
CONSTITUTIONAL LAW — SECOND AMENDMENT — EN BANC SEVENTH CIRCUIT HOLDS PROHIBITION ON FIREARM POSSESSION BY DOMESTIC VIOLENCE MISDEMEANANTS TO BE CONSTITUTIONAL. — *United States v. Skoien*, 614 F.3d 638 (7th Cir. 2010) (en banc).

The Supreme Court’s decision in *District of Columbia v. Heller*¹ established that the Second Amendment protects an individual right to bear arms for the purpose of self-defense.² However, the Court cautioned that its decision did not jeopardize “longstanding” and “presumptively lawful” firearm restrictions, such as laws prohibiting felons from possessing guns,³ and offered little guidance on the standards of review that might apply to future Second Amendment challenges.⁴ Thus, since *Heller*, lower courts have been left to craft their own approaches to determining the constitutionality of various firearm regulations⁵ and have sometimes relied on analogies to First Amendment jurisprudence in determining standards of scrutiny.⁶ Recently, in its en banc decision in *United States v. Skoien*,⁷ the Seventh Circuit joined this trend when it upheld the constitutionality of 18 U.S.C. § 922(g)(9), which prohibits those who have been convicted of a misdemeanor of domestic violence from possessing firearms.⁸ While the outcome was unsurprising, the decision’s comparison of the restriction to “categori-

¹ 128 S. Ct. 2783 (2008).

² *Id.* at 2799; *see also* McDonald v. City of Chicago, 130 S. Ct. 3020, 3036 (2010) (reiterating *Heller*’s core holding that the Second Amendment protects the right of “individual self-defense”).

³ *Heller*, 128 S. Ct. at 2816, 2817 n.26. Specifically, the Court stated:

[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 2816–17.

⁴ *See id.* at 2817 (finding the District of Columbia’s broad ban on handgun possession in the home unconstitutional “[u]nder any of the standards of scrutiny that we have applied to enumerated constitutional rights”).

⁵ *See generally* Brannon P. Denning & Glenn H. Reynolds, *Heller, High Water(mark)? Lower Courts and the New Right to Keep and Bear Arms*, 60 HASTINGS L.J. 1245 (2009).

⁶ *See, e.g.*, *United States v. Marzarella*, 614 F.3d 85, 97 (3d Cir. 2010) (relying on the First Amendment to suggest that “the Second Amendment can trigger more than one particular standard of scrutiny”). *Heller* itself invited such comparisons by noting that the Second Amendment right is “not unlimited, just as the First Amendment’s right of free speech [is] not,” 128 S. Ct. at 2799 (citing *United States v. Williams*, 128 S. Ct. 1830 (2008)), and First Amendment comparisons have appeared in the scholarly literature, *see, e.g.*, Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 67–75 (1996); Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 COLUM. L. REV. 1278, 1280–81 (2009).

⁷ 614 F.3d 638 (7th Cir. 2010) (en banc).

⁸ *Id.* at 645; *see also* 18 U.S.C. § 922(g)(9) (2006). The Eleventh Circuit has upheld § 922(g)(9), *see United States v. White*, 593 F.3d 1199, 1205–06 (11th Cir. 2010), while the Fourth Circuit has suggested that § 922(g)(9) may survive intermediate scrutiny, *see United States v. Chester*, No. 09-4084, 2010 U.S. App. LEXIS 26508, at *27–28 (4th Cir. Dec. 30, 2010).

cal” First Amendment limits, such as obscenity regulations,⁹ risks subjecting future firearm regulations to overly stringent scrutiny. Courts can reach *Skoien*’s form of intermediate scrutiny but sidestep its questionable analogy to categorical limits by relying on more nuanced First Amendment principles, such as the ability to respond, which are easier to transfer to the Second Amendment context.

Steven Skoien was twice convicted of domestic battery, a misdemeanor, in Wisconsin state court — once in 2003 and once in 2006.¹⁰ In 2007, probation officers discovered a shotgun in Skoien’s truck, and Skoien admitted he had used the shotgun for deer hunting.¹¹ Skoien was indicted for violating § 922(g)(9), which prohibits anyone “who has been convicted in any court of a misdemeanor crime of domestic violence” from possessing a firearm in or affecting interstate commerce.¹² Skoien challenged the statute’s validity, but the district court denied his motion to dismiss the indictment, finding that § 922(g)(9) would survive even “the highest standard” of scrutiny: the statute was “narrowly tailored” and covered “only . . . persons who have been found guilty by a court of domestic violence.”¹³ Furthermore, *Heller*’s finding of an individual right did not disturb prior Seventh Circuit precedent holding § 922(g)(9) constitutional.¹⁴

A panel of the Seventh Circuit vacated the district court judgment and remanded.¹⁵ Writing for the panel, Judge Sykes¹⁶ held that *Heller* had established a two-tier approach in gun restriction cases. The court first asked whether the regulated conduct was covered by the Second Amendment, based on original public understanding, and found that it was.¹⁷ *Heller* did not suggest that hunting firearms lay outside its protection,¹⁸ and the government had not strongly argued that the original understanding excluded the gun rights of felons and misdemeanants.¹⁹ Judge Sykes next considered the appropriate standard of review. Under *Heller*, rational basis was foreclosed,²⁰ and strict scrutiny would be inappropriate since the rights of violent offenders did not lie “at the

⁹ *Skoien*, 614 F.3d at 641.

¹⁰ *Id.* at 645. The victim in 2003 was Skoien’s wife at the time; the victim in 2006 was his new fiancée. *Id.*

¹¹ United States v. Skoien, 587 F.3d 803, 806 (7th Cir. 2009).

¹² 18 U.S.C. § 922(g)(9); see also 18 U.S.C. § 921(a)(33) (2006) (defining the term “misdemeanor crime of domestic violence”).

¹³ United States v. Skoien, No. 08-cr-12-bbc, 2008 U.S. Dist. LEXIS 66105, at *1, *3 (W.D. Wis. Aug. 27, 2008).

¹⁴ *Id.* at *3–4 (citing *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999)).

¹⁵ *Skoien*, 587 F.3d at 806.

¹⁶ Judge Sykes was joined by Senior Judge Bauer and Judge Tinder.

¹⁷ *Skoien*, 587 F.3d at 808–09.

¹⁸ *Id.* at 809 (citing *District of Columbia v. Heller*, 128 S. Ct. 2783, 2801 (2008)).

¹⁹ *Id.* at 810.

²⁰ *Id.* (citing *Heller*, 128 S. Ct. at 2818 n.27).

heart of the Second Amendment right.”²¹ Thus, Judge Sykes applied intermediate scrutiny to § 922(g)(9), seeking “only . . . a ‘reasonable fit’ between an important governmental end” and the chosen means of achieving that end.²² The panel found that the government had not yet demonstrated that fit by presenting empirical evidence about the link between firearm possession and domestic violence, and remanded for further factfinding.²³

The Seventh Circuit granted rehearing en banc, vacated the panel decision,²⁴ and affirmed the district court’s denial of the motion to dismiss the indictment.²⁵ Writing for the court, Chief Judge Easterbrook²⁶ first considered “whether Congress is entitled to adopt categorical disqualifications such as § 922(g)(9).”²⁷ The court parsed *Heller*’s reference to “presumptively lawful” regulations regarding felons and others, concluding that it demonstrated that “statutory prohibitions on the possession of weapons by some persons are proper — and . . . that the legislative role did not end in 1791,” given the twentieth-century vintage of felon-in-possession laws.²⁸ To support the validity of “categorical” firearm restrictions, Chief Judge Easterbrook analogized to “the First Amendment, which has long had categorical limits: obscenity, defamation, incitement to crime, and others.”²⁹ The court reasoned that “some form of strong showing (‘intermediate scrutiny,’ many opinions say) is essential” for the creation of a categorical Second Amendment exception, and suggested that “substantial[] relat[ion] to an important governmental objective” may be required.³⁰

The court continued, however, that “we need not get more deeply into the ‘levels of scrutiny’ quagmire, for no one doubts that the goal of § 922(g)(9), preventing armed mayhem, is an important governmental objective.”³¹ Chief Judge Easterbrook stated that § 921(a)(33) re-

²¹ *Id.* at 812 (describing the “natural right of armed defense” of law-abiding persons as “the central concern of the Second Amendment”).

²² *Id.* at 814 (citing *Bd. of Trs. of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

²³ *Id.* at 815–16.

²⁴ *United States v. Skoien*, No. 08-3770, 2010 U.S. App. LEXIS 6584 (7th Cir. Feb. 22, 2010).

²⁵ *Skoien*, 614 F.3d at 645.

²⁶ Chief Judge Easterbrook was joined by Senior Judge Bauer and Judges Posner, Flaum, Kanne, Rovner, Wood, Williams, Tinder, and Hamilton.

²⁷ *Skoien*, 614 F.3d at 639.

²⁸ *Id.* at 640 (noting that federal felon-in-possession statutes date to 1938). The court did caution that *Heller*’s language itself did not conclusively determine the validity of § 922(g)(9). *Id.* (“The language . . . warns readers not to treat *Heller* as containing broader holdings than the Court set out to establish The opinion is not a comprehensive code; it is just an explanation for the Court’s disposition.”).

²⁹ *Id.* at 641 (citing *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010)).

³⁰ *Id.* The court discussed *United States v. Stevens*, 130 S. Ct. 1577 (2010), which found no categorical exception to the First Amendment for depictions of animal cruelty, to suggest that a “strong” showing is necessary for the creation of a categorical limit. *Skoien*, 614 F.3d at 641.

³¹ *Skoien*, 614 F.3d at 642.

quires that the triggering misdemeanor involve “actual or attempted” violence “toward a spouse, child, or domestic partner.”³² The court found that § 922(g)(9) was supported by three claims: that domestic violence misdemeanors are often as serious as felonies, that firearms are particularly lethal in domestic violence, and that those convicted of domestic violence are likely to recidivate.³³ Chief Judge Easterbrook cited extensive empirical evidence for all of these propositions, indicating a strong justification for the statute.³⁴ The court also addressed Skoien’s argument that the statute was overbroad, applying “to older persons” who pose little risk of violence as well as to recent offenders,³⁵ by noting that § 921(a)(33) exempts misdemeanants who have received “expungement, pardon, or restoration of civil rights.”³⁶ Additionally, as a recent offender, Skoien was not well situated to raise an as-applied challenge that might succeed if offered by another defendant.³⁷ Accordingly, the court held § 922(g)(9) to be constitutional.

Judge Sykes dissented, arguing that *Heller* had not conceded that categorical firearms restrictions might be permissible.³⁸ She noted that the majority had not specified whether domestic violence misdemeanants lie entirely outside Second Amendment protections or whether restrictions on them are simply subject to more deferential review.³⁹ The dissent described the majority’s analogies to the First Amendment as inapt, distinguishing between limitations on “certain narrowly limited categories of speech” and broad, permanent firearm bans for “a certain category of *persons*.”⁴⁰ Judge Sykes criticized the majority for supplying its own social science research on domestic violence, which she suggested was misinterpreted,⁴¹ and urged the court not to “read *Heller*’s dicta in a way that swallows its holdings.”⁴²

Although the Seventh Circuit’s analysis of the linkage between guns and domestic violence convincingly “establish[es] a substantial re-

³² *Id.*

³³ *Id.* at 643.

³⁴ *Id.* at 643–44.

³⁵ *Id.* at 644.

³⁶ *Id.* (citing 18 U.S.C. § 921(a)(33)(B)(ii) (2006)). The court noted that expungement and pardon are available in Wisconsin, *id.* at 644–45, adding that § 922(g)(9) “tolerates different outcomes for persons convicted in different states,” *id.* at 645.

³⁷ *Id.* at 645.

³⁸ *Id.* at 648 (Sykes, J., dissenting).

³⁹ *Id.* at 649–50. The dissent argued that the majority’s reference to *Stevens* was undercut by the Court’s warning in *Stevens* that there is no “freewheeling authority” to find speech entirely outside the First Amendment. *Id.* at 650 n.9 (quoting *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010)).

⁴⁰ *Id.* at 650.

⁴¹ *Id.* at 651–52.

⁴² *Id.* at 654.

lation” to “an important governmental objective,”⁴³ its analogies to the First Amendment are misplaced and may muddy the waters in future firearm restriction cases. Even assuming that an analogy to the First Amendment is helpful in determining Second Amendment levels of scrutiny, *Skoien* misapplied this analogy. Specifically, while *Skoien* suggests that the firearm restriction at issue is similar to First Amendment regulations that receive intermediate scrutiny, a categorical prohibition on ownership by a specific type of person is more similar to speech restrictions subject to strict scrutiny, such as content-based restrictions. Courts that draw this conclusion from *Skoien*’s analogy may apply an unnecessarily stringent standard approaching strict scrutiny in future Second Amendment cases.

A blanket restriction on the possession of firearms by domestic violence misdemeanants differs in important ways from the “categorical” limits on First Amendment rights that the majority cites: “obscenity, defamation, incitement to crime, and others.”⁴⁴ These restrictions are aimed at particular forms of speech, leaving a person free to express a message through other means.⁴⁵ But prohibiting a specific person from possessing a gun at all prevents him from exercising the core right to bear arms in self-defense protected by the Second Amendment.⁴⁶ The most closely analogous First Amendment restriction might be a content-based restriction on speech: preventing a person from expressing a given message in any form at all. But content-based restrictions are generally subject to strict scrutiny.⁴⁷ Thus, while the Seventh Circuit suggested that its analogies to categorical First Amendment prohibitions supported the application of intermediate scrutiny,⁴⁸ those prohibitions are “categorical” in a narrower sense than is § 922(g)(9), which has a broader constitutional range consisting of a given person’s core self-defense right. *Skoien*’s analogy to “categori-

⁴³ *Id.* at 642 (majority opinion).

⁴⁴ *Id.* at 641 (citing *Stevens*, 130 S. Ct. at 1584).

⁴⁵ *Cf.* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (noting validity of time, place, and manner regulations of speech that “leave open ample alternative channels for communication of the information”).

⁴⁶ While *Heller* did not decide whether the Second Amendment’s protection is limited to firearms or extends to other forms of arms, it emphasized that the handgun is “the quintessential self-defense weapon” and that the availability of other weapons could not justify a handgun ban. *District of Columbia v. Heller*, 128 S. Ct. 2783, 2818 (2008). A ban on all firearms would, if anything, be more suspect than a ban on handguns alone. *See also* Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97, 97–98 (2009), http://www.columbialawreview.org/assets/sidebar/volume/109/97_Volokh.pdf (rejecting a comparison between the “core category” of gun possession and the “marginal” speech category of obscenity).

⁴⁷ *See, e.g., Stevens*, 130 S. Ct. at 1584.

⁴⁸ *See Skoien*, 614 F.3d at 641 (arguing that *Stevens* requires a “strong showing” for a categorical First Amendment limit and suggesting that “intermediate scrutiny” would satisfy that standard in the Second Amendment context).

cal” limits would more logically compare the statute to a broad content-based regulation and imply strict scrutiny; yet the court used intermediate scrutiny instead, suggesting the weakness of the analogy.

Casting the issue in terms of undue burdens on constitutional rights⁴⁹ further exposes the inconsistencies of the court’s analogy to restrictions on obscenity or defamation. Regulations on obscenity, for instance, may be thought constitutionally unproblematic because these prohibitions “impose only a slight burden on the values that the Free Speech Clause protects.”⁵⁰ But this analysis does not transfer well to the Second Amendment context, where a blanket firearm prohibition burdens the core of the self-defense right. A child pornographer has less of a free speech interest in distributing his message than citizens have in expressing other messages, justifying child pornography’s exclusion from the First Amendment;⁵¹ even obscenity and defamation, which receive some First Amendment protection, may be regulated because they provide only a limited “benefit” to their speaker.⁵² However, a person convicted of a domestic violence misdemeanor has as much of an interest in self-defense as other persons have: the firearm ban does not distinguish between means of self-defense in which an individual has a greater or lesser interest.⁵³ Thus, the categorical First Amendment analogy may lead courts on a futile quest to define categories of persons whose self-defense interests are “low value.” The justification for § 922(g)(g) is not that the value to misdemeanants of their self-defense rights is low, but that this value is outweighed by the danger their gun possession could pose to others; a similar rationale underlies many firearm restrictions.⁵⁴

⁴⁹ Such a test would allow restrictions that do not burden the “core” of the right at issue. Professor Mark Tushnet has imported this concept from the context of abortion jurisprudence, suggesting that lower courts have applied and will continue to apply a similar analysis in Second Amendment challenges, resulting in a standard of review somewhere between “rational basis with bite” and “intermediate scrutiny.” Mark Tushnet, *Permissible Gun Regulations After Heller: Speculations About Method and Outcomes*, 56 UCLA L. REV. 1425, 1437 (2009).

⁵⁰ Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda*, 56 UCLA L. REV. 1443, 1455 (2009) (construing First Amendment decisions as holding that restrictions on “false statements of fact, obscenity, or fighting words . . . do not materially interfere with the marketplace of ideas”).

⁵¹ See *New York v. Ferber*, 458 U.S. 747, 762 (1982).

⁵² *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992) (“[O]ur society . . . has permitted restrictions upon the content of speech in a few limited areas, which are ‘of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))).

⁵³ In another sense, § 922(g)(g) does make such a distinction (between firearms and other weapons), but in the wrong direction: again, as *Heller* made clear, firearms, or at least handguns, are more essential to the self-defense right than other weapons.

⁵⁴ This rationale is particularly powerful where a regulation is meant to protect against domestic violence, since forms of gun possession that might pose little risk of public harm still pose do-

An additional reason for skepticism about the First Amendment analogy is that the means by which speech can cause harm is different from the means by which firearms can cause harm. Harm from problematic speech in the First Amendment context generally comes from the influence that speech has on its listeners and from those listeners' resulting actions.⁵⁵ The essence of the "marketplace of ideas" concept, which limits the use of broad content-based restrictions, is that the bad effects of unwanted speech can generally be neutralized in a competition with other speech.⁵⁶ However, because the potential harm from gun usage — physical violence against another person — is more immediate than the harm from problematic speech, harm from firearms cannot be similarly neutralized, at least in the domestic violence context.⁵⁷ A less protective standard of review may thus be more appropriate for categorical Second Amendment restrictions such as § 922(g)(9) than for categorical First Amendment restrictions. Furthermore, although the government could have an equally strong interest — preventing physical harm — in each case,⁵⁸ it is more difficult for the government to cordon off situations in which gun possession is unprotected by the Second Amendment: the right to self-defense found in *Heller* involves a right to "keep" arms in the home, and thus is not as susceptible to time, place, and manner restrictions familiar from the

mestic violence risks. For instance, while the "keeping of long guns" within the home has been portrayed as the least objectionable expression of the Second Amendment right, given long guns' lack of concealability and unfitness for "urban crime," C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 734 (2009) (suggesting that felon-in-possession laws should be constitutionally limited to handguns), even long guns raise the potential for domestic violence because concealability and portability are not factors in that context.

⁵⁵ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57–60 (1973) (suggesting that state interests in regulating obscenity stem from obscenity's long-term coarsening effect on society, not from its immediate impact on individuals exposed to it). Types of speech that do pose a risk of imminent harm have received less First Amendment protection. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (forbidding criminalization of advocacy of violence "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

⁵⁶ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market That at any rate is the theory of our Constitution.")

⁵⁷ Victims of domestic violence certainly face limits on their ability to protect against future abuse through use of their own Second Amendment rights: a firearm the victim keeps in the home for her own defense will likely be equally available to her potential abuser (if they are co-habitants). Thus, the "marketplace of ideas" concept is a poor analog for analyzing § 922(g)(9). The domestic violence context more closely resembles First Amendment cases in the defamation sphere, such as *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held defamatory speech to be less protected when the victim has less access to the media to defend her reputation through her own speech. *Id.* at 344.

⁵⁸ Numerous cases have upheld First Amendment restrictions as necessary to avoid actual physical harm. See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Rice v. Paladin Enters., Inc.*, 128 F.3d 233 (4th Cir. 1997) (crime-facilitating speech).

First Amendment context.⁵⁹ Because gun usage in domestic violence inherently involves a high risk of imminent injury in a way that controversial speech does not, and because free speech rights can be regulated more flexibly than the right to self-defense in the home, analogizing Second Amendment laws to categorical First Amendment prohibitions risks applying an unduly high level of scrutiny.⁶⁰

Facing the difficulties of *Skoien's* analogy, some judges may avoid any analogy to the First Amendment whatsoever, attempting instead to develop a Second Amendment jurisprudence from first principles.⁶¹ Yet such a complete retreat would be unnecessary. First Amendment law makes distinctions *within* categories such as incitement to crime and defamation based on principles such as imminence and the ability of the victim to respond.⁶² These principles, easily transferable to the Second Amendment context, can help courts resolve challenges to particular gun restrictions, such as regulations aimed at domestic violence.⁶³ However, *Skoien's* specific comparison of § 922(g)(9) to categorical limits such as those on obscenity undercuts its implicit choice of intermediate scrutiny as the appropriate standard of review, since these speech laws do not cut to the core of a constitutional right. A full-fledged analogy to these categorical restrictions would require a total firearm ban for domestic violence misdemeanants to face the unduly harsh test of strict scrutiny. While a more nuanced First Amendment analogy based on distinctions within categories could support intermediate scrutiny, the Seventh Circuit's overbroad analogy to categorical speech prohibitions does not justify the standard of review it adopts for Second Amendment challenges.

⁵⁹ See Volokh, *supra* note 46, at 100 (“[S]elf-defense can’t be shifted to a more convenient time or location.”).

⁶⁰ One possible objection is that consideration of the type of harm should come into play at the narrow tailoring stage of scrutiny, rather than when determining the level of scrutiny to apply. But courts often consider some harm in the abstract when setting a level of scrutiny before considering that harm in the specific case at the interest or tailoring steps. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532–33, 535–37 (1996) (considering the nature of discriminatory gender classifications in applying intermediate scrutiny to such classifications before weighing the particular harms caused by male-only education at publicly funded university).

⁶¹ See, e.g., *United States v. Chester*, No. 09-4084, 2010 U.S. App. LEXIS 26508, at *37–42 (4th Cir. Dec. 30, 2010) (Davis, J., concurring in the judgment) (criticizing the majority’s reliance on First Amendment overbreadth doctrine and analogies of gun possession to expressive conduct).

⁶² See *Gertz*, 418 U.S. at 344; *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

⁶³ For instance, consideration of the ability of the victim to respond would support more deferential scrutiny for regulations of particular types of arms that pose severe threats to public safety. Cf. Volokh, *supra* note 50, at 1482 (proposing that weapons “more practically dangerous than what is in common use among law-abiding citizens” should receive no protection). Of course, the appropriate level of detail in the scrutiny analysis will depend on future determinations of the scope of the Second Amendment right. A finely grained analysis may be unnecessary if the right is strictly limited to the home and to self-defense, but will be more supportable if a broader conception of the right prevails.