A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change

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ABSTRACT:

Popular constitutionalists often ignore one of the most important features of popular constitutional culture—the constitutional life of the average citizen. Although these scholars have detailed the key role played by non-judicial actors in promoting non-Article V constitutional change, they have spent little time considering how changes to constitutional meaning become part of our popular constitutional fabric. This Article fills a gap in the literature by examining how popular constitutional meaning is shaped “on the ground,” once the most recent controversy fades and constitutional life returns to normal. To that end, it focuses on a pathway that has been largely ignored by legal scholars—civic education. In particular, this Article scrutinizes the free speech stories presented in our leading high school textbooks. In the end, these popular constitutional narratives are not particularly popular—and have become even less so in recent decades. Furthermore, the patterns of change in these accounts suggest that transformations in our popular constitutional narratives tend to follow periods where key public officials and broad-based social movements promote similar changes to constitutional meaning.

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TABLE OF CONTENTS

INTRODUCTION.................................................................................................................4
I. THE FIRST AMENDMENT, PUBLIC OPINION, AND POPULAR CONSTITUTIONAL MEANING .................................................................9
   A. Popular Constitutional Culture and the First Amendment ..............12
   B. The First Amendment in the Twenty-First Century .......................15
II. TOWARDS A THEORY OF CONSTITUTIONAL ABSORPTION ..............17
   A. The Court, Our Schools, and the Inculcation of Constitutional Values ..........................................................17
   B. A Theory of Constitutional Absorption .............................................19
III. CONSTITUTIONAL ABSORPTION IN OUR HIGH SCHOOL GOVERNMENT CLASSROOMS ..............................................................23
   A. Civil Rights in Magruder’s American Government .....................24
   B. The Pre-Modern First Amendment in Our High School Government Classrooms—1917 through the 1940s ......................24
   C. Transformational Shift I: McCarthyism and Magruder’s .............28
   D. Transformational Shift II: The Modern First Amendment in Our High School Government Classrooms—The 1960s Through Today ...........................................31
      1. The 1960s: The Emergence of a Speech-Protective Account of the First Amendment ...........................................31
      2. The 1970s: The Emergence of a Court-Centered Account of the First Amendment ..........................................33
      3. The 1980s: New Issues and New Cases ......................................34
      4. The 1990s and Beyond: Magruder’s and the Modern First Amendment ......................................................36
      5. Conclusion ..............................................................................37
IV. CONSTITUTIONAL ABSORPTION IN OUR HIGH SCHOOL HISTORY CLASSROOMS ........................................................................38
   A. The Speech-Protective and “Court-Free” Accounts of the 1940s ...38
   B. A Subtle Shift: Stability and Change in the 1950s .........................40
   C. Transformational Shift I: Schenck, World War I Speech Suppression, and Our 1960s History Textbooks ...............................41
   D. Transformational Shift II: The Emergence of a Speech-Protective Court in Our 1970s History Textbooks (and Beyond) .............42
   E. The Modern First Amendment in Today’s History Textbooks .......44
V. THE POPULAR FREE SPEECH TRADITION IN OUR HIGH SCHOOL HISTORY CLASSROOMS .................................................................47
   A. John Peter Zenger, the “Checking Value,” and Our Simple (and Enduring) Commitment to a Free Press ...........................................49
B. The Alien and Sedition Acts Controversy, Democratic Self-Governance, and Our Simple (and Enduring) Commitment to Political Dissent

C. The People as Ambiguous Protectors (Or, Minority Speech Suppression as Constitutional Evil): The Silencing of Abolitionists in the Nineteenth Century

1. Mob Violence Against Abolitionists
2. Southern Suppression of Abolitionist Literature
3. The “Gag Rule”
4. Conclusion

D. First Amendment Theory in Our High School History Textbooks

CONCLUSION
Popular constitutionalists fear that our constitutional culture is becoming less popular. At the same time, these scholars often ignore key popular sources of constitutional meaning. Their accounts focus, instead, on the elite conflicts that give rise to constitutional change, particularly the

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1 See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 229 (2004) (“Sometime in the past generation or so . . . Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others.”); Larry D. Kramer, “The Interest of the Man”: James Madison, Popular Constitutionalism, and the Theory of Deliberative Democracy, 41 VAND. U.L. REV. 697, 697 (2006) (noting that “we—and by ‘we’ I mean not just members of the legal profession, but political leaders and the American public as well—assume that the Supreme Court is responsible for [the] final resolution” of constitutional controversies”).

2 In this context, I use the term “popular” to refer to aspects of our constitutional culture that involve average citizens. In this sense, popular constitutionalism is the study of the constitutional life of the average citizen, especially in times of “normal politics.” For an extended discussion of “normal politics,” see 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 230-266, 305-06 (1991) (developing the idea of “normal politics” as the overwhelming majority of times when “other values and interests . . . appropriately distract [the average citizen] from a single-minded concern with the public good of the nation as a whole—her work, her family, her friends, her religion, her culture”).


3 For instance, Bruce Ackerman provides an account of “intergenerational synthesis,” where the American people channel their views through electoral politics in times of heightened constitutional engagement. ACKERMAN, supra note 2, at 86-104. In Ackerman’s account, these views are eventually “synthesized” by the Court in the form of “transformative opinions” that consider the meaning of the most recent constitutional revolution, in light of revolutions past. Id. at 283-85. Reva Siegel focuses on the interaction between social movements and the Court, noting the ways in which activists on
ongoing debates between elected officials, movement leaders, and the
Supreme Court. Although these studies are essential to understanding the
pathways for promoting non-Article V constitutional change, they are
“popular” only in the sense that they focus on non-judicial actors and
politically-salient controversies. The constitutional life of the average
citizen is generally ignored. If legal scholars are serious about popular
constitutionalism, they must move beyond these studies of elite discourse
and examine how popular constitutional meaning is shaped “on the
ground,” once the most recent controversy fades and constitutional life
returns to normal. While many scholars have already turned their attention
to how legal culture absorbs new constitutional settlements, this Article
both sides of an issue can help to transform constitutional meaning—and, eventually, Court
discipline. See Reva B. Siegel, Constitutional Culture, Social Movement Conflict and
Constitutional Change: The Case of the De Facto ERA, 94 CAL. L. REV. 1323 (2006); see
also Jack M. Balkin & Reva B. Siegel, Principles, Practices, and Social Movements, 154
U. PA. L. REV. 927, 929 (2006) (discussing the ways in which “political contestation can
alter what people think constitutional principles mean and how principles should apply in
practice”). Jack Balkin outlines various pathways for constitutional change, particularly in
the form of electoral victories, judicial appointments, and new Court opinions. See Jack M.
Balkin, How Social Movements Change (or Fail To Change) the Constitution: The Case of
observe the productive ways in which public constitutional meaning can be channeled
through congressional actions under Section Five of the Fourteenth Amendment. See
Robert C. Post & Reva B. Siegel, Legislative Constitutionalism and Section Five Power:
Policentric Interpretation of the Family and Medical Leave Act, 112 YALE L.J. 1943
(2003); Robert C. Post & Reva B. Siegel, Protecting the Constitution from the People:
Juricentric Restrictions on Section Five Power, 78 IND. L.J. 1 (2002).

4 See, e.g., Purdy, supra note 2, at 1837 (“The twin sources of legitimacy in American
political culture are constitutional principle and democratic will, principles of notoriously
awkward and sometimes paradoxical fit.”); Post & Siegel, supra note 2, at 374 (“Courts
play a special role in this process. Courts exercise a distinctive form of authority to declare
and enforce rights, which they enjoy by virtue of the Constitution and the norms of
professional legal reason that they employ.”).

5 Although these accounts stress the ability of “popular” movements to alter constitutional
meaning, many leave open the possibility of changes driven by potentially small subsets of
the population—or even a handful of elite lawyers in robes. For instance, in Ackerman’s
account, an aggressive Court can shift constitutional meaning through an act of
“intergenerational synthesis” with only a tenuous connection to previous constitutional
pronouncements by the American people. In Siegel’s account, the Court can adopt new
constitutional meanings advanced by a vocal, persistent subset of the population. In
Balkin’s account, the President’s most recent judicial nominees may serve as payback to
narrow constituencies.

6 These scholars note that “even if only aspiring lawyers were to read the Court’s opinions,
the Court’s teaching may [still] significantly influence public opinion,” as “[l]awyers
exercise considerable power in American society.” Christopher L. Eisgruber, Is the
Supreme Court an Educative Institution?, 67 N.Y.U.L. REV. 962, 1009 (1992). This has
led several scholars to examine the lessons that our law schools are transmitting to the next
fills a key gap in the literature by examining how changes to constitutional meaning become part of our popular constitutional fabric—a process I call “constitutional absorption.” To that end, I focus on an important pathway that has been largely ignored by legal scholars—civic education.

Few citizens are likely to go to law school, read a legal opinion, or purchase a book on constitutional law. Even so, all citizens must learn about the Constitution in our high schools. As a result, civic education is one of the few consistent, sustained ways in which we systematically transmit our canonical constitutional lessons to large groups of Americans. These classroom-based lessons are all the more important because they are presented in an organized, authoritative manner to the next generation of citizens.

This Article focuses on how our public schools have absorbed and transmitted our evolving commitment to free speech values over time. The First Amendment provides a particularly useful case study in this context because it is an area of constitutional law whose doctrinal roots are in the twentieth century. Furthermore, the doctrine itself has changed
generation of lawyers, including extensive analyses of the key issues and cases filling our most widely-used casebooks. See J.M. Balkin & Sanford Levinson, Constitutional Canons and Constitutional Thought, in LEGAL CANONS 6 (J.M. Balkin & Sanford Levinson eds., 2000) (“Just as literature professors decide what poems and novels to teach, editors of casebooks decide what ‘cases and materials’ students ought to be exposed to on their intellectual journey from uninitiated laypersons to well-educated, ‘disciplined’ lawyers.”); Jerome A. Barron, Capturing the Canon, 17 CONST. COMMENT. 349 (2000); Philip Bobbitt, The Constitutional Canon, in LEGAL CANONS, supra note 6, at 364 (“There is a canon in constitutional interpretation. It is captured in major casebooks, taught in the introductory courses in constitutional law, relied upon explicitly, but more often implicitly, by judges and presidents and members of Congress.”); Suzanna Sherry, The Canon in Constitutional Law, in LEGAL CANONS, supra note 6, at 374; Mark Tushnet, The Canon(s) of Constitutional Law: An Introduction, 17 CONST. COMMENT. 187 (2000); William M. Wiecek, Is There a Canon of Constitutional History?, 17 CONST. COMMENT. 411 (2000); Richard A. Primus, Canon, Anti-Canon, and Judicial Dissent, 48 DUKE L.J. 243, 243 (2000) (“[C]asebooks play a large role in the construction of the constitutional canon.”); J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 HARV. L. REV. 963 (1998).


8 Of course, the First Amendment is much more publicly salient than other aspects of our constitutional history or provisions of our Constitution. Therefore, First Amendment values are often shaped by other popular institutions. For instance, newspaper columns, magazine articles, and popular books sometimes focus on free speech issues—not to mention televisions shows and films. These influences cannot be ignored. Even so, citizens are first prompted to think deeply about First Amendment history, theory, and doctrine in our public schools, when they are forced to take examinations on the First Amendment lessons that the State has prescribed.

9 For a concise history of the First Amendment, see generally KEN I. KERSCH, FREEDOM OF
considerably since the first wave of important Supreme Court cases during World War I, with an initial shift towards greater speech protection during the 1930s and 1940s, a period of renewed speech suppression in the 1950s, and the development of the modern First Amendment from the late 1950s onward.\textsuperscript{10}

This Article is concerned with how quickly and fully our high schools have accommodated these changes, especially in light of the popular free speech tradition that predated these doctrinal developments.\textsuperscript{11} To that end, I examine the free speech stories presented in our American history and government textbooks from the early twentieth century through today.\textsuperscript{12} These stories can be viewed as the conservative foundation of our popular constitutional culture—stories that have become widely-accepted

\textsuperscript{10} See id. at 97-161 (outlining key developments in free speech doctrine during these pivotal years).
\textsuperscript{11} For an overview of our popular free speech tradition, see generally MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE’S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY (2000); and DAVID M. RABBNAN, FREE SPEECH IN ITS FORGOTTEN YEARS (1997).
\textsuperscript{12} It is important to note that it remains difficult to obtain lists of the most widely-used high school United States history and government textbooks, as education publishers closely guard information about volume and sales as trade secrets. Therefore, I have followed the guidance of noted education scholars in selecting the textbooks to use for this Article. In selecting the textbooks, I was guided by Professors Diane Ravitch, Meira Levinson, and John J. Patrick, as well as Dr. Frederick Hess of the American Enterprise Institute and staff members at the Center for Civic Education and the National Council on the Social Studies.

The best resource for determining today’s most widely-used high school United States history textbooks is the American Textbook Council’s list of “Widely Adopted History Textbooks.” American Textbook Council, Widely Adopted History Textbooks, http://www.historytextbooks.org/ adopted.htm (last visited Aug. 19, 2009). The Council has been tracking this information since 1986 by surveying “key states and large school districts annually.” \textit{Id.} They focus on Texas, California, Indiana, North Carolina, Florida, and New York. The American Textbook Council notes that the textbooks I have analyzed comprise an estimated eighty percent of the national market in United States history textbooks. \textit{Id.}

For the most widely-used American history textbooks of the 1940s through 1980s, I relied upon a list compiled by Robert Lerner, Althea Nagai, and Stanley Rothman. For an overview of their methodology, see ROBERT LERNER, ALTHEA K. NAGAI & STANLEY ROTHMAN, MOLDING THE GOOD CITIZEN: THE POLITICS OF HIGH SCHOOL HISTORY TEXTS 159-61 (1995). In compiling their list of most widely-used history textbooks by decade, Lerner, Nagai, and Rothman “surveyed all state departments of education” by “requesting information regarding the high school American history textbooks most widely used throughout the state since 1940.” \textit{Id.} at 159. They also “decided to survey the 120 largest school districts in the nation, asking them what books their high schools used in the 1940s, 1950s, 1960s, and 1970s.” \textit{Id.} at 160. Although this is an imperfect method, I was unable to find a more reliable list.
enough to survive our complicated textbook adoption process.\textsuperscript{13} We should expect them to be lagging indicators of larger shifts in popular constitutional meaning.

In Part I, I consider the American public’s evolving commitment to free speech values. In Part II, I examine the key factors that shape popular constitutional meaning, providing a model for how constitutional change is absorbed by our popular constitutional culture. In Part III, I turn to a detailed case study of our most widely-used government textbook, \textit{Magruder’s American Government}, connecting developments in First Amendment history to the evolving lessons taught in our American government classrooms. In Part IV, I track similar developments in the American history context. In Part V, I consider key exceptions to these dynamic accounts in the form of three popular narratives that have been consistently taught in our American history classrooms since the early twentieth century: the Zenger case, the Alien and Sedition Acts controversy, and the suppression of abolitionist speech.\textsuperscript{14} Throughout, I remain sensitive to three sets of actors vying to shape popular constitutional meaning: 1) our official lawgivers (especially the Supreme Court); 2) competing social movements (both broad-based and narrow); and, 3) key popular translators (in this context, textbook publishers, high school teachers, and academics).\textsuperscript{15}

In the end, this Article concludes that an important factor in shaping popular constitutional culture (civic education) is not particularly popular\textsuperscript{16}—and has become even less so in recent decades. From the early twentieth century through the 1940s, the First Amendment stories in our government and history textbooks ignored the actions of the Supreme Court, even as the Court took on increased importance in settling First Amendment disputes. At the same time, high school students were presented with competing accounts of the First Amendment, with our government courses stressing traditional limits on free speech rights and our history courses celebrating the speech-protective conduct of popular actors.

These competing narratives began to shift in the 1950s, as our

\textsuperscript{13} For an overview of the textbook adoption process, see \textsc{Diane Ravitch, The Language Police: How Pressure Groups Restrict What Students Learn} 98 (2003).

\textsuperscript{14} When I describe certain constitutional narratives or episodes, the term “popular” simply means “non-Court-centered.”

\textsuperscript{15} Previous accounts suggest that any theory attempting to understand popular constitutionalism must account for each of these key actors. \textit{See, e.g., Ackerman, supra} note 2, at 283-85 (emphasizing the significance of our official lawgivers); Bruce Ackerman, \textit{The Living Constitution}, 120 \textit{Harv. L. Rev.} 1737, 1809 (2007) (noting the key role of popular translators); Siegel, \textit{supra} note 3 (stressing the importance of social movements).

\textsuperscript{16} In this context, I use “popular” to signify “non-Court-centered.”
leading government textbooks finally inserted key First Amendment cases into their accounts. In the 1960s, our history textbooks followed suit. By the 1970s, both sets of textbooks settled on a common, speech-protective account of the First Amendment. In short, after decades of relative stability, our First Amendment narratives were fundamentally transformed: first by the speech-restrictive efforts of the anti-Communist movement and the Vinson Court; and then by the speech-protective advocacy of the civil rights movement and the Warren Court. These developments suggest that transformations in our popular constitutional narratives tend to follow periods where both broad-based social movements and key public officials promote similar changes to constitutional meaning.

In the ensuing decades, our textbooks became increasingly Court-centered and Court-conscious—as the path from Court pronouncement to newly-adopted content became quicker and more direct. Today, the First Amendment sections in our government textbooks are dominated by the Supreme Court, with few mentions of popular episodes. At the same time, our history textbooks provide mixed accounts, featuring popular stories from earlier decades alongside an increasing number of Supreme Court cases. Taken together, today’s textbooks provide a more coherent, speech-protective, and Court-centered account of the First Amendment than in previous decades.

Apart from concerns about school speech doctrine, constitutional scholars rarely enter the high school classroom. This is a mistake. Although it is not the only factor influencing popular constitutional meaning, the public school importantly shapes our children’s early conception of their constitutional tradition, including its longstanding commitment to free speech values.

I. THE FIRST AMENDMENT, PUBLIC OPINION, AND POPULAR CONSTITUTIONAL MEANING

The First Amendment is, perhaps, the most widely-known and publicly-valued provision of our Constitution. As Robert Tsai observes, “Many people believe in the promise of the First Amendment before they
set eyes on the actual text.”

Although various studies confirm that Americans possess little knowledge of their Constitution or its history, a vast majority of Americans can name at least one of the rights guaranteed by their First Amendment. Furthermore, a strong majority of Americans believe that key First Amendment rights, such as “the right to speak freely about whatever you want” and “the right to be informed by a free press,” are “essential” constitutional privileges. Today the First Amendment is strongly associated with the protection of minority rights by the Supreme Court—with our public conception of free speech rights closely linked to Court-based protections of unpopular speech. However, the American commitment to First Amendment values precedes such judicial protections (and constructions).

Long before the Court proclaimed the Constitution’s opposition to prior restraints in 1931, American colonists had already defended a free press in the trial of John Peter Zenger in 1735. Even as Supreme Court justices riding circuit jailed and fined Republican printers under the Sedition Act of 1798, voters rejected John Adams, his ruling Federalist Party, and their Alien and Sedition Acts in the election of 1800. Even so,

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18 ROBERT L. TSAI, ELOQUENCE & REASON: CREATING A FIRST AMENDMENT CULTURE, at ix (2008). Tsai is particularly concerned with “explain[ing] how words in the Constitution ratified by a distant generation become culturally salient ideas, inscribed in the habits and outlooks of ordinary Americans.” Id. In this, Tsai explores the key metaphors that have breathed life into our First Amendment culture—vivid, recurrent images of “fire,” the “marketplace,” and the “public meeting,” to name just a few. Id. at 52-60, 60-68, 82-93.


20 The First Amendment Center has been tracking public opinion on the First Amendment since 1997. Since 2000, at least 56% of the Americans have been able to name the “freedom of speech” as one of the rights guaranteed by the First Amendment. THE FIRST AMENDMENT CENTER, STATE OF THE FIRST AMENDMENT 2008, available at http://www.firstamendmentcenter.org/pdf/SOFA2008survey.pdf.


22 See CURTIS, supra note 11; RABBAN, supra note 11.


24 See STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 1-14 (2008); CURTIS, supra note 11, at 23-52.

25 See FELDMAN, supra note 24, at 70-101 (2008); CURTIS, supra note 11, at 52-80. But See Akhil Reed Amar, Architexture, 77 IND. L.J. 671, 689 (2002) (“The 1796 race between John Adams of Massachusetts and Thomas Jefferson of Virginia had featured a razor-sharp division between Northern states and Southern states. Adams won that one, but in the rematch four years later Jefferson prevailed, with the slavery-skew of the electoral college as the decisive margin of victory. Without the extra electoral college votes generated by slavery, the mostly Southern states that supported Jefferson would not have sufficed to give him a majority.”). Even so, Amar concludes that “the congressional election in 1800 was far more decisive.” Id. at 694 n.82.
the American government and its citizens have not always maintained their commitment to free speech values—especially in the face of war. Lincoln suppressed dissent during the Civil War, and Wilson did the same during World War I. The Founding generation tarred and feathered Tories during the American Revolution, and both sections smashed abolitionist printing presses in the 1830s. The South even passed highly restrictive laws against abolitionist speech, including capital punishment for the distribution of abolitionist literature. Throughout American history, the government and its citizens have often veered from free speech protection to speech suppression and back again, depending upon the surrounding circumstances. In the face of grave threats—whether in the form of Communists from within or foreign powers from without—many Americans have often valued security over free speech.

With this multifaceted tradition in mind, it is important to distinguish between two separate free speech values that have been defended at various times in American history. The first value concerns the right of the individual to speak out against an unresponsive government in the name of the community. This value is often associated with earlier free speech narratives, such as the trial of John Peter Zenger and the Alien and Sedition Acts controversy. As Akhil Amar explains, “[T]he [First] Amendment’s historical and structural core was to safeguard the rights of popular majorities . . . against a possibly unrepresentative and self-interested Congress.”

The second free speech value concerns the right of an unpopular minority to speak out against the community—a value that is closely aligned with the Court-centered First Amendment that has emerged from the middle of the twentieth century onward. This value is in considerable tension with its counterpart outlined in the previous paragraph. Amar describes it as the right of “geographic, cultural, and ethnic outsiders who were critical of dominant social institutions and opinions” to be protected by the Court from the community’s efforts to suppress their unpopular speech acts. In this, the “paradigmatic speaker” shifts from “someone like John Peter Zenger or James Callender, a relatively popular publisher saying relatively popular things critical of less popular government officials,” to

26 See CURTIS, supra note 11, at 300-57.
27 See FELDMAN, supra note 24, at 241-91; RABBAN, supra note 11, at 248-342.
28 See FELDMAN, supra note 24, at 46-70.
29 See CURTIS, supra note 11, at 117-300.
30 See id. at 289-300.
31 For a comprehensive overview of free speech protection and suppression throughout American history, see generally FELDMAN, supra note 24.
33 Id. at 237.
“speakers like Samuel Hoar,” “a Massachusetts lawyer . . . who in 1844 went to South Carolina to defend the rights of free blacks.”

Both of these free speech values were eventually absorbed by our American history and government textbooks, with the popular episodes of Zenger and the Alien and Sedition Acts present in our history textbooks well before the Court made its first appearance. Key Court-centered stories only emerged later, as our textbooks incorporated new developments in First Amendment doctrine from the 1950s onward. Therefore, certain stories featuring popular free speech heroes, such as John Peter Zenger and Elijah Lovejoy, represent foundational narratives that today’s high school students share with their grandparents and great-grandparents—even as today’s students are also presented with narratives featuring the Court-centered protection of minority speech.

A. Popular Constitutional Culture and the First Amendment

First Amendment scholars traditionally separate the American free speech tradition into three eras: the first lasting from the Founding through the Alien and Sedition Acts controversy; the second from the Revolution of 1800 through World War I; and the third from the Espionage Act of 1917 through today. These scholars tend to privilege the Founding moment and twentieth century developments over the middle period. In the traditional account, key early moments in modern First Amendment theory and practice include the landmark dissents of Holmes and Brandeis, Zechariah Chafee’s *Freedom of Speech*, and the founding of the American Civil Liberties Union. From a Court-centered perspective, “First Amendment jurisprudence as we now know it springs from a series of profoundly influential opinions by Oliver Wendell Holmes in the spring and fall of [1919].” From there, the modern First Amendment emerges “as the development of a ‘worthy tradition’ of protection for unpopular speech . . .

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34 Id. at 236.
35 See RABAN, supra note 11, at 1.
36 See id. (noting that scholars “assume intense debate and activity over the meaning of free speech during the first period” and “the creation of the modern First Amendment during the third period”).
37 See, e.g., Primus, supra note 6, at 297 (noting the “construction of Holmes as a visionary, a far-sighted Justice who knew in advance what course doctrine would take and how best to vindicate truth in the end”).
38 See, e.g., id. (“Chafee not only shaped the meaning of Holmes’s dissent but also prepared the ground for the redemption of that dissent by constructing the dissenter along with the dissent.”).
39 See RABAN, supra note 11, at 1.
reaching fruition in a series of landmark decisions by the liberal Supreme Court in the 1960s and 1970s.\textsuperscript{41} The prevalence of this narrative has led some scholars to speak of it as the First Amendment’s “creation story.”\textsuperscript{42}

Given the ubiquity of this “creation myth,” it is hardly surprising that most Americans, not to mention legal scholars,\textsuperscript{43} typically “understand free speech to be a national right and one that is enforceable in the courts.”\textsuperscript{44} Viewed one way, this emphasis is perfectly reasonable. Today the Court does serve an important role in defending the free speech rights of many Americans—particularly Americans expressing unpopular opinions. Viewed another way, however, it is easy to forget how recent a development this is.\textsuperscript{45} Free speech only becomes the Court-centered, minority-protective right that we think of today in the twentieth century. Prior to these developments, “[n]o group of Americans was more hostile to free speech claims . . . [than] the judiciary, and no judges were more hostile than the justices on the United States Supreme Court.”\textsuperscript{46}

41 RABBAN, supra note 11, at 1.
42 Tsai, supra note 18, at 49 (“As lawyers learn, the civic myth that recounts the birth of the right to speak one’s mind in America begins with the missed opportunities of the World War I decisions, and the ‘end of the story’ is the 1969 decision Brandenburg v. Ohio, in which the promise of expressive liberty is ultimately realized.”); see also MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 3 (1991) (labeling this the “Myth of the Worthy Tradition”).
43 See FELDMAN, supra note 24, at 3 (“Many scholars equate free expression with the first-amendment legal doctrine emanating from the Supreme Court.”). The association of free speech with Court doctrine may be more of a curse than a blessing. As Robert Post observes, “The simple and absolute words of the First Amendment float atop a tumultuous doctrinal sea.” Post, supra note 40, at 2355. Post criticizes modern First Amendment doctrine as “striking chiefly for its superficiality, its internal incoherence, [and] its distressing failure to facilitate constructive judicial engagement with significant contemporary social issues connected with freedom of speech.” Id. at 1249-50. Post adds, “I would go so far as to say that the Court’s First Amendment jurisprudence, which is a lively and growing area of constitutional law, dances now macabrely on the edge of complete doctrinal disintegration.” Robert Post, Recuperating First Amendment Doctrine, 47 STAN. L. REV. 1249, 1270 (1995). Post concludes,

[T]he court’s doctrinal failures stem from a common cause. The Court has attempted to formulate general principles for the constitutional protect of “speech as such.” But “speech as such” has no constitutional value, and so the Court’s project has been doomed from the start. Constitutional value inheres instead in specific forms of social order, and, in point of actual judicial practice, speech has tended to receive the constitutional protection necessary for it to facilitate the maintenance and success of specific forms of social order.

44 CURTIS, supra note 11, at 8, 9.
45 See id. at 9.
46 RABBAN, supra note 11, at 15. Michael Kent Curtis provides key examples to support

Id. at 1279.
focusing on the Court, both citizens and scholars alike often overlook the important role that popular constitutional culture has played in shaping the American conception of free speech.

The popular free speech tradition “grew up outside the courts (and often contradicted judicial doctrine).”\(^{47}\) It was rooted in the work of “activists, newspaper editors, ministers, lawyers, and politicians,”\(^{48}\) among others, “that stretched from seventeenth-century England through the American Civil War and beyond.”\(^{48}\) Importantly, this tradition had a practical impact at various times in history—“in elections, in legislatures, for at least some judges, and in actions by government officials.”\(^{49}\) Furthermore, the popular free speech tradition often emerged to check speech suppression. Michael Kent Curtis enumerates key examples:

The public reaction to the Sedition Act ensured that it would not be reenacted. In the Northern states, serious legal incursions on abolitionist speech . . . were checked, not by courts, but by citizens. . . . The uproar over the suppression of speech during the Civil War . . . limited repression.\(^{51}\)

There have also been several instances where the American public (or at least certain social activists) “espoused ideas that have since become central parts of free speech legal doctrine,”\(^{52}\) ideas that ran afoul of contemporaneous judicial pronouncements. Such contributions include “the idea that states must obey national guarantees of free speech, that ‘bad tendency’ alone does not justify suppressing speech about matters of public concern, and that government may not use the criminal or civil law to establish political orthodoxy.”\(^{53}\)

Furthermore, key examples of speech suppression have also been driven by popular impulses. Such episodes include “the suppression of

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\(^{47}\) CURTIS, supra note 11, at 4.

\(^{48}\) Id. at 4, 416.

\(^{49}\) Michael Kent Curtis notes a dichotomy between the “orthodox legal view” of free speech and the “popular free speech tradition” throughout much of American history. Id. at 3.

\(^{50}\) Id. at 4.

\(^{51}\) Id. at 6.

\(^{52}\) Id.

\(^{53}\) Id. at 416.
antislavery speech in the South, Northern antiabolitionist mobs [in the early 1830s], and the punishment of antiwar speech . . . during World War I.”

Throughout American history, this tradition of speech-suppression has often manifested itself in “[m]ob violence, tar and feathers, and chasing outsiders from town,” not to mention state-sanctioned actions taken by public officials with popular support, such as speech-restrictive ordinances, state laws, and congressional statutes. In the end, both sets of historical examples suggest the important link between popular constitutional culture and the speech-related actions of both public officials and average citizens.

B. The First Amendment in the Twenty-First Century

At the dawn of the twenty-first century, we have managed to construct a popular constitutional culture that is (or at least professes to be) broadly protective of unpopular speech. For instance, large majorities of Americans believe that people “should be allowed to express unpopular opinions,” “sing offensive lyrics,” “say things that might offend religious groups,” and hold rallies for causes that “may be offensive to others in the community.” Americans even oppose a constitutional amendment to “prohibit burning or desecrating the American flag.” Concededly, Americans do support some restrictions on free speech rights, but these restrictions tend to cluster around issues that have typically been less politically-salient, such as student speech and broadcast regulation.

In addition, Americans value a free press, viewing the news media as “a watchdog” designed to “hold our government in check.” They

\[54\] Id. at 417.

\[55\] Id. at 4.


\[57\] See THE FIRST AMENDMENT CENTER, supra note 20.

\[58\] See id.

\[59\] See THE FIRST AMENDMENT CENTER, supra note 56.

\[60\] See THE FIRST AMENDMENT CENTER, supra note 20.

\[61\] See id. (noting that fifty percent of Americans believe that schools should be able to discipline students for off-campus postings on social networking sites, if the posting disrupts classroom learning); THE FIRST AMENDMENT CENTER, supra note 21 (showing that seventy-four percent of Americans oppose the right of public school students “to wear a T-shirt with a message or picture that others might find offensive”).

\[62\] See THE FIRST AMENDMENT CENTER, supra note 21 (reporting that sixty-two percent of American support fines for “television broadcasters who air profane or offensive words that are scripted prior to broadcast”).

\[63\] See THE FIRST AMENDMENT CENTER, supra note 20.

support this value even in the face of national security concerns—for instance, opposing “court orders that require journalists to reveal their sources,” even if such revelations “will make America safer.” Furthermore, Americans broadly support the news media’s right to both “criticize the U.S. military about its strategy and performance” and publish “sensitive and classified government information.”

In the end, most Americans have a fairly robust conception of their First Amendment rights, supporting free speech as a value to both speak out against the government and to express views that are offensive to the community. Importantly, recent empirical research confirms that such popular beliefs matter, as various studies have shown a strong correlation between public preferences and judicial outcomes. Furthermore, in recent years, public opinion has often played an important (if complicated) role in the First Amendment context—as deeper, diffuse constitutional values have shaped the public’s medium-to-long-term reactions to immediately unpopular First Amendment decisions. This can be seen, for instance, in the public’s long-term reaction to the flag-burning controversy of 1989-90, as the public immediately (and strongly) opposed the Court’s decisions only to later acquiesce. I am interested in further examining the ways in which the public’s views have evolved over time and how these views have impacted judicial decision-making.

See The First Amendment Center, supra note 64.
See id.
See, e.g., Gewirtzman, supra note 19, at 627 (“[P]opular conceptions of constitutional law—in the form of public opinion—often act as a constraint on the Court’s power. . . . If, as many political scientists and constitutional scholars have concluded, the Supreme Court operates within constraint established by dominant electoral majorities, the forces that govern individuals’ political perceptions and behavior are a powerful and highly relevant dynamic in contemporary constitutional lawmaking.”).
Although the American people may have immediately rejected the Court’s decision in Eichman, additional public deliberation led the American people to reconsider their views. Directly following the Eichman decision, a Newsweek/Gallup poll showed fifty-eight percent of Americans disagreeing with the Court’s decision and sixty-eight percent supporting a constitutional amendment overturning it. NationalJournal.com, Poll Update – Newsweek/Gallup: Attitudes on Flag, Obscenity, http://nationaljournal.com/cgi-bin/ftetch4?ENG+HOTLINE+7cr0199+1211371DBSCORE+256+0+23160+F+29+102+21+flag+AND+burning+AND+PD%2f01%2f1989%2d%3e01%2f23%2f1991 (last
which diffuse support for the Court’s protection of minority speech has developed over time.

II. TOWARDS A THEORY OF CONSTITUTIONAL ABSORPTION

In his 2006 Holmes Lectures, Bruce Ackerman argued that “the stories lawyers tell about our constitutional development will make a difference—both in shaping the perceptions of judges, legislators, and Presidents, and in framing broader public understandings of democratic possibility.”73 The same may be said of the stories we tell our schoolchildren.74 First transmitted in childhood, many of these stories continue to “dwell in the half-memories of our restless and earnest people.”75

A. The Court, Our Schools, and the Inculcation of Constitutional Values

High school is the final time that most Americans study their nation’s history and constitutional system in any detail.76 Furthermore, high school texts are the only books most Americans ever read on these important topics.77 As a result, high school civic education is called upon to play an outsized role in promoting both “cultural literacy” and “cultural attachment.”78 To be sure, other factors shape civic knowledge, including visited Aug. 19, 2009). Over time, however, a flag burning amendment became even less popular and less salient. For instance, in June 2006, when the Congress was considering a new flag burning amendment, zero percent of Americans said that “flag burning” should be a “top priority for Congress. . . this summer.” PollingReport.com, Law and Civil Rights, http://www.pollingreport.com/civil.htm (last visited Aug. 19, 2009). Furthermore, a June 2007 Zogby Poll showed sixty-six percent of Americans disagreeing that “the U.S. Constitution should be amended to . . . [b]an flag burning,” with fifty-two percent strongly disagreeing. Id. In the end, public opinion turned from overwhelming support for a constitutional amendment in the summer of 1990 to even support in 1997 to little interest and majority opposition in 2000. Id.

73 Ackerman, supra note 15, at 1809.
74 Cf. BALKIN, supra note 74, 18-19 (“[T]he key to information is in formation; it lies in the selection of and categorization of the flux of experience into comprehensible categories, events, and narratives. In order to understand, we must establish similarities and differences, categories and narratives, canons and heuristics.”).
75 Bobbitt, supra note 6, at 364.
76 See Alice Garrett, Teaching High School History Inside and Outside the Historical Canon, in LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS 71, 72 (Lloyd Kramer et al., eds. 1994).
“our families, neighbors, churches, politicians, and mass media.”79 Even so, high school civic education provides many citizens with the most comprehensive, systematic presentation of the American constitutional tradition that they are likely to receive at any point in their lives.80 This tradition is often transmitted to high school students in the form of canonical constitutional stories—stories with consensus heroes and villains, successes and setbacks, settled issues and continuing challenges.81 This “institutionalized” storytelling plays an important role in “ensur[ing] . . . the continued survival of our society’s deepest values,”82 including its commitment to free speech.

Admittedly, our leading textbooks usually take on a “nationalistic” tone.83 This should come as little surprise, as these texts “are written . . . to tell children what their elders want them to know about their country.”84 In short, “like time capsules, [our textbooks] contain the truths selected for posterity”—truths that are seldom questioned by secondary school teachers or their students. Concededly, students may not remember many of the specific facts imparted in our classrooms—not to mention those lodged in our long (and increasingly dull) textbooks.86 Regardless, studies suggest that adults often retain “snatches” of textbook knowledge, often in the form of “an atmosphere, an impression, a tone.”87 Furthermore, with respect to the First Amendment, an area filled with powerful metaphors and memorable stories, these impressions are likely to have a lasting influence.88

79 Lloyd Kramer & Donald Reid, Introduction: Historical Knowledge, Education, and Public Culture, in LEARNING HISTORY IN AMERICA: SCHOOLS, CULTURES, AND POLITICS 1, 8 (Lloyd Kramer et al., eds. 1994) (noting that these factors “offer us interpretations of historical events and narrative structures to make sense of the past”).
80 See id.
81 See Tsai, supra note 18, at 6 (“Constitutional language is the primary means by which the state reproduces itself over time. In the mind of every citizen lives an image of the Republic.”); Gewirtzman, supra note 19, at 656 (“These [cultural] scripts are often transmitted and reinforced through . . . archetypal narratives.”).
82 Balkin, supra note 74, at 85.
83 FitzGerald, supra note 77, at 47.
84 Id.; see also David Jenness, MAKING SENSE OF SOCIAL STUDIES 282 (1990) (“Since the schools are charged with helping to enculturate the young, and since history preserves collective ‘memory,’ it is natural that there should be a desire to emphasize, in school history, the national story, the American memory.”).
85 Jenness, supra note 84, at 282.
86 See FitzGerald, supra note 77, at 17 (“[T]he sight of an old textbook is much less likely to bring back the sequence of Presidents . . . than it is to evoke the scene of an eighth-grade classroom: the sight of, say, Peggy, one long leg wrapped around the other.”).
87 Id. at 18.
88 See Tsai, supra note 18, at 39 (noting that a “metaphor’s quotable and compact nature enhances its diffusion through society”).
In the end, these canonical accounts are designed to, at the very least, “preserve cultural content and cultural identity.” At the same time, they often succeed in promoting “an emotional attachment to the polity”—one which tends to “encourage[] citizens to behave toward their country and its citizens as they do toward their family: proud, protective, and willing to make sacrifices.” Recent studies confirm that, “[w]hile many Americans remain ill-informed about the Constitution’s specific content, they have an emotional bond with the document that sustains its legitimacy and lasting integrity.” Particularly during times of war, this “emotional bond” has been at the core of American civic education.

B. A Theory of Constitutional Absorption

In the United States, high school textbooks are developed by private publishing houses. At the same time, actual textbook content is often shaped by local and state governments through their respective textbook adoption processes, with roughly half of the states adopting textbooks at the state level and the other half leaving those decisions to local school districts. Social activists often agitate for changes to textbook content during these local and state adoption cycles, particularly in the largest statewide adoption states, such as Texas and California. Since textbooks do not read as polemics, but as the voice of consensus, social activists prize the opportunity to promote their values in the authoritative voice of our high

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89 BALKIN, supra note 74, at 90.
90 Sherry, supra note 78, at 163.
91 Gewirtzman, supra note 19, at 680.
92 See, e.g., RONALD W. EVANS, THE SOCIAL STUDIES WARS: WHAT SHOULD WE TEACH THE CHILDREN? 70 (2004) (noting that during times of war there has been a decided shift in American textbooks to promote more patriotic themes, focusing particularly on “preparing students to give their lives for democracy”); see also Sherry, supra note 78, at 163 (noting that these emotional attachments often “depend[] in turn on both knowledge and assimilation: to feel that she is an American, a child must learn about America’s cultural and political heritage and accept it as her own”).
93 See DAVID TYACK, SEEKING COMMON GROUND: PUBLIC SCHOOLS IN A DIVERSE SOCIETY 59 (2003).
94 See id. at 60.
95 See id. at 59 (noting that “[s]pecial interest groups of the right and left pressure publishers to include or drop topics, especially in big states such as California or Texas,” since these large statewide adoption states largely dictate the content of textbooks throughout the country); see also RAVITCH, supra note 13, at 98 (noting the importance of the large statewide adoption states). Diane Ravitch explains, “Publishers whose textbooks do not get adopted in one of these states sustain an economic blow and must struggle to sell their books to smaller states and individual districts.” Id. The development of new textbooks is thus a high-risk enterprise because the costs associated with researching, drafting, and printing are quite high. Id.
With these dynamics in mind, any theory of constitutional absorption must account for the tension between three key actors attempting to shape popular constitutional culture: 1) our official lawgivers (especially the Supreme Court); 2) competing social movements (both broad-based and narrow); and, 3) key popular translators (in this context, textbook publishers, high school teachers, and academics). Of course, as Jack Balkin and Sanford Levinson remind us, our canonical constitutional stories “are historical creations in which rational design and precision engineering are wishful thinking.”

Even so, the contours of our First Amendment history, as well as the dynamics of the textbook adoption process, provide us with some clues about the ways in which our public schools absorb constitutional change.

One would expect the absorption of any newly-salient constitutional value to begin after a key transformational shift, where the value actually becomes salient enough to be on the public’s agenda. This shift could take the form of a single triggering event or a series of such events that force the American public to take notice. In the textbook context, the constitutional value must become salient enough for textbook publishers (as well as the bureaucrats and activists shaping their product) to track new

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96 See, e.g., TYACK, supra note 93, at 40 (“Even though history textbooks have been, by most accounts, very dull, they have also been highly controversial. People have wanted history texts to tell the official truth about the past. . . . Textbooks resemble stone monuments. Designed to commemorate and re-present emblematic figures, events and ideas—and thus to create common civic bonds—they have also aroused vigorous dissent.”); LERNER, NAGAI & ROTHMAN, supra note 12, at 1 (“If American history and civics textbooks have become a battleground, it is because they now serve as the prayer-books of the United States’ civil religion.”); Suzanna Sherry, supra note 6, at 374 (“Canons (and anticanons) are one of the weapons of choice in what has been labeled ‘the culture wars’: the struggle for control of the hearts and minds of the educational system of the United States, and ultimately of its legal and political apparatus.”). For comprehensive accounts of past textbook adoption battles, see generally JONATHAN ZIMMERMAN, WHOSE AMERICA?: CULTURE WARS IN THE PUBLIC SCHOOLS (2002); EVANS, supra note 92; FITZGERALD, supra note 77.

97 J.M. Balkin & Sanford Levinson, Legal Canons: An Introduction, in LEGAL CANONS, supra note 6, at 5, 24.

98 This prediction grows out of Suzanna Sherry’s observation that “[t]he idea of a canon produces a natural disinclination toward sudden change.” Sherry, supra note 6, at 387.

99 Cf. Balkin & Levinson, supra note 97, at 25 (“Debates about the canon arise when what is canonical is no longer taken for granted, no longer ‘goes without saying,’ but becomes controversial in some significant way. . . . Debates may . . . occur when an imagined unity of thought and practice seems to be breaking down. They may occur when the forces of cultural reproduction that ensure the replication of interpretive assumptions in successive generations of a discipline’s membership no longer operate as smoothly as they once seemed.”).
developments in that area. Prior to such a transformational shift, any changes to the constitutional value would simply not be on anyone’s “radar screen,” except for certain specialists in the field or narrow interest groups. After the transformational shift, however, one would expect heightened public interest and scrutiny. In the textbook context, one would expect immediate, substantial changes to any textbook sections containing the newly-salient value. Any subsequent changes would likely be absorbed more directly and more rapidly—as textbook publishers tracked related developments more closely than before.

The patterns of change in our textbooks’ treatment of the First Amendment suggest that transformational shifts in popular constitutional narratives tend to follow periods where both our official lawgivers and broad-based social movements promote similar changes to constitutional meaning. Prior to the combined efforts of these key actors, transformational shifts in our canonical narratives simply do not occur. For instance, prior to the 1950s, our leading high school textbooks consistently ignored the Supreme Court’s role in settling First Amendment disputes, even as the Court became increasingly active in this area. Our model of constitutional absorption provides us with an explanation for this oversight: Throughout this period, our official lawgivers were acting without the aid of a broad-based social movement. For instance, even as Holmes and Brandeis were writing their landmark opinions in the early twentieth century, they were not joined by a widespread social movement promoting similar values—only by a handful of academics (such as Zechariah Chafee) and small-scale interest groups (such as the newly-formed American Civil Liberties Union). The same was true of the Court during its first wave of speech-protective decisions in the 1930s and 1940s, such as Near v. Minnesota, DeJonge v. Oregon, and Thornhill v. Alabama. During this period, even as the Court shifted, the accounts in our high school textbooks remained stable and entirely “Court-free.”

By the early 1950s, however, the Court was finally joined by a popular companion, in the form of the anti-Communist movement. Importantly, this was the first time that our official lawgivers (Congress and the Court) and a broad-based social movement (Anti-Communism) worked to promote a common vision of the First Amendment. In this case, both sets of actors endorsed the government’s power to restrict speech-related activities in the effort to fight Communism. It was only after these

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100 283 U.S. 697 (1931).
102 310 U.S. 88 (1940).
103 For an extended discussion of the anti-Communist movement’s impact on high school textbooks, see ZIMMERMAN, supra note 96, at 80-106.
concerted efforts that our government textbooks finally began to feature the actions of the Supreme Court—absorbing both 1950s-era developments and those from prior decades. By the 1960s, our history textbooks followed suit, finally absorbing Holmes’s landmark opinion in *Schenck v. United States*<sup>104</sup>—an opinion written over four decades earlier. This alone suggests just how slowly constitutional changes are sometimes absorbed by popular constitutional culture.

Additional developments in the 1960s lend further support to this model of constitutional absorption. Once again facing the concerted actions of a broad-based social movement and an aggressive Court, our textbooks shifted, this time embracing the Court-centered, minority-protective First Amendment of the civil rights movement and the Warren Court. Following this transformational shift, both sets of textbooks became increasingly Court-centered, as subsequent editions closely tracked new developments in First Amendment doctrine. In this sense, not only was the substantive content of these accounts fundamentally altered, but so were the ways in which these textbooks accommodated future constitutional changes—with the path from official Court pronouncement to new textbook content becoming quicker and more direct.

Finally, within the context of this larger pattern, key popular translators influenced the rate and depth of constitutional absorption. This is to be expected.<sup>105</sup> Our government and history textbooks are associated

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<sup>104</sup> 249 U.S. 47 (1919).

<sup>105</sup> Alternatively, one might also expect some changes in textbook content to be driven by elites, rather than social movements or official lawgivers. This pathway of elite-driven change, although quite plausible, is likely to be much less important in the textbook context than the alternative path, given the traditional role that social movements and official pronouncements play in the textbook adoption process. Furthermore, there is typically a disconnect between secondary educators, government bureaucrats, and textbook publishers, on the one hand, and judges, elite lawyers, and law professors, on the other hand. Therefore, in the absence of activist agitation, one would expect quite a time lag in elite-driven change, as content slowly filters down from judges’ chambers and universities down to publishing houses and high school classrooms.

Education scholars confirm this intuition, noting that “new scholarship trickles down extremely slowly into the school texts.” FITZGERALD, *supra* note 77, at 43. For instance, in the context of history, “[o]ne of the most striking academic paradoxes of the last decade has been that, during a period in which American historiography has been undergoing the most creative ferment in its entire lifetime, the teaching of American history in the schools has been widely perceived as sterile, moribund, and ineffective.” Robert P. Green & Richard L. Watson, *American History in the Schools, in Teaching Social Studies: Handbook of Trends, Issues, and Implications for the Future* 65, 65 (Virginia S. Wilson et al., eds. 1993). Indeed, the “fruits of historical scholarship are [often] neglected, and single-strand interpretations are left unquestioned.” Harold J. Noah et al., *History in High-School Textbooks, in Democracy, Pluralism, and the Social Studies* 238, 248 (James P. Shaver & Harold Berlak, eds. 1968). This is “strikingly
with distinct academic disciplines, with different agendas, interests, and inputs. Political scientists tend to be more normative, ideological, Court-centered, and (not surprisingly) “political” than historians. As a result, our government textbooks more closely (and fully) tracked new Court-centered developments after the first transformational shift in the 1950s. Although our history textbooks were not immune to these developments, certain popular, speech-protective narratives survived the turbulent 1950s and 1960s largely unchanged. Furthermore, even as our history textbooks absorbed changes to Court doctrine from the 1960s onward, they tended to incorporate fewer constitutional developments—and, even then, continued to lag a decade or so behind our government textbooks.

III. CONSTITUTIONAL ABSORPTION IN OUR HIGH SCHOOL GOVERNMENT CLASSROOMS

Magruder’s American Government was first published as a 427-page textbook in 1917. In its earliest incarnations, it resembled an actual book, with readable text, few pictures, and a manageable size. Since then, it has ballooned into an 806-page monstrosity, with fancy fonts, pictures galore, and a super-sized frame.

Over this ninety-year span, the one constant has been Magruder’s unparalleled influence inside of our high school civics classrooms. Its publisher, Prentice Hall, claims that the text has held at least seventy percent of the related textbook market since 1917. Independent sources support this bold assertion. Because of its long-term dominance,

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108 From its first edition in 1917 through the 1940s, Magruder’s “dominated high school civics instruction,” with over seventy percent of American civics classrooms still using the textbook into the 1950s. Banaszak, supra note 106, at 3. By the late 1970s, Magruder’s still “cover[ed] more than fifty per cent of the market.” FitzGerald, supra note 77, at 60-61. Even into the late 1980s, Magruder’s sustained its position as “the leading seller among American government textbooks.” Howard D. Mehlinger, The Reform of Social Studies and the Role of the National Commission for the Social Studies, 21 Hist. Teacher
Magruder’s will serve as the central case study in this Part.

A. Civil Rights in Magruder’s American Government

American government textbooks are designed to teach students about their government’s overall structure and its enduring constitutional commitments. Given these goals, it is hardly surprising that Magruder’s has included sections on the protection of key civil rights since its first edition in 1917. Even so, the textbook’s coverage of these rights has expanded considerably since its first edition.

From 1917 through the 1960s, each edition of Magruder’s devoted a similar amount of space to civil rights content, hitting a low of 1.9% of overall textbook content in the 1920s and reaching a high of 3.4% in the 1960s. Civil rights content almost doubled in the 1970s (to 6.5%)—likely tracking the earlier efforts of the civil rights movement and the Warren Court—only to increase again in the 1980s (to 12.1%). Since then, overall civil rights content has remained at roughly that level, comprising 12.8% of Magruder’s in the 1990s and 12.2% in the 2000s.

The First Amendment has always been an integral part of the Magruder’s civil rights story, consistently comprising more than 10% of its overall civil rights-related content. Beginning in 1917, the First Amendment comprised 10.9% of the Magruder’s civil rights chapter, increasing to 11.8% in the 1920s. First Amendment content dipped a bit in the 1930s (to 6.4%), gradually increasing again to 9.3% in the 1940s, 11.2% in the 1950s, 14.6% in the 1960s, and 17.1% in the 1970s, likely tracking increased popular and elite interest in the subject. Since the 1970s, First Amendment content has fluctuated, although always remaining above 11% and peaking at 19.3% in the 1990s.

In the end, although the First Amendment has been featured in Magruder’s since its first edition in 1917, the textbook’s overall treatment of this fundamental right has changed considerably over time, shifting from a speech-restrictive account through the 1950s to a speech-protective account from the 1960s onward.

B. The Pre-Modern First Amendment in Our High School Government Classrooms—1917 through the 1940s

195, 206 n.2 (1988). Finally, recent reports confirm the textbook’s enduring influence in today’s classrooms. In 2002, Slate labeled the text “America’s most popular civics book,” noting that Magruder’s remained “the 800-pound gorilla” in its field. Walker, supra note 107. Recently, the well-respected American Textbook Council similarly noted that Magruder’s was “clearly No. 1 in its category.” Id.
The first edition of Magruder’s did not include any First Amendment cases. This should come as little surprise, as this edition was published two years before Holmes formulated his “clear and present danger” test in Schenck and over a decade before the Court would strike down Minnesota’s prior restraint in Near. Regardless, the First Amendment received its own section in this edition’s “Civil Rights” chapter. Therefore, although First Amendment freedoms had not yet been defended by the Court, free speech rights were viewed as sufficiently fundamental that they merited their own section in this early textbook. Even so, the first edition of Magruder’s did not feature any of the popular, speech-protective episodes that emerged in the early editions of our leading history textbooks, such as the Zenger trial and the Alien and Sedition Acts controversy. Instead, Magruder’s took the freedom of speech for granted as an important value and focused on the ways in which free speech rights had been traditionally limited by the enforcement of community-based dignitary interests, such as privacy and reputation.\(^{109}\)

The first edition of Magruder’s began by noting that both the federal Constitution and most state constitutions protected free speech rights.\(^{110}\) From there, it stressed traditional limits on First Amendment freedoms—for instance, noting that the freedom of speech only extended to statements that did not “violate a statute law, injure some one’s reputation or business, or violate public morality.”\(^{111}\) Furthermore, this edition explained that the government could “prohibit[] addresses in public parks or thoroughfares” and punish the use of “profane language.”\(^{112}\)

Even political criticism was only protected under certain circumstances—for instance, when “the critic speaks of what he knows or believes, has only the public interest in view, and speaks without malice.”\(^{113}\) If a speaker failed to meet these requirements, the speech could be penalized. The first edition posited a hypothetical candidate to demonstrate the limited scope of these political speech rights:

\(^{109}\) For a concise account of community in the First Amendment context, see ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 3-4 (1995).

\(^{110}\) FRANK ABBOTT MAGRUDER, AMERICAN GOVERNMENT: A CONSIDERATION OF THE PROBLEMS OF DEMOCRACY 211 (1917).

\(^{111}\) Id.

\(^{112}\) Id.

\(^{113}\) Id.
To illustrate, if John Smith is a candidate for the city treasurership one could publish the fact that he had stolen city funds in New York back in the sixties when the Tweed Ring governed the city. But publishing the same fact against Smith simply because one dislikes him would make such a person subject to a damage suit; or, if the publication results in a feud or a breach of the peace, such publication is also a crime which the State can punish, *and proof that the statement is true will be no defense*. If a person has lived as a good citizen for a number of years he has a right not to have his past record made public by a person prompted by a spiteful or malicious motive.\(^\text{114}\)

In the end, this speech-restrictive account is understandable, as the first edition of *Magruder’s* predated even the slightest suggestion of the modern First Amendment.\(^\text{115}\) At the same time, continued stability in subsequent editions—from the 1920s through the 1940s, to be precise—requires additional analysis, as the American free speech tradition evolved considerably during this key period.

In 1919, Holmes constructed his “clear and present danger” test,\(^\text{116}\) only later that year to declare that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”\(^\text{117}\) In 1920, Zechariah Chafee published his landmark work, *Freedom of Speech*.\(^\text{118}\) In 1925, the Court declared that free speech and a free press were “among the fundamental personal rights and liberties protected by . . . the Fourteenth Amendment from impairment by the states.”\(^\text{119}\) And, in 1927, Brandeis spoke of the “courageous, self-reliant men” who “won our independence,” noting that to these men “no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.”\(^\text{120}\) In these developments, one can see the embryonic contours of our modern First Amendment.

Of course, First Amendment doctrine had not yet changed during

\(^{114}\) Id. (emphasis added).

\(^{115}\) This excludes earlier dissents by Justice John Marshall Harlan. *See, e.g.*, Patterson v. Colorado, 205 U.S. 454, 464 (1907) (Harlan, J., dissenting) (“The 14th Amendment . . . prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press [under the Privileges or Immunities Clause].”).


\(^{117}\) Abrams v. United States, 250 U.S. 616 (1919) (Holmes, J., dissenting).

\(^{118}\) ZECHARIAH CHAFFEE, FREEDOM OF SPEECH (1920).


\(^{120}\) Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).
this period. For instance, Charles Schenck and Eugene Debs were still jailed for their antiwar agitations. Regardless, the Supreme Court was becoming an important First Amendment battleground. Furthermore, the 1930s featured the Court’s first wave of speech-protective decisions, including Near and DeJonge. Even so, we see no indication of these developments in the 1920s and 1930s editions of Magruder’s. Instead, these early editions continued to stress the traditional limits on free speech rights. Furthermore, they remained completely “Court-free”—even ignoring key World War I-era decisions that largely tracked their speech-restrictive accounts.

Concededly, there were some slight changes to Magruder’s in the 1920s and 1930s. For instance, the 1920s edition added the following category of speech to the enumerated list that could be penalized: “speech that created a public disturbance calculated to result in bodily injury.”121 Otherwise, the First Amendment section was precisely the same as the 1917 edition. The 1930s edition changed “John Smith” from a member of the Tweed Ring to “a grafter during the World War.”122 It also added the “use of profane or indecent language over the radio” to the list of speech acts that could be prohibited.123 In the end, these minor changes in the 1920s and 1930s editions actually made the accounts slightly more speech-restrictive. Although the stability in these accounts may appear puzzling at first glance, our model of constitutional absorption provides an explanation. Even as certain shifts occurred in the Court’s treatment of the First Amendment and several key academics took up the cause of free speech, these actors were not joined by a widespread social movement organizing around similar free speech issues. Therefore, Magruder’s did not track these important developments in First Amendment history.

The 1940s edition would remain similarly restrictive (and stable), even as FDR declared “freedom of speech and expression” one of his “four essential human freedoms,” Robert Jackson spoke of his “fixed star,”124 and Alexander Meiklejohn published his masterpiece, Free Speech and Its Relation to Self-Government.125 Concededly, there was a structural move in Magruder’s to more closely link First Amendment rights and the judiciary, as the “Civil Rights” chapter (and, therefore, the First Amendment section) was moved into a separate unit, entitled “The Judiciary and Civil Rights.”

123 Id.
Even so, the actual content of the First Amendment section remained exactly the same as the 1930s edition. Again, this tracks with the expectations of our model of constitutional absorption. Even as the Court became more active, the President raised his voice on the issue, and additional intellectual heavyweights entered the battle, there was still not a widespread social movement advocating for robust free speech rights. Therefore, the First Amendment section in *Magruder’s* remained unchanged.

### C. Transformational Shift I: McCarthyism and Magruder’s

Tracking our model of constitutional absorption, the 1950s edition of *Magruder’s* featured a transformational shift in its treatment of the First Amendment, with the Court finally making its first appearance. Given this edition’s use of its Court-centered content, the shift appears to be a product of the anti-Communist movement. Importantly for our model of constitutional absorption, this was the first time in which both our official lawgivers (Congress and the Court) and a widespread social movement (Anti-Communism) worked to promote a common First Amendment vision.\(^{126}\) Granted, this was a speech-restrictive vision that, in retrospect, many Americans viewed as mistaken; however, it was a coherent, widely-supported vision nonetheless.

In 1948, Whittaker Chambers accused Alger Hiss of being a Communist before the House Committee on Un-American Activities. In 1950, Senator Joseph McCarthy gave his famous “Wheeling Speech,” during which he claimed to have a list of 205 names of known Communists in the State Department. Later that year, Congress passed the McCarran Internal Security Act, which required the registration of Communist organizations and established the Subversive Activities Control Board.\(^{127}\) In 1951, the Supreme Court affirmed the convictions of several Communist Party leaders under the Smith Act in *Dennis v. United States*.\(^{128}\) By 1952, *Magruder’s* finally included its first pair of free speech cases—*Schenck* and *Dennis*.

Importantly, this transformational shift in *Magruder’s* may have been a product, not only of the national mood, but also of a specific, coordinated campaign. In 1947, the *Chicago Tribune* published a series of

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\(^{126}\) See ZIMMERMAN, *supra* note 96, at 82 ("As many historians have shown, a powerful and wide-ranging anticommunist consensus dominated national life in the wake of World War II.").


\(^{128}\) 341 U.S. 494 (1951).
articles on “subversive” textbooks. In 1949, William F. Buckley, Jr. started the *Educational Reviewer*, a journal devoted to scrutinizing these texts for hints of Communism. In its first edition, Buckley’s journal took dead aim at *Magruder’s*, an attack which was later echoed by leading newspapers and radio programs. Buckley and his allies were soon joined by “thousands of parents, military veterans, and other grassroots activists,” who “converg[ed] on local school boards and classrooms.” The findings in this Section suggest that their coordinated campaign may have had some influence on textbook content.

Before turning to the transformational shift in *Magruder’s*, it is important to note a few additional (if minor) changes to the 1950s edition. For instance, for the first time, *Magruder’s* included two pictures—one of Norman Rockwell’s “Freedom of Speech,” the other of a political cartoon celebrating a free press. These additions are, perhaps, a bit surprising, given the section’s overall speech-restrictive tone. The 1950s edition also added a passage on two damages claims against the *Saturday Evening Post*, one for “$1500 . . . for calling a man a ‘Stalinist busybody’ and the other for “$11,000 for calling another man ‘a Communist wrecker in American labor.’” This passage was designed to demonstrate that a publication will be fined more for “damn[ing] [a man] at length” than “damn[ing] [a man] in

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129 Zimmermann, supra note 96, at 93.
130 See id. at 81.
131 See id. at 85. During the 1950s, some states actually banned *Magruder’s* for its “socialistic” tendencies, including Georgia and Texas. Id. at 86, 94. The City of Chicago would do the same. Id. at 101. In addition, both Texas and Alabama passed laws “requiring all . . . textbooks to carry a statement confirming that neither the author nor the people quoted had been members of a communist or ‘Communist-front’ organization.” Id. at 88, 102. Illinois even created an “official ‘textbooks censorship committee.’” Id. at 102.
132 See id. at 93-94 (noting that the Chicago Tribune, the Indianapolis Star, and two syndicated radio hosts, Fulton Lewis and John T. Flynn, ran the attacks on *Magruder’s*, with Flynn also including these attacks in his newspaper column, which reached “roughly 20 million people”).
133 Id. at 82, 83; see also id. at 94 (“In Little Rock, Arkansas, citizens seeking to remove Magruder’s textbook sent copies of the *Educational Reviewer* to school officials and teachers; in Beaufort, South Carolina, a group of mothers cited Amos Fries’s *Bulletin of Friends of the Public Schools* in their own demand for ‘patriotic textbooks.’”). This movement created a backlash among several educational leaders, parents, and businessmen, which limited the overall effectiveness of the anti-Communist crusade. Id. at 83; see also id. at 103 (“Throughout the Cold War, thousands of veterans and other citizens rallied against textbooks. But this popular movement generated an even more popular ‘countermovement.’”).
135 Id. at 407.
136 Id.
Most importantly, however, the 1950s edition of *Magruder’s* was the first to include landmark First Amendment cases—two, to be precise. This revised section began with a discussion of Holmes’s “clear and present danger” test in *Schenck*. Interestingly, this case was decided over three decades earlier, thus suggesting how long our textbooks sometimes wait before absorbing key constitutional developments. In the 1950s edition of *Magruder’s*, Holmes’s test provided students with a new lesson on the limits of their First Amendment freedoms—particularly in times of national peril. The account explained, “In cases involving freedom of speech and press, the Supreme Court applies what is known as the ‘clear and present danger’ rule,” which “was first enunciated by the great Justice Oliver Wendell Holmes in 1919.” The 1950s edition then applied the Holmes test to the recently-decided *Dennis* case, proceeding directly from Holmes’s canonical statement of the test in *Schenck* to the facts of *Dennis*.

This move ignored divisions between the justices over the proper scope of Holmes’s test. In particular, the 1950s account ignored the key shift in Holmes’s own thinking, including his famous dissents in *Abrams v. United States* and *Gitlow v. New York*. Instead, the 1950s edition cited the *Schenck*-based Holmes to lend doctrinal (and heroic) support to the Court’s speech-restrictive decision in *Dennis*, explaining that both the “noted Justice [sic] Learned Hand” and the Supreme Court rejected the petitioners’ argument that “no act of theirs created a ‘clear and present danger’ to the United States.”

In the end, although the Court finally appeared in the 1950s edition, this 1950s-edition Court diverged considerably from the minority-protective Court of later editions. Instead, the Court was presented as an institution upholding the decisions of the popularly-elected branches to suppress the speech of a feared (and hated) minority. Therefore, in spite of the move to include the Court in the 1950s edition, the overall tone of *Magruder’s* remained the same—speech-restrictive—and, arguably, even more so than previous editions. This was in stark contrast to the popular, speech-protective narratives presented in our history textbooks during this same period. As a result, up through the 1950s, high school students received ideologically incompatible accounts of the First Amendment in their government and history classrooms. A more coherent account would only

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137 *Id.*
138 *Id.* at 407-08.
139 *Id.* at 408.
140 250 U.S. 616 (1919).
141 268 U.S. 652 (1925).
142 *McClenaghan*, *supra* note 134, at 408.
emerge later, in the 1960s and 1970s, as the joint efforts of the civil rights movement and the Warren Court encouraged both sets of textbooks to become increasingly Court-centered and speech-protective.

D. Transformational Shift II: The Modern First Amendment in Our High School Government Classrooms—The 1960s Through Today

Another transformational shift occurred in the 1960s, following the growth of the civil rights movement and the landmark opinions of the Warren Court, including *Yates v. United States*, *New York Times v. Sullivan*, *Brandenburg v. Ohio*, and *Tinker v. Des Moines School District*. Gone was the myopic focus on traditional limits to free speech rights. Instead, *Magruder’s* increasingly emphasized Supreme Court doctrine, particularly the speech-protective pronouncements of the Warren Court and its successors.

1. The 1960s: The Emergence of a Speech-Protective Account of the First Amendment

In the 1960s edition of *Magruder’s*, the number of Supreme Court cases expanded to eight, with most still focusing on wartime speech—including sections on the “clear and present danger” test and “internal security and freedom.” In an important shift, the 1960s edition discussed *Schenck* in greater detail and altered the account of the 1950s Communist Scare to include extensive background information on the Smith Act, the McCarran Internal Security Act, and the Communist Control Act. Furthermore, in stark contrast to the previous decade, the 1960s edition provided an account that was highly critical of *Dennis*, as this new edition absorbed several key speech-protective decisions, including *Yates*.

In addition to this extended treatment of wartime speech, new sections were added on prior restraints (noting that government “may not censor ideas before they are expressed”) and motion pictures (explaining that the First Amendment guaranteed “liberty of expression” in this fast-

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147 See WILLIAM A. MCCLENAGHAN, MAGRUDER’S AMERICAN GOVERNMENT 112 (1965).
148 See id.
149 See id.
151 MCCLENAGHAN, supra note 147, at 112.
The 1960s edition also cited *New York Times v. Sullivan* in a footnote, noting that “[t]he law [of defamation] is less restrictive concerning criticism of public officials.” This footnote was a reversal of the speech-restrictive “John Smith” hypotheticals of previous decades.

Most importantly, the 1960s account eliminated any reference to state constitutions, tying our fundamental free speech rights directly to federal guarantees. This key change was accompanied by two related shifts. First, citing Justices Holmes and Jackson, the 1960s edition of *Magruder’s* provided its first salute to minority speech, noting that “[t]he guarantees of the freedom of speech . . . are especially intended to protect the expression of unpopular views by a minority.” Second, the 1960s edition implicitly fused the First Amendment theories of Alexander Meiklejohn and Oliver Wendell Holmes. Borrowing from Meiklejohn, the 1960s account noted that democratic self-governance relied upon “the ability of the people to make sound, reasoned judgments [through open debate].” Borrowing from Holmes, this account added that Meiklejohn’s “sound, reasoned judgments” required Holmes’s “free marketplace of ideas”—“where every man is free to speak his mind.” Even as this account ignored some of the key differences between Meiklejohn and Holmes, it represented the first theoretical justification of the First Amendment offered in any edition of *Magruder’s*.

In the end, *Magruder’s* was completely transformed in the 1960s from a textbook apologizing for speech-restrictive actions taken against
alleged Communists to one celebrating the minority-protective nature of the modern First Amendment. In addition, for the first time, Magruder’s reinforced the popular free speech stories in our leading history textbooks, with both accounts celebrating America’s commitment to robust free speech rights.

2. The 1970s: The Emergence of a Court-Centered Account of the First Amendment

The Magruder’s First Amendment section was further transformed in the 1970s, as this popular textbook continued to absorb new constitutional developments. Overall, the number of cases more than tripled (to twenty-five) and the number of issues expanded yet again. For instance, the “Press” section was expanded to include extended accounts of both Near and the recently-decided Pentagon Papers Case.163 Furthermore, a “Radio and Television” section was inserted alongside the previous decade’s section on “Motion Pictures.”164

These developments suggest that the process of constitutional absorption itself was altered by the transformational shifts of the 1950s and 1960s. In contrast to previous decades, Magruder’s began to accommodate new changes in First Amendment doctrine, even in the absence of widespread social movement agitation. As a result, over time, changes to our popular constitutional understandings of the First Amendment (as embodied in our leading high school textbooks) became less “popular” and more “official”—or, at least more derivative of new developments in Court doctrine.

Even in light of these changes, the 1970s edition retained certain core elements of the previous decade’s account. For instance, the 1970s edition continued to stress the importance of the First Amendment to democratic self-governance,165 as well as the minority-protective nature of contemporary Court doctrine.166 In addition, the 1970s account still featured a detailed discussion of wartime speech, leaving the accounts of Schenck167 and the 1950s-1960s Communist speech cases largely unchanged.168 In the ensuing decades, Magruder’s would continue to absorb new First Amendment cases (and issues), with its account becoming

163 403 U.S. 713 (1971); William A. McClenaghan, Magruder’s American Government 103 (1976).
164 McClenaghan, supra note 163, at 104.
165 Id. at 102.
166 Id. at 103.
167 Id. at 104.
168 Id. at 104-06.
increasingly Court-centered.

3. The 1980s: New Issues and New Cases

In the 1980s edition of Magruder’s, the number of First Amendment cases almost doubled again (to forty-one). In addition, several new issues were added, including new sections on obscenity, confidentiality, advertising, and symbolic speech. I briefly consider each in turn.

First, the “Obscenity” section began with a discussion of *Miller v. California*,{169} and then considered related cases, including *Stanley v. Georgia*,{170} *United States v. Thirty-Seven Photographs*,{171} and *United States v. Reidel*.{172} This new section explained to our high school students that “the Court has upheld the right of a person to read a dirty book or see a dirty movie in his or her home,” but, at the same time, “has upheld the laws that deny to that person the principal means of obtaining them.”{173}

Second, the “Confidentiality” section focused on *Branzburg v. Hayes*,{174} and the reporter’s privilege.{175} This new section noted that “[b]oth state and federal courts have generally rejected the news media’s argument” on confidentiality, with “a number of reporters [going] to jail” over the issue.{176} Although the 1980s edition was clear that the law cut against the reporters, Magruder’s valorized these acts of First Amendment martyrdom, noting that the reporters’ “willingness to pay the penalty for contempt of court testifies to the importance of the issues involved.”{177}

Third, the “Advertising” section discussed the Court’s recognition of commercial speech rights.{178} This new section included citations to several recently-decided cases, including *Bigelow v. Virginia*,{179} *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*,{180} *Carey v. Population Services International*,{181} *First National Bank of Boston v. Bellotti*,{182} and *Wooley v. Maynard*.{183}

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{173} MCCLENAGHAN, supra note 172, at 105-06.
{174} 408 U.S. 665 (1972).
{175} MCCLENAGHAN, supra note 172, at 108.
{176} Id. at 108-09.
{177} Id. at 109.
{178} Id. at 111-12.
{179} 421 U.S. 809 (1975).
{180} 425 U.S. 748 (1976).
Fourth, the “Symbolic Speech” section explained to our high school students that “drawing the line between protected speech and punishable conduct is not easy.” This new section quickly added that, although “the Supreme Court has been sympathetic to the symbolic speech argument,” it has not “given blanket 1st Amendment protection to that means of expression.” The Magruder’s discussion of symbolic speech featured several landmark cases, including *United States v. O’Brien*, *Buckley v. Valeo*, *Tinker v. Des Moines School District*, *Smith v. Goguen*, and *Spence v. Washington*.

Finally, in addition to these new sections, the 1980s edition also provided an entirely new overview of wartime speech under a new heading, “National Security.” This revised section began by asking our high school students, “What of those who seek to destroy this country and its form of government? Are they, too, protected by the constitutional guarantees of freedom of expression?” The 1980s edition then emphasized the difficulty in answering these questions. On the one hand, “the guarantees of free speech and press are especially intended to protect unpopular opinions.” On the other hand, “[g]overnment has an undoubted right to protect itself and the nation against internal subversion.” The 1980s edition enumerated certain easy cases—for instance, “government may punish espionage, sabotage, and treason.” At the same time, the section added, “Sedition presents a much more delicate problem—for it involves the use of spoken or written words.”

From there, the 1980s edition of Magruder’s provided the most liberal account of wartime speech rights to date, an account that would serve as the model for later editions. It began with a discussion of the Alien and Sedition Acts, noting that they were “undoubtedly unconstitutional,” even if “they were never tested in the courts.” The 1980s edition then proceeded to the World War I context. Although this edition did not provide excerpts from the landmark Holmes dissents, it did emphasize the

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183 430 U.S. 705 (1977); McClenaghan, supra note 172, at 111-12.
184 McClenaghan, supra note 172, at 110-11.
189 418 U.S. 405 (1974); McClenaghan, supra note 172, at 110-11.
190 McClenaghan, supra note 172, at 112.
191 id.
192 id.
193 id. at 113.
194 id.
195 id.
196 id.
knotty question raised by Holmes’s canonical “clear and present danger”
test: “What words used in what circumstances constitute a clear and present
danger?”197

Although critical of the Schenck Court, the 1980s edition noted that
at least the Espionage Act of 1917 was “effective only in time of war.”198
Not surprisingly, the 1980s edition was highly critical of the suppressive
Smith Act, which was “applicable during peacetime,”199 and the Court’s
1951 decision upholding it in Dennis. In the end, the 1980s edition praised
the Court’s speech-protective reversal in the late 1950s and early 1960s. It
concluded the Dennis-Yates narrative by noting that in recent decisions, the
Court had “construed [the Smith Act’s] provisions [so] as to make
successful prosecutions under it very difficult.”200 Later editions of
Magruder’s would largely retain this speech-protective account.

4. The 1990s and Beyond: Magruder’s and the Modern First Amendment

The actual substance of the Magruder’s First Amendment section
changed little from the 1980s through today.201 At the same time, the First
Amendment canon expanded yet again—ballooning to sixty-one cases in
the 1990s edition of Magruder’s. Furthermore, this edition included full-
page accounts of selected cases for “Close Up” analysis by the students.
Four cases were flagged for this treatment, one political speech case (Feiner
v. New York202), one press freedom case (The Pentagon Papers Case203),
and two school speech cases (Tinker v. Des Moines School District204 and

In today’s edition of Magruder’s, the number of First Amendment
cases diminishes slightly (to 55 cases). At the same time, the number of the
First Amendment “Close Up” cases increases to seven, with two campaign

197 Id. at 114.
198 Id.
199 Id. at 115.
200 Id.
201 The only key change in these editions is a reordering of the wartime speech section.
Rather than organizing it under the heading “National Security,” the section is entitled,
“Seditious Speech.” WILLIAM A. MCCLENAGHAN, MAGRUDER’S AMERICAN GOVERNMENT
547-48 (2007). From there, the substance is largely the same, with similar discussions of
the Alien and Sedition Acts, the Espionage Act, and the Smith Act. Id. Other minor
changes include a new sub-section devoted to flag-burning and a somewhat larger section
on commercial speech. Id. at 552, 553.
regulation cases (Nixon v. Shrink Missouri Government PAC and Republican Party of Minnesota v. White, one Internet speech case (United States v. American Library Association, one school speech case (Tinker v. Des Moines School District), one symbolic speech case (United States v. Eichman), one political speech case (Hutchinson v. Proxmire), and one door-to-door solicitation case (Watchtower Bible & Tract Society v. Village of Stratton). In the end, the account in today’s edition of Magruder’s largely tracks modern First Amendment culture—and, therefore, reinforces the speech-protective accounts in today’s leading history textbooks.

5. Conclusion

Tracking our model of constitutional absorption, transformational shifts in the Magruder’s narrative followed periods where our official lawgivers and a broad-based social movement promoted a common vision of the First Amendment. These concerted actions resulted in two key shifts: one to a more Court-centered, speech-restrictive account in the 1950s; and another to a speech-protective reversal in the 1960s. Furthermore, as predicted by our model, Magruder’s rapidly absorbed subsequent developments in First Amendment doctrine, as later editions began to more closely track “official” culture by providing a fairly direct route from Court pronouncement to new textbook content.

As will become clearer in Parts IV and V, these developments suggest that government textbooks tend to be more value-laden than their history counterparts. In short, our government textbooks have been more likely to alter their accounts to track the political mood of the country, particularly once a constitutional value increases in salience. This finding is particularly evident in the contrasting responses of our government and history textbooks to the widespread social movements of the 1950s and 1960s. As was outlined in this Part, these successive developments completely transformed Magruder’s, resulting in an initial shift towards a more speech-restrictive account in the 1950s and then a complete reversal in the 1960s. In contrast, our history textbooks accommodated many of these new developments, but retained a certain speech-protective, popular core—
even in the face of the paranoia of the 1950s and the Court-centered developments of the 1960s and 1970s. These contrasting responses to key constitutional developments are likely a function, at least in part, of the unique concerns and overall agenda of the academic discipline underlying our government textbooks—political science.

IV. CONSTITUTIONAL ABSORPTION IN OUR HIGH SCHOOL HISTORY CLASSROOMS

High school history courses are tasked with covering all of our nation’s history, from colonial America to Obama’s America. Not surprisingly, these courses tend to organize this material chronologically, thus leaving our free speech stories scattered throughout American history. Even so, our history textbooks have included memorable free speech stories since the early twentieth century. Most durable among them has been a trio of popular free speech episodes: the Zenger trial, the Alien and Sedition Acts controversy, and the suppression of abolitionist speech. These durable stories have survived sweeping changes to First Amendment doctrine, including the constitutional transformations of the 1950s and 1960s. In Part V, I consider these enduring stories in greater detail.

Since the 1960s, our history textbooks have absorbed an increasing number of Court-centered narratives. In most cases, these newly-absorbed stories have supplemented, not displaced, the popular free speech episodes of previous decades. I turn now to the emergence of the Court-centered First Amendment in our high school history textbooks.

A. The Speech-Protective and “Court-Free” Accounts of the 1940s

No First Amendment cases were included in the most widely-used American history textbooks of the 1940s. Like Magruder’s, our history textbooks simply ignored the Supreme Court, even as the Court became increasingly active in settling First Amendment disputes. Unlike Magruder’s, however, our leading history textbooks adopted a speech-

[213] Our early textbooks also included general statements on free speech and a free press. For instance, on the freedom of the press, one 1940s textbook notes that “America newspapers enjoy freedom from political control or censorship. One explanation of the extraordinary power of the press in the United States is that the doctrine of the freedom of the press was early established in this country and has been uninterruptedly maintained.” EUGENE C. BARKER & HENRY STEELE COMMAGER, OUR NATION 797 (1949). This same textbook then ties this tradition of press freedom to the overall quality of the American press, noting that “[p]artly as a result of this freedom American newspapers are today the most informative, the most accurate, and the most interesting of any in the world.” Id. at 798.
protective tone.

For instance, these textbooks were highly critical of World War I-era speech suppression, with each account connecting the Wilson Administration’s actions during World War I to those of the Adams Administration over a century earlier. One representative textbook noted,

Congress supplemented [the Espionage Act] with a Sedition Act which equaled in severity the famous Sedition Act against which Jefferson and Madison had protested in 1798. . . . In spite of the fact that the Sedition Act itself violated the constitutional guarantee of free speech (which the President declared only a little earlier to be an inalienable privilege of the American people) . . . the influence of the administration was strong enough to put it through Congress without delay.214

In fact, some accounts went even further, adding that World War I-era speech suppression was actually worse than the speech-restrictive actions of the eighteenth-century Federalists. For instance, one textbook explained,

[The new Sedition Act] was far more harshly enforced than its prototype of 1798. “Individual critics of the war and the Wilson program,” says Professor Beard, “were rounded up by the government, often without warrants of arrest, hustled to jail, held incommunicado without bail, tried in courts where the atmosphere was heavily charged with passion, lectured by irate judges, and sent to prison for long terms—in one case an adolescent girl for twenty years.”215

At the same time, even these highly critical accounts conceded the difficulty of dealing with antiwar advocacy. In a section entitled, “Mistaken Zeal,” one textbook concluded,

It is not easy to determine the limit to which the government of a liberty-loving people in a republic should go in repressing freedom of speech . . . in a great national emergency. Obviously it will depend upon the degree of danger apprehended; and on that point there will always be a wide difference of opinion.216

Even while noting these difficulties, the 1940s accounts were clear in their

214 DAVID SAVILLE MUZZEY, A HISTORY OF OUR COUNTRY 707 (1943).
215 Id.
216 Id.
historical judgments, with one textbook summarizing the consensus view: “As we look back from the postwar days it is not difficult to see that the government was overzealous in repression and persecution.”

Of course, in addition to these critical appraisals of the Wilson Administration, our history textbooks also included the popular, speech-protective narratives introduced at the beginning of this Part—narratives which will be discussed in greater detail in Part V. In the end, our 1940s history textbooks advanced a speech-protective vision of the First Amendment.

B. A Subtle Shift: Stability and Change in the 1950s

Although the 1950s edition of Magruder’s witnessed a transformational shift towards a more Court-centered, limited First Amendment, our 1950s history textbooks retained their popular, speech-protective core. At the same time, these textbooks did not escape the anti-Communist paranoia of the 1950s completely unscathed.

Even as our history textbooks ignored the speech-restrictive decisions of the Vinson Court, they aligned their treatment of World War I-era speech suppression with the overall speech-restrictive mood of the 1950s. For instance, unlike the previous decade’s editions, our 1950s history textbooks refused to tie the Wilson Administration’s speech suppression efforts to the infamous actions of the Federalists in the late 1790s. Furthermore, one leading textbook subtly defended the Wilson Administration’s Sedition Act as a limited measure intended to stifle the subversive activities of a tiny minority, noting, “The vast majority of Americans threw themselves enthusiastically into the task of winning the war, but there was a small group which was not in sympathy with the government’s war effort. To deal with these people, the Sedition Act was adopted.”

Finally, our 1950s history textbooks were generally equivocal in their treatment of the larger argument over wartime speech suppression. For instance, one textbook noted,

Opinion differed widely on the necessity of [the Sedition Act]. Many believed the law was powerless to reach those who were a real danger to the United States, but was an annoyance to thousands of well-intentioned pacifists and conscientious objectors. Others insisted that while freedom of speech and of the press was desirable

217 Id.
in time of peace, these rights were dangerous in time of war.\textsuperscript{219}

In the end, there was a discernable shift in our history textbooks’ treatment of the World War I era, from the unequivocally critical accounts of the 1940s to the more balanced accounts of the 1950s; however, it is important not to overemphasize the magnitude of this shift. First, even as the 1950s Court had become more vocal in wartime speech disputes, our history textbooks continued to ignore the Court’s World War I-era pronouncements—even while discussing related actions taken by the Wilson Administration. This is in stark contrast to the 1950s edition of \textit{Magruder’s}, which finally absorbed \textit{Schenck}—not to mention \textit{Dennis}. Second, even as our 1950s history textbooks were less critical of the Wilson Administration’s speech suppression efforts, these textbooks still featured several memorable, speech-protective episodes elsewhere, including the Zenger trial and the Alien and Sedition Acts controversy. Therefore, on balance, our history textbooks continued to advance a fairly robust conception of American free speech rights, even in the face of the widespread paranoia of the 1950s.

\textit{C. Transformational Shift I: Schenck, World War I Speech Suppression, and Our 1960s History Textbooks}

In the 1960s, our history textbooks finally absorbed their first Supreme Court case—\textit{Schenck v. United States}.\textsuperscript{220} Even so, \textit{Schenck} was not used by our 1960s history textbooks to usher in the speech-protective Court of the Civil Rights era—or its analogue in the 1960s edition of \textit{Magruder’s}. Instead, \textit{Schenck} was inserted for a limited (and speech-restrictive) purpose—to lend additional legitimacy to the Wilson Administration’s efforts to suppress speech during World War I.\textsuperscript{221}

In spite of this key shift to include \textit{Schenck}, the overall account in our history textbooks remained predominantly speech-protective—and otherwise “Court-free.” Even as a few speech-restrictive passages lingered,\textsuperscript{222} our 1960s history textbooks renewed many of their earlier

\begin{itemize}
  \item \textsuperscript{219} \textit{Id.} (emphasis added).
  \item \textsuperscript{220} 249 U.S. 47 (1919).
  \item \textsuperscript{221} \textsc{Henry W. Bragdon & Samuel P. McCutchen}, \textsc{History of a Free People} 563 (1967) (“[T]he Supreme Court upheld the principle of the Espionage and Sedition Acts in a decision written by Justice Holmes.”).
  \item \textsuperscript{222} For instance, one textbook noted that the freedom of speech could be “limited by the federal government if there is a ‘clear and present’ danger that what is said may injure the general welfare.” \textsc{Lewis Paul Todd & Merle Curti}, \textsc{Rise of the American Nation} 187 (1966). Another textbook added that “a citizen’s rights [to free speech] end where his abuse of them . . . threatens public safety.” \textsc{Bragdon & McCutchen, supra} note 221, at
\end{itemize}
criticisms of World War I-era speech suppression. For instance, these textbooks emphasized the harshness of the Espionage and Sedition Acts:

> These [Acts] were so severe that they silenced opposition to the war. The Postmaster General was given authority to ban newspapers, magazines, and pamphlets from the mails at his discretion. Under these laws hundreds of people were imprisoned, sometimes even for opinions expressed in private conversations.

Furthermore, the popular, speech-protective core of our history textbooks remained largely unchanged during this turbulent decade.

In the end, for the first time, both Magruder’s and our leading history textbooks coalesced around a robust, speech-protective vision of the First Amendment—with Magruder’s emphasizing the speech-protective decisions of the Warren Court and our history textbooks stressing America’s popular free speech tradition.

**D. Transformational Shift II: The Emergence of a Speech-Protective Court in Our 1970s History Textbooks (and Beyond)**

In the 1970s, our history textbooks finally absorbed their first line of speech-protective cases—adopting the retreat from Dennis in the form of Yates and its progeny. This new Court-centered narrative began with various criticisms of Dennis. For instance, one 1970s textbook noted that Dennis “opened up new vistas in the control of subversive activity and the guarding of loyalty to the government” by upholding a law “making it a crime to advocate the violent overthrow of the government.” From there, our history textbooks described the Court’s swift reversal in Yates, which held that “mere advocacy of the violent overthrow of the government, without any overt action toward that end, was not in itself a crime.” For added emphasis, one textbook even quoted a key passage from Justice Hugo
Black’s opinion in this landmark case.\textsuperscript{227}

Following \textit{Yates}, our history textbooks presented a Court courageously expanding First Amendment freedoms—first, by striking down “Arizona’s requirement of a loyalty oath from state employees” in \textit{Elfbrandt v. Russell};\textsuperscript{228} and then by “remov[ing] the requirement that members of the Communist party register themselves with governmental authorities” in \textit{Albertson v. Subversive Activities Control Board}.\textsuperscript{229} These decisions led one 1970s textbook to conclude that “the Court has grown increasingly vigilant and precise in its definition of civil liberties.”\textsuperscript{230} These Court-centered developments led another textbook to add that the First Amendment “must be interpreted by the courts to have any real meaning.”\textsuperscript{231} This Court-centered, speech-protective narrative would endure into the 1980s and 1990s.

During this period, our history textbooks would also provide critical accounts of World War I-era speech suppression. For the first time, these accounts noted that some of the war’s supporters opposed the Espionage and Sedition Acts on First Amendment grounds. For instance, one textbook explained, “Many loyal Americans, themselves thoroughly in sympathy with the war effort, objected to the Espionage Act and the Sedition Act. They held that the constitutional rights of citizens should not be interfered with, even in wartime.”\textsuperscript{232} Another textbook added, “By 1920 a growing number of Americans who had no sympathy with radicals were becoming increasingly alarmed at the widespread violation of civil liberties. Many leaders of both political parties agreed . . . that Americans could not solve their problems by trying to suppress unpopular political views.”\textsuperscript{233} In addition, these accounts went to great lengths to quantify the human costs of the government’s speech suppression efforts. For instance, one textbook noted, “Operating [under the Espionage Act], the Department of Justice arrested at least 1,597 persons. Of these, 41 received prison sentences of from 10 to 20 years. In addition, newspapers and periodicals that criticized the government’s conduct of the war were deprived of their mailing privileges.”\textsuperscript{234}

In the end, from the 1970s through the 1990s, our history textbooks

\textsuperscript{227} See id. (“I believe that the First Amendment forbids Congress to punish people for talking about public affairs, whether or not such discussion incites to action, legal or illegal.”).
\textsuperscript{228} 378 U.S. 127 (1964).
\textsuperscript{229} 382 U.S. 70 (1965); \textsc{Griff & Krout, supra} note 225, at 779.
\textsuperscript{230} \textsc{Griff & Krout, supra} note 225, at 779.
\textsuperscript{231} \textsc{Lewis Paul Todd & Merle Curti, Rise of the American Nation} 167 (1972).
\textsuperscript{232} \textit{Id.} at 615.
\textsuperscript{233} \textit{Id.} at 630.
\textsuperscript{234} \textit{Id.} at 615.
became increasingly speech-protective and Court-centered.

E. The Modern First Amendment in Today’s History Textbooks

Today’s history textbooks contain an even larger number of First Amendment cases than in previous decades. *Schenck*, with Holmes’s canonical “clear and present danger” test, remains the most-cited case, followed by *The Pentagon Papers Case* and *Gitlow*. Furthermore, today’s textbooks finally extend the Court-centered canon beyond wartime speech cases by including key decisions on obscenity (*Roth v. United States*235 and *Reno v. A.C.L.U.*236), school speech (*Tinker v. Des Moines School District*237), and symbolic speech (*Texas v. Johnson*238).

Other than *Schenck*, *The Pentagon Papers Case* receives the most in-depth treatment of any First Amendment case in today’s textbooks. Furthermore, other than Zenger, it is the most extensive gloss on America’s commitment to a free press—with the case actually replacing Zenger in two of today’s textbooks. As one textbook explains, *The Pentagon Papers Case* affirmed “the strong presumption that ‘prior restraint’ is unconstitutional” and that, therefore, “[t]he government . . . ha[s] a ‘heavy burden’ to show that blocking publication is justified.”239 The same textbook quickly adds that “the ruling upheld the key role of the press in educating and informing

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235 354 U.S. 476 (1957); ANDREW CAYTON ET AL., AMERICAN: PATHWAYS TO THE PRESENT 980 (2005) (“The Warren Court made the first attempt to define obscenity in the 1957 case *Roth v. United States*, ruling that obscene materials were ‘utterly without redeeming social importance.’”).

236 521 U.S. 844 (1997); EDWARD L. AYERS ET AL., AMERICAN ANTHEM 1080-81 (2007) (“During the 1990s, the Internet emerged as a major means of communication and commerce. It also presented challenges, however. For example, many adults were concerned that children would be exposed to inappropriate material on the Internet. The White House helped push a 1996 law to limit the use of the Internet for transmitting certain sexually explicit material. In *Reno v. ACLU*, however, the Supreme Court struck down this law as a violation of the freedom of speech.”).

237 393 U.S. 503 (1969); DANZER ET AL., THE AMERICANS 603 (2007) (“The Court has also been asked to decide if young people in schools have the same First Amendment rights as adults. In *Tinker v. Des Moines School District* (1969), the Court ordered a school to readmit students who had been suspended for wearing black arm bands in protest of the war in Vietnam.”).

238 491 U.S. 397 (1989); DANZER ET AL., supra note 237, at 603 (“In *Texas v. Johnson* (1989), the Court, by a narrow five to four vote, invalidated a law under which a man who burned an American flag to protest Reagan administration policies had been convicted. The decision so outraged some people that members of Congress considered amending the Constitution to prohibit any ‘physical desecration’ of the flag. The amendment did not pass. Our freedoms of expression continue to depend upon the words in the first article of the Bill of Rights, written more than 200 years ago.”).

239 AYERS ET AL., supra note 236, at 1026.
the public.” In addition, Justice Potter Stewart emerges as one of only four justices mentioned in the First Amendment context, with a passage from his concurrence included in one of today’s textbooks: “[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.”

Even as today’s textbooks consider First Amendment cases outside of the wartime context, these textbooks also expand the canon of wartime speech cases. As a result, today’s textbooks provide an even more Court-centered account of the World War I period than in previous decades, even as the Court is not viewed as a great defender of an expansive First Amendment during this key period.

Interestingly, some of today’s accounts are equivocal about the suppression of wartime speech during World War I. One representative textbook provides an account of the debate during this period that resembles earlier accounts from the 1950s: “Some Americans believed that the Espionage Act and the Sedition Act violated the First Amendment. Others, however, thought these laws were essential to protect military secrets, the safety of American soldiers, and the overall U.S. war effort.” The same textbook later adds, “Between 1917 and 1920, many Americans were willing to give up some civil liberties in order to achieve security.” Another textbook notes, “The Sedition Act violated the First Amendment’s guarantee of freedom of speech, but many felt that the needs of war required harsh measures.” These passages may be a result of the lingering effects of September 11th and the ongoing wars in Afghanistan and Iraq.

In spite of these key exceptions, the consensus account in today’s textbooks advances an even more robust vision of speech protection than in previous decades. For instance, today’s accounts provide vivid passages on the costs of speech suppression during World War I. One textbook explains, “More than 1,000 opponents of the war were jailed under [the Espionage and Sedition Acts],” including “Robert Goldstein, who directed a film on the American Revolution called The Spirit of ’76 [and was] jailed for three years because he refused to remove scenes of British brutality from the movie.” In addition, many textbooks cite the example of frequent

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240 Id.
241 Id.
243 AYERS ET AL., supra note 236, at 604.
244 Id. at 624.
245 CAYTON ET AL., supra note 235, at 667.
246 AYERS ET AL., supra note 236, at 604.
Socialist presidential candidate Eugene Debs, who was “sentenced to prison for 10 years for criticizing the United States government’s prosecution of Americans under the Espionage Act.” Furthermore, for the first time, several textbooks focus on the mobbing of antiwar protesters during the World War I era. For instance, one textbook explains,

This atmosphere of legal repression, or official restriction of dissent, soon led to mindless crowd reaction. One night in Tulsa, Oklahoma, “gowned and masked gunmen” terrorized members of the Industrial Workers of the World. One member remembered the ordeal: “After each one [of us] was whipped another man applied the tar with a large brush, from the head to the seat. Then a brute smeared feathers over and rubbed them in.”

Another simply notes, “Groups of vigilantes . . . lynched and horsewhipped [antiwar protesters].”

In addition to this emphasis on the human costs of speech suppression, today’s textbooks once again link the speech-restrictive efforts of the Wilson Administration to the infamous actions of the Adams Administration over a century earlier. For instance, one textbook notes, “Like the Alien and Sedition Acts of 1798, [the Espionage and Sedition Acts] clearly violated the spirit of the First Amendment.” This is the first time our history textbooks have made this explicit connection since the 1940s.

Even as today’s textbooks include World War I-era cases other than Schenck, most textbooks still ignore the famous Holmes-Brandeis opinions of this period, with only one textbook providing a full account of Holmes’s key shift from Schenck to Abrams, along with his “marketplace” theory. This account explains,

By the fall of 1919 . . . Holmes had changed his mind. The case of Abrams v. United States concerned leaflets that criticized President Wilson’s ‘capitalistic’ government for sending troops to put down the Russian Revolution. Justice Holmes, joined by Justice Louis Brandeis, dissented from the majority of the Court, which upheld the conviction. In his dissent, Holmes emphasized the importance of a free exchange of ideas so that truth will win out in the intellectual marketplace. His reasoning won him acclaim as a protector of free

247 Id.
249 CAYTON ET AL., supra note 235, at 667.
250 DANZER ET AL., supra note 237, at 598.
The textbook quickly adds, “The belief that truth will eventually win out in the marketplace of ideas has become an important legal justification for promoting freedom of speech.”

Instead of emphasizing Holmes’s famous dissents, the typical account still focuses on Schenck—in particular, noting that this case was the Court’s “first decision interpreting the First Amendment” and that this opinion by Holmes “explain[ed] the limits to free speech.” One representative textbook provides the following account:

Holmes went on to explain that many things that can safely be said in peacetime can cause problems for the government and danger for soldiers in wartime. For that reason, Holmes argued, some limits needed to be placed on individual free-speech rights during wartime to ensure the country’s overall safety.

In the end, today’s history textbooks finally emphasize the key role that the Court has played in settling First Amendment disputes, especially when discussing the key controversies of both the World War I era and the 1950s. Even so, these Court-centered accounts are only part of the First Amendment narrative that emerges in our leading history textbooks—and, as the analysis in this Part has demonstrated, they are of a relatively recent vintage.

V. THE POPULAR FREE SPEECH TRADITION IN OUR HIGH SCHOOL HISTORY CLASSROOMS

The First Amendment only began to emerge as a Court-centered right in the early twentieth century. Since then, Court doctrine has shifted considerably, including key transformations in the 1950s and 1960s. Not surprisingly, our government and history textbooks have tracked many of these constitutional developments. Over time, the First Amendment narratives in our leading high school textbooks have become increasingly Court-centered and speech-protective. In light of these evolving accounts, it is fair to ask whether or not any First Amendment lessons have remained constant during this turbulent century.

Indeed, a few key lessons have—a trio of popular, speech protective

\[\text{footnotes}\]
episodes, to be precise: the Zenger trial, the Alien and Seditious Acts controversy, and the suppression of abolitionist speech. These durable accounts have provided generations of high school students with simple stories of popular heroes standing up to powerful villains—John Peter Zenger and Andrew Hamilton challenging the powerful (and corrupt) Governor of New York and a biased judge; Thomas Jefferson and James Madison taking on the power-hungry and oppressive Federalists; Reverend Elijah Lovejoy facing down an angry anti-abolitionist mob; and, ex-President John Quincy Adams defending the free speech rights of abolitionists in the halls of a hostile Congress. These popular free speech stories first appeared in our leading history textbooks in the early twentieth century and have remained there ever since. As a result, these memorable narratives are common to every generation of Americans alive today.

Although many nuances in these accounts are left unexplored, it may be useful for our schools to transmit core values to our students through the telling of simple stories. In the Supreme Court context, Charles Black similarly believed “that even though a justice must know deep down that no one can really mean there can be no restrictions on free speech, there is a value in his putting it that way nonetheless.”

Following Black, perhaps these simple stories create an enduring presumption in the minds of our youngest citizens—a presumption against any attempt to restrict their free speech rights. In fact, such a presumption may underlie the American public’s diffuse support for the Supreme Court in the First Amendment context, as average citizens often forgive the Court when it defends free speech rights in the face of contrary community values.

To be sure, this presumption is rebuttable. Throughout the twentieth century, the public has supported many efforts to suppress speech—especially in times of perceived national peril, such as World War I and the Communist Scare of the 1950s. During these periods, the Court has largely tracked public opinion and permitted widespread speech suppression. At

255 Interestingly, these popular narratives are not featured with any frequency in our casebooks. See Michael Kent Curtis, Teaching Free Speech from an Incomplete Fossil Record, 34 Akron L. Rev. 231, 238 (2000) (“Taken as a whole, the casebook fossil records suggest that the evidence for a robust historic right to free speech is weak indeed.”); see also Michael Kent Curtis, Critics of “Free Speech” and the Uses of the Past, 12 Const. Comment. 29, 30 (1995) (“American legal education has paid too little attention to either the history of liberty or of free speech”). Curtis adds, “Casebooks have been caught in a time warp. . . . Crucial constitutional events that do not produce Supreme Court cases rarely appear in most casebooks.” Id. at 257.


257 Cf. Sherry, supra note 6, at 379 (“[T]he existing canon should always form the starting point, because it presumptively represents accumulated wisdom.”).
various times, however, the public has become incensed with the Court’s protection of offensive speech—even when not perceived to be immediately dangerous. The flag-burning controversy of 1989-90 springs immediately to mind. Such emotionally-charged episodes can lead the public and its representatives to denounce the Court, with inevitable calls for constitutional amendments—not to mention more radical measures, such as jurisdiction-stripping.

These immediate, speech-restrictive responses may suggest certain limits to the popular free speech episodes that have endured for decades. For instance, the Zenger narrative features a newspaper printer and a colonial jury defying the proxies of a tyrannical, unrepresentative British government. The Alien and Sedition Acts controversy involves two of our Founding Fathers (indeed, collectively, the “authors” of our Declaration of Independence, Constitution, and Bill of Rights) standing up to an infamous Act created by a soon-to-be-extinct Party and a soon-to-be-defeated President. Neither of these episodes features unpopular political speech by a despised minority speaker, such as a Jehovah’s Witness or a flag-burner. As a result, these popular episodes could be viewed as celebrating—not dissent per se—but rather dissent that has been vindicated by history.

Even with these limitations in mind, the telling of these simple stories may be the only realistic way of presenting a memorable account of the First Amendment to our high school students, given the variety of other history lessons they must learn in our classrooms. Furthermore, the overall durability of these stories suggests that, even in the face of widespread constitutional change, popular constitutional culture sometimes seeks to reaffirm core values through the preservation of canonical constitutional narratives. In the end, these simple, enduring myths may be more valuable than the whole truth.

A. John Peter Zenger, the “Checking Value,” and Our Simple (and Enduring) Commitment to a Free Press

The Zenger trial has introduced generations of high school students to America’s longstanding commitment to a free press.\(^\text{258}\) In particular, these accounts have emphasized the so-called “checking value”—the

\(^{258}\text{See, e.g., Todd & Curti, supra note 222, at 82 (“[Many] colonists believed that people should be free to learn, to think, and to express their opinions. They also believed that printers should be free to print and distribute their own thoughts and the thoughts of others.”); Leon H. Canfield & Howard B. Wilder, The Making of Modern America 77 (1962) (“Living in a continent of open spaces and unlimited opportunity, the colonists naturally championed freedom of expression.”).}

\(^{259}\text{See Blasi, supra note 64, at 521.}\)
news media’s importance in exposing corrupt public officials. For instance, a 1960s textbook framed the Zenger episode as a simple clash between a courageous printer and an abusive governor: “John Peter Zenger . . . accused the royal governor of corruption. As a result, copies of the paper were publicly burnt by the sheriff, and Zenger was brought to trial on a charge of libel.”

A 1940s textbook similarly noted that the trial turned on the “question of whether the press should or should not be free to condemn the acts of public officials.” Over the years, most textbooks have included a similar introduction to this episode.

In addition to the “checking value,” most accounts have used the Zenger story to stress the jury’s special role in reversing the actions of a repressive government. As these textbooks have typically noted, Zenger not only faced a corrupt governor, but also a hostile judge who was “strong[ly] bias[ed] against [him].” As a result, Zenger relied upon the good sense of the jury—not just the novel arguments of his lawyer—to secure his acquittal. This simple, consistent story has taught generations of high school students that the protection our nation’s deepest freedoms sometimes depends upon the “People” themselves, not the judiciary. In Zenger’s case, he was saved by the speech-protective decision of a sympathetic jury—over and above the contrary preferences of a hostile judge and a corrupt governor.

In addition to this simple tale, a sizeable minority of textbooks have provided additional details about the Zenger trial, including the actual arguments advanced by Zenger’s lawyer, Andrew Hamilton. For instance, a 1940s textbook included the following summary:

Hamilton maintained that the jury had the right to decide whether the article in question was false, malicious, and, therefore, libelous, while the judge maintained that the jury merely had to decide whether or not Zenger had written the article. Hamilton, however, persuaded the jury that they must pass on all the facts in the case. The jury, following Hamilton’s suggestion, acquitted Zenger, and thereby upheld the freedom of the press.

Many of these textbooks have also noted that Hamilton argued, in particular, for a truth defense to libel. For instance, a 1960s textbook

260 BRAGDON & MCCUTCHEN, supra note 221, at 25.
261 MUZZEY, supra note 214, at 90.
262 See, e.g., FREMONT PHILIP WIRTH, THE DEVELOPMENT OF AMERICA 85 (1943) (“The jury . . . acquitted Zenger, and thereby upheld the freedom of the press.”).
263 Id.
264 Id.
explained that Hamilton argued for Zenger’s innocence because “the charges against the governor were true [and] free speech was one of the rights of Englishmen.” Furthermore, one of today’s textbooks similarly notes: “[Zenger] went to court and won the right to print unpleasant political facts in his newspaper.”

Finally, for decades, the consensus portrayal of the Zenger trial has concluded with a poetic salute to Zenger’s legacy. For instance, a 1940s textbook concluded, “American liberty was advanced a step further by the famous Zenger case.” A 1960s textbook similarly noted that the Zenger trial “came to be regarded as a landmark in the development of a free press in America.” Some of these accounts have even left students with the misleading impression that the press lived happily ever after, once Zenger was acquitted.

As a practical matter, there is little doubt that the Zenger trial set an important precedent; however, the Zenger precedent itself was a limited one—namely, that “truthful statements on matters of public concern were protected speech.” To be sure, this precedent made a practical difference for eighteenth-century printers. Following Zenger’s acquittal, printers were rarely prosecuted for seditious libel. In fact, not a single printer was convicted for such an offense during the remainder of the colonial period. Even so, the press would still face many obstacles in the years ahead.

For instance, several decades after the Zenger trial, the Founding generation oppressed loyalist Tories, often silencing their printing presses through extralegal means. As Stephen Feldman notes, “Tories were scared into silence, driven out of town, or tarred and feathered.” After the Revolution, several states prosecuted printers for seditious libel, in spite of state constitutional analogues to the First Amendment. Furthermore,

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265 BRAGDON & MCCUTCHEN, supra note 221, at 25.
267 WIRTH, supra note 262, at 84.
268 BRAGDON & MCCUTCHEN, supra note 221, at 25.
See id. at 46.
See id.
See id. at 47.
FIELDMAN, supra note 24, at 49.
See CURTIS, supra note 11, at 48; see also FIELDMAN, supra note 24, at 50 (“Americans . . . continued to accept the propriety of the long-standing British law on seditious libel.”).
many judges still followed repressive English precedents, including Blackstone’s limited conception of free press rights. 277 In the end, the stable presence of the Zenger trial in our First Amendment canon speaks to an enduring American commitment to a free press. Furthermore, its disappearance in two of today’s leading textbooks serves as an additional indicator, not only of the increasingly Court-centered nature of today’s textbooks, but also of the depth of this commitment—as the Zenger episode is replaced in both textbooks by a modern, Court-centered analogue, The Pentagon Papers Case.

B. The Alien and Sedition Acts Controversy, Democratic Self-Governance, and Our Simple (and Enduring) Commitment to Political Dissent

The Alien and Seditions Acts controversy has taught generations of high school students about the American tradition of political dissent. Furthermore, the portrayal of this episode in our leading history textbooks has changed little since the early twentieth century. Most textbooks have begun their discussion of this controversy by framing the First Amendment value at stake. For instance, one 1940s textbook explained,

[T]he party out of power often gets control of the government by criticizing the party in power. With a Sedition Act in force it was against the law to criticize the President or Congress, a fact which made it difficult for the party out of power (in this case the Republicans) to defeat its opponents. 279

A 1970s textbook noted, more dramatically, “[The Sedition Act] pointed in the direction of what we call today ‘a police state.’” 280

From the early twentieth century onward, our leading history textbooks have been highly critical of the Federalists in this episode. Indeed, the Sedition Act has been framed from the beginning as an attempt to destroy the political opposition—an act of hypocrisy at best and willfully unconstitutional anger at worst. Unlike accounts of the Wilson Administration’s speech suppression efforts during World War I, our history textbooks have never taken the Federalists’ concerns about national security seriously—not even during the anti-Communist paranoia of the 1950s. Instead, the Federalists’ national security justification has always been viewed as a mere pretext for the passage of a law designed to destroy

277 See CURTIS, supra note 11, at 48; see also FELDMAN, supra note 24, at 50.
278 See CURTIS, supra note 11, at 49.
279 WIRTH, supra note 262, at 218.
280 TODD & CURTI, supra note 231, at 217.
the Jeffersonians. For instance, as one 1950s textbook explained: “Under the claim of a national emergency, [the Federalists] forced measures through Congress that were aimed at weakening the Republicans.”281 A 1970s textbook similarly noted, “The Federalist administration took advantage of the war excitement to pass the Alien and Sedition Acts to penalize Republican critics of the administration.”282 A few textbooks even attempted to disassociate the most famous Federalists (Hamilton, Adams, and Marshall) from these notorious Acts. For instance, one early textbook noted, “It is only fair to say that the wisest Federalists, such as Adams, Hamilton, and Marshall, disapproved of these harsh acts, put through Congress by the panicky ‘hyper-Federalists.”283

Most history textbooks have also emphasized the “harsh”284 provisions of the Sedition Act. A 1960s textbook provided a representative description: “It forbade citizens to speak or publish anything false or malicious against the federal government or any of the officers thereof. Violators could be punished by fines up to $5,000 and imprisonment up to five years.”285 Some textbooks went further, emphasizing the practical impact of these provisions. For instance, a 1970s textbook explained, “The Sedition Act was carefully designed to stifle anyone who said the Republicans could direct the federal government better than the Federalists.”286

In addition, there has been a consistent emphasis across the decades on the human costs of the Sedition Act, with many textbooks specifying the actual number of Republican editors jailed by Act. For instance, one early textbook explained, “[A]bout a dozen Republican editors and writers were convicted.”287 Some textbooks have also included stories of First Amendment martyrs convicted under the Act—with many focusing on Congressman Matthew Lyon. For instance, one 1940s textbook explained, “Soon after the Sedition Act was passed, Matthew Lyon, a Congressman from Vermont, was arrested. . . . He was fined $1000 and given four months in jail.”288 A 1950s textbook added that Lyon was imprisoned “merely for

281 CANFIELD & WILDER, supra note 218, at 158.
282 FRANK B. FREIDEL & HENRY N. DREWRY, AMERICA: A MODERN HISTORY OF THE UNITED STATES 133 (1970); see also MUZZEY, supra note 214, at 204 (“In the heyday of their power, in the exciting summer of 1798, [the Federalists] had sought to crush the Republican opposition and secure their own party’s hold on the government by passing a set of laws that caused their downfall.”).
283 MUZZEY, supra note 214, at 205.
284 BOORSTIN & KELLEY, supra note 266, at 167 (emphasis added).
285 BRAGDON & MCCUTCHEON, supra note 221, at 185.
286 GRAFF & KROUT, supra note 225, at 141.
287 BARKER & COMMAGER, supra note 213, at 187.
288 Id. at 187-88.
stating that Adams had turned men out of office for party reasons, and for criticizing the President’s ‘continual grasps for power’ and his ‘unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice.’” These accounts of Lyon survived into the 1970s.  

Finally, many of our textbooks have used the Alien and Sedition Acts controversy to stress the American people’s ability to protect their own free speech rights from violations by their political leaders—without recourse to the Supreme Court. For instance, as one 1950s textbook explained, “People all over the country protested against the Alien and Sedition Acts.” One of today’s leading textbooks similarly notes, “The Alien and Sedition Acts proved very unpopular, and public opinion turned against the President and the Federalists.”

The canonical popular statements against the Alien and Sedition Acts were the Kentucky and Virginia Resolutions. Early accounts of these Resolutions in our history textbooks stressed the political motivations behind them. For instance, one early textbook explained, “The resolutions were meant to serve chiefly as campaign material against the Federalists in the election of 1800; and they did serve admirably for that purpose.” Another added, “The Kentucky and Virginia resolutions were intended . . . simply as campaign material . . . and were followed by no action undermining federal authority.”

More recent accounts have taken the Resolutions seriously as acts of popular constitutionalism, with a more robust account of the Resolutions finally emerging in the 1970s. This is one of the few examples of our textbooks becoming more popular (as opposed to more Court-Centered) in their treatment of the First Amendment in recent decades. For instance, a representative 1970s textbook explained,

Jefferson feared . . . that if the Federalists succeeded in smashing the Republicans, the United States government would become a tyranny in which the Senate and President would be elected for life. He and Madison concluded that the states should have the right to decide whether or not laws were constitutional. The two men believed that the Sedition Act was clearly unconstitutional, because it violated the First Amendment, which protects freedom of speech, press,
assembly, and petition. They thought that to leave the law unchallenged would be, in effect, to say the Constitution was a dead letter.295

One of today’s textbooks raises (and answers) a related question: “If the courts would not defend the people against the Alien and Sedition Acts or other tyrannical measures, who could do so? Madison and Jefferson believed that in this situation the only power able to oppose the federal government was the states.”296

Of course, our textbook accounts gloss over certain key subtleties of these Jeffersonian arguments. Although one has to expect a certain level of simplification in our high school textbooks, these omissions may serve to both overstate the level of Federalist repression and overemphasize America’s enduring nationwide commitment to free speech. First, as Stephen Feldman notes, the Alien and Sedition Acts can be viewed, in context, as “the most liberal seditious libel statute then imaginable,” as the Sedition Act incorporated key “Zengerian reforms.”297 This is not to suggest that the Federalists should be praised for their enlightened leadership—far from it. The Federalists are rightly viewed as early constitutional villains in our First Amendment canon. At the same time, repression under the Federalists’ Sedition Act paled in comparison to later instances of speech suppression, including the silencing of abolitionist speech in the antebellum South and the curbing of antiwar speech in the World War I era.

Second, the core of the Jeffersonian critique was jurisdictional, not general.298 Although the Jeffersonians argued that the federal government had exceeded its constitutional powers in enacting the Sedition Act, they believed that the states still retained the power to punish seditious libel.299 Furthermore, Jefferson himself believed that printers could be punished by the states for publishing false facts.300 As President, he even supported the prosecution of seditious printers under state libel laws.301 None of this is particularly surprising, given the Jeffersonian commitment to states rights;302 however, our high school history textbooks completely ignore this

295 GRAFF & KROUT, supra note 225, at 141-42.
296 BOORSTIN & KELLEY, supra note 266, at 169 (emphasis added).
297 FELDMAN, supra note 24, at 79-80.
298 See id. at 83; see also CURTIS, supra note 11, at 72 (noting that the Jeffersonians “repeatedly asserted the lack of federal power over the press” in their criticisms of the Sedition Act).
299 See FELDMAN, supra note 24, at 83.
300 See CURTIS, supra note 11, at 101.
301 See id. at 83.
302 See FELDMAN, supra note 24, at 83 (“[I]t reverberated with a broader Republican
Regardless, the Alien and Sedition Acts controversy has consistently taught our schoolchildren that stifling political speech for a political purpose is un-American, with today’s accounts particularly emphasizing the American public’s ability to vindicate their fundamental rights without recourse to the Court.

C. The People as Ambiguous Protectors (Or, Minority Speech Suppression as Constitutional Evil): The Silencing of Abolitionists in the Nineteenth Century

The suppression of abolitionist speech is not quite as coherent and consistent an episode in our leading history textbooks as the Zenger trial and the Alien and Sedition Acts controversy. Instead of occupying its own section under a single title, such as “The Suppression of Abolitionist Speech,” instances of abolitionist speech suppression are usually sprinkled throughout larger accounts on the evils of slavery. In these accounts, the suppression of abolitionist speech becomes symptomatic of the larger evils of the slave power rather than a simple evil unto itself. The First Amendment-related episodes that consistently emerge in this larger slavery narrative include the mobbing of abolitionists (particularly Elijah Lovejoy), Southern efforts to suppress abolitionist literature in the mail, and the so-called “gag rule” controversy. I consider each of these episodes in turn.

In the end, the suppression of abolitionist speech is an important episode in the history of the First Amendment—particularly as a paradigmatic example of the value of minority speech. Furthermore, these episodes have been consistent fixtures in our leading history textbooks since the 1940s. At the same time, these episodes are in tension with the accounts of the Zenger trial and the Alien and Sedition Acts controversy outlined in Sections V.A and V.B. In those accounts, the American people were protecting their free speech rights against the contrary actions of a repressive government, either through the jury system or other acts of popular constitutionalism. In the abolitionist speech narratives discussed in this Section, however, certain local (or national) majorities were acting to suppress minority speech rights, either legally or extra-legally. Therefore, our high school students learn that the American public alone cannot be trusted to protect minority speech rights.

1. Mob Violence Against Abolitionists
The most vivid abolitionist episodes offered by our leading history textbooks focus on the mobbing of abolitionist leaders. These narratives have often been used to stress Northern hostility towards the abolitionists and have frequently featured the mobbing of famous figures, such as William Lloyd Garrison and Wendell Phillips. For instance, one representative textbook from the 1940s noted,

A mob in Boston destroyed the office of The Liberator and dragged Garrison through the streets. In 1835 a purse of one hundred dollars was offered to the individual who would first lay violent hands upon an abolitionist leader who, it was rumored, would address an antislavery society at Boston.303

A 1970s account similarly explained,

Abolitionist preachers in the North were sometimes forced to quit by their congregations. Influential citizens like Wendell Phillips, of Boston, a gifted writer and orator, were barred from clubs and social gatherings because of their anti-slavery activities. William Lloyd Garrison was once forced to flee for safety to a Boston jail. More than once Theodore Weld and his students were manhandled by angry audiences.304

Finally, one of today’s textbooks provides a particularly vivid account:

Opposition to the abolitionists eventually boiled over into violence. At public events on abolition, people hurled stones and rotten eggs at the speakers or tried to drown them out with horns and drums. In 1835, an angry Boston mob assaulted William Lloyd Garrison and paraded him around the city with a rope around his neck. A new hall built by abolitionists in Philadelphia was burned down, as were homes of black residents.305

Although he has not been featured in every textbook, the most tragic example of mobbing in this context was that of Elijah Lovejoy, who has emerged in many textbooks as a martyr both to the cause of abolitionism and a free press. For instance, one 1970s textbook noted, “Elijah Lovejoy, an abolitionist editor who lived in Alton, Illinois, was murdered as he tried

303 WIRTH, supra note 262, at 360.
304 TODD & CURTI, supra note 231, at 343.
305 CAYTON ET AL., supra note 235, at 325.
to prevent a hostile mob from destroying his printing press.”

In addition, one of today’s textbooks provides an extended account of Lovejoy’s murder:

The most brutal act occurred in Alton, Illinois, where Elijah P. Lovejoy edited the *St. Louis Observer*, a weekly Presbyterian newspaper. In his editorials, Lovejoy denounced slavery and called for gradual emancipation. Opponents repeatedly destroyed his presses, but each time Lovejoy resumed publication. On the night of November 7, 1837, rioters again attacked the building. Lovejoy, trying to defend it, was shot and killed.

Interestingly, our textbook accounts have not followed this “Northern” narrative through to its conclusion to note the eventual role played by public opinion in turning the tide against abolitionist speech suppression in the North. Michael Kent Curtis has referred to this as a “crucial” period in the development of our popular free speech tradition. Between 1835 and 1837, the South increasingly demanded that the North pass legislation to prevent the spread of abolitionist literature. In response, many Northerners rallied against these Southern demands, citing America’s longstanding commitment to free speech rights. For most Northerners, the murder of Elijah Lovejoy was a key turning point. In the end, no free states passed legislation during this period to suppress abolitionist speech.

2. Southern Suppression of Abolitionist Literature

In addition to these acts of mob violence, many textbooks have also included the Southern suppression of abolitionist literature. For instance, one early textbook explained, “Southerners resented the sending of abolitionist papers by mail and attempted to stop the practice.” Another added, “So bitter became [the abolitionist] criticism of the slaveholders, and so insidious their propaganda, that their opponents determined to put an end to their activities, even at the price of freedom of speech and of the
Through the years, these vivid accounts have usually focused on the interplay between both legal and extralegal actions taken by the Southern majority—particularly the public burning of abolitionist literature with the support of key public officials. As one of today’s textbooks notes, “Southerners tried every measure—legal and illegal—to prevent the delivery of abolitionist literature into their states.” Some textbooks have also used this episode to teach our students about the practical effects of broad-based speech suppression. For instance, one 1970s textbook explained:

[S]outhern postmasters for years censored the incoming mail in order to dam up the flow of abolitionist propaganda into their section. In so doing, they banned much other reform literature, too. In defending slavery, then, southerners were closing the door to useful social improvements and innovations and to new thinking on public problems.

One early textbook provided a representative account of the extralegal actions taken by Southerners:

Southern irritation was increased when, in 1835, the American Antislavery Society began the publication of four monthly papers or magazines designed to promote the “entire abolition of slavery in the United States.” The first shipment of these papers that reached Charleston, South Carolina, was taken from the post office by angry citizens and burned. Later, postmasters in other parts of the South reported similar actions.

Several of our leading history textbooks have mentioned the South’s response to Hinton Helper’s famous tract, *The Impending Crisis*, as an important example of “legal” speech suppression during this period. For instance, one 1960s textbook explained, “By its threat of internal disunion, *The Impending Crisis* alarmed leaders of the South even more than *Uncle Tom’s Cabin*. Southern states banned the book from the mails, while the Republican party distributed 100,000 copies as a campaign document.”

Finally, many textbooks have also emphasized the federal
government’s complicity in these acts of speech suppression. For instance, one early textbook noted, “In December, 1835, President Jackson asked Congress to pass a law prohibiting the use of the mails to circulate ‘incendiary publications intended to instigate the slaves to insurrection.’ In other words, he asked for a law that would put a stop to the mailing of antislavery papers.”\(^{319}\) Another added, “When the citizens of Charleston, South Carolina, seized and burned a mail sack full of abolitionist documents in 1835, Congress upheld Postmaster-General Kendall in his refusal to compel the postmasters of the South to deliver such mail.”\(^{320}\)

In the end, this simple story has demonstrated to generations of students the dangers of popular majorities working with public officials to deny the free speech rights of unpopular minorities.

3. The “Gag Rule”

The “gag rule” has been the most prevalent (and consistent) of the abolitionist speech episodes in our leading history textbooks—with ex-President John Quincy Adams emerging as the story’s constitutional hero. Most textbooks have presented this narrative as an important example of popular constitutionalism, with Adams appealing to the First Amendment and the American free speech tradition in his efforts to convince Congress to end the “gag rule.” For instance, one early textbook noted, “When a ‘gag rule’ passed Congress . . . forbidding the reception of any petitions against slavery, John Quincy Adams . . . protested it was ‘a direct violation of the Constitution of the United States (Amendment I), of the rules of this House and of the rights of my constituents.’”\(^{321}\) Another early textbook added, “The indomitable Adams considered the resolutions as unconstitutional.”\(^{322}\)

Importantly, today’s textbooks have preserved this key episode, often using the same language as earlier editions.\(^{323}\)

Over time, many textbooks have also noted that the American commitment to the First Amendment was sufficient to draw certain anti-abolitionist politicians to the abolitionist side in this particular episode. For instance, one early textbook explained, “Many other people who had not been in sympathy with the abolitionists held a view similar to that of

\(^{319}\) BARKER & COMMAGER, supra note 213, at 346.
\(^{320}\) MUZZEY, supra note 214, at 305.
\(^{321}\) Id.
\(^{322}\) WIRTH, supra note 262, at 360.
\(^{323}\) See, e.g., BOORSTIN & KELLEY, supra note 266, at 295 (emphasis added) (“Former President John Quincy Adams . . . protested that such a restriction of free speech in the Congress was in ‘direct violation of the Constitution of the United States, of the rules of the House, and of the rights of my constituents.’”) (emphasis added).
Adams, and some of them enlisted in the abolitionist cause.” 324 Another even added that John Quincy Adams himself was “no friend of abolition” before the “gag rule” controversy. 325 Even so, as one of today’s textbooks concludes, “‘Old Man Eloquence,’ as Adams came to be called, angered members of the House with his lengthy orations against the gag resolution. He finally managed to secure its repeal in 1844 by convincing members that limiting free speech endangered the Union.” 326

In the end, this episode emerged as an important example of popular actors interpreting (and defending) the First Amendment—even if it featured the actions of a Founding Father’s son and the United States Congress rather than those of an ordinary citizen and a popular movement.

4. Conclusion

In the end, the key lessons presented to our students in these abolitionist speech episodes have remained stable over the years, as each textbook has tied the constitutional evil of slavery to that of speech (particularly minority speech) suppression. The larger narrative has also served as a cautionary tale for our students—namely, that the “People” alone (either acting as a local or national majority) cannot always be trusted with the protection of minority speech rights.

D. First Amendment Theory in Our High School History Textbooks

Even as our leading history textbooks have provided generations of high school students with memorable free speech stories, few have dwelled on key First Amendment theories. 327 For instance, while most of today’s textbooks discuss Holmes’s canonical “clear and present danger” test, only one outlines his “marketplace” theory in any detail. No other First Amendment theory is explicitly presented in our leading history textbooks—even if many are implied. Instead, our high school students leave their American history courses with a strong (if relatively unformed)

324 Wirth, supra note 262, at 360.
325 Muzze, supra note 214, at 305.
326 Boorstin & Kelley, supra note 266, at 296 (emphasis added).
327 For a concise overview of various First Amendment theories, see generally William Van Alstyne, A Graphic Review of the Free Speech Clause, 70 CAL. L. REV. 107 (1982). For key examples of First Amendment theories, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (introducing the “marketplace” theory); C. Edwin Baker, Human Liberty and Freedom of Speech (1992) (noting the First Amendment’s importance in promoting individual autonomy); Meiklejohn, supra note 125 (discussing his “self-governance” theory); Post, supra note 40, at 2369-74 (outlining his “participatory” theory); Blasi, supra note 64 (explaining the “checking value”).
impression that Americans deeply value free speech rights (and have valued them for centuries)—an impression reinforced by a set of consistent, powerful stories.

In the end, our leading history textbooks teach our high school students that, although it is sometimes necessary to privilege security over our civil liberties, such priorities are the exception, not the American rule. Furthermore, our history textbooks link speech suppression to clear-cut instances of historical wrongdoing, including political power grabs (such as the Alien and Sedition Acts), repressive acts (such as the burning of abolitionist literature), and historical evils (such as the murder of Elijah Lovejoy). As a result, even as only a handful of our history textbooks explicitly discuss First Amendment theory, the free speech episodes that recur manage to teach our schoolchildren key lessons about the values protected by our First Amendment.

CONCLUSION

The First Amendment emerged as a key privilege of American citizenship long before the days of Holmes and Brandeis—to say nothing of Black, Warren, and Brennan. Outraged Americans at the turn of the eighteenth century responded to the Alien and Sedition Acts by tossing Adams and his ruling Federalists from office. Courageous abolitionists in the nineteenth century risked their lives to exercise their free speech rights. Even Abraham Lincoln found himself limited by Northern public opinion in his attempts to suppress speech during the Civil War. In short, popular protection of free speech rights preceded the speech-protective Court of the twentieth century.

This popular free speech tradition has been featured in our leading history textbooks since the early twentieth century—long before the First Amendment was fully established as the Court-centered, minority-protective right that it is today. For over six decades, these popular stories—including the Zenger case, the Alien and Sedition Acts controversy, and the suppression of abolitionist speech—have represented relatively simple, stable statements of our nation’s enduring commitment to free speech rights. Beginning in the 1950s and 1960s, these stories were joined by an increasing number of First Amendment cases. Taken together, today’s high school textbooks tend to promote (and reinforce) our modern First Amendment—with its increased focus on Supreme Court doctrine, its robust protection of minority speech rights, and its keen awareness of our historical missteps. Even so, the popular free speech episodes of previous decades continue to anchor the First Amendment accounts in our leading history textbooks.
In the end, even as the American public has come to understand the freedom of speech as a predominantly Court-centered right, the survival of a vibrant and durable First Amendment culture continues to depend, at least in part, on the People themselves. As a result, the free speech stories we tell our schoolchildren continue to matter.

* * *

328 CURTIS, supra note 11, at 21 ("[T]he free speech tradition ultimately belongs to the American people and derives strength from their commitment to it. . . . Like the Titanic or a supertanker, liberty requires redundant safety devices—lifeboats as well as a double hull. It needs courts, juries, public support, a system of broad access to the debate, and understanding by politicians. Politicians, lawyers, and judges have a special duty to protect free speech. But free speech is too important to leave exclusively to judges, lawyers, and politicians. It belongs to the American people.").