

A TALE OF THREE WARS: *TINKER* IN CONSTITUTIONAL CONTEXT

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INTRODUCTION

I shall try to weave together three stories today—stories of three bloody wars in American history, and the constitutional lessons that emerged from the bloodshed. The first story involves the Revolutionary War, which led to the creation of the nation, the establishment of the Constitution, and the birth of the Bill of Rights. Second comes the story of the Civil War, prompting the reconstruction of the nation and the rebirth of the Bill of Rights through the Fourteenth Amendment. Finally, there is the story of the Vietnam War and *Tinker v. Des Moines Independent Community School District*,¹ a case powerfully illuminated—or so I shall argue—by the lessons of the first two stories.

STORY ONE: THE REVOLUTIONARY WAR AND THE FIRST AMENDMENT

British North America was founded over the course of the Seventeenth and Eighteenth Centuries as a series of distinct British colonies, established at different times, with different charters and legal institutions, and populated by different peoples. As late as 1760, Georgians had no idea that they would soon

* Southmayd Professor, Yale Law School. This Article derives from oral remarks delivered on October 9, 1999, at the Drake University Law School Constitutional Law Symposium commemorating the thirtieth anniversary of *Tinker v. Des Moines Independent Community School District*. My remarks at this event borrow from and build upon my general study of the Bill of Rights. Readers looking for more details and documentation are invited to consult Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998). Special thanks to Tom Baker and Keith Miller for their warm hospitality and to Josh Chafetz for his superb editorial assistance.

1. *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

become part of a single continental entity connected to Massachusetts but not to Canada, to Connecticut but not to the British West Indies. Each of these colonies was connected to the mother country in a manner rather analogous to the British Commonwealth of Nations circa 1940—New Zealand, Australia, Canada, India, and Kenya each had a connection to the crown but very little connection to one another. In 1760, Georgia was a long way from Massachusetts, given transportation technology. Georgians were more likely to follow events in London than in Boston.

The American Revolution was waged against an imperial center. The British unwittingly forced the American colonies to band together by treating these very different entities alike and by imposing similar burdens and taxes on all of them. As America began to develop a continental consciousness, local governments led the charge against Parliament. When Parliament went too far, local governments mobilized opposition by forming committees of correspondence and militias. It was the several states, in an international assembly—"congress" refers to a transnational body,² like the Congress of Vienna in 1815—that declared independence. The Articles of Confederation likewise reflected a confederacy of sovereign states.

The political ethos of the Founding strongly associated liberty with localism. "No taxation without representation"—the rallying cry of the American Revolution—was not anti-taxation, as some would have you believe; it was about localism. Taxation was fine so long as the taxing entity was the state government, in which the interests of the taxed were faithfully represented. In contrast, the colonists had no representation in Parliament. Americans were living in a world where vast geographic empires were always associated with unfreedom. Liberty was local. The history of the world up to that point was one in which no continental regime had ever been democratic. Democracies had extended only over small geographic areas—the ancient Greek city-states, Venice, and pre-imperial Rome. Once Rome became an empire, it needed an emperor, and an emperor rules with a standing army and heavy taxes; an empire is neither representative nor democratic.

Thus, it was in the best tradition of liberty (as then understood) that the Articles of Confederation gave most of the power to state and local governments. But that system was not strong enough to keep the new union together, and so thirteen years after independence, a new Constitution was born. This new Constitution created a much stronger central government, and because of that, its Framers had a lot of persuading to do. Anti-Federalist skeptics wondered whether it was possible to have a truly free continental government. They insisted that, if the Constitution was going to create such a powerful central

2. WEBSTER'S THIRD INTERNATIONAL DICTIONARY (UNABRIDGED) 1001 (3d ed. 1981).

government, it must also include some special safeguards beyond what had been proposed by the Philadelphia Convention. These safeguards became our Bill of Rights. It is important to understand how the original Bill of Rights was associated with localism and, in some important ways, with majority rule rather than minority rights.

Let's begin with the First Amendment. Consider the first five words: "Congress shall make no law"³ From the outset, this is a Bill of Rights that applies against the Congress, against the federal government, but not against state and local governments. The famous 1833 case of *Barron v. Mayor of Baltimore*⁴ confirmed that the First Amendment—and indeed the rest of the original Bill of Rights—applied only against the federal government.⁵ The reason is that the federal government was seen by some as unrepresentative, much as the colonists had viewed its predecessor, Parliament.⁶ Of course, colonists had not been allowed to vote for Parliament at all, whereas citizens of the new nation would get to vote for Congress; but many still wondered whether a tiny elite in Congress could truly be representative of the vast diversity of the nation.⁷ How much power were the American people comfortable granting to twenty-six senators, of whom a quorum would be fourteen, eight of whom would constitute a majority? How much of the business of this vast continent ought to be entrusted to eight people? Compared to a typical state legislature with close to a hundred lawmakers, the Senate seemed dangerously small and unrepresentative. Even the national House of Representatives was smaller than most state legislatures.⁸

Moreover, only great men—wealthy men with extensive reputations—could be elected to Congress from large geographic districts. Anti-Federalists feared that these lordly men would go off to an imperial capital city, where they would take up permanent residence, hobnob with haughty European diplomats and ambassadors, rule with a federal standing army, and impose unpopular taxes on the folks back home. Virginians—at least white, male, propertied Virginians—thought they could trust the Virginia House of Burgesses because it had been up and running for more than a century and a half, since 1620. It was already older for them than the Fourteenth Amendment is for us today. The thing to be feared was not the old, established state legislature, but this new-fangled

3. U.S. CONST. amend. I.

4. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

5. *See id.* at 247-48.

6. *See id.* at 250.

7. *See id.*

8. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 11-12 (1998).

Congress, the likes of which had never before been seen in human history, a purportedly democratic regime to govern a continent.

To check the new central government, the original Bill of Rights was designed not simply (or even centrally) to protect individual rights or minority rights, but also to protect *states'* rights against the federal government. The Tenth Amendment is a clear statement of states' rights, but this same principle can also be found in the First Amendment. The wording "Congress shall make no law"⁹ is actually a gloss on the wording of the Necessary and Proper Clause, which reads: "The *Congress shall* have Power . . . To *make all Laws* which shall be necessary and proper for carrying into Execution the foregoing Powers

. . . ."¹⁰ The original First Amendment is saying, on one level, that there is no federal power over the domains of religion and press regulation—not as a matter of individual rights, but simply as a matter of Article I, section 8, enumerated powers. There is no enumerated federal power to censor the press; there is no enumerated federal power on the topic of religion. Those are things left to state policy. So, when the First Amendment says "Congress shall make no law respecting an establishment of religion,"¹¹ it prevents a nationally-established church; it does not prevent a state-established church. State-established churches were perfectly permissible under the original First Amendment. But the picture at the Founding is even more dramatic than that: the First Amendment actually *protects* a state's right to have an established church. Six of the thirteen states had established churches at the time the Constitution was adopted. Even the "non-establishment" states generally had laws that were pro-Protestant or, more generally, pro-Christian.¹² The First Amendment says not only that Congress cannot create a nationally established church, but also that Congress cannot *disestablish* the state churches.¹³ A federal disestablishment law would be a congressional law "respecting"—that is, on the topic of—"an establishment of religion."¹⁴

So why did the Anti-Federalists trust states to legislate in these areas while distrusting the federal government? Partly because states were seen as closer to the people. And a uniform imperial policy on religion would have been inappropriate because Americans disagreed too much. The original First Amendment was like the European Peace of Augsburg of 1555 and the Treaty of Westphalia of 1648, in which the basic idea was that the Holy Roman Empire would have no uniform imperial policy on religion. Instead, the matter would be

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9. U.S. CONST. amend. I.
 10. U.S. CONST. art. I, § 8, cl. 18 (emphasis added).
 11. U.S. CONST. amend. I.
 12. AMAR, *supra* note 8, at 33.
 13. *See* U.S. CONST. amend. I.
 14. *Id.*

left to local choice. Analogously, the Americans basically said: “We can’t agree on the national level about the proper relationship between government and religion; we’re going to leave that up to local option.” It was unsurprising that they saw a uniform national policy as inappropriate: there were Anglicans down south, Quakers in Pennsylvania, Baptists in Rhode Island, Catholics in Maryland, and Congregationalists in New England. Two hundred years ago, that was tremendous religious diversity, and it translated into tremendous variation in church-state policy. The only thing that all could agree on at the Founding was that the federal government should keep its hands off.

In important respects, this structural agreement protected dissenters. Americans worried that Congress would try to suppress political dissent, just as Parliament had done in the colonies. Americans especially worried about protecting anti-governmental speech—speech of political dissenters. The phrase “the freedom of speech” is at its core about political speech and expression. It comes from the English Bill of Rights of 1689, which says there shall be free speech and debate in Parliament.¹⁵ Parliament, from the French *parler*, is a place where people parley, or speak. Specifically, in Parliament, they speak about politics. One of the big ideas of the American Revolution is that, on this side of the water, Parliament is not sovereign; “We the People” are.¹⁶ Therefore, “We” should have the same freedom of speech, the same freedom of political discourse, that in England was reserved specifically for the legislature.

So, the First Amendment aims to protect political expression, especially the expression of opposition to a possibly unrepresentative national government. As it turned out, Anti-Federalist fears were justified: within a decade of the adoption of the Constitution and Bill of Rights, Congress passed the infamous Sedition Law of 1798.¹⁷ This law, signed by President John Adams, made it a federal crime to criticize the President of the United States or a member of Congress.¹⁸ Interestingly, it did not make it a federal crime to criticize the Vice President, who happened to be Thomas Jefferson, the leader of the opposition party. The law did not make it a crime for members of Congress to criticize their challengers—only for the challengers to criticize the incumbents—and it expired after the next election. The Sedition Act was a paradigmatic example of governmental self-dealing, and people began to mobilize against it. Where? Not in newspapers, because attacking the Sedition Act in newspapers opened the attacker to prosecution under the Sedition Act itself. So opposition mobilized in the state legislatures. This is what the Kentucky and Virginia Resolutions were all about: freedom of speech and debate in these local legislatures mobilizing

15. See LOIS J. SCHWOERER, *THE DECLARATION OF RIGHTS* 297 (1981).

16. See U.S. CONST. preamble.

17. Act of July 14, 1798, 1 Stat. 596.

18. *Id.* at 596-97.

constituents against Congress, just as the colonial legislatures had mobilized opposition to Parliament. The Kentucky and Virginia Resolutions highlight an important point about freedom of speech at the time of the Founding: the right was majoritarian in some ways—it was centrally about protecting a majority of the citizens against a possibly unrepresentative Congress trying to suppress popular speech, like the speech of the Jeffersonians in 1798-1800. Jefferson won the election of 1800, and this victory helped launch the strong tradition in America of protecting dissenting speech.

But “dissenting” here means somewhat popular speech against an unpopular federal regime, and it was protected largely by empowering state and local governments and local juries. In the case of John Peter Zenger, a newspaper publisher in colonial New York, the hero of the case was the local jury that let the defendant go free because he was saying popular things in New York against an unpopular governor.¹⁹ The rules against prior restraint, which are part of the original First Amendment, are also pro-jury. If the goal is to directly protect free expression, a rule saying that government cannot prohibit speech in advance, but can chop the speaker’s head off afterwards, is not so obviously protective—the knowledge that speakers who go too far tend to lose their heads has, to borrow a phrase, a certain chilling effect. So, how is a rule against prior restraint in any way protective of free expression if the speaker can still be punished after the fact? Here’s how: prior restraints were enforced by judges issuing injunctions and by administrators and licensors—agents of the state. After-the-fact punishment, on the other hand, would require conviction by a jury of ordinary citizens. And if the speaker was saying relatively popular stuff that the folks in his locality liked, the jury could acquit—essentially nullify—just as they acquitted Zenger. So the prior restraint rule of the First Amendment was very much about empowering local juries, making sure that they, and not federal judges (who were, after all, sometimes appointed by presidents like John Adams) served as the final protectors of free expression.

Now this is a very different picture of the Bill of Rights than the one we have today. In the story I have just told, the Bill of Rights is primarily localist and majoritarian, celebrating local juries and states’ rights, safeguarding the right of states to have established churches, and protecting a certain kind of political dissent, but only against Congress. But this story captures only part of what a case like *Tinker* is about.²⁰ To fully understand *Tinker*, we also need to examine the second big war in American history, the Civil War—a war essentially about the unfreedom of the South.

19. Trial of John Peter Zenger, 9 Geo. 2 (1735), reprinted in 17 T.B. HOWELL, COBBETT’S COMPLETE COLLECTION OF STATE TRIALS 675 (1816).

20. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969).

STORY TWO: THE CIVIL WAR AND THE FOURTEENTH AMENDMENT

Beginning in the 1830s, abolitionists waged first a religious, and ultimately a political, crusade against slavery. Slavery was first and foremost a sin, and the initial appeals of the abolitionists simply tried to persuade people one at a time to abandon the sin, to free their slaves, and to free themselves from their own bondage to slavery. That initial religious crusade later ripened into a political crusade to limit slavery's expansion and ultimately put it on a path towards extinction: the first goal was to stop the expansion of this Evil Empire called the Slave Power; then, once that was accomplished, the goal would be to actually push slavery back. This was very similar to the domino theory of communist containment a hundred years later: first stop communist expansion at the world level, then try to roll back the advances it has already made.

At first, the abolitionists were dismissed as kooks and cranks; they were a small minority, shunned by respectable people. They were zealots and fanatics, but they happened to be right, morally, and ultimately, legally. The Civil War was precipitated by extremely aggressive Southern attempts to stifle liberty. First, of course, the liberty of slaves was snatched away, requiring brutal repression, slave by slave. Then, it became necessary to oppress free blacks down South, because free blacks, by their very example of being free and walking around, were an incitement to slaves. Next, it became imperative to suppress anti-slavery Southern whites—and there were many such people: most white Southerners were not, in fact, slave owners. Finally, the Slave Power had to suppress Northerners who tried to come down South and preach against slavery—often, preach literally, because these were generally men and women of faith. Thus, in order to prop up slavery, the Slave Power had to resort to an ever-widening spiral of oppression. The Republican Party in 1860 was an outlaw party—it was, in effect, a crime in the Southern states to be a Republican; it was sedition.

Recall that the First Amendment did not yet protect citizens against state oppression of this sort. There were no remedies to be found in federal court. So, Abraham Lincoln's name did not appear on the ballot in any Southern state. But, he was elected nonetheless; the Southern states seceded; the Civil War was fought; and good triumphed over evil. In the war's aftermath, the Republican Party needed to reconstruct Southern states before they could be allowed back into normal relations with the rest of the Union. The Republicans needed to establish fundamental preconditions for a healthy democracy. In order to do that, they adopted a second Bill of Rights, the Fourteenth Amendment.²¹

21. U.S. CONST. amend. XIV (ratified July 9, 1868).

The Founding had demonstrated that far-off, aloof, unrepresentative governments could violate liberty—first Parliament, in which the colonists had no vote at all, and then Congress, which was feared as possibly unrepresentative and susceptible to self-dealing. These realizations at the Founding established the need for a Bill of Rights against the imperial center. In light of lessons learned from the Slave Power and the Civil War, it became clear that even supposedly democratic states and local governments could also threaten liberty. This type of oppression called out for a new Bill of Rights, one against the periphery, and one that would balance the initial Bill of Rights against the center.

The canonical expression of this new Bill is the second sentence of the Fourteenth Amendment: “No State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States”²² What was meant by “privileges and immunities”? Things like freedom of speech and of the press, freedom of religion, freedom against unreasonable search and seizure, as well as the right of habeas corpus, and freedom from ex post facto laws. In short, privileges and immunities encompassed the rights in the original Bill of Rights, plus rights found elsewhere in the Constitution, like habeas corpus, and freedom from ex post facto laws. These things are privileges and immunities of American citizens that no state may abridge.

Note how the Fourteenth Amendment borrows from the language of the First: “Congress shall make no law . . . abridging” in the First,²³ and “No State shall make or enforce any law which shall abridge” in the Fourteenth.²⁴ But the Fourteenth says that we need a Bill of Rights against the states, to be protected and enforced by federal courts, by the federal government, against the periphery. Juries are no longer quite so trustworthy, because they may reflect the same forces of social intolerance that the rights are meant to protect against. The Revolutionary Founders loved juries: in 1760, colonists did not get to vote for Parliament (and they certainly did not have any say in who was to be king), so one of the few places where they could actually make their voices heard was on a local jury. The king appointed colonial judges, so judges were not always heroes to the colonists. The colonial jury thus naturally evolved into a political institution—one of the most truly representative institutions in the colonies—so it is unsurprising that the jury emerged as the main bulwark of the original Bill of Rights. We can see the Founders’ emphasis on the jury explicitly in the Fifth Amendment grand jury provision, in the Sixth Amendment criminal jury provision, and in the Seventh Amendment civil jury provision. We can also see it implicitly in things like the First Amendment prior restraint rule and the

22. *Id.*

23. U.S. CONST. amend. I (emphasis added).

24. U.S. CONST. amend. XIV (emphasis added).

Second Amendment celebration of local militias, which were close cousins to local juries.

The Civil War experience, however, tempered American enthusiasm for juries. A new model of dissent emerged, involving a commitment to protect not only those who oppose government policy (although that continues to be very important), but also those who challenge the majority viewpoint. Of course, the paramount virtue of the jury to the Framers was its fundamentally populist makeup, but a majoritarian jury provides a less than complete safeguard for this new kind of dissent. Part of the reason it is important to protect the lonely dissenter is that, given enough time to make her case, she might be able to persuade a majority. Abolitionists were a case-in-point: they, who had been dismissed as utter extremists in 1830, had become the heart and soul, the dominant force, of the Republican Party by 1866. Even a strict believer in majority rule has to protect the current minority in order to give it a chance to ripen into an ultimate majority if allowed to make its case.

The reconstructed Bill of Rights also protects religious speech and not merely political expression. At the Founding, religion was in the First Amendment along with freedom of speech, but religion was included largely for reasons of federalism: Congress had no enumerated power over either of these domains. No state constitution linked religion and speech, or religion and press. Only the Federal Constitution linked them, and it did so on the theory of enumerated power. By the time of the Fourteenth Amendment, there was a different vision aborning, one that favored the absolute protection of religious speech, and not simply the relegation of the matter to local governments. This came about in part because it was seen that religious and political speech were intimately connected, as exemplified by the abolitionists. This also came about in part because of a respect for individual conscience, a respect evident in the writings of Emerson, Thoreau, and John Stuart Mill, whom Nadine Strossen invoked yesterday in her stirring Keynote Address.²⁵ These men were all mid-nineteenth century thinkers. They are not Founding thinkers, and to read their views back into the Founding is rather anachronistic. So ideas about protecting religious and artistic speakers (and women) like Harriet Beecher Stowe; protecting the lone Northerner down South, a carpetbagger; protecting a black man in a white country, like Frederick Douglass—these are Fourteenth Amendment ideas more than First Amendment ideas. This new birth of freedom in the Fourteenth Amendment helps redefine the entire American ethos to include more emphasis on the individual, and the need to protect him or her against

25. See Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate: Student Rights Thirty Years After Tinker v. Des Moines Independent Community School District*, 48 DRAKE L. REV. 445, 453-54 (2000).

majoritarian oppression and social intolerance, not just against unrepresentative government.

STORY THREE: THE VIETNAM WAR AND THE *TINKER* CASE

Now, let's think about *Tinker* in the context of these two stories. *Tinker* reflects some important lessons of the Founding story. Consider, for example, the *Tinker* Court's vigorous protection of political expression—in particular, expression that criticized government policies, namely, the administration's policies in prosecuting the Vietnam War.²⁶ Indeed, the Court exhibited special vigilance in *Tinker* because the challenged rule seemed specifically aimed against this kind of oppositional speech.²⁷ Said the Court:

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of all political or controversial significance. The record shows that students at some of the schools wore buttons relating to national political campaigns, and some even wore the iron cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. *Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition.*²⁸

The school's apparent targeting of those speaking out against government policy violates a core Founding idea.

But here is where we must move beyond the Founding. The anti-speech rule in *Tinker* did not come from Congress or the federal government; it came from local government, supported at the time by the majority of the local community. If this case had been tried by a jury in Des Moines, the *Tinkers* and Eckhardt might have lost. According to the record, there were seven students out of 18,000 who wore armbands, and the *Tinker* Court was sensitive to that fact, talking about the need to protect this minority against majority intolerance. The Court says, for example:

Any departure from absolute regimentation may cause trouble. Any variation *from the majority's opinion* may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk [The state] must be able to show that its action was caused by something more than a mere desire to

26. See *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 510-11 (1969).

27. See *id.*

28. *Id.* (emphasis added).

avoid the discomfort and unpleasantness that always accompany *an unpopular viewpoint*.²⁹

These are the themes of the Fourteenth Amendment, not the Founding. Federal judges, rather than somewhat suspect juries, are now the heroes, protecting liberty against localities. Local juries were the heroes of the Founding; federal judges were the ones who cheerfully incarcerated those who violated the Sedition Act, brushing aside their First Amendment challenges to the law.

Another central Fourteenth Amendment theme at work in *Tinker* is that of the outsider. Women were central speakers at the time of the Fourteenth Amendment. Because of their exclusion from political participation, women became very involved in church organizations, and consequently in religious crusades, which ultimately became political crusades. Anti-cruelty, temperance, anti-slavery, anti-gambling, and women's suffrage movements were all born in the mid-nineteenth century and all heavily involved women. Women were core Fourteenth Amendment speakers, even though they were not voters. Blacks, too, who were not voters in some of the states, were core Fourteenth Amendment speakers. *Tinker* is a natural extension of an amendment designed to protect those kinds of social outsiders. Children, like women and minorities, are social outsiders of sorts. Also, the Court showed a deep understanding of our Fourteenth Amendment experience when it wrote: "In our system, state-operated schools may not be enclaves of totalitarianism."³⁰ That image of totalitarianism very much captures the essence of the Southern states before the Civil War. "School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution."³¹ The word "persons" is emphasized because it is a reference to the first sentence of the Fourteenth Amendment. "All persons born or naturalized in the United States"³² are citizens thereof, whether they are males or females, born slave or born free, children or adults—everyone is a person, and so everyone is a citizen under the Fourteenth Amendment.

These are centrally Fourteenth Amendment themes, dealing with inclusion of formerly marginalized groups and protecting them against majority oppression and intolerance. And part of the logic here is that those who might seem like nuts and cranks today, if allowed to make their case, might tomorrow convince the majority of us that they were right after all. This was the story of the anti-slavery movement in the mid-nineteenth century, and it is also, I suggest, part of the story of the anti-war movement in the mid-twentieth century. So in thinking

29. *Id.* at 508-09 (emphasis added).

30. *Id.* at 511.

31. *Id.*

32. U.S. CONST. amend. XIV.

about *Tinker*, we must ponder not just the First Amendment and the Founders' Bill of Rights, but also the new birth of freedom—the new Bill of Rights—reflected in the Fourteenth Amendment.