

# Q&A: Guns, politics and the American constitution

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The second amendment to the American constitution is subject to conflicting interpretations, says Professor Ryan Hurl. Credit: Bigstock photo

Mass shootings at a Dark Knight Rises screening in Colorado and at a mosque in Wisconsin this past summer reignited the national conversation about gun control in the U.S. Writer Jenny Hall asked Professor Ryan Hurl of political science at the University of Toronto Scarborough to help interpret the second amendment to the American constitution.

**We hear a lot about the second amendment, but many Canadians might not know what it actually says. Can you tell us?**

The text states: "A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

## **What does that mean?**

The meaning is not entirely clear and it's subject to contrasting and even conflicting interpretations.

The dominant view today is that the second part of the amendment is most important—the right of the people to keep and bear arms. On the other hand, you have the first part, about a well-regulated militia being necessary to the security of a free state.

The question is, what is the relationship between the two parts of the amendment? Does the first clause structure the meaning of the individual right? That's what a lot of the disagreement is about.

## **Does it matter what the intent was at the time it was written?**

Historically, the argument is about the dangers of standing armies, of what we might call a military establishment. For many Americans at the time of the revolution, a permanent army was regarded as a threat to freedom.

The problem was that modern states in the 18th century, when the constitution was being ratified, needed a national military. Leaders like Alexander Hamilton, who served in the revolutionary war and saw the limits of citizen militias and amateur armies, knew that the national government would require a professional military. When the constitution was being debated, people said, "We're recreating the imperial British

government at home and it's going to be a threat to the autonomy of the states." This is where the second amendment comes in. It's about the national government not limiting the ability of the states to create militias.

From that argument you have to move to a different one, which is the idea that the Bill of Rights, as it was originally meant to function, was not intended as a limit on state governments. The second amendment is a limit on the national government. When people were arguing about how much power the national government should have vis-a-vis the military, they were all in agreement that the second amendment was meant to limit the power of the national government to regulate firearms. For the first century of America's existence, the second amendment was not a question.

## **So why is it a question today?**

The answer is about how the Bill of Rights come to affect state governments. It's a long, confusing, complicated story and it's not even entirely resolved. The story is sometimes referred to as the process of incorporation, in which the courts begin to apply the Bill of Rights to state governments. In the few cases where the Supreme Court dealt with the second amendment, they have said it doesn't make sense to understand it as an individual right in the same way as, for example, freedom of speech.

Since then, though, more people have interpreted the second amendment as an individual right along the lines of freedom of expression. If you look at left-leaning legal thinkers, it's a question of consistency. It becomes difficult to argue for vigorous protection of freedom of expression or separation of church and state and also say, "Oh, but we're not going to treat the second amendment in the same way." There is a pretty strongly developed individual rights interpretation of the second

amendment that has bipartisan support.

We certainly think about the U.S. Bill of Rights or the Canadian Charter of Rights and Freedoms as being about individual rights.

Yes, and it's strange because in the modern era we're skeptical of absolutes. Yet there's nothing more absolute than a right. In Canada or the United States today, people across the political spectrum have become much more enthusiastic about this notion of rights as a kind of "brooding omnipresence in the sky," to use a phrase from Oliver Wendell Holmes. In the past, the Bill of Rights didn't function that way. It was a limit on the national government. Therefore states could go different ways. This original understanding of the Bill of Rights really only started to change toward the end of the 19th century, if not later.

**Some people make the point that we have weapons now that the founding fathers couldn't have imagined, things like semiautomatic rifles. Should this change the discussion?**

Maybe it should change the discussion, but people will have different views about how the discussion should change! Let's go back to the original point about standing armies. Part of their concern here is that people should have the ability to resist government. Governments can be controlled by tyrants. The notion is that it's a good thing for people to be able to resist the government if necessary. And this is not something that's just a centuries-old concern. In the 1960s you still had Democrats like John F. Kennedy and Hubert Humphrey making these kinds of claims. John F. Kennedy was a member of the National Rifle Association and it wasn't just because he liked duck hunting.

So some people would say, "Of course people need to own semi-

automatic rifles. We would need them in those extreme political situations where we need to resist government." I'm not endorsing that view necessarily. But it's out there, and it's not an archaic one—and until relatively recently it might have been endorsed by both Democrats and Republicans. What Canadians often forget is that suspicion of government is something that crosses the political spectrum in the United States.

## **What about the mass shootings this summer at the Dark Knight Rises in Colorado or at the mosque in Wisconsin?**

In the U.S you have to talk about the second amendment when you talk about violence like this because it is a crucial symbol, legal niceties aside. Any attempt to deal with the misuse of guns will have to deal with it just because of the political reality. The National Rifle Association is very organized. It's been an early innovator in a lot of grassroots mobilization techniques. Anyone who wants to deal with the problem of gun control has to take that into account. But I don't think those events are going to change the American discussion about the second amendment all that much.

## **Is there room for gun control to coexist with an individual rights interpretation of the second amendment?**

Yes, absolutely, but there are limits to what can be done. I think gun control advocates are aware of this. To simply say that the second amendment is an anachronism, it's 200 years old and should be thrown in the dustbin of history—that's not going to work in the United States today.

## What's your own opinion?

I'm tempted to say that most of these issues have to be left to the political arena. If I was creating a constitution I would probably have a very broad scope for regulation of guns. I would leave it in the political arena for the simple reason that you can't know what kind of regulations are going to be necessary in the future. You can't know how history will change.

But even if we accept the notion that rights should be living, that rights should change over time, people are going to disagree about what time or history is telling them. You can't go to history as if it was a sage on a mountaintop. You have to have a pretty enthusiastic interpretation of the philosophical capacities of judges and lawyers if you think they're going to be able to commune with history and reach the right answer. They'll reach an answer that might very well be plausible. But there is no "brooding omnipresence in the sky," so it will be one possible answer. That's why we have democracy. You argue about these things in the public arena and ultimately it's put to the test of voters.

I'm not saying that there are any easy answers here. When you study political science long enough, you realize that all you understand are the problems; you don't understand any solutions!

Provided by University of Toronto

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