

PROTESTS, INSURRECTION, AND THE SECOND AMENDMENT

Will the Supreme Court Avoid Further Self- Inflicted Second Amendment Wounds?

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The Original Sin

We are approaching the 13th year as a nation that has enshrined in the Second Amendment a *private* right of individuals to have guns. Had the Supreme Court been asked to rule on this issue any time prior to 2000, or if the butterfly ballot in Palm Beach, Florida, had not turned an estimated 2,800 would-be Al Gore voters into Pat Buchanan voters, or if Chief Justice John Roberts had realized in 2008 how much mischief the *District of Columbia v. Heller* decision would unleash, there would likely be no federal constitutional right of individuals to have firearms today. The question now before the country is whether the damage of *Heller* will be contained or whether the Supreme Court will continue down the path of Second Amendment expansion that the gun lobby has dictated to a compliant Republican Party in opposition to the growing demands for reasonable gun regulation.

While the increasing menace of mass shootings and the growing realization that other affluent countries simply do not have the same level of homicidal firearm violence as the United States have persuaded large majorities of Americans to favor an array of gun regulations, the gun lobby — with its vice-like hold on Republican politicians — has utterly thwarted even wildly popular measures such as universal background checks. Through a careful campaign of litigation and judge-shopping, aided by its strong and effective input into federal judicial selection, the gun lobby is hoping to turbocharge the Second Amendment to create a new right to carry guns outside the home, to end restrictions on assault weapons and high-capacity magazines, and to prohibit sensible regulations such as gun registration, safe storage laws, age requirements for firearm possession, and uniform restrictions on felons having guns.

Lessons from January 6

If there is a bright spot in the horrific events of the January 6 attack on the U.S. Capitol, it is what it teaches us about the value and importance of gun regulation to the well-being of our democracy. Importantly, the U.S. Capitol attack clarified the profound errors in almost everything the National Rifle Association (NRA) and the gun lobby have ever said about gun policy. Consider the gun lobby protestation that “Gun control simply doesn’t work.” Imagine for a moment what that rally would have looked like in Houston, Texas, or some other “gun-friendly” jurisdiction. Without Washington, DC’s profoundly wise firearm restrictions, a very large number of the rioters would have been marching on the U.S. Capitol armed with assault rifles equipped with high-capacity magazines and other highly lethal weapons. When the mob storming the Capitol spun out of control, guns would have been flashing everywhere, and it is not hard to imagine that bullets would have been cutting down scores or even hundreds of victims. Those who remember the 1970 Kent State massacre understand that once the bullets start flying in a riotous atmosphere, the consequences quickly turn lethal and dire.

The pernicious Proud Boys leader Enrique Tarrio, who had planned to address the crowd before the U.S. Capitol riot, was thankfully taken off the streets two days earlier when he was arrested for tearing down a Black Lives Matter banner on a Washington, DC, church and lighting it on fire. At the time of his arrest, Tarrio was carrying two high-capacity magazines festooned with the Proud Boys logo. Washington, DC’s wise prohibition on such unnecessary accoutrements to lethal weaponry managed to keep one conspiring criminal away from the U.S. Capitol on January 6, and thousands of others, knowing of Washington, DC’s strict gun laws, were dissuaded from carrying weapons because of these laws.¹

The gun lobby has fought to try to subvert these wise protections in legislatures and in the courts. An egregious legislative campaign has pushed for congressional action that would allow anyone with a concealed carry permit from any state to lawfully carry throughout the United States (the “Concealed Carry Reciprocity Act”). Ironically, the advocates for this federal legislation often trumpet a states’ rights rhetoric that is completely inconsistent with the idea that the gun laws of, say, North Dakota or Texas should govern the District of Columbia, New York, or California. Hopefully, the events of January 6 will help inter any further efforts in the direction of “national reciprocity of gun carrying.” Washington, DC’s restrictions meant that gun owners who traveled there for the Trump protest — including the Proud Boys and members of armed militias — knew that gun carrying would invite police scrutiny, so they largely left them at home. Note that the NRA’s claim that it is desirable to have “good guys with guns” is largely fatuous. One minute the Trump supporters who stormed the Capitol were “law-abiding” patriots; the next minute they were criminals. Indeed, most mass shooters are “law-abiding citizens” . . . until they open fire and start their wanton destruction.

Disarmed by Washington, DC, gun laws, some of the rioters did what criminals frequently do: seek to seize guns from lawful possessors, which happens roughly 400,000 times per year throughout the United States.² (Recall that the Boston Marathon bombers killed a police officer near MIT for one purpose only: to steal his firearm.)³ When Washington, DC, police officer Michael Fanone was overwhelmed by the riotous U.S. Capitol crowd, he realized the idea that his gun could protect him was a fantasy. Fanone stated that he could have killed two or three of the rioters, but then they would certainly have killed him. Instead, Fanone stated, “Some guys started getting a hold of my gun and they were screaming out, ‘Kill him with his own gun.’”⁴ Fanone saved his life by appealing to the humanity of the crowd and saying that he had children.

Perhaps the greatest pedagogical lesson taught by the U.S. Capitol insurrection is the sheer lunacy of the claim that high-powered weapons in the hands of the public are needed to protect against a tyrannical federal government. When Sen. Rand Paul made the claim “Why do we have a Second Amendment? . . . It’s to shoot at the government when it becomes tyrannical!” some dismissed it merely as the political rhetoric of a demagogic blowhard, but the assertion has even received endorsement from members of the federal judiciary. The somewhat unhinged and now-retired Ninth Circuit Court of Appeals Judge Alex Kozinski endorsed the view that the Second Amendment would protect against federal tyranny.⁵

More recently, U.S. District Judge Roger Benitez repeated the claim in enjoining a California law that banned high-capacity magazines.⁶ Indeed, Judge Benitez went on to strike down all restrictions on high-capacity magazines and seemed to believe that citizen access to the most lethal weaponry was an essential feature of ordered liberty. Again, one might think this to be simply the aberrant view of a solitary judge, but a panel of the Ninth Circuit Court of Appeals upheld Judge Benitez’s decision with a misguided opinion penned by a recent Trump appointee.⁷

The lessons of the U.S. Capitol invasion of January 6 may have been in the minds of some federal judges on February 25, 2021, when the Ninth Circuit vacated the panel decision and set the case down for en banc rehearing. First, the thought that private gun owners could stand up to the modern U.S. military if it backed a tyrannical federal government is absurd.⁸ 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 a “tyrannical” government.⁹ Second, the idea that gun owners can be expected to *oppose* rather than support the tyrant was dealt a fatal blow by the violence at the U.S. Capitol.

The Transformation of the NRA and the Republican Party on Gun Policy

Interestingly, the NRA and Republicans used to disagree completely with the aggrandized view of the Second Amendment that has continued to metastasize since the *Heller* decision. Indeed, the former head of the NRA testified in support of the 1934 federal gun control act, stating “I do not believe in the general promiscuous toting of guns. I think it should be sharply restricted and only under licenses.”¹⁰ Ronald Reagan in May 1967 stated that “[t]here’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.”¹¹

The renowned conservative Republican and former U.S. Supreme Court Chief Justice Warren Burger told PBS *NewsHour* 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.’”¹²

The events of March 16, 2021, when an unhinged 21-year-old killed eight in Atlanta, underscore the wisdom of Burger’s remarks. The shooter had legally bought a 9-millimeter handgun in a gun shop on the very day of the shooting — so that he could commit mass murder. Thankfully, when police released a picture of the assailant from video footage, his parents contacted authorities, leading to his capture before he achieved his intended goal of killing more in Florida.¹³ How much better for all involved if he had not been able to buy a gun in the first place? At the very least, a 30-day waiting period would have provided an opportunity for the shooter’s immediate mental health crisis — he had just been thrown out of his home by his parents — to pass, potentially saving many lives.

Former solicitor general for Richard Nixon Erwin Griswold echoed the theme of Burger’s remarks when he stated, in a 1990 *Washington Post* editorial: “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.”¹⁴ These remarks came from a “lifelong Republican with a background of Midwest conservatism” who was “built like a granite block and [was] just as inflexible in his conceptions of basic rectitude.”¹⁵

No Republican politician could utter such views today, when the most zealous expansion of “gun rights” has become the virtue signaling of today’s “conservatives.” By the mid-1970s, 45 states and the District of Columbia had 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.¹⁶ Today, Republicans show their fealty to the gun lobby by arguing that there is a federal constitutional right to carry guns without governmental restriction, and 16 states have passed “permitless carry laws,” sometimes wishfully referred to as “constitutional carry,” as they await the gun lobby’s

efforts to provide a vehicle for the Supreme Court to issue a decision that would expand the *Heller* notion of a Second Amendment right to have a gun in the home to the more expansive right to have it with you in virtually any public venue.¹⁷

The consequences of the gun lobby position that any 18-year-old should be allowed to parade around with a gun as a matter of constitutional right are not likely to be benign. For example, consider that right now under current state law 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 decades-old ban of guns on campus to avoid having armed 19-year-olds in its classrooms and roaming its campus, it was sued — and the Missouri attorney general (and now U.S. senator) Josh Hawley argued that the Constitution called for overturning the ban. On June 8, 2020, the trial court sustained the ban, but the fact that the university 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 well over half a century indicates the changed world in which we live today.¹⁸ The implicit tax on wise policy that gun interests now impose on state and local governments and public universities is not inconsiderable, prompting many to reluctantly acquiesce to allowing promiscuous access to guns that officials are confident will be socially harmful.

The Importance of the Federal Assault Weapons Ban

Louis Klarevas¹⁹ was the first to provide evidence that the federal assault weapons ban — which had been in place from 1994 to 2004 — had limited gun massacres, defined as violent incidents in which a shooter killed at least six individuals. To further probe this finding, Theodora Boulouta and I culled through the *Mother Jones* mass shooting database over a 35-year period to assess the pattern of public mass shootings, not including crimes of armed robbery, gang violence, or domestic violence.²⁰ Figure 1 shows the number of incidents of such gun massacres and the deaths resulting therefrom.²¹ 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 the number of these gun massacres.

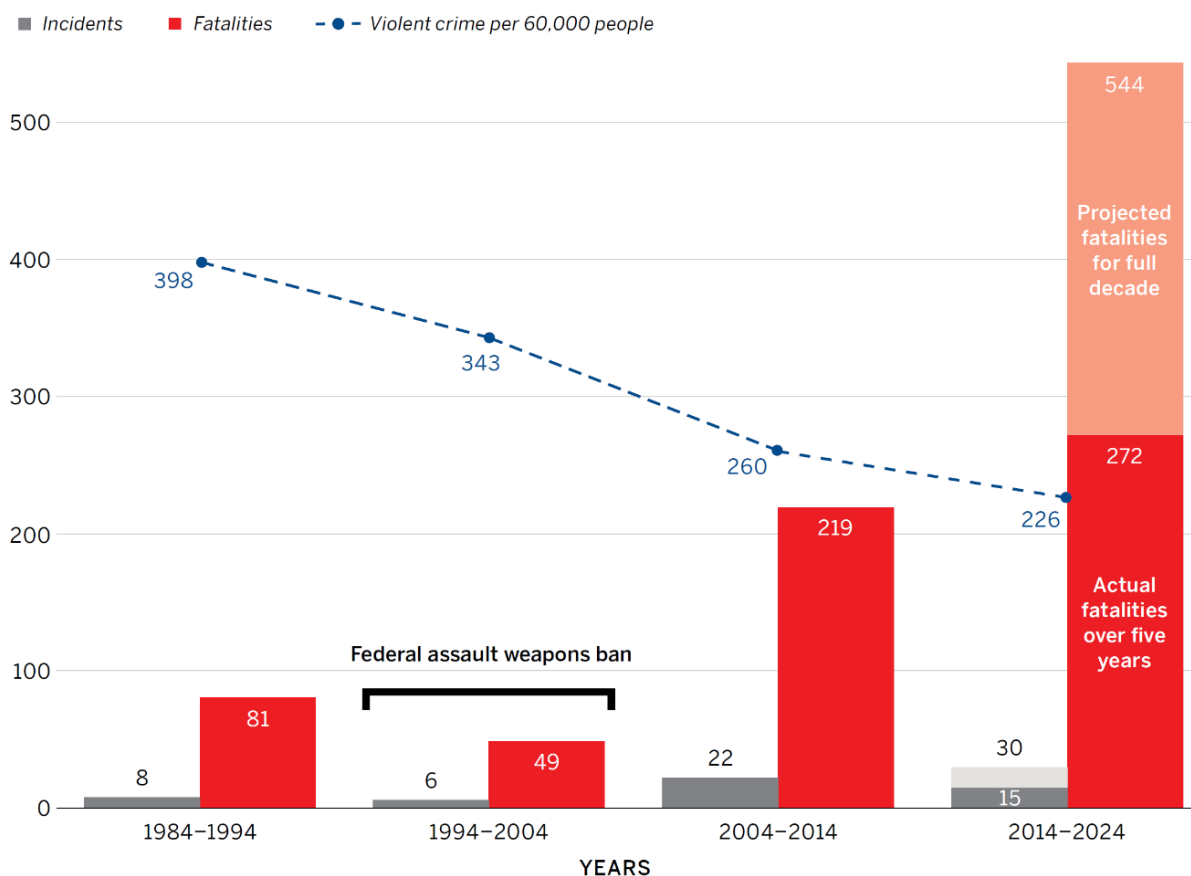
Second, one sees that the number and deadliness of these mass shootings dropped during the 10 years of the federal assault weapons ban, 1994–2004, and rose sharply after the ban was lifted.²² Although the number of incidents is too limited to highlight the 25 percent drop in gun massacres, the 40 percent drop in overall fatalities during the period of the federal ban is noteworthy.

On its face, the lower death toll is plausible since for that decade mass killers could not simply waltz into a gun store and buy an assault weapon with a high-capacity magazine, as they can do in most of the United States today.²³ On the other hand, figure 1 also shows that overall, violent crime dropped by roughly 14 percent during the decade of the federal assault weapons ban. This curve 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 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 to decline (again reflected in figure 1). In other words, our independent assessment confirms the Klarevas finding: gun massacres fell during the assault weapons ban and rose sharply when it was removed in 2004.

Figure 1: Gun Massacres Were Less Frequent and Less Deadly During the Federal Assault Weapons Ban



Sources: Mass shooting data from *Mother Jones*; violent crime rate data from the FBI's Uniform Crime Reporting (UCR) Program.

Notes: Dates begin and end in September to reflect the period from September 13, 1994, to September 12, 2004, when the federal assault weapons ban was in place. Dots mark 10-year averages, except for the last dot, which marks the 5-year average from 2015 to 2019. Massacres are defined as incidents in which six or more people were killed, not including the perpetrator.

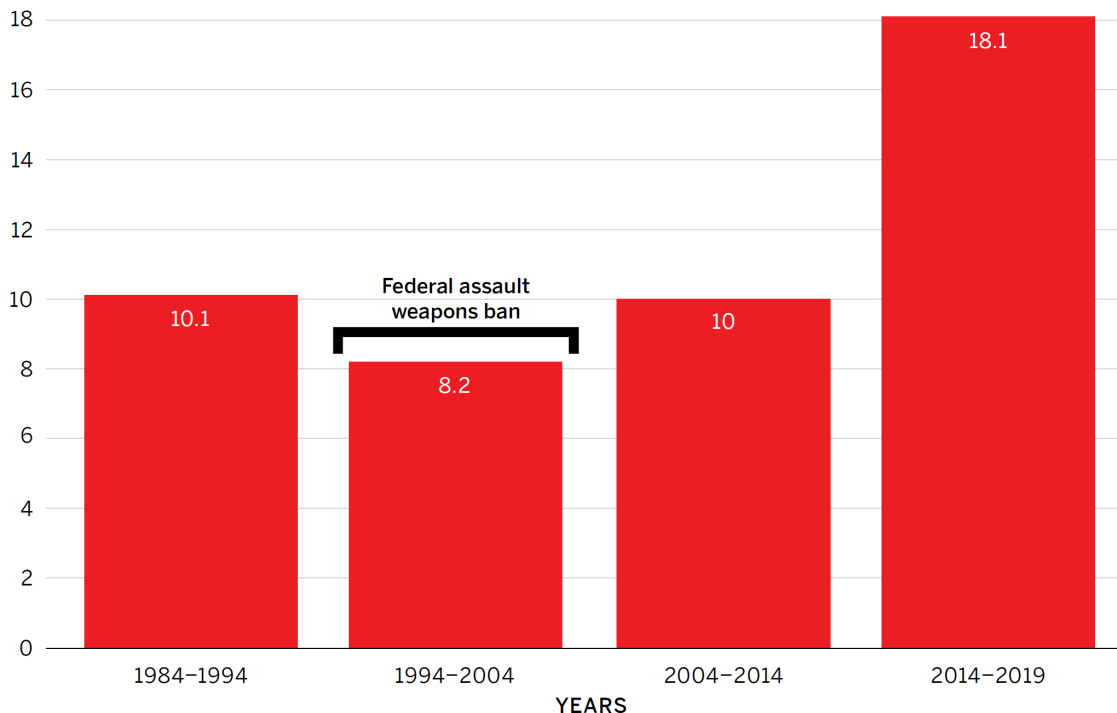
What has happened since 2014 is even more alarming. In five years, the number of fatalities in these gun massacres has already topped the previous high that occurred during the entire decade after the federal assault weapons ban was removed. This murderous leap has occurred at the same time that overall violent crime persisted on a downward trend, as the dotted line in figure 1 confirms. If we continue at the post-2014 pace until 2024, the last column of figure 1 shows that we will have an order of magnitude increase in gun massacre deaths over a 20-year period.²⁴

Figure 2 illustrates the average number of fatalities in each mass shooting for the same four periods shown in figure 1. The pattern is the same: fatalities per incident fell during the federal assault weapons ban and have

risen sharply thereafter. With the weaponry available to citizens getting ever more potent and plentiful, the average number of people who die per incident has increased by 121 percent in the last five years compared to the level during the assault weapons ban (18.1 versus 8.2 deaths per incident). Assault weapons and/or high-capacity magazines were used in all 15 of the gun massacres since 2014; all 272 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 Marjory Stoneman Douglas High School in Parkland, Florida, in 2018²⁵ and the 2019 Dayton shooter (who killed nine)²⁶ possessed traits that would have disqualified them from access to any firearm in other affluent nations, let alone an AR-15 style weapon.²⁷ In the United States, however, there was virtually no impediment to their acquiring such weapons to commit mass murder. The common NRA claim that we should “just enforce the gun laws we have” makes little sense when the gun laws we have are so weak and porous — in large part because of the NRA.

Figure 2: Gun Massacres: Deaths per Incident



Source: *Mother Jones*.

Notes: Dates begin and end in September to reflect the period from September 13, 1994, to September 12, 2004, when the federal assault weapons ban was in place. Massacres are defined as incidents in which six or more people were killed, not including the perpetrator.

I should quickly note that the identical pattern exists whether one uses five or four deaths as the definition of a mass shooting, as I have shown elsewhere.²⁸ Indeed, it is useful to see the results from using a more restrictive definition that only looks at gun massacres in which, say, at least 10 individuals were killed by the shooter. In fact, there were no such high-fatality public shootings by lone gunmen in the decade of the federal assault weapons ban. In the decade after the ban ended, the United States suffered through six of these horrific killings,

and in the last *five* years we have suffered through 10 such massacres, causing 231 deaths (compared to the 13 killed by two shooters at Columbine during the federal assault weapons ban *decade*).²⁹

This research highlights the causal mechanism — restraining access to weaponry with the ability 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.³⁰

Importantly, the federal assault weapons ban limited the size of gun magazines to 10 rounds. The Las Vegas shooter could not have shot as many individuals as he did in 11 minutes without 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 equipped with such magazines.³¹ The 10-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.³²

The NRA is correct that “good guys with guns” can play a role in ending these mass shootings but misguided on who it thinks the good guys are. They are called *the police*. In fact, the graphics in figures 1 and 2 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 15 years.

Conclusion

Over the last few decades, the Second Amendment has metastasized into a catalyzing force behind an array of social pathologies, including racism, misogyny, xenophobia, autocratic and anti-democratic tendencies, and even attacks on the very notion of truth — whether through the caricatures of history that its adherents often trumpet, the grotesquely distorted empirical assertions they often reference,³³ or the fantastical claims they offer about the magical effectiveness of guns to stop mass shooters, dangerous criminals, and even tyrannical governments. The Second Amendment has become a straitjacket for Republican politicians who must acquiesce to every demand of the gun lobby and the thoughtless, virtue-signaling battle cry of those trying to establish their conservative credentials, bolster some comforting identity, or overcome some sense of personal weakness or vulnerability. It is time for courts and legislatures to stop compounding the self-inflicted wounds of America’s destructive drift toward a free market in guns.

Endnotes

- ¹ Tarrío had posted online that “the Proud Boys will turn out in record numbers on Jan 6th but this time with a twist,” indicating that they would spread out incognito. See Associated Press, *Judge Bans Proud Boys Leader from Washington, D.C., After Arrest*, NBC NEWS (Jan. 5, 2021), <https://www.nbcnews.com/news/us-news/judge-bans-proud-boys-leader-washington-d-c-after-arrest-n1252906>.
- ² John Donohue, Abhay Aneja & Kyle D. Weber, *Right-to-Carry Laws and Violent Crime: A Comprehensive Assessment Using Panel Data and a State-Level Synthetic Control Analysis*, J. EMPIRICAL LEGAL STUDIES, 198, 247 n.19 (2019).
- ³ Michele McPhee, *New Images Show Sean Collier Murder Scene After Boston Marathon Bombing*, ABC NEWS (Mar. 11, 2015), <https://abcnews.go.com/US/images-show-sean-collier-murder-scene-boston-marathon/story?id=29556597>.
- ⁴ Mark Morales, *“Kill Him with His Own Gun”: Police Describe Facing the Mob at the Capitol*, CNN (Jan. 15, 2021), <https://www.cnn.com/2021/01/14/politics/police-officers-capitol-riot-hodges-fanone/index.html>.
- ⁵ See *Silveira v. Lockyer*, 328 F.3d 567, 569–70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc).
- ⁶ See *Duncan v. Becerra*, 366 F. Supp. 3d 1131, 1141 (S.D. Cal. 2019).
- ⁷ See *Duncan v. Becerra*, 970 F.3d 1133, 1169 (9th Cir. 2020).
- ⁸ Recall that in 1990, a relatively small portion of the U.S. military fighting more than 6,000 miles from the United States needed only four days to defeat the battle-tested Iraqi army of more than 1 million men. Consider the Iraqi weaponry that afforded virtually no protection from the American military: “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.” See John M. Broder & Douglas Jehl, *Iraqi Army: World’s 5th Largest but Full of Vital Weaknesses*, L.A. TIMES (Aug. 13, 1990), <https://www.latimes.com/archives/la-xpm-1990-08-13-mn-465-story.html>.
- ⁹ 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, Israel Weapon Industries, 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 cooperation 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.” See James Gill, *Civilians Carrying “Ultimate Weapon” Gavin Long Used in Baton Rouge Would Be Regarded Worldwide as Insane*, NEW ORLEANS ADVOCATE (Aug. 10, 2016), https://www.nola.com/opinions/james_gill/article_4567899b-0cac-5e78-81ad-84729147171f.html.
- ¹⁰ *National Firearms Act Hearings Before the H. Comm. on Ways and Means*, 72nd Cong. (1934) (testimony of Karl T. Frederick), <http://www.keepandbeararms.com/nra/nfa.htm#p45>.
- ¹¹ Steven Rosenfeld, *7 Uncovered Quotes That Reveal Just How Crazy the NRA’s Become*, SALON (Jan. 23, 2013), 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, which was named after his former press secretary who took a bullet to the head during John Hinckley’s attempted assassination of Reagan. *Supra*.
- ¹² *Warren Burger 2nd Amendment Fraud* (PBS NEWSHOUR 1991), https://www.youtube.com/watch?v=Eya_k4P-iEo.
- ¹³ Kate Brumback, *Atlanta-Area Shootings Leave 8 Dead, Many of Asian Descent*, WHYY (Mar. 16, 2021), <https://whyy.org/articles/georgia-massage-parlor-shootings-leave-8-dead-man-captured>.
- ¹⁴ Erwin N. Griswold, *Phantom Second Amendment “Rights,”* WASH. POST (Nov. 4, 1990), <https://www.washingtonpost.com/archive/opinions/1990/11/04/phantom-second-amendment-rights/f4381818-fed9-4e63-8d62-f62056818181>.
- ¹⁵ Dennis Hevesi, *Erwin Griswold Is Dead at 90; Served as Solicitor General*, N.Y. TIMES (Nov. 21, 1994), <https://www.nytimes.com/1994/11/21/obituaries/erwin-griswold-is-dead-at-90-served-as-a-solicitor-general.html>.
- ¹⁶ See generally John J. Donohue, *The Swerve to “Guns Everywhere”: A Legal and Empirical Evaluation*, 83 L. & CONTEMP. PROBS. 117 (2020).

¹⁷ See, e.g., Sami Sparber, *Texas Republicans Have Long Pushed to Allow “Constitutional Carry” of Guns. Proponents Say This Year Is Their Best Chance.*, TEXAS TRIBUNE (Apr. 06, 2021), <https://www.texastribune.org/2021/04/06/texas-constitutional-carry>; and Gerald Harris, *Republicans Moving Ahead on “Permitless Carry” of Guns Despite Law Enforcement Opposition*, WATE (Mar. 18, 2021), <https://www.wate.com/news/republicans-moving-ahead-on-permitless-carry-of-guns-despite-law-enforcement-opposition>.

¹⁸ 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. *Missouri ex rel. Schmitt v. Choi*, Nos. 16BA-CV03144, 16BA-CV02758, 2020 WL 5093608, at *16 (Mo. Cir. June 8, 2020). 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 was an accomplished marksman, having received the highest marksmanship score of anyone in his police academy class and having served as a firearms instructor. *Id.* at *2. Based on this wealth of knowledge and his 40 years of experience in law enforcement, the chief testified that he was “unequivocally” opposed to changing the gun ban, *id.*, because guns on campus “would have nothing but adverse impacts in countless ways.” *Id.* at *3. 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 that was “not my assumption. That’s my experience.” *Id.* 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.’” *Id.* 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. *Id.* at *7–*8.

¹⁹ See generally LOUIS KLAREVAS, *RAMPAGE NATION: SECURING AMERICA FROM MASS SHOOTINGS* (2016).

²⁰ *Mother Jones* has compiled a comprehensive listing and description of mass shootings from 1982 to the present. See Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982–2021: Data from Mother Jones’ Investigation*, MOTHER JONES (Mar. 22, 2021), <https://www.motherjones.com/politics/2021/12/mass-shootings-mother-jones-full-data>; see also John Donohue & Theodora Boulouta, *That Assault Weapon Ban? It Really Did Work*, N.Y. TIMES (Sept. 4, 2019), <https://www.nytimes.com/2019/09/04/opinion/assault-weapon-ban.html>.

²¹ Figures 1 and 2 are replicated from John Donohue & Theodora Boulouta, *The Assault Weapon Ban Saved Lives*, STAN. L. SCHOOL LEGAL AGGREGATE BLOG (Oct. 15, 2019), <https://law.stanford.edu/2019/10/15/the-assault-weapon-ban-saved-lives>.

²² The Federal Assault Weapons Ban took effect September 13, 1994, and expired on September 13, 2004, due to a sunset provision that allowed the law to lapse after President George W. Bush reneged on his campaign promise to support retention of the federal ban. See *id.*

²³ Only seven states and the District of Columbia ban assault weapons, and all of those plus Colorado and Vermont restrict the permissible size of the ammunition magazines. See *Assault Weapons*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/assault-weapons/#:~:text=Seven%20states%20and%20the%20District,of%20Columbia%20prohibit%20assault%20weapons> (last visited May 14, 2021); *Large Capacity Magazines*, GIFFORDS L. CTR., <https://giffords.org/lawcenter/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines> (last visited May 14, 2021).

²⁴ We followed Klarevas’s 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 were 366 mass shootings in the first 318 days of 2019, killing 408 and injuring 1477. See Skye Gould & Shayanne Gal, *There Have Been 366 Mass Shootings in the US So Far in 2019 — Here’s the Full List*, INSIDER (Nov. 14, 2019), <https://www.insider.com/number-of-mass-shootings-in-america-this-year-2019-8>. The number of these mass shootings leapt past 600 in 2020. See Daniel Victor & Derrick Bryson Taylor, *A Partial List of Mass Shootings in the United States in 2021*, N.Y. TIMES (May 10, 2021), <https://www.nytimes.com/article/mass-shootings-2021.html>.

²⁵ The school was so concerned with the behavior of Nikolas Cruz that he was searched for weapons every morning before school. See Natalie Musumeci, *Parkland Shooter Was Searched for Weapons Every Morning Before School*, N.Y. POST (July 26, 2019), <https://nypost.com/2019/07/26/parkland-shooter-was-searched-for-weapons-every-morning-before-school>. Needless to say, this is not the profile of someone for whom judicious government authorities would readily grant a request for a license to have a firearm.

²⁶ The warning signs for the Dayton shooter screamed out that this was a person who should not have access to weapons. See Paul P. Murphy et al., *Dayton Shooter Had an Obsession with Violence and Mass Shootings, Police Say*, CNN (Aug. 7, 2019), <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 that it was good that her disturbed son Adam should have access to firearms. See Diane Dimond, *Did Nancy Lanza Handle Her Guns Responsibly? “You’ll Be Surprised,” Police Spokesman Says*, DAILY BEAST (July 12, 2017), <https://www.thedailybeast.com/did-nancy-lanza-handle-her-guns-responsibly-youll-be-surprised-police-spokesman-says>. 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. See Jack Healy, Mike McIntire & Julie Turkewitz, *Oregon*

Killer's Mother Wrote of Troubled Son and Gun Rights, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/us/mother-of-oregon-gunman-wrote-of-keeping-firearms.html?smid=pl-share>. 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." *Id.*; see also Julie Turkewitz, *Oregon Gunman Smiled, Then Fired, Student Says*, N.Y. TIMES (Oct. 9, 2015), <https://www.nytimes.com/2015/10/10/us/roseburg-oregon-shooting-christopher-harper-mercier.html> (noting that eight students and a professor were killed in an attack in Oregon in October 2015).

²⁷ John Donohue, *How US Gun Control Compares to the Rest of the World*, CONVERSATION (June 24, 2015), <https://theconversation.com/how-us-gun-control-compares-to-the-rest-of-the-world-79490>.

²⁸ See Donohue & Boulouta, *supra* note 20.

²⁹ 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 generally Maya Rossin-Slater et al., *Local Exposure to School Shootings and Youth Antidepressant Use* (Stan. Inst. Econ. Pol'y Rsch. Working Paper No. 19-036, Dec. 2019), <https://siepr.stanford.edu/sites/default/files/publications/19-036.pdf#:~:text=Local%20Exposure%20to%20School%20Shootings%20and%20Youth%20Antidepressant,events%20on%20the%20mental%20health%20of%20surviving%20youth>.

³⁰ The Defense Department chose the fully automatic version of the AR-15 for battlefield use in Vietnam. The speed of fire and devastating injuries inflicted by the AR-15 make it one of the most effective mass killing technologies — even when restricted to only semi-automatic operation, which is actually the customary battlefield mode of fire. In fact, the U.S. 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 (Feb. 22, 2018), <https://www.rollingstone.com/politics/politics-features/all-american-killer-how-the-ar-15-became-mass-shooters-weapon-of-choice-107819>.

³¹ Stephen Paddock killed 58 concertgoers at a Las Vegas concert and injured nearly 1,000 others on Oct. 1, 2017. See Vanessa Romo, *FBI Finds No Motive in Las Vegas Shooting, Closes Investigation*, NPR (Jan. 29, 2019), <https://www.npr.org/2019/01/29/689821599/fbi-finds-no-motive-in-las-vegas-shooting-closes-investigation>.

³² In the attack on Congresswoman Gabrielle Giffords in 2011, her assailant was tackled when he went to reload another high-capacity magazine into his weapon. A nine-year-old girl waiting to meet the congresswoman was killed by the 13th shot — beyond the 10-round limit of the expired federal assault weapons ban. See *Victims in 2011 Giffords Attack See Parallel to U.S. Capitol Riot*, NORWALK HOUR (Jan. 9, 2021), <https://www.pressreader.com/usa/the-norwalk-hour/20210109/281668257610305>. See also J.J. Stambaugh, *Takedown of Alleged Shooter Recounted*, KNOXVILLE NEWS SENTINEL CO. (July 29, 2008), <https://web.archive.org/web/20080729184422/http://www.knoxnews.com/news/2008/jul/29/takedown-alleged-shooter-recounted> (discussing the 2008 Tennessee shooting where the church shooter who killed two and wounded six was tackled and stopped while trying to reload); *Accused Oregon School Shooter Shows No Emotion in Court*, CNN (May 22, 1998), <http://www.cnn.com/US/9805/22/oregon.shooting.pm> (discussing the 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).

³³ Empirical studies about millions of defensive gun uses or claiming that more guns lead to less crime are wholly discredited but live on as a blight on our democracy. See generally John J. Donohue, Abhay Aneja & Kyle D. 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 STUDIES 198 (2019).