

## Introduction

### *The Gun Debate and the Constitution*

On the morning of December 14, 2012, Adam Lanza shot his way through a glass panel in front of Sandy Hook Elementary School in Newtown, Connecticut. Entering the building, he worked his way from room to room, methodically killing twenty young children and six adults with more than 150 shots from a Bushmaster semiautomatic rifle. The massacre ended, as it had begun, with a gunshot, as Lanza – standing in the middle of a classroom – placed a handgun to his head and pulled the trigger.<sup>1</sup>

The immediate reaction to Sandy Hook was horror. During a televised address that afternoon, President Barack Obama paused twice to wipe away tears, and later said that visiting Newtown was the “toughest day of my presidency.”<sup>2</sup> National Rifle Association Executive Vice President Wayne LaPierre held a press conference a week later, saying that the organization’s “4 million mothers, fathers, sons and daughters join the nation in ... outrage, grief and earnest prayer for the families of Newtown, Connecticut.”<sup>3</sup>

Congressional leaders soon drafted legislation designed to help keep guns away from people like Lanza. The most notable proposal would have expanded existing federal background checks to cover most commercial sales of firearms, including gun shows and online sales. It was known as the Manchin-Toomey Amendment, after its sponsors, Senator Joe Manchin (a Democrat from West Virginia) and Senator Pat Toomey (a Republican from Pennsylvania).<sup>4</sup> The idea was broadly popular. Polls

<sup>1</sup> See CNN Library, *Connecticut Shootings Fast Facts*, CNN (Dec. 7, 2017), [www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts/](http://www.cnn.com/2013/06/07/us/connecticut-shootings-fast-facts/); Edmund H. Mahoney & Dave Altimari, *A Methodical Massacre: Horror and Heroics*, THE HARTFORD COURANT, Dec. 16, 2012, at A1.

<sup>2</sup> See Dylan Stableford, *Obama: Going to Newton was the ‘Toughest day of my Presidency’*, YAHOO NEWS (Jan. 5, 2017), [www.yahoo.com/news/obama-going-to-newtown-was-the-toughest-day-of-my-presidency-164748871.html](http://www.yahoo.com/news/obama-going-to-newtown-was-the-toughest-day-of-my-presidency-164748871.html).

<sup>3</sup> See *NRA Press Conference Transcript*, THE RECORD, Dec. 22, 2012, at News Section (ellipses in original).

<sup>4</sup> S. Amdt. 715, 113th Cong. (2013), 158 CONG. REC. S2613-18 (daily ed. Apr. 11, 2013).

indicated that more than 90 percent of Americans favored “universal” background checks, including 74 percent of NRA members<sup>5</sup> – an almost unimaginable degree of support for any legislative proposal, let alone one involving guns. It seemed, for the first time in decades, that Democrats and Republicans would find common ground on a major gun law.

But not everyone supported the proposal. After a meeting with Vice President Joe Biden to discuss possible regulations, NRA leaders expressed “disappoint[ment] with how little [the] meeting had to do with keeping our children safe and how much it had to do with an agenda to attack the Second Amendment.”<sup>6</sup> The NRA’s fundamental position was that “the only thing that stops a bad guy with a gun is a good guy with a gun.”<sup>7</sup> The way to prevent another Sandy Hook, the NRA argued, was not to further limit guns, but to ensure that they were in the proper hands – to emphasize gun rights, rather than gun regulation. “[A]bsolute protection” would mean putting “armed police officers in every single school in this nation.”<sup>8</sup> That suggestion was widely derided by others.<sup>9</sup>

Despite strong public support for the background check requirement, the Senate rejected the Manchin-Toomey Amendment.<sup>10</sup> Why? Lobbying groups like the NRA are certainly a part of the explanation. But how were those groups able to sink legislation that seemed to have so much going for it? What accounts for the strong opposition to otherwise popular regulations such as expanded background checks?

According to a Gallup poll, the most common reason for opposition to the Manchin-Toomey Amendment was not that background checks would be ineffective, but that they would violate the Second Amendment or the “right to own

<sup>5</sup> Scott Clement, *90 Percent of Americans Want Expanded Background Checks on Guns. Why Isn’t This a Political Slam Dunk?*, WASH. POST (Apr. 3, 2013), [www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/90-percent-of-americans-want-expanded-background-checks-on-guns-why-isnt-this-a-political-slam-dunk/](http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/03/90-percent-of-americans-want-expanded-background-checks-on-guns-why-isnt-this-a-political-slam-dunk/), archived at <http://perma.cc/X8E3-KM68> (“Nine in 10 Americans support expanding background checks on gun purchases.”). After the Senate vote, 65 percent of Americans believed the Senate should have passed the provision to expand background checks. Frank Newport, *Americans Wanted Background Checks to Pass Senate*, GALLUP (Apr. 29, 2013), [www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx](http://www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx), archived at <http://perma.cc/Y3S9-DNXS> (showing that only “29% agree with the Senate’s failure to pass the measure”).

<sup>6</sup> See Stephanie Condon, *NRA “Disappointed” with Biden Gun Meeting*, CBS NEWS (Jan. 10, 2013), [www.cbsnews.com/news/nra-disappointed-with-biden-gun-meeting/](http://www.cbsnews.com/news/nra-disappointed-with-biden-gun-meeting/).

<sup>7</sup> See Peter Overby, *NRA: ‘Only Thing That Stops A Bad Guy With A Gun Is A Good Guy With A Gun,’* NPR-ALL THINGS CONSIDERED (Dec. 21, 2012), [www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun](http://www.npr.org/2012/12/21/167824766/nra-only-thing-that-stops-a-bad-guy-with-a-gun-is-a-good-guy-with-a-gun) (quoting Wayne LaPierre).

<sup>8</sup> See David Nakamura, *Put Armed Police in Every School, NRA urges*, WASH. POST, Dec. 22, 2012, at A1.

<sup>9</sup> Eric Lichtblau and Motoko Rich, *N.R.A. Envisions ‘A Good Guy With a Gun’ in Every School*, N.Y. TIMES, Dec. 22, 2012, at A1 (“The N.R.A.’s plan ... was met with widespread derision from school administrators, law enforcement officials and politicians....”).

<sup>10</sup> 158 CONG. REC. S2740 (daily ed., Apr. 17, 2013); see also Ted Barrett & Tom Cohen, *Senate Rejects Expanded Gun Background Checks*, CNN POLITICS (Apr. 18, 2013), [www.cnn.com/2013/04/17/politics/senate-guns-vote/](http://www.cnn.com/2013/04/17/politics/senate-guns-vote/), archived at <http://perma.cc/C9M3-4EP7>.

guns.”<sup>11</sup> Congressional rejection of universal background checks – an overwhelmingly popular proposal floated at a time of extraordinary national attention – speaks volumes about the power of constitutional rhetoric in the American gun debate. Policy preferences concerning guns are frequently framed by one’s understanding of constitutional law. To make sense of the political debate, then, not to mention the current state of the law, one must also understand the Constitution itself.

Popular beliefs about constitutional law have always undergirded America’s national political conversation. But the gun debate is unique in the degree to which constitutionalism is the starting point, and often the ending point, of political argument. And the version of the Second Amendment invoked in political discussions often diverges sharply from the Second Amendment recognized as constitutional doctrine. Under current law, for example, there is no reason to suppose that an equitably administered system of background checks would violate the Second Amendment. Still, many describe those checks as infringements of Second Amendment rights.

Divergence between popular discussion of the Second Amendment and constitutional law was once even more extreme. After all, it was only in 2008, with the Supreme Court’s holding in *District of Columbia v. Heller*,<sup>12</sup> that the Second Amendment became plausibly enforceable in the way that most Americans understand constitutional rights. In a 5-4 decision, the Court found that the Amendment was not limited to members of the organized militia, but protects an “individual” right to keep and bear arms for private purposes such as self-defense, thereby pushing the law closer to the popular conception of the right. But *Heller* also emphasized that the individual right to keep and bear arms is subject to a broad set of potential regulations.

*Heller* ushered in a new era for the Second Amendment. Indeed, it is no exaggeration to say that we are witnessing the nativity of a fundamental constitutional right – one whose development will, in turn, affect the future of gun policy in the United States. Still, though *Heller* may have helped bridge the gap between law and popular understanding of the Amendment, it has done little so far to decrease the political polarization concerning guns. Discussions of the Amendment often exhibit the same venom, blame, and misunderstanding that characterize the broader gun policy debate.

Some supporters of broad gun rights believe that the right to keep and bear arms encompasses an individual right not just to defend against would-be criminals, but also the right to resist whatever governmental tyranny the individual may detect. On this

<sup>11</sup> See Frank Newport, *Americans Wanted Background Checks to Pass Senate*, GALLUP (Apr. 29, 2013), [www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx](http://www.gallup.com/poll/162083/americans-wanted-gun-background-checks-pass-senate.aspx), archived at <http://perma.cc/Y3S9-DNXX> (showing that only “29% agree with the Senate’s failure to pass the measure”) (reporting that when asked an open-ended question about why they opposed expanding background checks, 40 percent of people answered “Violates Second Amendment/People have right to own guns”).

<sup>12</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

account, gun regulation – or, more ominously, gun “control” – is a modern invention out of step with American tradition and identity. The Amendment is “absolute” and immune to regulation. Supporters of this view essentially ask, “What part of ‘shall not be infringed’ do you not understand?”

Some advocates of gun regulation, by contrast, consider the Second Amendment an anachronism at best and an outright constitutional evil at worst. Because of it, they say, we are unable to pass gun regulations to address the epidemic of firearm death in the United States – a plague that claims roughly 30,000 lives (mostly by suicide) and causes 70,000 injuries every year.<sup>13</sup> Some say that *Heller* lacks historical support and must be overturned. More strident voices call for the repeal of the Second Amendment itself.<sup>14</sup>

The extremists are wrong about the Second Amendment. They are wrong about what the other side believes, and they are often just as wrong about what *they* believe. They are wrong about what they disagree about, and they are wrong about what they agree about. They are wrong to conflate support for the Second Amendment with opposition to gun regulation, wrong to equate support for gun regulation with rejection of the Second Amendment, and wrong to treat agreement with *Heller* as a litmus test for supporting the Second Amendment. Most of all, they are wrong to believe these things with such certainty.

The Second Amendment is complicated and nuanced. There are no easy answers, and nothing in this book will fully satisfy the extremists. To the contrary, we hope to show that aside from a few broad certainties – that the right protects some private purposes, and that it is and has always been subject to regulation – the Second Amendment resists the kinds of simplistic arguments lobbed for or against it by gun rights absolutists or gun prohibitionists.

We will support this position with evidence rooted in history, doctrine, and jurisprudence, but our conclusions are not limited to the academy – far from it. A solid majority of Americans – like the Constitution itself – reject the extremes, and embrace the legitimacy of both gun rights and gun regulation. More than three-quarters of Americans believe, as *Heller* held, that the Second Amendment protects an individual right to keep and bear arms.<sup>15</sup> And yet, as the debate over

<sup>13</sup> Centers for Disease Control and Prevention, National Center for Health Statistics, [www.cdc.gov/nchs/fastats/injury.htm](http://www.cdc.gov/nchs/fastats/injury.htm).

<sup>14</sup> See David S. Cohen, *Why It's Time to Repeal the Second Amendment*, ROLLING STONE (June 13, 2016), [www.rollingstone.com/politics/news/why-its-time-to-repeal-the-second-amendment-right-bear-arms-20160613](http://www.rollingstone.com/politics/news/why-its-time-to-repeal-the-second-amendment-right-bear-arms-20160613); Kurt Eichenwald, *Let's Repeal the Second Amendment*, VANITY FAIR (Jan. 3, 2013), [www.vanityfair.com/news/politics/2013/01/kurt-eichenwald-lets-repeal-second-amendment](http://www.vanityfair.com/news/politics/2013/01/kurt-eichenwald-lets-repeal-second-amendment); Hollis Phelps, *The Second Amendment Must Go: We Ban Lawn Darts. It's Time to Ban Guns*, SALON (Dec. 4, 2015), [www.salon.com/2015/12/04/the\\_second\\_amendment\\_must\\_go\\_we\\_ban\\_lawn\\_darts\\_its\\_time\\_to\\_ban\\_guns/](http://www.salon.com/2015/12/04/the_second_amendment_must_go_we_ban_lawn_darts_its_time_to_ban_guns/); Bret Stephens, *Repeal the Second Amendment*, N.Y. TIMES (Oct. 5, 2017), [www.nytimes.com/2017/10/05/opinion/guns-second-amendment-nra.html](http://www.nytimes.com/2017/10/05/opinion/guns-second-amendment-nra.html); John Paul Stevens, *Repeal the Second Amendment*, N. Y. TIMES (Mar. 27, 2018), [www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html](http://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html).

<sup>15</sup> Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), [www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx](http://www.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx).

Manchin-Toomey revealed, even more Americans support universal background checks.<sup>16</sup> It is these overlapping groups – the quiet, consistent middle of the gun debate – who have the Second Amendment on their side, rather than those who make such broad and confident claims for or against it.

The Second Amendment as a matter of constitutional law is not the bogeyman feared by some, nor the invincible champion imagined by others. Though the gun debate tends to drive participants to political extremes, the *law* of the Second Amendment respects rights and regulation in the way that most Americans do.

In addition to explaining the substance and method of Second Amendment law, we hope to help point a way forward in the gun debate by giving a *positive account* of the Second Amendment that is true to law, history and theory, even if it does not satisfy everyone. By “positive,” we mean a vision of the Second Amendment that is affirmative and constructive, a creature of constitutional rather than natural law, and also one that provides some right and wrong answers. We do not suppose that any account of the Second Amendment can fully satisfy all of these goals, and we do not claim to have answered all of the hard questions. But we hope to show that the Second Amendment can be understood through the kind of reasoned debate to which law aspires, rather than the extremism that gun politics too often deliver. And, to be sure, Second Amendment extremism has consequences. It hobbles productive political discussion, it blocks reasonable firearm policy, and it distorts our understanding of constitutional law.

It wasn’t always like this, and it doesn’t have to be. The Second Amendment, the Constitution, and the country should recover a discourse and doctrine that can accommodate both the fundamental right to keep and bear arms and the imperative of reasonable regulation. Consider three ways in which a better understanding of constitutional law might resolve unnecessary disagreements in the gun debate, thereby making room for the many disagreements that matter.

First, gun debate partisans often misunderstand or misrepresent the content of constitutional doctrine, for example in assuming – with either relief or resentment – that the Second Amendment is “absolute,” and permits only minimal gun regulation, or perhaps none at all. One often hears people saying that they oppose gun regulation because they support the Second Amendment, or vice versa.

In fact, the history of gun rights and regulation is primarily one of accommodation and coexistence, and nothing in *Heller* demands otherwise. The proper debate is about how, not whether, to accommodate rights and regulation. Although the constitution undoubtedly restricts policy choices, no constitutional right is entirely immune to regulation. As Justice Antonin Scalia emphasized in *Heller*, the right to keep and bear arms is “not unlimited.”<sup>17</sup> The right to keep and

<sup>16</sup> Newport, *supra* note 11.

<sup>17</sup> *Heller*, 554 U.S. at 595.

bear arms does not allow a person to do whatever he or she wants with a gun, just as the right to free speech does not give a person a right to say whatever he or she wants to say.

The boundaries of constitutional rights manifest in different ways. Constitutional law can establish thresholds for a principle's applicability (what counts as "speech," for example) and it can explain what the principle, if applicable, demands (the conditions under which "speech" be regulated). This means that there are at least two ways in which a constitutional claim can fail. A challenge might fall outside the scope of the asserted right altogether. If a white-collar criminal argues that his securities fraud is constitutionally protected, a court will respond that fraud is simply not "speech" for First Amendment purposes.<sup>18</sup> But even constitutionally covered activity (speech in a public park, for example) can be regulated, pursuant to one of the many types of scrutiny that form the bread and butter of constitutional doctrine. Following Fred Schauer's now-familiar terminology, these two categories of limitation can be called "coverage" limitations – those in which the right does not even come into play – and "protection" limitations – those in which the right can be invoked, but also modulated based on the type and strength of government interests.<sup>19</sup> These categories of limitation form the conceptual backbone of post-*Heller* Second Amendment doctrine. For example, courts have overwhelmingly held that concealed carrying falls outside the scope of the Second Amendment, and that banning it therefore raises no constitutional questions. By contrast, most courts have held or assumed that some form of public carrying is covered by the Second Amendment, but that it is subject to various forms of regulation.

Second, gun debate partisans often distort not only the substance but also the *method* of constitutional law. In American constitutional law, not all forms of argument are legitimate. One can usually invoke precedent, history, and tradition in support of a particular legal position, for example, but not bare political preference. The latter is not simply unpersuasive, but inapt – like using the Bible to prove a mathematical theorem, or particle physics to analyze a Renaissance poem.<sup>20</sup> Like any specialized language, American constitutional law has a grammar – rules that govern not just what one says, but how one says it. A goal of this book is to affirm that constitutional reasoning has rules, and that the gun debate would benefit from respecting them.

Participants in the gun debate regularly conflate personal, partisan, or policy preferences with constitutional law. Constitutional doctrine is not the same as sound public policy, although the former may coincide with or even incorporate the latter.

<sup>18</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1806 (2004). But see Wendy Gerwick Couture, *The Collision Between the First Amendment and Securities Fraud*, 65 ALA. L. REV. 903, 905–06 (2014) (questioning this conclusion).

<sup>19</sup> Schauer, *supra* note 18, at 1806.

<sup>20</sup> See Chapter 5.

It is perfectly sensible to conclude that a particular regulation is desirable and yet unconstitutional, or constitutional and yet undesirable. One might, for example, believe that a ban on assault weapons would save lives and is forbidden by the Second Amendment, or that a blanket prohibition on concealed carry would be constitutional and also completely ineffective. In fact, if one's constitutional conclusions and policy preferences regularly converge, one should stop to ask how much work constitutional law is actually doing.

Most pernicious, perhaps, is the extent to which the Second Amendment is routinely invoked to address issues that aren't even constitutional. For example, with a few exceptions not relevant here, only government actors are subject to constitutional rules. As a matter of law, then, it is simply wrong to invoke the Second Amendment against private companies like Starbucks who forbid guns on their property.<sup>21</sup> Our employer, Duke University, bans personal guns on campus.<sup>22</sup> Because Duke is a private institution, this stringent rule does not even implicate, much less violate, the Second Amendment. By contrast, when public universities ban guns, they are subject to constitutional lawsuits.<sup>23</sup> Gun rights advocates can of course argue that allowing firearms onto private property is good policy, and supporters of gun regulation can argue the opposite, but that debate has nothing to do with Second Amendment law.

Finally, the misunderstanding and misuse of the Second Amendment tends to aggravate geographical and political divisions. More than any other constitutional right, the Second Amendment reflects the country's urban/rural divide – a split that has received a great deal of attention in the wake of the 2016 election.<sup>24</sup> Many rights have varying degrees of constitutional salience in different geographic areas. The religion clauses, for example, might matter more (or less) in areas of varied religious practice. But little compares to the Second Amendment when it comes to regional difference. Study after study has shown that “[g]un ownership is more common among those residing in small cities and towns and in the suburbs compared to those living in large cities.”<sup>25</sup> The precise figures vary, but one representative survey found that only 29 percent of urban residents own a gun, compared to 56 percent of

<sup>21</sup> For instance, 2ACheck.com (tagline: “Don’t Check Your Rights At Their Door”) maintains a Second Amendment Check Boycott List of “Anti-Gun Companies.” [www.2acheck.com/the-boycott-list/](http://www.2acheck.com/the-boycott-list/) (accessed Dec. 30, 2017).

<sup>22</sup> Duke University Policies, *Weapons/Firearms/Explosives*, (Aug. 3, 2016), <http://policies.duke.edu/students/universitywide/weapons.php>.

<sup>23</sup> See, e.g., *DiGiacinto v. The Rectors & Visitors of George Mason Univ.*, 704 S.E.2d 365 (Va. 2011) (prohibition of firearms on campus did not violate visitor's Second Amendment or state constitutional right to bear arms).

<sup>24</sup> See, e.g., Robert Leonard, *Why Rural America Voted for Trump*, N.Y. TIMES, Jan. 5, 2017, at A23.

<sup>25</sup> JAN E. DIZARD, ROBERT MUTH & STEPHEN P. ANDREWS, *The War over Guns: Introduction: Numbers Don't Count*, in GUNS IN AMERICA: A READER 165, 169 (Jan E. Dizard, Robert Muth & Stephen P. Andrews, eds., 1999); see also DAVID C. WILLIAMS, THE MYTHIC MEANINGS OF THE SECOND AMENDMENT: TAMING POLITICAL VIOLENCE IN A CONSTITUTIONAL REPUBLIC 71 (2003) (“American gun owners ... reside primarily in rural areas.”).



rural residents.<sup>26</sup> This difference in gun ownership unsurprisingly echoes differing views about the desirability of gun regulation. One recent study found that while 56 percent of urban residents favored stricter gun control, only 34 percent of rural residents did – numbers roughly comparable to those for non-gun owners (59 percent) and gun owners (31 percent).<sup>27</sup>

Moreover, the gun debate has become almost completely partisan,<sup>28</sup> in a way that amplifies and reinforces common misunderstandings of the Second Amendment. In May 2016, Donald Trump told a crowd, “Hillary Clinton wants to take your guns away, and she wants to abolish the Second Amendment.”<sup>29</sup> Democrats had very little to offer other than denials. Responding to a question at one of the presidential debates, Hillary Clinton insisted that she did not want to do away with guns or the Second Amendment, and then followed up with a qualifier: “Well, first of all, I support the Second Amendment ... But I also believe that there can be and must be reasonable regulation.”<sup>30</sup>

What was missing from Clinton’s response was a positive constitutional account of the Second Amendment, as opposed to a series of exceptions to it. There is, we think, a serious difference between saying, “I support the Second Amendment, *but* I also support reasonable gun regulations,” and saying, “I support the Second Amendment *and* reasonable regulations.” Until liberals offer an account of the Second Amendment, as opposed to a defense *against* it, they will

<sup>26</sup> Carl T. Bogus, *Gun Control and America’s Cities: Public Policy and Politics*, ALB. GOV’T L. REV. 440, 464 (2008) (citing The Gallup Poll: Public Opinion 2005, at 141 (Alec M. Gallup & Frank Newport, eds., 2006)); see also Gary Langer, *Some Gun Measures Broadly Backed but the Politics Show an Even Split*, LANGER RESEARCH (Mar. 12, 2013), [www.langerresearch.com/uploads/1147a2GunControl.pdf](http://www.langerresearch.com/uploads/1147a2GunControl.pdf) (reporting that gun ownership is “nearly doubly common in rural compared with urban areas”); Chuck Raasch, *In Gun Debate, It’s Urban vs. Rural*, USA TODAY (Feb. 27, 2013), [www.usatoday.com/story/news/nation/2013/02/27/guns-ingrained-in-rural-existence/1949479](http://www.usatoday.com/story/news/nation/2013/02/27/guns-ingrained-in-rural-existence/1949479) (“A compilation of December [2012] Gallup polls showed that rural Americans – roughly one-sixth of the population – are more than twice as likely to have a gun in the home than those living in large cities.”). The General Social Survey found that only 23 percent of urban households had guns in the 2000s, compared to 56 percent in rural areas; the same study found that 22 percent of households in the Northeast had guns, compared to roughly 40 percent in the comparatively rural South and mountain regions. Sabrina Tavernise & Robert Gebeloff, *Share of Homes with Guns Shows 4-Decade Decline*, N.Y. TIMES, Mar. 10, 2013, at A1.

<sup>27</sup> Public Opinion on Gun Control Laws (Feb. 2013), TEX. POL., [http://laits.utexas.edu/txp\\_media/html/poll/features/gun\\_control\\_feature/slide1.html](http://laits.utexas.edu/txp_media/html/poll/features/gun_control_feature/slide1.html) (dataset and methodology described at Sampling and Weighting Methodology for the February 2013 Texas Statewide Study, TEX. POL., [http://texaspolitics.laits.utexas.edu/11\\_9\\_16.html](http://texaspolitics.laits.utexas.edu/11_9_16.html)).

<sup>28</sup> Nate Cohn & Kevin Quealy, *Nothing Divides Voters Like Owning a Gun*, N.Y. TIMES (Oct. 5, 2017), [www.nytimes.com/interactive/2017/10/05/upshot/gun-ownership-partisan-divide.html](http://www.nytimes.com/interactive/2017/10/05/upshot/gun-ownership-partisan-divide.html); Baxter Oliphant, *Bipartisan support for some gun proposals, stark partisan divisions on many others*, PEW RESEARCH CENTER (June 23, 2017), [www.pewresearch.org/fact-tank/2017/06/23/bipartisan-support-for-some-gun-proposals-stark-partisan-divisions-on-many-others/](http://www.pewresearch.org/fact-tank/2017/06/23/bipartisan-support-for-some-gun-proposals-stark-partisan-divisions-on-many-others/).

<sup>29</sup> Jeremy Diamond, *Trump Says Clinton Wants to Abolish the 2nd Amendment*, CNN (May 7, 2017), [www.cnn.com/2016/05/07/politics/donald-trump-hillary-clinton-second-amendment/index.html](http://www.cnn.com/2016/05/07/politics/donald-trump-hillary-clinton-second-amendment/index.html).

<sup>30</sup> The American Presidency Project, Presidential Debate at the University of Nevada in Las Vegas (Oct. 19, 2016), [www.presidency.ucsb.edu/ws/index.php?pid=119039](http://www.presidency.ucsb.edu/ws/index.php?pid=119039).



continue to lose constitutional debates. And as long as liberals choose to ignore or reject the Second Amendment, they lose a chance to shape it – ceding that authority to gun rights partisans who systematically underestimate and minimize its limits.

Conservatives must come to grips with a new reality as well: A world in which their central reading of the Second Amendment is the law, recognized by *District of Columbia v. Heller* and enforced by the courts. That is a victory, but also a change in substance and style. The constitutional Second Amendment cannot bear all of the weight that some gun rights partisans would place on it. It is enforceable by courts, but also answerable to doctrine, and not simply to imagined histories and values.

The gun debate maps on to some of the deepest divisions in American life – between individual and society, between present and past, between rural and urban, between Republican and Democrat. If these divisions can be bridged, the Second Amendment must be part of the solution. To oversimplify a bit: Liberals must take the law of the Second Amendment seriously; conservatives must take the Second Amendment seriously *as law*.

Skeptics may doubt that a clarification of constitutional law will be of much help in such a contentious debate and, to be fair, they have reasons for their skepticism. Many gun rights absolutists know perfectly well that *Heller* leaves ample room for most gun regulations, ranging from registries and concealed carry regulation to outright bans on dangerous and unusual weapons. Justice Scalia made that fact quite clear. On the other side, of course, there are supporters of gun regulation who play down the historical evidence favoring an individual right to keep and bear arms. Wildly exaggerated (or misleadingly minimizing) claims about the extent of constitutional rights are nothing new in American popular discourse and nothing here will end them. We do not suppose that we will reach the skeptics or the extremists, and our object is not to confirm preconceived notions of what the Second Amendment means.

Instead, we think that – beyond the realm of passionate insiders, with their prepared talking points about the Second Amendment – there is an interested and engaged population of citizens who would actually like to know what the law of the Second Amendment says and doesn't say. When we have discussed these issues in public fora, we've been struck by the degree to which people, whatever their particular commitments regarding guns, are genuinely interested in constitutional law.

Exploring the Second Amendment requires engaging with history, politics and controversy in ways that can be profoundly illuminating. The past decade has seen the development, almost from scratch, of a new constitutional right – a remarkable opportunity and challenge for anyone interested in constitutional doctrine. The Second Amendment also serves an important symbolic role; it valorizes and re-imagines a particular relation of the citizen to arms and to the

state. As a symbolic matter, *Heller* was rightly seen to embrace a particular narrative and set of norms about American identity. To make sense of the Second Amendment's many roles – as a constitutional rule, a political banner, and a cultural symbol – one must situate it in a larger story about gun rights, gun regulation, and constitutional law.

The story begins with the history of gun rights and regulation in the United States, a history in which the two have always coexisted (Chapter 1). That broad proposition is historically uncontestable, and yet debate abounds concerning the proper boundary between rights and regulation and the tools with which it should be drawn. Before the Second Amendment became judicially enforceable as a personal right, some legislators regulated as if there were no rights, and some rights-advocates responded as if there was no legitimate regulation. That helped generate the first major debate for the right to keep and bear arms: Whether it is limited to arms, people, and activities bearing some connection to the militia, or whether it includes certain private purposes such as self-defense against crime. That was the central question in *District of Columbia v. Heller* (Chapter 2). The Supreme Court endorsed the latter view, and ultimately extended its application beyond federal law; it also reiterated the constitutionality of many forms of gun regulation and left open a broad range of difficult questions (Chapter 3).

*Heller's* constitutionalization of the gun debate means that questions previously left to politics must now answer to the Constitution, as courts continue to map the boundaries and internal terrain of the Second Amendment (Chapter 4). In doing so, they – and any faithful participant in the debate – must respect the fundamental rules of constitutional argument; the “grammar” or “language” of constitutional law (Chapter 5). In addition to abiding by those rules, full elaboration of Second Amendment doctrine requires a clearer view of the Amendment's underlying value – one that might be grounded in personal safety, autonomy, or the prevention of tyranny (Chapter 6). Though it is not easy, gaining a clearer understanding of the Second Amendment can help minimize some of the gun debate's pathologies (Chapter 7).

We are not so naïve as to think that understanding the Second Amendment as constitutional law will supply ready answers to every question surrounding firearms. Nor does it guarantee that gun partisans on either side will respect or respond to legal arguments,<sup>31</sup> although we hope they will. At the very least, we want to provide a framework for Second Amendment theory – to approach the myriad problems left unresolved by *Heller* with the kinds of legal tools used for other constitutional rights.

<sup>31</sup> Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149 (2006) (arguing that individual's public stances on policy issues are not formed by empirical evidence).