

# THE SWERVE TO “GUNS EVERYWHERE”: A LEGAL AND EMPIRICAL EVALUATION

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## I INTRODUCTION

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, the large majority of states confer the “right-to-carry” (RTC) with little or no restriction. After unwisely granting cert and proceeding with oral argument in *New York State Rifle and Pistol Association v. City of New York*, in which the U.S. Supreme Court was asked to create an individual right under the Second Amendment to carry guns outside the home, the Court chose to leave this question for another day.<sup>1</sup> One argument frequently used to justify this expansion of the Second Amendment is that good guys with guns can quickly thwart mass shootings. 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.<sup>2</sup> Moreover, a growing body of evidence suggests that allowing expanded gun access outside the home has increased violent crime.

While *New York State Rifle and Pistol Association*, which involved an idiosyncratic and moot provision of city law, would have been a terrible vehicle to make new constitutional law, it did have the potential to either confine the

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1. N.Y. State Rifle & Pistol Ass’n v. City of New York, 140 S. Ct. 1525 (2020) (per curiam).

2. After the federal assault weapons ban lapsed in 2004, the gun industry was able to flood the market with increasingly more powerful weaponry (including large-capacity magazines) that enable mass killers to kill ever more quickly with predictable results. The decade after the ban elapsed saw a sharp increase in mass shooting incidents and a 347 percent increase in fatalities, even as overall violent crime continued downward. John Donohue & Theodora Boulouta, *That Assault Weapon Ban? It Really Did Work*, N.Y. TIMES (Sep. 4, 2019), <https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html> [<https://perma.cc/Z73J-MT4C>]. The deadly pace has only increased in the last five years, with notably little benefit from interventions from private individuals carrying weapons (as opposed to police or security personnel). *See id.*; *see also* John Donohue & Theodora Boulouta, *The Assault Weapon Ban Saved Lives*, STANFORD LAW SCH. LEGAL AGGREGATE BLOG (Oct. 15, 2019), <https://stanford.io/2MWNsrV> [<https://perma.cc/C234-NC7Q>].

Second Amendment to its current contours or vastly expand its reach in a way that could have wiped out a considerable array of state and local legislative enactments limiting the right to carry weapons outside the home and restricting the power and deadliness of permissible weaponry. In Part II, I survey the latest literature on the empirical effects of RTC laws on gun violence, which should be an issue of central concern when the Court next considers whether to mandate “constitutional carry.”

Part III then explores several examples of the dangers of a vision of the Second Amendment that fails to account for, or even to competently assess, the empirical effects surveyed in Part II or any other relevant empirical evidence. I conclude that in interpreting the Second Amendment, courts must reflect carefully on the consequences of their decisions for both public safety and democracy. This is particularly important with respect to constitutional decisions that may impose large social costs in terms of increased gun massacres and violent crime, while simultaneously thwarting the democratic will of the people as expressed in legislation and state referenda.

## II

### THE IMPACT OF RIGHT TO CARRY LAWS

To think sensibly about desirable policies concerning carrying guns outside the home, one must begin with the best evidence on the impact of RTC laws on crime. My study with coauthors Abhay Aneja and Kyle Weber examining the impact of RTC laws found that whatever benefit might come from gun carrying by private citizens seems to be more than offset by overall increases in violent crime.<sup>3</sup> In addition, a number of recent studies have found that permissive gun-carrying leads to *higher* rates of homicide,<sup>4</sup> and there is little question it leads to enormous increases in gun thefts that can further stimulate criminal activity. Indeed, while RTC laws have shown no ability to reduce robberies, states that adopt these laws see *increases* in the percentage of robberies committed with a gun.<sup>5</sup>

The lax regulation of the huge number of guns in the hands of U.S. civilians 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 twenty-four days of 2015*, police in the United States fatally shot fifty-nine individuals, which was greater than the comparable number of fifty-five shot by

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3. John J. Donohue, Abhay Aneja & Kyle Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, 16 J. EMPIRICAL LEGAL STUD. 198, 200 (2019) [hereinafter DAW 2019].

4. See generally *infra* Part II.A–D.

5. DAW 2019, *supra* note 3, at 210.

police in England and Wales *over the past twenty-four years*.<sup>6</sup> 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 increased fatalities and other socially harmful consequences.

#### A. Panel Data Analysis of RTC Laws

Violent crime in the United States has steadily decreased for the past thirty-five years.<sup>7</sup> Surely the increase in gun-carrying is responsible for that benign trend? The simple answer is no. While some early work in the late 1990s claimed to find that RTC laws did reduce violent crime,<sup>8</sup> 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.<sup>9</sup> In the last decade, though, a growing body of evidence using updated tools and methodologies contradicts the early studies and suggests that the costs of RTC laws exceed their benefits.<sup>10</sup>

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 1 depicts percentage changes in the violent crime rate over a thirty-eight-year period for three groups of states: those that never adopted RTC laws, those that adopted RTC laws sometime between 1977 and 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 thirty-eight-year period.<sup>11</sup>

While the graphical evidence can be illuminating, one needs to consider other factors that can influence crime to determine the causal effect of RTC laws. The standard econometric tool that tries to control for these other factors in the period following state adoption of RTC laws is called a panel data model with state and year fixed effects. The early work by John Lott and David Mustard that used this tool was marred by at least two econometric shortcomings that were common in applied econometric papers prior to around 2004.<sup>12</sup> First, most research during this time relied on what we now know were inaccurate standard errors that exaggerated the statistical significance of their findings. Second, early

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6. Jamiles Lartey, *By the Numbers: US Police Kill More in Days than Other Countries Do in Years*, GUARDIAN (Jun. 9, 2015), <https://www.theguardian.com/us-news/2015/jun/09/the-counted-police-killings-us-vs-other-countries> [<https://perma.cc/3USA-XNKA>].

7. See generally DAW 2019, *supra* note 3.

8. See John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right-to-Carry Concealed Handguns*, 26 J. LEGAL STUD., no. 1, 1997, at 65.

9. NAT'L RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 49–50 (Charles F. Wellford et al. eds., 2005).

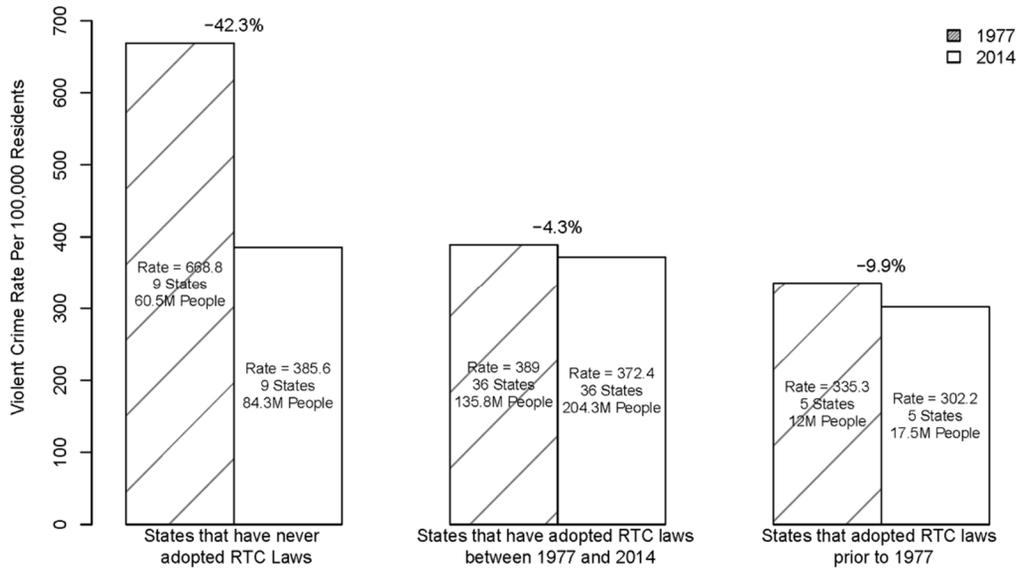
10. See *infra* Part II.A–D.

11. DAW 2019, *supra* note 3, at 213. The discussion in the following paragraphs comes from evidence presented in this work.

12. See generally, e.g., Lott & Mustard, *supra* note 8.

researchers were also less aware of or at least less 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 early work evaluating RTC laws.

**Figure 1. Changes in Violent Crime Rates Depending on Adoption of RTC Laws, 1977–2014<sup>13</sup>**



Unlike that early work, my more recent study with Aneja and Weber benefits from both advances in econometric practice and more complete data, and finds that on average RTC laws are associated with a roughly nine percent higher rate of violent crime.<sup>14</sup> 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.

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

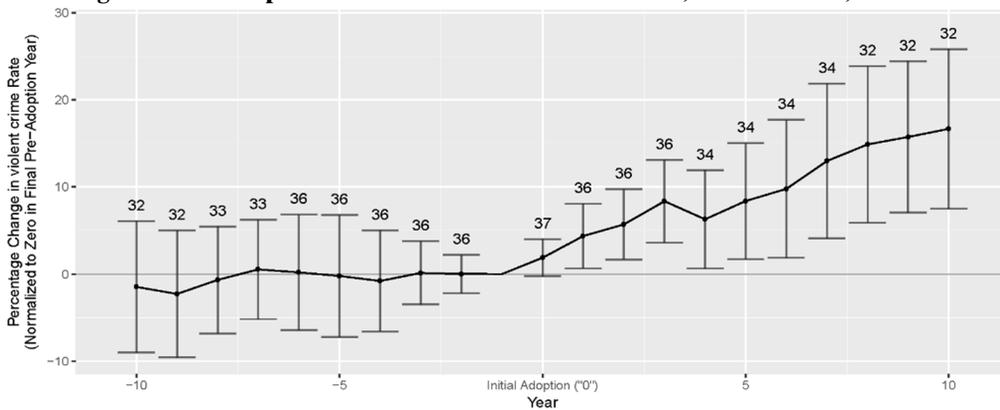
13. Reprinted from Figure 1 in DAW 2019, *supra* note 3, at 214.

14. *Id.* at 217. This estimate is highly statistically significant, with a standard error that was less than one-third the size of the nine percent estimate.

path of crime. While the violation of the parallel-trends assumption badly marred Lott’s statistical model, our research does not share this problem.<sup>15</sup>

Figure 2 graphically depicts the estimated impact of RTC laws using the DAW panel data model. Because the law can have no impact before it goes into effect, we know that if the DAW model works properly, the estimated effect of the law in the years prior to adoption should be zero. The figure shows exactly this pattern. Put differently, Figure 2 shows that, controlling for the various explanatory variables used in the DAW model, the trends in the violent crime rates in adopting and non-adopting states during the ten years prior to RTC adoption are nearly perfectly parallel.<sup>16</sup> Once the RTC laws go into effect (designated as year zero in Figure 2), violent crime immediately starts to rise above what we would otherwise have expected, and ten years after adoption, the estimated increase in violent crime from RTC laws is greater than fifteen percent. To put a violent crime increase of this magnitude in perspective, note that it is plausible to estimate that one could engineer a crime *reduction* of roughly fifteen percent by doubling America’s already bloated prison population. 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 2. The Impact of RTC Laws on Violent Crime, DAW model, 1979–2014<sup>17</sup>**



15. See *id.* at 220–22.

16. Essentially, the fact that the dark line to the left of the initial year of RTC law adoption in Figure 2 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.

17. Reprinted from Figure 2 in DAW 2019. *Id.* at 221. We regress crime on dummies for pre- and post-passage years and DAW covariates. The reference year is the year before adoption and adoption year is the 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.

## B. Synthetic Control Analysis of RTC Laws

While panel data analysis has been the workhouse of empirical evaluation of the impact of various state law changes, it is 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 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. These limitations in panel data analysis led Harvard economist Alberto Abadie and his coauthors to develop a new technique that has already gained widespread acceptance: synthetic control analysis.<sup>18</sup>

DAW implemented this approach for thirty-three RTC law adoptions occurring over three decades throughout the country.<sup>19</sup> Since we know the pattern of crime prior to any state's adoption of a RTC law, we use the synthetic control analysis to find a weighted average of other states with no RTC laws to approximate the pattern of crime for our adopting state prior to RTC adoption. This "synthetic control" is then observed in the post-treatment period to compute the impact of RTC laws by measuring the difference in crime rates between the adopting state and its synthetic control. By comparing what actually happened to crime after RTC adoption to the crime performance of the synthetic control over the same period, we can generate estimates of the causal impact of RTC laws on crime.

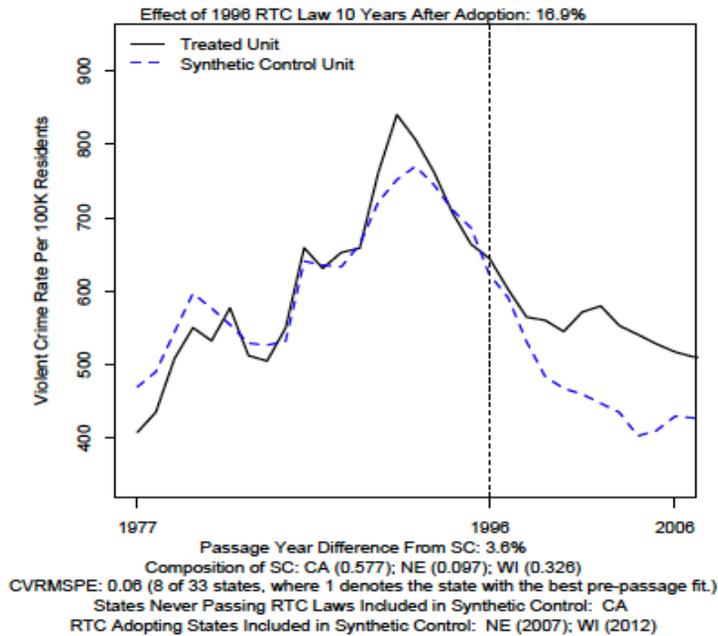
Figure 3 shows the synthetic control graph for violent crime in Texas over the period from 1977 through 2006 (ten years after the adoption of Texas's 1996 RTC law; the 1996 law adoption is represented by the vertical line in Figure 3). The non-adopting states with similar pre-adoption crime patterns used to generate the "synthetic Texas" control were California, weighted at 57.7 percent owing to its similar attributes to Texas, Nebraska weighted 9.7 at percent, and Wisconsin weighted at 32.6 percent.

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18. See generally Alberto Abadie & Javier Gardeazabal, *The Economic Costs of Conflict: A Case Study of the Basque Country*, 93 AM. ECON. REV. 1 (2003).

19. This and the following discussion come from DAW 2019, *supra* note 3, at 224–27.

**Figure 3. 1996 Texas RTC Law on Violent Crime Rate using Synthetic Control Analysis<sup>20</sup>**



One of the advantages of the synthetic control methodology is that one can assess how well synthetic Texas matches the pre-RTC law passage pattern of violent crime to see whether the methodology is likely to generate a good fit in the ten years of post-passage data. Here, in Figure 3, the fit looks rather good at mimicking the pre-passage rises and falls in violent crime in Texas. This pattern increases our confidence that synthetic Texas provides a plausible prediction of what would have happened in Texas had it not adopted a RTC law.

Figure 3 reveals that both Texas and synthetic Texas show declining crime rates in the post-passage 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. Figure 3 depicts 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. (This is quite comparable to the average estimate shown in Figure 2 using the panel data approach.)

Note that Figure 3 illustrates perhaps the most important lesson of causal inference: one cannot simply look before and after an event to determine the event's consequence. Rather, one needs to estimate the difference between what did unfold and the counterfactual of what would have unfolded without the event. The public and law enforcement officials may have perceived 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

20. Reprinted from Figure 5 in DAW 2019. *Id.* at 227.

violent crime decline if it had not passed a 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 the enactment of its RTC law, while synthetic Texas experienced a larger 31.0 percent decline. As such, DAW's results suggest that Texas's RTC law actually imposed a large social cost on the state.

The value of the synthetic control methodology over the panel data models considered above is that it provides a highly transparent estimate of that counterfactual, using a tool designed to ensure the validity of the parallel-trends assumption critical to achieving meaningful causal estimates. Figure 3 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 post-passage decade that might compromise the validity of the synthetic control estimate of the impact of RTC laws. 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,<sup>21</sup> we are given a perfect illustration of how one could easily draw the incorrect causal inference that Texas's decline in crime was facilitated by its (in fact) crime-inducing RTC law.<sup>22</sup>

Table 1 shows DAW's overall synthetic control estimates for the impact of RTC laws on violent crime for all thirty-three adopting states. The estimates of the average treatment effect percentage (TEP) suggest that states that passed RTC laws experienced more deleterious changes in violent criminal activity than their synthetic controls did in the ten years post-adoption. On average, treatment states had aggregate violent crime rates that were almost seven percent higher than their synthetic controls five years after passage and around fourteen percent higher ten years after passage. Table 1 suggests that the longer the RTC law is in effect (up to the tenth year that we analyze), the greater the cost in terms of increased violent crime.

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21. JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN CONTROL LAWS* 15 (3d ed. 2010).

22. See DAW 2019, *supra* note 3, at 288.

**Table 1. The Impact of RTC Laws on the Violent Crime Rate, DAW Covariates, Full Sample, 1977–2014<sup>23</sup>**

	Average normalized TEP	<i>N</i>	Pseudo <i>p</i> value
(1)	-0.117 (1.076)	33	0.936
(2)	2.629* (1.310)	33	0.274
(3)	3.631* (1.848)	33	0.22
(4)	4.682** (2.068)	33	0.192
(5)	6.876*** (2.499)	33	0.094
(6)	7.358** (3.135)	33	0.106
(7)	10.068*** (2.823)	33	0.06
(8)	12.474*** (3.831)	31	0.038
(9)	14.021*** (3.605)	31	0.032
(10)	14.344*** (2.921)	31	0.032

Note: Standard errors in parentheses. Row numbers indicate post-passage year under consideration; *N* = number of states in sample. The synthetic controls method was ran 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 presents uniformly undermine the “More Guns, Less Crime” hypothesis.<sup>24</sup> There is not even the slightest hint in the data using any econometrically sound regression that RTC laws reduce violent crime. Indeed, the weight of the evidence from both the panel data estimates and the synthetic control analysis discussed herein supports the view that adopting RTC laws substantially increases overall violent crime in the ten years post-passage. While both approaches have advantages and disadvantages, the picture that emerges from each econometric method is the same: violent crime *increases substantially* in the ten years following RTC adoption.

### C. Other Recent Research Documenting Crime Increases from RTC Laws

Beyond our own work, a number of other recent studies provide further support for the conclusion that RTC laws increase violent crime. For example, Michael Siegel and his co-authors look at state data from 1991–2015 and

23. Reprinted from Table 5 in DAW 2019. *Id.* at 233.

24. This hypothesis appears, for example, in Lott & Mustard, *supra* note 8.

concluded that RTC laws increase overall homicide 6.5 percent, firearm homicide by 8.6 percent, and handgun homicide by 10.6 percent.<sup>25</sup> A second paper by Siegel and his co-authors extended the dataset for one additional year, through 2016, and controlled for a richer array of gun laws to ensure that other legal changes are not driving the results in the initial paper.<sup>26</sup> Again, they found that RTC laws increase homicides by nine percent.<sup>27</sup>

To explore whether the state analyses are too aggregated to give precise estimates of the impact of RTC laws, Cassandra Crifasi and co-authors looked at 136 large, urban U.S. counties from 1984–2015. They found that RTC laws increase firearm homicides by four percent.<sup>28</sup>

Similarly, Mark Gius explored the specific legal change of a state moving from a prohibition on concealed carry to the adoption of a RTC law.<sup>29</sup> Using a synthetic control approach, Gius found that this transition to RTC law elevates overall homicide by 4.9 percent and firearm homicides by 12.3 percent.<sup>30</sup>

Moreover, two recent and extremely creative papers lend 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.<sup>31</sup> They found 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.<sup>32</sup> In other words, the crime-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, which led previous studies based on the Uniform Crime Reporting program (UCR) to underestimate crime and to often understate the impact of policies on crime.<sup>33</sup> 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 departments try to disguise the elevated crime (or are too overwhelmed by it to spend time to fully

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25. 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).

26. Michael Siegel et al., *The Impact of State Firearm Laws on Homicide and Suicide Deaths in the USA, 1991–2016: A Panel Study*, 34 J. GEN. INTERNAL MED. 2021, 2024 (2019).

27. *Id.*

28. Cassandra K. Crifasi et al., *Association between Firearm Laws and Homicide in Urban Counties*, 95 J. URB. HEALTH 383, 387 (2018); Cassandra K. Crifasi et al., *Correction to: Association Between Firearm Laws and Homicide in Urban Counties*, 95 J. URB. HEALTH 773, 773–74 (2018).

29. 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).

30. *Id.*

31. Jonathan Colmer & Jennifer L. Doleac, *Do Right-to-Carry Laws Mitigate or Exacerbate Violent Crime? Evidence from the Temperature-Violent Crime Relationship 1* (Nov. 9, 2019) (unpublished manuscript) (on file with author).

32. *Id.*

33. Richard T. Boylan, *Official Statistics Underreport Crime: Evidence from Regression Discontinuity and State Reporting Laws 1* (June 12, 2019) (unpublished manuscript) (on file with author).

report it). Within his sample, Boylan found that RTC laws increase crime by 18 percent if one accepts the UCR data that all of the above studies rely on, but that the estimated crime increase rises to 29 percent if one controls for the selective under-reporting of crime.<sup>34</sup> 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.

#### D. Mechanisms Behind the Increased Crime from RTC Laws

While the weight of the evidence supports the conclusion that increased gun carrying leads to a higher rate of 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. We know that there are some instances where gun carrying thwarts crime, and one could imagine there might also be some deterrent impact of increased gun carrying. However, 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. There is certainly plenty of evidence suggesting that road rage incidents and other arguments have ended with lethal violence only because of the presence of guns.<sup>35</sup> Additionally, guns carried outside the home are more likely to be lost or stolen, making them particularly valuable to criminals since they cannot be traced back to them.<sup>36</sup> A rough but plausible estimate would be that RTC laws are directly responsible for approximately 100,000 gun thefts per year, which equates to twenty-five percent of total annual gun thefts.<sup>37</sup>

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 the bad guys will take no responsive action

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34. *Id.* at 9.

35. See, e.g., Staff, *Road Rage Incident on I-5 in South Sacramento Leads to Woman Being Shot*, ABC10 (Sept. 25, 2018), <https://www.abc10.com/article/news/crime/road-rage-incident-on-i-5-in-south-sacramento-leads-to-woman-being-shot/103-597441561> [<https://perma.cc/HQS8-M9HQ>]. A 2015 study found that approximately 10.4 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. Jeffrey W. Swanson et al., *Guns, Impulsive Angry Behavior, and Mental Disorders: Results from the National Comorbidity Survey Replication (NCS R)*, 33 BEHAV. SCI. & L. 199, 209 (2015).

36. As an example, an NBA player bought a \$50,000 assault weapon only to have the gun stolen from his unlocked car a few minutes later. Jack Baer, *Hassan Whiteside Buys \$50K Assault Rifle, Immediately Has it Stolen After Leaving it in Unlocked Rolls Royce*, YAHOO! SPORTS (Nov. 15, 2018), <https://sports.yahoo.com/hassan-whiteside-buys-50k-assault-rifle-immediately-stolen-leaving-unlocked-rolls-royce-020551481.html> [<https://perma.cc/3CKW-J722>].

37. See DAW 2019, *supra* note 3, at 207. A nationally representative web-based survey conducted in April 2015 of 3,949 subjects revealed that those who carried guns outside the home had their guns stolen at a rate over 1 percent per year. Given the current level of roughly 16 million permit holders, a plausible estimate of the additional guns stolen by virtue of the increased gun carrying induced by the adoption of RTC laws is roughly 100,000 guns per year.

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 using data from 1980 to 2016 reveals that after adoption of RTC laws, the percentage of robberies committed with a firearm rises by 18 percent ( $t = 2.60$ ).<sup>38</sup> A synthetic control analysis predicts an even more ominous response: the percentage of robberies committed with a firearm increases by 35 percent over 10 years ( $t = 4.48$ ).<sup>39</sup> 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 amount of robberies. Indeed, a panel data analysis associates adoption of RTC laws with a 9 percent *increase* in overall robberies ( $t = 1.85$ ) while the synthetic control analysis suggests a 7 percent growth over 10 years ( $t = 1.19$ ).<sup>40</sup>

This evidence shows that criminals react in some socially harmful ways to the adoption of RTC laws for the simple reason that they do not want to be shot. It also shows that police act more aggressively and violently as 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 civilians are killed by police in the United States at a higher rate than in comparably affluent countries that are far less gun-saturated.<sup>41</sup>

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.<sup>42</sup> This tax on police activity puts upward pressure on violent behavior since, as numerous studies have shown, the police are one of the most important elements in restraining crime.<sup>43</sup>

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38. *Id.*

39. *Id.*

40. *Id.* at 210.

41. See *supra* note 6. The estimated rate of 2.93 killings by U.S. police per million citizens is about 42 times greater than the killing rate by police in Germany and more than 100 times that of police in England and Wales. Franklin E. Zimring, *Firearms and Violence in American Law*, in BRIDGING THE GAP: A REPORT ON SCHOLARSHIP AND CRIMINAL JUSTICE REFORM, 4–5 (Erik Luna ed.) (U.C. Berkeley Pub. Law Research Paper No. 2939902, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2939902](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2939902) [<https://perma.cc/6FSU-UFFQ>]. Zimring also found that police in the United States die from assaults while on duty (overwhelmingly from fatal shootings) at about 35 times the rate of police in Germany and 17 times the rate of police in the United Kingdom. *Id.*

42. See, e.g., Laurie Merrill, *Police Urge Holster Use After Man Shoots His Own Penis*, AZ CENT. (Aug. 7, 2011), <http://www.azcentral.com/community/chandler/articles/2011/08/07/20110807cr-penis-shot0811.html#ixzz6GtZitpgK> [<https://perma.cc/R8Z5-JGHP>].

43. As the Council of Economic Advisors has found, “[e]xpanding 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 ECON. ADVISORS, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 5 (2016). In other words, if the entire array of impositions on police time imposed by lawful gun carrying in the United States took up ten percent of police time, then one would expect this would elevate crime from three to ten percent. See also Steven Mello, *More COPS, Less Crime*, 172 J. PUB. ECON. 174, 189 (2019) (stating that the social value of an additional police officer exceeds \$300,000).

## III

## LEGAL CONSIDERATIONS IN LIGHT OF THE EMPIRICAL EVIDENCE

The previous discussion has illustrated that the best empirical evidence suggests that allowing citizens to carry concealed handguns as a matter of right will elevate violent crime. Similarly, the empirical evidence suggests that restrictions on assault weapons and high-capacity magazines can reduce the rising death toll from mass shootings.<sup>44</sup> One would ordinarily think this information would be enormously important for crafting wise policies concerning the carrying of weapons outside the home. But the special interests of the gun lobby and supporters of an aggrandized individual Second Amendment right argue that the consequences of gun carrying and of the growing power and danger of weaponry are irrelevant. This raises the question of the appropriate role of empirical evidence in Second Amendment litigation and interpretation.

## A. Should Public Safety Influence the Scope of the Second Amendment?

The extreme non-consequentialist view is that empirical evidence on gun policy should have no impact on judicial opinions because the Founders sealed the fate of the victims of gun violence by enacting the Second Amendment, taking off the table the consequences of that hoary determination of 1791. While many would find such a claim bewildering, this was the assertion of then-Judge Brett Kavanaugh’s dissent in a D.C. Court of Appeals case in which he was outvoted by two other judges (both originally appointed to the federal bench by Ronald Reagan).<sup>45</sup>

Kavanaugh argued that “text, history, and tradition” should “guide analysis of gun laws.”<sup>46</sup> In his view, the Supreme Court had “expressly rejected *judicial* assessment of ‘the costs and 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.”<sup>47</sup> Judge Kavanaugh announced that one of the conclusions that followed from this position was that there could be no ban on semi-automatic assault weapons,<sup>48</sup> and he would presumably draw the same conclusion about broad restrictions on the right to carry guns outside the home.

Some defenders of Kavanaugh’s position have tried to ground this view on “the Framers’ vision of governance, which emphasizes a judiciary that plays an important but limited role and leaves policymaking to” the legislative branch of government.<sup>49</sup> But this defense is untenable. One cannot announce that the

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44. See *supra* note 1.

45. *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

46. *Id.* at 1278.

47. *Id.* (emphasis added) (quoting the majority opinion).

48. See *id.* at 1287–88.

49. Anne Swearer & Scott French, *Brett Kavanaugh’s Defense of Second Amendment is Hardly ‘Extremist’*, HERITAGE: COMMENTARY (Jul. 18, 2018), <https://www.heritage.org/courts/commentary/brett-kavanaughs-defense-second-amendment-hardly-extremist> [<https://perma.cc/5MRU-ZFS6>].

legislature is more institutionally competent to evaluate the best empirical evidence concerning bans on assault weapons and restrictions on the right to carry weapons outside the home only to strike down such legislative enactments while claiming that the best empirical evidence is irrelevant when interpreting the Second Amendment. Kavanaugh was trying to foreclose legislative action, not defer to it. The modern version of virulent Second Amendment advocacy is the height of anti-democratic judicial activism wedded to anti-scientific proclivities to produce bad public policy.

Of course, the original sin behind Kavanaugh's misguided approach is the harshly-criticized five to four 2008 *Heller* decision authored by Justice Scalia that for the first time created an individual Second Amendment right<sup>50</sup>—which was, in the words of Justice John Paul Stevens, “unquestionably the most clearly incorrect decision” issued during his long tenure on the Court.<sup>51</sup> In *Heller*, the self-avowed originalist and textualist Scalia ignored the Supreme Court's pronouncement in *United States v. Miller* that the Second Amendment should be “interpreted and applied” in light of its “obvious purpose to assure the continuation and render possible the effectiveness of [militia] forces . . . .”<sup>52</sup> In other words, the decision that Kavanaugh claimed established the “text, history, and tradition” test of what was lawful gun regulation had itself ignored or mischaracterized the text, history, and tradition of the Second Amendment.

Even if the majority in *Heller* had not completely botched the text, history, and tradition relevant to their inquiry, the Kavanaugh gloss of indifference to public safety considerations in deciding Second Amendment cases would still be highly problematic since it inhibits the ability to address the new and growing dangers posed by modern weaponry. Scalia did raise and then immediately reject one possible avenue to limit the potential harm of his decision, stating: “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.”<sup>53</sup> But of course not only does this argument not “borde[r] on the frivolous,”<sup>54</sup> as Scalia asserted, it also makes perfect sense to consider whether the reasons for the Amendment are still operative today and whether the vastly

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50. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

51. John Paul Stevens, *The Supreme Court's Worst Decision of My Tenure*, ATLANTIC (May 14, 2019), <https://www.theatlantic.com/ideas/archive/2019/05/john-paul-stevens-court-failed-gun-control/587272/> [<https://perma.cc/X3RC-AHY7>]. For two more of the many strong criticisms of Scalia's decision in *Heller* and its “faux originalism,” both by conservative Reagan-appointed federal court of appeals judges, see generally Richard A. Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), <http://www.newrepublic.com/article/books/defense-looseness> [<https://perma.cc/7NBB-UZCR>]; and J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253 (2009). It is certainly challenging to think of another Supreme Court decision that would be as totally misguided from every conceivable dimension of constitutional interpretation—originalist, textualist, or pragmatist—that one might attribute to its author.

52. 307 U.S. 174, 178 (1939).

53. *Heller*, 554 U.S. at 582.

54. *Id.*

more deadly weaponry currently available would further or undermine its goals of advancing security.

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, as the Court itself noted in *Miller*.<sup>55</sup> The Second Amendment was designed to ensure that the federal government would have the ability to generate a fighting force to defend the country.<sup>56</sup> However, civilian ownership of firearms no longer plays any role in furthering that objective. The security of the United States against domestic and foreign enemies is now guaranteed by the U.S. military and the National Guard. Therefore, as even Justice Scalia acknowledged in *Heller*, the right the Court created in that 2008 opinion did not include the right to have weapons of war.<sup>57</sup>

When one compares the weaponry available at the time of the Founding to that available today, it becomes clear that the difference is immense. This difference has important implications for constitutional analysis. The Continentals were clearly not carrying around anything even remotely like modern assault weapons. 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 in 2018.<sup>58</sup> The Dayton, Ohio shooting in the Summer of 2019 was terminated with astonishing quickness owing to the large police presence that resulted in more bullets fired *at* the shooter than *by* him; yet, even though he was killed within thirty-two seconds of his initial firing, he still managed to shoot twenty-six people, killing nine, because of the enormous power, deadliness, and speed of his assault weapon.<sup>59</sup>

Any claim that the Second Amendment eliminates the ability to address the current, growing mass shooting problem in the United States because any gun in “common use” is now beyond government control is fatuous. If “originalist” Justice Scalia had contemplated what the practical framers of our Constitution

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55. 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. See 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) [hereinafter Konig, *A Missing Transatlantic Context*] (arguing the Second Amendment was created for national defense); see also 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) [hereinafter Konig, *Why the Second Amendment Has a Preamble*].

56. Konig, *A Missing Transatlantic Context*, *supra* note 55, at 154–55; see also generally Konig, *Why the Second Amendment Has a Preamble*, *supra* note 55.

57. See *Heller*, 554 U.S. at 636.

58. Richard A. Oppel Jr., *MGM Resorts Sues 1,000 Victims of Las Vegas Shooting, Seeking to Avoid Liability*, N.Y. TIMES (July 17, 2018), <https://www.nytimes.com/2018/07/17/us/mgm-resorts-sues-victims.html> [<https://perma.cc/NK9N-53W7>].

59. Adeel Hassan, *Dayton Gunman Shot 26 People in 32 Seconds, Police Timeline Reveals*, N.Y. TIMES (Aug. 13, 2019), <https://www.nytimes.com/2019/08/13/us/dayton-shooter-video-timeline.html> [<https://perma.cc/BNJ5-YS6P>].

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.

And yet then-Judge 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 struggled with what most would find to be a rather simple categorization question: he could conclude that AR-15's were more like handguns, which *Heller* said could not be banned, or more like "M-16 rifles," which *Heller* said could be banned. The en banc panel of the Fourth Circuit provided the obvious answer: "[T]he banned assault weapons . . . 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."<sup>60</sup>

Judge Kavanaugh, however, thought AR-15's were more like handguns, and therefore could not be banned.<sup>61</sup> His vapid dissenting opinion is at odds not only with his former D.C. Circuit colleagues, but also directly conflicts with every other appellate court that has considered this issue, all of which have upheld bans on assault weapons against Second Amendment attacks.<sup>62</sup> Although Judge Kavanaugh was correct that handguns kill more individuals overall than assault rifles, that does not 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 or of Second Amendment Fundamentalists

Some have tried to justify an aggrandized Second Amendment on the grounds that the Second Amendment is in place to enable individuals to fight a tyrannical federal government. Once we have crossed that bridge, of course, there would have to be a right to all of the weapons that the federal government has. Otherwise, telling citizens that it is their right to fight the tyrannical federal

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60. *Kolbe v. Hogan*, 849 F.3d 114, 137 (4th Cir. 2017).

61. *Heller v. District of Columbia*, 670 F.3d 1244, 1269 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("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.").

62. *See Worman v. Healey*, 922 F.3d 26 (1st Cir. 2019); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 469 (2017); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 447 (2015); *see also Wilson v. Cook Cty.*, 937 F.3d 1028 (7th Cir. 2019); *Commonwealth v. Cassidy*, 479 Mass. 527 (2018), *cert. denied*, 139 S. Ct. 276 (2018).

government while tying their hands behind their back by not giving them adequate 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.

But surely no one would believe that the unregulated mob could stand up to the overwhelming power of the United States military. While this “anti-tyranny” justification may seem far-fetched for modern times, it is still invoked by some in positions of power. For example, in 2016, Senator Rand Paul tweeted: “Why do we have a Second Amendment? It’s not to shoot deer. It’s to shoot at the government when it becomes tyrannical!”<sup>63</sup>

While some may applaud this zeal, I am highly dubious 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. Some Pennsylvanians entertained this notion when they launched the Whiskey Rebellion, which prompted President George Washington in 1794 to amass an army of 13,000 from four state militias to march on the rebels and end the insurrection.<sup>64</sup> 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.

While this anti-tyranny view of the Second Amendment may seem like theatrical political rhetoric, it has garnered some federal judicial support. For example, two separate lawsuits were filed in California federal courts seeking to enjoin the implementation of California’s 2016 ban on high-capacity magazines prior to its July 1, 2017 effective date.<sup>65</sup> 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 issuing a sensible ruling rejecting the Second Amendment claim.<sup>66</sup> In a macabre version of Russian Roulette, however, the case filed by the California Rifle and Pistol Association, an NRA affiliate, was assigned to Judge Roger Benitez, who delighted the gun lobby by issuing the desired injunction two days before the ban was to take effect.<sup>67</sup>

Judge Benitez’s order quoted a statement—absurd on its face in the context of modern America—reading, “tyranny thrives best where government need not fear the wrath of an armed people.”<sup>68</sup> A tyrannical federal government that has the support of the U.S. military will have little to fear from weapons in the hands

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63. Rand Paul (@RandPaul), TWITTER (Jun. 23, 2016, 9:48 AM), <https://twitter.com/RandPaul/status/746022114042478592?s=20> [<https://perma.cc/37SN-Q6LM>].

64. Matthew Waxman, *Remembering the Whiskey Rebellion*, LAWFARE (Sep. 25, 2018), <https://www.lawfareblog.com/remembering-whiskey-rebellion> [<https://perma.cc/S3UN-TJ8D>].

65. Both lawsuits challenged California Penal Code 32310 under the Second Amendment and the large-capacity magazine possession ban in subsections (c) and (d) under the Takings Clause. *Wiese* also included an Equal Protection and vagueness claim, and *Duncan* also included a Due Process claim.

66. *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1198 (E.D. Cal. 2018).

67. *Duncan v. Becerra*, 265 F. Supp. 3d 1106, 1139 (S.D. Cal. 2017).

68. *Id.* at 1133 n.16.

of private citizens.<sup>69</sup> Moreover, the references in Judge Benitez's opinion to the shooting at the Congressional baseball practice in Alexandria, Virginia<sup>70</sup> highlight the exact opposite of his claims: encouraging U.S. citizens to arm themselves to stand up against tyranny is foolish, and the more powerful the weapons that these "fighters against tyranny" have at their disposal, the more needless deaths and injuries will occur.<sup>71</sup>

But granting a preliminary injunction to the NRA and stopping the new ban on possession of high-capacity magazines from taking effect was only the beginning of the damage. On March 29, 2019, Judge Benitez struck down not just the new law about to take effect (which had been adopted by both the state legislature and the people of California via referendum by an almost two-to-one margin<sup>72</sup>), but *all* restrictions on high-capacity magazines<sup>73</sup> which had effectively been in place for decades.<sup>74</sup> High-capacity magazines immediately started pouring into the state following the Judge's decision,<sup>75</sup> 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 Ninth Circuit Court of Appeals review.<sup>76</sup>

Judge Benitez concluded his opinion with some words of encouragement:

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69. Moreover, "if you want to bring down a domestic tyrant, the statistical analysis strongly suggests that nonviolent mobilizations are generally a more promising tack than armed struggle." John Markoff, *Opposing Authoritarian Rule with Nonviolent Civil Resistance*, 48 AUSTRALIAN J. POL. SCI., no. 2, 2013, at 233, 236, <http://dx.doi.org/10.1080/10361146.2013.787670> [<https://perma.cc/A7JQ-RV6Y>]. See also ERICA CHENOWETH & MARIA J. STEPHAN, *WHY CIVIL RESISTANCE WORKS: THE STRATEGIC LOGIC OF NONVIOLENT CONFLICT* (2011).

70. *Duncan*, 265 F. Supp. 3d at 1130.

71. For example, in July 2016, incensed by police shootings of unarmed black men, Gavin Long used a particularly powerful TAVOR 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. James Gill, *Civilians Carrying 'Ultimate Weapon' Gavin Long Used in Baton Rouge Would Be Regarded Worldwide as Insane*, NEW ORLEANS ADVOC. (Aug. 10, 2016), [https://www.nola.com/opinions/james\\_gill/article\\_4567899b-0cac-5e78-81ad-84729147171f.html](https://www.nola.com/opinions/james_gill/article_4567899b-0cac-5e78-81ad-84729147171f.html) [<https://perma.cc/QZ9V-95MU>]. This example, as well as the Alexandria baseball field shooting, shows the profound lack of wisdom in encouraging private citizens in modern America to believe they could promote democracy by using assault weapons to kill government employees to show their disapproval of what they perceive to be a "tyrannical" government.

72. 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. See *Large Capacity Magazines in California*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE (Dec. 10, 2019), <https://lawcenter.giffords.org/large-capacity-magazines-in-california/> [<https://perma.cc/DR97-PLA9>].

73. 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.

74. See *Duncan v. Becerra*, 366 F. Supp. 3d at 1131, 1186 (S.D. Cal. 2019) (holding that California's limitations on high-capacity magazines were unconstitutional).

75. Don Thompson, *Delay Sought on Ruling Allowing High-Capacity Ammo Magazines*, ABC NEWS (Apr. 2, 2019), <https://abcnews.go.com/US/wireStory/delay-sought-ruling-allowing-high-capacity-ammo-magazines-62120179> [<https://perma.cc/T8ES-J29U>].

76. *Duncan v. Becerra*, No. 17-cv-1017-BEN-JLB, 2019 U.S. Dist. LEXIS 63045 (S.D. Cal. Apr. 4, 2019).

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.<sup>77</sup>

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.

I should hasten to add that in *Weise v. Becerra*, Judge William Shubb, the other federal district judge to address California’s ban on high-capacity magazines, ruled that “because California’s ban does not substantially burden individuals’ ability to defend themselves, intermediate scrutiny is appropriate.”<sup>78</sup> 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 was constitutional.<sup>79</sup> Note how Judge Shubb—unlike Judges Kavanaugh and Benitez—was showing deference to legislative judgments as opposed to making imperial judicial pronouncements.

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 III when the Fourth 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.<sup>80</sup>

Judge Wilkinson’s admonition about the threat to democracy posed by extreme deference to special interests is especially compelling given their success in blocking policies such as universal background checks that have overwhelming support—even among NRA members.<sup>81</sup> In the face of the evident threat to

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77. *Duncan*, 366 F. Supp. 3d at 1183. Judge 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). For example, he stated 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.” *Id.* at 1135. The cited defensive gun use numbers are 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 United States 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 among 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*, 10 CHANCE 6, 6 (1997).

78. *Wiese v. Becerra*, 306 F. Supp. 3d 1190, 1196 (E.D. Cal. 2018).

79. *Id.* at 1196–97 (quoting *Fyock v. City of Sunnyvale*, 779 F.3d 991, 998–99 (9th Cir. 2015)).

80. *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017).

81. See Brett Samuels, *Poll: Most NRA Members Support Comprehensive Background Checks*, HILL (Mar. 8, 2018), <https://thehill.com/blogs/blog-briefing-room/377455-poll-most-nra-members->

democratic rule posed by these special interests, courts should be particularly deferential to broadly popular legislative enactments designed to promote public safety that have garnered enough support to break through the stranglehold of these special interests. Rather than further tightening this stranglehold as the opinions of Scalia, Kavanaugh, Benitez and other like-minded advocates would do, the judicial branch should take great care not to further entrench the dangerous, anti-democratic objectives of these special interests.

Finally, it should be noted 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 provide support for the claim 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 does nothing to advance that interest, but does generate the unhappy consequences of the increased violent crime discussed above.

#### IV CONCLUSION

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. Depending on what vision of the Second Amendment the Supreme Court ultimately adopts, there is a danger that a substantial price in lives and in increased violent crime will be paid if the court strikes down legislative restrictions on gun carrying outside the home and accelerates our growing mass shooting problem by overturning bans on assault weapons and high-capacity magazines. Legislative judgments that address the problem of gun violence based on sound policy considerations are particularly deserving of deference. Ignoring empirical evidence will create a jurisprudence that disregards the societal costs of guns while shackling the democratic will of the people and exposing them to unnecessary levels of lethal violence. We should not interpret constitutional rights that way.

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support-comprehensive-background-checks [<https://perma.cc/6QA2-S683>] (“69 percent of NRA members support comprehensive background checks. Among gun owners not in the organization, 78 percent support requiring background checks for all firearm purchases.”).