crime rates in the postpassage decade after 1996. But what is noteworthy is that the crime drop is substantially *greater* in synthetic Texas, which had no RTC law over that period, than in actual Texas, which did. The Figure notes that ten years after adopting its RTC law, violent crime in Texas was 16.9 percent higher than we would have expected had it not adopted an RTC law.

Figure 15 also illustrates perhaps the most important lesson of causal inference: one cannot simply look before and after an event to determine the consequence of the event. Rather, one needs to estimate the difference between what did unfold and the counterfactual of what would have unfolded without the event. The value of the synthetic control methodology is that it provides a highly transparent estimate of that counterfactual, using a tool designed to ensure the validity of the parallel trends assumption that we have already seen is so critical to achieving meaningful causal estimates. Thus, when Lott quotes a Texas District Attorney suggesting that he had reversed his earlier opposition to the state's RTC law in light of the perceived favorable experience with the law, we are given a perfect illustration of how easy one could draw the incorrect causal inference that Texas's crime decline was facilitated by its actually crime-inducing RTC law (DAW 2019: 228).

The public may perceive the falling crime rate post-1996 (the solid black line), but only a rather sophisticated statistical analysis can discern that Texas would have experienced a more sizable violent crime decline if it had not passed an RTC law (the dotted line). More specifically, Texas

experienced a 19.7 percent decrease in its aggregate violent crime rate in the 10 years following its RTC law (between 1996 and 2006), while the state’s synthetic control experienced a larger 31.0 percent decline. This counterfactual would not be apparent to residents of the state or to law enforcement officials, but our results suggest that Texas’s RTC law imposed a large social cost on the state.

The greater transparency of the synthetic control approach is one advantage of this methodology over the panel data models that we considered above. Figure 15 makes clear what Texas is being compared to, and we can reflect on whether this match is plausible and whether anything other than RTC laws changed in these three states during the postpassage decade that might compromise the validity of the synthetic control estimate of the impact of RTC laws.

Table 1 shows our overall synthetic control estimates for the impact of RTC laws on violent crime for all 33 adopting states. Our estimates of the normalized average treatment effect percentage (TEP) suggest that states that passed RTC laws experienced more deleterious changes in violent criminal activity than their synthetic controls in the 10 years after adoption. On average, treatment states had aggregate violent crime rates that were almost 7 percent higher than their synthetic controls five years after passage and around 14 percent higher 10 years after passage. Table 1 suggests that the longer the RTC law is in effect (up to the 10th year that we analyze), the greater the cost in terms of increased violent crime.

Table 1: The Impact of RTC Laws on the Violent Crime Rate, DAW Covariates, Full Sample, 1977–2014

	(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)
Average normalized treatment effect percentage (TEP)	–0.117 (1.076)	2.629* (1.310)	3.631* (1.848)	4.682** (2.068)	6.876*** (2.499)	7.358** (3.135)	10.068*** (2.823)	12.474*** (3.831)	14.021*** (3.605)	14.344*** (2.921)
<i>N</i>	33	33	33	33	33	33	33	31	31	31
Pseudo <i>p</i> value	0.936	0.274	0.220	0.192	0.094	0.106	0.060	0.038	0.032	0.032

Note: Standard errors in parentheses. Column numbers indicate postpassage year under consideration; *N* = number of states in sample. The synthetic controls method is run using the nested option, and each year’s estimate is the average effect across *N* states. **p* < 0.10; ***p* < 0.05; ****p* < 0.01.

The extensive array of panel data and synthetic control estimates of the impact of RTC laws that DAW present uniformly undermine the “More Guns, Less Crime” hypothesis. There is not even the slightest hint in the data from any econometrically sound regression that RTC laws reduce violent crime. Indeed, the weight of the evidence from the panel data estimates as well as the synthetic control analysis best supports the view that the adoption of RTC laws substantially raises overall violent crime in the 10 years after adoption. While both approaches have advantages and disadvantages, it is reassuring that the picture that emerges from both is the same: violent crime rises in the ten years following RTC adoption.

C. Other Recent Research Documenting Crime Increases from RTC Laws

A number of other recent studies provide further support for this conclusion. For example, Siegel et al look at state data from 1991–2015 and conclude that RTC laws increase overall homicide 6.5 percent, firearm homicide by 8.6 percent, and handgun homicide by 10.6

percent.⁴⁴ A second paper by Siegel and his coauthors extends his dataset for one additional year (through 2016) and controls for a richer array of gun laws to ensure that other legal changes are not driving the results in his initial paper. Again, they find that RTC laws increase homicides 9 percent.⁴⁵

To explore whether the state analyses are too aggregated to give precise estimates of the impact of RTC laws, Crifasi and coauthors look at 136 large, urban U.S. counties from 1984-2015. They find that RTC increase firearm homicides by 4 percent.⁴⁶

Gius explores the specific legal change of a state moving from a prohibition on concealed carry to adopting an RTC law. Using a synthetic control approach, Gius finds that this transition to RTC law elevates homicide 4.9 percent and firearm homicides 12.3 percent.⁴⁷

Moreover, two recent and extremely creative papers give further credence to the finding that RTC laws elevate violent crime. The first, by Jonathan Colmer and Jennifer Doleac, uses the fact that increases in temperature tend to elevate violent crime to explore the impact of RTC laws on such crime.⁴⁸ They find that a one-degree Celsius increase in temperature is associated with a 0.4 percent increase in homicides without RTC laws and 1.0 percent increase in homicides with RTC laws. In other words, the stimulating effect of hotter temperatures is 150 percent larger in places with freer gun carrying access.

The second paper, by Richard Boylan, begins by using two tests to show that police departments are less likely to submit statistics when crime is high and have thus led previous studies based on the UCR to underestimate crime and often to understate the impact of policies on crime.⁴⁹ As it turns out, the police departments that under-report tend to be in RTC states, which is not surprising if RTC laws elevate crime and police try to disguise the elevated crime (or are too overwhelmed by it to spend time with full reporting). Boylan finds on his sample that RTC laws increase crime by 18 percent if one just accepts the UCR data that all of the above studies rely on, but that the estimated crime increase rises to 28 percent if one controls for the selective under-reporting of crime. In other words, Boylan believes that even though virtually all of the credible studies in the last five years have found that RTC laws increase crime, the true picture is even worse than these studies suggest.

⁴⁴ Michael Siegel, et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923 (2017).

⁴⁵ Michael Siegel et al, “The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991-2016: a Panel Study,” J Gen Intern Med (2019).

⁴⁶ Crifasi et al., *Association between Firearm Laws and Homicide in Urban Counties*, *supra*, at 387; (J Urban Health 2018); Crifasi et al., *Correction to: Association Between Firearm Laws and Homicide in Urban Counties*, *supra*, at 773–74.

⁴⁷ Mark Gius, *Using the Synthetic Control Method to Determine the Effects of Concealed Carry Laws on State-Level Murder Rates*, 57 Int’l Rev. L. & Econ. 1, 6 (2019).

⁴⁸ Jonathan Colmer and Jennifer Doleac, *Do Right-to-Carry Laws Mitigate or Exacerbate Violent Crime? Evidence From the Temperature-Violent Crime Relationship* (2019).

⁴⁹ Richard Boylan, *Official Statistics Underreport Crime* (2019).

D. Mechanisms Behind the Increased Crime from RTC Laws

While the weight of the evidence supports the conclusion that increased gun carrying leads to higher violent crime, the findings above are focused only on identifying net effects and do not directly address the mechanisms by which more guns lead to more crime. Since we know that there are some instances where gun carrying thwarted crime and one could imagine there might be some deterrent impact of increased gun carrying, the finding that RTC laws elevate violent crime means that the crime-inducing effect of more guns in public must outweigh any beneficial influences. But what generates these harmful effects?

The most obvious pernicious influence is that ready access to guns can quickly turn arguments into deadly encounters, and there is certainly plenty of evidence suggesting that road rage incidents can be fueled by gun carrying.⁵⁰ Another potent contributor to illegal misconduct is that guns carried outside the home are more likely to be lost or stolen, and these guns are particularly valuable to criminals since they cannot be traced back to the miscreants. A rough but plausible estimate for the number of guns stolen each year solely because of the adoption of RTC laws is 100,000 (with overall gun thefts being roughly 400,000 per year).⁵¹

Moreover, some of the more naïve thinking about the impact of increased gun carrying by “law abiding citizens” implicitly assumes that RTC laws will tip the balance in favor of the good guys and away from the bad guys, and the bad guys will take no responsive action that would escalate their dangerousness. The problem with this view is that it ignores that the bad guys act to gain more weaponry and act more aggressively in the wake of RTC adoption. Indeed, a panel data estimate over the years 1980 to 2016 reveals that the percentage of robberies committed with a firearm rises by 18 percent in the wake of RTC adoption ($t = 2.60$). A synthetic control assessment predicts an even more ominous response: the percentage of robberies committed with a firearm increases by 35 percent over 10 years ($t = 4.48$). It might be a tolerable tradeoff if the increase in armed and dangerous criminals were offset by an overall decline in robberies, but in fact there is no evidence that RTC laws reduce the overall level of robberies. Indeed, a panel data analysis associates RTC laws with a 9 percent *higher* level of overall robberies ($t = 1.85$) and the synthetic control analysis suggests a 7 percent growth over 10 years ($t = 1.19$).

Moreover, just as criminals react in socially harmful ways to the adoption of RTC laws for the simple reason that they don’t want to be shot, police also act more aggressively and violently as

⁵⁰ Road rage shootings are on the rise, and often result when occupants of two cars begin arguing while driving down a highway. <https://www.abc10.com/article/news/crime/road-rage-incident-on-i-5-in-south-sacramento-leads-to-woman-being-shot/103-597441561>. See, DAW (2019) at footnotes 9-14 and accompanying text. A 2015 study found that approximately 10.6 percent of the population has both significant anger traits *and* access to a firearm, and that millions of these Americans routinely carry a firearm in public. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5116908/>.

⁵¹ The purely American story of the NBA player buying a \$50,000 assault weapon only to have the gun stolen from his unlocked car only a few minutes later highlights a danger from the “guns everywhere” mentality. <https://www.yahoo.com/news/hassan-whiteside-buys-50k-assault-rifle-immediately-stolen-leaving-unlocked-rolls-royce-020551481.html>. See, DAW (2019) at footnotes 19-24 and accompanying text. Conversely, a less gun-friendly environment in Japan led to only eight crimes in which a gun was fired in all of 2015 in a country of 127 million. One Japanese editorial wrote after the Orlando mass shooting that editorial that American society, “in which criminals can easily acquire firearms, is abnormal.” https://www.washingtonpost.com/world/asia_pacific/for-some-expats-us-gun-violence-makes-japan-feel-like-a-haven/2016/07/18/0edca7d4-4840-11e6-8dac-0c6e4accc5b1_story.html?utm_term=.a6ec0edd2cf7.

gun carrying proliferates for much the same reason. Apart from car accidents, virtually the only threat to police safety comes from armed civilians. This in part explains why the rate of killings of civilians by police is so high in the U.S. compared to comparably affluent countries that are far less gun saturated.⁵²

Similarly, the increased shootings, thefts, aggravated assaults, and accidental discharges that follow from increased gun carrying take up an enormous amount of additional police time.⁵³ This tax on police activity puts upward pressure on violent behavior since the police are one of the most important elements in restraining crime, as an abundance of studies has consistently found.⁵⁴

III. Legal Considerations in Light of the Empirical Evidence

A. The Second Amendment and Assault Weapons

The growing evidence that the lax regulation of guns leads to substantial harmful consequences raises the question of how courts should consider such empirical evidence in their decisions interpreting the Second Amendment. One view is that it should have no impact since the Founders sealed the fate of the victims of gun violence by enacting the Second Amendment, so the consequences of that decision are now off the table. While many would find such a claim to be idiotic, this was the assertion of then Judge Brett Kavanaugh in a D.C. Court of Appeals case in which he was outvoted by two Republican-appointed judges.⁵⁵

Kavanaugh argued that “text, history, and tradition” should “guide analysis of gun laws.”⁵⁶ In his view, the Supreme Court had “expressly rejected judicial assessment of ‘the costs and

⁵² The estimated rate of 2.93 killings by U.S. police per million citizens is about 42 times the killing rate by police in Germany and more than 100 times that of police in England and Wales. Franklin Zimring, *Firearms and Violence* (2017). Zimring also found that police in the United State die from assaults on duty (overwhelmingly from fatal shootings) at about 35 times the rate as police in Germany and 17 times the rate in the United Kingdom.

⁵³ Accidental gun killings and woundings out on the street and in stores are increasing as gun carrying proliferates. For example, in 2011 a suburban Phoenix man accidentally shot himself in the penis with the bullet continuing through his left thigh while putting his girlfriend's gun in the waistband of his pants, as the couple walked toward a grocery store. The bullet first struck the man's penis and then continued through his left thigh. <http://archive.azcentral.com/community/chandler/articles/2011/08/07/20110807cr-penisshot0811.html#ixzz1UY3L1LzH>.

⁵⁴ As the Council of Economic Advisors has found, “Expanding resources for police has consistently been shown to reduce crime; estimates from economic research suggest that a 10 percent increase in police force size decreases crime by 3 to 10 percent.” Council of Economic Advisors, “Economic Perspectives on Incarceration and The Criminal Justice System,” April 2016. In other words, if the entire array of impositions on police time imposed by lawful gun carrying in the U.S. took up 10 percent of police time, then one would expect this would elevate crime by 3 to 10 percent. See also, Steven Mello, “More COPS, Less Crime,” *Journal of Public Economics*, Volume 172, April 2019, Pages 174-200 (“the social value of a marginal police officer exceeds \$300,000” in terms of reduced crime). Available at <https://doi.org/10.1016/j.jpubeco.2018.12.003>.

⁵⁵ *Heller v. District of Columbia (Heller II)*, D.C. Court of Appeals (2011).

⁵⁶ It is worth noting that there was no organized police force in the United States for more than 50 years after the adoption of the Second Amendment – the first police department was officially organized in New York City in 1845. <https://www.britannica.com/topic/police/Early-police-in-the-United-States>. In other words, the power

benefits of firearms restrictions’ and stated that courts applying the Second Amendment thus would not have to make ‘difficult empirical judgments’ about the efficacy of particular gun regulations.”

It is true that at one point in his harshly criticized *Heller* opinion, Justice Scalia stumbled in the direction of a making an intelligent comment about the nature of the Second Amendment, he then quickly gained his footing and retreated.⁵⁷ Justice Scalia stated: “Some have made the argument ... that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way.” But of course not only does this argument not “borde[r] on the frivolous,” as Scalia asserted, but it makes perfect sense to consider whether the reasons for the amendment are still operative today and whether the vastly more deadly weaponry currently available would further those goals.

The first question is rather easily answered given the fact that the founders explained the purpose of the Second Amendment in its very first clause. The Second Amendment was designed to ensure the federal government would have the ability to generate a fighting force to defend the country. Civilian ownership of firearms no longer plays any role in furthering that objective. The security of the United States is now guaranteed by the U.S. military and the National Guard. Therefore, as even Scalia acknowledged in *Heller*, the right the Court created in that 2008 opinion did not include the right to have weapons of war but only the right to self-defense within the home. When one compares the weaponry available at the time of the founding to that available today, it becomes clear that the difference is immense, with similar implications for constitutional analysis. Figure 16 highlights this point.

and deadliness of weaponry was vastly weaker in 1791 than today and the need for defense from animals, battles with Native Americans, hostile nations, and overall crime was greater than it is today. Moreover, 18th century guns were expensive and cumbersome, which kept them out of the hands of children and petty criminals, and those who had them used them all the time, which ensured they were well-trained in their appropriate use. All of which point to a greater current need for government to regulate weaponry in furtherance of public safety and welfare. <https://decentralize.today/to-understand-the-2nd-amendment-you-have-to-understand-what-guns-were-like-in-1792-888b7fb74011>.

⁵⁷ For two of the many strong criticisms of Scalia’s decision in *Heller* and its “faux originalism,” both by conservative Republicans and Reagan-appointed federal court of appeals judges, see Richard A. Posner, In Defense of Looseness: The Supreme Court and Gun Control, NEW REPUBLIC, Aug. 27, 2008, at 32, 33, available at <http://www.newrepublic.com/article/books/defense-looseness> and J. Harvie Wilkinson III, Of Guns, Abortions, and the Unraveling Rule of Law, 95 Va. L. Rev. 253 (2009).

A critical mis-step by self-proclaimed textualist and originalist Scalia was his decision to ignore the text and original meaning of the preamble of the Second Amendment. Historian David Konig has written the authoritative work establishing that constitutional and legal treatises from the founding era considered preambles to be critical in establishing textual meaning: David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of the Right of the People to Keep and Bear Arms*, 22 Law & Hist. Rev. 119, 154-55 (2004); David Thomas Konig, *Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America*, 56 UCLA L. Rev. 1295 (2009).

Figure 16



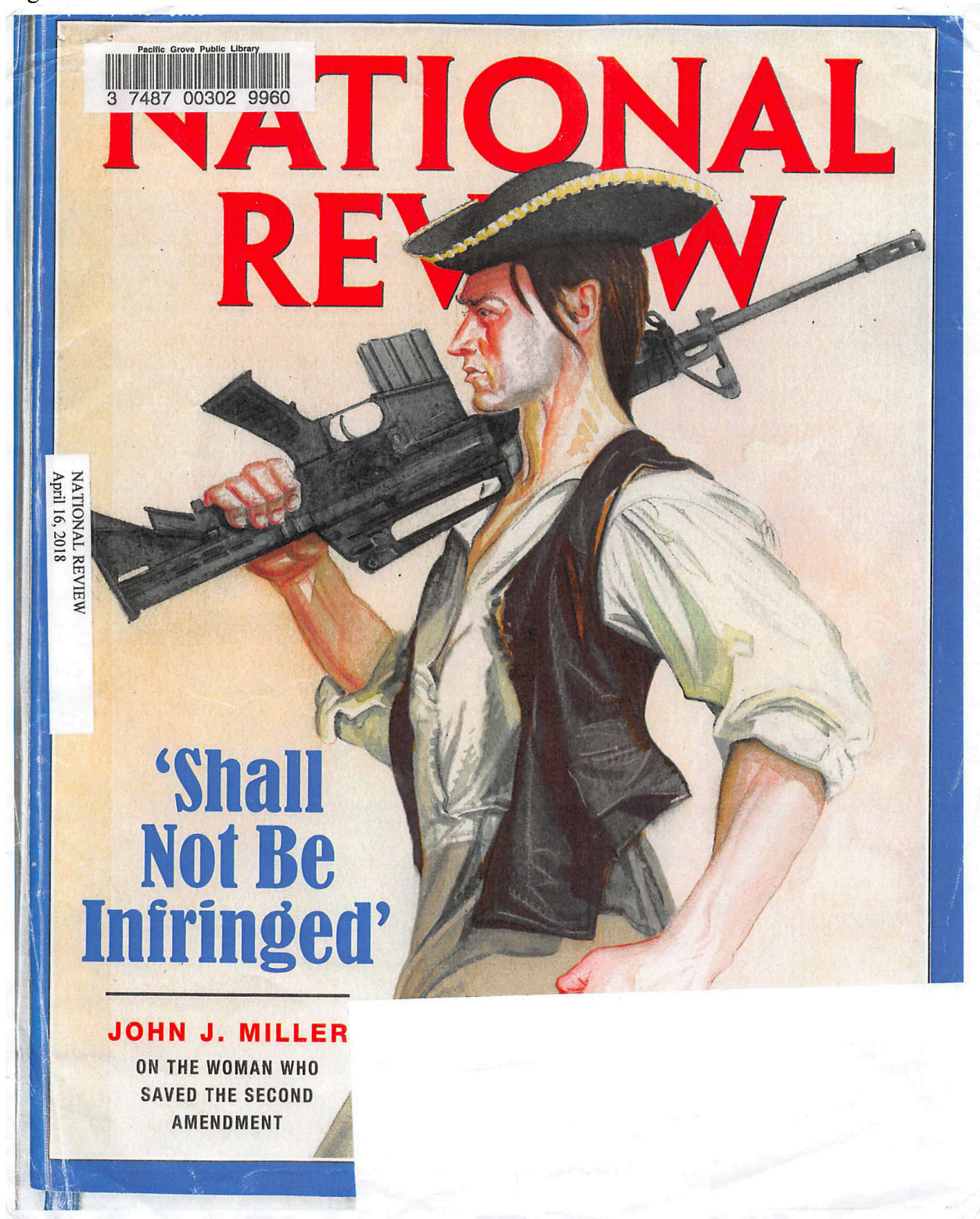
A musket from the 18th century, when the Second Amendment was written, and an assault rifle of today.
Top, MPI, via Getty Images, bottom, Joe Raedle/Getty Images .

Perhaps not surprisingly, those who would seek to follow Kavanaugh’s view that assault weapons are protected by the Second Amendment offer differing visual support – see Figure 17. Of course, the continentals were not carrying around anything like the modern assault weapons of today. There could not be a mass shooting problem in 1791 given the nature of the weaponry available to average citizens. The situation could not be more different today. Hundreds were shot in a matter of minutes in the horrendous Las Vegas shooting and the recent Dayton shooting ended with more bullets fired at than by the shooter (who was killed within 32 seconds of his initial firing), but he still managed to shoot 26 (killing nine) because of the enormous power, deadliness, and speed of his assault weapon.⁵⁸

Scalia’s bizarre view that the Second Amendment could undermine the ability to address the current, growing mass shooting problem in the U.S. because any gun in “common use” is now beyond government control is fatuous. If originalist Scalia had contemplated what the practical framers of our Constitution would have thought about the idea that an Amendment that they crafted would bind the hands of government hundreds of years later in a way that would facilitate mass murder, he likely would have realized the troubling nature of any such position.

⁵⁸ <https://www.nytimes.com/2019/08/13/us/dayton-shooter-video-timeline.html>

Figure 17



The following wisdom from the time of the constitutional debate seems particularly relevant:

...the vigor of government is essential to the security of liberty; ...in the contemplation of a sound and well-informed judgment, their interest can never be separated; and ... a dangerous ambition more often lurks behind **the specious mask of zeal for the rights of the people** than under the forbidden appearance of zeal for the firmness and efficiency of government. History will teach us that the former has been found a much more certain road to the introduction of despotism than the latter, and that of those men who have overturned the liberties of republics, the greatest number have begun their career by paying an obsequious court to the people; commencing demagogues, and ending tyrants.
-- The Federalist, No. 1 (emphasis added).

And yet Kavanaugh thought that the *Heller* holding that citizens have the right to a handgun in the home also mandated their right to have an assault weapon. Kavanaugh felt he had a difficult choice to make. He could say that AR-15's were more like handguns, which *Heller* said could not be banned or more like "M-16 rifles," while *Heller* said could be banned. My guess is most third graders could figure out what the right answer was to that simple categorization question. Indeed, as the en banc panel of the Fourth Circuit noted in concluding that "banned assault weapons and large-capacity magazines are not protected by the Second Amendment,"

we are convinced that the banned assault weapons and large-capacity magazines are among those arms that are "like" "M-16 rifles"—"weapons that are most useful in military service"—which the *Heller* Court singled out as being beyond the Second Amendment's reach. See 554 U.S. at 627, 128 S.Ct. 2783 (rejecting the notion that the Second Amendment safeguards "M-16 rifles and the like"). Put simply, we have no power to extend Second Amendment protection to the weapons of war that the *Heller* decision explicitly excluded from such coverage. **Nevertheless, we also find it prudent to rule that—even if the banned assault weapons and large-capacity magazines are somehow entitled to Second Amendment protection—the district court properly subjected the FSA to intermediate scrutiny and correctly upheld it as constitutional under that standard of review.**⁵⁹

Judge Kavanaugh somehow thought the AR-15 was more like the handgun that could not be banned:

"In my judgment, ... D.C.'s ban on semi-automatic rifles [is] unconstitutional under *Heller*.... In *Heller*, the Supreme Court held that handguns – the vast majority of which today are semi-automatic – are constitutionally protected because they have not traditionally been banned and are in common use by law-abiding citizens. There is no meaningful or persuasive constitutional distinction between semi-automatic handguns and semi-automatic rifles. Semi-automatic rifles, like semi-automatic handguns, have not traditionally been banned and are in common use by law-abiding citizens for self-defense in the home, hunting, and other lawful uses."

⁵⁹ *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017).

Kavanaugh thus showed an uncanny ability to separate the wheat from the chaff in his analysis, but then a lamentable tendency to throw out the wheat.⁶⁰ He is right that handguns kill more individuals overall than assault rifles but that doesn't pose an argument for preventing governmental action to ban assault rifles. Handguns also kill far more Americans than bazookas, hand-held missile launchers, and nuclear arms, but the notion that the right to keep and bear these arms cannot be infringed is hopefully beyond serious debate.

B. Fighting the Tyranny of the Federal Government

Some have tried to ground an individual right to possess such weaponry on the argument that the right of the Second Amendment is the right to fight a tyrannical federal government. Once we have crossed that bridge, of course, there must be a right to all of the weapons that the federal government has. Otherwise, telling the good citizens that it is their right to fight the tyrannical federal government while tying their hands behind their back by not giving them the needed weaponry would be the most cynical deception. The Second Amendment cannot be a suicide pact for our most patriotic and freedom-loving citizens who are willing to stand up against tyrants with their own weapons.

⁶⁰ Judge Kavanaugh's opinion on assault weapons bans in *Heller II* was at variance not only with his D.C. Circuit colleagues, but is also in direct conflict with every other appellate court that has considered this issue, all of which have upheld bans on assault weapons, including the [Second Circuit](#), [Fourth Circuit](#), and [Seventh Circuit](#) federal appeals courts, as well as the [Massachusetts Supreme Judicial Court](#).

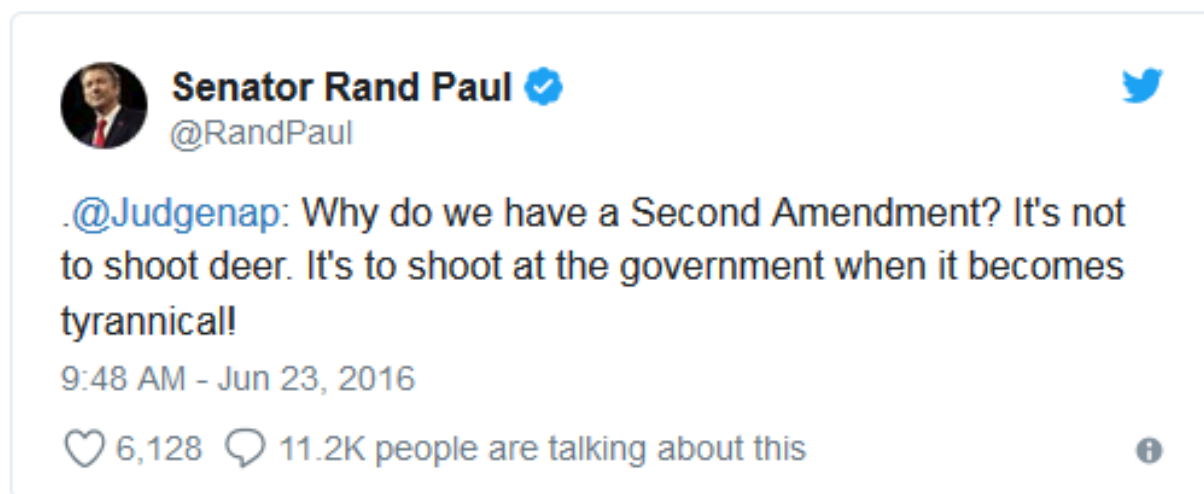
Conceivably, Justice Kavanaugh will have more support for his view that because assault weapons are "in common use" they cannot be banned among his Supreme Court colleagues. Justice Alito (joined by Justice Thomas in a concurring opinion) wrote that stun guns could not be banned because hundreds of thousands of them had been sold and therefore they were "in common use:"

the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding citizens for lawful purposes *today*. The Supreme Judicial Court offered only a cursory discussion of that question, noting that the "number of Tasers and stun guns is dwarfed by the number of firearms." ... This observation may be true, but it is beside the point. Otherwise, a State would be free to ban *all* weapons *except* handguns, because "handguns are the most popular weapon chosen by Americans for self-defense in the home." ... The more relevant statistic is that "[h]undreds of thousands of Tasers and stun guns have been sold to private citizens," who it appears may lawfully possess them in 45 States." *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016).

But the idea that because "hundreds of thousands" of weapons are possessed by private citizens means they are in common use and can't be banned makes no sense. [Roughly 391,000 machine guns](#) were listed in the national firearms registry as of November 2006. It is the level of danger of the weapon and the nature of the social harm it creates (in comparison with any social benefit) that determines whether it can and should be banned. If this expected harm is great enough, the greater the number of weapons "in common use" the *stronger* the argument for prohibition. Justices Alito and Thomas (like Judge Kavanaugh in *Heller II*) have been trapped by the backwards logic that Justice Scalia advanced in *Heller*. Moreover, if a particular weapon is banned early enough, it would never have been in common use, so under Scalian logic such bans would be permissible. But if the danger is not immediately recognized or grows over time or if a special interest is able to thwart or delay regulation and the numbers of weapons grows to some magic level, then government loses the power to control the problem that it previously possessed? That is not constitutional law; it is constitutional absurdity.

But surely no one would believe that the unregulated mob could stand up to the United States military. One might have thought not but cast your eyes on the words of wisdom of Senator Rand Paul.

Figure 18



While some may applaud this “specious mask of zeal for the rights of the people,” the idea that we want to encourage “the people” to have the weapons that would enable them to start shooting at “the government” when they decide it is tyrannical is utter nonsense. Some Pennsylvanians entertained this notion when they launched the Whiskey Rebellion, which prompted President George Washington to amass an army of 13,000 from four state militias to march on the rebels in 1794 and end the insurrection. The American Civil War is also not a stirring endorsement of the idea that those who would take up arms against the federal government are the ones fighting *against* tyranny.

Of course, we needn’t be concerned that the nonsensical ranting of a deluded libertarian Senator would be taken seriously by someone who could have the power to act on this delusion, right? But U.S. District Court Judge Roger Benitez of the Southern District of California, an appointee of President George W. Bush, seems to have been moved by a similar belief. In a noticeably effective effort at judge shopping, the NRA filed identical challenges to California’s 2016 ban on high-capacity magazines in two separate federal courts (changing only the names of the filing plaintiffs), hoping to enjoin the implementation of the ban prior to its July 1, 2017 effective date. This led to two federal district court judges deciding the request for a preliminary injunction on the same day, with Judge William Shubb of the Eastern District of California properly rejecting

the NRA request⁶¹ and Judge Roger Benitez issuing the injunction two days before the ban was to take effect.⁶²

Judge Benitez's ill-advised order quoted a statement – absurd on its face in the context of modern America – “that tyranny thrives best where government need not fear the wrath of an armed people.” A tyrannical federal government that has the support of the U.S. military will have little to fear from weapons in the hands of private citizens – beyond the apprehension that the experiences of President John Kennedy, former Senator Robert Kennedy, and President Ronald Reagan would (unhelpfully) create in any American politician.⁶³

Moreover, Judge Benitez, born in Cuba in 1950, seems not to have learned the lesson of his native land that arming civilians with assault weapons simply because they intone lofty promises to fight tyranny offers little guarantee that they will support the right side in any battle against the government. I assume the Judge was no fan of Fidel Castro, and his opinion's reference to the shooting at the Congressional baseball practice in Alexandria, Virginia highlights the exact opposite of his claims: encouraging U.S. citizens to arm themselves to stand up against tyranny is insanity, and the more powerful the weapons that these “fighters against tyranny” have at their disposal, the more needless deaths and injuries will occur.⁶⁴

⁶¹ *Weise v. Becerra*.

⁶² *Duncan v. Becerra*.

⁶³ Recall the following commentary on the size and power of the Iraqi army in 1990, which was battle tested, and over a million strong: “With about 6,000 battle tanks, 300 fighter planes and a vast array of missiles, Iraqi war-making equipment is impressive by any standard. In its top-line stockpile are battle-tested weapons that have earned stellar reputations in the decade's few wars: the Soviet T-72 tank, the Chinese Silkworm missile, the French Mirage fighter and the Exocet tactical missile, which almost sank the U.S. guided-missile frigate Stark in the Persian Gulf in 1987.” A relatively small portion of the U.S. military fighting more than 6000 miles from the United States defeated this army in four days. <https://www.latimes.com/archives/la-xpm-1990-08-13-mn-465-story.html>.

⁶⁴ In July 2016, incensed by police shootings of unarmed black men, Gavin Long used a particularly powerful assault rifle with a 40-round magazine to shoot six police officers in Baton Rouge, Louisiana, killing three before he himself was killed by a police sniper. Prior to the attack, a 911 call was made when Long was spotted walking in the July heat wearing a coat, body armor, and a ski mask while carrying a TAVOR assault rifle – which the manufacturer describes as “the ultimate weapon of the 21st century” employed by armed forces around the globe. Louisiana's open carry law gave the police no basis for disarming him. Israel Weapon Industries notes on its webpage that this particular weapon, developed in co-operation with the Israel Defense Forces, was “especially created” in response to “dynamic changes in the modern battlefield, the threats of global terrorism and the demands of ever-changing combat situations.” James Gill, “Civilians carrying 'ultimate weapon' Gavin Long used in Baton Rouge would be regarded worldwide as insane,” *The New Orleans Advocate*, August 10, 2016, https://www.nola.com/opinions/james_gill/article_4567899b-0cac-5e78-81ad-84729147171f.html. As East Baton Rouge District Attorney Hillar Moore stated, Long “was using green tip, steel penetrating type ammo. He was prepared to kill and hurt and these rounds went through walls and buildings. They were very powerful rounds.” “DA releases final report, suicide note from Baton Rouge police ambush,” <https://www.wvlv.com/article/news/da-releases-final-report-suicide-note-from-baton-rouge-police-ambush/289-453333136> (June 30, 2017).

In light of Judge Benitez's view that government employees should fear the wrath of armed citizens, consider the sentiments among Baton Rouge police and their families following the shooting:

“It scares the hell out of me,” Sgt. C. Bryan Taylor, the president of the Baton Rouge police union, said of open carry, adding there's an even greater risk for officers who encounter citizens sporting exposed rifles or

But stopping the new ban on possession of high-capacity magazines from taking effect (by granting a preliminary injunction to the NRA) was only the beginning of the damage. On March 29, 2019, Judge Benitez struck down not just the new law (adopted by both the state legislature and the people of California via referendum by an almost two-to-one margin⁶⁵) about to take effect, but all restrictions on high-capacity magazines which had effectively been in place for decades.⁶⁶ Ironically, in his earlier order in the case, the Judge had stated that “Courts are not free to impose their own policy choices on sovereign states,” when his behavior could be described by the dictum that “I am the sovereign and hereby reverse the policy choices of both the people of California and their elected officials.” High-capacity magazines immediately started pouring into the state following the Judge’s decision, and the California Attorney General was only able to stop that fiasco a week later when the state secured a stay of Benitez’s order pending 9th Circuit Court of Appeals review.

shotguns. "There's a time and place for everything," he said, adding that he would prefer owners of long guns to avoid carrying those weapons in public....

Open carry has unnerved the family of at least one of the slain officers. The father of Baton Rouge Cpl. Montrell Jackson said he couldn't comprehend why someone would be allowed to own an IWI Tavor, the Israeli-made assault rifle Long used to wreak havoc, let alone be allowed to carry it around in public. "I'm against that 100 percent," the officer's father, Hosea Jackson, said last week. "They shouldn't be able to own (a military-style rifle). They shouldn't be able to put their hands on it. If you're not in the military, you shouldn't be able to get your hands on it, and if you do, you should be punished."

Maya Lau and Jim Mustian, “Baton Rouge police shooting brings renewed attention to Louisiana's 'open carry' rights,” The New Orleans Advocate, August 6, 2016, https://www.theadvocate.com/baton_rouge/news/baton_rouge_officer_shooting/article_83d7317a-5b60-11e6-84b4-13cf89c9f22f.html. There is no circumstance in which private citizens in modern America could promote democracy by using assault weapons to kill government employees to show their disapproval of what they perceive to be “tyrannical” government.

⁶⁵ On July 1, 2016, the California legislature enacted the legislation that criminalized possession of high-capacity magazines within the state as of July 1, 2017, and the California electorate strongly endorsed this position in adopting Proposition 63 on November 8, 2016.

⁶⁶ The federal assault weapons ban had prohibited the acquisition of new high capacity magazines since September of 1994, and the California legislature had further prohibited the purchase, sale, transfer, receipt, or manufacture of such magazines since 2000.

Judge Benitez concluded his opinion⁶⁷ with some words of encouragement:

“The State has not carried its burden to justify the restrictions on firearm magazines protected by the Second Amendment based on the undisputed material facts in evidence. That is not to be lamented. It ought to provide reassurance. [I]t is the proudest boast of our Second Amendment jurisprudence that we protect a citizen’s right to keep and bear arms that are dangerous and formidable.”

I have grave concerns about any proud boasts that unleash the gun industry to provide increasingly dangerous and formidable weapons to mass shooters around the country.⁶⁸

⁶⁷Judge Benitez’s two opinions were marred by numerous claims that were inaccurate, misleading, or did not stand for the proposition he claimed (often standing for the exact opposite). The Judge may have been misled by some NRA or other pro-gun webpages, which may explain the large number of nonsensical or simply factually erroneous statements. For example, citing the worst fear of any homeowner – that a burglar will come into one’s home and commit a homicide – the judge cited a report for the claim that such home-invasion homicides occur 430 times a year on average (stating he visited the webpage the day before his 2019 opinion was released – see his fn. 9). Of course, anyone familiar with U.S. homicide data would have recognized that this number was incorrect because the report clearly specified that less than 1 percent of all homicides fall into this category. The true number was 86 – which is 1/5th the value that the Judge claimed and smaller than the number of friends and family members killed each year in the home by accidental discharge of guns. (A recent USA Today investigation found that in recent years the annual number of accidental deaths in which minors are killed accidentally or kill an adult accidentally is 140, roughly 63 percent higher than deaths resulting from home invasion, <https://www.pressreader.com/usa/usa-today-us-edition/20161014/281509340706268>. For context, 113 children age 1-4 died by firearm in 2016. Kate Prickett et al, “Family Firearm Ownership and Firearm-Related Mortality Among Young Children: 1976–2016,” *Pediatrics*, Volume 143, Issue 2 (2019), <https://pediatrics.aappublications.org/content/143/2/e20181171>.)

Moreover, this number doesn’t include accidental deaths involving only adults (see, <https://www.buzzfeednews.com/article/albertsamaha/good-guys-with-guns-shoot-wrong-people-in-seconds-of-panic> and <https://www.charlotteobserver.com/news/local/article231439203.html>), noting the case of an elementary school teacher who died when the gun in her purse fired and struck her in the abdomen while she was dining at a North Carolina Ruby Tuesday restaurant in June 2019). Neither does the 140 annual accidental gun deaths involving children count any homicidal or suicidal use of guns in the home for “protection.” (A 2019 study found that active-duty soldiers who keep loaded guns at home or publicly carry a gun when not on duty had a 4-fold increase in the odds of suicide death. https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2735465?utm_source=The+Trace+mailing+list&utm_campaign=80069a48b6-EMAIL_CANON_4_7_2018_COPY_01&utm_medium=email&utm_term=0_f76c3ff31c-80069a48b6-112411265).

In another of the Judge’s puzzling references, he states that “Nationally, the first study to assess the prevalence of defensive gun use estimated that there are 2.2 to 2.5 million defensive gun uses by civilians each year. Of those, 340,000 to 400,000 defensive gun uses were situations where defenders believed that they had almost certainly saved a life by using the gun.” Of course, while we might appreciate the historical reference, I don’t think if we wanted to comment on the age of the earth, we would reference Lord Kelvin’s estimate of 20 million years since we now know the true number is 4.5 billion years. The cited defensive gun use numbers are also wildly inaccurate, which underscores the dramatic unreliability of much of the research on which pro-gun forces rely. Since the largest number of homicides in the U.S. was about 25,000 in 1992, the idea that private gun toters saved lives anywhere close to 400,000 times a year is absurd – as anyone with the most basic knowledge of U.S. homicide rates would know. While these numbers still have currency on NRA webpages and among ignorant Second Amendment enthusiasts, they are widely acknowledged to be among the most wholly inaccurate figures referenced in U.S. policy debates. See, David Hemenway, “The Myth of Millions of Annual Self-Defense Gun Uses: A Case Study of Survey Overestimates of Rare Events,” *Chance*, Volume 10, 1997 - Issue 3, available at <https://www.tandfonline.com/doi/abs/10.1080/09332480.1997.10542033>.

⁶⁸ One recent article underscores the concern: “Spurred by the opportunity to land lucrative military contracts, American-based firearms accessory companies have developed a new generation of high-capacity

I should hasten to add that in *Weise v. Becerra*, the other federal district judge to address California's ban on high-capacity magazines -- Judge William Shubb -- ruled that "because California's ban does not substantially burden individuals' ability to defend themselves, intermediate scrutiny is appropriate." Judge Shubb then correctly explained that since this level of scrutiny requires "(1) the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective," the California law is constitutional.

While some federal judges have shown an appalling indifference to the growing menace of mass slaughters, one hopes that the U.S. Supreme Court will heed the words penned by conservative Reagan appointee J. Harvie Wilkinson when the 4th Circuit voted to uphold the Maryland assault weapons ban:

"To say in the wake of so many mass shootings in so many localities across this country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny -- this would deliver a body blow to democracy as we have known it since the very founding of this nation."

C. The Evidence Counsels Against Further Expansions of the Second Amendment

It should be noted in passing that to the extent the argument of being a bulwark against tyranny is to be offered as an explanation for an expansive interpretation of the Second Amendment, it would not further the argument that citizens should have a right to carry guns outside the home. The tyranny argument turns on having access to a gun when the time comes to launch the rebellion. Moving about town with a gun now does nothing to advance that interest -- but does generate the unhappy consequences of the increased violent crime that is discussed above.

The evidence that RTC laws increase violence should cause particular hesitation to any court contemplating an extension of the Second Amendment beyond the right to have a gun in the home for self-defense to a right to carry guns outside the home. If recent estimates are correct, there may be an even higher price to pay in lives and increased violent crime from gun carrying outside the home than from our worsening mass shooting problem. Curtailing the increased crime that follows from the adoption of right-to-carry laws through greater incarceration would require a doubling of our already bloated prison populations. We should not interpret constitutional rights that way.

magazines. The devices are compact, lightweight, and strong, holding anywhere from 40 to 100 rounds, allowing their users to fire far more before having to reload. Experts say these larger models are growing in popularity, and will soon dominate the civilian market.... The new products have a cult following among gun enthusiasts.... But there's another category of gun owner seeking out larger, highly functional magazines: mass shooters." <https://www.thetrace.org/2019/06/gun-industry-high-capacity-magazine-size/>.