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Incidental Burdens and the Nature of Judicial Review

A Response to Joseph Blocher and Darrell A.H. Miller,
*What Is Gun Control? Direct Burdens, Incidental Burdens, and
the Boundaries of the Second Amendment*,
83 U Chi L Rev 295 (2016).

Michael C. Dorf†

INTRODUCTION

Professors Joseph Blocher and Darrell Miller deserve enormous credit for identifying a heretofore largely unrecognized problem. They explain that common-law doctrines and general statutes that are not instances of conventional gun control can nonetheless be applied in ways that limit the freedom to own, possess, and use firearms.¹ They ask: “Does the Second Amendment apply to civil suits for trespass, negligence, and nuisance? Does the Amendment cover gun-neutral laws of general applicability like assault and disturbing the peace?”² More broadly, should the application of such doctrines and laws trigger Second Amendment scrutiny? Blocher and Miller offer a framework for thinking about an important set of unresolved questions.

Blocher and Miller accomplish three goals: (1) they demonstrate the scope of the problem by identifying a wide range of doctrines and laws that could be said to infringe the Second Amendment, depending on how the courts approach incidental burdens;³ (2) they list and elaborate factors that could be used to

† Robert S. Stevens Professor of Law, Cornell University Law School. Emily Rector provided excellent research assistance.

¹ See Joseph Blocher and Darrell A.H. Miller, *What Is Gun Control? Direct Burdens, Incidental Burdens, and the Boundaries of the Second Amendment*, 83 U Chi L Rev 295, 303–04 (2016). I refer to “firearms” (or sometimes “guns”) as the objects protected by the Second Amendment, because most cases involving the Amendment involve firearms. By this shorthand, I do not mean to take a position on what other arms it protects. See *Caetano v Massachusetts*, No 14-10078, slip opinion at 1–2 (US Mar 21, 2016) (per curiam) (reversing a state court’s determination that stun guns are not protected, as its reasoning was inconsistent with *District of Columbia v Heller*, 554 US 570 (2008), without deciding whether the Second Amendment protects stun guns).

² Blocher and Miller, 83 U Chi L Rev at 295 (cited in note 1).

³ Id at 303–23.

sort between incidental burdens that trigger Second Amendment scrutiny and those that do not;⁴ and (3) they describe various purposes that the Second Amendment might serve, because they understand that the question whether any particular doctrine or law should be understood to infringe the Second Amendment is partly a normative question that cannot be answered without reference to the Amendment's purposes.⁵

Blocher and Miller also shed new light on the general relation between rights and rules. Their analysis has potential implications for legal doctrines concerning incidental burdens on other rights, such as religion, speech, and equal protection. Their analysis also could bear on doctrines that they do not discuss, such as when litigants can succeed in facial challenges to the constitutionality of laws. Most fundamentally, Blocher and Miller point to a gap in constitutional law and legal theory: we do not have a good account of what constitutes a "law" that might infringe a right.

This Essay has three goals of its own. Part I is a compliment disguised as a quibble. In responding to Blocher and Miller's characterization of my own analysis of incidental burdens, I note that their article is an important contribution to the literature on the Second Amendment as a whole, not just incidental burdens thereon. Part II notes an important distinction between other rights that might be incidentally burdened by general laws—especially speech, religion, and equal protection—and the Second Amendment right to own, possess, and use firearms. Each of the former has a strong equality component. That difference might lead one to conclude that direct burdens on these other rights ought to trigger greater scrutiny than direct burdens on Second Amendment rights. Part III explains how Blocher and Miller have identified what ought to be, but is not yet, a central concern of jurisprudence: when and how to pick out a particular legal obligation from the entire legal corpus and call that particular obligation a distinct law.

I. DIRECT BURDENS ON SECOND AMENDMENT RIGHTS

Professors Blocher and Miller build on an article I wrote about incidental burdens two decades ago. There, I argued that laws that do not target fundamental constitutional rights can

⁴ *Id.* at 323–47.

⁵ *Id.* at 347–54.

nonetheless seriously infringe such rights in particular circumstances.⁶ I proposed that, in general, even such formally rights-neutral laws ought to be subjected to heightened scrutiny when they impose substantial incidental burdens on fundamental rights.⁷ I am grateful to Blocher and Miller for characterizing my article as “insightful.”⁸ However, I quibble with their contention that my favored approach runs counter to the Supreme Court’s treatment of incidental burdens on Second Amendment rights when those burdens are supported by history and tradition.⁹

My proposed framework was not *simply* a substantiality threshold. I also conceded that any sensible approach to incidental burdens can be only partly transsubstantive. How far to go in protecting rights against incidental burdens, I wrote, will “*require substantive interpretation of the relevant constitutional rights.*”¹⁰ Blocher and Miller make the same point. They explain that whether any particular incidental burden on an asserted Second Amendment right ought to trigger Second Amendment scrutiny should depend on the underlying purpose(s) of the Second Amendment.¹¹

Moreover, my argument was largely normative. I recognized that positive law in the areas I analyzed—speech, religion, and equality—did not fully conform to my proposed framework.¹² The fact that the Second Amendment doctrine propounded in *District of Columbia v Heller*¹³ also does not fully fit the framework I proposed does not show that the framework is normatively mistaken.

Even as a purely descriptive matter, *Heller* cannot contradict my approach because *Heller* involved a direct burden, not an incidental one. In providing assurances that ostensibly “longstanding” regulations of firearms would remain valid, the Court clearly had in mind direct regulations of firearms possession as such.¹⁴

⁶ See Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv L Rev 1175, 1176–79 (1996) (“[L]aws having the incidental effect of substantially burdening fundamental rights to engage in primary conduct should be subject to heightened scrutiny.”).

⁷ See id at 1232–33.

⁸ Blocher and Miller, 83 U Chi L Rev at 340 (cited in note 1).

⁹ See id at 339.

¹⁰ Dorf, 109 Harv L Rev at 1251 (cited in note 6).

¹¹ Blocher and Miller, 83 U Chi L Rev at 340, 347–55 (cited in note 1).

¹² See Dorf, 109 Harv L Rev at 1232–33, 1251 (cited in note 6) (acknowledging that the relevant case law was “riddled with inconsistencies and exceptions”).

¹³ 554 US 570 (2008).

¹⁴ See id at 626–27 (disclaiming any intention “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”).

Blocher and Miller make an important point in observing that incidental burdens on Second Amendment rights that arise from the application of longstanding common-law doctrines might similarly be treated as triggering no Second Amendment scrutiny in virtue of the history and tradition of these common-law doctrines. But that observation does not contradict the framework I offered twenty years ago, because it is not an observation about incidental burdens as such. If the pedigree of a restriction means that the right it is alleged to infringe “just does not show up,”¹⁵ then the right does not show up for direct or incidental burdens.

Putting aside my own defense,¹⁶ note how much of what Blocher and Miller have to say bears on direct burdens on Second Amendment rights. In articulating the uneasy role of history and tradition in validating exceptions to the Second Amendment, they speak to the kinds of direct burdens most likely to be challenged on Second Amendment grounds—laws restricting who may possess firearms¹⁷ and putting certain places off-limits to those who possess firearms.¹⁸

Likewise, the choice among various rationales for the Second Amendment right will have implications for the validity of direct burdens on the Second Amendment. For example, Blocher and Miller suggest that notwithstanding the Supreme Court’s focus on individual self-defense in *Heller* and *McDonald v City of Chicago, Illinois*,¹⁹ the insurrectionist justification for the Second Amendment remains viable.²⁰ That suggestion runs counter to

¹⁵ Blocher and Miller, 83 U Chi L Rev at 296 (cited in note 1), quoting Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765, 1769 (2004).

¹⁶ Perhaps my response is overly defensive. Blocher and Miller say only that treating even very substantial incidental burdens on Second Amendment rights as triggering no Second Amendment scrutiny “seems to run counter to the approach” I proposed. Blocher and Miller, 83 U Chi L Rev at 339 (cited in note 1).

¹⁷ See, for example, *United States v Meza-Rodriguez*, 798 F3d 664, 673 (7th Cir 2015) (upholding a statute prohibiting firearms possession by undocumented immigrants); *United States v Yancey*, 621 F3d 681, 687 (7th Cir 2010) (upholding a statute prohibiting possession of a firearm by unlawful drug users); *United States v Skoien*, 614 F3d 638, 639, 645 (7th Cir 2010) (en banc) (upholding a statute forbidding persons convicted of a domestic violence misdemeanor from possessing firearms, as applied to a recidivist who had been arrested for possessing guns while on probation).

¹⁸ See, for example, *Bonidy v United States Postal Service*, 790 F3d 1121, 1122–23, 1129 (10th Cir 2015) (upholding a regulation prohibiting firearms on USPS property); *GeorgiaCarry.org, Inc v Georgia*, 687 F3d 1244, 1248–49, 1264 (11th Cir 2012) (upholding a firearms restriction in places of worship); *Nordyke v King*, 681 F3d 1041, 1044 (9th Cir 2012) (en banc) (upholding an ordinance prohibiting possession of firearms on county property).

¹⁹ 561 US 742 (2010).

²⁰ Blocher and Miller, 83 U Chi L Rev at 350–52 (cited in note 1).

conventional wisdom, which holds that the militia movement in the 1990s discredited insurrectionism.²¹ Yet the suggestion is plausible and, if the insurrectionist strand of Second Amendment theory were accepted by the courts, could have important doctrinal consequences.

Consider laws restricting the number of firearms an individual may own, possess, or purchase.²² If the Second Amendment serves to protect only a right of individual self-defense, then numerical limits are likely valid. A person does not need more than one or two firearms to defend herself. However, if the Second Amendment serves insurrectionist purposes, then it arguably protects a right to stockpile weapons for a confrontation with the government.

I do not mean to suggest that the Second Amendment should be construed to protect a right to insurrection, or that even if one acknowledges its insurrectionist roots one must also concede that any particular laws limiting the stockpiling of weapons should be held unconstitutional. Nor do Blocher and Miller. My point here is simply this: their observation that the purpose(s) served by the Second Amendment affects how the Amendment should be construed is at least as important for the analysis of direct burdens as for the analysis of incidental ones.

II. DOES THE SECOND AMENDMENT HAVE AN EQUALITY COMPONENT?

Professors Blocher and Miller chiefly bill their article as a contribution to the literature on incidental burdens, and it is a major one. They explicitly raise important questions about when the application of firearms-neutral common-law doctrines and statutes could be regarded as infringing Second Amendment rights.²³ If, say, a law requiring bullets to be stored separately from guns implicates the Second Amendment, then perhaps the application of a general negligence principle to impose liability on a gun owner for death or injury caused by leaving his gun unsecured also implicates the Second Amendment. At least when the same act—storing a loaded gun, in this example—gives rise to liability, there is some need to explain why it matters whether that

²¹ See, for example, Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 Harv L Rev 191, 226–32 (2008).

²² See, for example, Md Pub Safety Code Ann § 5-128(b) (permitting each individual only one firearm purchase every thirty days); NJ Stat Ann § 2C:58-3(i) (permitting each individual only one handgun purchase every thirty days).

²³ Blocher and Miller, 83 U Chi L Rev at 303–23 (cited in note 1).

liability arises out of a firearm-specific rather than a firearm-neutral law or doctrine. After all, from the gun owner's perspective, the consequences are the same. Indeed, depending on the size and nature of liability, the incidental burden may be more substantial than the direct one.²⁴

A. Floodgates

Why, then, do most direct burdens on rights automatically trigger judicial scrutiny, whereas the application of judicial scrutiny based on incidental burdens is controversial? As I have previously noted, one answer is “a floodgates concern. Nearly every law will, in some circumstances, impose an incidental burden on *some right*.”²⁵ Accordingly, the Supreme Court has sometimes offered the fear of litigation as a reason to disregard incidental burdens on rights.

For example, in justifying the proposition that disparate impact on members of a racial minority group does not by itself constitute a prima facie equal protection violation, the Court in *Washington v Davis*²⁶ worried that a contrary rule “would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes.”²⁷ Likewise, in treating incidental burdens on the free exercise of religion as not implicating the First Amendment in the 1990 peyote case, the Court worried that a contrary rule “would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind.”²⁸

Yet the claim that treating incidental burdens on constitutional rights as infringing those rights will lead to a flood of litigation is empirical. The claim may or may not be true in different contexts. Moreover, the floodgates claim is falsifiable. In both the equal protection and the free exercise contexts we have statutory

²⁴ See Dorf, 109 Harv L Rev at 1177 (cited in note 6) (“Direct burdens can be trivial—for example, a one-penny tax on newspapers that publish editorials critical of the government—whereas conversely, incidental burdens can be extremely harsh—for example, applying a prohibition against wearing headgear in the military to an Orthodox Jew.”).

²⁵ Id at 1178.

²⁶ 426 US 229 (1976).

²⁷ Id at 248.

²⁸ *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872, 888 (1990).

regimes that take incidental burdens seriously.²⁹ The courts have not been overrun with such claims.

To be sure, recent cases involving religious exceptions are controversial. However, the controversy mostly concerns how broadly or narrowly to construe religious freedom and what counts as a compelling interest. Should corporations be able to assert religious freedom claims, as the Supreme Court held in *Burwell v Hobby Lobby Stores, Inc.*?³⁰ Do religious claimants make out prima facie claims that their religious exercise is “substantially burden[ed]” merely by asserting that compliance with a law would be sinful, as the plaintiffs in *Zubik v Burwell*?³¹ argued? Do states and localities have a compelling interest in combating anti-LGBTQ discrimination sufficient to override the state religious freedom claims of bakers, photographers, and florists? In none of these examples is the main argument for striking the balance against the claim of religious freedom a concern about the *volume* of litigation. Accordingly, skepticism about broad protection for religious freedom against incidental burdens does not vindicate the floodgates concern as such.

The floodgates concern is not necessarily trivial, but it is merely one factor that courts and legislators could legitimately consider in deciding whether and how to recognize any particular right against incidental burdens. The risk of a flood of litigation does not warrant the sorts of categorical dismissals of incidental burden claims that sometimes appear in the case law.

B. Direct Burdens and Singling Out

If not floodgates, then what justifies treating incidental burdens differently from direct burdens? In some areas the doctrine could be driven by the view that direct burdens pose the special

²⁹ The Court in *Davis* acknowledged the disparate impact test for statutory claims of employment discrimination under Title VII of the 1964 Civil Rights Act, but declined to treat the Constitution as requiring the same approach. *Davis*, 426 US at 246–48. Congress responded to the *Smith* decision with the Religious Freedom Restoration Act of 1993 (RFRA), Pub L No 103-141, 107 Stat 1488, codified at 42 USC § 2000bb et seq, and twenty-one states have similar regimes. See Sophia Martin Schechner, Note, *Religion’s Power over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 *Cardozo J L & Gender* 395, 397, 406 (2016).

³⁰ 134 S Ct 2751, 2785 (2014) (holding that a government mandate, “as applied to closely held corporations, violates RFRA”).

³¹ Nos 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119, and 15-191, slip op (US May 16, 2016).

³² See Reply Brief of Petitioners, *Southern Nazarene University v Burwell*, No 15-119, *1 (US filed Oct 13, 2015) (available on Westlaw at 2015 WL 6083219) (consolidated with *Zubik*).

harm of singling out. This harm is easiest to perceive in equal protection cases. By its very nature, an equality claim asserts that some burden or benefit has been distributed unevenly. In the equal protection context, incidental burden claims are disparate impact claims. When the courts reject disparate impact as the basis for equal protection liability, they reason that a law with a disparate impact does not, simply by virtue of the disparate impact, single people out based on an illicit criterion. A successful equal protection claim requires showing that the government's adoption of a policy disadvantaging a particular group was "because of, not merely in spite of, its adverse effects upon" that group.³³

One can disagree with the constitutional doctrine refusing to treat disparate impact as itself actionable, yet still recognize the force of the Court's point: there is something *especially* unequal about being singled out on the basis of an illicit trait. Singling out is, to paraphrase Justice Oliver Wendell Holmes, more like being kicked than being stumbled over.³⁴

Free speech and religious freedom also have equality components that make singling out especially problematic. The equality component of free speech cashes out doctrinally via the stringent scrutiny that applies to content-based³⁵ and, especially, viewpoint-based limits on speech.³⁶ Indeed, even laws that target expression on a content-neutral basis are as problematic as potential censorship. Thus, a tax that applies only to newspapers (or their electronic equivalent) is not considered an incidental burden.³⁷

Likewise, for religion, even as the Court construed free exercise in the peyote case to exclude incidental burdens, it promised that *discrimination* on the basis of religion would be deemed unconstitutional.³⁸ True to their word, three years later the justices

³³ *Personnel Administrator of Massachusetts v. Feeney*, 442 US 256, 279 (1979) (quotation marks omitted).

³⁴ O.W. Holmes Jr, *The Common Law* 3 (Little, Brown 1881).

³⁵ See *Brown v. Entertainment Merchants Association*, 564 US 786, 799 (2011).

³⁶ Even in a limited public forum, the government may not discriminate based on viewpoint. See *Rosenberger v. Rector and Visitors of University of Virginia*, 515 US 819, 825–26, 829 (1995) (holding that a university could not withhold student activity funds based on a student group's religious speech).

³⁷ See *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 US 575, 579 (1983) (holding that a tax on ink and paper used in periodicals violated freedom of the press protections).

³⁸ See *Smith*, 494 US at 878.

unanimously invoked free exercise to invalidate a law that discriminated on religious grounds.³⁹ Despite continuing contestation over numerous questions about the proper scope of religious liberty, there is little doubt that it has a strong equality component. The contest is entirely over what *else* religious liberty requires.

C. Singling Out Guns

What about Second Amendment rights? Gun regulation is a wedge issue in contemporary American politics and constitutional law. Gun regulations disproportionately impact “white, male, and rural”⁴⁰ Americans who regard such regulations as a targeted attack on their way of life. Yet despite occasional unfortunate political rhetoric that may reflect negative stereotypes of gun owners,⁴¹ Blocher and Miller are surely correct to discount the notion that laws regulating guns can be attributed to “hatred of guns” or “bigotry” against people who own, possess, or use guns.⁴² Indeed, even a gun-rights advocate concedes that many legislators who vote to enact gun control measures do not do so because they “hate guns and gun owners.”⁴³

Moreover, even if some gun regulations were, in fact, rooted in attitudes nurtured by the culture wars, that would only indicate that those regulations might be invalidated on equal protection grounds as based on impermissible “animus.”⁴⁴ Proving that bias against gun owners underwrites gun regulations would hardly show that *a purpose of the Second Amendment* is to protect against animus directed at gun owners in the way that equal

³⁹ *Church of the Lukumi Babalu Aye, Inc v City of Hialeah*, 508 US 520, 523–24 (1993) (striking down city ordinances that prohibited animal sacrifice because they targeted members of a Santeria church).

⁴⁰ Michael C. Dorf, *Identity Politics and the Second Amendment*, 73 Fordham L Rev 549, 552 (2004).

⁴¹ See Jeff Zeleny, *Obama Slams Critics on Middle-Class Comments* (NY Times, Apr 11, 2008), online at <http://nyti.ms/2c0983X> (visited Sept 17, 2016) (Perma archive unavailable) (quoting then-Senator Barack Obama stating that “bitter,” working class, white voters “cling to guns”).

⁴² Blocher and Miller, 83 U Chi L Rev at 346 & nn 287–88 (cited in note 1), citing Nicholas J. Johnson, *A Second Amendment Moment: The Constitutional Politics of Gun Control*, 71 Brooklyn L Rev 715, 795 (2005) (discussing hatred of guns), and quoting David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 Tenn L Rev 417, 462 (2014).

⁴³ Kopel, 81 Tenn L Rev at 462 (cited in note 42) (conceding that members of Congress “who hate guns and gun owners” are a “minority”).

⁴⁴ *Romer v Evans*, 517 US 620, 632 (1996). But see *id* at 652 (Scalia dissenting) (accusing the majority of “tak[ing] sides in the culture wars”).

treatment of different viewpoints and religions are among the respective purposes of free speech and free exercise of religion.

Accordingly, Second Amendment rights differ from the rights to equal protection, free speech, and religious freedom. Whereas an equality component of each of the latter three rights justifies treating direct burdens on those rights as more serious than incidental burdens, the Second Amendment lacks an equality component that makes direct burdens on Second Amendment rights inherently more problematic than incidental burdens.

However, it does not follow that incidental burdens on Second Amendment rights must be treated identically to direct burdens. The contrast between equal protection, free speech, religious freedom, and, alternatively, gun rights, shows that direct burdens on the former are extra problematic in a way that direct burdens on gun rights are not; it does not reveal that incidental burdens on gun rights are more problematic than incidental burdens on the other rights.

Contrasting incidental burdens on gun rights with incidental burdens on other rights thus leads to the conclusion that perhaps even direct burdens on Second Amendment rights should be judged under a relatively permissive standard. In contrast with direct burdens on other rights—which pose the special problem of singling out—there is no special problem of singling out guns.

If that conclusion is correct, we may have reason to doubt a seemingly central premise of the incipient Second Amendment case law—namely, that Second Amendment rights should be modeled on First Amendment rights. “Throughout the *Heller* majority opinion, the First Amendment is invoked as the gold standard of constitutional interpretation. The Court rejects any argument for construing the Second Amendment that would be rejected if applied analogously to the . . . First Amendment.”⁴⁵ If the analogy fails, however, direct burdens on Second Amendment rights could survive when seemingly parallel burdens on First Amendment rights would not.

Consider how such an approach would work in practice. Laws that target speech or religion generally trigger heightened judicial scrutiny regardless of how substantially they burden speech or religion. By contrast, if targeting is not a special concern of the Second Amendment, then even a law that targets firearms for

⁴⁵ Michael C. Dorf, *Does Heller Protect a Right to Carry Guns outside the Home?*, 59 *Syracuse L Rev* 225, 234 (2008) (citation omitted).

regulation would not trigger heightened scrutiny unless it substantially burdened the right to possess firearms. For example, whereas a special tax on the press is presumptively invalid, perhaps a special tax on guns (to fund medical care for victims of gun violence, say) would be valid—indeed, would not even trigger Second Amendment scrutiny—if the tax were not so burdensome as to render guns effectively unavailable for substantial numbers of people.⁴⁶ If singling out guns is different from singling out speech, religion, or some personal characteristic that is problematic as a matter of equal protection, then perhaps Second Amendment doctrine should reflect that fact.

I advance this hypothesis tentatively. Maybe there is some reason to treat the singling out of guns as problematic. Or maybe the Second Amendment is a kind of structural provision, so that any law targeting guns automatically triggers Second Amendment scrutiny. If someone can justify treating direct burdens on Second Amendment rights just like direct burdens on First Amendment and equal protection rights, the courts should pay attention. For now, though, Blocher and Miller have called attention to the need for such a justification.

III. WHERE DOES ONE LAW END AND THE NEXT ONE BEGIN?

Professors Blocher and Miller implicitly raise another issue with implications beyond the Second Amendment or incidental burdens more generally. By calling attention to the possibility that the application of the general common law of negligence or property to a case involving firearms could implicate the Second Amendment, Blocher and Miller reveal a gap in the conventional account of constitutional adjudication. We think we know what we mean when we say that a law is unconstitutional, but pressing harder reveals confusion and uncertainty about what we mean by “a law.”

A. As-Applied Targeting

The problem is not limited to common-law cases. Consider the Supreme Court’s 2010 decision in *Holder v Humanitarian*

⁴⁶ For present purposes, it is not necessary to be more specific about what regulations would or would not cross this threshold. One approach could model the test after the “undue burden” standard in the abortion context. See *Whole Woman’s Health v Hellerstedt*, 136 S Ct 2292, 2309 (2016) (noting that in evaluating abortion restrictions, courts should “consider the burdens a law imposes on abortion access together with the benefits those laws confer”).

*Law Project*⁴⁷ (“HLP”). Because that ruling ultimately *upheld* the application of a federal law forbidding material support for terrorism to organizations that sought to provide groups deemed terrorists with training in how to advance their causes peacefully,⁴⁸ civil libertarians criticized it as insufficiently protective of speech.⁴⁹ Yet before its speech-restrictive conclusion, Chief Justice John Roberts made an analytical move that has potentially far-reaching, speech-protective implications in distinguishing between content-based restrictions on speech and mere incidental burdens. He wrote for the Court:

The Government argues that [the material aid statute] should [] receive intermediate scrutiny because it *generally* functions as a regulation of conduct. That argument runs headlong into a number of our precedents, most prominently *Cohen v. California*. [That case] also involved a generally applicable regulation of conduct, barring breaches of the peace. But when Cohen was convicted for wearing a jacket bearing [the phrase “fuck the draft”], we did not apply [intermediate scrutiny]. Instead, we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction.⁵⁰

No justice dissented from this view in *HLP*. The dissenters thought the law content-based as applied, but they thought that it failed strict scrutiny.⁵¹ The justices unanimously adopted an as-applied approach to defining content-based regulations.⁵² Yet absent further clarification, that approach is highly problematic.

Imagine a statute that makes someone guilty of murder if he “intentionally causes the death of another human being without justification or excuse.” Suppose that a mob boss is accused of murdering a rival by instructing his henchman as follows: “Make

⁴⁷ 561 US 1 (2010).

⁴⁸ *Id.* at 7–8, 40.

⁴⁹ See generally, for example, Robert William Canoy Jr., Note, *Think before You Speak: Holder v. Humanitarian Law Project—The Terrorists Stole My Freedom of Speech!*, 31 *Miss Coll L Rev* 155 (2012).

⁵⁰ *HLP*, 561 US at 27–28 (citations omitted). See also *Cohen v. California*, 403 US 15, 16 (1971).

⁵¹ *HLP*, 561 US at 41 (Breyer dissenting).

⁵² See *id.* at 27–28; *id.* at 41 (Breyer dissenting).

sure that Eddie sleeps with the fishes.” The henchman then kills Eddie and dumps his body in the river. Does the mob boss have a free speech defense to murder? Under the *HLP* formulation, apparently so: the murder law may be described as directed at the conduct of murder, but *as applied* to the mob boss, the conduct triggering coverage under the statute consists of communicating a message. It seems wrong to subject the murder law to strict scrutiny, yet the unanimous agreement that the application of the material support statute as applied in *HLP* is content-based logically entails strict scrutiny in the prosecution of the mob boss for murder as well.

Can we avoid that implication? The murder law will undoubtedly survive strict scrutiny, so perhaps there is ultimately no harm in subjecting it to strict scrutiny. But this response misses the point. Suppose that the mob boss orders his henchman to commit a less serious offense, such as selling a small quantity of marijuana. It is not obvious that our drug laws could survive strict scrutiny, because they arguably do more harm than good (in creating a black market, fostering violence, discouraging addiction treatment, and so forth). There is a potential floodgates problem here, but even if no flood of litigation would arise from generalizing the *HLP* approach, there is also a conceptual problem. Whether the charge is murder or marijuana trafficking, it seems mistaken to say that the mob boss has even a *prima facie* free speech defense.

B. Other Free Speech Analogies

Free speech doctrine provides another potential escape. Perhaps any crime committed via a speech act would fall within the unprotected category of speech identified in *Giboney v Empire Storage & Ice Co.*⁵³ As elaborated in *United States v Stevens*,⁵⁴ that category consists of “speech integral to criminal conduct.”⁵⁵ Yet this escape is only partial. It deprives the mob boss of his free speech defense to criminal charges but leaves him with such a defense to civil liability if he gives instructions to his henchman to commit tortious but noncriminal acts. That too does not seem like an appropriate case for even a *prima facie* free speech defense.

⁵³ 336 US 490 (1949).

⁵⁴ 559 US 460 (2010).

⁵⁵ *Id.* at 468, citing *Giboney*, 336 US at 498. See also generally Eugene Volokh, *The “Speech Integral to Criminal Conduct” Exception*, 101 Cornell L Rev 981 (2016).

At the same time, however, for the sorts of reasons one might think it plausible to apply Second Amendment scrutiny in some of the common-law cases Blocher and Miller identify, First Amendment scrutiny in *HLP* itself seems right. Nor is the case unique.

Suppose a state university adopts a rule forbidding students, staff, and faculty members from storing explicitly sexual computer image files on university-owned servers, even if the images are not legally obscene. Now suppose the rule is successfully challenged on free speech grounds, so the university changes its policy. It adopts a broader policy forbidding “misuse of university property” and disciplines students, staff, and faculty members for storing even nonobscene pornography on the university servers under the broader policy. Perhaps the image-specific policy should have been upheld, but if it is invalid on free speech grounds, it is difficult to see why the application of the more broadly worded misuse rule would be permissible—even if the misuse rule were not specifically adopted for the purpose of circumventing free speech limits. After all, the application of the rule in the particular case is surely targeted at expression, just as in *HLP*.

We appear to have a genuine puzzle. Sometimes the application of a general rule or policy to particular conduct that appears to be the exercise of a right can be fairly characterized as targeted at the right, while sometimes it cannot or should not be so characterized. How do we know when to draw one rather than the other conclusion?

C. From Rights to Laws

Blocher and Miller make progress on that question with respect to the Second Amendment by focusing on the various purposes that the Amendment might serve. They offer a *rights-side* solution. In so doing, they join good company. Other scholars have similarly shown how rights do not merely operate as trumps or shields against any and all laws. For example, Professor Richard Fallon has shown how facial challenges are much more common than official doctrine recognizes.⁵⁶ Professor Matthew Adler has

⁵⁶ Richard H. Fallon Jr., *Fact and Fiction about Facial Challenges*, 99 Cal L Rev 915, 942–45 (2011).

demonstrated the pervasiveness of rule dependence in our constitutional law.⁵⁷ Professor Ashutosh Bhagwat has gone so far as to characterize the notion of rights as freestanding trumps or shields as a “myth.”⁵⁸ Blocher and Miller make an important contribution to the rights-side literature, but implicitly they also point the way toward a different path: a *law-side* solution.

Consider an analogy. For millennia philosophers and, more recently, neuroscientists have struggled with the mind-body problem: How does insensate matter in the brain give rise to consciousness? Perhaps the inquiry is backwards. It takes the material world as given, in no need of explanation, and consciousness as mysterious. Yet, as philosopher Colin McGinn notes, we know what consciousness is because we experience consciousness directly; we *are* consciousness. Using a distinction drawn by Bertrand Russell, McGinn says we have “knowledge by acquaintance” with consciousness, rather than the mere “knowledge by description” that we have of the material world.⁵⁹ Our *perceptions* of the material world through our senses are knowledge by acquaintance, but our inferences about the material world itself provide indirect, propositional knowledge. Reversed in this way, the puzzle remains. We still do not know how the brain produces the mind, and maybe, as McGinn also argues, we can never know,⁶⁰ but once we turn away from mind and back to the material world, we realize how little we understand about it. What is the relation between *the laws* of nature and nature itself? Do these laws merely describe the patterns we observe in the material world or do they in some sense *cause* the material world to conform to those laws? If the latter, how? Once we realize how little we understand about causation in the material world itself, we may see the mind-body problem as merely one of many puzzles about how causation works in the physical world.

Something similar occurs in the legal literature on rights and laws. Fallon, Adler, and Bhagwat all think that the core puzzle is our misunderstanding of what rights are. If only we come to see that rights generally are, in Adler’s phrase, “rule-dependent,”⁶¹ we will give up the myth of rights as trumps or shields and come to see them for what they really are. But in following that course,

⁵⁷ Matthew D. Adler, *Rights against Rules: The Moral Structure of American Constitutional Law*, 97 Mich L Rev 1, 3–6 (1998).

⁵⁸ Ashutosh Bhagwat, *The Myth of Rights: The Purposes and Limits of Constitutional Rights* 1–2 (Oxford 2010).

⁵⁹ Colin McGinn, *Consciousness and Its Objects* 6 (Clarendon 2004).

⁶⁰ See id at 12.

⁶¹ See Adler, 97 Mich L Rev at 45 (cited in note 57).

we find only more puzzles, because just as philosophers and neuroscientists mistakenly think that they understand matter and go looking for mind, so legal scholars mistakenly think that we understand what a law is and go looking for rights. The questions raised by Blocher and Miller show that we do not understand what we mean by a law.

Is every enactment of a legislature a discrete law? How about lines of text in a statute or regulation? Severable subparts of such text? Severable applications of a text? If so, how do we determine which applications are severable? Does it matter whether the relevant legal obligation is judge-made? Do the answers to these sorts of questions vary depending on the nature of the law?

If laws are mysterious, we have something like knowledge by acquaintance of rights. Although legal rights may be rule-dependent or structural, the moral rights they implement are simpler. To say that you have a moral right to some aspect of liberty means that the government needs a very good reason to limit that liberty. A similarly simple definition can be given for equality.

The analogy to the mind-body problem need not be perfect, however. Perhaps we lack knowledge by acquaintance of rights. Even so, we are certainly no *more* confused about the nature of rights than about the nature of laws. Yet nearly all of the scholarly attention has gone toward further clarifying what rights are. Blocher and Miller implicitly invite us to pay greater attention to figuring out what we mean when we say that a law infringes a right by puzzling over what “a law” might mean.

CONCLUSION

Activists and scholars contesting the meaning of the Second Amendment argue over a startling number of its twenty-seven words: “regulated,” “Militia,” “State,” “people,” “keep,” “bear,” and “Arms.” *Heller* and *McDonald* sought to resolve most of these debates, but before Professors Blocher and Miller, no one noticed the potential for contestation over the Second Amendment’s final word: “infringed.” When does the application of a gun-neutral law infringe the right? In that deceptively simple question lurk important future debates over the Second Amendment, the Constitution, and law itself.