

The Full Truth About the Second Amendment

by Steve Chapman

The debate on gun control lately has been going like this: Liberals propose various restrictions on allowable firearms, acceptable owners and approved ammunition. Conservatives exclaim, "Second Amendment!" And the debate, at least in the mind of the latter group, is over.

The Second Amendment, they believe, is not just one important provision of our basic government document. It's the first and last word on the subject of firearms.

Viewing the proposals offered since the Sandy Hook massacre, Sen. Rand Paul, R-Ky., concludes the supporters intend "to completely GUT our Second Amendment rights." The Utah Sheriffs Association warned President Barack Obama, "No federal official will be permitted to descend upon our constituents and take from them what the Bill of Rights — in particular Amendment II — has given them."

The logic is simple: The Second Amendment protects the rights of gun owners. Gun control laws violate those rights. Therefore, any such measure is unconstitutional.

But that's not quite how constitutional liberties work. The First Amendment protects freedom of speech — but the government may require permits for a political protest, outlaw child pornography, forbid incitement to violence, allow libel suits and more.

The First Amendment does not protect your right to tell an airport security screener you're fond of bombs. Yet some Second Amendment champions see no limit to the scope of their favorite freedom.

It's odd that they regard it as so vulnerable to abuse. For a long time, this provision was treated as an irrelevant antique. Until 2008, the U.S. Supreme Court had never interpreted it to protect an individual right to own or use guns for self-defense. Now that the "right to keep and bear arms" has gained full recognition, however, its admirers treat it as perpetually in peril.

Many of the old fears, though, are no longer warranted. Limits on "assault weapons" will lead to bans on handguns? No way. Registration of guns will end in house-to-house confiscation? Not in a million years. The Supreme Court has established firm limits on how far gun control can go — and it's not terribly far.

But there's another side to it. The Second Amendment does not preclude general regulation of firearms. And it doesn't disqualify some of the favorite ideas of gun control advocates.

That's not simply the view of liberal academics and anti-gun groups. It's also the view of many distinguished conservative legal experts. I called two, Eugene Kontorovich, of Northwestern University law school, and Eugene Volokh, of UCLA law school. Though they do not concur on all particulars, they agree that many common ideas would likely pass constitutional muster.

The most popular idea at the moment is expanding federal background checks to include all private sales. "I think the courts will say it's permissible," Volokh told me. "No problem, assuming the criteria are legitimate," Kontorovich said. The reason: It's a minimal obligation that does not substantially interfere with a person's right to obtain a gun for self-defense.

An assault weapons ban? Volokh suspects this law would be upheld mainly because it's so ineffectual. Outlawing certain guns that might be used for self-defense is probably OK because many other virtually identical weapons would remain legal.

Kontorovich thinks a limit on the size of magazines would be struck down because it could inhibit an individual's ability to stop multiple attackers. "Limiting magazine capacity is like saying a print magazine could be only 32 pages," he says. What would not be allowed in the context of press freedom should not be allowed in the context of gun rights, he says.

Surprisingly, both think the Second Amendment would allow some laws that are far more ambitious. A law mandating the mere registration of all guns, says Volokh, would probably be seen as no more objectionable than an ordinance requiring a permit for a parade.

Requiring a license to buy a gun or ammunition (as Illinois does), Kontorovich believes, would be "relatively unproblematic" as long as the goal is not to discourage such purchases. Neither regulation would deprive ordinary people of their right to obtain guns for protection, which is the core of the Second Amendment.

In practice, the Second Amendment allows many things — and many of the things it forbids could never be passed anyway. So gun rights supporters, a group that includes me, had better focus on explaining why the great majority of gun control ideas won't work. The Constitution won't save us from all bad ideas. It's not supposed to.