Response to 2nd Amendment Readings – Rich Harris

I confess that my views on the 2nd Amendment (2nd Am) and related court cases are a bit uneasy and evolving, both in terms of constitutional and policy analysis. Moreover, I am disappointed that racial considerations tend to be minimized, if not ignored, in debates about gun control.

Constitutional Interpretation

There is a straightforward view of 2nd Am (which I used to hold): the "well-regulated militia" predicate limits the right to "keep and bear arms." In this reading, any individual right to own guns is effectively null and void outside the context of a state militia. However, a line of analysis by two liberal Democratic law profs, Sanford Levinson (UT-Austin) and Akhil Amar (Yale) raised important challenges to this view that have given me pause. Levinson argued the judges need to take 2nd Am rights more seriously than they had because the amendment was rooted in a *republican* conception of citizenship that reflected (a) the founders' well-established fear of a standing army, (b) their conviction that the citizens had a right to and responsibility for their safety independent of the state, and (c) their universal agreement that the state should not be allowed to disarm citizens. Amar is credited with demonstrating that the 14th Amendment incorporated the Bill of Rights, including the 2nd Am into state law and, in doing so, elevated those rights such that any regulation, let alone prohibition of them would have to meet a very high bar. Neither Levinson nor Amar (nor for that matter the *Heller, McDonald,* and *Bruen* decisions), preclude regulation of gun rights, but they do raise the knotty problem of the 2nd Amendment being part of the Bill of Rights; treating it as a dead letter because we no longer have 18th century style state militias is thus problematic. Short of repealing the 2nd Am, the Court has to find a way to navigate gun rights, which the amendment assigns to "the people" not to "well-regulated militias."

The navigation device that Justice Thomas proposes in *Bruen*, textual/historical analysis, seems quite radical, though! This new jurisprudence strikes me as the most consequential and fraught aspect of the case. I think the technical legal term for what he is proposing is, "a real can of worms." (lol) Indeed, his analytic could promote exactly the kind of individually motivated reasoning that Scalia sought to avoid with his appeal to *originalism*. Even professional historians disagree about complicated historical questions.

Policy Analysis

Underlying the legal analysis of *Heller*, *McDonald* & *Bruen*, of course, is a policy dispute, what affect do gun control laws have on public safety. As satisfying as it might be to do something about gun violence, we ought to wary of measures that don't make a difference and may create unintended consequences. Not only is there a weak social scientific case that gun laws regulating the acquisition and use of firearms, so-called "shall issue" schemes, reduce violent crime, there is evidence that permissive laws promoted by the NRA have no statistically significant effect in the opposite direction. Economists John Lott & David Mustard present an analysis that suggests states adopting "shall issue" laws in fact saw a decrease in violent crime (they proposed and tested an empirical hypothesis that gun ownership has a prophylactic deterrent effect). While their work has been critiqued vigorously, a *Chronicle of Higher Education* article concedes, "Lott and Mustard have made an important scholarly contribution in establishing that these [shall issue] laws have not led to the massive bloodbath of death and injury that some of their opponents feared. On the other hand, we find that the statistical evidence that these laws have reduced crime is limited, sporadic, and extraordinarily fragile." It seems appropriate to be skeptical of the efficacy of gun control laws.

Interestingly, one of the *amicus curiae* briefs filed in Bruen notes, regulatory schemes like the NYC law the Court struck down can have perverse results. The brief, filed by five Public Defender attorneys noted that under the law, a Latino youth who acquired a gun for protection after his brother was slashed on the

street was prosecuted for violating the statute. More importantly, they pointed out that "In New York City, where we practice, the licensing structure allocates total and unilateral discretion to the NYPD to decide whose firearm possession is lawful and whose is a "violent felony."

It looks like "shall issue" regulatory schemes that are not fig leaves for prohibiting gun ownership (arguably the case with the NYC law challenged in *Bruen*) are here to stay regardless of whether they reduce gun violence.

Racial Myopia

A troubling aspect of our gun control debates is the focus on high profile, mass shootings (Columbine, Sandy Hook, Parkland, etc.) which, though heart-wrenching, are a small, proportion of gun deaths, and which divert discussion from the catastrophic amount of gun violence in black communities. In 2020 there were 513 people attacked in shootings of 4 or more people (a standard definition of mass shooting), but in the same year black citizens accounted for almost 10,000 additional shooting victims. Hardly any of this gun violence involved so-called "assault weapons" that the press and politicians obsess about. Nor would any of the "common sense" gun policies currently on offer significantly affect this number.

Another curious and underreported aspect of the gun control debate is the disparate impact of regulatory schemes such as those in NY, DC, Philadelphia, and other major cities. To qualify for a permit can cost upward of $500 and 15 hours of instruction. This presents a much higher barrier to gun ownership in poor and minority communities. One could, of course argue that any reduction in gun ownership is a good thing, but the practical effect of these policies is to disproportionately deny guns to black citizens who may lawfully want to own them; the case cited by the Public Defenders in their amicus brief is illustrative of this unintended consequence. Indeed, poor and minority communities are awash in guns (legal and illegal) and violent crime that the narrative about AR-15 and mass shootings completely elide. Any meaningful responses involve crackdowns (confiscation, buy-backs, heavy enforcement of existing laws) that would disproportionately affect minority communities and run afoul of current 2nd Am law.

Based on my experience working on public safety and prisoner reentry in Camden, NJ, I suspect well-designed criminal justice and court reform (community-engaged enforfement, diversionary programs and drug courts, not elimination of cash bail or defunding police) will reduce gun violence much more than restricting or even outlawing "assault-style" weapons…and these reforms happen at the state and local level.