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**THE RIGHT OF WORKERS TO ASSEMBLE AND TO BEAR ARMS:  
*PRESSER V. ILLINOIS*, LAST HOLDOUT AGAINST  
APPLICATION OF THE BILL OF RIGHTS TO THE STATES**

by Stephen P. Halbrook<sup>1</sup>

**I. INTRODUCTION**

Is the right of workers--like that of members of other classes--to assemble<sup>2</sup> and to bear arms<sup>3</sup> protected by the United States Constitution from violation by the States?<sup>4</sup> If this question sounds as if

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<sup>2</sup> The First Amendment to the United States Constitution states that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble."

<sup>3</sup> The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed." This right was intended to enable the citizenry to share power and thereby to prevent a tyranny. See Akhil Reed Amar and Alan Hirsch, *For the People: What the Constitution Really Says About Your Rights* (New York: The Free Press, 1998), 169-80. On the history of the Second Amendment, see Stephen P. Halbrook, *A Right to Bear Arms: State and Federal Bills of Rights and Constitutional Guarantees* (Westport, Conn.: Greenwood Press, 1989); Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* (Albuquerque: University of New Mexico Press, 1984; reprinted, Oakland, Calif.: Liberty Press, 1994).

<sup>4</sup> The Fourteenth Amendment provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." See Michael Kent Curtis, *No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights* (Duke University Press 1986); Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Westport, Conn.:

posed during the "labor struggles" of the second half of the nineteenth century, it is because it did. During that epoch, the Supreme Court held that Bill of Rights guarantees did not limit State action and read the Fourteenth Amendment in a narrow fashion.<sup>5</sup> The era is epitomized by *Presser v. Illinois* (1886), which held that the First and Second Amendments did not apply to the States, that an armed march in a city went far beyond the rights to assemble and to keep and bear arms, and that the due process clause of the Fourteenth Amendment was not relevant to such issues.<sup>6</sup>

From the Great Strike of 1873 to 1887, when the Supreme Court sealed the fate of the defendants who were condemned to death for the Haymarket riot, conflict between the industrialists and their workers in Chicago, Illinois, gave rise to divisive legal interpretations which continue to this day. While the holding in *Presser* that the right to assembly is not protected from State violation passed by the wayside over a half century ago,<sup>7</sup> its statement that the right to bear arms is not shielded from State infringement continues to be cited currently to uphold prohibitions on firearms possession. Indeed, the legacy of *Presser* is its citation as the main precedent for the proposition that the Second Amendment does not apply to the States.

Thus, the Sixth Circuit in a 1998 decision invalidated a local "assault weapon" ban as unconstitutionally vague and violative of equal protection. It added, *sua sponte* and *in dictum*, that the law was not invalid as an infringement of the right to keep and bear arms, in that *Presser* held that the Second

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Praeger, 1998).

<sup>5</sup> *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 391 (1978) (opinion of Marshall, J.) ("The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive provisions.").

<sup>6</sup> *Presser v. Illinois*, 116 U.S. 252 (1886).

<sup>7</sup> *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937).

Amendment did not apply to the states.<sup>8</sup> In 1992, the Ninth Circuit upheld America's first state "assault weapon" ban on that basis.<sup>9</sup> Ironically, just as the *Presser* case itself arose out of Chicago, America's first handgun ban was passed in the Chicago suburb of Morton Grove, and was upheld by the Seventh Circuit, relying on *Presser*, in 1983.<sup>10</sup>

Yet did *Presser* actually consider whether the Fourteenth Amendment's due process clause protected the right to keep and bear arms from state infringement? Is *Presser* a relic of a distant era of labor conflict? Does it withstand the Supreme Court's jurisprudence in the twentieth century incorporating Bill of Rights guarantees into the Fourteenth Amendment?

A return to that lost milieu of labor conflict illustrates how both statutory and case law reflect power structures in societies--such as how the Illinois legislature acted to weed workers out of the State militia in order to use that force to break strikes, and how the supreme courts of Illinois and the United States upheld such action. A look into that milieu reveals that a Chicago judge authored what remains one of the most remarkable decisions ever rendered on the right to bear arms, which he held invalidated the restrictive militia law of the State. That intrepid judge was labelled a tool of foreign "communists." An analysis of the *Presser* epoch offers a significant contribution to the history of labor conflict and its legal consequences, and portrays how judicial decisions reflect the times in which they are rendered.

The rights to assemble and to bear arms were never controversial until slavery was abolished in

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<sup>8</sup> Peoples Rights Organization, Inc. v. City of Columbus, 152 F.3d 522, 538-39 (6th Cir. 1998).

<sup>9</sup> Fresno Rifle & Pistol Club v. Van de Kamp, 965 F.2d 723, 729-31 (9th Cir. 1992).

<sup>10</sup> Quilici v. Village of Morton Grove, 695 F.2d 261, 269-70 (7th Cir. 1982), cert. denied 464 U.S. 863 (1983).

1865 and black people demanded all the rights of citizenship. The Fourteenth Amendment to the Constitution was ratified in 1868 to protect these and other freedoms under the Bill of Rights from violation by the States, which in the South sought to reenact the slave codes.<sup>11</sup> However, at the end of Reconstruction in 1876, the U.S. Supreme Court held that the First and Second Amendments did not protect the rights of freed slaves to assemble and bear arms from being violated by private violators, such as members of the Ku Klux Klan.<sup>12</sup>

By that time an aspiring labor movement, which included many recent immigrants, was beginning to flourish, demanding better working conditions and frightening the members of the economic elite. Working class meetings and demonstrations were increasingly subjected to violent dispersal by police forces and troops. The time had come, the forces of "order" believed, to curtail labor agitation and to restrict public assemblies and the bearing of arms to loyal Americans of the middle and upper classes.

It was in this milieu that German-American workers in Chicago, Illinois, in the 1870-80s, brought several test cases in the courts concerning the rights to assemble and to bear arms. These cases arose in the context of the perceived use of the police and the newly-created "National Guard" (actually a State armed force) by those in power against industrial workers who were intent on bettering their conditions. Those who initiated the litigation through protest acts behaved in a nonviolent manner to secure what they perceived to be their constitutional rights. Their goal was the official recognition of their rights by the courts

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<sup>11</sup> Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, *supra* note 4; Halbrook, "Personal Security, Personal Liberty, and 'the Constitutional Right to Bear Arms': Visions of the Framers of the Fourteenth Amendment," *5 Seton Hall Constitutional Law Journal*, 341 (Spring 1995).

<sup>12</sup> *United States v. Cruikshank*, 92 U.S. 542, 551-53 (1876).

of justice.

Relying on traditional American concepts of individual rights as well as similar liberal influences from the Revolution of 1848 in Germany,<sup>13</sup> they initially won a historic legal victory. This victory would be rolled back by the higher courts in other cases. Defeat would turn to tragedy as a result of the Haymarket riot of 1886, in which people died--both at the scene and later on the gallows--and, with them, a bit of the Bill of Rights. Responding to what many perceived as a threat to the social order, the members of the U.S. Supreme Court approved of what has been characterized as the disarming of unions and the reduction of jury autonomy.<sup>14</sup>

## II. THE NATIONAL GUARD AND THE *LEHR UND WEHR VEREIN*

The Great Strike of 1873 was followed by the creation of the First Regiment of the Illinois National Guard in Chicago in 1874. It was privately financed and its membership was restricted.<sup>15</sup> Since there was no law allowing funds for uniforms and equipment to be drawn from the State Treasury, it was initially

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<sup>13</sup> On the right to bear arms from the perspective of the "48ers," see Jonathan Sperber, *Rhineland Radicals: The Democratic Movement and the Revolution of 1848-1849* (Princeton, N.J., 1991), 170-72, 256, 363-85; Christine Heiss, "German Radicals in Industrial America: The Lehr- und Wehr- Verein in Gilded Age Chicago," in Hartmut Keil and John B. Jentz eds., *German Workers in Industrial Chicago 1850-1910* (DeKalb, Ill.: Northern Illinois University Press, 1983), 208-09. The latter is a condensed version of Christine Heiss, *Der Lehr- und Wehr-Verein von Chicago 1875-1887: Ein sozialgeschichtlicher Beitrag zur Radikalisierung deutscher Arbeiter in den USA* (Munich: Ludwig-Maximilians-Universität, 1981) (unpublished thesis).

<sup>14</sup> For an incisive analysis from the view of the critical legal studies movement, see L.H. LaRue, "Constitutional Law and Constitutional History," 36 *Buffalo Law Review* 373, 375-78, 401 (1987).

<sup>15</sup> Holdridge O. Collins, *History of the Illinois National Guard, from the Organization of the First Regiment, in September, 1874, to the Enactment of the Military Code, in May 1879* (Chicago: Black & Black, 1884), 12.

supported by voluntary contributions from "the citizens of Chicago,"<sup>16</sup> a euphemism for big business. Similar independent militia companies sprang up in other populous areas of the State.<sup>17</sup>

Traditionally, the militia meant all able-bodied citizens.<sup>18</sup> This newly-created "National Guard" consisted of a select body only. It would participate with the police in the suppression of labor activities and demonstrations.

The First Regiment carried arms for the first time in March 1875, to prevent an anticipated socialist attack on the Relief and Aid Society, an agency which allegedly failed dismally in assisting those in need.<sup>19</sup> Several members of the crowd which assembled at the city hall were clubbed by police.<sup>20</sup>

The *Vorbote*, the weekly edition of the Chicago *Arbeiter-Zeitung* (labor newspaper), reported that the workers were legally expressing their demands and were unlawfully suppressed by the police and militia. The paper compared the official attacks to the repression by the German authorities in the Revolution of 1848.<sup>21</sup>

The *Lehr und Wehr Verein* (Education and Defense Association) was incorporated under Illinois law on April 16, 1875, as a lawful association "for the purpose of improving the mental and bodily condition

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<sup>16</sup> *Id.* at 12.

<sup>17</sup> *Id.* at 27.

<sup>18</sup> 1 Stat. 271, 272 (1792) (defining militia to include "every able-bodied white male citizen" and requiring each such person to arm himself); 14 Stat. 422, 423 (1867) (striking term "white").

<sup>19</sup> Heiss, "German Radicals in Industrial America," *supra* note 13, at 210.

<sup>20</sup> *Id.*

<sup>21</sup> *Vorbote*, Feb. 27 and Jan. 1, 1875, quoted in Heiss, "German Radicals in Industrial America," *supra* note 13, at 210.

of its members so as to qualify them for the duties of citizens of a Republic. Its members shall therefore obtain, in the meetings of the Association, a knowledge of our laws and political economy, and shall also be instructed in military and gymnastic exercises." Any able-bodied man at least eighteen years old, of good repute, and intending to become a citizen could join.<sup>22</sup>

Founded in reaction to election fraud and police violence, the *Lehr und Wehr Verein* modelled itself on the republican tradition of the armed citizen militia as symbolized by the German Turner societies and according to the traditions of Switzerland.<sup>23</sup> Many adherents of the *Turnverein* (gymnastic societies), which were active in both physical and political culture, fled Germany when the 1848 Revolution was crushed and then founded the societies in the United States. Typical activities including the *Schuetzenfest* (shooting festivals), fencing, athletic competition, and marching.<sup>24</sup> The *Lehr und Wehr Verein* met at the Aurora Turnverein, located on Milwaukee Avenue in Chicago's Northwest Side, which taught physical training and republicanism.<sup>25</sup>

The Chicago *Vorbote* explained the formation of the *Lehr und Wehr Verein* in a manner which was more political and specific than the formal charter filed with the State of Illinois: "the worker's reaction

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<sup>22</sup> Quoted in *Presser v. Illinois*, 116 U.S. 252, 254-55 (1886).

<sup>23</sup> Hartmut Keil and John B. Jentz eds., *German Workers in Chicago: A Documentary History of Working-Class Culture from 1850 to World War I*, trans. Burt Weinshanker (Chicago: University of Illinois Press, 1988), 239. On the Swiss tradition of an armed populace, see Stephen P. Halbrook, *Target Switzerland: Swiss Armed Neutrality in World War II* (New York: Sarpedon Publishers, 1998), 5-20.

<sup>24</sup> Thomas B. Rentschler, "Rifles and Blades of the American Turners," *Man at Arms*, No. 1, 31, 32-33 (Jan./Feb. 1997).

<sup>25</sup> For a picture of the three story building, see Keil and Jentz, *German Workers in Chicago*, *supra* note 23, at 165.

against the formation of additional militia units designed to be used against them. The drills of the militia units . . . were openly directed against the Illinois Workingmen's party.<sup>126</sup>

The *Vorbote* claimed that the *Lehr und Wehr Verein* existed for self defense against violence by the select militia:

Inasmuch as the bourgeoisie of this place are building up a servile militia with its powers directed against the working man, the workingmen, man for man, should join the . . . organization and willingly give the few dollars necessary to arm and uniform themselves. When the workingmen are on their guard, their just demands will not be answered with bullets.<sup>27</sup>

Because of the advocacy of socialism by some members, the *Verein* meetings were placed under police surveillance.<sup>28</sup> In the summer and fall of 1875, the *Lehr and Wehr Verein* raised funds for purchase of arms, which could be bought on an installment plan, and advertised itself among the workers.<sup>29</sup>

The *Verein* held its first mass rally on November 4, 1876. That meeting and many others, despite the serious rhetoric about the organization's goals, reminds one of the typical German Schutzenfest--music, dancing, drinking, drill parades, speeches, and in general *Gemütlichkeit*.<sup>30</sup> One purpose of the *Verein* was to demonstrate that workers, like other classes, were lawfully armed and wished to protect themselves from lawlessness and to preserve constitutional rights. Despite the "Red scare" campaign waged by some

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<sup>26</sup> *Vorbote*, May 1, 1875, quoted in Heiss, "German Radicals in Industrial America," *supra* note 13, at 211.

<sup>27</sup> *Vorbote*, June 26, 1875, quoted in Nathan Fine, *Labor and Farmer Parties in the United States: 1828-1928*, (New York: Rand School of Social Science, 1928), 106-07.

<sup>28</sup> Keil and Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 167.

<sup>29</sup> Heiss, "German Radicals in Industrial America," *supra* note 13, at 212.

<sup>30</sup> *Id.* at 213.

newspapers and politicians, the *Lehr und Wehr Verein*, during its entire existence, never once had an armed conflict with authorities.<sup>31</sup>

In an 1876 strike by Bohemian lumber shovers, a lumberyard owner shot and killed a striker and wounded several others. Police then arrested seven of the strike leaders, prompting 400 workers to demand their release at the police station. When a committee of workers attempted to purchase arms, the mayor closed all gun shops.<sup>32</sup>

The forces of "order" proposed legislation that would have prohibited persons who were not a part of the official State militia from associating as a military company or parading with arms in any city without the license of the Governor. The bill had its first reading in the lower house of the Illinois legislature in January 1877. *Verbote* reported that socialist representatives described the bill as "a dangerous step in the direction of a costly military supremacy in the place of the voluntary organization of militia companies paid for by their own members" and objected to creating "a militia which would aid the people's exploiters in repressing and holding down the wage slaves." Charles Erhard, a socialist representative, stressed that the *Lehr und Wehr Verein* was ready to join the State militia.<sup>33</sup> The bill would not pass for two years.

On July 16, 1877, the Baltimore and Ohio Railroad announced a wage cut, sparking strikes along the line. Local militiamen ordered to suppress the strikes often threw down their arms.<sup>34</sup> This suggests that

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<sup>31</sup> *Id.* at 214.

<sup>32</sup> Eric L. Hirsch, *Urban Revolt: Ethnic Politics in the Nineteenth-Century Chicago Labor Movement* (Los Angeles: University of California Press, 1990), 22.

<sup>33</sup> Heiss, "German Radicals in Industrial America," *supra* note 13, at 217.

<sup>34</sup> Hirsch, *Urban Revolt*, *supra* note 32, at 23.

the traditional militia, composed of the entire adult male population, was unwilling to attack the strikers. A select militia with limited membership approved by the ruling authorities would have been a more reliable repressive force.

In the Great Strike of 1877, mass meetings of workers in Chicago were attacked by police, who killed some of the strikers. In a telling incident on July 26, the Furniture Workers Union was meeting at the Vorwärts Turner Hall when suddenly police stormed in, shooting and clubbing the members of the union and killing one. The National Guard then appeared, forcing everyone home with their bayonets.<sup>35</sup>

By that date, thousands of federal troops, special deputies, and armed groups hired by the industrialists had been called out to maintain "order." The *Chicago Times* advocated the use of hand grenades against the strikers, "an uncombed, unwashed mob of gutter-snipes and loafers."<sup>36</sup>

The police who attacked the furniture union members were later tried and convicted of inciting a criminal riot, but were fined the nominal sum of only six cents each. Such attacks encouraged workers to join the *Lehr und Wehr Verein* and similar groups.<sup>37</sup>

The Furniture Workers Union apparently brought a lawsuit against the police and received financial support from the *Lehr und Wehr Verein*. "As is known, Judge [William K.] McAllister stated in his decision that the men would have had the right to kill the police."<sup>38</sup> This decision reflected the common-law

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<sup>35</sup> *Id.* at 29-30.

<sup>36</sup> Paul Avrich, *The Haymarket Tragedy* (Princeton, N.J.: Princeton University Press, 1984), 33.

<sup>37</sup> Hirsch, *Urban Revolt*, *supra* note 32, at 29-30.

<sup>38</sup> "The Aurora Turnverein," *Der Westen: Frauen-Zeitung*, Nov. 15 & 22, 1896, in Keil and Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 161-62.

rule that excessive, deadly force, even if committed by law enforcement, could be resisted by an innocent party with deadly force for purposes of self defense.<sup>39</sup> The decision also confirmed the right of public assembly.<sup>40</sup>

Such police attacks prompted the perceived need for a workers' self-defense society to defend freedom of assembly and other constitutional rights.<sup>41</sup> According to the *Vorbote*, "police clubs and militia rifles outweighed the Constitution; and freedom of assembly and speech in reality existed, as in Europe, only for the ruling class."<sup>42</sup> Membership dramatically increased in groups such as the *Lehr und Wehr Verein*. The only answer to the labor question was to bear arms.<sup>43</sup>

The *Verein* was divided into four companies from different parts of the city. The members were armed with Springfield rifles and with Remington revolvers and ammunition, which was purchased by the quartermaster of the company.<sup>44</sup> This would have been the .45/70 caliber "Trapdoor" (breechloading), single shot Springfield rifle and the .44 caliber Remington Model 1875 Single Action Army revolver, both of which were in use by the army and the militia.<sup>45</sup> The whole battalion met each month on nice days on

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<sup>39</sup> *E.g.*, *Stevenson v. United States*, 162 U.S. 313, 321-23 (1896).

<sup>40</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, at 33.

<sup>41</sup> Heiss, "German Radicals in Industrial America," *supra* note 13, at 214-15.

<sup>42</sup> *Vorbote*, Aug. 4 & 11, 1877, in Heiss, "German Radicals in Industrial America," *supra* note 13, at 215.

<sup>43</sup> *Id.*

<sup>44</sup> Michael J. Schaack, *Anarchy and Anarchists* (New York: Arno Press, 1977), 290.

<sup>45</sup> Norm Flayderman, *Flayderman's Guide to Antique Arms* (Northbrook, IL: DBI Books, 1987), 149, 459-67.

the prairie to practice skirmish drills.<sup>46</sup> The second company of the *Lehr und Wehr Verein* practiced twice a week in the North Chicago Schuetzen Park (Sharpshooters' Park).<sup>47</sup>

The rhetoric of the *Chicago Tribune* knew few bounds as it attacked the socialist party as represented by Alfred R. Parsons, who "says that it plants itself firmly on the two great principles of Co-operation and Trades-Unions, and that it does not desire a forcible redistribution of property." The *Tribune* responded:

Socialism means in France and Germany, and every other country where it has taken root, the overthrow of Government, the seizure of property by force, the abolition of religion, and the murder or expulsion of all non-Socialists. . . . "Co-operation and Trades-Unions" is a cheap party motto that will not deceive anybody.<sup>48</sup>

By implication, all unionism is violent and must be eradicated by official violence--by police, the National Guard, or federal troops.

Gustav Lyser appealed to traditional European and American libertarianism and constitutionalism in support of civil rights and the right to self defense for labor.<sup>49</sup> Lyser's poem "Our Dear Police," published in the *Vorbote* in 1878, reflected such premises:

They say our dear Chicago police  
Are pretty sore these days,  
It seems the Lehr- und Wehr- Verein  
Has led their minds astray.

It teaches constitutional truths

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<sup>46</sup> Schaack, *Anarchy and Anarchists*, *supra* note 44, at 291.

<sup>47</sup> *Id.* at 288.

<sup>48</sup> *Chicago Tribune*, April 27, 1878, at 4.

<sup>49</sup> Keil and Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 239.

For all - not just th' elite,  
And that no one the right to assemble  
May trample under his feet!

It teaches what is guaranteed,  
- And read it each man might -  
To liberty, life, pursuit of happiness  
We have a common right!

It teaches, how we must defend  
'Gainst tyranny's reckless flood;  
That freedom much from us demands -  
May e'en demand our blood!

That's why our dear Chicago police  
Are pretty sore these days;  
For such a Lehr- und Wehr- Verein  
Has set their fears ablaze.<sup>50</sup>

Workers' self-defense groups like the *Lehr und Wehr Verein* reflected an affirmative response to the "*Bewaffnungsfrage*"--the "question of arming."<sup>51</sup> Similar organizations sprang up in mid-1878 in Cincinnati and San Francisco, where workers had been attacked by special deputies.<sup>52</sup> Gustav Lyser explained the sentiments behind such groups in an 1879 speech: "The *Lehr und Wehr Verein* was not founded to support putsches from time to time, but to maintain law and order when exploiters and swindlers of the people threaten to stage such putsches so as to install reactionary tendencies."<sup>53</sup>

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<sup>50</sup> *Vorbote*, May 4, 1878, quoted in Keil & Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 240.

<sup>51</sup> Henry David, *The History of the Haymarket Affair* (New York, Russell & Russell, 1953), 59.

<sup>52</sup> *Id.* at 57.

<sup>53</sup> *Arbeiter-Zeitung*, Jan. 25, 1879, in Heiss, "German Radicals in Industrial America," *Supra* note 13, at 219-20.

### III. THE "MILITIA LAW" ENACTED AND CHALLENGED IN A TEST CASE

Illinois Governor Cullom raised the subject of the "national guard" in his biennial message in early 1879, praising "the service of the rank and file of the militia during the labor troubles of 1877," and asserting: "It is well for the commonwealth to have in its militia not only the force of a small but the nucleus of a large army."<sup>64</sup> He affirmed that this would not be a "standing army,"<sup>65</sup> but the distinctions would become increasingly blurred.

The *Chicago Daily Times Herald* was aghast that the West-side police had found that the "communists were rather slyly carting arms away from their former headquarters."<sup>66</sup> The Assistant Superintendent ordered: "Use all possible means in finding out where the arms have gone, and watch for additional movements."<sup>67</sup> The police discovered that "the weapons had been carted away for distribution among the various branches of the red flag fraternity, to be used in the parade and demonstration at the Exposition building" that night.<sup>68</sup> Yet the police themselves felt there was no cause for alarm.<sup>69</sup>

Incensed by the workers' parade, the *Chicago Tribune* managed to combine urban chauvinism against rural areas, prejudice against foreigners, and paranoia against "communism" in its advocacy of the "militia" law which would soon be passed by the state legislature:

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<sup>54</sup> *Chicago Daily Times Herald*, Jan. 12, 1879, at 6.

<sup>55</sup> *Id.*

<sup>56</sup> *Chicago Daily Times Herald*, March 22, 1879, at 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

It is time that the people of Chicago awake to the real condition and purposes of Socialism in our midst, and that the rural-district members of the State Legislature should drop their blind and narrow prejudices against this city sufficiently to allow them to consider a question which may before long affect the whole State. Communism has selected Chicago as to its base of operations in the West. The large element of Poles, and Bohemians, and Germans in the city, reinforced by a very considerable sprinkling of Scandinavians, French, and Italians, and not a few of that class of Irishmen who care nothing for the teachings of their Church but hate the restraint of the laws, have given it a strong foundation upon which to build . . . Its [Communists] military sections, which have been organized outside of the State statutes and in defiance of law, have been pretty thoroughly organized and armed, and they have publicly paraded and drilled.<sup>60</sup>

In a more moderate vein, Chicago Mayor Carter Harrison stated in his inauguration address in April 1879 that the people are protected by the First and Second Amendments, but may not violate the rights of others:

The constitution of the land guarantees to all citizens the right to peaceably assemble, to petition for redress of grievances. This carries the right to free discussion. It also guarantees the people the right to keep and bear arms. But it does not give to anyone the right to threaten or to resist lawful authority.<sup>61</sup>

In response to the labor troubles, two bills were introduced into the state legislature. One was described as a bill "licensing the carrying of concealed weapons at \$1 a 'pop.' County clerks are to issue the licenses."<sup>62</sup> The other, the militia bill which had been defeated in 1877, would create a select militia and ban armed parades unlicensed by the governor.<sup>63</sup>

Perhaps these bills were more the product of a media frenzy than any social need, in that the *Lehr und Wehr Verein* had never (and would never) be involved in any armed or violent conflict with any person

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<sup>60</sup> *Chicago Tribune*, March 24, 1879, at 4.

<sup>61</sup> David, *The History of the Haymarket Affair*, *supra* note 51, at 126.

<sup>62</sup> *Chicago Daily Times Herald*, March 24, 1879, at ?.

<sup>63</sup> *Chicago Tribune*, May 23, 1879, at 4.

or group. The *Vorbote* reported in April 1879 that the arms of the *Lehr und Wehr Verein*, Springfield rifles and Remington revolvers, were the merely the same as that of the militia.<sup>64</sup> A month later, Frank Bielefeld gave a speech reaffirming the loyalty of the *Verein* to the Constitution.<sup>65</sup> Moreover, armed parades were hardly radical in that epoch, which was only a decade after Civil War militia units, some of them ethnic or labor based, proudly volunteered and marched through Chicago.<sup>66</sup> The *Lehr und Wehr Verein* uniforms resembled Civil War era type uniforms: "a blue linen blouse, black Sheridan-hat, in summer white linen pants, or dark ones in the colder season. The further equipment consists of a strong white linen haversack (sailcloth), and a cloth covered tin canteen."<sup>67</sup>

The *Chicago Times* stirred the pot for the pending militia bill with its ravings about socialists, workers, and foreigners stemming from the April 20, 1879 demonstration:

The unchallenged demonstration yesterday in the streets of Chicago of the military strength of the Socialists in this city suggests forcibly the idea that this is a very free country, and that a little less freedom in some directions would be beneficial to the remaining stock of liberty. This flourish of armed force was intended as a threat, a notification that trouble may be expected if the Legislature passes the pending Militia bill, one clause of which expressly prohibits the organization, drill, or parade of armed bodies not enrolled in accordance either with State or Federal laws. . . . If the *Lehr und Wehr Verein*, the *Jaeger Verein*, Bohemian Sharpshooters, and the Labor Guards are peaceful, well-meaning citizens, they will cheerfully and promptly comply with the law and become a part of the regular State militia; but if, on the contrary, they are enemies to the peace and good order of society, it is of the utmost importance that a law be passed which shall prohibit

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<sup>64</sup> *Arbeiter-Zeitung*, May 5, 1879, in Heiss, "German Radicals in Industrial America," *supra* note 13, at 213.

<sup>65</sup> *Id.* at 219.

<sup>66</sup> Heiss, "German Radicals in Industrial America," *supra* note 13, at 209.

<sup>67</sup> *Vorbote*, April 5, 1879, quoted in Heiss, "German Radicals in Industrial America," *supra* note 13, at 213. For pictures of *Verein* members armed and in uniform, *see id.* at 212.

demonstrations like that of yesterday.<sup>68</sup>

Yet the *Lehr und Wehr Verein* had not then, nor would it ever, commit any act of violence. This rhetoric appears to have been calculated to win passage of a bill to cleanse the militia of working class members in order that the new select militia would repress labor with no questions asked.

A founder of the Illinois National Guard described the "Communistic parade" of April 20 as including several thousands, twelve hundred of them in uniform, and "of these, four hundred were armed with the latest and most improved model of breech-loading rifles . . . . They were composed principally of Bohemians, Poles and Scandinavians of Socialist taint."<sup>69</sup> He continued:

Never before, in the history of civilized communities, did 400 men, armed with breech-loading rifles and fixed bayonets, parade the peaceful streets of a great city, in order, as they express it, "to show the Legislature and people of Chicago what they can do." The parade was a threat. It was a threat against law, order, decency, life and property.<sup>70</sup>

Even though *Verein* parades never led to violence, those who held economic and political power were determined to stamp them out with the militia bill. Their press characterized Illinois legislator Artley, who argued against the bill, as "the communist senator." His arguments must have had perceived merit, because "the senate refused to pass the bill; and, after wasting the day in bootless debate, added an amendment which will send the bill back to the house."<sup>71</sup> This infuriated those who insisted that there "is no legitimate purpose for which the communists or any other body of men with a grievance can find a

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<sup>68</sup> *Chicago Tribune*, April 21, 1879, at 4.

<sup>69</sup> Collins, *History of the Illinois National Guard, from the Organization of the First Regiment, in September, 1874, to the Enactment of the Military Code, in May 1879*, *supra* note 15, at 93-94.

<sup>70</sup> *Id.* at 94.

<sup>71</sup> *Chicago Daily Times Herald*, May 23, 1879, at 4.

shadow of justification for arming.<sup>72</sup> Such critics did not apply the same reasoning to their favored armed groups, such as the select militia the bill would create or the Pinkerton detective agency.

Nonetheless, both houses passed the militia bill.<sup>73</sup> Commented the *Chicago Daily Times Herald*:

The effect of this enactment, aside from the protection it is intended to afford to life and property and the public peace by denying to bands of Socialists and Communists the privilege of appearing with arms at drill or parade, will doubtless be to strengthen and improve the militia organizations, whose members have hitherto borne the entire burden of expense, but who will not feel that the State is doing its part.<sup>74</sup>

Signed by the governor, the militia bill became law on May 28, 1879 as "An act to provide for the organization of the State militia."<sup>75</sup> Article I, § 3 of the act provided:

The active militia shall be designated as the "Illinois National Guard," which shall consist of not more than 8,000 men and officers, to be divided into not more than three brigades, each to be commanded by a Brigadier-General, and shall be recruited by volunteer enlistments.

Almost all of the law concerned the enlisting, organizing, arming, drilling, paying, maintaining and regulating this 8,000 force called the "Illinois National Guard." The remainder of the population was subject to the following criminal provisions in Article XI:

Sec. 5. It shall not be lawful for any body of men whatever other than the regular organized volunteer militia of this State and the troops of the United States to associate themselves together as a military company or organization, or to drill or parade with arms in any city or town of this State, without the license of the Governor thereof, which license may at any time be revoked.

Sec. 6. Whoever offends against the provisions of the preceding section or belongs to or

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<sup>72</sup> *Id.*

<sup>73</sup> *Chicago Daily Times Herald*, May 24, 1879, at 10.

<sup>74</sup> *Chicago Tribune*, May 24, 1879, at 4.

<sup>75</sup> Bradwell, *Laws of Illinois* (1879), 149.

parades with any such unauthorized body of men with arms shall be punished by a fine not exceeding the sum of \$10 or by imprisonment in the common jail for a term not exceeding six months, or both.

The new law confirmed the worst fears of those members of the labor movement who advocated the traditional view that the militia must include all adult males, including members of the working class, which had held peaceable parades where some marchers carried rifles. The governor was entrusted to form a Praetorian guard of 8,000 armed men only loyal to him and the economic class he represented, and to allow or deny, without any standards, any body other than this Guard or federal troops the privilege of associating or marching in a city as a military company.

As the fourth of July approached, parade sponsors who wished to include armed marchers had to apply to the governor for a license. The *Chicago Daily Times Herald* assumed that the "governor will probably avoid the pressure for special licenses for irregular militia companies by licensing most of the applicants to celebrate the Fourth, and postponing action upon requests for permanent licenses."<sup>76</sup> While this was a concession that such groups did not pose any immediate danger, the *Herald* appealed to the governor to deny all applications for a license.<sup>77</sup>

Meanwhile, a gentleman's agreement was reached to resolve the constitutionality of the militia law by bringing a test case in the courts:

There is apparently a prospect that the question of the enforcement of the new Militia law will be settled in a quiet and perfectly peaceful and good-natured way. . . . The plan is to make up an agreed case and test in the Supreme Court the constitutionality of the law, and to conduct the

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<sup>76</sup> *Chicago Daily Times Herald*, July 1, 1879, at 4.

<sup>77</sup> *Id.*

proceeding so quietly that no alarm will be created.<sup>78</sup>

Mayor Harrison and Harry Rubens,<sup>79</sup> the attorney representing the *Lehr und Wehr Verein*, agreed that Captain Frank Bielefeld<sup>80</sup> would march a *Verein* company along a certain route. Two police officials and eight detectives would be waiting to get the marchers' names and addresses, after which arrest warrants would be issued. Those arrested would refuse bail, a petition for a writ of habeas corpus would be filed, and the Circuit Court would hear the case. The result was something of a "fiasco," in that only Bielefeld was arrested, "and he wasn't carrying a gun."<sup>61</sup> Bielefeld was taken before Justice Walsh at the West-Side Police Court.<sup>82</sup> An application was filed for release upon a writ of habeas corpus.<sup>83</sup>

The actions of the *Lehr und Wehr Verein* sparked discussion in the press of the meaning of the right to keep and bear arms. The *Chicago Daily Times Herald* granted the individual character of the right but denied that it was collective:

The right of the citizen to bear arms is clear enough and unmistakable. . . . It has long been recognized as a necessary part of, and indispensable to, the full right of self-defense. At the time of the adoption of the constitution, it was a well-defined right . . . .

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<sup>78</sup> *Chicago Tribune*, July 2, 1879, at 4.

<sup>79</sup> Rubens was born in Austria in 1850, emigrated to America, became a private secretary to Senator Carl Schurz, and became a prominent journalist and lawyer in Chicago. Rubens served as corporate counsel for Chicago in 1894-95 and was Judge Advocate General, Illinois State Militia, 1894-1897. I *Who Was Who in America* 1063 (Chicago: A.N. Marquis Co., 1943).

<sup>80</sup> This name often appears in the newspapers as "Bielefeldt." The above spelling is used here.

<sup>81</sup> *Chicago Tribune*, July 3, 1879, at 6.

<sup>82</sup> *Id.*

<sup>83</sup> *Chicago Tribune*, July 11, 1879, at 4.

The new law does not affect their right to bear arms as individuals. It is directed only against the maintenance of their military organization. . . . The question involved in the suppression of the communist armed organization is that of the preservation of municipal government.<sup>84</sup>

On July 4, a picnic was held at Ogden's Grove by "the friends of the Eight-Hour law." The *Tribune* reported: "The dreaded guns of the *Lehr und Wehr Verein*, the sanguinary banner of the Commune, and the expected army of the Socialists, were all conspicuous by their absence. It was simply a quiet, humdrum affair, noticeable chiefly for the respectable appearance of the participants . . . ."<sup>85</sup> The *Verein* had entrusted the rights it asserted to the courts.

The *Herald* reported that "the armed outbreak threatened for to-day has resolved itself into a peaceful demonstration in favor of eight hours for a day's work. . . . [T]he socialists have kindly resolved not to inaugurate any war at the present time."<sup>86</sup> A *Verein* spokesman had promised that the group would not march with arms, but would appear "in citizens dress, without any distinctive marks; and we will serve as a general committee at the picnic to preserve order. There will be regular policemen present to make arrests if necessary."<sup>87</sup>

At the first hearing in Captain Beilefeldt's test case, the prosecutor, a Mr. Cameron, was not acquainted with the new militia law. Justice Morrison released Bielefeld on bond and continued the case for a few days so that prosecutor Cameron could study the law and the case.<sup>88</sup>

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<sup>84</sup> *Chicago Daily Times Herald*, July 3, 1879, at 4.

<sup>85</sup> *Chicago Tribune*, July 5, 1879, at 2.

<sup>86</sup> *Chicago Daily Times Herald*, July 4, 1879, at 4.

<sup>87</sup> *Chicago Tribune*, July 3, 1879, at 6.

<sup>88</sup> *Id.* at 6.

Proceedings were held in the Criminal Court of Cook County on July 28, 1879. It is apparent that the defense filed an extensive written brief, for the court decision by Judge William H. Barnum, issued just over a month later, refers to the extensive arguments and authorities cited by the defendant.<sup>89</sup> Indeed, the brief may have been shared beforehand with the labor press, because the day before the hearing *Der Fackel* published an article "*Die Milizbill*" (The Militia Bill) which made many of the same arguments the court decision would attribute to the defendant: that the militia act violated the Second Amendment (quoting Justice Story's statement that the right to bear arms was necessary to prevent governmental usurpations) and was inconsistent with federal law defining the militia as including all males.<sup>90</sup>

#### **IV. THE MILITIA LAW RULED VIOLATIVE OF THE SECOND AMENDMENT**

On the afternoon of September 1, 1879, lawyers and interested observers assembled in the Cook County Circuit Court to hear the long-expected opinion of Judge Barnum in the Bielefeld case. The judge took his seat and announced that he would file, but would not read, his written opinion. He announced that Bielefeld "should be discharged, as the new Militia law, in his opinion, was unconstitutional, being at variance with the Federal Constitution regarding the right to carry arms." The *Tribune* reported Judge Barnum's following remarks from the bench:

He intimated that the other Judges did not in all respects agree with him, though a majority were with him. It seems that all the Judges consulted together (except Judge Moran, who did not join in the hearing), but since the opinion has been written but little conference has been had. Judges Barnum and McAllister are in accord, Judge Tuley has not been talked with since soon after the

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<sup>89</sup> *Chicago Tribune*, Sept. 2, 1879, at 6.

<sup>90</sup> *Der Fackel*, July 27, 1879, in Heiss, "German Radicals in Industrial America," *supra* note 13, at 217.

argument, while Judge Rogers entertains radically different views on some points.<sup>91</sup>

After the opinion was filed, defense attorneys Rubens and Story read it aloud to reporters, excitedly offering commentary. The *Tribune* published the full text of the opinion the next day.<sup>92</sup>

Judge Barnum's opinion was the most thorough ever written up to that time in history by any American court on the nature of the right to bear arms. Because it was not rendered by an appellate court, the opinion was not published in the reported judicial decisions. As it has been unknown to modern legal scholars until now, the opinion deserves a detailed analysis.

Judge Barnum declared the Illinois militia law squarely unconstitutional. He found that on July 1, 1879, Frank Bielefeld and a dozen other *Verein* members conducted a military parade near their meeting place, Turner Hall, "their accustomed rendezvous, for military and gymnastic exercises," on West Twelfth Street, in Chicago. They were not members of the National Guard or federal troops of the United States, nor did they have a license from the Governor.

Judge Barnum noted that, while the Second Amendment restrained the federal government and not the States, it was "claimed to be an explicit recognition of the right as one of the chief attributes and muniments of citizenship of a free Republic." Rejecting Alexander Hamilton's assurances that rights would be recognized by implication, the Framers concurred with Thomas Jefferson's insistence on explicit guarantees in a bill of rights. But the right to have arms did not originate there:

Not that the right to keep and bear arms owed its origins to the Constitution, for none knew better than the framers of that instrument that the right was pre-existent and older than any and all constitutions. Therefore was it, as maintained in the argument those profound and erudite

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<sup>91</sup> Chicago Tribune, Sept. 2, 1879, at 6.

<sup>92</sup> *Id.*

statesmen chose for their purpose, not the language in which some new boon was to be errated or bestowed, but that by which an old and immemorial right was to be recognized and fortified, "The right of the people . . . shall not be infringed."

Sir William Blackstone noted that the "absolute rights" of personal security, personal liberty, and private property are, in turn protected by auxiliary rights.<sup>93</sup> Judge Barnum continued:

Among these auxiliary rights and outworks of natural liberty, the distinguished commentator [Blackstone] ranks along with the regular administration of justice and the right of petition the coequal "right of having and using arms for self-preservation and defense." The context leaves no doubt of the author's meaning that the people's right to keep and use arms was a barrier against the encroachments of rulers as well as others.<sup>94</sup>

Judge Barnum then quoted U.S. Supreme Court Justice Story's classic statement as follows: "The right of the citizen to keep and bear arms had justly been considered as the palladium of the liberties of a republic, since it offers a strong moral check against the usurpation and arbitrary power of others, and will, generally, even if these are successful in the first instance enable the people to resist and triumph over them."<sup>95</sup>

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<sup>93</sup> Judge Barnum cited 1 Blackstone, *Commentaries* \*141.

<sup>94</sup> Judge Barnum continued in support of the above statement:

For he says, referring to the absolute rights of personal security, personal liberty, and private property: "So long as these remain inviolate, the subject is perfectly free from every species of compulsive tyranny, and oppression must act in opposition to one or other of these rights, having no other object on which it can possibly be employed."

The above references are to 1 Blackstone, *Commentaries* \*143-44.

<sup>95</sup> The quote has not been forgotten. Justice Thomas wrote in a 1997 decision which invalidated a portion of the Brady Handgun Violence Prevention Act on Tenth Amendment grounds: "Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms 'has justly been considered, as the palladium of the liberties of a republic.'" *Printz v. United States*, 521 U.S. \_\_\_, 117 S.Ct. 2365, 2385-86 (1997) (Thomas, J., concurring), citing 3 J. Story, *Commentaries* § 1890, p. 746 (1833).

The English Bill of Rights of 1689 recognized the right to have arms as among "the true, ancient, and indubitable rights of the people of this Kingdom."<sup>96</sup> Judge Barnum continued:

Let it be here observed, too, that the great auxiliary right to bear arms so eulogized by Blackstone and Story was not referable or secondary to any measure of State policy, such as the creation of a well-regulated militia, but existed for the individual subjects' own and only sake. There is not a word in the English Bill of Rights concerning the militia. It was "An act for declaring the rights and liberties of the subject," and one of the insidious methods by which, as it alleged, King James II and his evil counselors were endeavoring to subvert and extirpate the laws and liberties of the Kingdom was, "By causing several good subjects being Protestant to be disarmed at the same time when Papists were both armed and employed, contrary to law."<sup>97</sup>

Since the right of the people to bear arms is "an integral and inseparable part of their absolute rights as individuals," it follows that "every constitution which assumes to protect life, liberty, and property necessarily INSURES THE RIGHT OF ALL THE PEOPLE to keep and bear arms . . . ." The right is not dependent on the militia clause of the Second Amendment: "The right exists whether the Constitution contains that clause or not." While the Illinois Bill of Rights did not mention the right explicitly, it "includes the right as part of the personal outfit of every freeman, when it says almost in the very language of the Declaration of Independence: 'All men are by nature free and independent, and have certain inherent and inalienable rights. Among these are life, liberty, and the pursuit of happiness.'"

The two previous Illinois Constitutions of 1818 and 1842 had also asserted "the right of defending as well as enjoying life and liberty," but the deletion of this language did not imply that right or the right to bear arms not to be protected. As Judge Cooley observed, state constitutions "measure the power of the

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<sup>96</sup> Judge Barnum cited Creasy on the English Constitution, p. 289. The quotation is from An Act Declaring the Rights and Liberties of the Subject, 1 W. & M., Sess. 2, c. 2 (1689).

<sup>97</sup> The quotations are from 1 W. & M., Sess. 2, c. 2 (1689).

rulers; they do not measure the rights of the governed.<sup>98</sup>

As Cooley further explained, the arms protected were "those arms which are suited and proper for the general defense of the community against invasion and oppression." The State may still regulate the carrying of concealed weapons.<sup>99</sup> This means, noted Judge Barnum, that the right of the people to bear arms may be "exercised in their collective no less than in their individual capacity." To bear arms "means to bear the weapons of civilized warfare and to become instructed in their use." This is "an unconditioned and undeniable right," said Judge Barnum, "militia or no militia."

Further, in conformity with federal law, the Illinois Constitution provided that "the militia of the State of Illinois shall consist of all able-bodied male persons resident in the State between the ages of 18 and 45." This popular militia had been expressed in the Virginia Bill of Rights of 1776, which was framed by some of the authors of the Constitution: "A well-regulated militia, composed of the body of the people trained to arms, is the proper, natural, and safe defense of a free State."<sup>100</sup>

Judge Barnum noted the arguments that the law in question violated two provisions of the Illinois Constitution of 1870: its due process clause and its prohibition on special laws where a general law can be made applicable.<sup>101</sup> It also violated the Fourteenth Amendment to the U.S. Constitution. The law was "special, unequal, and partial legislation" in that "instead of organizing, it disorganizes the militia by excluding from it all but 8,000 enlisted volunteers,—that is to say, the bulk of the able-bodied men of the State of

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<sup>98</sup> Quoting Cooley, *Constitutional Limitations*, p. 87.

<sup>99</sup> Quoting Cooley, *Torts*, p. 801.

<sup>100</sup> Virginia Declaration of Rights, XIII (1776).

<sup>101</sup> Citing for the latter Illinois Constitution of 1870, Art. IV, Sec. 22.

whom the Constitution says the militia shall consist." No license is required for those 8,000, "but all other voluntary associations are forbidden under penalty of fine and imprisonment to organize without license, which the Governor may grant or refuse at his arbitrary will and pleasure."

The militia law "empowers the Governor in the granting or withholding of licenses to make odious discriminations based on politics, religion, class interests, nationality, place, or similar considerations repugnant to the genius of our institutions and subversive of constitutional equality."

As Bielefeld argued, if the law was valid, "then the will of the Governor is law, the people are disarmed, and, in defiance of both the State and National Constitutions, are kept out of the militia of their country as long as it shall suit the interest or pleasure of one man." Judge Barnum agreed that the police power would not justify treating the citizens unequally.

Under Illinois case law, the police power is not "an indefinable power superior to the Constitution," even as applied to corporations.<sup>102</sup> If corporations are so protected, the question arises:

Are, then, the rights of the people less sacred, and their charters of rights less solemn and effectual, than those of corporations; it is asked. . . . Hence it is denied that the great bulk of the people can be fenced off as fit subjects for police regulations, and the commonest rights limited to a favored few, as if police power was itself an end instead of a means, and the majority of the people only obstacles to be moved out of its way.

Moreover, the State had no authority to override the power of Congress over the militia under Article I, Section 8 of the Constitution. It provides:

The Congress shall have power to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the

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<sup>102</sup> Quoting *Lake View v. Rosehill Cemetary Company*, 70 Ill. 197.

authority of training the militia according to the discipline prescribed by Congress.<sup>103</sup>

Federal statutes on the militia, noted Judge Barnum, had been enacted "covering this entire field of legislation, and has thereby excluded all conflicting State legislation upon the same subject matter." In other words, federal law preempted the Illinois statute.

Judge Barnum then analyzed *Houston v. Moore* ( 1 8 2 0 ) ,<sup>104</sup> in which Justice Washington analyzed the Militia Clauses of the Constitution and federal legislation on the militia.<sup>105</sup> The Act of May 8, 1792, for establishing a uniform militia in the United States "declares who shall be subject to be enrolled in the militia, and who shall be exempt: what arms and accoutrements the officers and privates shall provide themselves with."<sup>106</sup> Justice Story, agreeing with Justice Washington that federal legislation was supreme, stated in a separate opinion in which Justice Marshall concurred: "When once Congress has carried this power into effect, its laws for the organization, arming, and disciplining of the militia are the supreme law of the land, and all interfering State regulations must necessarily be suspended in their operations."<sup>107</sup>

Judge Barnum recalled the disputes over calling out of the militia in the War of 1812<sup>108</sup> and in the

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<sup>103</sup> U.S. Const., Art. I, § 8.

<sup>104</sup> *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 12 (1820).

<sup>105</sup> U.S. Const., Art. I, § 8; Acts of Congress of May 2, 1792, and Feb. 28, 1796.

<sup>106</sup> *Houston v. Moore*, 18 U.S. at 14.

<sup>107</sup> *Id.* at 61.

<sup>108</sup> Regarding the call out of militia, "Massachusetts and Connecticut were the recalcitrant States in 1812, and submitted only when their Courts were overruled by the Supreme Court of the United States." Citing *Martin v. Mott*, 12 Wheaton 19 (1827).

Civil War.<sup>109</sup> The Illinois militia law, which was copied from that of the Massachusetts of the previous year,<sup>110</sup> contradicted federal law with its "limitation of arms-bearing militiamen to 8,000 volunteer guards, and the penal section applied to all the rest of the unlicensed population." The Massachusetts Supreme Court, in an 1859 opinion, had held:

The establishment of a militia was manifestly intended to be effected by arranging the able-bodied men in each and all the States in military array, arming and placing them under suitable officers, but without forming them into a regular standing army, to be ready as the exigency should require, to defend and protect the rights of all whether placed under the administration of the Local or General Government, to be called out by either in the manner and for the purpose determined by the Constitution and laws of either.<sup>111</sup>

Judge Barnum compared the Illinois law inconsistent with and preempted by the federal militia law.

While federal law and the Illinois Constitution defined the militia as all able-bodied males between 18 and 45, the provision at issue established a National Guard consisting of only 8,000 volunteers. In the Illinois law, "We hear no more of the people until some forty-four sections further on, when they are brought up long enough to pay the taxes, all the intervening sections being devoted to 'The Illinois National Guard.'" The only exception was a provision that postponed the enrollment of the militia until the governor proclaimed "it is necessary to execute the laws, suppress insurrections, or repel invasion, or to quell riots."

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<sup>109</sup> Citing Story on Constitution, Note to Sec. 1,210 (Governors of Virginia, North Carolina, Kentucky, Tennessee, Missouri, and Arkansas refused Lincoln's call for militia).

<sup>110</sup> In Massachusetts, the authorized militia was named:

The favored organizations there were singled out by name. They are the Ancient and Honorable Artillery Company, the Artillery Association of Newburyport, the Cadet Association of Salem, the Independent Corps of Cadets of Boston, the Salem Light Infantry, and the Artillery Association of Amesbury and Salisbury.

<sup>111</sup> Opinion of the Justices, 80 Mass. (14 Gray) 614, 617 (1859).

Judge Barnum insisted: "I cannot bring myself to think that it was the intention of Congress to defer the enrollment, the very first act toward the organization of the militia, until actual invasion or insurrection."

Yet the 8,000 volunteers called the "Illinois National Guard" were not required to be enrolled or even required to be able-bodied men between the ages of 18 and 45. But "we still have the National Guard with us, together with all the 'pomp, pride, and circumstance of glorious war.'" Judge Barnum found: "I find it clear beyond controversy that they could not be compelled to come out, because **THEY ARE NOT MILITIAMEN AND NOT ENROLLED.**"

Illinois militia law as of 1877 was consistent with federal law, but the 1879 law simply was not. Instead of being a militia, the National Guard was "patterned after the regular army."

Judge Barnum concluded: "For all these repugancies of our statute to the acts of Congress I must pronounce the former unauthorized legislation in all the parts." He then ordered the release of Bielefeld from incarceration.

As noted above, Judge William K. McAllister agreed with Judge Barnum.<sup>112</sup> Judge McAllister, it will be recalled, had in an earlier decision ruled that the police attack on the Furniture Workers Union had been illegal.<sup>113</sup> Judge Barnum also implied that Judge Murray F. Tuley agreed.<sup>114</sup> Interestingly, Judges McAllister and Turley were known as liberal judges who were elected in 1878 by large majorities and who

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<sup>112</sup> Chicago Tribune, Sept. 2, 1879, at 6.

<sup>113</sup> "The Aurora Turnverein," *Der Westen: Frauen-Zeitung*, Nov. 15 & 22, 1896, in Keil and Jentz, *German Workers in Chicago*, *supra* note 23, at 161-62.

<sup>114</sup> Chicago Tribune, Sept. 2, 1879, at 6. Judge Tuley was admitted to the Illinois bar in 1847, served with Illinois troops in the Mexican war, became attorney general of New Mexico, and then returned to Chicago to practice law, becoming corporate counsel and circuit judge of Cook County. I *Who Was Who in America 1257* (Chicago: A.N. Marquis Co., 1943).

had been endorsed by the Labor Party.<sup>115</sup> Judge John C. Rogers, who "entertains radically different views on some points,"<sup>116</sup> would preside over the grand jury which rendered the indictments following the 1886 Haymarket tragedy.<sup>117</sup>

### NULLIFICATION OF JUDGE BARNUM'S RULING

The *Chicago Daily Times Herald* reacted to the decision by smugly comparing Chicago's workers to the Ku Klux Klan (rather than to the freedmen, the poorest of the Southern working class) as follows:

The purpose of this statute was to compel the disbandment and prevent any organization hereafter of the extra-legal, and now illegal, military associations of the communist enemies of society, which, in many northern cities are the counterpart of the lawless "Ku-Klux Klans," "Night Riders," "Red Shirts," "White Leagues" and other shot-gun associations in the country of the Yazooos. . . . They had a right to keep and bear arms which meant, they fancied, that they had a right to organize in military companies to learn the art and practice of war.<sup>118</sup>

Southern history just a decade before belied this comparison. The closer parallel would have been the Southern black codes enforced by select white militias to disarm freedmen in order to maintain the servile status of blacks. When these black codes were nullified by the federal Constitution, the Klan took over the function of disarming blacks.<sup>119</sup> Just as the Southern select militia of 1866 disarmed black laborers on behalf of the wealthier interests, the Illinois select militia of 1879 functioned to disarm immigrant laborers on behalf of the wealthier interests.

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<sup>115</sup> Avrigh, *The Haymarket Tragedy*, *supra* note 36, at 39.

<sup>116</sup> Chicago Tribune, Sept. 2, 1879, at 6.

<sup>117</sup> Avrigh, *The Haymarket Tragedy*, *supra* note 36, at 233.

<sup>118</sup> *Chicago Daily Times Herald*, Sept. 1, 1879, at 4.

<sup>119</sup> See Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms*, *supra* note 4, *passim*.

In further commentary, the *Herald* denounced the *Verein* but gleefully reported that the governor would nullify Judge Barnum's decision--another parallel with Klan practices, which sought to nullify the civil rights of blacks, including the right to have arms:

The *Lehr und Wehr Verein* announce a picnic for next Sunday at a local resort, to which they propose marching, arms in hand, fortified by the decision of the circuit court. It is understood that, in the exuberance of their glee over the ruling of Judge Barnum, they have asked the 1st and 2d regiments [of the National Guard] to be present in force and witness the edifying spectacle. Inasmuch as the governor has intimated that he will enforce the militia law regardless of the Cook county decision, it is barely possible that the invitation of the socialists will be accepted, with all that the term implies.<sup>120</sup>

Characterizing Judge Barnum's opinion as "vicious and deplorably mischievous," the *Herald* depicted the purpose of the law as protection of the State "against the organization of an armed rebellion by lawless inhabitants, communists and 'Ku-Klux.'"<sup>121</sup>

The *Chicago Tribune* threw in the *ad hominem* argument that Judge Barnum, when he was in private practice as an attorney, represented "communists" who sued the police for breaking up a labor meeting. "The opinion in the militia case impresses the impartial reader as a labored plea to sustain the Socialist view of the Militia law."<sup>122</sup>

The *Tribune* gleefully "reported from Springfield that Gov. CULLOM does not intend to treat the Military Code of this State as null and void simply because Judge BARNUM holds the entire law unconstitutional in order to enable armed bands of Communists to violate it."<sup>123</sup> By contrast, the Mayor's

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<sup>120</sup> *Chicago Daily Times Herald*, Sept. 3, 1879, at 4.

<sup>121</sup> *Id.*

<sup>122</sup> *Chicago Tribune*, Sept. 3, 1879, at 4.

<sup>123</sup> *Chicago Tribune*, Sept. 4, 1879, at 4.

position was consistent both with the rule of law and conflict avoidance:

Mayor Harrison is willing to take Judge Barnum's decision . . . and abide by it. If the Communists turn out and carry arms, he will not interfere with them, he says, but will leave Gov. Cullom to do that if he wants to. The Circuit Court of Cook County and the decisions which it makes are, he says, authority enough for him, and he doesn't propose to do anything that would run counter to it or them.<sup>124</sup>

Meanwhile, various "communistic military organizations" along with musical bands drilled for the coming parade and picnic, and about 500 participants were expected. "It will include the *Lehr und Wehr Verein*, the *Jaeger Verein*, the Bohemian Sharpshooters, members of the various Communistic sections, the Workingmen's Association, and some other scattered societies."<sup>125</sup>

The event dreaded by the establishment press took place on September 22, but it seemed pretty harmless:

the *Lehr und Wehr Verein* and a number of other persons, male and female, held a picnic at Colehour Station. At the unearthly hour of 8 in the morning a train of ten cars pulled out of the LaSalle street depot having the excursionists on board. A few of the "militia"--that is, Judge Barnum's militia--had their guns with them, and the exercises of the afternoon included a drill and some prize-shooting, the prizes being rifles and muskets . . . .<sup>126</sup>

The Bielefeld case never reached the Illinois Supreme Court supposedly because of a legal technicality.<sup>127</sup> Perhaps the prosecution was not inclined to appeal or it may have been precluded by law from doing so. Supporters of the National Guard would then have their turn in court in another test case.

## V. THE EMPIRE STRIKES BACK:

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<sup>124</sup> *Id.* at 8.

<sup>125</sup> *Id.*

<sup>126</sup> *Chicago Tribune*, Sept. 22, 1879, at 8.

<sup>127</sup> David, *The History of the Haymarket Affair*, *supra* note 51, at 58.

### *DUNNE V. PEOPLE (1879)*

Private P. J. Dunne of the First Regiment of the National Guard was summoned for jury duty, but claimed exemption as a member of the State militia. Since the court had ruled that the National Guard was not the militia, Judge Barnum fined Dunne \$50 for contempt of court.<sup>128</sup> Judge Barnum "alluded to his former decision as to the unconstitutionality of the new state militia law, and stated that Dunne was guilty of contempt in asking to be excused from jury duty on account of being a member of the militia organized under that law, after the court had already given his decision in the matter."<sup>129</sup>

Judge Barnum did not incarcerate Dunne, which was interpreted as a "disposition to shirk the point [of whether the National Guard is the militia] and to deprive the militiaman, by declining to lock him up, of his coveted opportunity to apply to the Supreme Court for a writ of habeas corpus, and thus obtain a prompt decision on the merits of the case."<sup>130</sup>

Dunne's attorney, a Mr. Gregory, argued that the fine was not for contempt but was for refusing to do jury duty, and that the case could therefore be appealed. Judge Barnum took a few days to decide whether to allow an appeal. During this time, Dunne was not deprived of his liberty nor did he pay his fine.<sup>131</sup>

According to the *Tribune*, Dunne's case was anxiously watched by the public who wondered if "something should be done against the immediate interest of those who favor and those who disfavor the

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<sup>128</sup> *Chicago Tribune*, Sept. 28, 1879, at 3.

<sup>129</sup> *Chicago Daily Times Herald*, Sept. 28, 1879, at 4.

<sup>130</sup> *Chicago Tribune*, Sept. 28, 1879, at 3.

<sup>131</sup> *Chicago Daily Tribune Herald*, Sept. 28, 1879, at 6.

Militia law."<sup>132</sup> The case would proceed through the courts and the question settled whether Illinois had a "militia." "Men must know speedily whether they are compellable to jury duty while also yielding military service . . . ."<sup>133</sup>

*Dunne* was appealed to the Illinois Supreme Court. One of the briefs filed against Dunne's position was by none other than Lyman Trumbull, a former member of the Illinois Supreme Court and a member of the U.S. Senate in the years 1855-73 where, as chairman of the Committee on the Judiciary, he oversaw the enactment of civil rights legislation. The abolition of slavery by the Thirteenth Amendment, declared Trumbull in 1866, rendered void the Southern State laws which prohibited blacks from having firearms.<sup>134</sup> Now, instead of stressing the right of individuals to have arms to protect themselves, Trumbull argued for the right of groups to organize and parade with arms. It is unclear whether Trumbull's brief was filed as counsel for the prosecution or as an amicus curiae.

Trumbull wrote in his brief: "It is because 'a well regulated militia is necessary to the security of a free State,' that the right to keep and bear arms, cannot be abridged. This shows that the arms are intended for the people in their organized capacity."<sup>135</sup> The personal rights of individuals was not at issue in the case:

Whether a State may not prohibit its citizens from keeping or bearing arms for other than militia purposes is a question which need not be considered, as the Illinois statute is aimed against the organizing, arming and drilling of bodies of men as militia, except they belong to the Illinois

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<sup>132</sup> *Chicago Tribune*, Sept. 30, 1879, at 3.

<sup>133</sup> *Id.*

<sup>134</sup> *Congressional Globe*, 39th Cong., 1st Sess., 474 (Jan. 29, 1866).

<sup>135</sup> Argument of Lyman Trumbull on Behalf of Defendant in Error, *Dunne v. The People* (1879), 10. This brief was filed as an attachment to the brief on behalf of Presser in *Presser v. Illinois*, 116 U.S. 252 (1886).

National Guard of eight thousand.<sup>136</sup>

The Illinois Supreme Court reversed Dunne's conviction and upheld the militia law. The opinion, which was officially published, ignored the arguments and authorities set forth in Judge Barnum's comprehensive opinion in the Bielefeld case, and indeed does not even refer to that opinion. It upheld the power of Illinois to enact the militia law under the Tenth Amendment to the U.S. Constitution:

It might be well in this connection to call to mind that "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The power of State governments to legislate concerning the militia existed and was exercised before the adoption of the Constitution of the United States, and as its exercise was not prohibited by that instrument, it is understood to remain with the States, subject only to the paramount authority of acts of Congress enacted in pursuance of the Constitution of the United States.<sup>137</sup>

Quoting parts of the Second Amendment, the Illinois supreme Court continued:

"A well-regulated militia being necessary to the security of a free State," the States, by an amendment to the Constitution, have imposed a restriction that Congress shall not infringe the right of the "people to keep and bear arms." The chief executive officer of the State is given power by the Constitution to call out the militia, "to execute the laws, suppress insurrection and repeal invasion." This would be a mere barren grant of power unless the State had power to organize its own militia for its own purposes.<sup>138</sup>

This proposition was not controversial. The issue the court side stepped was how could the militia be restricted to a select group.

The court proceeded to uphold the regulation of the right contended for, to parade with arms without a license in cities. This was dictum, in that the defendant had not been convicted of this provision

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<sup>136</sup> *Id.* at 11.

<sup>137</sup> *Dunne v. People*, 94 Ill. 120, 34 Am. Dec. 213, 216 (1879).

<sup>138</sup> 34 Am. Dec. at 222.

and was not directly at issue. However, the court correctly distinguished the collective right to bear arms as a group and the purely individual right to carry arms for self-defense: "The right of the citizen to 'bear arms' for the defense of his person and property is not involved, even remotely, in this decision."<sup>139</sup>

Interestingly, the U.S. Supreme Court would remember *Dunne* in a decision upholding the power of Congress to send National Guardsmen to El Salvador on the basis that, when federalized, the Guard was part of the army, not the militia.<sup>140</sup> Quoting *Dunne*, the Court referred to the militia as "a body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace."<sup>141</sup> Ironically, the U.S. Supreme Court's 1990 decision that the National Guard was not, at least in that instance, the "militia" was contrary to the Illinois Supreme Court decision in *Dunne* that the National Guard was the militia.

The legal realist might suggest that the members of the Illinois Supreme Court, to use the vocabulary of the day, were allied with the forces of "order" and were unlikely to allow the "communist foreigners" free reign. In hindsight, Judge Barnum was one of those rare judges who was willing to follow his convictions even if it meant going against the established current.

The press reports were livelier and more revealing than the Supreme Court's decision. The *Chicago Times* commented: "The distinction between the First and Second Regiments of this city, whose members meet at night to drill, and who have a military encampment once a year, and the standing troops of Continental nations is obvious to the Judges, though it may not be to the Communists." The *Dunne*

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<sup>139</sup> *Id.* at 228.

<sup>140</sup> *Perpich v. Department of Defense*, 496 U.S. 334 (1990).

<sup>141</sup> *Id.* at 348, quoting *Dunne v. People*, 94 Ill. 120 (1879).

decision

settled the question of the right of the *Lehr und Wehr Verein* -- a Communistic organization about which more or less has been heard for some time -- to bear arms without becoming a part of the State militia or getting a permit from the Governor. . . . The Dunne case, however, did not reach the merits of the question fully and fairly, and he [Attorney Harry Rubens] was relying upon the Presser case, wherein he was indicted for unlawfully carrying arms, to settle it.<sup>142</sup>

The reference to the Presser case was yet another test case, this time again brought by the *Lehr und Wehr Verein*. As is analyzed below, *Presser* would go all the way to the U.S. Supreme Court.

#### **VI. TOUCHE: HERMANN PRESSER, WITH HORSE AND SWORD, LEADS MARCH OF ARMED WORKERS**

Hermann Presser was indicted on September 24, 1879, for having paraded with arms in Chicago without a license from the governor. Riding a horse and carrying a sword, Presser led a peaceable march of 400 members of *Lehr und Wehr Verein* carrying unloaded rifles. Presser was convicted by the Criminal Court of Cook County and fined \$10, the judgment was affirmed by the Illinois Supreme Court based on the *Dunne* precedent, and the U.S. Supreme Court decided to hear the case. However, it would not be until 1886, seven years after Presser's march, that the U.S. Supreme Court would render a decision.<sup>143</sup>

The Presser challenge was an attempt to regain the judicial win in the Bielefeld case that had seemingly been lost in the Dunne case. True, *Dunne* held that a National Guardsman was in the "militia" and thus exempt from jury service, but the constitutionality of the requirement that the governor must issue a permit for an armed march in a city was not at issue. The peaceable character of the *Lehr und Wehr Verein* remained clear with Presser's arrest apparently contrived with the authorities to bring another test

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<sup>142</sup> *Chicago Tribune*, Feb. 9, 1880, at 8.

<sup>143</sup> *Presser v. Illinois*, 116 U.S. 252, 253-55 (1886).

case. In those days before one could bring a civil action for a declaratory judgment to contest a criminal law, one had to get arrested to test its constitutionality. For his part, Bielefeld continued to maintain that the people must be armed, because "only a people fit for military service is a free people."<sup>144</sup>

As the *Presser* appeal dragged on, the *Dunne* decision gave free reign to those in power to use the National Guard to serve their political and economic interests. *Verbote* described the result of the militia law as follows: "'Order' prevailed over the people's constitutional rights. It was the first successful attempt on the part of capital to disarm the people and surround its palatial plunder with mercenaries (Pinkertons)."<sup>145</sup> Quoting Machiavelli's *Prince* to the effect that, like the Romans, "the Swiss are armed and free,"<sup>146</sup> *Verbote* continued:

As long as the politicians had known that the young labor party had armed backing they had been more or less well behaved; and though they had swindled the labor party in former elections, it had been done with "propriety and decorum." But now they had no reason to fear, and all pretense of respect and consideration was immediately dropped. There have probably been but few instances of more blatant and shameful riggings of elections than those which were committed against the socialist party in the spring of 1880.<sup>147</sup>

Documenting cases where "repeat" voters stole elections from socialists, *Verbote* asserted: "Prior to the passage of the militia law, no one ever would have dared such a disgraceful act! First the people

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<sup>144</sup> *Areiter-Zeitung*, March 16, 1880, in Heiss, "German Radicals in Industrial America," *supra* note 13, at 220.

<sup>145</sup> *Verbote*, May 4 & 18, 1887, in Keil and Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 233.

<sup>146</sup> See Niccolò Machiavelli, *The Prince*, trans. L. Ricci (New York: New American Library of World Literature, 1952), 73.

<sup>147</sup> *Verbote*, May 4 & 18, 1887, in Keil and Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 233.

were disarmed, then they were cheated, and when they raised their voice in indignation, they were laughed at!"<sup>148</sup>

The *Presser* appeal was before the Illinois Supreme Court in its May Term 1881. The only published decision of the Court related to the failure of Presser's attorneys to file their brief by the deadline required by the Court's rules. The Illinois Attorney General filed a motion to affirm the conviction for non-compliance with the rules. The brief for Presser was then filed. The Court ruled that the rules were not followed as strictly in criminal cases as in civil cases and denied the motion.<sup>149</sup>

Upon consideration of the appeal on the merits, the Illinois Supreme Court, in an unpublished per curiam opinion, summarily affirmed Presser's conviction with the words: "This case depends upon the validity of the militia law, and is controlled by *Dunne v. The People*, 94 Ill. 123. For the reasons there given the judgment is affirmed."<sup>150</sup> Actually, *Dunne* held that a member of the National Guard was excusable from jury duty as a member of the militia; the validity of the ban on armed marches was not before the court. The judgment thus consisted of judicial fiat, not reasoned opinion.

The date of the final decision of the Illinois Supreme Court in *Presser* could not be located in any published decision (including that court and the U.S. Supreme Court). The U.S. Supreme Court would grant an appeal in the case, but would not make a final decision until 1886.

Reports that the workers were arming continued unabated in the Northern states in the first half of

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<sup>148</sup> *Id.* at 236.

<sup>149</sup> *Presser v. Illinois*, 98 Ill. 406 (May Term 1881).

<sup>150</sup> Quoted in Brief of Attorney General of Illinois in *Presser v. Illinois*, No. 73, U.S. Supreme Court, 13. The disposition was apparently not published in Illinois Reports.

the 1880s. In an 1883 article, the *New York Tribune* reported that rifles and shotguns were the only topics of discussion heard around the meeting place of the Central Labor Union. "The communication of the Advance Labor Club which was received at the previous meeting was taken up and a motion was offered to form militia companies."<sup>151</sup>

A "labor agitator" wrote that in 1884, "capitalism was beginning to look upon the militia as its natural ally."<sup>152</sup> Armed labor groups in this period included the Detroit Rifles, the Rifle Union in Cincinnati, two *Lehr und Wehr Vereine* in St. Louis, the International Guards in Omaha, *Lehr und Wehr Vereine* in Newark, *Lehr und Wehr Verein* and International Guards Association in New York, an armed branch of the Shriners in San Francisco, and groups in other cities.<sup>153</sup> Meanwhile, in Chicago (and doubtless elsewhere), businessmen were forming military companies, and the National Guard was being expanded.<sup>154</sup>

Civil libertarians looked askance at the growing tendency to restrict militia membership to those chosen by political rulers. An attorney wrote in a 1885 issue of the *Kansas Law Journal* that select militias were being used to break strikes and to suppress the right freely to assemble.<sup>155</sup> "Now suppose a railroad company should take a turn at politics: they could very easily have some of their employees made captains

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<sup>151</sup> *New York Tribune*, Oct. 15, 1883, at 2.

<sup>152</sup> Joseph R. Buchanan, *The Story of a Labor Agitator*, (Freeport: Books for Libraries Press, 1903), 128.

<sup>153</sup> David, *The History of the Haymarket Affair*, *supra* note 51, at 149-50.

<sup>154</sup> *Id.* at 151-52.

<sup>155</sup> G.C. Clemens, "The Militia Law," 1 *Kansas Law Journal* 261 (May 30, 1885).

of these militia companies."<sup>156</sup> The author argued that the state constitution empowered the legislature to organize the militia and the governor to call out the militia, and the constitution defined the militia as "the whole body of male citizens--not a military class to terrorize the community."<sup>157</sup> "The constitutional militia is a thing into which a man grows by reaching his majority--he does not become a member by voluntary enlistment." He continued:

The intention was that every able-bodied citizen should have a gun in his hands and know how to use it; then none need fear his neighbor nor a despot; while this law puts arms into the hands of *a class*, and leaves the average citizen at their mercy. This law creates a standing army in violation of the Bill of Rights. What element does it lack? And while "the people have the right to bear arms for their defense and security," "standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated." (Bill of Rights, sec. 4.)<sup>158</sup>

## VII. *PRESSER V. ILLINOIS* IN THE U.S. SUPREME COURT

The case of *Presser v. Illinois* was finally argued in the U.S. Supreme Court in November 1885. Presser was represented by Allan C. Story and Lyman Trumbull (whose brief in the *Dunne* case was also submitted). Their briefs did not raise the issue of whether the Fourteenth Amendment protects the individual right to keep and bear arms.<sup>159</sup> Arguing that the militia should consist of the entire male populace, they queried: "*what security against usurpation*, would be found in a volunteer (Governor's) guard, of limited strength, and the balance of the people practically disarmed, and their *organization and arming*, stamped as a criminal offense, except it be done with the consent, of the very man, against whose

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<sup>156</sup> *Id.* at 264.

<sup>157</sup> *Id.* at 265.

<sup>158</sup> *Id.* at 265-66.

<sup>159</sup> S. Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights?" 2 *Stanford Law Review* 140, 147 (1949).

usurpations of powers, their organization and arming may, perhaps be directed, and lawfully so[?]"<sup>160</sup>

Presser's attorneys argued that the Second Amendment right of the people to bear arms was a right "to be exercised in their collective, not less than in their individual capacity."<sup>161</sup> They continued:

"To bear arms", then in the constitutional sense, means to bear the weapons of civilized warfare, and to become instructed in their use. But this is drilling, officering, organizing; therefore, these are claimed to be part and parcel, of the same impregnable right, and placed by the supreme law of the land, beyond the reach of infringement by the provisions of any military code or, the precarious will, and license of whoever may happen to be Governor.<sup>162</sup>

The Brief of Illinois Attorney General George Hunt in *Presser* argued that the States had ample power to organize their militias as they saw fit. The State power to organize a militia did not derive from the U.S. Constitution, but existed before its adoption, and was not prohibited by it.<sup>163</sup> Further, "the right to keep and bear arms by no means included the right to assemble and publicly parade in the manner forbidden by the law under which the conviction in this case was had."<sup>164</sup>

On January 4, 1886, seven years after Presser's march, the U.S. Supreme Court affirmed his conviction.<sup>165</sup> The *Presser* opinion was written by Justice William Woods. A decade earlier, as a circuit

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<sup>160</sup> Brief of Hermann Presser, U.S. Supreme Court, 18 (1885).

<sup>161</sup> *Id.* at 33. "Counsel did not argue for a 'right to keep and bear arms' as a simple individual right. Instead, the right as argued for by counsel was more corporate than individual. It was asserted that citizens have the right to be part of a militia . . ." L.H. LaRue, "Constitutional Law and Constitutional History," *Buffalo Law Review* 36 (1987): 373, 377.

<sup>162</sup> Brief of Hermann Presser at 33-34.

<sup>163</sup> Brief of Attorney General of Illinois in *Presser v. Illinois*, No. 73, U.S. Supreme Court, 4, citing *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 16-17 (1820) (Story, J.).

<sup>164</sup> *Id.* at 8.

<sup>165</sup> *Presser v. Illinois*, 116 U.S. 252, 253-55 (1886).

judge during the Reconstruction period, Woods had presided over federal criminal prosecutions against members of the Ku Klux Klan for violating the rights of blacks to assemble and to bear arms. Circuit Judge Woods had opined that both the federal government and the States were prohibited from abridging rights guaranteed by the Bill of Rights.<sup>166</sup> In one famous case, Judge Woods instructed the jury that "every citizen of the United States has the right to bear arms," which is "secured by the Constitution."<sup>167</sup> His opinion in that case that the rights to assemble and to bear arms were federally-protected from *private* conspiracy would be rejected by the Supreme Court in *United States v. Cruikshank* (1876).<sup>168</sup>

Ten years later, in *Presser*, Justice Woods concluded that the Second Amendment right of individuals to have arms does not preclude a State law requiring a license from the governor for an armed march by a military unit in a city:

The sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation upon the power of Congress and the National government, and not upon that of the States.<sup>169</sup>

The Court thus held that the armed paraders went beyond the individual right of keeping and bearing of arms, adding that the Second Amendment does not apply directly to the States. Among the authorities cited for the latter proposition was an antebellum North Carolina opinion upholding a law

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<sup>166</sup> *United States v. Hall*, 26 F.Cas. 79, 81-82 (C.C.S.D. Ala. 1871).

<sup>167</sup> *New Orleans Republican*, March 14, 1874, at 1.

<sup>168</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>169</sup> 116 U.S. at 265.

prohibiting free blacks from carrying firearms<sup>170</sup> on the basis that "the free people of color cannot be considered as citizens"<sup>171</sup> and that the states are not mentioned in the Second Amendment, which "is therefore only restrictive of the powers of the Federal Government."<sup>172</sup> The Court's reliance on this and other antebellum cases reinforces the fact that the Court did not consider whether the Fourteenth Amendment, adopted after the Civil War, protected Bill of Rights guarantees.

*Presser* did, however, recognize that the States may not infringe on the right to keep and bear arms in a manner that would deprive the federal government of the militia:

All citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the States, and, in view of this prerogative of the general government . . . the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But . . . the sections under consideration do not have this effect.<sup>173</sup>

Similarly, the Court rejected a First Amendment right of assembly applicable to *Presser's* band, because "the right voluntarily to associate together as a military company, or to drill or parade with arms, . . . is not an attribute of national citizenship."<sup>174</sup> The States "have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties

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<sup>170</sup> *Id.*, citing *North Carolina v. Newsom*, 5 Iredell 250, 27 N.C. 203 (1844).

<sup>171</sup> 27 N.C. at 204.

<sup>172</sup> *Id.* at 207.

<sup>173</sup> 116 U.S. at 265.

<sup>174</sup> *Id.* at 267.

or exercises the privileges of citizens of the United States . . . ."<sup>175</sup> After that narrow view of the right to assemble, the Court's language turned dramatic: "To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine."<sup>176</sup> If the Court had visions of foreign-born, armed proletarians rioting in the streets, those facts were not before the Court. The incident giving rise to the litigation was a peaceable march in which Presser intentionally got himself arrested, probably with the cooperation of local authorities, in order to test the law in the courts.

After the above discussion, the Court stated that Presser's argument that the law deprived him of life, liberty, or property without due process of law "is so clearly untenable as to require no discussion."<sup>177</sup> It is noteworthy that, beginning in 1897 and continuing throughout the twentieth century, the Court selectively incorporated most Bill of Rights guarantees into the due process clause of the Fourteenth Amendment.<sup>178</sup> As the above indicates, it never occurred to the Court in *Presser* to ask whether the First and Second Amendments were protected by the Fourteenth Amendment's due process clause. The Court could have done so and still upheld the law in question.

Presser had also argued that the Illinois law, by providing for a select militia instead of the militia of all able-bodied males provided by federal law, was inconsistent with and preempted by the federal law.

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 268.

<sup>177</sup> *Id.*

<sup>178</sup> The first such case was *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) (incorporating Just Compensation Clause of Fifth Amendment); the most recent is *United States v. Bajakajian*, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (Excessive Fines Clause of Eighth Amendment).

The Court avoided a decision on that issue by ruling that the provision under which Presser was convicted was severable from the militia provision.<sup>179</sup>

Doctrine aside, the legal realist might conclude that *Presser* reflected the fear of the established interests toward the perceived challenges of foreigners and the laboring class. Similarly, in the preceding decade, in the face of the rising aspirations of the freedmen in the South, the Court seemed to read the Reconstruction Amendments narrowly.

Presser's attorney Alan C. Story was less than candid when he commented that the Court did not answer the question at stake, but "merely said that this particular case would not raise the question as to the right of the State to organize and keep a separate militia." This meant that the *Lehr und Wehr Verein* would have to have a permit from the Governor to march.<sup>180</sup>

The *Central Law Journal*, whose contributors included Supreme Court justices and distinguished scholars, reviewed the *Presser* decision and concluded:

It will no doubt be news to most people, not members of the legal profession, and to many who are, that the Constitution of the United States does not secure to the citizens of the United States the right to "keep and bear arms." Such, however, is manifestly the effect of the ruling under consideration, the clause in the Second Amendment on that subject, the court regards as a limitation upon the powers of Congress, prohibiting that body and the general government from infringing that right. Whatever privileges therefore connected with bearing arms may be desired by any citizen, he must look for to his State, not to the United States.<sup>181</sup>

### **VIII. HAYMARKET: THE TROUBLES BOIL OVER**

Meanwhile, repression of the labor movement by police and the National Guard continued

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<sup>179</sup> 116 U.S. at 263.

<sup>180</sup> *Chicago Tribune*, Jan. 6, 1886, at 2.

<sup>181</sup> "Notes of Recent Decisions," 22 *Central Law Journal* 411, 412-13 (Jan.-June 1886).

unabated, and decisions like *Presser* did nothing to alleviate the situation. In the midst of strikes in April 1886, the *Arbeiter-Zeitung* advised Chicago's workingmen to "arm yourselves, but conceal your arms lest they be stole from you."<sup>182</sup> Outside factories where strikers assembled, "many arrests were made of people who were found to have concealed weapons, and who were afterwards fined \$10 in the Police Court."<sup>183</sup>

On the evening of May 4, 1886, four months after *Presser* was decided, a mass protest rally took place at the Haymarket in Chicago. Speakers included August Spies, a socialist writer and a member of *Lehr und Wehr Verein*. After police appeared, an unknown person threw a bomb, killing several people, including at least one policeman. Spies and seven other "anarchists," six of whom were German-American, were charged with instigation of murder of that policeman. Six other policemen died in the riot, but may have been killed by bullets fired from fellow officers.<sup>184</sup>

Presiding over the grand jury was none other than Judge John C. Rogers,<sup>185</sup> the only Chicago judge who had clearly disagreed with Judge Barnum's 1879 opinion declaring the militia law violative of the Second Amendment and vindicating the activities of the *Lehr und Wehr Verein*.<sup>186</sup> Judge Rogers instructed the grand jury that radical speech and red flags amounted to conspiracy to murder, although he later

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<sup>182</sup> *Arbeiter-Zeitung*, April 30, 1886, quoted in Schaack, *Anarchy and Anarchists*, *supra* note 44, at 94.

<sup>183</sup> Schaack, *Anarchy and Anarchists*, *supra* note 44, at 293.

<sup>184</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, at 234-35.

<sup>185</sup> *Id.* at 233.

<sup>186</sup> Chicago Tribune, Sept. 2, 1879, at 6.

expressed shock at the bias shown by the trial judge.<sup>187</sup>

At trial, the defendants were convicted of murder charges. The trial judge of the Criminal Court of Cook County opined that they were guilty because of their opinions, not because of any act they committed. Their publications and speeches advocated arming "to resist any unlawful attacks which the militia or the police might make upon them." It did not matter that none of the defendants anticipated the bomb attack. To find them not guilty would lead to "anarchy."<sup>188</sup>

On September 14, 1887, the Illinois Supreme Court rendered its decision affirming the convictions. Much of the evidence against the defendants had been newspaper articles and inflammatory publications. The following from the *Alarm* is one of the many published items introduced into evidence and quoted by the Supreme Court:

*"The Right to Bear Arms.* The conspiracy of the ruling against the working classes in 1877--the breaking up of the monster meeting on Market square, the brutal assault upon a gathering of furniture workers in Vorwärts Turner Hall, the murder of Tessmann, and the general clubbing and shooting down of peaceably inclined wage-workers by the bloodhounds of 'law and order'--greatly enraged the producers in this city, and also convinced them that they had to do something for their future protection and defense. The result was the organization of an armed proletarian corps, known as the '*Lehr und Wehr Verein.*' About one and one-half years later this 'corps' had grown so immensely that it numbered over 1,000 well-equipped and well-drilled men. Such an organization the 'good citizens' of our 'good city' considered a menace to the common weal, public safety, and good order, as one might easily imagine, and they concluded that 'something had to be done.' And, very soon after, something was done. The state legislature passed a new 'militia law,' under which it became a punishable offense for any body of men, other than those patented by the governor, and chosen as guardians of 'peace,' to assemble with arms, drill, or parade the streets. This law was expressly aimed at the '*Lehr und Wehr Verein,*' who, as a matter of course, did not enjoy the sublime confidence and favor of 'his excellency.'"<sup>189</sup>

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<sup>187</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, at 223-34, 263.

<sup>188</sup> David, *The History of the Haymarket Affair*, *supra* note 51, at 329.

<sup>189</sup> *Alarm*, January 9, 1885, quoted in *Spies v. People*, 122 Ill. 1, 12 N.E. 865, 886 (1887).

Revealingly, the Illinois Supreme Court opinion deleted the following part of the above article, which demonstrated the peaceable character of the Lehr und Wehr Verein:

The members of the Lehr Und Wehr Verein, mostly Socialists, who believed in the ballot, made up a test case to determine the constitutionality of this act, rejecting the counsel of the extremists. Judge Barnum held the law to be unconstitutional--an appeal was taken--and the Supreme Court upset this decision and held the law constitutional. Thereupon the Lehr Und Wehr Verein applied to the Supreme Court of the United States, which, within a few days, affirmed the decision of the Supreme Court of the State.<sup>190</sup>

While the above was mistaken on the details of the litigation, it made clear that the members of the Lehr Und Wehr Verein has consciously decided to trust their fate to the courts and not to violence.

The extent to which the Illinois Supreme Court upheld the convictions based because of the socialist opinions of the defendants, literature found in their houses, and guilt by association is beyond the scope of this analysis. Of interest for this study is the Court's discussion of "an association with which all the defendants in this case were connected"--the International Workingmen's Association.<sup>191</sup> Describing that organization as a socialist conspiracy, the Court asserted that "there was also a certain armed socialistic

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<sup>190</sup> Dyer D. Lum, *The Great Trial of the Chicago Anarchists* (New York: Arno Press, 1969), 143. The Illinois Supreme Court also quoted (12 N.E. at 899) from the book by Johann Most, *Science of Revolutionary War* (New York: International Zeitung Verein, n.d.). While this "Anarchist Cookbook" of the last century was quite inflammatory, it included the following of interest here:

The best thing would be for organized workingmen throughout the civilized world to provide themselves with muskets and ammunition, and to thoroughly drill; but this is almost impossible, as the authorities would interfere with them, and throughout Europe even the purchase of weapons by the common people is made difficult, while secret purchase subjects them to the charge of "constructive treason." In America every one has the constitutional right to arm, but the carrying of concealed weapons is prohibited, while, if carried openly, that also would soon be prohibited. That is not all. Hardly had a military organization been effected in Illinois, when the legislature passed a law allowing to march and drill only the state organizations. A litigation has resulted, which is as yet undetermined.

<sup>191</sup> *Spies v. People*, 12 N.E. at 920.

organization called the 'Lehr und Wehr Verein,' whose members seem to have been members also of the International groups.<sup>192</sup> The Court proceeded to detail some facts about the *Verein*, but failed to document any unlawful objective or to mention its historic commitment to bringing test cases in the courts. It then stated that the International was "an unlawful conspiracy" because it had an unlawful purpose--"the destruction of the right of private ownership of property"--and unlawful methods, i.e., groups armed and drilled without a license from the governor, in violation of the militia law.<sup>193</sup>

The *Chicago Inter Ocean* rejoiced that, as a result of the decision of the Illinois Supreme Court, "it is now law in Illinois that a conspiracy to overthrow government . . . by riot and murder is a crime to be expiated by the death of the conspirators."<sup>194</sup> It described the opinion as the "most important criminal case upon which any court of appeal has ever given judgment in this country."<sup>195</sup> The decision "affirmed that the indicted anarchists had conspired to murder certain officers of the law, that their conspiracy had been successful of murder, and that the punishment thereof was death for seven and imprisonment for one of them."<sup>196</sup>

The *Spies* case then went to the U.S. Supreme Court. The attorneys for the defendants now included John Randolph Tucker, who had served as a Representative to Congress from Virginia and President of the American Bar Association. In his treatise on the U.S. Constitution, Tucker would write

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<sup>192</sup> *Id.* at 921.

<sup>193</sup> *Id.* at 923-24.

<sup>194</sup> *Chicago Inter Ocean*, Sept. 15, 1887, at 10.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

of the Second Amendment: "This prohibition indicates that the security of liberty against the tyrannical tendency of government is only to be found in the right of the people to keep and bear arms in resisting the wrongs of government."<sup>197</sup>

Tucker argued before the Supreme Court in *Spies* on behalf of all the defendants that the Fourteenth Amendment incorporated the Bill of Rights, the first time that had ever been argued to the Court. The Fourteenth Amendment, Tucker argued, thus prohibited the States from violating "the privilege of freedom of speech and press--of peaceable assemblages of the people--of keeping and bearing arms--of *immunity* from search and seizure--*immunity from self-accusation*, from second trial--and privilege of trial by due process of law."<sup>198</sup> Tucker maintained that *Presser* "did not decide that the right to keep and bear arms was not a privilege of a citizen of the United States which a State might therefore abridge, but that a State could under its police power forbid organizations of armed men, dangerous to the public peace."<sup>199</sup> The framers of the Fourteenth Amendment, Tucker continued, "were looking to the protection of the freedmen from the peril of legislation in the South against those fundamental rights," and he referred to "the fundamental nature of these rights, as common law rights, which were recognized at the time of the Revolution as the inherited rights of all the States . . . ."<sup>200</sup>

While the right to bear arms was not involved in the case, Tucker referred to it and other Bill of Rights guarantees to demonstrate that the Fourteenth Amendment protected such rights from state

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<sup>197</sup> J. Tucker, *Constitution of the United States*, Vol. 2 , 671 (1899).

<sup>198</sup> *Spies v. Illinois*, 123 U.S. at 150-51.

<sup>199</sup> *Id.* at 152.

<sup>200</sup> *Id.*

infringement. The specific rights violated in the case, Tucker maintained, was the right to due process--"the prisoners were tried by a packed jury"--and the right against unreasonable search and seizure.<sup>201</sup>

Arguing on behalf of petitioners Spies and Fielden was none other than Benjamin F. Butler, the former Union general and congressman who was instrumental in the passage of the Civil Rights Act of 1871, which Butler interpreted to protect Bill of Rights guarantees, including the right to keep and bear arms.<sup>202</sup> Butler now argued that these guarantees were protected by the Fourteenth Amendment, focusing on the warrantless search and seizure of Spies' office and desk.<sup>203</sup>

Chief Justice Waite wrote the opinion of the Supreme Court. Waite had written the opinion in *United States v. Cruikshank* (1876), which held that the rights to assemble and to bear arms, albeit these rights antedated the Constitution, were not protected from private violation, and thus whites could not be prosecuted in federal court for violating such rights held by blacks.<sup>204</sup>

In *Spies*, Waite wrote that *before* the adoption of the Fourteenth Amendment the Bill of Rights had been interpreted as being inapplicable to State action.<sup>205</sup> The Court cited *Presser* as authority that the Bill of Rights did not apply to the States.<sup>206</sup> As noted, Tucker made a separate argument that the Fourteenth

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<sup>201</sup> *Id.* at 155.

<sup>202</sup> H. R. Rep. No. 37, 41st Cong., 3d Sess. 3-4, 7-8 (Feb. 20, 1871); CONG. GLOBE, 42nd Cong., 1st Sess. 448-49 (April 4, 1871). The Act survives today as 42 U.S.C. § 1983.

<sup>203</sup> *Spies v. Illinois*, 123 U.S. at 157-60.

<sup>204</sup> *United States v. Cruikshank*, 92 U.S. 542 (1876).

<sup>205</sup> *Spies v. Illinois*, 123 U.S. at 166.

<sup>206</sup> *Id.*

Amendment protected Bill of Rights guarantees, such as a fair trial by jury, from State infringement.<sup>207</sup> The Court refused to decide that issue because it was not raised by the defendants' attorneys in the trial court.<sup>208</sup> This technical procedural rule was the kiss of death for the defendants.

It seems rather incredible that the case was before the Court only twelve days--the petition was filed on October 21, and the opinion was issued on November 2, 1887.<sup>209</sup> The opinion appears weak and reflects haste.<sup>210</sup> The defendants were remanded for execution.

Less than a week later, over 40,000 signatures were obtained in Chicago alone pleading the governor for executive clemency. Signatures included those of Judges William K. McAllister and Murray F. Tuley,<sup>211</sup> who had been favorably disposed in the 1879 ruling in favor of Bielefeld.<sup>212</sup>

As a result of the Supreme Court's decision, four of the eight defendants were executed on November 11--another committed suicide the day before.<sup>213</sup> Yet all of the Haymarket defendants, after a public education campaign led in part by Clarence Darrow, would be pardoned posthumously in 1893

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<sup>207</sup> *Id.* at 151-52, 166-67. On the influence of Tucker's argument, see Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," 101 *Yale Law Journal* 1193, 1259-60, 1270-72 (April 1992).

<sup>208</sup> *Spies v. Illinois*, 123 U.S. at 181.

<sup>209</sup> *Id.* at 131, 142-43.

<sup>210</sup> LaRue, "Constitutional Law and Constitutional History," *supra* note 14, at 378-381.

<sup>211</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, at 338.

<sup>212</sup> *Chicago Tribune*, Sept. 2, 1879, at 6.

<sup>213</sup> Keil and Jentz, eds., *German Workers in Chicago*, *supra* note 23, at 189-90.

by Illinois Governor John Altgeld, on the basis of a total lack of evidence to convict them.<sup>214</sup> The real culprit or culprits who threw the bomb at the Haymarket were never apprehended.

Special mention should be made of Captain Michael J. Schaack, who was in charge of the Haymarket arrests and whose book has been used in this article as an original document of the epoch. His superior, Chief of Police Ebersold, wrote that Schaack "wanted to keep things stirring. He wanted bombs to be found here, there, all around. . . . After we got the anarchist societies broken up, he wanted to organize new societies right away. . . . After I heard all that, I began to think there was perhaps not so much to all this anarchist business as they claimed . . . ."<sup>215</sup> Schaack would be drummed out of service, however, because of his exposure as a trafficker in stolen goods and a policeman who took bribes from thieves and prostitutes.<sup>216</sup>

The labor troubles were far from over. In the Pullman strike of 1894, Justice Woods, acting as Circuit Court judge, issued an injunction against union interference with commerce, and troops were called in to enforce it. Violence erupted, and labor spokesman Eugene Debs was imprisoned for allegedly disobeying the injunction. Lyman Trumbull argued his appeal in the Supreme Court, which rejected the petition for release from jail.<sup>217</sup> This was yet another decision in which the Constitution was interpreted in a manner that gave the appearance of anti-labor bias.

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<sup>214</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, 419-23.

<sup>215</sup> Charman Simon, *The Story of the Haymarket Riot* (Chicago: Children's Press, 1988), 18.

<sup>216</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, at 415.

<sup>217</sup> *In re Debs*, 158 U.S. 564 (1895). On this case, see LaRue, "Constitutional Law and Constitutional History," *supra* note 14, at 381-86.

Trumbull then drafted a resolution which the national People's Party would adopt. It decried judicial curtailment of free speech and free labor, adding that Congress' power over the militia "does not warrant the Government in making use of a standing army in aiding monopolies in the oppression of their employees."<sup>218</sup> Such political rhetoric was not found in the legal briefs but captured the perceptions of many as the true reality.

Perhaps this reality was best represented not in carefully-worded Supreme Court opinions, but in the popular press and statements by national leaders. General Sherman of the U.S. Army, who well knew how to realize his Civil War slogan "war is hell," threatened: "There will soon come an armed contest between Capital and Labor. . . . The better classes are tired of the insane howlings of the lower strata, and they mean to stop them."<sup>219</sup> In a history of "anarchy" in Chicago which traced the development of the *Lehr und Wehr Verein*, the *Chicago Inter Ocean* stated in 1900:

The troublesome element has always been found among the lower classes of Germans, Bavarians, Austrians, Bohemians, and Hungarians, who used to hold secret meetings in organized groups, armed and equipped like the nihilists of Russia and the communists of France.<sup>220</sup>

The legal formalisms of *Presser* and kindred precedents show little or no traces of xenophobia or class suspicion,<sup>221</sup> but they are certainly consistent with the world view of the epoch in which they were rendered.

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<sup>218</sup> Horace White, *The Life of Lyman Trumbull* (Boston, 1913), 414-16.

<sup>219</sup> Avrich, *The Haymarket Tragedy*, *supra* note 36, at 176.

<sup>220</sup> *Chicago Inter Ocean*, Aug. 6, 1900, at 2.

<sup>221</sup> See *Commonwealth v. Murphy*, 44 N.E. 138 (Mass. 1896) (citing *Presser* and *Dunne* in support of proposition that "the right to keep and bear arms for the common defense does not include the right to associate together as a military organization" and upholding conviction of defendant for marching with 10 or 12 others and carrying inoperable Springfield rifles).

## IX. WHITHER THE SECOND AND FOURTEENTH AMENDMENTS?

In the twentieth century, the Supreme Court has held most Bill of Rights guarantees protected from State violation by the Fourteenth Amendment. The Court has remained silent on whether the right to bear arms is protected from State infringement by the Fourteenth Amendment.

What has been the legacy of *Presser* in the Supreme Court? *Presser* has been typically cited with other precedents to the effect that the privileges-and-immunities clause of the Fourteenth Amendment does not protect Bill of Rights guarantees.<sup>222</sup> It has been cited twice regarding the nature of the militia.<sup>223</sup> Every relevant citation of *Presser* in a Supreme Court opinion was in the context of holding that *other* Bill of Rights guarantee, not including the Second Amendment, were inapplicable to the states.<sup>224</sup>

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<sup>222</sup> *Maxwell v. Dow*, 176 U.S. 581, 597 (1900); *cf. id.* at 606-07 (Harlan, J., dissenting) (privileges and immunities protected by Fourteenth Amendment "embrace at least those expressly recognized by the Constitution and placed beyond the power of Congress to take away or impair"). *See also Twining v. New Jersey*, 211 U.S. 78, 97-98 (1908).

<sup>223</sup> *Hamilton v. Regents*, 293 U.S. 245, 260 (1934) ("the State is the sole judge of the means to be employed and the amount of training to be exacted for the effective accomplishment of these [militia] ends"); *United States v. Miller*, 307 U.S. 174, 182 n. 3 (1939) (citing *Presser* and state decisions on the nature of the militia).

<sup>224</sup> *Malloy v. Hogan*, 378 U.S. 1, 14 (1964) noted:

Decisions that particular guarantees were not safeguarded against state action by the Privileges and Immunities Clause or other provision of the Fourteenth Amendment are: *United States v. Cruikshank*, 92 U.S. 542, 551; *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 543 (First Amendment); *Presser v. Illinois*, 116 U.S. 252, 265 (Second Amendment); *Weeks v. United States*, 232 U.S. 383, 398 (Fourth Amendment) . . . .

Precedents representing the same on the Fifth, Sixth, Seventh, and Eighth Amendments were also cited. *See Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (citing *Presser* and other cases against the notion that "the Fourteenth Amendment is no more than a shorthand reference to what is explicitly set out elsewhere in the Bill of Rights").

All of the pertinent Supreme Court cases citing *Presser* held either that the Bill of Rights did not apply directly to the states or that the privileges-and-immunities clause of the Fourteenth Amendment did not incorporate the Bill of Rights.<sup>225</sup> After this era of niggardly interpretation of the Fourteenth Amendment had passed, the Supreme Court has incorporated most Bill of Rights guarantees under the due process clause of the Fourteenth Amendment. Because it failed to consider whether the Fourteenth Amendment's due process clause protects the Second Amendment, *Presser* has been obsolete for a century.

Moreover, *Presser* has not been in good company. It was cited alongside *Plessy v. Ferguson* (1896), which embraced the "separate-but-equal" doctrine of school segregation, for a narrow interpretation of the privileges and immunities protected from state action by the Fourteenth Amendment.<sup>226</sup> *Presser* was also cited in one of the Court's worst decisions denigrating free speech under the First Amendment.<sup>227</sup> While the Supreme Court has not relied on *Presser* in recent times, *Presser* has been cited

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<sup>225</sup> See *Adamson v. California*, 332 U.S. 46, 78 (1947) (Black, J., dissenting) (citing *Presser* and other cases to effect that the rights under the Second, Fifth, Sixth, Seventh and Eighth Amendments "were not 'privileges or immunities' of national citizenship, so as to make them immune against state invasion"). "While it can be argued that these cases implied that no one of the provisions of the Bill of Rights was made applicable to the states as attributes of national citizenship, no one of them expressly so decided." *Id.*

<sup>226</sup> *Colgate v. Harvey*, 296 U.S. 404, 444-46 & n. 2 (1935) (Stone, J., dissenting) (asserting that none of the Court's forty-four decisions on point had ever found that a state statute violated the privileges-and-immunities of the Fourteenth Amendment, citing, *inter alia*, *Presser* and *Plessy v. Ferguson*, 163 U.S. 537 (1896)). Justice Stone's dissent was quoted in *Hague v. C.I.O.*, 307 U.S. 496, 532 (1939) ("even those basic privileges and immunities secured against federal infringement by the first eight amendments have uniformly been held not to be protected from state action by the privileges and immunities clause").

<sup>227</sup> *Gilbert v. Minnesota*, 254 U.S. 325, 331 (1920) (state statute prohibiting speech which discouraged enlistment in military does not violate First Amendment and may be upheld under police power; *Presser* cited as authority). The "subversive" speech advocated a vote on conscription and stated that "if they conscripted wealth like they have conscripted men, this war would not last over forty-eight

by federal courts of appeals to uphold local and state bans on handguns and on "assault weapons" (mostly rifles).<sup>228</sup> These courts ignored the last word of the Supreme Court on the subject--an 1894 ruling that its precedents established that the Bill of Rights did not apply to the states directly, and refusing to consider whether Bill of Rights guarantees (in that case, the Second and Fourth Amendments) applied to the states, because the issue was not raised in the courts below.<sup>229</sup>

Professor L.H. LaRue, concluding an analysis of the Supreme Court decisions in *Presser*, *Spies*, and *Debs*, stressed class conflict as the reality behind the legalisms:

In that case [*Presser*], the Supreme Court endorsed the changes that were underway in other courts in which the right to bear arms was being limited. During these same years, the power of the jury to make final resolutions of a controversy was eliminated. Furthermore, freedom of speech was also sharply restricted. These changes go together if they are viewed in their historical context. The nineteenth century was a time of change. Different classes gained and lost unequally, which led to social unrest. Judges responded to these events by attempting to impose order. In this historical context the disarming of unions, the reduction of jury autonomy, the expansion of the injunction, and the restriction of radical speech form a coherent pattern. . . . The judges changed law in an attempt to deal with events thought to be serious threats to the social order in which they had a stake and to which they pledged loyalty.<sup>230</sup>

Xenophobia, fear of the lower classes, and the desire to preserve the existing politico-economic order could well have been underlying premises for formal-sounding judicial decisions which gave the

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hours." *Id.* at 326.

<sup>228</sup> *Quilici v. Village of Morton Grove*, 695 F.2d 261, 269-70 (7th Cir. 1982) (upholding handgun ban), *cert. denied*, 464 U.S. 863 (1983); *Fresno Rifle & Pistol Club v. Van de Kamp*, 965 F.2d 723, 729-31 (9th Cir. 1992) (upholding "assault weapon" ban). See *Peoples Rights Organization, Inc. v. City of Columbus*, 1998 U.S. App. Lexis 16189, 1998 FED App. 0210P (6th Cir. 1998) (invalidating "assault weapon" ban as vague and violative of equal protection, but stating in dictum that *Presser* decided that the Second Amendment did not apply to the states).

<sup>229</sup> *Miller v. Texas*, 153 U.S. 535, 538 (1894).

<sup>230</sup> LaRue, "Constitutional Law and Constitutional History," *supra* note 14, at 400-01.

appearance of reliance on logic and precedent. However, such prejudices rarely invaded the decorum of a judicial decision. The decisions concerning the *Lehr und Wehr Verein* profoundly exemplify how the social milieu can influence--and limit--the contours of civil and constitutional rights as interpreted by the courts.

From the point of view of constitutional interpretation, *Presser* belongs to a bygone era of the nineteenth century when the Supreme Court rejected the application of the Bill of Rights to the states without considering whether the Fourteenth Amendment, particularly its due process clause, made the Bill of Rights so applicable. In the twentieth century, however, almost all of the Bill of Rights has been held applicable to the states. The structure of the amended Constitution and the logic of incorporation suggest that the Second Amendment right of the people to keep and bear arms, whatever its limits, should be considered as protected from state infringement by the Fourteenth Amendment.