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

Argued November 23-24, 1885

Decided January 4, 1886

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS

MR. JUSTICE WOODS delivered the opinion of the Court.

The position of the plaintiff in error in this Court was that the entire statute under which he was convicted was invalid and void because its enactment was the exercise of a power by the Legislature of Illinois forbidden to the states by the Constitution of the United States. The clauses of the Constitution of the United States referred to in the assignments of error were as follows:

"Art. I, sec. 8. The Congress shall have power . . . to raise and support armies; . . . to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions; to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by Congress; . . . to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers,"

&c.

"Art. I, sec. 10. No state shall, without the consent of Congress, keep troops . . . in time of peace."

"Art. II of Amendments. A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

The plaintiff in error also contended that the enactment of the 5th and 6th sections of Article XI of the Military Code was forbidden by subdivision 3 of section 9, Art. I, which declares "No bill of attainder or *ex post facto* law shall be passed," and by Art. XIV of Amendments, which provides that

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law."

The first contention of counsel for plaintiff in error is that the Congress of the United States having, by virtue of the provisions of Article I of section 8, above quoted, passed the Act of May 8, 1792, entitled "An act more effectually to provide for the national defense by establishing an uniform militia throughout the United States," 1 Stat. 271, the Act of February 28, 1795, "to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions," 1 Stat. 424, and the Act of July 22, 1861, "to authorize the employment of volunteers to aid in enforcing the laws and protecting public property," 12 Stat. 268, and other subsequent acts, now forming "Title 16, The Militia," of the Revised Statutes of the United States, the Legislature of Illinois had no power to pass the act approved May 28, 1879, "to provide for the organization of the state militia," entitled the Military Code of Illinois, under the provisions of which (sections 5 and 6 of Article XI) the plaintiff in error was indicted.

The argument in support of this contention is that the power of organizing, arming, and disciplining the militia being confided by the Constitution to Congress, when it acts upon the subject, and passes a law to carry into effect the constitutional provision, such action excludes the power of legislation by the state on the same subject.

It is further argued that the whole scope and object of the Military Code of Illinois is in conflict with that of the law of Congress. It is said that the object of the act of Congress is to provide for organizing, arming, and disciplining all the able-bodied male citizens of the states, respectively, between certain ages, that they may be ready at all times to respond to the call of the nation to enforce its laws, suppress insurrection, and repel invasion, and thereby avoid the necessity for maintaining a large standing army, with which liberty can never be safe, and that, on the other hand, the effect if not object of the Illinois statute is to prevent such organizing, arming, and disciplining of the militia.

The plaintiff in error insists that the act of Congress requires absolutely all able-bodied citizens of the state, between certain ages, to be enrolled in the

militia; that the act of Illinois makes the enrollment dependent on the necessity for the use of troops to execute the laws and suppress insurrections, and then leaves it discretionary with the governor by proclamation to require such enrollment; that the act of Congress requires the entire enrolled militia of the state, with a few exemptions made by it and which may be made by state laws, to be formed into companies, battalions, regiments, brigades, and divisions; that every man shall be armed and supplied with ammunition; provides a system of discipline and field exercises for companies, regiments, &c., and subjects the entire militia of the state to the call of the President to enforce the laws, suppress insurrection, or repel invasion, and provides for the punishment of the militia officers and men who refuse obedience to his orders. On the other hand, it is said that the state law makes it unlawful for any of its able-bodied citizens, except eight thousand, called the "Illinois National Guard," to associate themselves together as a military company or to drill or parade with arms without the license of the governor, and declares that no military company shall leave the state with arms and equipments without his consent; that even the eight thousand men styled the "Illinois National Guard" are not enrolled or organized as required by the act of Congress, nor are they subject to the call of the President, but they constitute a military force sworn to serve in the military service of the state, to obey the orders of the governor, and not to leave the state without his consent, and that, if the state act is valid, the national act providing for organizing, arming, and disciplining the militia is of no force in the State of Illinois, for the Illinois act, so far from being in harmony with the act of Congress, is an insurmountable obstacle to its execution. We have not found it necessary to consider or decide the question thus raised as to the validity of the entire Military Code of Illinois, for, in our opinion, the sections under which the plaintiff in error was convicted may be valid even if the other sections of the act were invalid. For it is a settled rule

"that statutes that are constitutional in part only will be upheld so far as they are not in conflict with the Constitution, provided the allowed and prohibited parts are separable."

Packet Co. v. Keokuk, 95 U. S. 80; *Penniman's Case,* 103 U. S. 714, 103 U. S. 717; *Unity v. Burrage,* 103 U. S. 459. *See also Trademark Cases,* 100 U. S. 82.

We are of opinion that this rule is applicable in this case. The first two sections of Article I of the Military Code provide that all able-bodied male citizens of the state between the ages of 18 and 45 years, except those exempted, shall be subject to military duty, and be designated the "Illinois state Militia," and declare how they shall be enrolled and under what circumstances. The residue of the Code, except the two sections on which the indictment against the plaintiff in error is based, provides for a volunteer active militia, to consist of not more than eight thousand officers and men, declares how it shall be enlisted and brigaded, and the term of service of its officers and men; provides for brigade generals and their staffs, for the organization of the requisite battalions and companies and the election of company officers; provides for inspections, parades, and encampments, arms and armories, rifle practice, and courts-martial; provides for the pay of the officers and men, for medical service, regimental bands, books of instructions and maps; contains provisions for levying and collecting a military fund by taxation, and directs how it shall be expended, and appropriates $25,000 out of the Treasury, in advance of the collection of the military fund, to be used for the purposes specified in the Military Code.

It is plain from this statement of the substance of the Military Code that the two sections upon which the indictment against the plaintiff in error is based may be separated from the residue of the Code and stand upon their own independent provisions. These sections might have been left out of the Military Code and put in an act by themselves, and the act thus constituted and the residue of the Military Code would have been coherent and sensible acts. If it be conceded that the entire Military Code, except these sections, is unconstitutional and invalid for the reasons stated by the plaintiff in error, these sections are separable, and, put in an act by themselves, could not be considered as forbidden by the clauses of the Constitution having reference to the militia or to the clause forbidding the states, without the consent of Congress, to keep troops in time of peace. There is no such connection between the sections which prohibit any body of men, other than the

organized militia of the state and the troops of the United States, from associating as a military company and drilling with arms in any city or Town of the state, and the sections which provide for the enrollment and organization of the state militia, as makes it impossible to declare one, without declaring both, invalid.

This view disposes of the objection to the judgment of the Supreme Court of Illinois, which judgment was in effect that the legislation on which the indictment is based is not invalid by reason of the provisions of the Constitution of the United States which vest Congress with power to raise and support armies, and to provide for calling out, organizing, arming, and disciplining the militia, and governing such part of them as may be employed in the service of the United States, and that provision which declares that "no state shall, without the consent of Congress, . . . keep troops . . . in time of peace."

We are next to inquire whether the 5th and 6th sections of Article XI of the Military Code are in violation of the other provisions of the Constitution of the United States relied on by the plaintiff in error. The first of these is the Second Amendment, which declares: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed."

We think it clear that the sections under consideration, which only forbid bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, do not infringe the right of the people to keep and bear arms. But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment is a limitation only upon the power of Congress and the national government, and not upon that of the state. It was so held by this Court in the case of *United States v. Cruikshank,* 92 U. S. 542, 92 U. S. 553, in which THE CHIEF JUSTICE, in delivering the judgment of the Court, said that the right of the people to keep and bear arms

"is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no

more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to what is called in *City of New York v. Miln,* 11 Pet. 102, 36 U. S. 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained' by the Constitution of the United States."

See also Barron v. Baltimore, 7 Pet. 243; *Fox v. State,* 5 How. 410; *Twitchell v. Commonwealth,* 7 Wall. 321, 74 U. S. 327; *Jackson v. Wood,* 2 Cowen 819; *Commonwealth v. Purchase,* 2 Pick. 521; *United States v. Cruikshank,* 1 Woods 308; *North Carolina v. Newsom,* 5 Iredell 250; *Andrews v. State,* 3 Heiskell 165; *Fife v. State,* 31 Ark. 455.

It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, in view of this prerogative of the general government, as well as of its general powers, the states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government. But as already stated, we think it clear that the sections under consideration do not have this effect.

The plaintiff in error next insists that the sections of the Military Code of Illinois under which he was indicted are an invasion of that clause of the first section of the Fourteenth Amendment to the Constitution of the United States which declares "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A state may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. The inquiry is therefore pertinent what privilege or immunity of a citizen of the United States is abridged by sections 5 and 6 of Article XI of the Military Code of Illinois?

The plaintiff in error was not a member of the organized volunteer militia of the State of Illinois, nor did he belong to the troops of the United States or to any organization under the militia law of the United States. On the contrary, the fact that he did not belong to the organized militia or the troops of the United States was an ingredient in the offense for which he was convicted and sentenced. The question is therefore had he a right as a citizen of the United States, in disobedience of the state law, to associate with others as a military company and to drill and parade with arms in the towns and cities of the state? If the plaintiff in error has any such privilege, he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred. For, as was said by this Court in *United States v. Cruikshank,* 92 U. S. 542, 92 U. S. 551, 92 U. S. 560, the government of the United States, although it is

"within the scope of its powers supreme and above the states, . . . can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction. . . . All that cannot be so granted or so secured are left to the exclusive protection of the state. "

Page 116 U. S. 267

We have not been referred to any statute of the United States which confers upon the plaintiff in error the privilege which he asserts. The only clause in the Constitution which upon any pretense could be said to have any relation whatever to his right to associate with others as a military company is found in the First Amendment, which declares that

"Congress shall make no laws . . . abridging . . . the right of the people peaceably to assemble and to petition the government for a redress of grievances."

This is a right which it was held in *United States v. Cruikshank,* above cited, was an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. But it was held in the same case that the right peaceably to assemble was not protected by the clause referred to unless the purpose of the assembly was to petition the government for a redress of grievances.

The right voluntarily to associate together as a military company or organization or to drill or parade with arms without and independent of an

act of Congress or law of the state authorizing the same is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent of law. Under our political system, they are subject to the regulation and control of the state and federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

It cannot be successfully questioned that the state governments, unless restrained by their own constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States, and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations, are

authorized by the militia laws of the United States. The exercise of this power by the states is necessary to the public peace, safety, and good order. To deny the power would be to deny the right of the state to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine.

In the case of *New York v. Miln,* 11 Pet. 102, 36 U. S. 139, this Court said:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: that a state has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation where that jurisdiction is not surrendered or restrained by the Constitution of the United States; that by virtue of this, it is not only the right but the bounden and solemn duty of a state to advance the safety, happiness, and prosperity of its people and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends where the power over the particular subject or the

manner of its exercise is not surrendered or restrained in the manner just stated,"

namely by the Constitution and laws of the United States. *See also Gibbons v. Ogden,* 9 Wheat. 1, 22 U. S. 203; *Gilman v. Philadelphia,* 3 Wall. 713; *License Tax Cases,* 5 Wall. 462; *United States v. Dewitt,* 9 Wall. 41; *United States v. Cruikshank,* 92 U. S. 542. These considerations and authorities sustain the power exercised by the Legislature of Illinois in the enactment of sections 5 and 6 of Article XI of the Military Code.

The argument of the plaintiff in error that the legislation mentioned deprives him of either life, liberty, or property without due process of law, or that it is a bill of attainder or *ex post facto* law is so clearly untenable as to require no discussion.

It is next contended by the plaintiff in error that sections 5 and 6 of Article XI of the Military Code, under which he was indicted, are in conflict with the acts of Congress for the organization of the militia. But this position is based on what seems to us to be an unwarranted construction of the sections referred to. It is clear that their object was to forbid voluntary military associations, unauthorized by law, from organizing or

drilling and parading with arms in the cities or towns of the state, and not to interfere with the organization, arming and drilling of the militia under the authority of the acts of Congress. If the object and effect of the sections were in irreconcilable conflict with the acts of Congress, they would, of course, be invalid. But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and the paramount law. *Parsons v. Bedford,* 3 Pet. 433; *Grenada County Supervisors v. Brogden,* 112 U. S. 261; *Marshall v. Grimes,* 41 Miss. 27. If we yielded to this contention of the plaintiff in error, we should render the sections in valid by giving them a strained construction, which would make them antagonistic to the law of Congress. We cannot attribute to the legislature, unless compelled to do so by its plain words, a purpose to pass an act in conflict with an act of Congress on a subject over which Congress is given authority by the Constitution of the United States. We are therefore

of opinion that, fairly construed, the sections of the Military Code referred to do not conflict with the laws of Congress on the subject of the militia.

The plaintiff in error further insists that the organization of the Lehr und Wehr Verein as a corporate body under the general corporation law of the State of Illinois was in effect a license from the governor within the meaning of section 5 of Article XI of the Military Code, and that such corporate body fell within the exception of the same section "of students in educational institutions where military science is a part of the course of instruction."

In respect to these points, we have to say that they present no federal question. It is not, therefore, our province to consider or decide them. *Murdock v. Memphis*, 20 Wall. 590.

All the federal questions presented by the record were rightly decided by the Supreme Court of Illinois.

Judgment affirmed.