

Reconciling a Public Health Approach to Gun Violence and Second Amendment Rights

Author : Carl Coleman

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Michael R. Ulrich, [A Public Health Law Path for Second Amendment Jurisprudence](#), 71 *Hastings L.J.* 1053 (2020).

Gun violence in the United States has become a public health crisis, with an average of [100 Americans killed by firearms every day](#). If any other product caused this many deaths, it would almost certainly be subject to extensive regulation. However, efforts to regulate firearms are often stymied by claims that they violate individuals' Second Amendment rights. In *A Public Health Law Path for Second Amendment Jurisprudence*, Michael Ulrich explains why this absolutist interpretation of the Second Amendment is inconsistent with longstanding constitutional principles. In so doing, he demonstrates that it is possible to respect the Second Amendment as an important constitutional value without stripping governments of the authority to regulate firearms in the interest of public health.

Ulrich begins with an overview of the Supreme Court's two primary Second Amendment cases, [District of Columbia v. Heller](#) and [McDonald v. City of Chicago](#). He concludes that those cases definitively resolved only three specific issues: First, that the Second Amendment protects an individual's right to keep and bear arms; second, that the right is not unlimited; and third, that the right does not extend to "dangerous and unusual weapons." Beyond those general conclusions, the decisions provide little clarity as to how courts should analyze regulations that implicate Second Amendment rights.

Justice Scalia's opinion in *Heller* – and, to an even greater extent, now-Justice Kavanaugh's dissent in the D.C. Circuit opinion in [Heller v. District of Columbia \("Heller II"\)](#) – suggest that the scope of Second Amendment rights should be determined by historical investigation. While Ulrich rightly disputes the clarity of the historical record on gun laws, he recognizes that a persuasive case for gun regulation must take the role of history seriously. However, he challenges the assumption that history is relevant only to identifying the type of conduct protected by the Second Amendment. Instead, he argues that a historical analysis should also guide judgments about the circumstances in which states can enact laws limiting Second Amendment rights.

In particular, Ulrich emphasizes that a historically grounded interpretation of the scope of Second Amendment protection must recognize the longstanding judicial acceptance of laws that limit individual rights in pursuit of public health and safety. In *Jacobson v. Massachusetts*, for example, "the Court treats the notion of infringing on individuals for the public good as well-settled in common law and constitutional analysis." (P. 1078.) In light of this fact, a historical approach to the Second Amendment does not mean that any infringements on the right to keep and bear arms are necessarily unconstitutional.

Ulrich provides numerous examples of situations in which courts have accepted limitations on fundamental rights for public health and safety purposes. His strongest example is the quarantine power: "The right to move freely is perhaps the most important liberty interest, and yet, the authority to quarantine has been upheld by courts since the founding due to the recognition that the police power authorizes the state to take preventive measures to reduce the risk of harm." (P. 1083.) If freedom of movement, as well as other fundamental rights, can be limited for public health and safety, "infringing on Second Amendment rights for public health and safety places it on the same level of protection as any other constitutionally protected right." (P. 1084.)

Ulrich further shows that states' authority to restrict fundamental rights for public health purposes is not limited to crisis situations. For example, in [Zucht v. King](#), the Supreme Court upheld a law requiring children to be vaccinated for

smallpox even in the absence of evidence that smallpox existed in the area. *Zucht* and other cases support states' authority to take preventive actions to prevent public health harms before those harms have occurred.

After establishing that states' public health powers can justify limitations on individual rights, even those that are characterized as fundamental, Ulrich next explains why efforts to reduce gun violence fall within states' public health authority. He explains that gun violence is not simply a question of individual bad actors engaging in criminal activity, but a "far-reaching public health problem" that "can be alleviated through preventive legal measures." (Pp. 1085-86.) Like other public health problems, he argues, gun violence has a broad impact on a variety of population health measures, with a disproportionate share of those burdens experienced by members of vulnerable groups. Moreover, the mechanisms by which gun violence operates share many characteristics with other public health threats. For example, like contagious diseases, gun violence spreads through social networks and becomes concentrated in particular populations. Finally, "there is growing evidence that the law can have a significant impact on subduing or increasing gun violence," which "suggests government action may be warranted and constitutional in certain circumstances depending on the specifics of the regulation." (P. 1092.)

Ulrich argues that the devastation of gun violence "likely enables a wide range of firearm regulations." (P. 1096.) Even if the probability that a gun will cause harm is low in any individual situation, the magnitude of the potential harm is substantial. Moreover, the probability of harm increases when it is aggregated across the population. Because the magnitude and probability of harm make the states' interest in controlling gun violence compelling, "even the application of strict scrutiny does not cripple the ability of the state to act under its police power authority." (P. 1096.)

In order to determine whether any particular intervention is constitutionally permissible, Ulrich argues, courts must consider not only the extent to which it burdens individual's Second Amendment liberties but also the potential public health benefits. For example, in evaluating a restriction on carrying firearms in public, "a public health law evaluation would balance the need for self-defense against the risks generated to the public by large numbers of people regularly carrying firearms in public. It may also include an inquiry into what, if anything, data suggests about the success rate of self-defense to determine whether this claim properly override the increased risk to the public." (P. 1098.)

Ulrich's analysis provides a persuasive rebuttal to Second Amendment absolutists. It shows that a historically grounded approach to the Second Amendment does not require striking down firearms regulations solely because they did not exist at the time the Second Amendment was ratified. The article is well worth reading by anyone concerned that the Court's emerging Second Amendment jurisprudence leaves insufficient room for public health.

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