No. 08-1521

IN THE
Supreme Court of the United States

Otis McDonald, *et al*.

Petitioners

v.

CITY OF CHICAGO, Illinois, *et al*.

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Brief of Arms Keepers as *Amicus Curiae* in Support of Petitioners

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INTEREST OF *AMICUS CURIAE*

Amicus filed a brief supporting certiorari in this case. Arms Keepers is a volunteer organization that supports reasonable regulation of handguns and rifles, instead of prohibition.[1] Formed in 2009, *Amicus* is an unincorporated association headquartered in Monroe, Connecticut and registered there with the town government. *Amicus* communicates with its members and the general public primarily via electronic means including the web site www.ArmsKeepers.org. Arms Keepers is nonpartisan, and its business is conducted and transacted solely within the United States.

Amicus is filing this merits brief in support of reversal with respect to citizens who wish to keep and bear arms, because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

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[1]Pursuant to Supreme Court Rule 37, *amicus* provided timely notice of intent to file this brief to counsel of record for both petitioners and respondents, whose blanket consents are on file with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

This amicus brief explains why the Court should rule against Petitioners' substantive due process argument, but in favor of Petitioners under the Privileges or Immunities Clause, regarding incorporation of the right to keep and bear arms as against the states. The Court should do so without overturning the *Slaughter-House Cases*, 83 U.S. 36 (1873), which did not involve incorporation of any enumerated right.

Amicus urges the Court not to overturn its wise and venerable holding in *Miller v. Texas,* 153 U.S. 535 (1894), which correctly said: "as the proceedings were conducted under the ordinary forms of criminal prosecutions there certainly was no denial of due process of law." *Id.* at 539. The *Miller* Court thus rejected substantive due process.

The holding in *Miller v. Texas* did not reject incorporation of the right to keep and bear arms via the Privileges or Immunities Clause, nor did the holdings in *United States v. Cruikshank*, 92 U.S. 542 (1876), or *Presser v. Illinois*, 116 U.S. 252 (1886) do so. See Brief For Respondents the National Rifle Association at 40-42.

The Due Process Clause would be a very inappropriate clause for incorporating the substantive right to keep and bear arms, especially in a case like this where there are competing interests in life and liberty on both sides. After all,

accidental shooting victims are "persons" within the meaning of the Due Process Clause no less than unarmed crime victims are "persons."

The Court could hypothetically tell the city and people of Chicago how to balance the competing life and liberty interests in this case, given that the doctrine of substantive due process does not have "any limit but the sky." *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting, joined by Brandeis & Stone, JJ.). However, judicial restraint counsels against doing so, and indeed the Court should reconsider the entire doctrine of substantive due process, at least with respect to substantive rights that have not yet been applied against the states.

Justice Thomas, joined by the late Chief Justice Rehnquist, wrote that, "the demise of the Privileges or Immunities Clause has contributed in no small part to the current disarray of our Fourteenth Amendment jurisprudence…." *Saenz v. Roe*, 526 U.S. 489, 527 (1999). The present case offers an opportunity to begin moving legitimate elements of the Court's individual rights jurisprudence from the Due Process Clause to the Privileges or Immunities Clause.

The right to keep and bear arms preceded the Constitution and was not created by it, but the privilege of vindicating that right in federal court was certainly created by the Constitution. See generally *District of Columbia v. Heller*, 128 S.Ct.

2783 (2008). That is why the right can now very plausibly be incorporated (selectively rather than en bloc) against the states via the Privileges or Immunities Clause, without overturning *Slaughter-House*.

The phrase "privileges and immunities of citizens" in Article IV, Section 2 does not include natural rights that cannot actually be vindicated. See Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GEORGIA LAW REVIEW 1117, 1161, 1188 (2009). The same principle applies to the same words in the Fourteenth Amendment.

The framers of the Fourteenth Amendment intended their new Due Process Clause to mean substantially what the same clause means in the Fifth Amendment, which in turn is equivalent to the Law of the Land Clause in the Northwest Ordinance of 1787: "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land." Northwest Ordinance of 1787, Art. VI, 1 stat. 50, 52 (1789).

The primary author of the Northwest Ordinance was Nathan Dane of Massachusetts, and Dane later wrote a treatise concisely explaining the clause: "an arrest according to the law of the land means any arrest authorized by the common law, or by statute…." NATHAN DANE, 9 GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 631 (Hilliard & Co. 1829). This interpretation by Dane is incompatible with using the Due Process Clause

to strike down statutes that authorize arrest, including the Chicago ordinance at issue here. The Due Process Clause acts as a practical restraint on executive branch officials by forbidding unauthorized arrests, and likewise restrains legislators from repealing this vital limitation on the executive branch. Dane's treatise accurately captures how the courts of England interpreted the similar clause in their own laws, and that same interpretation was merged into American law by the reception statutes adopted by the newly independent states.

This Court has unanimously acknowledged that, "the substantive content of the [due process] clause is suggested neither by its language nor by preconstitutional history." *University of Michigan v. Ewing*, 474 U.S. 214, 225-226 (1985)(citations omitted). Consequently, overturning the anti-substantive-due-process holding of *Miller v. Texas* would countenance an ascendancy of the *U.S. Reports* over the Constitution itself.

The Constitution does not allow the government to disarm the American people. However, that great principle has absolutely nothing to do with the Due Process Clause.

ARGUMENT

I. Incorporating Second Amendment Rights Via Substantive Due Process Would Violate Both Original Meaning As Well As Precedent That Bound The Court Below

The right in question should be incorporated against the states via the Privileges or Immunities Clause without overturning *Slaughter-House*. In contrast, incorporation via the Due Process Clause, and concomitantly overturning *Miller v. Texas*, would contradict precedent as well as original meaning. Even laying aside those considerations, this case is unsuitable for substantive due process, because there are liberty interests on both sides.

A. Judicial Restraint Counsels Against Substantive Due Process In Cases Like This Where There Are Life Or Liberty Interests On Both Sides

As Justice Scalia has observed, it is generally a mistake to assume, "one disposition can expand a 'liberty'…without contracting an equivalent 'liberty' on the other side." *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989). Indeed, the courts should be very wary of taking liberties in such cases.

In the present case, accidental shooting victims are "persons" no less than unarmed crime victims are "persons," and so this is a very

unsuitable case for application of the doctrine of substantive due process. This Court has in the past indicated that substantive due process would not be used to take sides where life or liberty interests exist on both sides of the case. See *Roe v. Wade,* 410 U.S. 113, 156 (1973)("If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment").

The issue in this case is very different from things like assisted suicide or contraceptives, where the interests in life and liberty are basically on only one side of the case. See generally *Griswold v. Connecticut,* 381 U.S. 479, 499 (1965)(Justice Harlan's concurring opinion arguing for a substantive due process right to contraceptives); *Washington v. Glucksberg,* 521 U.S. 702 (1997)(no substantive due process right to suicide). See also *Lawrence v. Texas*, 539 U.S. 558 (2003)(substantive due process right to sex).

The Court has not always been true to the principle that it will refrain from using substantive due process to balance competing interests in life and liberty. For example, in *Planned Parenthood v. Casey*, 505 U.S. 833, 897-898 (1992), the Court ordered that fathers must no longer be at liberty to know that their unborn offspring will be aborted. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court limited the ability of children and their grandparents to see each other. And in *Roe*, a direct consequence of the Court's decision was that states

had to criminalize a woman's family members who intercede between her and the abortion provider. Nevertheless, if the Court is to persist with the doctrine of substantive due process, it should do so only when the interests in life and liberty are not competing, lest the Court completely usurp the political process and the right of self-government.

B. The Doctrine Of Substantive Due Process Is Invalid With Respect To Substantive Rights That Have Not Yet Been Applied Against the States

The Due Process Clause in the Fourteenth Amendment has the same meaning as the Due Process Clause in the Fifth Amendment,[2] and in

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[2]*Hurtado v. California*, 110 U.S. 516, 535 (1884) ("when the same phrase was employed... it was used in the same sense and with no greater extent"). *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905) (same); *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 329 (1901) (assuming "that the legal import of the phrase 'due process of law' is the same in both Amendments" although different constructions may be proper); *Benton v. Maryland*, 395 U.S. 784, 795 (1969) ("the same constitutional standards apply against both the State and Federal Governments"). The primary author of the Fourteenth Amendment's Due Process Clause was John Bingham, and he only wanted to enforce pre-existing federal rights against the states. *See* Cong. Globe, 39th Cong., 1st Sess. 1088-1089 (1866). *See also* William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in

neither instance does it include a citizen's right to keep and bear arms. See generally *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995)(same words have same meaning). This substantive right has not yet been incorporated against the states via the Fourteenth Amendment's Due Process Clause, and, in view of *Miller v. Texas*, stare decisis disfavors such a result. Additionally, the original public meaning of the Due Process Clause is completely inconsistent with incorporation of this substantive right.

Nathan Dane was the primary author of the Northwest Ordinance including its Law of the Land Clause: "No man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land." Northwest Ordinance of 1787, Art. VI, 1 stat. 50, 52 (1789). The meaning of this Law of the Land Clause is a window onto the meaning of the Due Process Clause, especially because American colonists equated the phrases "due process of law" and "law of the land." *See Pacific Mutual v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *Twining v. New Jersey*, 211 U.S. 78, 100 (1908); *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875); *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 276 (1855).

In his legal treatise, Dane explained that, "an arrest according to the law of the land means any arrest authorized by the common law, or by

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state and federal proceedings. To this day that remains the position of the Court").

statute…." NATHAN DANE, 9 GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 631 (Hilliard & Co. 1829). Dane also explained that when, "a statute makes an offence, and is silent as to the mode of trial, it shall be by jury, according to the course of the common law." NATHAN DANE, 6 GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 230 (HILLIARD & CO. 1829). Thus, Dane understood the Law of the Land Clause as setting up neither a general substantive common law nor a general procedural common law, to reign supreme over statute law. Dane's understanding is evident in the very structure of the Bill of Rights.

James Madison originally introduced the right to keep and bear arms together with the right to due process, in a single proposed amendment. 1 Annals of Cong. 451-452 (1789). Congress then split those rights into what became the Second and Fifth Amendments respectively. JOHN VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002 202 (ABC-CLIO 2003). The separateness of these simultaneous amendments is a structural feature of the Constitution signifying that the two amendments are "distinct" as Roger Sherman put it,[3]

[3] *Letter from Roger Sherman to Simeon Baldwin* (Aug. 22, 1789) reprinted in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 1375 (Charlene Bickford et al., eds., 2004)("each may be passed upon distinctly by the states").

and "unconnected" as Madison put it.[4] The states were invited to simultaneously ratify the due process right and reject the right to keep and bear arms, at their pleasure, which unequivocally shows that Congress did not regard the latter right as being part of "due process." The Court should not now join together what the framers split apart, even if the Court has made that kind of erroneous decision before, especially because doing so now would require the Court to overturn *Miller v. Texas*.

The Due Process Clauses are our heritage from the Magna Carta. The meaning in the American colonies was clear under English law, and that meaning was received by the newly independent states via reception statutes adopting English law:

> [L]ex terrae is not confined to the common law, but takes in all the other laws, which are in force in this realm; as the civil and canon law.... By the 28 Ed. 3, c. 3, there the words lex terrae, which are used in Mag. Char. are explained by the words, due process of law; and the meaning of the statute is, that all commitments must be by a legal authority.

Regina v. Paty, 92 Eng. Rep. 232, 234 (K. B. 1704).

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[4] *Letter from James Madison to Alexander White* (Aug. 24, 1789) reprinted in CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 287-288 (Helen E. Veit, et al., eds., 1991)("The several propositions will…go forth as so many amendments, unconnected with one another").

Holdsworth confirms the meaning described in *Regina v. Paty*: "as Coke phrases it, 'by due process of law'….is in substance a demand that no violence be offered to person or property without legal warrant." WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 61 (Sixth Edition Revised 1938).

Neither the American colonists nor the highest legal authorities in England attributed any sort of technical meaning to the critical phrase "law of the land."[5] That phrase simply referred to the rules of the country or region. *See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768) (e.g., defining the word law as a "rule of action," defining the word land as a "country; a region," defining the word due as "exact; without deviation," defining the word process as "course," and defining the word course as "consequences"). The ordinary meaning of the phrase "law of the land" was confirmed by legal luminaries such as Sir Edward Coke. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONTAINING

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[5] *Cf.* Alexander Hamilton, *Remarks on an Act for Regulating Elections* (1787), *reprinted in* 4 PAPERS OF ALEXANDER HAMILTON 35 (H. Syrett ed., Columbia Univ. Press 1962). Hamilton saw technical meanings but his view was disputed. *See generally* James Ely, *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process* 16 CONST. COMMENTARY 315, 326 (1999)("it is unlikely that a single statement, made in the course of a legislative debate, provides an adequate basis for broad generalizations").

THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES 45 (Brooke 1797). Coke wrote that, "no man be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custom of England" — notice the conjunction "or" used here by Coke, which is consistent with the choice by the framers of our Fifth Amendment to use the phrase "due process of law" rather than "due process of the common law." *Id*.

Lord Coke also wrote that the due process clause in a particular statute was "declaratory of the old law of England." *Id*. at 50. It is important to attend carefully to what Coke meant. He was saying that the statute reiterated what had already been included in a clause of the Magna Carta, rather than saying that the statute incorporated various other old rules aside from that particular clause in the Magna Carta. As Coke put it, "the prudent reader may discern…whether the statute be introductory of a new law, or declaratory of the old…." *Id*. at Proeme (seventh page). *See also* WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 86 (First Edition 1765)("Statutes also are either declaratory of the common law, or remedial of some defects therein").

The Court correctly explained in *Hurtado v. California,* 110 U.S. 516, 531 (1884), that "bills of attainder, *ex post facto* laws, laws declaring forfeitures of estates, and other arbitrary acts of

legislation which occur so frequently in English history were never regarded as inconsistent with the law of the land."[6] When Coke referred to a particular aspect of due process, he was not referring to an intrinsic aspect, but rather was merely giving "an example and illustration of due process of law as it actually existed in cases in which it was customarily used." *Hurtado*, 110 U.S. at 523.

It would be inconsistent with the constitutional text if the courts were to now say that state statutes infringing upon gun ownership are not sufficiently rooted in history or fairness to be "laws" within the meaning of the Due Process Clause.[7] The Constitution prescribes what "shall be a law." U.S. Const. art. I, § 7, cl. 2. The Constitution also prescribes what "shall be the supreme law of the land." U.S. Const. art. VI, cl. 2. The judiciary does not generally have carte blanche to counteract those prescriptions, whether the statute be federal or local.

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[6] *Cf. Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819)(Law of the Land Clause was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice"). This quote from *Okely* is a classic instance of accurately stating original intent rather than original meaning; by analogy, the original intent was also to make people happy, but that is no basis for using this clause of the Magna Carta to overturn laws to make people happier.

[7] *See generally* SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1768)("LAW…1. A rule of action. *Dryden* 2. A decree, edict, statute, or custom, publicly established. *Davies"*).

Even if the judiciary enlarges its role by ensuring that laws are uniform, permanent, and universal instead of being mere transient decrees or edicts, such a judicial role would not say anything about *what* the law does uniformly, permanently, and universally. See generally WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 44 (First Edition 1765).

Blackstone defined municipal law in the following way: "a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id*. Blackstone elaborated that the declaratory part of the law, which declares "the rights to be observed, and the wrongs to be eschewed….depends not so much upon the law of revelation or of nature as upon the wisdom and will of the legislator." *Id*. at 53-54. To the extent that our Constitution does not declare which laws are right and wrong, that is a job for legislators as Blackstone said; otherwise, there is no separation of powers except temporarily, or in matters that the Court believes are not important enough to decide itself. The present case is one of the relatively rare instances where the matter has been resolved by specific applicable constitutional provisions, and those provisions do not include the Due Process Clause.

Petitioners argue that statutes must be consistent with natural law. Petitioners' Brief at 66. That may be true, but we elect legislators to ensure consistency with natural law, not judges. As Justice Souter once observed: "the idea that legislation may be struck down based on principles of common law or natural justice not located within the constitutional text has been squarely rejected in this country." *Seminole Tribe v. Florida*, 517 U.S. 44, 163 n. 56 (1996)(Souter, J., dissenting). Use of the word "law" in the Fourteenth Amendment does not let the judiciary strike down acts that are supposedly not good enough to be "law," any more than use of the word "law" in the original unamended Constitution did so. George Mason spoke about this during the constitutional convention, saying that judges, "could declare an unconstitutional law void. But with regard to every law, however unjust, oppressive or pernicious, which did not come plainly under this description, they would be under the necessity as Judges to give it a free course." MAX FARRAND, 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 73 (1911). Mason therefore supported giving judges a qualified veto over new laws, but that proposal lost.

The Court's due process decisions in the years leading up to 1868 are relevant here, but they ought not to be completely controlling as to the meaning of the Due Process Clause adopted that year, without regard to earlier history, for several reasons. First, that would allow the two different Due Process

Clauses to currently be interpreted very differently from each other, which was not what the people who adopted the later clause meant. Second, the Court's due process cases leading up to 1868 were inconsistent. For example, Justice Curtis wrote for the Court in *Murray's Lessee v. Hoboken Land*, 59 U.S. 272, 277 (1855), that whether a process is "due process" must be determined by looking at "common and statue [sic] law of England" prior to adoption of the Constitution. But Justice Curtis's subsequent dissent in *Dred Scott v. Sandford*, 60 U.S. 393, 626-627 (1856), jettisoned that intercontinental requirement without bothering to cite *Murray*, and the majority opinion in *Dred Scott* invoked the Due Process Clause without providing any rationale at all. *Id.* at 450. The *Dred Scott* case was then overturned by the Fourteenth Amendment itself on other grounds (i.e. birth confers citizenship). A third problem with taking the Court's decisions of the 1850s to be completely controlling here is that none of them clearly indicate whether the right to keep and bear arms is incorporated into the Due Process Clause; the issue in *Murray* was procedural, and the Court in *Dred Scott* provided no rationale.

On its face, the phrase "law of the land" does not suggest any distinction between procedural law and substantive law. Indeed, no one has ever suggested that this part of the Magna Carta allowed the King to inflict whatever violence he wanted on

whoever he wanted, so long as he followed certain procedures along the way.[8]

There are two primary alternative interpretations of the Due Process Clause that could conceivably displace the unfortunate substantive due process interpretation of recent years. First, there is a completely objective due process jurisprudence that simply requires compliance with all other laws that are in force. In the twentieth century, the leading advocate on the Court for this objective interpretation was Justice Black. *See In Re Winship*, 397 U.S. 358, 382 (1970) (Black, J., dissenting) quoted in *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004) (Thomas, J., dissenting). The purely objective interpretation is also typified by *Walker v. Sauvinet*, 92 U.S. 90 (1875). The second alternative interpretation is a purely procedural due process jurisprudence having subjective recourse to "fundamental fairness." *See generally Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring). The Court in *Miller v. Texas* rejected the substantive interpretation, and said the statute

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[8]Some scholars say that the phrase "per legem terrae" in the Magna Carta originally meant trial procedures such as battle, ordeal, or compurgation. See WILLIAM HOLDSWORTH, 1 A HISTORY OF ENGLISH LAW 59-63 (Sixth Edition Revised 1938). However, that interpretation requires the word "vel" to mean "and," so that "lawful judgment of his peers" was also required, the word "lawful" embracing both substantive and procedural law.

at issue was consistent with a procedural interpretation, but the Court did not choose between the procedural and objective interpretations.

The objective interpretation is most consistent with original meaning, and would still constrain legislators. For example, it would bar Congress and state legislatures from repealing the Due Process Clause as a limitation on the executive. It would also arguably allow the courts to apply the following remedy for deprivation of procedural rights enumerated in the Constitution: the government could not take life, liberty, or property.[9]

Additionally, the objective interpretation would not necessarily slow the courts from making procedural rules. See generally *Herrera v. Collins*, 506 U.S. 390, 405 (1993) ("the Eighth Amendment requires increased reliability of the process..."). Still, it may be worthwhile to bear in mind Blackstone's prescient admonition: "the formal part or method of proceeding, cannot be altered but by or with the sanction of parliament; for, if once those outworks were demolished, there would be an inlet

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[9]*See Chapman v. California*, 386 U.S. 18, 21 (1967)("we cannot leave to the States the formulation of ... remedies designed to protect people from infractions by the States of federally guaranteed rights"). *See also Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 277 (1855)("We must examine the constitution itself, to see whether this process be in conflict with any of its provisions….") *See also* Andrew Hyman, *The Little Word Due*, 38 AKRON LAW REV. 1, 30 (2005)("Congress must either respect all of the accused persons' process rights, or let them have their liberty").

to all manner of innovation in the body of the law itself." WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 138 (First Edition 1765).[10]

Recent substantive due process cases have required that laws be fair, independently of what legislators may think about fairness, and independently of what later members of the Court may think about fairness. *See, e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 870 (1992). However, the court below correctly observed that even a historical due process inquiry that looks for "deep-rooted" traditions is subjective, because ancient principles like self-defense and federalism may conflict with each other. *Nat'l Rifle Ass'n of Am., Inc. v. City of Chicago,* 567 F.3d 856, 859-860 (7th Cir. 2009); *cf. Washington v Glucksberg*, 521 U.S. 702, 720-721 (1997)("Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'").

Amicus urges the Court to shelve the doctrine of substantive due process, at least with respect to substantive rights that have not yet been applied against the states. If the Court wishes to completely uproot this illegitimate doctrine, then perhaps that

[10]The passage quoted above is sometimes misprinted or misquoted, to say "there would be no inlet" instead of the correct version: "there would be an inlet." See the list of errata following the Table of Contents, in Blackstone's book.

would be a matter for a future case dealing with a substantive right that has already been applied against the states. This is not such a case.

C. The Doctrine Of Implied Reservation Is Inapplicable To This Case

Respondent National Rifle Association argues that the doctrine of "implied reservation" is applicable to this case. See Brief for Respondents The National Rifle Association (NRA) et al. at 23. This *Amicus* respectfully disagrees.

If the people of Illinois did not explicitly surrender the right to keep and bear arms to their state government via their state constitution, then this Court could perhaps infer an "implied reservation" of that right, despite a general grant of power by the people of Illinois. Such an implied reservation could later be overcome by an amendment to the state's constitution. As Chief Justice John Marshall once wrote, there is sometimes an "argument in favor of presuming an intention to except a case, not excepted by the words of the constitution." *Fletcher v. Peck*, 10 U.S. 87, 139 (1810).

But, the Constitution of Illinois does explicitly say the right to arms is subject to the police power. Constitution of the State of Illinois, Article I, Bill of Rights, Section 22 ("Subject only to the police power,

the right of the individual citizen to keep and bear arms shall not be infringed"). This state constitutional provision precludes application of the doctrine of implied reservation to the present case.

II. A Process Of Elimination Rules Out Implausible Readings Of The Privileges Or Immunities Clause And Supports An Interpretation That Selectively Incorporates The Right To Keep And Bear Arms Without Overturning Precedents Like *Slaughter-House*

We can go a long way toward deducing what the Privileges or Immunities Clause means, by using a process of elimination to rule out what the clause does *not* mean.[11] Generally speaking, "a process of elimination is perhaps not always the most desirable

[11]See, e.g., *United States v. Ramirez*, 233 F.3d 318, 322 (5th Cir. 2000)("the statutory meaning of 'all other cases' is arrived at by a simple process of elimination"); *United States v. Duarte*, 246 F.3d 56, 59 (1st Cir. 2001)("The catch-all provision – which, by process of elimination, covers offenses involving at least fifty but less than one hundred kilograms of marijuana – carries a maximum sentence of twenty years"); *State v. Achterberg*, 201 Wis.2d 291, 300 (1996)("We are compelled by a process of elimination to conclude that this interpretation is the only logical and reasonable result").

means of arriving at a conclusion,"[12] but it is an honest and realistic one in this case where the meaning of the clause is not obvious on its face, and the meaning intended by the ratifying public is disputed. The goal here is to eliminate implausible interpretations, *not* to eliminate rights. Using a process of elimination has the incidental benefit of helping to ensure that a revived Privileges or Immunities Clause will not become a Frankenstein's Monster in later jurisprudence.

Once the implausible interpretations are eliminated, there is only one reasonable interpretation left standing. To wit: the Privileges or Immunities Clause only aids citizens by selectively incorporating against the states fundamental rights that already can be vindicated against Congress nationwide by citizens of the United States. Congressman John Bingham acknowledged that he was not trying to do any more than give the federal government, "the power to enforce the bill of rights as it stands in the constitution today." Cong. Globe, 39th Cong., 1st Sess., 1088 (1866).

Thus, the Court should apply the right to keep and bear arms via the Privileges or Immunities

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[12]Zachary Kaufman, *Transitional Justice Delayed is Not Transitional Justice Denied: Contemporary Confrontation of Japanese Human Experimentation During World War II Through A People's Tribunal,* 26 YALE L. & POL'Y REV. 645, 655 (2008).

Clause, as Respondent National Rifle Association urges the Court to do, without overturning *Slaughter-House* or *Miller* or *Presser* or *Cruikshank*. Brief For Respondents the National Rifle Association at 38-43.

A. The Privileges Or Immunities Clause Does Not Include Rights That Cannot Already Be Vindicated Against The Federal Government

The phrase "privileges and immunities of citizens" in Article IV Section 2 does not include natural rights even if they are declared by law, unless the law provides a mechanism for vindication of those rights. Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GEORGIA LAW REVIEW 1187-1188 (2009).

Thus, for example, the phrase "privileges and immunities of citizens" excludes natural rights like "justice" and "tranquility" that are unenforceable in the Constitution's preamble. *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905). The fact that U.S. citizens nationwide have been given a clear constitutional right to sue the federal government for vindication of the right to keep and bear arms shows that that right is a privilege or immunity of citizens of the United States.

1. The Privileges Or Immunities Clause Does Not Include Rights That Some Framers Mistakenly Thought Could Be Vindicated Against the Federal Government

As one scholar has accurately put it, "Republicans in the Thirty-ninth Congress relied on a reading of the privileges and immunities clause of article IV, section 2 that is unorthodox, at least by current legal standards." MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 47 (1986). Republicans such as Senator Jacob Howard believed that Article IV, Section 2 protected a body of national rights that could be vindicated by a person "solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon state legislation." Cong. Globe, 39th Cong., 1st Sess., 2765 (1866). All the same, Howard recognized that he had only "some intimation of what probably will be the opinion of the judiciary." Id.

Petitioners acknowledge that Article IV Section 2 does not actually confer a plurality of national rights. Petitioners' Brief at 65. And Petitioners also acknowledge that the framers of the Privileges or Immunities Clause sought no more than enforcement of Article IV Section 2 and the Bill of Rights against the states. Petitioners' Brief at 30. It therefore would not be plausible to interpret the

Privileges or Immunities Clause as guaranteeing a plurality of unenumerated national rights of citizenship that apply against the states but not against the federal government nationwide.

Justice Bushrod Washington used some expansive language in the case of *Corfield v. Coryell*, 6 Fed. Cas. 546 (C.C.E.D. Pa. 1825), to describe rights protected by the Privileges and Immunities Clause in Article IV. But Justice Washington did not indicate that those rights were judicially enforceable against the federal government. Even with regard to enforcement against the states, the *Corfield* decision was soon clarified by Justice Henry Baldwin, who described Article IV, Section 2 as, "a grant by the people of the state in convention, to the citizens of all the other states of the Union, of the privileges and immunities of the citizens of this state." *Magill v. Brown*, 16 Fed. Cas. 408, 420 (C.C.E.D. Pa. 1833). Some framers of the Fourteenth Amendment may have preferred Justice Washington's interpretation to Justice Baldwin's, but no one suggests that such a preference amended Article IV, Section 2 in any way.

B. The Privileges Or Immunities Clause Is Unlike Other Clauses In That It Does Not Protect Any Aliens

Petitioners assert that the reference to "citizens" in the Privileges or Immunities Clause is

for defining the rights involved, rather than for defining the beneficiaries of the clause. Petitioners' Brief, page 62. But if that were true then states would have to respect a right of illegal aliens to keep and bear arms, which is not supported by the text of the amendment or by the history of its adoption.

The text of the Clause only mentions citizens, and not other people, which strongly suggests that neither legal nor illegal aliens are covered. While other clauses in the first paragraph of the Fourteenth Amendment do refer to other people, this Clause plainly does not, which is a telling contrast. Framers such as Senator Jacob Howard understood this very well: "The last two clauses of the first section of the amendment disable a state from depriving not merely a citizen of the United States, but any person, whoever he may be…." Cong. Globe, 39th Cong., 1st Sess., 2766 (1866).

If members of this Court are concerned about the consequences of denying to aliens the substantive protections of the Privileges or Immunities Clause, then it is relevant that the Equal Protection Clause would address that problem, even though the Equal Protection Clause is not in the question presented for this case. A good argument can be made that the Equal Protection Clause supplements the Privileges or Immunities Clause so as to cover the rights of aliens, provided that those aliens are already safeguarded against federal action by the Constitution. See generally

William J. Brennan, *The Bill of Rights and the States*, 61 N. Y. U. L. REV. 535, 545 (1986) ("[O]nce a provision of the Federal Bill was deemed incorporated, it applied identically in state and federal proceedings. To this day that remains the position of the Court"). Interpreting the Equal Protection Clause in this way would not render the Due Process Clause of the Fourteenth Amendment superfluous, because the latter clause would still prevent states from harming both citizens and aliens by means other than making or enforcing laws. Nor would interpreting the Equal Protection Clause in this way obliterate the Fourteenth Amendment's deliberate distinction between the protections afforded to citizens versus aliens.

C. The Privileges Or Immunities Clause Does Not Apply Federal Statutory Rights Against The States

The phrase "privileges or immunities of citizens of the United States" cannot include mere federal statutory rights. After all, the framers of the Fourteenth Amendment gave Congress power that is not "plenary but remedial." *City of Boerne v. Flores*, 521 U.S. 507, 522 (1997). And framers such as John Bingham assured colleagues that he was proposing "to arm the Congress…with the power to enforce the bill of rights as it stands in the constitution today. It hath that extent—*no more*" (emphasis added). Cong. Globe, 39th Cong., 1st

Sess., 1088 (1866). True, Bingham was only referring there to a draft version of the Fourteenth Amendment; and, it is also true that he meant the term "bill of rights" to include not just personal rights listed in the amendments but also personal rights protected by the original Constitution. All the same, his statement was never contradicted by himself or anyone else, and in fact others such as Senator Jacob Howard spoke of the need to enforce pre-existing constitutional rights, and no more. See Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866).

The conclusion that they were not referring to statutory rights is supported by the framer's removal of the expansive word "all" from the language they copied from Article IV Section 2, suggesting that they had a more specific set of rights in mind. They adopted the phrase "*the* privileges or immunities" instead of "*all* privileges or immunities." The word they adopted ("the") has a "specifying or particularizing effect." *Random House Webster's College Dictionary* 1352 (1999).

Some members of Congress in 1866, such as John Bingham, saw their proposed Privileges or Immunities Clause as ensuring the constitutionality of the Civil Rights Act of 1866, 14 Stat. 27. However, they understood the Civil Rights Act as merely enforcing constitutional rights that they thought (mistakenly) already could be enforced against the federal government. As mentioned above, the framers of the Fourteenth Amendment had an unorthodox reading of the privileges and immunities

clause of Article IV Section 2, but they also recognized that their interpretation might be wrong.

D. The Privileges Or Immunities Clause Does Not Apply Rights That Are Inapplicable Against Congress Where Federal Power Is Plenary

Under the original meaning of the Privileges and Immunities Clause in Article IV Section 2, if a right was a privilege or immunity of citizenship, that meant any citizen could take advantage of it. Robert Natelson, *The Original Meaning of the Privileges and Immunities Clause*, 43 GEORGIA LAW REVIEW 1117, 1161 (2009). Therefore, if a citizen cannot take advantage of a particular right on federal territory, then it cannot be a privilege or immunity of citizens of the United States, even though citizens within the boundaries of the fifty states may take advantage of such a federal constitutional right. See, e.g., *United States v. Lopez*, 514 U.S. 549 (1995)(federal government may not infringe noncommercial right to carry guns near schools where federal power is not plenary).

The statesmen who framed the Fourteenth Amendment understood that "all" immunities of citizens of the United States were possessed by citizens in some of the geographic regions where federal power is plenary. See Treaty Concerning the

Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, Article III, 15 Stat. 539, 542 (1867)("The inhabitants of the ceded territory…shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States…."). See also *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. 511, 542 (1828)(treaty with Spain granted inhabitants of Florida, "the privileges, rights, and immunities of the citizens of the United States"). Given that the federal government's powers are stringently limited within the boundaries of the fifty states, it would make little sense to apply those limits against the state governments themselves, via the Privileges or Immunities Clause, and the treaties regarding Alaska and Florida confirm this.

Likewise, Ninth Amendment rights cannot reasonably be considered to be privileges or immunities of citizens of the United States, because they do not attach to citizens in those geographic areas where federal power is plenary. See KURT LASH, THE LOST HISTORY OF THE NINTH AMENDMENT 305 (2009)("Once an enumerated power is found, there can no longer be a claim under either the Ninth or Tenth Amendment"). In this regard, it is significant that Senator Howard's speech of May 23, 1866 specifically referred to the "first eight amendments of the Constitution," which reflected his

understanding that Ninth Amendment rights would not be included. See Cong. Globe, 39th Cong., 1st Sess., 2765 (1866).

E. The Privileges Or Immunities Clause Should Be Interpreted Without Overturning Precedents Like *Slaughter-House*

Slaughter-House did not involve any enumerated constitutional right. As Justice Hugo Black once wrote, "The state law under consideration in the Slaughter-House cases was only challenged as one which authorized a monopoly, and the brief for the challenger properly conceded that there was 'no direct constitutional provision against a monopoly.'" *Adamson v. California,* 332 U.S. 46, 76 (1947)(Black, J., dissenting).

According to scholars such as Professor Nelson Lund, it may be that *Slaughter-House* "left open the possibility of incorporation under the Privileges or Immunities Clause." Nelson Lund, *Anticipating Second Amendment Incorporation: The Role of the Inferior Courts*, 59 SYRACUSE LAW REV. 185, 190 (2008). This possibility becomes a probability if one considers selective incorporation of "fundamental" enumerated rights, instead of total (i.e. en bloc) incorporation of every enumerated personal right.

After all, the Court in *Slaughter-House* specifically said that the Clause is confined to "those rights which are fundamental." *Slaughter-House*, 83 U.S. at 76.

In *Slaughter-House*, the Court declined to become "a perpetual censor upon all legislation of the States," *id*. at 78. The Court was correct to eliminate that implausible interpretation of the Fourteenth Amendment. The Court correctly said that the clause in question does not protect privileges or immunities that do not "owe their existence to the Federal government, its National character, its Constitution, or its laws." *Id*. at 79. The privilege to vindicate one's right to keep and bear arms, in an action against the federal government, is much more than the natural right that is being vindicated, and therefore this privilege certainly owes its existence to the Constitution.

As for *Cruikshank*, *Presser*, and *Miller*, they pose no obstacle to incorporation via the Privileges or Immunities Clause. *Cruikshank* "did not involve state law or state action," *Presser* "only addressed the supposed right to 'drill and parade with arms,'" and *Miller* merely held that the claim under the Privileges or Immunities Clause "had been waived below." Brief For Respondents the National Rifle Association at 40-41.

F. The Privileges Or Immunities Clause Does Not Merely Confer Rights That Are Already Conferred By Other Parts Of The Constitution

If this clause only did what other clauses already accomplished, then this clause would be entirely useless, i.e. a vain and idle enactment. As of now, the U.S. Supreme Court does not use the Privileges or Immunities Clause to protect any right whatsoever. In the case of *Saenz v. Roe*, 526 U.S. 489 (1999), the Court did construe the clause as protecting an aspect of the right to travel:

> Writing for the majority in the *Slaughter-House Cases*, Justice Miller explained that one of the privileges conferred by this Clause "is that a citizen of the United States can, of his own volition, become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

Saenz, 526 U.S. at 503 (emphasis added). However, the *Slaughter-House* opinion actually said: "One of these privileges is conferred by the very article under consideration." *Slaughter-House*, 83 U.S. at 80 (emphasis added). The *Saenz* Court acknowledged that its decision "rests on the fact that the Citizenship Clause of the Fourteenth Amendment

expressly equates citizenship with residence." *Saenz,* 526 U.S. at 506. The Privileges or Immunities Clause was unnecessary to the result in *Saen*z, and thus that Clause continues to be treated by American jurisprudence as basically a nullity.

Some scholars have also suggested that the Privileges or Immunities Clause is an antidiscrimination provision. See John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L. J. 1385, 1387-1388 (1992). However, such an interpretation would not allow the Privileges or Immunities Clause to do anything that the Equal Protection Clause does not already do.

G. The Privileges Or Immunities Clause Does Not Incorporate Rights Other Than Fundamental Rights And Thus En Bloc Incorporation Of Personal Rights Is Implausible

Petitioners argue for en bloc incorporation of all the personal rights memorialized in the Bill of Rights, against the states. Petitioners' Brief at 10. However, en bloc incorporation is very different from selective incorporation. The text and history of the Privileges or Immunities Clause show a primary concern with rights that are "fundamental," which suggests some judicial authority to selectively

determine which enumerated rights are *not* fundamental.

The decisions of this Court have not required states to indict by grand jury under the Fifth Amendment, nor have they required states to provide a jury in civil cases under the Seventh Amendment. Those decisions in *Hurtado v. California,* 110 U.S. 516 (1884) and *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875) were well within the range of plausibility, and should therefore stand under the doctrine of stare decisis.

In his speech introducing the proposed Fourteenth Amendment, Senator Jacob Howard emphasized the "fundamental" nature of the protected rights eight separate times. In that speech by Howard, he said that the Privileges or Immunities Clause would incorporate the first eight amendments, and he listed what he thought were the key provisions, while leaving out other provisions which suggests that he regarded some of the left-out provisions as not being fundamental. Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866). Not a single member of Congress explicitly said anything about requiring states to use grand juries, until years after the amendment was ratified. Cong. Globe, 42d Cong., 1st Sess., app. at 84 (1871)(statement of Rep. Bingham).

Whereas en bloc incorporation of personal

rights is urged by Petitioners, Petitioners' Brief at 10, selective incorporation under the Privileges or Immunities Clause remains a viable alternative that has been discussed and supported by various scholars. See Michael Kent Curtis, *John Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON LAW REV. 617, 626 n.30 (2003). *See* also Akhil Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE LAW JOURNAL 1193 (1992) (proposing a "refined incorporation" of some but not all parts of the first eight amendments). Selective incorporation of the right to keep and bear arms under the Privileges or Immunities Clause would not undermine the holdings in *Hurtado* or *Walker*, whereas en bloc incorporation of personal rights would do so.

Although there are some obvious differences between the Privileges or Immunities Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV Section 2, there is also some common terminology. Therefore, it is relevant to mention the case of *Baldwin v. Montana Fish and Game Comm'n*, 436 U.S. 371 (1978). Neither the majority nor the dissenters in *Baldwin* suggested that the Privileges and Immunities Clause in Article IV Section 2 robotically extends every single right of citizens to visitors from out-of-state. By analogy, no justice should now assume that the Privileges or Immunities Clause in the

Fourteenth Amendment robotically applies every single right in the Bill of Rights against the states.[13]

H. The Proper Interpretation Of The Privileges Or Immunities Clause Becomes Apparent Given Its History And That All Other Interpretations Are Implausible

As discussed above, many implausible interpretations of the Privileges or Immunities Clause can be ruled out. The only one left standing is an interpretation that incorporates fundamental enumerated constitutional rights and nothing else.

This conclusion is similar to that drawn by Professor Kurt Lash who has extensively analyzed antebellum legal terminology, although Lash (like Justice Hugo Black) infers en bloc rather than selective incorporation. Kurt Lash, *The Origins of the Privileges or Immunities Clause, Part I: "Privileges and Immunities" as an Antebellum Term of Art*, LOYOLA-LA LEGAL STUDIES PAPER (2009).[14]

A selective "fundamental" rights inquiry under the Privileges or Immunities Clause of the Fourteenth Amendment would indeed be somewhat

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[13]In other words, there is no reason to now completely overturn *Barron v. Baltimore,* 32 U.S. 243 (1833).

[14]Available at SSRN: http://ssrn.com/abstract=1457360.

subjective. However, it would be cabined by the requirement that a proposed privilege or immunity must already be protected nationwide against infringement by Congress.

III. If The Court Incorporates The Right To Keep and Bear Arms Via The Privileges Or Immunities Clause Then The Court Should Not Use The Avoidance Doctrine To Bypass A Due Process Clause Analysis

The Second Amendment protects from federal action those aliens who have "sufficient connection with this country to be considered part of the [national] community." *District of Columbia v. Heller*, 128 S.Ct. 2783, 2791 (2008)(internal citation omitted). Therefore, even if the Court now holds that the Privileges or Immunities Clause incorporates the right for citizens, that would not release the Court from the necessity of considering whether the Due Process Clause incorporates Second Amendment rights for persons who are *not* citizens.

Petitioners now seek to facially invalidate a provision of the Chicago Municipal Code,[15] and that

[15]Petitioners seek an order permanently enjoining enforcement of Chicago Municipal Code §8-20-050(c). See generally *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006)(partial invalidation is preferred).

provision applies to any "person."[16] Accordingly, the question presented in this case covers aliens. The question presented does not explicitly mention "aliens" but it does not mention other groups either. Petitioners are arguing to extend the right to aliens, and so the Court must address this issue. See Petitioners' Brief, page 62.

Amicus is not aware of any statement by the framers of the original Constitution or Bill of Rights explicitly denying that lawful resident aliens are within the meaning of the term "the people" as used in the Second Amendment. James Wilson explained at the constitutional convention that, "it was necessary to observe the twofold relation in which the people would stand. 1. as Citizens of the Genl. Govt. 2. as Citizens of their particular State. The Genl. Govt. was meant for them in the first capacity: the State Govts. in the second." MAX FARRAND, 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 405 (1911). But Wilson did not explicitly say anything about aliens; he also did not say anything about citizens of the United States who are not citizens of a particular state (e.g. residents of the nation's capital).

The due process issue is unavoidable. The Court should hold that the Due Process Clause does not incorporate any right to keep and bear arms for aliens or anyone else, though other clauses not now

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[16]Chicago Municipal Code §8-20-040 ("No person shall…."). These gun control regulations are subject to a severability clause. Chicago Municipal Code §1-4-200.

before the Court (e.g. the Equal Protection Clause) may well protect this right for lawful resident aliens.

CONCLUSION

For the foregoing reasons, the decision below should be reversed with respect to citizens who wish to keep and bear arms.

Respectfully submitted,

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