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David B. Kopel

# Lyman Trumbull: Author of the Thirteenth Amendment, Author of the Civil Rights Act, and the First Second Amendment Lawyer

*David B. Kopel**

*This Article provides the first legal biography of lawyer and Senator Lyman Trumbull, one of the most important lawyers and politicians of the nineteenth century. Early in his career, as the leading anti-slavery lawyer in Illinois in the 1830s, he won the cases constricting and then abolishing slavery in that state; six decades later, Trumbull represented imprisoned labor leader Eugene Debs in the Supreme Court, and wrote the Populist Party platform. In between, Trumbull helped found the Republican Party, and served three U.S. Senate terms, chairing the judiciary committee.*

*One of the greatest leaders of America's "Second Founding," Trumbull wrote the Thirteenth Amendment, the Civil Rights Act, and the Freedmen's Bureau Act. The latter two were expressly intended to protect the Second Amendment rights of former slaves. Another Trumbull law, the Second Confiscation Act, was the first federal statute to providing for arming freedmen. After leaving the Senate, Trumbull continued his fight for arms rights for workingmen, bringing* Presser v. Illinois *to the U.S. Supreme Court in 1886, and* Dunne v. Illinois *to the Illinois Supreme Court in 1879. His 1894 Populist Party platform was a fiery affirmation of Second Amendment principles.*

*In the decades following the end of President James Madison's Administration in 1817, no American lawyer or legislator did as much as Trumbull in defense of Second Amendment. Yet Lyman Trumbull had little personal interest in firearms, and never considered the Second*

* Adjunct Professor of Advanced Constitutional Law, Denver University, Sturm College of Law. Research Director, Independence Institute, Denver, Colorado. Associate Policy Analyst, Cato Institute, Washington, D.C. Professor Kopel is the author of eighteen books and one hundred scholarly journal articles, including the first law school textbook on the Second Amendment: NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY (Vicki Been et al. eds., 2012). Kopel's website is http://www.davekopel.org. I would like to thank Noah Rauscher for assistance with this Article.

*Amendment to be one of his major issues. So how did Lyman Trumbull become the leading Second Amendment lawyer of the time? His lifelong cause was "the poor who toil for a living in this world." When Trumbull examined America in the nineteenth century, he saw that the rights of the toilers could always be trampled, unless they had the right to arms, individually and collectively.*

*The story of Lyman Trumbull's career begins in the Age of Jackson and ends with Trumbull's protégé, William Jennings Bryan, winning the Democratic presidential nomination in 1896. It is a story of a man who changed political parties five times, while holding fast to his fundamental principle of free labor. Even today, "The Grand Old Man of America" continues to shape our understanding of constitutional liberty.*

## INTRODUCTION

Illinois Senator and attorney Lyman Trumbull wrote the Thirteenth Amendment, outlawing slavery in the United States, and giving Congress the power to remove all badges of servitude "by appropriate legislation."[1] The appropriate legislation that Trumbull then introduced was the Civil Rights Act of 1866, the foundational civil rights statute in the United States.[2] He also wrote the First Freedmen's Bureau Bill, to protect the civil rights of freedmen nationally.[3] The bills were the first federal legislation to protect Second Amendment rights.[4]

Later, he brought Second Amendment test cases to the U.S. Supreme Court (*Presser v. Illinois*[5] in 1886) and the Illinois Supreme Court (*Dunne v. Illinois*[6] in 1879). These Second Amendment cases involved labor rights—in particular, the rights of organized groups of workingmen to defend themselves from company goons and other violence. The most famous case of the last part of Trumbull's career was also a labor case, *In re Debs*; there, he brought a habeas corpus case to the Supreme Court in support of the labor leader Eugene Debs, who had defied a federal court injunction against continuing to encourage a railroad strike.[7]

Trumbull was not a particularly "pro-Second Amendment" person. Other rights in the Constitution, such as habeas corpus, interested him much more.[8] His legislation and litigation for the Second Amendment

1. U.S. CONST. amend XIII; *see infra* Part III.C.
2. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
3. *See* Freedmen's Bureau Bill, ch. 90, 13 Stat. 507 (1865); *infra* Part III.D.1.
4. *See infra* Part III.D.
5. 116 U.S. 252 (1886).
6. 94 Ill. 120 (1879).
7. *In re* Debs, 158 U.S. 564, 566 (1895), *abrogated by* Bloom v. Illinois, 391 U.S. 194 (1968).
8. *See infra* text at notes 219–34 and Part III.E.

were derivative of the great cause to which he was devoted: "a fair chance" for "the poor who toil for a living in this world"—as Clarence Darrow remembered him.[9]

This Article examines Trumbull's career as a lawyer and legislator. It pays particular attention to the themes that explain why he became involved in Second Amendment issues.

Part I of this Article provides an overview of Trumbull's political philosophy, as it remained mostly constant from his early days as an Andrew Jackson Democrat to Republican Senator to Populist. Part II then begins the narrative of Trumbull's life, from earliest days through his service in the Illinois state legislature, on the Illinois Supreme Court, and as the leading anti-slavery advocate of that state. Part III details Trumbull's three terms as a U.S. Senator from Illinois—defending civil liberties during the war, authoring the first statute that freed slaves, the Thirteenth Amendment, and then major Reconstruction legislation. Finally, Part IV examines Trumbull's career after the Senate, as a Chicago lawyer from 1873 until his death in 1896.

Trumbull was one of the "Founding Sons"—the leaders who in the mid-nineteenth century first eliminated slavery, and then set up the constitutional and statutory structures for national protection of civil rights. These structures continue to be vitally important today. Accordingly, studying the full sweep of Trumbull's political and legal career is important for the same reason as is studying the other Founding Sons, such as Salmon Chase, Jonathan Bingham, or Thaddeus Stevens. Trumbull has been the subject of three biographies, the first in 1913 by his friend the newspaper writer Horace White, and the last in 1979.[10] None of these biographies, however, were legal scholarship. Given Trumbull's tremendous importance in the development of American law, this Article aims to fill that gap.

A second purpose of this Article is to explicate Trumbull's heretofore overlooked position as the leading pro-Second Amendment legislator and lawyer of the nineteenth century—or at least the part of the century after Founders such as Thomas Jefferson and James Madison had departed. Second Amendment rights were *not* among Trumbull's major political or legal interests. So why did he end up doing so much on behalf of the Second Amendment? This Article suggests that the answer was Trumbull's lifelong devotion to the rights of workers.

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9. HORACE WHITE, THE LIFE OF LYMAN TRUMBULL 425–26 (1913).

10. *See id.* The other two book-length biographies are RALPH J. ROSKE, HIS OWN COUNSEL: THE LIFE AND TIMES OF LYMAN TRUMBULL (1979), and MARK M. KRUG, LYMAN TRUMBULL: CONSERVATIVE RADICAL (1965).

## I. AN OVERVIEW OF LYMAN TRUMBULL AND HIS POLITICAL PHILOSOPHY

Lyman Trumbull began his political life as an Andrew Jackson Democrat, supporting the workingman and fighting against government favoritism for monopolists. He changed political parties repeatedly (Democrat, Anti-Nebraska Democrat, Republican, Liberal Republican, Democrat, Populist),[11] but he stuck with his basic Jacksonian principles.[12] As a result, he defended free labor always and

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11. ROSKE, *supra* note 10, at viii (chart of Lyman Trumbull's political affiliations).

12. *Id.* at 20, 81. As we shall see, Jacksonian principles made Trumbull often (but not always) suspicious of "big government," because Jacksonians believed that big government was likely to do the bidding of the rich and powerful, to the detriment of working people. As Jackson explained in his famous veto for the recharter of the Second Bank of the United States:

> It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes. Distinctions in society will always exist under every just government. Equality of talents, of education, or of wealth can not be produced by human institutions. In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society-the farmers, mechanics, and laborers—who have neither the time nor the means of securing like favors to themselves, have a right to complain of the injustice of their Government. There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing. In the act before me there seems to be a wide and unnecessary departure from these just principles.
>
> Nor is our Government to be maintained or our Union preserved by invasions of the rights and powers of the several States. In thus attempting to make our General Government strong we make it weak. Its true strength consists in leaving individuals and States as much as possible to themselves—in making itself felt, not in its power, but in its beneficence; not in its control, but in its protection; not in binding the States more closely to the center, but leaving each to move unobstructed in its proper orbit.
>
> Experience should teach us wisdom. Most of the difficulties our Government now encounters and most of the dangers which impend over our Union have sprung from an abandonment of the legitimate objects of Government by our national legislation, and the adoption of such principles as are embodied in this act. Many of our rich men have not been content with equal protection and equal benefits, but have besought us to make them richer by act of Congress. By attempting to gratify their desires we have in the results of our legislation arrayed section against section, interest against interest, and man against man, in a fearful commotion which threatens to shake the foundations of our Union. It is time to pause in our career to review our principles, and if possible revive that devoted patriotism and spirit of compromise which distinguished the sages of the Revolution and the fathers of our Union. If we can not at once, in justice to interests vested under improvident legislation, make our Government what it ought to be, we can at least take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many, and in favor of compromise and gradual reform in our code of laws and system of political economy.

President Andrew Jackson, Veto Message Regarding the Bank of the United States (July 10,

everywhere: as a lawyer and legislator combatting the de jure and de facto systems of slavery that existed in Illinois in the 1830s and 1840s, and then winning the case that abolished legal slavery in Illinois;[13] as a Senator fighting the spread of slavery into the Territories in the 1850s;[14] as Judiciary Chair in the Civil War, winning the first legislation to actually free slaves;[15] and eventually as the author of the Thirteenth Amendment.

Trumbull wrote the First Freedmen's Bureau Bill,[16] was closely involved in passage of the Second Freedmen's Bureau Bill,[17] and wrote the Civil Rights Act.[18] All of these aimed to ensure that the freedmen would be truly free, and not forced into de facto servitude. Like other supporters of these bills, Trumbull explained that part of the program to protect civil freedom was ensuring that the freedmen would be able to exercise their individual Second Amendment rights of armed self-defense, particularly against persons who would take away that freedom.[19]

While Trumbull yielded to no one in his insistence that the Confederate rebellion be suppressed with maximal force, he remained constitutionally scrupulous, and sponsored the legislation that put President Lincoln's constitutionally dubious suspension of habeas corpus on a sounder legal footing, and circumscribed it with due process protections.[20] It was also Trumbull who convinced Lincoln to free the publisher of the *Chicago Times* newspaper, who had been imprisoned by the military.[21]

Although Trumbull wanted the federal military to crush what he considered to be an illegal rebellion, and then to ensure that the defeated

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1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp.

13. *See infra* notes 84–145 and accompanying text.

14. *See infra* notes 152–94 and accompanying text.

15. *See infra* notes 201–08 and accompanying text.

16. Freedmen's Bureau Bill, ch. 90, 13 Stat. 507 (1865). The Freedmen's Bureau Bill provided a variety of protections for the civil rights of ex-slaves, including for "the constitutional right to bear arms." *See id*. It was vetoed by President Andrew Johnson, and the veto was upheld. *See infra* notes 271–81 and accompanying text.

17. Second Freedmen's Bureau Bill, ch. 200, 14 Stat. 173 (1866). The Second Freedmen's Bureau Bill was very similar to the first. Congress overrode President Johnson's veto, and it became law. *See infra* note 281 and accompanying text.

18. Civil Rights Act of 1866, ch. 31, 14 Stat. 27. While the Freedmen's Bureau Bills were mainly to address Southern conditions following the end of the Civil War, the Civil Rights Act was a nationally applicable statute, to protect the civil rights (including Second Amendment rights) of people regardless of color. *See infra* notes 283–309 and accompanying text.

19. *See infra* notes 277–87 and accompanying text.

20. *See infra* notes 215–34 and accompanying text.

21. *See infra* notes 239–41 and accompanying text.

rebels did not return to power after the War, Trumbull was also, over the long course of his career, opposed to militarism, military rule over civilians, and "big government."[22] The conflict between Trumbull's principles became especially stark in 1868, when he argued the Supreme Court case *Ex parte McCardle* in favor of the denial of habeas corpus for an anti-Union newspaper editor in Mississippi.[23]

An ardent friend of all immigrants, Trumbull was strongly anti-nativist;[24] as he moved away from the old Democratic Party in the 1850s, he insisted that the new parties adopt not a scintilla of the nativism of the Whigs or the Know-Nothings.[25] Trumbull supported citizenship rights for Chinese immigrants, and always maintained excellent relations with the large community of German immigrants in Illinois.[26]

Finally, Trumbull was a reformer who wanted government to serve the common good, and not the interests of the few. He sponsored into law the Pay Act and other first steps at civil service reform.[27] It was the corruption of the administration of President Ulysses Grant that led to Trumbull's 1872 rupture with the regular Republicans, and his joining the new Liberal Republican party.[28]

Like the Founders, Trumbull abhorred a "select militia," composed of only a small body of the population.[29] He was outraged when the U.S. Army or a select militia were used to suppress labor strikes, as they sometimes were in Illinois in the latter nineteenth century.[30] Trumbull argued these violated the militia system created by Article I of the Constitution.[31]

Workers had the right to keep and bear arms—a right that belonged

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22. ROSKE, *supra* note 10, at 20, 23, 39, 46, 127.

23. 74 U.S. (7 Wall.) 506 (1868).

24. That is, he believed in full equality among Americans, without regard to whether they were born in the United States or had immigrated.

25. The Whigs were one of the two major American political parties from the Age of Jackson until shortly before the Civil War. *See generally* MICHAEL F. HOLT, THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR (1999). "Know-Nothing" was a nickname for a variety of political groups who were hostile to Catholic immigrants. After great success in the 1854 elections, they formally united as the "American Party." The party did poorly in the 1856 elections, and dwindled thereafter. Many of its members were ex-Whigs who later became Republicans. *See* TYLER ANBINDER, NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS & THE POLITICS OF THE 1850S (1992).

26. *See infra* notes 32, 58–61, 477–78 and accompanying text.

27. *See infra* notes 245–53 and accompanying text.

28. *See infra* notes 431–52 and accompanying text.

29. *See infra* notes 481–90 and accompanying text.

30. *See infra* notes 453, 488, 619–22 and accompanying text.

31. *See infra* notes 513–20, 544, 622 and accompanying text.

to the German immigrant laborers of Illinois just as much as it belonged to the freedmen of Mississippi. They had the right to practice and train together, and to engage in public parades, and to prepare to defend themselves from corporate violence if necessary. To deny these rights was a direct violation of the Second Amendment, Trumbull argued in *Presser* (1886) and *Dunne* (1879)—both of which involved an Illinois statute that forbade armed parades and group training by an organization of German immigrant workingmen.[32]

Trumbull's last major case was *In re Debs*,[33] a habeas corpus petition to the Supreme Court. It too involved "big government" crushing the masses—namely using a federal court injunction and the U.S. Army to suppress a railroad strike in 1894.[34]

Trumbull's final act on the political stage was to write the platform of the People's Party (usually called the "Populists") for their 1894 Convention.[35] It stated:

> Resolved, That the power given Congress by the Constitution provide for calling forth the militia to execute the laws of the Union, to suppress insurrections, to repel invasions, does not warrant the Government in making use of a standing army in aiding monopolies in the oppression of their employees. When freemen unsheathe the sword, it should be to strike for liberty, not for despotism, or to uphold privileged monopolies in the oppression of the poor.[36]

Formally speaking, this was a legal argument about congressional powers under Article I, rather than about the Second Amendment. The broader point, however, involved the spirit of the Second Amendment, and of the entire system of constitutional government in America: that the power of the sword is of, by, and for the people.[37]

His Populist platform concluded: "Resolved, That we inscribe on our banner, 'Down with monopolies and millionaire control! Up with the rights of man and the masses!' And under this banner we march to the polls and to victory."[38]

So how did the man who was Republican Chairman of the U.S. Senate Judiciary Committee in 1864 end up exhorting the Populist masses in victory in 1894? To answer that question, we need to

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32. Presser v. Illinois, 116 U.S. 252, 253–54 (1886); Dunne v. People, 94 Ill. 120, 123 (1879); *see also infra* notes 506–49 and accompanying text.

33. *See infra* notes 550–605 and accompanying text.

34. *See id.*

35. *See infra* notes 616–17, 621–39 and accompanying text.

36. *See infra* note 622 and accompanying text.

37. *Cf.* President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) ("that government of the people, by the people, for the people, shall not perish from the earth").

38. *See infra* note 623 and accompanying text.

examine the abiding principles of Trumbull's life. So let us begin at the beginning.

## II. LAWYER, LEGISLATOR, AND JUDGE

Lyman Trumbull was born in Colchester, Connecticut, on October 12, 1813, in a large and loving family.[39] The extended family was illustrious but not wealthy; among the extended relatives in various generations were three Governors of Connecticut, as well as the painter John Trumbull.[40] Public service—through the practice of law, judicial office, and political office—was an established idea among the Trumbulls of Connecticut.

Lyman Trumbull received a superb education at Bacon Academy, but his family could not afford to send him to Yale.[41] So like many young men of the time, Trumbull first made his living as a school teacher.[42] He started in Connecticut, and then moved to Georgia for a higher-paying job.[43] There, he cast his first vote, in support of the successful presidential campaign of Democrat Martin Van Buren, Andrew Jackson's Vice President.[44] Trumbull was an excellent and well-liked teacher, but he had broader ambitions.[45]

He began reading law under Superior Court Judge Hiram Warner.[46] Later, when Georgia created a state Supreme Court in 1845, Warner would become one of the three justices.[47] In that capacity, he joined a unanimous decision striking down a ban on handguns and on open carry of handguns.[48] Trumbull's legal career would last until his death in

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39. KRUG, *supra* note 10, at 19–21.

40. *Id*. at 19; ROSKE, *supra* note 10, at 1; WHITE, *supra* note 9, at 1–2. Among the Governors was Jonathan Trumbull, who served in the Connecticut government from 1769–1784 as assemblyman, county judge, chief justice, and governor. KRUG, *supra* note 10, at 20. Governor Trumbull's son, John Trumbull (1756–1843), was renowned for his portraits of leading men and women of the Revolution and the Early Republic, for his scenes of the War of Independence, and for his iconic painting of the signing of the Declaration of Independence. *Id*.

41. KRUG, *supra* note 10, at 22.

42. *Id*.

43. *Id*. at 22–23.

44. ROSKE, *supra* note 10, at 3. Van Buren won the 1836 election, but was defeated for re-election in 1840. In 1848, he ran as the nominee of the Free Soil Party, which opposed expansion of slavery into the Territories. *See generally* JOHN NIVEN, MARTIN VAN BUREN: THE ROMANTIC AGE OF AMERICAN POLITICS (1983).

45. KRUG, *supra* note 10, at 23.

46. *Id*.; ROSKE, *supra* note 10, at 2; WHITE, *supra* note 9, at 5.

47. Prior to 1845, Georgia had no Supreme Court; errors in trial courts could only be redressed by asking for a new trial with a new jury. *The Supreme Court of Georgia History*, SUPREME COURT GA., http://www.gasupreme.us/history/ (last visited Apr. 21, 2016) (noting Justice Warner's service, first as an Associate Justice from 1845–1865 and then 1868–1872).

48. Nunn v. State, 1 Ga. 243 (1846).

1896.[49]

After admission to the Georgia bar, Trumbull moved to Illinois in March 1837.[50] He traveled on horseback with a friend on the "Cherokee Tract," a cattle and swine trail through the forests of Georgia, Tennessee, and Kentucky. Although he was carrying his life savings of a thousand dollars, he traveled unarmed.[51]

He began his Illinois legal career in the law office of then-U.S. Representative and former Illinois Governor John Reynolds, who was nicknamed the "Old Ranger."[52] Trumbull lived in Belleville, a town in St. Clair County, bordering the Mississippi River in southwestern Illinois.[53]

Trumbull won election to the Illinois House of Representatives in 1840 as a Democrat.[54] At age twenty-seven, he was the youngest member of the legislature.[55] He was quickly recognized as a formidable debater, for "[h]is style of speaking was devoid of ornament, but logical, clear-cut, and dignified, and it bore the stamp of sincerity. He had a well-furnished mind, and was never at a loss for his words. . . . [H]is manner toward his opponents was always that of a high-bred gentleman."[56]

The biggest issue of the Jackson presidency had been "the bank battle"—the difficult but ultimately successful attempt to stop renewal of the charter of the Second Bank of the United States. Thus, naturally, young Representative Trumbull opposed efforts to bail out the Illinois State Banks, which were in financial trouble partly because of their loans in support of a massive, failed statewide public works project.[57]

Legal immigrant aliens who had not yet become naturalized citizens of the United States were considered to be citizens of the State of Illinois. Thus, they could vote in state elections, but not federal elections. The immigrants were mostly German or Irish, and they

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49. *See infra* notes 625–26 and accompanying text.

50. KRUG, *supra* note 10, at 23–24.

51. WHITE, *supra* note 9, at 5.

52. *Id*. at 6.

53. Charles Dickens visited Belleville in 1842 and hated it, describing it as backwards and ramshackle. CHARLES DICKENS, AMERICAN NOTES FOR GENERAL CIRCULATION 122–27 (Carlisle, Mass., Applewood Books 1850).

54. KRUG *supra* note 10, at 28; ROSKE *supra* note 10, at 3–4.

55. ROSKE, *supra* note 10, at 4.

56. WHITE, *supra* note 9, at 10.

57. KRUG, *supra* note 10, at 32–33; ROSKE, *supra* note 10, at 4–5. Trumbull favored paying the interest on bank debts that had been contracted at the state's behest, but not on the ultra vires loans made by the banks. He opposed the banks' wishes to escape their contractual obligations to pay their debts in specie (gold or silver). KRUG, *supra* note 10, at 32–34.

overwhelmingly voted Democrat. Because the four-justice Illinois Supreme Court was dominated by Whigs, the Democrats were worried that the court might rule that immigrant voting violated the Illinois Constitution.[58] In order to prevent this from happening, Trumbull managed the passage of a bill to enlarge the Illinois Supreme Court from four to nine justices; he then succeeded in overriding the Governor's veto—quite an accomplishment for a young freshman, and the beginning of Trumbull's lifelong work in support of immigrants.

In Belleville (the largest town in Illinois south of Springfield), and in the surrounding St. Clair County, Trumbull had become friends with many German immigrants.[59] The number of Germans in and around Belleville would grow significantly in 1849–1850, with many well-educated and liberty-loving refugees fleeing Germany after a failed attempt at democratic revolution.[60] By 1850, of the 30,000 German immigrants in Illinois, 18,000 lived in St. Clair County.[61]

Trumbull also sponsored successful legislation to allow any free black in Illinois to register with a county clerk.[62] Registration would be prima facie proof that the person was legally free.[63] This provided protection from slave catchers, who often abducted free blacks by claiming that they were runaway slaves.[64]

Representative Trumbull must have made quite an impression in Springfield. At the end of the legislative session, the Governor appointed Trumbull as Illinois Secretary of State.[65] But after a new Governor succeeded, policy differences on banks and other issues mounted, and Trumbull was asked to resign in 1843.[66] He then unsuccessfully ran for Governor and for the U.S. House in 1846.[67]

Like most lawyers of the time who were also elected officials, Trumbull continued to maintain his law practice. Based on the many

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58. KRUG, *supra* note 10, at 33–34.

59. *Id*. at 25–26.

60. *Id*.

61. WHITE, *supra* note 9, at 38.

62. *Id*.

63. LAWS OF THE STATE OF ILLINOIS, PASSED BY THE TWELFTH GENERAL ASSEMBLY 189–90 (Springfield, Ill., WM. Walters 1841); ROSKE, *supra* note 10, at 5.

64. NORMAN DWIGHT HARRIS, THE HISTORY OF NEGRO SERVITUDE IN ILLINOIS AND OF THE SLAVERY AGITATION IN THAT STATE 1719–1864, at 101, 109–10 (1904).

65. KRUG, *supra* note 10, at 34; ROSKE, *supra* note 10, at 6; WHITE, *supra* note 9, at 10–11. There was a vacancy because the previous Secretary of State, Stephen Douglas, had resigned in order to take one of the five new seats that Trumbull had created for the Illinois Supreme Court. ROSKE, *supra* note 10, at 5–6.

66. KRUG, *supra* note 10, at 37–40; ROSKE, *supra* note 10, at 7; WHITE, *supra* note 9, at 11.

67. KRUG, *supra* note 10, at 51–52.

instances in which Trumbull's name appears as a lawyer in reported cases of the Illinois Supreme Court in the 1840s, his legal practice consisted primarily of property and contract disputes, along with some tort and criminal defense work.[68] From 1839–1848, he argued eighty-seven cases in the Illinois Supreme Court (ten percent of the Court's entire docket in that period), and won fifty-one.[69] For little or no remuneration, he also represented black people in Illinois who were forced into involuntary servitude.[70] In that capacity, he brought about the end of legal slavery in Illinois.

### *A. Trumbull's Major Anti-Slavery Cases*

#### 1. Slavery in Illinois

In 1787, the Congress of the Confederation (the U.S. Congress of the Articles of Confederation) enacted the Northwest Ordinance, organizing the Territories of Illinois, Indiana, Ohio, Michigan, and Wisconsin. The Northwest Ordinance forbade slavery in the new territories: "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes whereof the party shall have been duly convicted."[71]

However, slavery had existed in Illinois from the early days of French settlement, starting around 1718.[72] Slavery continued to exist there after England took control of Illinois, having won the French and Indian war of 1756–1763.[73] During the American Revolution, Virginia wrested Illinois from England, and then ceded Illinois to the U.S.

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68. *See, e.g.*, People *ex rel*. Janney v. Miss. & Atl. R.R. Co., 14 Ill. 440 (1853); Rigg v. Cook, 9 Ill. (4 Gilm.) 336 (1847); Anderson v. Semple, 7 Ill. (2 Gilm.) 455 (1845); Swiggart v. Harber, 5 Ill. (4 Scam.) 364 (1843); Fournier v. Faggott, 4 Ill. (3 Scam.) 347 (1842); Delahay v. Clement, 4 Ill. (3 Scam.) 201 (1841).

69. ROSKE, *supra* note 10, at 13.

70. HARRIS, *supra* note 64, at 123.

71. Ordinance of 1787: The Northwest Territorial Government, at art. VI, *reprinted in* 1 U.S.C. at LV (2012). The article also contained a fugitive slave provision: "Provided always, that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original states, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." *Id*. For the enormous influence of the Northwest Ordinance in American political thought, and its continuing significance as a major work of the Founding Era, see Matthew J. Hegreness, Note, *An Organic Law Theory of the Fourteenth Amendment: The Northwest Ordinance as the Source of Rights, Privileges, and Immunities*, 120 YALE L.J. 1820 (2011). *See also* Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995).

72. HARRIS, *supra* note 64, at 1–2; WHITE, *supra* note 9, at 23.

73. Treaty of Paris 1763, Feb. 10, 1763, http://avalon.law.yale.edu/18th_century/paris763.asp; HARRIS, *supra* note 64, at 4–5.

government in 1784.[74]

Soon after the organization of the Illinois Territory under the Northwest Ordinance, Governor St. Clair announced his interpretation that the Northwest Ordinance banned the introduction of new slaves, but did not emancipate slaves already present in Illinois.[75] When Illinois achieved statehood in 1818, its new constitution outlawed slavery "hereafter."[76] The descendants of the French slaves, however, continued to be held as slaves.[77]

Slavery also existed in Illinois under the sham of indentured servitude.[78] There was a long tradition of indentured servants in America. For example, an Englishman who wished to settle in America might sign an indenture contract to work as a servant for someone else for seven years, in exchange for the master paying for the servant's voyage to America.[79] Signing an indentured service contract was legal everywhere in America, and not controversial. However, when settlers from southern states arrived in Illinois, they would bring their slaves with them.[80] The slaves would be coerced into signing "indentured servant" contracts for terms of several decades.[81] If the slave did not sign the "contract," the slave would likely be sold back into formal slavery in the nearby slave states.[82] On top of this, kidnappings of free blacks by slave traders were common, and law enforcement did little to thwart them. Any black person who entered Illinois (even as a legally free migrant), had to sign a contract to be an indentured servant—or else be subject to arrest, and sale into service for a one-year term.[83]

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74. *The Virginia Cession*, IN.GOV, http://www.in.gov/history/2898.htm (last visited Apr. 21, 2016) (detailing the completion of the Virginia Deed of Cession on March 1, 1784).

75. HARRIS, *supra* note 64, at 6.

76. ILL. CONST. of 1818, art. VI, § 1, https://archive.org/details/constitutionofst00inilli.

77. *See* HARRIS, *supra* note 64, at 116–17 (noting the much later court decision declaring that descendants of French slaves cannot be held in slavery); *see also* Jarrot v. Jarrot, 7 Ill. (2 Gilm.) 1 (1845) (concluding that the descendants of French settlers cannot be slaves in Illinois).

78. HARRIS, *supra* note 64, at 26, 28; *see also* Sarah v. Borders, 5 Ill. (4 Scam.) 341, 342 (1843) (holding that indentured servitude is valid in the particular facts of the case).

79. *See, e.g.*, William Miller, *The Effects of the American Revolution on Indentured Servitude*, 7 PA. HIST. 131, 132 (1940) (noting that the distinctions between the various types of servants disappeared when an indentured servant landed in America). The term "indenture" comes from the same root as the word "dentist." Contracts were sometimes cut in half with jagged lines; each party to the contract would retain one of the two halves. The jagged cuts looked like teeth; hence "indenture."

80. HARRIS, *supra* note 64, at 11.

81. *Id.* at 12.

82. *Id.* at 11–15; WHITE, *supra* note 9, at 24–25. Slaves under the age of fifteen who were brought into Illinois were simply held as slaves or servants without consent, until the age of thirty (males) or twenty-eight (females). HARRIS, *supra* note 64, at 8.

83. KRUG, *supra* note 10, at 59–60.

Trumbull's first appearance on the political stage came soon after he arrived in Illinois in 1837.[84] He began giving anti-slavery speeches in order to collect signatures for a petition to Congress to prohibit the interstate slave trade and to abolish slavery altogether in the District of Columbia.[85] These speeches were not always popular. A young man named John M. Palmer, who would later become a Union General and then Governor of Illinois, recalled an episode in late 1837 in the town of Griggsville, in front of a hotel: there were "a number of persons kicking a man by the name of Trumbull."[86] Trumbull had given an anti-slavery speech in town earlier that day.[87]

What happened to Trumbull was mild compared to what happened to Elijah Lovejoy, publisher of an anti-slavery newspaper in the nearby town of Alton. Lovejoy's printing press was twice destroyed by anti-abolition mobs.[88] Under constant threat of attack, Lovejoy was guarded by a group of armed friends.[89] One evening in November, a mob attacked Lovejoy's office, where Lovejoy and about twenty armed friends were locked inside.[90] The attackers were initially repelled, but they set the building on fire, and when Lovejoy stepped outside with his pistol, he was fatally shot.[91] Trumbull wrote to his father in Connecticut that he gladly would have joined the men defending Lovejoy.[92]

Trumbull thought that the Illinois Constitution and the Northwest Ordinance meant what they said: that no person in Illinois could be a slave.[93] He "told the negroes repeatedly that they were free, urged them to leave their masters, and fought their cases in the lower courts time

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84. *Id*. at 62.

85. *Id*.

86. *Id*.

87. *Id*.

88. MERTON L. DILLON, ELIJAH P. LOVEJOY, ABOLITIONIST EDITOR 90, 113 (1961); HARRIS, *supra* note 64, at 68–98; HENRY TANNER, THE MARTYRDOM OF LOVEJOY: AN ACCOUNT OF THE LIFE, TRIALS, AND PERILS OF REV. ELIJAH P. LOVEJOY 87 (Chicago, Fergus Printing Co. 1881); *see* JOSEPH C. LOVEJOY & OWEN LOVEJOY, MEMOIR OF THE REV. ELIJAH P. LOVEJOY 172–73, 181 (Books For Libraries Press 1970) (1838) (referencing the first mob and the violence that ensued).

89. DILLON, *supra* note 88, at 159; HARRIS, *supra* note 64, at 68–98; LOVEJOY & LOVEJOY, *supra* note 88, at 282–83; TANNER, *supra* note 88, at 148–49.

90. DILLON, *supra* note 88, at 169–71; HARRIS, *supra* note 64, at 68–98; LOVEJOY & LOVEJOY, *supra* note 88, at 284–89; TANNER, *supra* note 88, at 149–52.

91. DILLON, *supra* note 88, at 169–71; HARRIS, *supra* note 64, at 68–98; LOVEJOY & LOVEJOY, *supra* note 88, at 289–91; TANNER, *supra* note 88, at 150–51.

92. KRUG, *supra* note 10, at 61–62.

93. *See* ILL. CONST. of 1818, art VI, § 1; Jarrot v. Jarrot, 7 Ill. (2 Gilm.) 1, 1–2 (1845) (noting Trumbull's arguments); Sarah v. Borders, 5 Ill. (4 Scam.) 341, 345 (1843) (noting Trumbull's argument).

and time again."[94] The 1906 book *History of Negro Servitude in Illinois* calls Trumbull the "Chief" of the Illinois lawyers whose

> name should be written large in antislavery annals. He was a lawyer of rare intellectual endowments, and of great ability. He had few equals before the bar in his day. In politics he was an old-time Democrat, with no leanings toward abolitionism, but possessing an honest desire to see justice done the negro in Illinois. It was a thankless task in those days of prejudice and bitter partisan feeling to assume the role of defender of the indentured slaves. It was not often unattended with great risk to one's person, as well as to one's reputation and business. But Trumbull did not hesitate to undertake the task, thankless, discouraging, unremunerative as it was . . . .[95]

### 2. *Kinney v. Cook*

Trumbull's first Illinois Supreme Court case on slavery was *Kinney v. Cook*, in 1841.[96] Represented by Trumbull, Thomas Cook sued William Kinney for the value of service provided. Kinney had held Cook as a slave. At trial Kinney was unable to produce any evidence that Cook was legally a slave. Nor could Cook produce evidence that Cook was not a slave. The court ruled in favor of Trumbull's client, Cook, because "the fundamental principles of evidence, which requires him, who asserts a right, to produce the evidenee [sic] upon which he seeks to maintain his claim."[97] Kinney had no evidence to prove that he had a right to Cook's unpaid service.

Trumbull returned in the December 1843 term of the Illinois Supreme Court representing clients in four anti-slavery cases.

### 3. *Sarah v. Borders*

The hardest case, even for a skilled lawyer, was representing Sarah Borders. She had escaped from slavery in Randolph County (southern Illinois) and made it all the way to Peoria County, in the northern half of the state.[98] There she was captured.[99] The Justice of the Peace ruled that she was free, the county court reversed, and Trumbull brought the

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94. HARRIS, *supra* note 64, at 122.

95. HARRIS, *supra* note 64, at 123. The author was a political science professor at Northwestern University. Kenneth Janda, Presentation at Northwestern Department INPuT (May 29, 2012), http://www.polisci.northwestern.edu/documents/about/century-of-polisci.pdf.

96. Kinney v. Cook, 4 Ill. (3 Scam.) 232 (1841).

97. *Id.* at 234. In other words, the law presumes that no person has a right to the labor of another person, unless there is evidence of such right. Kinney claimed that he had a right to Cook's labor, but Kinney produced no evidence in support of his alleged right.

98. HARRIS, *supra* note 64, at 106.

99. *Id.*

case to the state supreme court.[100]

The decision of the Illinois Supreme Court began:

> THIS was an action of *trespass vi et armis*, brought by Sarah, a woman of color, to test her right to freedom. The declaration is in the usual form, and contains two counts. The first charges the defendant with having beat and ill treated the plaintiff; and the second, in addition, contains a charge of false imprisonment.[101]

The case is captioned "SARAH, alias SARAH BORDERS, a woman of color, appellant, v. ANDREW BORDERS, appellee."[102] As a slave, Sarah had no family name, so for legal purposes she had to adopt the name of her owner.

The Illinois Supreme Court agreed with Lyman Trumbull and Sarah Borders that the Northwest Ordinance, the 1818 Illinois Constitution, and the Enabling Act by which Congress admitted Illinois as a State had all outlawed slavery in Illinois.[103] But the Court explained that the (quasi-slavery) indenture under which Sarah was held (beginning in 1815) had never been construed as slavery by the Illinois courts or by practice.[104]

A concurring opinion by Justice Jesse Burgess Thomas conceded that some indentures were void as conflicting with the Northwest Ordinance, but said that after Illinois became a state, it was no longer bound by the 1787 statute that had organized the territory.[105]

Trumbull had also argued that even if Sarah's illegal indenture in 1815 had been made legally valid after statehood in 1818, specific performance could not be required after the indenture had been assigned to another master.[106] "The ingenuity of the argument urged by the counsel in support of this position is equaled only by its unsoundness," retorted Justice Thomas; contracts were assignable.[107]

### 4. *Chambers v. People*

Trumbull also represented the man who had been criminally convicted of harboring Sarah after she had escaped from slavery under

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100. WHITE, *supra* note 9, at 28–29.

101. Sarah v. Borders, 5 Ill. (4 Scam.) 341, 342 (1843).

102. *Id.* at 341. The original reporter is *Scammon's Illinois Reports*. The case also involved her three children, who had run away with her. HARRIS, *supra* note 64, at 105–08; ROSKE, *supra* note 10, at 9–10.

103. *Borders*, 5 Ill. (4 Scam.) at 345.

104. *Id.* at 345–46.

105. *Id.* at 346–49 (Thomas, J., concurring).

106. *Id.* at 349.

107. *Id.* at 350.

Andrew Borders.[108] Trumbull argued that "an indentured servant" as practiced in Illinois "is but another name for slavery."[109] Because the Illinois Constitution prohibited slavery, the defendant could not be indicted "for harboring a description of person, that by the [Northwest] ordinance and [Illinois] constitution cannot exist."[110] Besides that, there was insufficient evidence to support the validity of Sarah's 1815 indenture for a term of forty years, or of the later assignment of that indenture.[111]

Trumbull lost on the broad argument, but won a reversal and remand on the grounds of insufficient evidence for proof of the legal registration of the indenture contract.[112] A concurrence stated that the indictment was defective for having failed to allege that the defendant did in fact "know that the negro girl was a slave."[113]

Another concurrence took up the mens rea theme.[114] The absence of an express scienter requirement in the statute rendered it defective; it made sheltering a black person a strict liability offense in case the person turned out to be a slave or indentured servant.[115] The legislature could not constitutionally impose liability without knowledge for a person "to extend the most common offices of humanity to that unfortunate class of mankind, to whom God has given a skin colored differently from ours."[116] A strict liability statute would make it "illegal to receive such persons into our houses, although they were perishing in the streets, with hunger, cold, or sickness."[117]

### 5. *Williams v. Jarrot*

Trumbull's third anti-slavery case of the December 1843 term was *Henry Williams v. Vital Jarrot*.[118] Henry Williams had put an "X" mark on an 1814 indenture contract, to serve for eighty years, and thereafter receive fifty dollars.[119] He brought a tort suit for what we would today

108. Chambers v. People, 5 Ill. (4 Scam.) 351, 351–52 (1843).
109. *Id.* at 352.
110. *Id.*
111. *Id.* at 353.
112. *Id.* at 355–56.
113. *Id.* at 356 (Wilson, J., concurring). The majority thought it sufficient for the indictment to simply quote the full language of the statute. *Id.* at 354–55 (majority opinion).
114. *Id.* at 357–60 (Lockwood, J., concurring).
115. *Id.* at 357–59.
116. *Id.* at 359.
117. *Id.*
118. Williams v. Jarrot, 6 Ill. (1 Gilm.) 120 (1844).
119. *Id.* at 122–23.

call battery, but was styled then as "*trespass vi et armis*."[120] The issue was the physical abuse he suffered when he was captured after having attempted to run away.[121] He lost in the trial court, but Trumbull won a reversal and remand, on the grounds that parol evidence had been improperly admitted regarding the details of the assignment of the indenture contract.[122]

### 6. *Jarrot v. Jarrot*

The fourth and most important of Trumbull's anti-slavery cases in the December 1843 term was *Jarrot v. Jarrot*.[123] This case was put over for rehearing, and was announced in 1845.[124]

Since 1790, the common understanding of the 1787 Northwest Ordinance had been that it did not apply to slaves whom the French settlers held in 1787, nor did it apply to the descendants of those slaves.[125] The anti-slavery clause of the Illinois Constitution obliquely referenced this understanding, that "[n]either slavery nor involuntary servitude shall *hereafter* be introduced into this state."[126]

Julia Beauvais Jarrot was born in 1780, daughter of Vital Jarrot (defendant in the above case brought by the indentured Henry Williams) and of Felicite (née Beauvais) Jarrot.[127] Besides owning slaves acquired by (involuntary) indenture, such as Henry Williams, the Jarrot family also owned "French slaves"—that is, the Jarrot ancestors had been French settlers of Illinois, and the family continued to own descendants of their slaves from the time when Illinois was a French colony.[128]

Julia Jarrot owned Joseph Jarrot, the latter being the grandchild of a Jarrot family French slave (Angelique) who had been held in Illinois in 1787.[129] Joseph sued Julia for wages owed, but the trial judge instructed the jury to rule in favor of Julia Jarrot if the jury determined

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120. *Trespass vi et armis* means trespass "with force and arms." BLACK'S LAW DICTIONARY (10th ed. 2014).

121. *Williams*, 6 Ill. (1 Gilm.) at 123.

122. *Id.*

123. 7 Ill. (2 Gilm.) 1 (1845).

124. *Id.*

125. Newton N. Newborn, *Judicial Decision Making and the End of Slavery in Illinois*, 98 J. ILL. ST. HIST. SOC'Y 7, 8 (2005).

126. ILL. CONST. of 1818, art. VI, § 1 (emphasis added).

127. GEORGIA L. OSBORNE, BRIEF BIOGRAPHIES OF THE FIGURINES ON DISPLAY IN THE ILLINOIS STATE HISTORICAL LIBRARY 20 (1932), http://archive.org/stream/briefbiographies00osbo/briefbiographies00osbo_djvu.txt.

128. *Jarrot*, 7 Ill. (2 Gilm.) at 13 (Young, J., concurring).

129. *Id.* at 5 (majority opinion).

that Joseph was a descendant of Angelique.[130] The jury so found.[131] Trumbull took the case on appeal, pro bono.[132]

On rehearing, Trumbull's anti-slavery arguments were more sophisticated than in the *Sarah* case from the previous year.[133] Rather than relying directly on the Northwest Ordinance and the Illinois Constitution per se, he built a stronger argument with more extensive and more adroit use of case law from various states regarding those fundamental enactments.[134] As in the previous year, he also raised broad interpretive principles, such as Blackstone's rule that "[e]very reasonable construction is to be made in favor of liberty."[135]

The majority opinion[136] for the Illinois Supreme Court was written by Justice Walter B. Scates—the same justice who had written the majority opinion against the "indentured servant" Sarah the previous year.[137] The court ruled that anyone born in Illinois after 1787 could not be a slave.[138] The Northwest Ordinance mandated it, and the Illinois Constitution of 1818 confirmed it.[139] Although Virginia's 1784 cession of Illinois to United States had reserved the rights of the French inhabitants, the cession did not thwart Congress's 1787 prohibition of slavery in Illinois.[140] Significantly, the courts of other states were in accord that persons born in the Northwest Territories after 1787 could not be slaves.[141]

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130. *Id*.

131. *Id*.

132. KRUG, *supra* note 10, at 63–64.

133. *See Jarrot*, 7 Ill. (2 Gilm.) at 2–4 (detailing Trumbull's arguments).

134. *Id*. at 7–11.

135. *Id*. at 2 (citing 2 WILLIAM BLACKSTONE, COMMENTARIES 97).

136. *Id*. at 4–12. Three justices dissented without opinion. *Id*. at 32.

137. Scates was one of the five new justices who had joined the court thanks to Trumbull's court expansion bill in 1841. Scates resigned from the Court in 1847. After Trumbull resigned from the Illinois Supreme Court in 1853, Scates took his place and served until 1857. WHITE, *supra* note 9, at 21; *see also Walter B. Scates*, ILL. COURTS, http://www.illinoiscourts.gov/SupremeCourt/JusticeArchive/Bio_Scates.asp (last visited Apr. 21, 2016). In 1872, Scates urged Trumbull to run for President, to "save the country from corruption, pillage, high tax, class legislation, and central despotism." WHITE, *supra* note 9, at 375.

138. *Jarrot*, 7 Ill. (2 Gilm.) at 7–11.

139. *Id*. at 3–4.

140. *Id*. at 7–11.

141. HARRIS, *supra* note 64, at 117–18; *see also* State v. Lasselle, 1 Blackf. 60, 62 (Ind. 1820) (finding that, based on the Northwest Ordinance and the constitution of Indiana adopted in 1816, a slave that had been purchased before 1787 and thereafter moved to Indiana was entitled to her freedom); Merry v. Chexnaider, 8 Mart. (n.s.) 699, 699 (La. 1830) (noting that any person "born in the north western territory" since 1787 is free); Harry v. Decker, 1 Miss. (1 Walker) 36, 42 (Miss. 1818) (noting an instance where a Virginian and three slaves moved to Indiana in 1784 and because of the Northwest Ordinance, they became free in 1787—"Slavery is condemned by reason and the laws of nature. It exists and can only exist, through municipal regulations, and in

Justice Scates was not done yet. He stated: "[I]t affords me sincere pleasure, when my duty under the Constitution and laws requires me to break the fetters of the slave, and declare the captive free."[142] Whenever the construction of the law was doubtful, "[t]he presumption is in favor of liberty."[143] The rule that doubt should be construed in favor of a criminal defendant applied all the more strongly in the case of doubt in favor of liberating a slave. Judgment was entered for the plaintiff, in the agreed sum of the amount owed, namely five dollars.[144] Trumbull's win in *Jarrot v. Jarrot* ended what was then called "the old French slavery."[145]

### *B. Illinois Supreme Court Justice*

A new Illinois Constitution in 1848 reduced the number of Illinois Supreme Court justices from nine to three, with each one of the three to be elected from a different division. Trumbull ran for the southern Illinois seat in 1848, and won.[146] Under the reorganization, one of the newly elected justices would serve a full nine-year term, one would serve for six years, and one would serve for three. They drew lots, and Trumbull ended up with the three-year term.[147]

He was easily re-elected to a nine-year term in 1852.[148] But he resigned in 1853, finding the life of a justice too cloistered and the pay too low.[149] He also disliked riding circuit, which separated him from his family.[150] In addition, he wanted to play a more active role in public

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matters of doubt, is it not an unquestioned rule, that courts must lean 'in favorem vitae et libertatis.'"); Merry v. Tiffen, 1 Mo. 725, 725–26 (Mo. 1827) (noting that when a French slave bore a child in Illinois after 1787, the child was free); Winny v. Whitesides, 1 Mo. 472, 475–76 (Mo. 1824) (noting that when a North Carolina master moved to Illinois and took a slave with him, the slave automatically become free).

142. *Jarrot*, 7 Ill. (2 Gilm.) at 11.

143. *Id.* (citing Bailey v. Cromwell, 4 Ill. (3 Scam.) 71, 73 (1841) (holding that because there was no indenture contract provided as evidence, the individual must be free; Abraham Lincoln won the case)).

144. The stipulated amount must have been chosen for some advantage in litigation. When masters rented their servants to someone else, the typical price for a year of "service" by a black person in Illinois was one hundred dollars. HARRIS, *supra* note 64, at 14.

145. Andrew M. Cooperman, *St. Louis Legal Landmarks*, ST. LOUIS MAG. (Jan. 20, 2012, 4:41 PM), http://www.stlmag.com/St-Louis-Legal-Landmarks/.

146. ROSKE, *supra* note 10, at 14; WHITE, *supra* note 9, at 20.

147. ROSKE, *supra* note 10, at 14; WHITE, *supra* note 9, at 20. Among the opinions written by Judge Trumbull was the upholding of a state statute requiring railroads to have warning bells and whistles. He rejected the argument that the statute could not be applied to a railroad whose corporate charter, which predated the statute, did not address the provision of bells and whistles. Galena & Chi. Union R.R. Co. v. Loomis, 13 Ill. 548, 549–51 (1852).

148. KRUG, *supra* note 10, at 76; ROSKE, *supra* note 10, at 15.

149. KRUG, *supra* note 10, at 76–77; ROSKE, *supra* note 10, at 16.

150. KRUG, *supra* note 10, at 76–77; ROSKE, *supra* note 10, at 16.

affairs, especially anti-slavery.[151]

## III. LYMAN TRUMBULL'S SENATE CAREER

In 1854, Lyman Trumbull won his first of three terms as a U.S. Senator from Illinois. He would become Chairman of the Senate Judiciary Committee. During the Civil War, he wrote the first legislation that freed slaves and the first legislation that armed ex-slaves. He was also the most powerful senatorial opponent of President Lincoln's abuse of civil liberties during wartime, such as the unilateral suspension of habeas corpus.

Trumbull authored the Thirteenth Amendment, abolishing slavery. Then he wrote the first major laws to try to ensure that the freedmen would be truly free, not just nominally so. These laws included the Freedmen's Bureau Bill and the Civil Rights Act, both of which protected Second Amendment rights.

Trumbull had been one of the founders of the Republican party in Illinois in 1854, which at the time was an idealistic anti-slavery party dedicated to the principles of the Declaration of Independence. But in the late 1860s and early 1870s, Trumbull became disillusioned with the party corruption of Congress and the executive branch. Consequently, Trumbull broke with the mainstream of his party in order to champion reforms of the federal workforce.

### *A. Anti-Nebraska Democratic Senator, Then a Republican.*

In 1854, Illinois U.S. Senator Stephen Douglas was Chairman on the Senate Committee on Territories.[152] Douglas was searching for a means to defuse the intense sectional conflict over slavery, especially regarding the spread of slavery into what would become the future states of the Midwest and the Rocky Mountains.[153]

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151. KRUG, *supra* note 10, at 76–77; ROSKE, *supra* note 10, at 16.

152. *See generally* ROBERT W. JOHANNSEN, STEPHEN A. DOUGLAS (Illini Books ed. 1997) (1973).

153. Trumbull's biographer and friend Horace White described Douglas:

> In the Democratic party he had forged to the front by virtue of boldness in leadership, untiring industry, boundless ambition, and self-confidence, and horsepower. He had a large head surmounted by an abundant mane, which gave him the appearance of a lion prepared to roar or to crush his prey, and not seldom the resemblance was confirmed when he opened his mouth on the hustings or in the Senate Chamber. As stump orator, senatorial debater, and party manager he never had a superior in this country. Added to these gifts, he had a very attractive personality and a wonderful gift for divining and anticipating the drift of public opinion. The one thing lacking to make him a man "not for an age but for all time," was a moral substratum. He was essentially an opportunist. Although his private life was unstained, he had no conception of morals in politics, and this defect was his undoing as a statesman.

The Missouri Compromise of 1820 had admitted Missouri to the Union as a slave state, with the proviso that, except in Missouri, slavery was prohibited north of the thirty-sixth parallel.[154] For many Americans, the Compromise had a revered status, second only to the Constitution itself. Senator Douglas, however, authored the 1854 Kansas-Nebraska Act, which provided that the permissibility of slavery in the future states of Kansas and Nebraska (both located north of the Missouri Compromise line) would be determined by a vote of the settlers.[155]

Pro- and anti-slavery settlers poured into Kansas, determined to win the state for their side. The slavery side had the advantage, with Missouri next door. The "Border Ruffians" or "Jayhawks" from Missouri frequently used violence against the anti-slavery side.[156] In New England, where anti-slavery sentiment was strongest, "Emigrant Aid Societies" provided assistance to anti-slavery settlers.[157] They sent shipments of supplies, including firearms concealed under stacks of Bibles.[158] Trumbull spoke in favor of the activities of the Emigrant Aid Societies.[159]

Like many northern Democrats, Trumbull was outraged by the Kansas-Nebraska Act.[160] In Illinois, the Anti-Nebraska Democrats held their own caucuses and conventions, and nominated slates of candidates separate from the regular Democratic Party, which was still loyal to Senator Douglas.[161] Trumbull comfortably won election to the U.S. House in the 1854 election, running as an Anti-Nebraska Democrat.[162]

Until the early twentieth century, U.S. Senators in all states were elected by the state legislatures.[163] In January 1855, the Illinois

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WHITE, *supra* note 9, at 33.

154. The 36°30' north latitude line forms the boundary line for the Missouri Compromise.

155. The Kansas-Nebraska Act of 1854, ch. 59, 10 Stat. 277.

156. *See* JAY MONAGHAN, CIVIL WAR ON THE WESTERN BORDER: 1854–1865, at 57 (1955) (referring to Border Ruffians as an "army" and noting their use of artillery and violence).

157. David B. Kopel, *Beecher's Bibles*, *in* 1 GUNS IN AMERICAN SOCIETY: AN ENCYCLOPEDIA OF HISTORY, POLITICS, CULTURE, AND THE LAW 77, 77–78 (Gregg Lee Carter ed., 2d ed. 2012) (giving as an example of an Emigrant Aid Society, the Massachusetts Emigrant Aid Company, which smuggled firearms to anti-slavery settlers in Kansas).

158. *Id*.

159. KRUG, *supra* note 10, at 124.

160. *Id*.; ROSKE, *supra* note 10, at 20; WHITE, *supra* note 9, at 56.

161. KRUG, *supra* note 10, at 91.

162. ROSKE, *supra* note 10, at 22–23.

163. The first state to adopt direct election was Oregon in 1907. *Direct Election of Senators*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/Direct_Election_Senators.htm (last visited Apr. 21, 2016).

legislature convened to elect a Senator.[164] There were three major factions: the regular (pro-Douglas) Democrats, the Anti-Nebraska Democrats, and the Whigs. The favorite candidate of the third faction was Abraham Lincoln, who had previously served one term in the U.S. House, and several terms in the Illinois House, as a Whig.[165]

After half a dozen ballots, things developed exactly the way that Trumbull's supporters wanted. Although the legislature had more Whigs than Anti-Nebraska Democrats, Abraham Lincoln and the Whigs threw their support to Trumbull, as the only means of preventing the election of a pro-Douglas Democrat.[166] Abraham Lincoln apparently carried no grudge; he and Trumbull worked closely together thereafter.[167]

By 1856, Trumbull and Lincoln had both switched to a new political party, the Republicans.[168] The cornerstone Republican principle was opposition to the expansion of slavery in the Territories.[169] Trumbull worked hard to ensure that the new party would adopt none of the anti-immigrant nativism of the now-deceased Whig Party, or of the Know-Nothings (an anti-immigrant third party that had some successes in the middle of the decade).[170]

Democratic President James Buchanan generally sided with the pro-slavery forces in Kansas, and favored providing them with federal military support. The House disagreed, and passed an appropriations bill for the U.S. Army to forbid use of military to enforce the pro-slavery Kansas legislature's acts; but this appropriations rider was stripped in the Senate, notwithstanding the strenuous efforts of Senator Trumbull to preserve it.[171] He argued that "[t]he recent use of the army in Kansas" was a "usurpation" on behalf of a "slaveholding oligarchy whose chief object is the spread and perpetuation of negro slavery and the degradation of free white labor."[172]

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164. HARRIS, *supra* note 64, at 195–96; ROSKE, *supra* note 10, at 24.

165. HARRIS, *supra* note 64, at 195–96; ROSKE, *supra* note 10, at 24–26.

166. HARRIS, *supra* note 64, at 195–96; ROSKE, *supra* note 10, at 24–26. In 1855, Senator Douglas declined Senator Trumbull's invitation to debate, so some of Douglas's critics dubbed him "The Great Dodger." HARRIS, *supra* note 64, at 196 n.3.

167. ROSKE, *supra* note 10, at 26–27. In contrast, Lincoln's wife Mary Todd was furious, and broke off her long friendship with Trumbull's wife Jane. *Id*.

168. KRUG, *supra* note 10, at 119; WHITE, *supra* note 9, at 197–204, 219 (detailing the formation of the party in Illinois in the summer of 1856).

169. KRUG, *supra* note 10, at 119; ROSKE, *supra* note 10, at 26; WHITE, *supra* note 9, at 119.

170. ROSKE, *supra* note 10, at 52.

171. CONG. GLOBE, 34th Cong., 1st Sess. 1968–69, 2230–36 (1856); ROSKE, *supra* note 10, at 38–39.

172. WHITE, *supra* note 9, at 71 (citing Letter from Lyman Trumbull, to Professor J.B. Turner

Two years later, Trumbull launched a broader attack on militarism:

> Trumbull confirmed his opposition to foreign adventures, his devotion to economy in government, and his basic opposition to a large military establishment when he proposed a drastic fifty-percent cut in the Army and Navy of the United States. . . . [I]t revealed Trumbull's deep distrust of the military, which was to remain with him throughout his life. He thoroughly disliked the standing army and the West Point and Annapolis academies and wanted to rely, in time of war or insurrection, on a people's volunteer army.[173]

Anti-militarism would remain a major theme of Trumbull's work until the end of his days; it would be at the center of his legal cases in defense of labor and on behalf of the Second Amendment.

Another issue at the top of Trumbull's agenda was trying to ensure that free men could be free in practice, not just in theory, by having their own home, along with a farm to cultivate and support their family. In 1860, he shepherded a generous Homestead Bill through Congress, providing federal land in the West to families who would settle and cultivate it.[174] However, President Buchanan vetoed the bill.[175] During the Civil War, Trumbull urged that plantations be confiscated and given to freed slaves, so that they could enjoy practical independence.

Abraham Lincoln won the presidential election of November 6, 1860, and Trumbull was re-elected to the Senate by a very slender margin.[176]

### *B. The War of the Rebellion*

#### 1. The Corwin Amendment

The Deep South made good on its threat to secede if a Republican won the presidential election. South Carolina seceded in December, followed in January of 1861 by Mississippi, Florida, Alabama, Georgia, and Louisiana.[177] Trumbull, meanwhile, urged Illinois Governor Yates

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(Oct. 19, 1857)).

173. KRUG, *supra* note 10, at 153–54.

174. ROSKE, *supra* note 10, at 54.

175. *Id*. A major Homestead Act was enacted in 1862. HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL 35 (1986).

176. Because Senators were chosen by the state legislature, Trumbull's fate depended on the state legislative election. The Republicans had a majority in the state House, but the state Senate was closely contested. It was not until several days after the polls had closed, and the final election returns came in, that Trumbull learned that his brother-in-law, William Jayne, had won his state senate election by a margin of nine votes, thus providing a state senate majority to send Lyman Trumbull back to the U.S. Senate. ROSKE, *supra* note 10, at 60.

177. *See Dates of Secession*, U. GA. LIBR., http://www.libs.uga.edu/hargrett/selections/confed/dates.html (last updated Aug. 26, 2013) (noting the various dates of secession for thirteen states).

to raise volunteer companies to suppress the rebellion.[178]

Trying to hold the Union together, Trumbull affirmed the standard Republican position of supporting enforcement of the 1850 federal Fugitive Slave Law.[179] While the Republicans were founded on opposition of expansion of slavery into the Territories, most Republicans were not abolitionists, and they insisted that they had no intent to interfere with slavery in States where it existed. Acceptance of the Fugitive Slave Act was one of the ways they demonstrated this. Trumbull, however, maintained his staunch opposition to the provision of that 1850 statute, which required private citizens to assist federal marshals who were hunting for fugitive slaves.[180]

The provision that Trumbull objected to was the Fugitive Slave Act's statutory invocation of the ancient and still-thriving power of *posse comitatus*—the power of law enforcement to call upon the aid of all able-bodied men to aid in enforcement of the law; members of the *posse* were expected to supply their own arms.[181] From Anglo-Saxon times until the 1850 Fugitive Slave Act, the *posse comitatus* power had typically been invoked by the county sheriff, and *posse* duty was considered an uncontroversial duty of the citizen.[182]

The federal government did have *posse comitatus* power, pursuant to the Necessary and Proper Clause, as Alexander Hamilton had pointed out in Federalist 29.[183] Yet, until the Fugitive Slave Act of 1850, the federal *posse* power was rarely invoked.[184] Northerners detested being forced into the role of slave catchers, and considered it akin to being themselves degraded to the status of slaves.[185]

Texas left the Union in February 1861, and that same month there were desperate efforts to convince the Southern states to call off secession.[186] The mechanism was a proposed Thirteenth Amendment to

178. KRUG, *supra* note 10, at 178.

179. CONG. GLOBE, 36th Cong., 2d Sess. 312 (1861); KRUG, *supra* note 10, at 178.

180. CONG. GLOBE, 36th Cong., 2d Sess. 312 (1861); KRUG, *supra* note 10, at 178.

181. *See* David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761 (2015) (presenting the history and law of the *posse comitatus* and the office of sheriff from their earliest days to the present and describing how the past and present of the *posse comitatus* can be used in interpretation of the Second Amendment).

182. *Id*. at 772.

183. THE FEDERALIST NO. 29 (Alexander Hamilton).

184. Kopel, *supra* note 181, at 799.

185. *Id*. at 798–99.

186. *See* R. Alton Lee, *The Corwin Amendment in the Secession Crisis*, 70 OHIO HIST. Q. 1, 3 (1961) (noting the various attempts through conventions to solve the issues relating to the slavery dispute).

the Constitution.[187] Known as the "Corwin Amendment," it provided that the Constitution could never be amended to give Congress the power to interfere with slavery in the states where it currently existed.[188]

As the lame duck session of the old Congress drew to a close on March 2, 1861, Trumbull thundered against the proposed Amendment.[189] He declared that he would "never agree" to "making perpetual slavery anywhere. No, sir; no human being shall ever be made a slave by my vote."[190] To the southerners who were asking for some foundation to allow them to argue against disunion, he said: "The best political foundation ever laid by mortal man upon which to plant your foot is the Constitution. Take the old Constitution as your fathers made it, and go to the people on that . . . ."[191]

He likened the Southern threats to war to the threats of a highway robber. "You can always escape a fight by submission," but fighting was better than submission.[192] Besides, "you can often escape collision by being prepared to meet it. The moment the highwayman discovers your preparation and ability to meet him, he flees away."[193] Trumbull's arguments notwithstanding, both Houses of Congress passed the proposed Thirteenth Amendment, and it was sent to the states for ratification.[194]

The new Congress assembled on March 4, 1861, and Trumbull was elected Chairman of the Senate Judiciary Committee.[195] Events would quickly eliminate any possibility that the Corwin Amendment could avert war.

South Carolina attacked and captured Fort Sumter on April 12, 1861.[196] Northern outrage gave President Lincoln the political support he needed to issue an April 15 call to the states to provide their militias to suppress the rebellion. Lincoln's actions in turn spurred the secession of Virginia, Arkansas, Tennessee, and North Carolina in the

187. *Id*. at 3, 18–20.

188. President Lincoln endorsed the amendment in his first inaugural address on March 4, 1861.

189. Lyman Trumbull, Speech Against the Crittenden Compromise, Address Before the Senate (Mar. 2, 1861), *reprinted in* WHITE, *supra* note 9, at 123–38.

190. WHITE, *supra* note 9, at 132.

191. *Id*. at 134.

192. *Id*. at 136.

193. *Id*. at 137.

194. ROSKE, *supra* note 10, at 67.

195. KRUG, *supra* note 10, at 191; ROSKE, *supra* note 10, at 69.

196. *See* DAVID DETZER, ALLEGIANCE: FORT SUMTER, CHARLESTON, AND THE BEGINNING OF THE CIVIL WAR 270–76 (2001) (describing the first day of the Fort Sumter bombardment).

next several weeks.[197] Trumbull returned to Illinois in April to help Governor Yates draft emergency legislation.[198] Yates did call forth the Illinois militia, but there were not enough rifles and equipment.[199]

Throughout the next four years of the war, Trumbull was an ardent war hawk, insisting on the most forceful action possible to crush the rebellion.[200] As will be detailed below, Trumbull would have two major legislative projects while the war continued: first, to free as many slaves as possible in the seceded states, and to provide them with homesteads from the confiscated plantations of disloyal Confederates; second, to restrain President Lincoln's constitutional violations in the Union states, especially the suspension of habeas corpus.

### 2. Freeing Slaves

When Congress reconvened in July 1861, its only significant legislative accomplishment was the passage of Trumbull's Confiscation Act, which declared that any slave who was employed in military work against the U.S. government (e.g., as a servant in support of the Confederate military) was free.[201] President Lincoln, however, did little to enforce it. He was still trying to conciliate the Confederacy, and besides that, he knew that if he pushed too hard on slavery, the slave states that were still in the Union (Missouri, Kentucky, Maryland, and Delaware) might secede; the loss of any one of them might make victory in the war impossible.[202] To Trumbull's consternation, the Union army generally continued to return escaped slaves to their owners.[203] Even so, Trumbull's Confiscation Act was the first legislative step towards emancipation.[204]

Trumbull sponsored a Second Confiscation Act, which became law in July 1862.[205] This declared that anyone who participated in the rebellion forfeited all of their property, including slaves.[206] It authorized the enlistment of escaped slaves into the Union army.[207] The Second Confiscation Act was also underenforced by President Lincoln,

197. ROSKE, *supra* note 10, at 184.
198. KRUG, *supra* note 10, at 184–85; ROSKE, *supra* note 10, at 71.
199. KRUG, *supra* note 10, at 185.
200. *Id*. at 190; ROSKE, *supra* note 10, at 64.
201. Confiscation Act of 1861, ch. 60, 12 Stat. 319.
202. KRUG, *supra* note 10, at 197.
203. *Id*.
204. *Id*. at 194–95; ROSKE, *supra* note 10, at 76, 83–87; WHITE, *supra* note 9, at 168.
205. Confiscation Act of 1862, ch. 195, 12 Stat. 589.
206. *Id*.
207. *Id*.

except for the provision authorizing the creation of Negro regiments.[208] This was the first of Trumbull's acts in support of armed freedmen.

Trumbull's next step was to push legislation for dividing the plantations of Confederate leaders, and giving them to slaves as homesteads.[209] The plantation plan, however, ran into the constitutional objection that Article III, Section 3, provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[210] Thus, once the Confederate leader died, his plantation would have to revert back to his heirs.[211] Given this fact, Congress decided that plantation confiscation was not worth the trouble.[212]

### 3. Protecting Civil Liberties in Wartime

Trumbull had known Lincoln since they served together (in opposing parties) in the Illinois House of Representatives in 1841. They agreed sometimes, but not always, and Trumbull was not reticent about making his disagreements public. Lincoln maintained his equanimity about Trumbull, as he did about everything. After Trumbull had left a cordial but frank meeting with Lincoln at the White House, Lincoln's son Robert asked about the differences between the two men.[213] President Lincoln answered: "We agree perfectly, but we see things from a different point of view. I am in the White House looking down the [Pennsylvania] Avenue, and Trumbull's in the Senate looking up."[214]

Trumbull's greatest clashes with Lincoln were on civil liberties. "I am for suppressing this monstrous rebellion according to law, and in no other way," said Trumbull.[215] For Trumbull, every bill was subject to two tests: First, was it constitutional? Second, would it preserve the Union?[216]

In the Union states, there were many opponents of the war, also known as "Copperheads."[217] They wanted to make peace with the

208. Confiscation Act of 1862, ch. 195, § 11, 12 Stat. at 592 (authorizing the President to employ "persons of African descent" in suppressing the rebellion); KRUG, *supra* note 10, at 202–03, 215–16; WHITE, *supra* note 9, at 173–77.

209. ROSKE, *supra* note 10, at 104–05, 116–17, 121.

210. U.S. CONST. art. III, § 3, cl. 2.

211. ROSKE, *supra* note 10, at 104–05, 116–17, 121.

212. *Id*.

213. *Id*. at 114.

214. *Id*.

215. CONG. GLOBE, 37th Cong., 2d Sess. 18 (1861).

216. ROSKE, *supra* note 10, at 77.

217. JENNIFER L. WEBER, COPPERHEADS: THE RISE AND FALL OF LINCOLN'S OPPONENTS IN THE NORTH 1–3 (2006).

Confederate States of America. Most of the Copperheads were engaged in legitimate political dissent, but some of them undertook covert assistance to the Confederate military.[218]

In April 1861, President Lincoln suspended the writ of habeas corpus.[219] Some of the people who were imprisoned were accused of genuine offenses—such as John Merryman, who allegedly had burned bridges in Maryland to impede the passage of southbound federal troops.[220] But Secretary of State William Seward rounded up many Copperheads and imprisoned them without charges or trial—and with little distinction between the political dissenters and the active traitors.[221]

Article I, Section 9, of the Constitution declares: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[222] Because Article I deals with the structure and powers of Congress, many people inferred that only Congress has the power to suspend the writ of habeas corpus. That was what Supreme Court Chief Justice Roger Taney ruled in *Ex parte Merryman*, in which Taney was circuit-riding and sitting as a Circuit Court Judge.[223] Lincoln, however, ignored the court's order. When Congress reconvened on July 4, 1861, Lincoln sent them a message defending his actions.[224]

Trumbull was not impressed. He insisted that "[w]e are fighting for

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218. *Id*. at 2–7.

219. *Id*. at 31; *see also* BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS 1 (2011).

220. *Ex parte* Merryman, 17 F. Cas. 144, 147–48 (C.C.D. Md. 1861) (No. 9,487).

221. WEBER, *supra* note 217, at 92–93.

222. U.S. CONST. art. I, § 9, cl. 2.

223. *Merryman*, 17 F. Cas. at 148.

224. Lincoln wrote:

> To state the question more directly, Are all the laws *but one* to go unexecuted, and the Government itself go to pieces lest that one be violated? Even in such a case, would not the official oath be broken, if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it? But it was not believed that this question was presented. It was not believed that any law was violated. The provision of the Constitution that "the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it" is equivalent to a provision—is a provision—that such privilege may be suspended when, in cases of rebellion or invasion, the public safety *does* require it. It was decided that we have a case of rebellion and that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made.

President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), http://www.presidency.ucsb.edu/ws/?pid=69802; *see* WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 36–39 (1998) (discussing Lincoln's message to Congress).

the Government as our fathers made it. The Constitution is broad enough to put down this rebellion without any violations of it."[225] On July 31, 1861, he introduced legislation to stop Lincoln and Seward. Trumbull's bill called for Congress itself to vote to suspend habeas corpus, for Trumbull believed that Congress alone had such power.[226] The suspension of habeas corpus in Trumbull's bill was considerably narrower than what Lincoln and Seward were doing (essentially, rounding up people all over the country at will, and holding them indefinitely), and provided far more protections for due process.

It took until February 24, 1863, for Trumbull to get a habeas bill through Congress.[227] As enacted, the bill required that the military provide lists of detained persons in all areas where courts were functioning, and to release those persons if they were not indicted by the end of the court's term.[228] The reason that Trumbull could pass the bill in 1863 but not in 1861 was because of the Democratic gains in the November 1862 elections, which resulted in part from the Lincoln suspension of habeas corpus.[229] Congressional Republicans retreated from Lincoln's unpopular policy.[230]

Trumbull said he wanted to "provide for putting down [the] rebellion in a constitutional and legal manner."[231] His bill was "not to legalize arbitrary arrests; it [was] to make just and proper arrests constitutionally and legally."[232] He called the arrests based on Secretary of State Seward's orders "usurpations of power" and "precedents for the destruction of constitutional liberty."[233] "[T]o arrest a man in a peaceable portion of the country and imprison him indefinitely, is the very essence of despotism."[234]

Trumbull was active on other fronts against illegal arrests. In December 1861 he introduced a resolution demanding that Seward justify the Copperhead arrests.[235] "What are we coming to if arrests

225. WHITE, *supra* note 9, at 193.

226. Act of Mar. 3, 1863, ch. 81, 12 Stat. 755 ("relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases"); CONG. GLOBE, 37th Cong., 1st Sess. 364 (1861); KRUG, *supra* note 10, at 194.

227. CONG. GLOBE, 37th Cong., 3d Sess. 1208 (1863); KRUG, *supra* note 10, at 193.

228. KRUG, *supra* note 10, at 207. This clause would be the basis for the Supreme Court's 1866 decision in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 84–85 (1866). *See infra* Part III.E.

229. WHITE, *supra* note 9, at 192–200.

230. *Id*.

231. CONG. GLOBE, 37th Cong., 1st Sess. 337 (1861); KRUG, *supra* note 10, at 192–93.

232. CONG. GLOBE, 37th Cong., 3d Sess. 1187 (1863).

233. CONG. GLOBE, 37th Cong., 2d Sess. 1559 (1862); KRUG, *supra* note 10, at 205.

234. CONG. GLOBE, 37th Cong., 2d Sess. 91 (1861); KRUG, *supra* note 10, at 205.

235. ROSKE, *supra* note 10, at 101; *see also* CONG. GLOBE, 37th Cong., 2d Sess. 90 (1861)

may be made at the whim or the caprice of a cabinet minister?" he asked.[236] The answer was clear: "the foundations of tyranny."[237] Although the Senate rejected Trumbull's resolution, the political pressure he had created forced the release of many political prisoners in February 1862.[238]

In June 1863, Union General Ambrose Burnside, whose military district included Ohio and Illinois, suppressed the publication of a vehemently Copperhead newspaper, the *Chicago Times*.[239] He also forbade the circulation of the *New York World* within his district.[240] Trumbull immediately denounced the suppression of the newspapers; along with U.S. Representative Isaac Newton Arnold (R-Chicago),[241] he sent a telegram to President Lincoln, urging that Burnside's order be rescinded. Lincoln, who had initially supported Burnside's action, was persuaded by the Arnold-Trumbull telegram, and rescinded the order.[242]

### 4. Fighting Big Government

During the War, as during his entire senatorial career, Trumbull never had a long-term working relationship with any other senator, or long-term attachment to any faction within the Republican Party. He could be with the Radicals on one issue, with the Conservatives on the next.[243] One reason was Trumbull's independent temperament. Another reason was that he was still a Jacksonian Democrat, even though his formal party affiliation was Republican. While he had become a Republican because of the slavery issue, he retained the Jacksonian suspicion of "big government." Among the reasons that Jacksonians disliked big government was that they considered it to be usually corrupt, and when corrupt, corrupted by the powerful to the detriment of working people. This put him in tension with the many ex-Whigs (including Lincoln) who had joined the Republican Party; Whigs loved high taxes and spending. For example, the "American System" proposed by one of the

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(introducing the resolution relating to the arrests).

236. CONG. GLOBE, 37th Cong., 2d Sess. 91 (1861); ROSKE, *supra* note 10, at 81.

237. CONG. GLOBE, 37th Cong., 2d Sess. 91 (1861); ROSKE, *supra* note 10, at 82.

238. ROSKE, *supra* note 10, at 82.

239. KRUG, *supra* note 10, at 207–09; ROSKE, *supra* note 10, at 100–02; WHITE, *supra* note 9, at 206–09.

240. KRUG, *supra* note 10, at 207–09; ROSKE, *supra* note 10, at 100–02; WHITE, *supra* note 9, at 206–09.

241. *ARNOLD, Isaac Newton, (1815–1884)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000288 (last visited Apr. 21, 2016).

242. KRUG, *supra* note 10, at 207–09; ROSKE, *supra* note 10, at 100–02; WHITE, *supra* note 9, at 206–09.

243. ROSKE, *supra* note 10, at 78.

most revered founders of the Whigs, Senator Henry Clay of Kentucky, called for a high tariff, a powerful national bank, and massive federal spending on internal improvements.[244]

Accordingly, Trumbull was a leader in regularizing the operations of the executive branch, to make sure that it operated according to the rule of law. Trumbull's greatest efforts in this regard would come during his third Senate term, of 1867–1873. But during his second term, he did win a major victory in controlling lawless operation of the executive branch. In 1863 he introduced and passed the Pay Act.[245] It was written to clamp down on presidential abuse of the Recess Appointments Clause.[246] The clause allows the President to make appointments to fill vacancies that "happen during the Recess of the Senate."[247] The appointee thus does not need Senate confirmation, and may continue to serve until a new Congress convenes.[248] Presidents were abusing this authority by making appointments for vacancies that did not "happen" during a Senate recess, but rather had occurred while the Senate was still in session, and which continued to be vacant when the Senate recessed.[249]

Trumbull's Pay Act provided that no such appointee could be paid from the federal Treasury until confirmed by the Senate.[250] The Act continued in force for the next eight decades.[251]

Continuing to adhere to Jacksonian principles, Senator Trumbull also fought against government creation of monopolies, special privileges for businesses, and aid to farmers.[252] He did support the creation of a federal Department of Education, which he called "of great importance to this country."[253]

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244. MAURICE G. BAXTER, HENRY CLAY AND THE AMERICAN SYSTEM 201 (2004).

245. Act of Feb. 9, 1863, ch. 25, 12 Stat. at 646 (codified as amended at 5 U.S.C. § 5503 (2012)); CONG. GLOBE, 37th Cong., 3d Sess. 564 (1863) (noting Trumbull's introduction of the Pay Act).

246. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. at 646; CONG. GLOBE, 37th Cong., 3d Sess. 564 (1863).

247. U.S. CONST. art. II, § 2, cl. 3.

248. *Id*.

249. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. at 646; CONG. GLOBE, 37th Cong., 3d Sess. 564 (1863).

250. Act of Feb. 9, 1863, ch. 25, § 2, 12 Stat. at 646; CONG. GLOBE, 37th Cong., 3d Sess. 564 (1863); *see* NLRB v. Noel Canning, 134 S. Ct. 2550, 2614 (2014) (Scalia, J., concurring) (discussing the Pay Act).

251. *Noel Canning*, 134 S. Ct. at 2614.

252. ROSKE, *supra* note 10, at 127.

253. CONG. GLOBE, 39th Cong., 2d Sess. 1842 (1867).

### *C. The Thirteenth Amendment*

To Trumbull, even more so than Lincoln, freeing slaves was one of the major purposes of the war.[254] Although Trumbull agreed with the objective of Lincoln's Emancipation Proclamation, issued on January 1, 1863, he was unsure as to its constitutionality.[255] What authority did a President have to forfeit the property of a loyal citizen who happened to live in a seceded state, and who had done nothing to support the rebellion? Therefore, Trumbull decided to support a constitutional amendment to provide a permanent and unquestionable end of American slavery.[256]

Iowa Representative James F. Wilson had introduced an anti-slavery Thirteenth Amendment in December 1863.[257] Senator John B. Henderson of Missouri, who was himself a slave owner, introduced a similar amendment in January 1864.[258] The Senate was not inclined to spend time on Henderson's proposal, believing that the House would not pass a slavery prohibition amendment.[259]

Nevertheless, Trumbull took the Henderson bill into the Senate Judiciary Committee.[260] There, he re-wrote it entirely. Rather than using either the Henderson or the Wilson language, he followed the anti-slavery language of the Northwest Ordinance of 1787, making it apply nationwide: "Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."[261] The venerable Northwest Ordinance was older than the Constitution, and very prestigious. As newspaperman Horace White wrote, the Ordinance "was among the household words of the nation."[262] Thus, the Thirteenth Amendment appealed to continuity and tradition.

Trumbull's Thirteenth Amendment included a second section, which

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254. KRUG, *supra* note 10, at 204.

255. *Id*.

256. *Id*. at 217.

257. WHITE, *supra* note 9, at 223.

258. *Id*.

259. ROSKE, *supra* note 10, at 107.

260. KRUG, *supra* note 10, at 218; ROSKE, *supra* note 10, at 106–07; WHITE, *supra* note 9, at 227.

261. KRUG, *supra* note 10, at 218; ROSKE, *supra* note 10, at 106–07; WHITE, *supra* note 9, at 224. He acknowledged that it would be less burdensome for Congress just to abolish slavery by enacting a statute, but that would not be constitutional: "it is not because a measure would be convenient that Congress has authority to adopt it." CONG. GLOBE, 38th Cong., 1st Sess. 1314 (1864).

262. WHITE, *supra* note 9, at 224.

was in the Wilson bill but not the Henderson bill: an express enforcement power.[263] Slightly revised from the Wilson bill, Section two of the Thirteenth Amendment provides: "Congress shall have power to enforce this article by appropriate legislation."[264] This provision was little discussed when the Thirteenth Amendment was being ratified, but it was quite important, as will be detailed below. The enforcement section makes congressional power over the matter certain, and avoids disputes over whether an enforcement power must be drawn by implication, or by reference to the Necessary and Proper Clause. The Trumbull-Wilson model of an explicit enforcement power was followed, usually verbatim, in the Fourteenth, Fifteenth, Eighteenth, Nineteenth, Twenty-third, Twenty-fourth, and Twenty-sixth Amendments.[265]

The Thirteenth Amendment passed the Senate easily on April 8, 1864.[266] It took a titanic struggle for the House to finally pass it on February 1, 1865.[267] Ratification was less difficult, and was accomplished on December 18, 1865.[268]

Years later, when Trumbull was teaching at Union College of Law (in Chicago), he would tell his students: "Gentlemen, this good right hand wrote this Amendment to the Constitution."[269] Trumbull would also say the same thing about the Civil Rights Act of 1866,[270] discussed *infra*.

### *D. Reconstruction*

On January 5, 1866, Trumbull introduced two major bills—the Freedmen's Bureau Bill and the Civil Rights Bill—both aimed at protecting the civil rights of freedmen, including their right to arms.

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263. U.S. CONST. amend. XIII, § 2.

264. *Id*.

265. *See* U.S. CONST. amends. XIV, XV, XVIII, XIX, XXIII, XIV, XXVI.

266. CONG. GLOBE, 38th Cong., 1st Sess. 1490 (1864).

267. CONG. GLOBE, 39th Cong., 1st Sess. 531 (1866). *See generally* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2004).

268. *See* KRUG, *supra* note 10, at 220; *see also* A Proclamation of President Andrew Johnson on December 1, 1865, *reprinted in* Public Acts of 38th Cong., 1st Sess., app. No. 51, at 774, http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=013/llsl013.db&recNum=803.

269. ROSKE, *supra* note 10, at 109; *see* DAVID RAY PAPKE, THE PULLMAN CASE: THE CLASH OF LABOR AND CAPITAL IN INDUSTRIAL AMERICA 61 (Peter Charles Hoffer & N. E. H. Hull eds., 1999) (describing Trumbull's career after retiring from the Senate in 1873).

270. Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

### 1. The Freedmen's Bills and the Right to Arms

The first bill was titled "An act to establish a Bureau for the Relief of Freedmen and Refugees," and was numbered S.60. It is today called "the First Freedmen's Bureau Bill." The bill forbade state actions that denied freedmen the "full and equal benefit of all laws and proceedings for the security of person and estate."[271] Some of the bill applied only in the formerly rebellious states, but Trumbull said that other provisions, including the just-quoted provision, would apply wherever there were large numbers of freedmen, including in states such as Delaware, which had not seceded, but which had slavery until the ratification of the Thirteenth Amendment the previous month.[272]

Trumbull's other bill, the Civil Rights Bill, was numbered S.61, and guaranteed to all persons, regardless of race, "full and equal benefit of all laws and proceedings for the security of person and property."[273] The Civil Rights Bill applied nationwide.

Trumbull argued that both S.60 and S.61 were authorized by Section Two of the Thirteenth Amendment.[274] In Trumbull's view, "[w]ith the destruction of slavery necessarily follows the destruction of the incidents of slavery. When slavery was abolished the slave codes in its support were abolished also."[275] These included "all badges of servitude made in the interest of slavery and as a part of slavery."[276] As Chairman of the Senate Judiciary Committee, Trumbull reported both bills to the full Senate in January.

In the House, the First Freedmen's Bureau Bill was amended to expressly protect "the constitutional right to bear arms."[277] When the bill returned to the Senate for consideration of the House amendments, Trumbull explained to his Senate colleagues that the House amendment

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271. S. 60, 39th Cong. § 7 (1866); *see* CONG. GLOBE, 39th Cong., 1st Sess. 209 (1866) ("[W]herein, in consequence of any State or local law, ordinance, police, or other regulation, custom, or prejudice, any of the civil rights or immunities belonging to white persons (including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate) are refused or denied to negroes, mulattoes, freedmen, refugees, or any other persons, on account of race, color, or any previous condition of slavery or involuntary servitude . . . .").

272. CONG. GLOBE, 39th Cong., 1st Sess. 318–22 (1866).

273. *Id*. at 211; *see* KRUG, *supra* note 10, at 237; WHITE, *supra* note 9, at 257 (noting Trumbull's introduction of the Civil Rights Bill).

274. CONG. GLOBE, 39th Cong., 1st Sess. 42–43, 936–43 (1865–66); ROSKE, *supra* note 10, at 123–24; WHITE, *supra* note 9, at 250–51.

275. WHITE, *supra* note 9, at 258 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866)).

276. *Id*. at 260.

277. CONG. GLOBE, 39th Cong., 1st Sess. 654 (1866).

on the right to arms did not change the meaning of the bill.[278] Trumbull was right that the House amendment had not substantively altered the bill. The Act was always intended to protect all civil rights, including Second Amendment rights. The House's enumeration of the right to bear arms thus added some specificity to the bill, but that was simply an express statement of the bill's purposes from its inception.

Vice President Andrew Johnson had succeeded to the presidency following President Lincoln's assassination on Good Friday, April 14, 1865. On February 19, 1866, President Johnson vetoed the Freedmen's Bureau Bill.[279] Urging a Senate vote to override the veto, Trumbull quoted a letter from a Mississippi Colonel that "[n]early all the dissatisfaction that now exists among the freedmen is caused by the abusive conduct of this [State] militia," because that state entity likes to "hang some freedman or search negro houses for arms."[280] Johnson's veto was narrowly sustained,[281] but Trumbull and his allies passed a Second Freedmen's Bureau Bill, which contained the same right to arms language and this time beat the President's veto.[282]

### 2. The Civil Rights Act of 1866 and the Right to Arms

The Senate took up Trumbull's Civil Rights Bill on January 29, 1866.[283] He pointed to the Black Code of Mississippi, which had re-enacted many provisions of the state's old Slave Code.[284] As Trumbull explained to the Senate, the Mississippi law forbade immigration to the state by blacks, and made it illegal for black people in Mississippi to travel from one county to another without a pass.[285] "Other provisions of the statute prohibit any negro or mulatto from having fire-arms; . . .

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278. *Id*. at 742–43; ROSKE, *supra* note 10, at 124.

> There is also a slight amendment in the seventh section, thirteenth line. That is the section which declares that negroes and mulattoes shall have the same civil rights as white persons, and have the same security of person and estate. The House have inserted these words, "including the constitutional right of bearing arms." I think that does not alter the meaning.

CONG. GLOBE, 39th Cong., 1st Sess. 743 (1866). Justice Thomas cited Senator Trumbull's analysis in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 833–34 (2010) (Thomas, J. concurring) (citing CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866)).

279. LILLIAN FOSTER, ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES; HIS LIFE AND SPEECHES 226–41 (New York, Richardson & Co. 1866).

280. CONG. GLOBE, 39th Cong., 1st Sess. 941 (1866).

281. ROSKE, *supra* note 10, at 124 ("To uphold the veto, six senators reversed their earlier positions; the vote was 30 to 18. It was a pyrrhic victory for Johnson . . . .").

282. Second Freedmen's Bureau Bill, ch. 200, 14 Stat. 173 (1866). The right to arms language is in section 14.

283. WHITE, *supra* note 9, at 265.

284. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

285. *Id*.

similar provisions are to be found running through all the statutes of the late slaveholding States."[286] The Civil Rights Bill would overturn these state laws, as it would overturn all state laws that infringed what Trumbull called "fundamental rights belonging to free citizens."[287]

Another feature of the Civil Rights Bill gave federal marshals express power to summon the *posse comitatus* or the militia when necessary to suppress Southern resistance to federal civil rights law.[288] Trumbull pointed out that these provisions were "copied from the late fugitive slave act, adopted in 1850."[289] During the war, Trumbull had sponsored the law which allowed armed blacks to fight for freedom, as Union soldiers. Now, he was creating a role for armed blacks (and their white allies) in the South to continue using their arms in defense of civil rights.

On the Senate floor, Trumbull added an amendment to the Civil Rights Bill that all persons of African ancestry who were born in the United States were citizens of the United States.[290] He added another amendment to provide citizenship for taxed Native Americans, and for Chinese immigrants.[291] The citizenship for Native Americans provision was added notwithstanding the objection from opponents that it would override the laws of some Western states that forbade selling arms or ammunition to Native Americans.[292] Trumbull's birthright citizenship principle was later constitutionalized by the Fourteenth Amendment.[293]

The citizenship provisions were plainly within Congress's Article I powers over naturalization. But it was questionable whether Congress had the power to enact the rest of the Civil Rights Bill, which applied nationally (not just temporarily in the ex-Confederate states via congressional war powers), and which reached far into controlling state

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286. *Id*.

287. *Id*. at 475.

288. Civil Rights Act of 1866, ch. 31, § 5, 14 Stat. 27, 28 (empowering federal civil rights commissioners to appoint "suitable persons . . . to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty").

289. CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866).

290. WHITE, *supra* note 9, at 265.

291. *See* ROSKE, *supra* note 10, at 122 (describing how Trumbull utilized Congress's past grant of citizenship to Native American tribes as precedent to support the amendment, and upon reconsideration, decided to expand the bill to grant citizenship to the Chinese and to Indians who paid taxes).

292. CONG. GLOBE, 39th Cong., 1st Sess. 574–75 (1866).

293. U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.").

governments.[294] Trumbull continued to insist that the enforcement power in Section Two of the Thirteenth Amendment fully justified everything in the Civil Rights Bill.[295]

The bill passed the Senate by a wide margin, and also the House.[296] But one vote against came from Radical Republican John Bingham of Ohio, who liked the idea of the Civil Rights Bill, but thought that it lacked a secure constitutional foundation.[297] Shortly, Bingham would introduce the Fourteenth Amendment, to put the Civil Rights Bill on stronger constitutional footing.[298]

President Johnson vetoed the Civil Rights Bill on March 27, 1866, for policy reasons and for unconstitutionality.[299] Congress overrode the veto speedily, and on April 9, Trumbull's bill became the Civil Rights Act of 1866.[300] A few months later, Trumbull reiterated that the Civil Rights Act protected the same civil rights as did the Second Freedmen's Bureau Bill (which of course had express language about "the constitutional right to bear arms").[301]

As the Supreme Court recognized in *McDonald v. Chicago*,[302] the Freedmen's Bureau Bills, the Civil Rights Act, and the Fourteenth Amendment shared many common purposes, among them the protection of Second Amendment rights from infringement by state or local governments.[303] Proponents said so dozens of times; and opponents objected for the same reason.[304] Everyone agreed that these measures prohibited disarmament.[305] Justice Alito explained:

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294. Michael Kent Curtis, *John A. Bingham and the Story of American Liberty: The Lost Cause Meets the "Lost Clause,"* 36 AKRON L. REV. 617, 648–51 (2003); Michael Kent Curtis, *Conceived in Liberty: The Fourteenth Amendment and the Bill of Rights*, 65 N.C. L. REV. 889, 895–96 (1987).

295. WHITE, *supra* note 9, at 265–67 ("[T]he only question is, will this bill be effective to accomplish the object, for the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect. . . . [A]nd that is to be found in the . . . [second] section[] of the bill." (quoting CONG. GLOBE, 39th Cong., 1st Sess. 475 (1866))).

296. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866); WHITE, *supra* note 9, at 271–72.

297. CONG. GLOBE, 39th Cong., 1st Sess. 1293 (1866); WHITE, *supra* note 9, at 271.

298. WHITE, *supra* note 9, at 281–82.

299. *Id.* at 272.

300. Civil Rights Act of 1866, ch. 31, 14 Stat. 27; CONG. GLOBE, 39th Cong., 1st Sess. 129 (1866); WHITE, *supra* note 9, at 272–73.

301. CONG. GLOBE, 39th Cong., 1st Sess. 3412 (1866).

302. 561 U.S. 742 (2010).

303. *Id.*

304. *Id. See generally* STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876 (1998).

305. HALBROOK, *supra* note 304.

> There can be no doubt that the principal proponents of the Civil Rights Act of 1866 meant to end the disarmament of African-Americans in the South. In introducing the bill, Senator Trumbull described its purpose as securing to blacks the "privileges which are essential to freemen." He then pointed to the previously described Mississippi law that "prohibit[ed] any negro or mulatto from having fire-arms" and explained that the bill would "destroy" such laws.[306]

After the Fall 1866 general elections, the anti-Johnson majority in Congress increased.[307] In Illinois, three Republicans who were former Union army generals (Palmer, Oglesby, and Logan) wanted to become senators.[308] But the state legislature's Republicans unanimously voted to re-elect Trumbull to a third term.[309]

### *E. Habeas Corpus Again*

During the Civil War, Trumbull had led the Senate fight against the Lincoln-Seward violations of habeas corpus. During Reconstruction, Trumbull passed a major statute expanding habeas corpus rights. To his chagrin, the statute resulted in a Supreme Court case, *Ex parte McCardle*,[310] which threatened to destroy Reconstruction. Trumbull represented the U.S. government before the Supreme Court, making arguments that were legally defensible, but inconsistent with his usual defense of civil liberty. The twists and turns of the *McCardle* case led to another congressional statute—one which continues to provide the strongest precedent for congressional limitations of Supreme Court appellate jurisdiction.

Applying Trumbull's 1863 habeas corpus statute, the Supreme Court on December 17, 1866, released its decision in *Ex parte Milligan*.[311] Lamdin P. Milligan of Ohio was a vehement Copperhead, and may well have been involved in a treasonous plot to supply arms to Confederate sympathizers in Ohio.[312] He was arrested by the military in October

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306. *McDonald*, 561 U.S. at 774 n.23 (internal citations omitted). This speech by Trumbull was also quoted in the appendix of a famous dissent by Justices Black and Douglas. Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting), *overruled in part by* Malloy v. Hogan, 378 U.S. 1 (1964). As Justices Black and Douglas demonstrated, the Fourteenth Amendment was plainly intended to make the entire Bill of Rights enforceable against the states.

307. WHITE, *supra* note 9, at 277.

308. *Id*.

309. *Id*.

310. 74 U.S. (7 Wall.) 506 (1868).

311. 71 U.S. (4 Wall.) 2 (1866).

312. *Id*.; *see also* Curtis A. Bradley, *The Story of* Ex Parte Milligan*: Military Trials, Enemy Combatants, and Congressional Authorization*, *in* PRESIDENTIAL POWER STORIES 93 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

1864, tried before a military tribunal, and sentenced to death.[313] The Supreme Court unanimously ruled that the 1863 Act clearly forbade military trials of civilians such as Milligan, who had allegedly committed civil, not military, offenses, and whose offenses took place in areas where courts were functioning.[314]

After this ruling Trumbull sponsored another bill, which became law on February 5, 1867, granting federal courts express authority to issue writs of habeas corpus to anyone who was restrained in violation of the Constitution, any treaty, or laws of the United States.[315] The circuit courts were granted jurisdiction to hear habeas appeals from the district courts, and the Supreme Court was granted jurisdiction to hear appeals from the circuit courts.[316] This act was supplemental to the more limited federal court habeas jurisdiction which had been granted by the Judiciary Act of 1789.[317] The 1789 Act was only for persons who were held by the U.S. government.[318] Trumbull's 1867 Act applied regardless of who was holding the person. Thus, a federal court could grant a habeas petition from someone who was in the custody of state or local government. A federal court could also hear a habeas case involving someone who was held by a private person—such as a person who was still held in servitude in violation of the Thirteenth Amendment.[319] To prevent interference with federal use of the military in the South, section two of Trumbull's 1867 habeas act said that it did not apply to persons in military custody who were "charged with any military offence," or with having aided or abetted rebellion against the United States prior to February 1867.

As the lame duck Congress neared its end, on March 2, 1867, it passed the Military Reconstruction Act.[320] Tennessee, which had been

313. *Milligan*, 71 U.S. (4 Wall.) at 6.

314. *Id*. at 107–31; Bradley, *supra* note 312, at 93–132; WHITE, *supra* note 9, at 288. The *Milligan* decision was used against Trumbull during his 1866 re-election campaign, for having the effect of weakening the Reconstruction. ROSKE, *supra* note 10, at 136.

315. Habeas Corpus Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as amended at 28 U.S.C. § 2241–2251 (2012)) (amending the Judiciary Act of 1789, 1 Stat. 73, which established the judicial courts of the United States).

316. *Id*.

317. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. at 81.

318. *Id*. Congress expanded federal habeas corpus in 1833, allowing federal courts to grant the writ to state prisoners whose acts or omissions were "done, in pursuance of a law of the United States" or of a federal court ruling. Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634. In 1842, habeas was granted to foreign citizens held by states, if the detention allegedly violated national or international law. Act of Aug. 29, 1842, ch. 257, 5 Stat. 539.

319. CONG. GLOBE, 40th Cong., 2d Sess. 2096 (1868); William W. Van Alstyne, *A Critical Guide to* Ex Parte McCardle, 15 ARIZ. L. REV. 229 (1973).

320. Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

the final state to secede (June 8, 1861), had been the first state to resume its place in the Union (July 24, 1866).[321] With ex-Confederates barred from voting until 1870, Reconstruction was proceeding with mixed success.[322] But things were generally worse in the other ex-Confederate States. In March 1867, Congress declared that none of those ten states had functional governments that were protecting the people of those states.[323] Congress then placed all of those states under direct military rule.[324] The South was divided into five military districts of two states per district, with a U.S. Army General in charge of each district.[325] The Reconstruction Act further provided that martial law would be applied in the South, and alleged offenses could be tried in military courts.[326] Unexpectedly, Trumbull's February 1867 habeas corpus act became the tool by which opponents of military rule challenged that rule before the Supreme Court.

Mississippi's *Vicksburg Daily Times* was edited by W.H. McCardle, a vituperative opponent of Reconstruction.[327] In October and November 1867, he wrote several articles that led to his arrest that month at the order of Major General E.O.C. Ord, who commanded the Fourth Military District, comprising Mississippi and Arkansas.[328] At the more innocent end of the spectrum, McCardle had called General Edward Ord "a vulgar, paltry despot" for refusing to obey a writ of habeas corpus.[329] More seriously, he urged the unreconstructed Governor of Mississippi to resist the general's order that he surrender his office.[330] The proposed new Constitution of Mississippi was before the voters, and it could only be ratified in an election in which at least half of eligible voters participated.[331] McCardle urged an election boycott.[332] When eight white men in Vicksburg defied McCardle and voted anyway, he offered to pay readers to supply him with the names of those men, for publication.[333] The implicit threat was that the voters

321. CONG. GLOBE, 39th Cong., 1st Sess. 4102–04 (1866).

322. *See generally* THOMAS BENJAMIN ALEXANDER, POLITICAL RECONSTRUCTION IN TENNESSEE (1968).

323. Military Reconstruction Act of 1867, ch. 153, 14 Stat. 428.

324. *Id*.

325. *Id*.

326. *Id*.

327. Transcript of Record at 12, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (No. 380) [hereinafter Transcript]; *see also* Van Alstyne, *supra* note 319, at 236.

328. Transcript, *supra* note 327, at 1–2; *see also* Van Alstyne, *supra* note 319, at 236.

329. Transcript, *supra* note 327, at 16; *see also* Van Alstyne, *supra* note 319, at 236.

330. Transcript, *supra* note 327, at 14–15; *see also* Van Alstyne, *supra* note 319, at 236.

331. WHITE, *supra* note 9, at 327.

332. Transcript, *supra* note 327, at 11–12.

333. Van Alstyne, *supra* note 319, at 236 n.42.

would then be violently attacked in retaliation. Before a military tribunal, McCardle was charged with four counts: disturbing the peace; inciting insurrection, disorder and violence; libel; and impeding Reconstruction by intimidating voters.[334]

McCardle petitioned the circuit court for a writ of habeas corpus, which was granted.[335] In compliance with the writ, the military trial (which had been about to commence) was halted.[336] McCardle was brought before the circuit court. General Ord's "return" of the habeas writ detailed the circumstances of McCardle's detention, so that the circuit court could consider the lawfulness of McCardle being held in custody.[337] The court ruled that McCardle's detention was lawful, and the military trial could proceed as long as there were due process protections, such as a public trial, the right to confront witnesses, and so on.[338] Guilt would, of course, be decided by the military tribunal, and not by a civil jury.[339] McCardle promptly appealed to the U.S. Supreme Court, pursuant to Trumbull's 1867 habeas act.[340] While the Supreme Court appeal was pending, McCardle was allowed to post bond, and was set free pending resolution of the case.[341]

The supporters of Reconstruction were terrified that the Supreme Court might rule that Congress's March 1867 Reconstruction Act, which was the basis for McCardle being seized by the military, was entirely unconstitutional.[342] The fear was especially great in light of the Court's ruling the prior year in *Ex parte Milligan*.[343] All nine Justices had agreed that Milligan's detention and military death sentence violated Trumbull's 1863 statute.[344] Five Justices had gone further, and

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334. The articles were reprinted in the specification of charges brought before the military tribunal (similar to an indictment). This was in turn contained in the record of the case as brought to the U.S. Supreme Court. Transcript, *supra* note 327, at 12–25. The articles are as follows: *A Bureau Beauty*, VICKSBURG DAILY TIMES, Oct. 2, 1867; *A Startling Rumor*, VICKSBURG DAILY TIMES, Oct. 15, 1867; *The Insolence and Despotism of a Small Satrap*, VICKSBURG DAILY TIMES, Nov. 1, 1867; *The Scoundrelism of Satraps*, VICKSBURG DAILY TIMES, Nov. 6, 1867; *Stay Away from the Polls*; *The Immortal Eight*, Nov. 6, 1867, VICKSBURG DAILY TIMES. McCardle was arrested on November 8, two days after publication of the last two articles. Van Alstyne, *supra* note 319, at 236.

335. Transcript, *supra* note 327, at 1–2; Van Alstyne, *supra* note 319, at 237.

336. Transcript, *supra* note 327, at 7–11.

337. *Id*. at 6.

338. *Id*. at 34.

339. *Id*.

340. *Id*.

341. Transcript, *supra* note 327, at 34; ROSKE, *supra* note 10, at 141–43; Van Alstyne, *supra* note 319, at 237.

342. Van Alstyne, *supra* note 319, at 237–41.

343. *Id*. at 238 n.46; *see supra* text accompanying notes 311–14.

344. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 106–31 (1866).

said that habeas corpus could never be suspended in places where the courts were functioning.[345] This had obvious implications for McCardle's case; the federal courts were indisputably functioning in Mississippi, as the circuit court's ruling in the *McCardle* case itself demonstrated.

The U.S. Attorney General refused to defend McCardle's detention.[346] Consequently, the War Department took the lead, and hired Trumbull as its attorney.[347] On January 31 and February 7, 1868, Trumbull argued that the Supreme Court should dismiss McCardle's case for lack of jurisdiction. Based on the text of Trumbull's 1867 habeas corpus statute, McCardle had a strong argument. Yet according to Trumbull, the Court should not literally follow the broad language of the 1867 Act, which allowed federal courts to issue writs of habeas corpus to anyone being held, regardless of who was holding him; rather, the 1867 Act's provisions for Supreme Court appeals should be construed as applying only to cases for which the 1867 Act expanded federal habeas jurisdiction beyond the 1789 Judiciary Act (such as the 1867 expansion to cover state prisoners).[348] Moreover, section 2 of the 1867 Act said that it did not apply to any person in federal military custody who was "charged with any military offence."[349]

The Court on February 17, 1868, rejected Trumbull's argument.[350] The plain language of the 1867 habeas statute obviously made the case appealable to the Supreme Court.[351] As for the argument that the "military offenses" exception meant that the circuit court never had habeas jurisdiction in the first the place, the Supreme Court said that the issue could be discussed during the hearing on McCardle's habeas appeal.[352]

It was clear that the March 1867 Reconstruction Act, imposing military rule in ten states, was on the line. The brief of Trumbull's co-

345. *Id*. at 132–42.

346. WHITE, *supra* note 9, at 328.

347. *Id*. at 327. The offer was made in a letter to Trumbull on January 8, 1868, and accepted on January 11.

348. *Ex parte* McCardle, 73 U.S. (6 Wall.) 318, 321–22 (1867); ROSKE, *supra* note 10, at 141–42; Van Alstyne, *supra* note 319, at 237. The 1789 Act applied to federal prisoners and not to state prisoners; Trumbull's point was that the Supreme Court appeal section of the 1867 Act should apply only to state prisoners. *Id*.

349. Habeas Corpus Act of Feb. 5, 1867, ch. 28, § 2, 14 Stat. 385, 386–87 ("This act shall not apply to the case of any person who is or may be held in the custody of the military authorities of the United States, charged with any military offence . . . .").

350. *McCardle*, 73 U.S. (6 Wall.) at 325–26.

351. *Id*.

352. *Id*. at 326–27.

counsel, Matthew Carpenter, was almost entirely on that subject.[353] So was the brief for McCardle, written by David Dudley Field, who had won *Ex parte Milligan*.[354] The briefs addressed fundamental issues of constitutional structure.[355] Mississippi's secession in January 1861 had been illegal, null and void *ab initio*—all parties agreed with that.[356] So was Mississippi still a "State of this Union," as Field argued? Many enactments by Congress and acts of the President during the War of Rebellion so indicated, as Field demonstrated in a beautifully written and compelling brief.[357] The de facto, illegal rebel government of Mississippi having been defeated on the battlefield, Mississippi continued its unalterable status as a State of the Union.[358]

Trumbull and Carpenter countered that Mississippi had in essence committed civil suicide by its act of secession.[359] The seceded government did things that no State of the Union could—such as keep troops without congressional permission, and negotiate with foreign governments for the purposes of making war on the United States.[360] According to Trumbull and Carpenter, Mississippi was a conquered, belligerent territory, and by the laws of war (of the mid-nineteenth century) Congress could do whatever it wanted with the territory and the people therein.[361]

Trumbull argued that because Congress had not declared that the Civil War was over, McCardle had no right to a jury trial; at Gettysburg, the soldiers shot enemy soldiers, even though those soldiers had not been convicted of any crime by a jury.[362] He analogized the Sixth Amendment jury issue to the Second Amendment; the right "applies to the people of a friendly State," and did not forbid Union generals from disarming the rebellious southern cities or states they captured.[363]

As for the 1867 habeas statute, Trumbull argued that it did not apply

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353. Carpenter was a Wisconsin lawyer who would be elected to the U.S. Senate in 1869. *Seelast CARPENTER, Matthew Hale, (1824–1881)*, BIOGRAPHICAL DIRECTORY U.S. CONGRESS, http://bioguide.congress.gov/scripts/biodisplay.pl?index=C000171 (last visited Apr. 21, 2016).

354. Brief for Appellant at 1–40, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (No. 380) [hereinafter Appellant Brief].

355. *Id*.

356. *Id*. at 23.

357. *Id*. at 1–40.

358. *Id*. at 30–33.

359. Brief for Appellee at 5, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (No. 380) [hereinafter Appellee Brief].

360. *Id*.

361. *Id*. at 6–18.

362. Transcript of Oral Argument at 24, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868) (No. 380) [hereinafter Trumbull Oral Argument] (Trumbull's oral argument).

363. *Id*. at 23–24.

because McCardle's peacetime publication fell under the scope of "military offenses," which were excluded under section two of the statute.[364] But he could only cite two Supreme Court cases in support; both of these had said that Congress could use its militia powers to set up court martials (i.e., not civil courts) to punish men who refused to appear for federal militia duty after they had been called forth to such duty.[365] Having refused to muster, the men had never entered militia service; yet they, as recalcitrant civilians, could still be tried by a court martial.[366] But these two cases, on the edge of the militia powers, provided little support for military trials of civilians who had nothing to do with the militia.

Oral argument in the Supreme Court, on March 2, 4, and 9, 1868, went badly for the government.[367] In the meantime, Trumbull had been working to prevent the Court from hearing the *McCardle* case.

Earlier in the year, Trumbull had introduced a bill to forbid federal courts from hearing "political" cases, and defining Reconstruction cases as political.[368] This was an attempt to expand the established doctrine that certain matters, when conclusively determined by Congress, are unreviewable by court—for example, the admission of a State to the Union, or the existence of a state of war. Trumbull's bill could not overcome a filibuster of conservative Senators determined to allow the Court to decide the *McCardle* case.[369]

After the *McCardle* oral argument, the Republicans tacked on an amendment to another bill, and repealed the portion of the 1867 Act that granted the Supreme Court jurisdiction over habeas appeals.[370] Senate conservatives did not notice the obscure amendment until it was too late. President Johnson vetoed the bill, but Congress overrode the veto, and the bill, with the provision known as the Repealer Act, became law on March 27, 1868.[371]

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364. *Id*. at 6.

365. *Id*. at 7–9 (citing Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827)).

366. *Id*.

367. KRUG, *supra* note 10, at 253; ROSKE, *supra* note 10, at 141.

368. S. 363, 40th Cong. (1868); CONG. GLOBE, 40th Cong., 2d Sess. 1204 (1868); ROSKE, *supra* note 10, at 142.

369. CONG. GLOBE, 40th Cong., 2d Sess. 1428 (1868); ROSKE, *supra* note 10, at 142.

370. WHITE, *supra* note 9, at 329; Van Alstyne, *supra* note 319, at 239.

371. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44, 44 ("*And be it further enacted*, That so much of the act approved February five, eighteen hundred and sixty-seven, entitled 'An act to amend "An act to establish the judicial courts of the United States," approved September twenty-fourth, seventeen hundred and eighty-nine,' as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is,

Six days earlier, at the Supreme Court's March 21 conference, two Justices wanted to decide *McCardle* right away, but the others put off a vote.[372] Instead, the Court would ask that *McCardle* be re-argued in its December 1868 Term, to decide if the Supreme Court still had jurisdiction.[373] Then in April 1869, the Court unanimously and tersely ruled that it lacked jurisdiction to hear McCardle's appeal.[374] Article III, Section 2, of the Constitution gave Congress the power to make "Exceptions" to Supreme Court appellate jurisdiction, and the recently passed Repealer Act had done so.[375] The Supreme Court reminded everyone that it still had habeas corpus jurisdiction under the Judiciary Act of 1789 (which allowed original habeas petitions to the Supreme Court).[376] But McCardle's habeas petition had been based on the 1867 habeas statute, not the 1789 one.[377]

McCardle's attorney had argued that the March 1868 Repealer Act was obviously enacted for the purpose of interfering with McCardle's pending case.[378] The Court replied that it could not consider legislative motives.[379]

Ever since 1868, the Repealer Act, and the Supreme Court's acquiescence therein, have been the proof texts for persons who advocate stripping the Supreme Court of appellate jurisdiction on politically controversial matters; at various times persons have advocated jurisdiction stripping for Supreme Court review of infringements of economic liberty, of restrictions on abortion, or of school bussing for desegregation.[380]

Trumbull continued pushing his own bill to reduce Supreme Court jurisdiction, and even to limit the habeas jurisdiction granted under the 1789 Judiciary Act.[381] Fortunately, neither bill became law. All of the legal arguments he had argued in the *McCardle* case were plausible, but despite his protestations at oral argument, his position in *McCardle* was

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hereby repealed."); Van Alstyne, *supra* note 319, at 239.

372. Van Alstyne, *supra* note 319, at 245.

373. *Id*.

374. *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

375. U.S. CONST. art. III, § 2; Van Alstyne, *supra* note 319, at 239–41.

376. *McCardle*, 74 U.S. (7 Wall.) 506. For a review of the Court's appellate jurisdiction under the 1789 Judiciary Act for some but not all habeas appeals, see Van Alstyne, *supra* note 319, at 235. For a thoughtful and intricate analysis of congressional power to make exceptions to the Court's appellate jurisdiction, see *id*. at 244–69.

377. Trumbull Oral Argument, *supra* note 362, at 3–4; Van Alstyne, *supra* note 319, at 246.

378. *McCardle*, 74 U.S. (7 Wall.) at 510.

379. *Id*. at 514.

380. Van Alstyne, *supra* note 319, at 260–67.

381. KRUG, *supra* note 10, at 280 (citing CONG. GLOBE, 41st Cong., 2d Sess. 167–69 (1869)).

not in the spirit of his earlier defenses of civil liberties and habeas corpus during the war. Ironically, Trumbull found himself in the same position that Lincoln had been in in 1861, when Trumbull was looking up from the Capitol, and Lincoln was looking down from the White House. This time, it was Trumbull who had to make the decision: either let everything fall to pieces (i.e., allow Reconstruction to be terminated, leaving the ex-rebels in control of the South), or adopt a legally plausible but harshly repressive position on habeas corpus. Like Lincoln, Trumbull chose the latter.

Trumbull received strong criticism for his participation in *McCardle*; the criticism was not about the content of his legal arguments, but about the propriety of his representing the War Department in court while he was a sitting U.S. Senator. In fact, there was nothing untoward about Congressmen taking paying cases to represent the executive branch, or any other litigant; that was a long-standing practice.[382] For example, of the 223 cases which Daniel Webster argued to the Supreme Court, a large majority were when he was serving as a U.S. Representative or Senator.[383] Trumbull, for his own part, had decided in 1868 to increase his Supreme Court practice, as he needed the money.[384] That said, it was not proper for Trumbull to use his senatorial role in order to advance the legal interests of his client (the War Department).[385]

Subsequently, Trumbull returned to the defense of habeas corpus, and opposition to military law enforcement. He criticized President Grant's deployment of federal troops to deter looting during the Great Chicago Fire of 1871.[386] He also opposed the 1871 Anti-Ku Klux Klan Bill because of its imposition of military force and suspension of habeas corpus.[387] By this point, all of the ex-Confederate states had been re-admitted to the Union, the last being Georgia on July 15, 1870.[388] Trumbull pointed out that the Constitution only allowed suspension of habeas corpus in the case of invasion or insurrection, and that the Klan's violence was neither.[389] The Supreme Court would later rule the Anti-

382. ROSKE, *supra* note 10, at 143; *see* WHITE, *supra* note 9, at 331–32 (describing 1808 statute that forbade some executive branch contracts with members of Congress, but not contracts for legal services).

383. CRAIG R. SMITH, DANIEL WEBSTER AND THE ORATORY OF CIVIL RELIGION 32 (2005).

384. KRUG, *supra* note 10, at 274.

385. ROSKE, *supra* note 10, at 143.

386. KRUG, *supra* note 10, at 320.

387. WHITE, *supra* note 9, at 301.

388. *Id*.

389. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."); KRUG, *supra* note 10, at 297–99; WHITE, *supra* note 9, at 356–57 (quoting CONG. GLOBE, 41st

Ku Klux Klan Act unconstitutional, closely tracking the reasoning in Trumbull's Senate speech.[390]

### *F. Trumbull's Split with the Regular Republicans*

Trumbull's vigorous efforts in *Ex parte McCardle* to save Reconstruction had been in the mainstream of the Republican Party. Yet the day after the Supreme Court oral argument in *McCardle*, Trumbull began to journey to Republican apostasy. He would provide the decisive vote against the Senate conviction of President Andrew Johnson on the charges for which Johnson had been impeached by the House. Indeed, Trumbull would become a leader of the anti-conviction forces. After Republican Ulysses Grant won the presidential election in 1868, Trumbull would greatly annoy most of his fellow Senate Republicans by pressing for reforms to reduce the tremendous corruption within the federal government. While Grant and the mainstream Republicans pressed forward with militarized Reconstruction, Trumbull had had enough, and opposed further efforts to rule the South militarily. In 1872, he would join a new splinter party, the Liberal Republicans, aiming to challenge Grant for re-election.

#### 1. Impeachment

Trumbull had become a Republican in 1856 because the new party was founded on opposition to the expansion of slavery into the Territories.[391] But by Trumbull's third term in the Senate, he was finding himself increasingly at odds with the mainstream of Senate Republicans. The most notable issue on which Trumbull split was the impeachment of President Andrew Johnson.[392]

With Trumbull's support, Congress had passed the Tenure in Office Act.[393] It required that when the President wanted to remove an officer whose appointment had required confirmation by the Senate, the President must obtain the permission of the Senate.[394] However, the Act's application to Cabinet officers was recognized as problematic

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Cong., 3d Sess. 578–79 (1871)).

390. *See* United States v. Harris, 106 U.S. 629 (1883) (holding that the federal government could not penalize certain crimes); WHITE, *supra* note 9, at 358.

391. *See supra* notes 168–70 and accompanying text.

392. *See* WHITE, *supra* note 9, at 423 (noting contemporary descriptions of Trumbull as one of the "Seven Traitors" who voted against the conviction of President Andrew Johnson).

393. *Id*. at 301. For the general story of the impeachment, see HANS L. TREFOUSSE, IMPEACHMENT OF A PRESIDENT: ANDREW JOHNSON, THE BLACKS, AND RECONSTRUCTION (2d ed., Fordham Univ. Press 1999) (1975).

394. WHITE, *supra* note 9, at 301. *See generally* TREFOUSSE, *supra* note 393 (discussing impeachment).

right from the start.[395] President Johnson precipitated his impeachment by attempting to fire Secretary of War Edwin Stanton.[396] While the House voted eleven articles of impeachment, the only ones of substance involved permutations of the Stanton controversy.[397] The others involved purely political matters, such as Johnson's having delivered an intemperate speech.[398]

The Senate began the impeachment trial with Supreme Court Chief Justice Salmon P. Chase presiding, as the Constitution provides.[399] To the consternation of impeachment advocates, Chief Justice Chase ran the Senate trial as a trial, and not as a political debate.[400] The trial began on March 5, 1868 (the day after Trumbull had argued *Ex parte McCardle* in the Supreme Court).[401] Trumbull was one of the few Senators who listened to the entire trial carefully.[402] As he listened, he consulted the stacks of law books on his desk.[403] He received physical threats, warning him not to vote against conviction of the President.[404]

Johnson was a poor President, at least in the eyes of all congressional Republicans.[405] But it was questionable whether Stanton was even covered by the Tenure in Office Act, as he had been appointed in Lincoln's first term, and was a holdover in the succeeding Johnson administration.[406]

The crowd in the Senate gasped when Trumbull announced his decision; in a lengthy speech, he stated that the House's charges against President Johnson were insufficient even for a case to be decided by a Justice of the Peace.[407] Trumbull also filed a written statement, arguing that convicting Johnson would be a pure act of political power, "destructive of all law and all liberty worth the name, since liberty unregulated by law is but another name for anarchy."[408] He said it was improper to remove Johnson for alleged "misconstruction of what must

395. TREFOUSSE, *supra* note 393, at 139–40; WHITE, *supra* note 9, at 301.
396. TREFOUSSE, *supra* note 393, at 140; WHITE, *supra* note 9, at 302.
397. TREFOUSSE, *supra* note 393, at 140; WHITE, *supra* note 9, at 302.
398. TREFOUSSE, *supra* note 393, at 138–39; WHITE, *supra* note 9, at 303.
399. U.S. CONST. art. I, § 3.
400. TREFOUSSE, *supra* note 393, at 148–49; WHITE, *supra* note 9, at 308.
401. WHITE, *supra* note 9, at 309.
402. ROSKE, *supra* note 10, at 147.
403. *Id*.
404. *Id*.
405. TREFOUSSE, *supra* note 393, at 54–55.
406. *Id*. at 139–40; WHITE, *supra* note 9, at 311.
407. ROSKE, *supra* note 10, at 149; *Impeachment, Proceedings in the Secret Session of the Senate*, N.Y. TIMES, May 12, 1868, at 1.
408. WHITE, *supra* note 9, at 318.

be admitted to be a doubtful statute"—especially since Johnson had relied on the sponsors' interpretation of that statute when it was being considered by Congress.[409]

As pressure then shifted to other potential swing Senators, Trumbull perambulated the Senate floor, joining conversation to try to convince Senators to vote against conviction.[410]

By a one-vote margin, the Senate voted on May 16, 1868, to acquit President Johnson.[411] Along with the other Republican Senators who had voted not to convict, Trumbull was denounced as one of the "Seven Traitors."[412] The *Nation* magazine, which had supported impeachment, nevertheless defended Trumbull and like-minded Maine Senator William P. Fessenden; they were "the class of men who are most needed in our politics just now," particularly "high-minded, independent men, with their hands clean and souls of their own."[413] They were the opposite of the "roaring, corrupt, ignorant demagogues, who are always on 'the right side' with regard to all party measures."[414]

The vote might have cost Trumbull the Presidency. Joseph Medill (editor of the *Chicago Tribune* and Mayor of Chicago) thought that Trumbull could have succeeded Grant as President in 1877, but for Trumbull's vote to acquit.[415]

### 2. Reforming Big Government

Ulysses Grant, the commanding general of the Union Army that had won the Civil War, was the unstoppable choice for the Republican presidential nomination in 1868, and a solid winner in the general election.[416] When the new Senate convened in 1869, Trumbull found himself among the four most senior Senators.[417] Nevertheless, Trumbull was at odds with the Republican majority.

President Grant was not personally corrupt, but his loyalty to his friends made him willfully blind to the vast corruption in his administration.[418] Trumbull estimated that about one-quarter of

409. *Id*.
410. ROSKE, *supra* note 10, at 150; *Impeachment*, N.Y. TIMES, May 16, 1868, at 1.
411. KRUG, *supra* note 10, at 267–68; WHITE, *supra* note 9, at 313.
412. WHITE, *supra* note 9, at 303.
413. *Id*. at 316–17 (quoting *What Was the Impeachment?*, NATION, May 14, 1868, at 385).
414. *Id*. at 317.
415. WHITE, *supra* note 9, at 424–25 (quoting the *Chicago Times* from June 26, 1896).
416. *See generally* CHARLES H. COLEMAN, THE ELECTION OF 1868: THE DEMOCRATIC EFFORT TO REGAIN CONTROL (Octagon Books 1971) (1933). Grant won 52.66% of the popular vote, and won the Electoral College 214 to 80.
417. WHITE, *supra* note 9, at 325 (quoting CONG. GLOBE, 41st Cong., 1st Sess. 113 (1869)).
418. *See generally* WILLIAM S. MCFEELY, GRANT: A BIOGRAPHY (2002).

government revenues were being stolen.[419] He blamed Grant's advisors, but not Grant personally.[420] Everybody was interested in making money, in an atmosphere that was later described as "the Great Barbeque."[421]

Trumbull tried to clean up the mess, which he recognized as stemming from a flawed system that long predated the Grant administration.[422] In 1870 he tacked a rider onto an appropriations bill, to require inquiry into a federal job candidate's "age, health, character, knowledge and ability for the branch of service into which he seeks to enter."[423] This was the first congressional civil service reform law.[424] The next year he passed a bill to create a civil service reform commission—although the Senate leadership thwarted the bill's effect, by stacking the commission with reform opponents.[425]

From the earliest days of the American Republic, and especially since the Jackson Administration, it had been common for members of Congress to solicit the President to provide federal jobs for the Congressman's friends and supporters.[426] Building and cultivating this patronage network was essential for any Congressmen who hoped to maintain a political base in his home state. Trumbull had been no slouch in this regard. During the Lincoln administration, Trumbull had procured more appointments than almost anyone else, second only to Lincoln's longtime friend Norman Judd.[427] However, Trumbull wanted to end the practice. He introduced a bill to prohibit members of Congress from recommending appointments to the President.[428]

Trumbull was also far ahead of his time on women's rights, which he connected to good government.[429] He argued that in the federal work force, men and women who did the same job ought to be paid

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419. KRUG, *supra* note 10, at 304.

420. *Id*. at 304–05.

421. 3 VERNON L. PARRINGTON, MAIN CURRENTS IN AMERICAN THOUGH: THE BEGINNINGS OF CRITICAL REALISM IN AMERICA 1860–1920, at 23 (1927).

422. CONG. GLOBE, 41st Cong., 3d Sess. 1997 (1871); KRUG, *supra* note 10, at 293–94; ROSKE, *supra* note 10, at 158.

423. CONG. GLOBE, 41st Cong., 3d Sess. 1997 (1871); KRUG, *supra* note 10, at 293–94; *see* ROSKE, *supra* note 10, at 158.

424. KRUG, *supra* note 10, at 293–94.

425. CONG. GLOBE, 41st Cong., 3d Sess. 1997 (1871); ROSKE, *supra* note 10, at 158.

426. Carl Schurz, President, National Civil-Service Reform League, Civil-Service Reform and Democracy: An Address Delivered at the Annual Meeting of the National Civil-Service Reform League (Apr. 25, 1893).

427. KRUG, *supra* note 10, at 295; ROSKE, *supra* note 10, at 68–69.

428. KRUG, *supra* note 10, at 291–93.

429. CONG. GLOBE, 39th Cong., 2d Sess. 977–78 (1867).

equally.[430] At a July 4, 1871 speech in Galesburg, Illinois, he announced his support for woman suffrage, which he said might reduce government corruption.[431]

### 3. The 1872 Presidential Election

An open Republican revolt against the Grant administration and the Republican congressional leadership broke out in 1870 in Missouri.[432] There, a group that called itself the "Liberal Republicans" bolted from the regular party and held their own convention.[433] The platform was amnesty for ex-confederates, withdrawal of federal troops from the South, civil service reform, and opposition to monopolies.[434]

The Liberal Republicans laid plans for a presidential nominating convention in Cincinnati during the summer of 1872.[435] They correctly predicted that the Democrats (who were still dispirited and unpopular, because most of them had been on the wrong side of the Civil War and the slavery issue) would give their own nomination to whomever the Liberal Republicans chose.[436] Trumbull was a major contender for the nomination, but he refused to authorize his supporters to take any steps on his behalf. He adhered to the old-school principle that the presidential nomination should be neither sought nor declined.[437]

Supreme Court Justice David Davis was the favorite coming into the convention, but to widespread surprise, the Cincinnati Convention nominated New York City newspaper editor Horace Greeley.[438] Later, the Democrats also nominated Greeley, on a fusion ticket.[439]

Trumbull campaigned hard for the Liberal Republicans, pointing out that the regular Republicans were refusing to address the issues of the day, and instead were parroting patriotic platitudes and Civil War

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430. *Id*.

431. ROSKE, *supra* note 10, at 159; *Senator Trumbull: His Fourth of July Oration-Views on Public Questions*, N.Y. TIMES, July 6, 1871, at 1.

432. KRUG, *supra* note 10, at 303.

433. *Id*.

434. *Id*.

435. *Id*. at 303–38; ROSKE, *supra* note 10, at 162–66; WHITE, *supra* note 9, at 394.

436. KRUG, *supra* note 10, at 303–38; ROSKE, *supra* note 10, at 162–66; WHITE, *supra* note 9, at 394.

437. KRUG, *supra* note 10, at 303–38; ROSKE, *supra* note 10, at 162–66; WHITE, *supra* note 9, at 394.

438. KRUG, *supra* note 10, at 303–38; ROSKE, *supra* note 10, at 162–66; WHITE, *supra* note 9, at 394; *see also* Horace Greeley, President, N.Y. State Comm., Proceedings of the Liberal Republican Convention, in Cincinnati, Horace Greeley's Letter of Acceptance (May 1–3, 1872).

439. KRUG, *supra* note 10, at 303–38; ROSKE, *supra* note 10, at 162–66; WHITE, *supra* note 9, at 394.

sentiment.[440] He explained that everything for which the Republican Party had been created had been achieved.[441] After all that success, "[n]othing remained but the machinery, which had fallen into the hands of those who sought to use it for merely selfish ends."[442] He denounced the "Senatorial Ring" that thwarted attempts to uncover government corruption.[443] "I was never a party man to the extent of being willing to serve the party against my country . . . ."[444] He railed against the recent legislation allowing for peacetime suspension of the writ of habeas corpus.[445]

Trumbull never held sentimental attachment to a party or to the two-party system. He hoped that the nomination of Greeley, who was popular but eccentric, might "blow up both parties. This [would] be an immense gain. Most of the corruptions in government are made possible through party tyranny."[446] Senators were "daily coerced into voting contrary to their convictions through party pressure."[447]

In 1854, he had been a leader in splitting the Democratic Party—a move that quickly destroyed the Whig Party, and led to the emergence of the Republican Party.[448] Contrary to Trumbull's hopes, 1872 did not blow up either the Republicans or the Democrats. Two decades later, Trumbull would play a leading role in the emergence of yet another party, the People's Party, which soon revolutionized politics by fusing with the Democratic Party.[449]

But as of 1872, the country in general and Illinois in particular were happy with the regular Republicans led by President Grant, who swept the state.[450] Consequently, when the new Illinois legislature convened, Trumbull was not re-elected to the Senate.[451] The legislature instead sent Governor Richard Oglesby to the Senate, as he was a loyal party man.[452]

Trumbull had come to the Senate as an Anti-Nebraska Democrat—a

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440. ROSKE, *supra* note 10, at 167; WHITE, *supra* note 9, at 394–95.

441. WHITE, *supra* note 9, at 395–99 (synopsis of Trumbull's June 26, 1872 speech in Springfield, Illinois).

442. *Id*. at 395.

443. *Id*. at 395–96.

444. *Id*. at 398.

445. *Id*. at 398–99.

446. *Id*. at 387 (quoting Lyman Trumbull's letter to William Cullen Bryant on May 10, 1872).

447. *Id*.

448. *See supra* notes 152–67 and accompanying text.

449. KRUG, *supra* note 10, at 340.

450. *Id*.

451. *Id*.

452. *Id*. The legislature voted on January 21, 1873. *Id*.

group that had split from the regular Democrats and held its own convention. Then he became a Republican, Chairman of the Judiciary Committee, and a member of the inner circle who guided the business of the Senate. By the time he was among the most-senior Senators, he was again a party dissident, supporting the Liberal Republicans who bolted the party and tried to unseat the incumbent Republican President. Through all the partisan changes, Trumbull had been generally consistent in his Jacksonian principles: he distrusted big government, and fought to control it. He thought that the workingman should have a fair chance, and not be trampled down by big government—so he opposed expansion of slavery in the Territories, and then took the opportunity presented by the War of the Rebellion to free as many slaves as fast as he could. Somewhat by accident, he had become the greatest pro-Second Amendment legislator of the nineteenth century, and had done more than any other single person to ensure that freedmen had guns that they could use to defend their freedom.[453] He abhorred military rule and suppression of civil liberties by a standing army, although he temporarily made an exception to this, based on pragmatic concern that the rebels who had (in his view) started an illegal war should not be allowed to continue to rule in defiance of federal guarantees of civil rights, including the Thirteenth Amendment.

All of Trumbull's core principles would continue to guide him in the remaining twenty-three years of his career, and would help to turn the leading Second Amendment legislator of the nineteenth century into the leading Second Amendment litigator of the century. Again, it would be by happenstance.

## IV. LAWYER FOR THE RIGHTS OF THE WORKINGMAN

After Trumbull's senatorial term expired on March 3, 1873, he moved to Chicago, and devoted himself to the full-time practice of law, including in the U.S. Supreme Court.[454] He helped found the American Bar Association and the Chicago Bar Association.[455] The biographies of Trumbull move quickly through this period, rushing toward Populism and the *Debs* case in 1894. None of them analyze Trumbull's Second

453. Trumbull's only major competition for this title would be the presidential administrations of Thomas Jefferson and James Madison. They convinced Congress to make large appropriations for "public arms"—a program to supply firearms to militiamen who could not afford to buy one. *See* Stephen P. Halbrook & David B. Kopel, *Tench Coxe and the Right to Keep and Bear Arms, 1787–1823*, 7 WM. & MARY BILL RTS. J. 347, 374–87 (1999).

454. KRUG, *supra* note 10, at 340; WHITE, *supra* note 9, at 407.

455. ROSKE, *supra* note 10, at 170–71; *see* KRUG, *supra* note 10, at 340 (detailing Trumbull's role in the Chicago and American Bar Associations); WHITE, *supra* note 9, at 419 (same).

Amendment cases. But in fact, Trumbull's road to Populism and *Debs* was via the Second Amendment—in the legal and moral principles against centralized militarism being used to suppress the people.

Trumbull's post-senatorial return to the national political stage had an anti-militarist aspect. He had rejoined the Democratic Party in 1876,[456] and later that year, following the highly disputed presidential election of 1876, Trumbull served as a lawyer for the Democrats before the fifteen-man commission that had been created to decide who were the proper electors in four disputed states.[457] Among Trumbull's arguments was that the Louisiana electoral votes, purportedly for Republican candidate Rutherford B. Hayes, were invalid: Louisiana was de facto under military rule; the nominally civilian government held power only because of military support.[458] This was contrary, argued Trumbull, to the constitutional mandate that the United States must guarantee to every state "a Republican Form of Government."[459] Trumbull would continue with the themes of republican form of government, and anti-militarism, in his Second Amendment cases.

### *A. Armed Parades and Workingmen*

Trumbull's first Second Amendment case, *Dunne v. Illinois*, was decided by the Illinois Supreme Court in 1879.[460] Trumbull's second Second Amendment case, *Presser v. Illinois*, was decided by the U.S. Supreme Court in 1886.[461] The two cases grew out of the same issue: armed parades by organizations of Illinois workingmen.[462]

#### 1. The Development of Volunteer Militias

After the Civil War, the pace of industrialization in the United States accelerated rapidly. As gigantic factories spread in urban America, the individual worker had little bargaining power,[463] thus naturally labor

456. ROSKE, *supra* note 10, at 169.

457. There was massive election fraud and voter suppression on both sides. *See* MICHAEL F. HOLT, BY ONE VOTE: THE DISPUTED PRESIDENTIAL ELECTION OF 1876, at 233–34 (2008) (explaining how Trumbull represented the Democrats).

458. WHITE, *supra* note 9, at 409–11.

459. *Id.* at 409; *see also* U.S. CONST., art. IV, § 4.

460. Dunne v. People, 94 Ill. 120 (1879).

461. Presser v. Illinois, 116 U.S. 252 (1886).

462. Stephen P. Halbrook, *The Right of Workers to Assemble and to Bear Arms:* Presser v. Illinois*, One of the Last Holdouts Against Application of the Bill of Rights to the States*, 76 U. DET. MERCY L. REV. 943, 944 (1999). This article is the best history of the *Presser* and *Dunne* cases. Halbrook was well suited to write the article, as he was the first American lawyer to have a long-term practice primarily involving the right to arms in civil, criminal, and administrative cases.

463. *See* ROBERT V. BRUCE, 1877: YEAR OF VIOLENCE 15 (Elephant Paperbacks 1989) (1959)

unions became popular.[464] Collectively, people were more powerful together than individually, but unions were viewed with great suspicion by much of the upper classes.[465]

Violent clashes between labor and corporations became frequent, with violence on all sides.[466] Most notorious was the Great Strike of July 1877, a nationwide week of rioting and destruction of railroad property.[467] But the Great Strike was hardly the only instance of labor-related violence that year, as detailed in Robert V. Bruce's book *1877: Year of Violence*.[468] Chicago had plenty of labor-related violence in the mid-1870s, which Halbrook argues was initiated by the industrialists.[469]

The conflict between labor and capital drew in two different types of volunteer organizations that met for practice in the use of arms.[470] To understand these different organizations, which were at the heart of the *Dunne* and *Presser* cases, a little background on the militia in the nineteenth century is necessary. After the War of 1812 ended in 1815, most states were desultory about training their militias. Taking up the slack, civic-minded men around the nation created volunteer militia units, the best-known being the Zouaves. The volunteer militias met for military practice and camaraderie. They would typically receive a charter from the state, and their officers would be granted state military commissions by the governor. In wartime, such as during the Mexican-American War and especially the Civil War, the units would volunteer en masse, and their units usually entered federal service intact.[471]

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(discussing how the depression in the United States left the country divided between great corporations and labor workers, and how the individual worker lost his bargaining power as a result of this).

464. *Id*.

465. *See id*. at 15–20 (discussing how low wages and poor working conditions drove many to form unions that clashed with the upper class, corporate world).

466. *Id*.

467. Although the common view is that the riots were about labor issues, one historian has assembled significant evidence that most of the anti-railroad violence was city-dwellers striking back against railroads that dangerously ran trains right through crowded urban settings. *See* DAVID O. STOWELL, STREETS, RAILROADS, AND THE GREAT STRIKE OF 1877 (1999).

468. *See generally* BRUCE, *supra* note 463 (detailing the violence that stemmed from the Long Depression and the labor-union unrest).

469. Halbrook, *supra* note 462, at 944.

470. *See* JERRY COOPER, THE RISE OF THE NATIONAL GUARD: THE EVOLUTION OF THE AMERICAN MILITIA, 1865–1920, at 65 (1997) [hereinafter COOPER 1997]; JERRY COOPER, THE MILITIA AND THE NATIONAL GUARD IN AMERICA SINCE COLONIAL TIMES: A RESEARCH GUIDE 19–20 (1993) [hereinafter COOPER 1993]; MARCUS CUNLIFFE, SOLDIERS AND CIVILIANS: THE MARTIAL SPIRIT IN AMERICA, 1775–1865, at 177–254 (1968); NICHOLAS J. JOHNSON, DAVID B. KOPEL, GEORGE A. MOCSARY & MICHAEL P. O'SHEA, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 236–37 (2012).

471. *See* COOPER 1997, *supra* note 470, at 18–22; COOPER 1993, *supra* note 470, at 19–20;

Volunteer militias from New York and Massachusetts played an important role in protecting Washington, D.C. from Confederate invasion during the chaotic period after the firing on Fort Sumter.[472]

Toward the end of the Civil War, a new sort of state volunteer force began to arise. These militias usually called themselves the ''National Guard.''[473] During the latter decades of the nineteenth century, they began to receive official state recognition, financial support, and training.[474] During the twentieth century, they would seek federal support, which was granted, but which eventually led to the National Guard being eliminated as a militia. Congress controls the National Guard primarily by using its enumerated power to raise and support armies, not its enumerated power to organize the militia.[475]

But as of the 1870s, it had not been uncommon for Americans to see volunteer militias (Zouaves, National Guard, and other groups) marching around town in armed parade.[476] These were pride parades of people who were proud to be good Americans, free and armed for community defense.

In Illinois and elsewhere, workingmen formed volunteer organizations whose purposes included sports (e.g., gymnastics), social and cultural events, and armed training, drilling, and parading. The best known of these was *Lehr und Wehr Verein*, composed of German immigrants.[477] Their stated purposes included protecting workers from violence.[478]

### 2. The Illinois Legislation Against Workers' Militias

A controversial bill to crack down on the workingmen's organizations was introduced in the Illinois legislature in 1877.[479] It did not pass that session, but did become law the next session, on May 28, 1879, after the Governor urged its passage.[480] The bill defined the

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CUNLIFFE, *supra* note 470, at 177–254.

472. CUNLIFFE, *supra* note 470, at 252–54.

473. COOPER 1997, *supra* note 470, at 23–43; JOHNSON, *supra* note 470, at 236.

474. COOPER 1997, *supra* note 470, at 44–64; JOHNSON, *supra* note 470, at 237.

475. *E.g.*, Act of June 15, 1933, ch. 87, 48 Stat. 153, 153–54 (providing for congressional re-organization of the National Guard under the Army power, not the Militia power).

476. Halbrook, *supra* note 462, at 945–46.

477. *Id.* at 946–47.

478. *Id.* at 947.

479. *Id.* at 949.

480. Military Code of Illinois (1879) (codified as amended at 20 ILL. COMP. STAT. 1805/1–102 (2016)), *reprinted in* BRADWELL'S LAWS OF 1879, at 149 [hereinafter Militia Act]. The publisher of this collection of Illinois statutes was the husband and wife legal publishing team of James and Myra Bradwell. The latter is best known for her unsuccessful Supreme Court case

militia of the State of Illinois as males aged eighteen to forty-five.[481] This was not controversial. It tracked the definition of the militia of the United States, first enacted by Congress in 1792.[482] Another section turned the volunteer National Guard into a select militia of the State.[483] National Guard members (but not the broader class of all militiamen aged eighteen to forty-five) would receive regular training from the State, and their arms would be supplied by the State.[484] Even before the National Guard of Illinois had been converted into a state entity, it had been used against strikers.[485]

What the Illinois statute called the "active militia" was what the Founders called a "select militia."[486] It was the opposite of a popular militia, containing "the whole body of the People."[487] A select militia

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challenging Illinois's refusal to admit women to the practice of law as a violation of the Privileges or Immunities Clause. *See* JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL (1993). *See generally* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).

481. Militia Act, *supra* note 480, at 149.

482. Act of May 8, 1792, ch. 23, 1 Stat. 271 (codified as amended at 10 U.S.C. § 310 (2012)). Some states had (and still have) broader definitions, with the minimum age as low as sixteen, and the maximum age as high as 60. For example, Vermont's first militia statute set an age range of sixteen to fifty. JOHNSON, *supra* note 470, at 175.

483. Militia Act, *supra* note 480, at 150.

484. *Id*. at 153.

485. Halbrook, *supra* note 462, at 949–50.

486. "Select" militias had been used by the Stuart Kings in England to suppress political dissidents, in part by disarming their opponents. District of Columbia v. Heller, 554 U.S. 570, 592 (2008). One purpose of the Second Amendment was to prevent a select militia in the United States from doing the same. *Id*. at 598.

487. The standard Founding Era view was that all of the people should be armed.

> A militia, when properly formed, are in fact the people themselves . . . and include . . . all men capable of bearing arms . . . . [T]o preserve liberty, it is essential that the whole body of the people always possess arms, and be taught alike, especially when young, how to use them . . . . The mind that aims at a select militia, must be influenced by a truly anti-republican principle . . . .

Letter from Melancton Smith to the Poughkeepsie County Journal (Jan. 25, 1788), http://www.constitution.org/afp/fedfar18.htm. As Noah Webster wrote:

> Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom of Europe. The supreme power in America cannot enforce unjust laws by the sword; because the whole body of the people are armed, and constitute a force superior to any bands of regular troops that can be, on any pretense, raised in the United States. A military force, at the command of Congress, can execute no laws, but such as the people perceive to be just and constitutional; for they will possess the power, and jealousy will instantly inspire the inclination, to resist the execution of a law which appears to them unjust and oppressive.

Noah Webster, *An Examination into the Leading Principles of the Federal Constitution*, *in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 25, 56 (Paul Leicester Ford ed., Brooklyn, N.Y. 1888). See *Nunn v. State*, 1 Ga. 243, 251 (1846), which was cited with approval in *Heller*, because it "perfectly captured" the relationship between the two clauses of the Second Amendment: "The right of the whole people . . . and not militia only, to keep and bear arms of

included only a small fraction of the people, and those people would be only those who supported the current faction in control of the government.[488] The militia of the whole was supposed to be a deterrent to tyranny, whereas a select militia was feared as an instrument of tyranny.[489]

Other provisions of the new law were aimed directly at the labor groups. The statute prohibited association "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."[490] There were exemptions for the National Guard, the U.S Army, or students at schools where military science was taught.[491]

### 3. *Bielefeld*, the First Test Case

Quickly, the Governor and his critics agreed to bring a test case.[492] *Lehr und Wehr Verein* would hold an armed parade.[493] Captain Frank Bielefeld would be arrested, he would refuse to post bail, and would instead file a petition for a writ of habeas corpus.[494]

On September 1, 1879, the Cook County Circuit Court issued its opinion: the Militia Act was unconstitutional because it violated the Second Amendment.[495] The opinion was the most extensive analysis of the Second Amendment by any American court up to that point, and was reprinted in full in the *Chicago Tribune*.[496] Judge William H. Barnum, writing for a panel, recognized that the Second Amendment applied only to the federal government.[497] Even so, the nature of any free government precluded that government from infringing the right to arms.[498] This was true even though the Illinois Constitution then in effect had no specific right to arms provision. Judge Barnum's opinion on this issue was similar to that of the Georgia Supreme Court, which in 1846 had ruled a handgun ban and a ban on handgun carry to be

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every description, and not such merely as are used by the militia, shall not be infringed." *Heller*, 554 U.S. at 612 (emphasis omitted).

488. *Heller*, 554 U.S. at 592.

489. *Id*. at 600.

490. Militia Act, *supra* note 480, at 156.

491. *Id*. at 156–57.

492. Halbrook, *supra* note 462, at 957.

493. *Id*.

494. *Id*. at 957–58.

495. *Militia Law*, CHI. TRIB., Sept. 2, 1879, at 6, http://archives.chicagotribune.com/1879/09/02/page/6/article/militia-law.

496. *Id*.

497. Halbrook, *supra* note 462, at 960, 977.

498. District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

unconstitutional, although Georgia's Constitution at the time had no right to arms.[499] Several Louisiana cases in the 1850s used similar reasoning, finding that the right to arms principle of the Second Amendment applied to the acts of the Louisiana legislature, but that a ban on carrying handguns *concealed* did not violate the Second Amendment.[500] According to Judge Barnum, the right to arms included the right to carry arms openly (but not concealed), as *Lehr und Wehr Verein* was doing.[501] The right included the right to practice, and not just solo practice, but also to practice in groups.[502]

The Militia Act's definition of "active militia" (only the National Guard) was preempted by federal militia laws and by the 1870 Illinois Constitution, both of which defined the militia broadly (able-bodied males aged eighteen to forty-five), with no special definition making only a subset of them "active."[503] Upon close reading of the Illinois statute, the National Guard was not even a militia, but rather was "patterned after the regular army."[504]

Moreover, the Militia Act violated the due process and equal protection clauses of the Illinois Constitution and of the Fourteenth Amendment: the licensing system "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."[505]

### *B.* Dunne v. Illinois

Judge Barnum's decision was not appealable, for technical reasons.[506] Because the *Bielefeld* case was not appealable, a new test was immediately brought. A minor portion of the statute exempted National Guardsmen from jury duty.[507] Peter Dunne, a Guardsman,

499. Nunn v. State, 1 Ga. 243 (1846). As noted, young Trumbull had clerked for attorney Hiram Warner, who later became one of the Georgia Supreme Court Justices who joined in the unanimous *Nunn* opinion. *See supra* text accompanying notes 46–48.

500. State v. Jumel, 13 La. Ann. 399 (La. 1858); State v. Smith, 11 La. Ann. 633, 634 (La. 1856); State v. Chandler, 5 La. Ann. 489 (La. 1850). *Nunn* and *Chandler* are cited with approval in *Heller*. *Heller*, 554 U.S. at 612–13, 626, 629.

501. *Militia Law*, *supra* note 495.

502. *Id*.

503. Militia Act, *supra* note 480, at 150.

504. Halbrook, *supra* note 462, at 966.

505. *Id*. at 963.

506. *Id*. at 969.

507. *Id*.

refused to do jury duty in Judge Barnum's court in September 1879.[508] Given that the Militia Act had been ruled unconstitutional, Judge Barnum determined that the Militia Act was no excuse for a Guardsman refusing to perform jury service.[509] Dunne was fined $50, and appealed to the Illinois Supreme Court.[510]

At the request of both parties, the Illinois Supreme Court said that it would examine the constitutionality on all aspects of the new militia statute in Dunne's case.[511] Trumbull was now in the case, arguing against the Militia Act and in favor of the lower court ruling that it was unconstitutional.[512]

Trumbull's co-counsel was Wolford M. Low, who would later serve as President of the Illinois Sportsmen's Association.[513] Trumbull himself, however, was not a "gun guy." We do not know whether he personally owned firearms, but his favorite sports appear to have been croquet and boating.[514]

In *Dunne* v. *Illinois* the Illinois Supreme Court upheld the Militia Act by a 6–1 vote.[515] As was common at the time, the dissenting judge did not file an opinion.[516] The court ruled that the provisions to organize the Illinois militia were not contrary to any of the federal powers over the militia, or any of the congressional statutes thereon.[517] That the federal government had militia powers under Article I, Section 8, Clauses 15–16 did not displace state authority over state militias, except to the extent that Congress chose to displace them.[518] The court closely studied and quoted extensively from the Supreme Court's 1820 case on concurrent state militia powers, *Houston v. Moore*.[519] The court also rejected the argument that by putting only a small fraction of the people into service as a select militia (the Illinois National Guard), the government was creating not a genuine militia, but a standing army—the "troops" that the Constitution forbids states to maintain, except

508. *Id*.
509. *Id*.
510. *Id*.
511. Dunne v. People, 94 Ill. 120, 123–24 (1879).
512. *Id*. at 124.
513. EDWARDSVILLE INTELLIGENCER, Sept. 17, 1895, at 2, http://www.newspapers.com/newspage/26407910/.
514. ROSKE, *supra* note 10, at 120; WHITE, *supra* note 9, at 421.
515. *Dunne*, 94 Ill. at 140–41.
516. The dissenter was Justice John H. Mulkey.
517. *Dunne*, 94 Ill. at 140–41.
518. *Id*. at 126.
519. Houston v. Moore, 18 U.S. (5 Wheat.) 1, 3 (1820).

during wartime.[520]

Regarding the ban on unlicensed military associations or parades, Trumbull had disclaimed any argument on gun control in general. He had focused on the argument that the Second Amendment certainly protects the bearing of arms in an "organized capacity," such as what the labor organizations did.[521]

The *Dunne* court noted that the training and parade ban had been the object "of severe criticism as being repugnant in some way to the laws of the United States."[522] The court appeared to accept the argument that the right to arms was a limitation on the actions of the Illinois state legislature. The court said, however, that "[t]he right of the citizen to 'bear arms' for the defence of his person and property is not involved, even remotely, in this discussion."[523] That was the entire discussion of the Second Amendment issue.

While the Illinois Supreme Court did not address any of Judge Barnum's analysis of the right to arms from the earlier test case that had held the Militia Act unconstitutional, the *Dunne* court appeared to view the Second Amendment the same way that the U.S. Supreme Court would describe the amendment in the 2008 *District of Columbia v. Heller* case:[524] that the "core" of the right to arms is personal self-defense. To whatever extent the right comprised more than just the core, the right apparently had nothing to do with mass parades or mass drill.[525]

*Dunne* appears to be the first reported appellate test case of the right to arms. Starting with *Bliss v. Commonwealth* in Kentucky in 1822,[526] there had been plenty of state supreme court cases on the Second Amendment and its state counterparts.[527] Yet, almost all of the earlier cases were appeals of criminal proceedings, and there is no indication in any of the case reports that the criminal cases were test cases, rather than ordinary prosecutions.[528]

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520. *Dunne*, 94 Ill. at 138.

521. Halbrook, *supra* note 462, at 970.

522. *Dunne*, 94 Ill. at 139.

523. *Id.* at 140.

524. 554 U.S. 570, 630 (2008).

525. *Dunne*, 94 Ill. at 140.

526. Bliss v. Commonwealth, 12 Ky. (2 Litt.) 90, 90 (1822) (discussing the statutory ban on carrying concealed arms being unconstitutional in relation to defendant's sword-cane, that is, a sword concealed in a walking stick).

527. David B. Kopel & Clayton Cramer, *State Court Standards of Review for the Right to Keep and Bear Arms*, 50 SANTA CLARA L. REV. 1113, 1114 (2010).

528. One non-criminal case upheld a civil suit over a firearm that had been unlawfully taken by the Tennessee government. *See* Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214 (1866).

In 1880, Trumbull was nominated as the Democratic candidate for Governor of Illinois, running on a platform of civil service reform and for stronger laws for the payment of earned wages.[529] He was defeated by incumbent Governor Shelby M. Collum, who had not only signed the Militia Act, but had urged its enactment in a message to the legislature at the beginning of the 1879 session.[530]

### *C.* Presser v. Illinois

In the nineteenth century, a would-be lawyer was not required to attend law school; instead, a person could learn how to become a lawyer by "reading the law"—that is, serving as an apprentice to a practicing lawyer. That was how Trumbull had learned the law.[531] In 1881, Trumbull's longtime political ally Silas Bryan asked if his son could read law under Trumbull's supervision.[532] Trumbull agreed, and a young man named William Jennings Bryan came to the law office.[533] Bryan, who would win the Democratic presidential nomination in 1896, 1900, and 1908, later ranked Trumbull second only to Bryan's parents in shaping his political views.[534]

While the *Dunne* case was working its way to the Illinois Supreme Court, *Lehr und Wehr Verien* set up another test case. Hermann Presser carried a sword while leading a parade of men carrying unloaded rifles.[535] He was indicted on September 24, 1879.[536] He then was convicted and fined ten dollars.[537] For procedural reasons, the case took years to resolve in the Illinois Supreme Court. Eventually, the conviction was affirmed in an unpublished per curiam opinion that simply cited *Dunne*.[538] The case made its way to the U.S. Supreme Court, and was argued in November 1885 by Trumbull.[539]

Trumbull's brief argued that the People's Second Amendment right is "to be exercised in their collective, not less than in their individual

529. KRUG, *supra* note 10, at 346; ROSKE, *supra* note 10, at 170; WHITE, *supra* note 9, at 412; Halbrook, *supra* note 462, at 985–86.

530. KRUG, *supra* note 10, at 346; ROSKE, *supra* note 10, at 170; WHITE, *supra* note 9, at 412; Halbrook, *supra* note 462, at 959.

531. *See supra* text accompanying notes 46–48 (apprenticeship under Georgia Superior Court Judge Warner).

532. ROSKE, *supra* note 10, at 170.

533. *Id.* at 171.

534. *Id.*

535. Halbrook, *supra* note 462, at 972.

536. *Id.*

537. *Id.*

538. *Id.*

539. *Id.* at 975.

capacity."[540] To make parades and collective training dependent on the Governor's consent was to require "the consent, of the very man, against whose usurpation of powers, their organization and arming may, perhaps be directed, and lawfully so."[541] In other words, "drilling, officering, [and] organizing" were all part "of the same impregnable right," and the Second Amendment placed those activities "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."[542] The Illinois Attorney General responded that "the right to keep and bear arms by no means includes the right to assemble and publicly parade in the manner forbidden by the law under which the conviction in this case was had."[543]

The Court's opinion sidestepped Trumbull's argument that the Illinois Militia Act was preempted by, or contrary to, federal militia law. The case at bar only involved Hermann Presser's parade, and not the other provisions of the Act.[544] As for the provisions that Presser had violated, the Court explained, these sections, "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."[545] The Court did not elaborate. Moreover, wrote the Court, the decisive answer to Presser's petition was that the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state."[546] The Court acknowledged that state disarmament of the public would unconstitutionally infringe federal militia powers:

> [A]ll citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, . . . in view of this . . ., the states cannot, even laying the constitutional provision in question [the Second Amendment] 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.[547]

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540. *Id*. at 976 (quoting Brief for Petitioner at 33, Presser v. Illinois, 116 U.S. 252 (1886) [hereinafter Petitioner's Brief]).

541. *Id*. (quoting Petitioner's Brief, *supra* note 540, at 18).

542. *Id*. (quoting Petitioner's Brief, *supra* note 540, at 33–34).

543. *Id*. (quoting Brief for Respondent at 8, Presser v. Illinois, 116 U.S. 252 (1886)).

544. *Presser*, 116 U.S. at 253–54.

545. *Id*. at 264–65.

546. *Id*. at 265.

547. *Id*. at 265–66.

The *Presser* ruling about armed parades was followed by a Massachusetts Supreme Judicial Court ruling a decade later.[548] Citing *Presser* and *Dunne*, the Massachusetts court recognized that the right to arms provision of the Massachusetts Constitution protected the individual right to arms, but this right was not violated by requiring a license for armed parades.[549]

Since 1886, there have been no changes in Second Amendment doctrine that would undermine *Presser*'s rule that permits can be required for armed parades. The Supreme Court's First Amendment cases, from the 1960s onward, forbid ideological discrimination in the granting of parade permits.[550] This solves one part of the problem that Trumbull was trying to fix.

### *D*. In re Debs

Lyman Trumbull's final great case was also in defense of organized labor: the infamous *In re Debs*.[551] Eugene Debs, the President of the American Railway Union, was leading a strike against the Pullman Palace Car Company, which manufactured sleeping cars for railroad passengers.[552] Debs convinced railway workers in Chicago and around the nation to refuse to operate any train that was carrying a Pullman car.[553] This led to a massive disruption of rail service in Chicago, and significant disruptions elsewhere.[554]

The strike was proceeding peacefully until a crowd stopped a train from moving into Indiana, near the Illinois border.[555] At the request of two sheriffs, Illinois Governor John Peter Altgeld called out the militia in those counties.[556] President Cleveland sent federal troops to Chicago

548. Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896).

549. *See id*. Murphy belonged to the Sarsfield Guards. *Id*. Apparently because of anti-Irish prejudice, the group was not allowed to parade. REPORTS OF PROCEEDINGS OF THE CITY COUNCIL OF BOSTON FOR THE YEAR COMMENCING MONDAY, JANUARY 7, 1895, AND ENDING MONDAY, JANUARY 4, 1896, at 535 (Boston, Rockwell & Churchill, 1896). Murphy and about a dozen others paraded anyway, carrying inoperable Springfield rifles, in which the firing pins had been filed down. *Murphy*, 44 N.E. at 172.

550. *See, e.g*., Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147 (1969) (explaining how parade permits must be issued or denied based on narrow, objective standards); Freedman v. Maryland, 380 U.S. 51 (1965) (discussing how the government has the burden of proof of justification for denial; there must be prompt judicial review available).

551. 158 U.S. 564, 598 (1895), *abrogated by* Bloom v. Illinois, 391 U.S. 194 (1968).

552. PAPKE, *supra* note 269, at 24.

553. *Id*. at 25.

554. *Id*. at 26.

555. *Id*. at 29.

556. *Id*.

to ensure that the mails would go through.[557]

Governor Altgeld was furious, and telegrammed Cleveland that the Governor and the Illinois Militia had everything under control, and that the reason that trains were not moving was simply that people were on strike.[558] Illinois needed no assistance, the Governor told the President.[559] To Trumbull, the President's intervention was one more example of "big government" performing its typical malignant function of supporting monopolies and big business.[560]

The military intervention sparked great violence nationwide, including destruction of railroad property. Debs never urged violence.[561] The U.S. Department of Justice sought an injunction against Debs and three other union leaders.[562] Under the civil procedure of the time, the "bill in equity" would be decided by a two-judge panel of one district judge and one circuit judge.[563] Quite improperly, the two judges advised the federal lawyers on how to draft their papers.[564]

The affidavit in support of the injunction request made numerous unsupported allegations about violence, and was anonymous.[565] The two-judge panel granted the motion after an ex parte hearing.[566] Debs and the other three union leaders had not been given notice of the hearing, nor opportunity to present evidence or to tell their side of the story.[567] Indeed, the first they heard about the injunction having been issued was when they read it in the newspapers.[568]

The injunction forbade many types of violent acts, or the urging of people to engage in such acts.[569] But the injunction also could be read to forbid peaceful advocacy of strikes. Debs and the other union leaders were ordered to refrain from "inducing, or attempting to . . . induce, by . . . persuasion, . . . any of the employés of any of said railroads to refuse or fail to perform any of their duties as employés of any of said

557. *Id*. at 29–31; WHITE, *supra* note 9, at 413–14.
558. PAPKE, *supra* note 269, at 31.
559. *Id*.
560. ROSKE, *supra* note 10, at 172.
561. PAPKE, *supra* note 269, at 33–35.
562. *In re* Debs, 158 U.S. 564, 598 (1895), *abrogated by* Bloom v. Illinois, 391 U.S. 194 (1968); PAPKE, *supra* note 269, at 39.
563. PAPKE, *supra* note 269, at 40.
564. *Id*. at 40–42.
565. *See id*. at 71 (noting Trumbull's point about this during Supreme Court oral argument).
566. *Id*. at 40–42.
567. *Id*.
568. *Id*.
569. *In re* Debs, 158 U.S. 564, 598 (1895), *abrogated by* Bloom v. Illinois, 391 U.S. 194 (1968).

railroads in connection with the interstate business or commerce of such railroads."[570]

Later in the Supreme Court, the Attorney General would argue that this did not really ban advocacy of strikes; it simply prohibited Debs from urging that employees who did show up to work not to perform their duties at work.[571]

Debs and the others continued to send telegrams to labor leaders around the nation, urging them to keep up the strike.[572] Debs needed a lawyer, and he contacted Trumbull.[573] Trumbull knew that at his advanced age, trial work would be too much; thus, he recommended a young lawyer who had an office in the same building.[574] The young lawyer had a successful practice that represented railroads, and he thought that unions were generally selfish.[575] Yet, he sympathized with Debs and the strikers fighting the unjust imposition of federal power.[576] Accordingly, the young lawyer took the Debs case, which turned out to be the first of many nationally famous labor cases for Clarence Darrow.[577] Darrow worked on the case with Stephen S. Gregory, a former President of the American Bar Association.[578]

Debs and the other three leaders were brought up on charges of contempt of court for violating the injunction.[579] Whether anything in the mass of pro-strike telegrams that Debs had sent actually violated the injunction was questionable. (At least if the injunction is read so as not to restrict advocating strikes.) But the circuit judge found them guilty on December 14, 1894, and sentenced Debs to six months in prison for contempt of court.[580] The judge's core rationale was that mass national strikes lead to violence; so by advocating a mass national strike, Debs was responsible for the violence.[581]

Darrow wanted to bring the case to the Supreme Court, and he asked

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570. *Id*. at 571.

571. PAPKE, *supra* note 269, at 69.

572. *Id*. at 43–44.

573. PAPKE, *supra* note 269, at 61; ROSKE, *supra* note 10, at 173.

574. PAPKE, *supra* note 269, at 61; ROSKE, *supra* note 10, at 173.

575. CLARENCE DARROW, THE STORY OF MY LIFE 58–62 (1932); PAPKE, *supra* note 269, at 45–46.

576. DARROW, *supra* note 575, at 58–62; PAPKE, *supra* note 269, at 45–46.

577. DARROW, *supra* note 575, at 58–62; PAPKE, *supra* note 269, at 45–46.

578. DARROW, *supra* note 575, at 58–62; PAPKE, *supra* note 269, at 45–46.

579. United States v. Debs, 64 F. 724, 733 (C.C.N.D. Ill. 1894); PAPKE, *supra* note 269, at 47–49, 58.

580. *Debs*, 64 F. at 739; PAPKE, *supra* note 269, at 47–49, 58.

581. *Debs*, 64 F. at 755–64.

Trumbull to join the legal team.[582] He hoped that Trumbull's prestige would help attract the Court's interest.[583] Trumbull agreed, and took the case pro bono, asking only to be paid for his traveling expenses to Washington.[584]

The Debs team filed petitions in the Supreme Court for a writ of error, and for a writ of habeas corpus.[585] The petition for a writ of error should have been granted. The lower court's issuance of the injunction was flagrantly improper, and reflected obvious bias. But the petition was rejected without opinion in January 1895.[586] Later, the Supreme Court said that the reason for denying the writ of error was that the contempt conviction "was not a final judgment or decree."[587] The rationale was implausible. Debs had been tried; the court had issued a final judgment, and had imposed its sentence.[588]

Next came the petition for a writ of habeas corpus. Justice John Harlan received the petition, and referred it to the full Court.[589] Normally at the time, two attorneys for each side presented oral arguments to the Court.[590] But for the *Debs* case, the Court increased this to three, allowing Trumbull to participate.[591]

The argument went back and forth for two days on March 25 and 26, 1895.[592] Most observers agreed that the Attorney General's team had the better of it.[593] The injunction itself, while broad, was mostly an order not to do things that were already illegal (e.g., destroy railroad property, surreptitiously remove coupling pins).[594] Whether Debs had actually violated the injunction was questionable, but that issue was not up for review in the Supreme Court.[595] The Debs team's strongest argument was that the criminal contempt hearing for Debs had deprived him of his right to a jury trial. There were many other arguments, including about the propriety of the federal government having gotten

582. PAPKE, *supra* note 269, at 61.
583. *Id.* at 60.
584. WHITE, *supra* note 9, at 414.
585. *In re* Debs, 159 U.S. 251, 251 (1895).
586. *Id. But see In re* Debs, 158 U.S. 564, 573 (1895) (explaining the denial of petition for writ of error), *abrogated by* Bloom v. Illinois, 391 U.S. 194 (1968).
587. *Debs*, 158 U.S. at 573.
588. There was a separate criminal prosecution pending against Debs, but that was for the alleged commission of various federal offenses, and not for contempt of court.
589. PAPKE, *supra* note 269, at 62.
590. *Id.*
591. *Id.*
592. *Id.* at 69–74.
593. *Id.*
594. *Id.*
595. *Id.*

involved in the strike at all.[596]

In late May, the Court ruled unanimously against Debs.[597] The Court strongly affirmed federal power and federal court jurisdiction.[598] First, there was the postal power, and the strike was obstructing the delivery of U.S. mail.[599] Second, the railroad strike, which was national in scope, was a major obstruction to interstate commerce.[600] Further, there was the Sherman Antitrust Act.[601] This poorly drafted and very overbroad statute banned any "conspiracy, in restraint of trade."[602] It had not been written with labor strikes in mind, but the textual language was broad enough to cover them easily. The Court's opinion affirmed that of course people have the right to strike, but added that they have no right to engage in mob violence.[603] As for the right of jury trial, it was not violated, because a court necessarily had to have its own power to punish contempt of court.[604]

The *Debs* case led to frequent use of federal court injunctions against labor strikes.[605] Eight decades later, *In re Debs* was overruled, on the grounds that when a judicial contempt proceeding involves substantial punishment, the defendant has the right to a jury trial.[606]

### *E. Populist*

While the *Debs* case was going on, Lyman Trumbull was playing one last act on the political stage. A new national political party had been formed: the "People's Party," generally known as the "Populists."[607]

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596. *Id*.

597. *In re* Debs, 158 U.S. 564, 600 (1895), *abrogated by* Bloom v. Illinois, 391 U.S. 194 (1968).

598. *Id*.

599. *Id*. at 579–80.

600. *Id*. at 568–69.

601. Act of July 2, 1890, ch. 647, 26 Stat. 209 ("An act to protect trade and commerce against unlawful restraints and monopolies.").

602. *Id*. *See generally* ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (The Free Press 1993) (1978); DAVID B. KOPEL, ANTITRUST AFTER MICROSOFT: THE OBSOLESCENCE OF ANTITRUST IN THE DIGITAL ERA (2001); THE ABOLITION OF ANTIRUST (Gary Hull ed., 2005).

603. *Debs*, 158 U.S. at 599–600.

604. *Id*. at 599.

605. PAPKE, *supra* note 269, at 98. The power to issue such injunctions was restricted by the Norris-LaGuardia Act in 1932. Act of Mar. 23, 1932, ch. 90, 47 Stat. 70 ("An Act To amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes."). For a survey of the practice of labor injunctions, and relevant changes in federal statutes, see generally Ralph K. Winter, Jr., Comment, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 YALE L.J. 70 (1960).

606. *See generally* Bloom v. Illinois, 391 U.S. 194 (1968).

607. JOHN D. HICKS, THE POPULIST REVOLT: A HISTORY OF THE FARMERS' ALLIANCE AND

Trumbull left the Democrats and joined the People's Party in 1894.[608] On October 6, 1894, he was the featured speaker at a Populist rally at the Central Music Hall in Chicago.[609] At age eighty-one, Trumbull's speaking powers were as great as ever, and the audience of three thousand "went wild with enthusiasm."[610] The speech was published in newspapers, reprinted as a pamphlet, and used as Populist campaign literature.[611]

He denounced "judicial usurpation," with obvious reference to the *Debs* injunction. He said that big business had not gotten rich on its own, but through government favoritism of monopolies.[612] He was against the greedy "one percent" who were enriching themselves by impoverishing everyone else.[613] As Trumbull left the hall, journalist Henry Demarest Lloyd[614] asked for, and received, thunderous cheers for the "Grand Old Man of America."[615]

In December 1894 (while Trumbull was working on the Supreme Court appeal in the *Debs* case), he was asked to prepare a platform for the People's Party National Convention in St. Louis later that month.[616] Trumbull wrote it, and gave it to Lloyd, who presented it to the convention. The convention adopted it verbatim.[617] The first two sections contained general statements of liberty:

> 1. Resolved, that human brotherhood and equality of rights are cardinal principles of true democracy.
> 2. . . . unite[d] in the common purpose to rescue the government from the control of monopolies and concentrated wealth . . . to secure the rights of free speech, a free press, free labor, and trial by jury . . .[618]

Section three returned to the themes of the *Dunne* and *Presser* cases, and to Trumbull's long crusade against military rule.[619] He tied the current controversies to the Republican Party's long-ago opposition to

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THE PEOPLE'S PARTY (1931).

608. KRUG, *supra* note 10, at 349; WHITE, *supra* note 9, at 415.

609. KRUG, *supra* note 10, at 349; WHITE, *supra* note 9, at 414–15.

610. KRUG, *supra* note 10, at 350; WHITE, *supra* note 9, at 415.

611. KRUG, *supra* note 10, at 349–50; WHITE, *supra* note 9, at 415.

612. KRUG, *supra* note 10, at 350.

613. *Id*.

614. Henry Demarest Lloyd was a muckraking journalist. His most famous work was *Wealth Against Commonwealth*, an 1894 critique of the Standard Oil Company. CHESTER MCARTHUR DESTLER, HENRY DEMAREST LLOYD AND THE EMPIRE OF REFORM 275 (1963).

615. KRUG, *supra* note 10, at 350–51.

616. *Id*. at 351; ROSKE, *supra* note 10, at 172–73.

617. KRUG, *supra* note 10, at 351; ROSKE, *supra* note 10, at 172–73.

618. WHITE, *supra* note 9, at 415–16 (quoting the *Chicago Times* from December 27, 1894).

619. *Id*. at 415 (quoting the *Chicago Times* from December 27, 1894).

President Buchanan's use of the federal army to support the pro-slavery territorial government in Kansas:

> 3. We endorse the resolution adopted by the National Republican Convention of 1860, which was incorporated by President Lincoln in his inaugural address as follows: ". . . we denounce the lawless invasion by armed forces of the soil of any state or territory, no matter under what pretext, as among the greatest of crimes."[620]

This led directly to language about the armed people that would have found unanimous endorsement from the Founders:[621]

> 4. Resolved, That the power given Congress by the Constitution provide for calling forth the militia to execute the laws of the Union, to suppress insurrections, to repel invasions, does not warrant the Government in making use of a standing army in aiding monopolies in the oppression of their employees. When freemen unsheathe the sword it should be to strike for liberty, not for despotism, or to uphold privileged monopolies in the oppression of the poor.[622]

Sections 5–8 called for limits on the amount of property that could be transmitted by inheritance, no government issuance of bonds during peacetime, silver coinage at a 16:1 ratio to gold, and government ownership of all monopolies affecting the public interest, with employees to be protected by civil service rules.[623]

And in conclusion:

> 9. Resolved, That we inscribe on our banner, "Down with monopolies and millionaire control! Up with the rights of man and the masses!" And under this banner we march to the polls and to victory.[624]

Lyman Trumbull's final argument before the U.S. Supreme Court was on March 22, 1896.[625] In April, he fell seriously ill after delivering

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620. *Id*. (quoting the *Chicago Times* from December 27, 1894).

621. *See, e.g*., District of Columbia v. Heller, 554 U.S. 570 (2008); STEPHEN P. HALBROOK, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS (2008); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994); THE ORIGIN OF THE SECOND AMENDMENT: A DOCUMENTARY HISTORY OF THE BILL OF RIGHTS, 1787–1792 (David E. Young ed., 2d ed. 1995); *see also* 1 WILLIAM BLACKSTONE, COMMENTARIES *143, app. at 357 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803); Nelson Lund, *Second Amendment*, *in* THE HERITAGE GUIDE TO THE CONSTITUTION 1177 (David F. Forte & Matthew Spalding eds., 2d ed. 2014).

622. WHITE, *supra* note 9, at 416 (quoting the *Chicago Times* from December 27, 1894).

623. *Id*. (quoting the *Chicago Times* from December 27, 1894).

624. *Id*. at 417 (quoting the *Chicago Times* from December 27, 1894).

625. WHITE, *supra* note 9, at 418. The case was *Cornell v. Green*, 163 U.S. 75 (1896). To simplify, the case involved a judicial resolution of a dispute about inherited real property; the lower court had deprived William Tucker of his property without notice or an opportunity to be heard. *Id*. The Court ruled 8–1 that the constitutional issue (deprivation of property without due

the eulogy of Gustave Koerner—his lifelong political best friend—a liberty-seeking German refugee, fellow anti-slavery lawyer, and reforming politician since the first days in Belleville.

Lyman Trumbull died on June 25, 1896, of an internal tumor.[626] A few weeks later, Trumbull's protégé William Jennings Bryan won the Democratic Party's nomination for the presidency, at the Democratic National Convention in Chicago.[627] Bryan's nomination brought the Populists into coalition with the Democrats, on a joint ticket.[628] The decisive event in Bryan's nomination was his platform speech, which led to the Democrats adopting a platform with similarities to the platform that Trumbull had written for the Populists in 1894.[629] For example, the Democratic platform denounced "Government by injunction," a phrase coined by Governor Altgeld in opposition to federal intervention in the Pullman strike.[630]

Without artificial amplification, Bryan's booming and sonorous voice filled the Chicago Coliseum. If there was a precise moment when the small government Democratic Party of Jefferson and Jackson turned into the active government party of today, this was the moment:

> Upon which side will the Democratic Party fight: upon the side of the "idle holders of idle capital" or upon the side of "the struggling masses"? That is the question which the party must answer first, and then it must be answered by each individual hereafter. The sympathies of the Democratic party, as shown by the platform, are on the side of the struggling masses who have ever been the foundation of the Democratic party.
>
> There are two ideas of government. There are those who believe that, if you will only legislate to make the well-to-do prosperous, their prosperity will leak through on those below. The Democratic idea, however, has been that if you legislate to make the masses prosperous, their prosperity will find its way up and through every class which rests upon them.

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process of law, in violation of the Fourteenth Amendment) had not been raised with sufficient explicitness below, so the appeal was dismissed for want of jurisdiction. *Id*. Justice Henry Brown dissented. *Id*. at 80–81 (Brown, J., dissenting).

626. KRUG, *supra* note 10, at 353; ROSKE, *supra* note 10, at 174; WHITE, *supra* note 9, at 418.

627. RICHARD FRANKLIN BENSEL, PASSION AND PREFERENCES: WILLIAM JENNINGS BRYAN AND THE 1896 DEMOCRATIC NATIONAL CONVENTION (2008).

628. *Id*.

629. *Id*.

630. "[W]e especially object to government by injunction as a new and highly dangerous form of oppression by which Federal judges, in contempt of the laws of the States and rights of citizens, become at once legislators, judges, and executioners . . . ." *Democratic Party Platform*, 1896: VASSER PROJECTS, http://projects.vassar.edu/1896/chicagoplatform.html (last visited Apr. 21, 2016); *see* BENSEL, *supra* note 627, at 205; PAPKE, *supra* note 269, at 31.

> . . .
>
> Having behind us the producing masses of this nation and the world, supported by the commercial interests, the laboring interests, and the toilers everywhere, we will answer their demand for a gold standard by saying to them: You shall not press down upon the brow of labor this crown of thorns; you shall not crucify mankind upon a cross of gold.[631]

## CONCLUSION

From the first day in 1837 when Lyman Trumbull began giving speeches for an anti-slavery petition, until his 1895 fights on behalf of Debs and the Populists, Lyman Trumbull considered himself a consistent Jacksonian. How could a supporter of the Democratic Party of Andrew Jackson and Martin Van Buren end up writing the platform of the People's Party, which favored so much government intervention in the economy?

The answer is that there's more than one way to be a Jacksonian. The defining issue of Andrew Jackson's administration was his battle to destroy the Second Bank of the United States.[632] To the Jacksonians, the Bank was everything malignant about big government: a monopoly created by government, for the benefit of corrupt insiders, and to the harm of the workingman.[633] More generally, the Jacksonian suspicion was that when the federal government did something beyond its strictly construed enumerated powers, that something was likely to be picking the pockets of the workingman for the benefit of political insiders—even if the pocket picking were camouflaged in language about some important project.

Andrew Jackson introduced the principle of "equal protection" into American constitutional discourse in his 1832 message vetoing the re-charter of the Bank of the United States: "There are no necessary evils in government. Its evils exist only in its abuses. If it would confine itself to equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor, it would be an unqualified blessing."[634] To the Jacksonians, "special" or "class" legislation was anathema.

In the latter part of the nineteenth century, skeptics of government

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631. WILLIAM JENNINGS BRYAN, THE CROSS OF GOLD: SPEECH DELIVERED BEFORE THE NATIONAL DEMOCRATIC CONVENTION AT CHICAGO, JULY 9, 1896, at 26–28 (1996).

632. *See* ROBERT V. REMINI, ANDREW JACKSON (1966); *supra* text accompanying note 57.

633. *See* REMINI, *supra* note 632; *supra* text accompanying notes 12, 57.

634. Jackson, *supra* note 12.

meddling in economic affairs were part of the Jacksonian heritage.[635] A Jacksonian skeptic of class-based legislation might not have been surprised by what happened to the Sherman Antitrust Act. It was enacted to protect small business against big business. Yet it was soon converted into a tool to use against workers' legitimate rights to strike. That particular problem was addressed by the Clayton Antitrust Act Amendments in 1915, but always, and to this day, the Sherman Act has primarily been used by less-efficient big business to limit competition from more-efficient big business—all to the detriment of the consumer.[636] Indeed, when President Woodrow Wilson later implemented much of the Bryan and Populist agenda, the results were the entrenchment of the power of the most politically powerful businesses.

That is my view, as a Jackson Democrat. Lyman Trumbull was also a Jackson Democrat, and his later policy views were a legitimate, different application of Jacksonian principles. Big business was driving the workingman into the ground. Big business had not gotten big by being good; it had gotten big because of big government: big government's creation of monopolies. Big government's intervention against strikers. Big government's high tariffs for the protection of domestic industry, which harm consumers. If big government had caused the mess, then perhaps the solution was more active government to get America out of the mess.

Clarence Darrow suggested that "the socialistic trend" of Trumbull's opinions "sprang from his deep sympathies with all unfortunates; that sympathy that made him an anti-slavery Democrat in his early years, and afterwards a Republican. He became convinced that the poor who toil for a living in this world were not getting a fair chance. His heart was with them."[637]

Free labor is the unifying principle of Lyman Trumbull's career. There is a straight line from Sarah Borders to Eugene V. Debs. Workers have the right to freely negotiate for whom, when, and whether they shall work. This is a natural right. Trumbull fought for this right across the political spectrum. Whichever party at present best stood for

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635. *See* HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 19–60 (1993); Alan Jones, *Thomas M. Cooley and "Laissez-Faire Constitutionalism": A Reconsideration*, 53 J. AM. HIST. 751 (1967); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897*, 61 J. AM. Hist. 970 (1975).

636. KOPEL, *supra* note 602.

637. WHITE, *supra* note 9, at 425–26 (quoting *History Made by Him: Tributes to Lyman Trumbull*, CHI. TIMES, June 26, 1896, at 3 [hereinafter *Trumbull Tributes*]).

this principle, that was the party for Lyman Trumbull.

Trumbull's principle of fairness applied to how government should operate. It should be for the benefit of all—neither for corrupt government employees, nor for monopolists nurtured by big government. One way for the poor man to have a fair chance is to have the chance to settle some land. Then, he can be his own master, and make a living for his family. Thus, Trumbull championed a Homestead Bill, and urged that the slavocracy's plantations be given to the freedmen.

To have a fair chance, to not be a de jure or de facto slave, a person must be able to repel assaults. Without the right and practical ability of self-defense, a person can be held under the power of another. Thus, Trumbull wrote his Reconstruction bills to effectuate that right. In his view, Section two of the Thirteenth Amendment empowered Congress to abolish disarmament. Written by Trumbull's "good right hand," Section two granted Congress the power to eradicate the "badges of servitude."[638] One of the incidents of non-servitude, of not being a slave, is the constitutional right to bear arms.[639]

That made practical sense in Mississippi in 1866, and it made practical sense in Illinois in 1879. In many places and times, the poor who toil for a living must have the right to bear arms, in order to not be held in de facto servitude. Sometimes, this right must be exercised collectively.

Arms are for liberty. "When freemen unsheathe the sword, it should be to strike for liberty, not for despotism, or to uphold privileged monopolies in the oppression of the poor."[640] Lyman Trumbull did not fight for the Second Amendment because he was pro-gun. He fought for the Second Amendment because he believed that everyone should have a fair chance.

Trumbull's law partner Henry S. Robbins recalled that Trumbull

> seemed to practice law as a mission, not as a vocation by which to make money. With his reputation and his ability combined he might have died a millionaire. It always gave him a pang to charge a fee,

638. CONG. GLOBE, 39th Cong., 1st Sess. 322 (1866).

639. *See* Second Freedmen's Bureau Bill, ch. 200, 14 Stat. 173 (1866) (stating that all persons born in the United States, without regard to any previous condition of slavery or involuntary servitude, shall have the same rights as white citizens, which includes "the constitutional right to bear arms").

640. Richard Linthicum, *Lyman Trumbull*, *in* 12 THE ARENA 33, 36 (B. O. Flower ed., Bos., Mass., Arena Publ'g Co. 1895).

> and when he fixed the charge it was usually about half what a modern lawyer would charge.[641]

Before Lyman Trumbull, there had been plenty of lawyers who had raised right to arms claims in defense of their clients.[642] Some of those lawyers had succeeded in protecting their clients and the public from unconstitutionally oppressive legislation.[643] But as far as we know, every one of those lawyers only participated in a single reported case on the right to arms.

Lyman Trumbull was the first lawyer to bring more than one appellate test case on behalf of Second Amendment rights. With his good right hand, he wrote the first federal laws freeing slaves, arming freedmen, and protecting Second Amendment rights. Among these laws was the Thirteenth Amendment. He was a good lawyer because he was a good man: "His rare forensic gifts would have been unavailing without confidence in the justice of his cause, and a clear conscience which shone in his face and pervaded him through and through."[644]

641. WHITE, *supra* note 9, at 425 (quoting *Trumbull Tributes*, *supra* note 637, at 3).
642. Kopel & Cramer, *supra* note 527, at 1118.
643. *Id*. at 1170.
644. WHITE, *supra* note 9, at 420.