

Introduction: Logic, History, and the McCarthy Era

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

—Supreme Court Justice Oliver Wendell Holmes Jr., dissenting in
Abrams v. United States, 250 U.S. 616, 630 (1919)

To historians, the cold war in recent years has become quite hot. More than twenty years after the historical book on the so-called McCarthy era of the late 1940s and early 1950s in the United States appeared to have been irrevocably sealed, startling revelations in the 1990s of previously secret documents—documents whose very existence was unknown except to a very few—appeared to dramatically alter well-accepted understandings of historians about this troubled period in American history. During that era, when the nation first began to grasp the gravity of the threat posed by the Soviet Union and the Eastern bloc nations to our national security, both the government and private institutions imposed extensive and severe punishment on American commu-

nists, and often any American who at one time had been a communist (or even suspected of being a communist) and who failed to repudiate those connections.

Once the McCarthy era ended, historians vigorously debated whether such suppression was ever justified by anything other than the nation's naked ideological repugnance for communism. Many concluded that, whatever dangers the Soviet Union and its allies may have presented, American communists caused no real threat to our internal security. Rather, the expression of national security concerns was merely a subterfuge, strategically designed to justify the persecution of those who held repugnant political views. Others, however, continued to see American communists as nothing more than a tool of Joseph Stalin and the Soviet Union. In the words of a respected group of historians, "[t]o their admirers and defenders, American Communists [were] usually . . . seen as idealistic and committed radical populists. They built unions, fought for racial and social equality, and battled fascism, often prodding their reluctant fellow citizens to live up to America's democratic ideals."¹ However, "[t]o their enemies, American Communists were 'soldiers of Stalin,' committed to a totalitarian philosophy and willing to alter their political stance whenever it suited the foreign policy needs of the Soviet Union."²

By the early 1970s, the view that American communists had presented no real threat had become the dominant position among American historians.³ The fears of the dangers presented by American communists that had dominated American society during the period in question were generally "dismissed as the product of paranoid fears created by third-rate spy novels."⁴ Certainly, those scholars who adopted this so-called revisionist view argued, whatever minimal threat to which the Communist Party of the United States of America (CPUSA) actually gave rise failed to justify the widespread suppression of American communists that took place during the period in question. The true rationale for the suppression of American communists, according to the revisionists, was not really a threat to national security, but rather the ideological offensiveness of the views expressed by American communists.⁵ In the words of the two leading modern historians on the subject, John Earl Haynes and Harvey Klehr, "[i]f one were to read [the] early revisionists' writings and nothing else, one would gain the impression that the CPUSA was largely a figment of the anticommunist imagination and that anticommunists were simply paranoids embarked on a hunt for imaginary witches."⁶ Moreover, "[w]here early revisionists had dismissed American communists as so unimportant that public fears about them were irrational, the second wave of revisionists believed communists to have been important shapers of American politics and culture."⁷

Those who vigorously opposed communism during the McCarthy era did so for a variety of reasons: fear on the part of American business people that communism would undermine well-established principles of American capitalism; antagonism on the part of religious Catholic Eastern European immigrants who had themselves witnessed the viciousness of communist suppression firsthand; and concern by American liberals about the totalitarian threat to human rights and democracy that communism presented.⁸ From the revisionist perspective, then, all of the seemingly wild allegations of American communist espionage or attempted overthrow made during the 1940s and 1950s were, for the most part, unsupported or even concocted means of discrediting American communists, designed to justify the suppression by both public and private levels of American society.⁹

For much of the latter part of the twentieth century, this view was so widely accepted that few scholars bothered to challenge it seriously.¹⁰ As the last decade of the century dawned, this well-accepted view was about to change dramatically. It was the revelation of two sets of previously unavailable documents, one in the United States and one in the former Soviet Union, that jolted the relatively peaceful world of mid-twentieth-century American political history. Although “[t]he revisionists . . . either denied or downplayed arguments about what others have described as the dark side of American communism,” these documents, according to the historians who initially reviewed them, “provided a powerful challenge to the revisionist perspective.”¹¹

The first set of documents to be made known to the world in the 1990s were the so-called Comintern documents, named after the entity in the Soviet Union that for many years had supervised communist parties throughout the world.¹² The documents were made available, in a limited manner, by the Russian government to selected American historians after the fall of the Soviet Union. After the revelations of Comintern were made known, “[i]t [was] no longer possible to maintain that the Soviet Union did not fund the American party, that the CPUSA did not maintain a covert apparatus, and that key leaders and cadres were innocent of connection with Soviet espionage.”¹³ These documents established that the CPUSA had never functioned as an independent political organization. Indeed, according to the historians who reviewed the documents, apparently “there was never a time when the CPUSA made its decisions autonomously, without being obliged to answer to or—more precisely—without *wishing* to answer to Soviet authority.”¹⁴

An even more startling historical jolt came in 1995, with the declassification of the highly secret Venona documents. These were previously

unknown decryptions of cable messages sent by agents of the Soviet intelligence service, the KGB, in America back to officials in Moscow. The United States had originally begun the secret decryption program in 1943, in order to determine whether the Soviet Union was seriously pursuing a separate peace with Nazi Germany. By the time that American intelligence officials had deciphered the first messages in 1946, the war was over and the program's initial goal was therefore rendered superfluous. What the United States agents learned, however, proved far more important than an answer to the original inquiry. In the words of historians Haynes and Klehr, "[e]spionage, not diplomacy, was the subject of these cables."¹⁵ The United States discovered that since 1942, the nation had been targeted by an intense and widespread Soviet espionage program that had utilized numerous professional Soviet agents and hundreds of Americans, often taken from the ranks of the CPUSA's so-called secret apparatus—cadres of specially recruited American communists who were fiercely loyal to the party and its goals.¹⁶

Since the revelations of Venona in the mid-1990s, numerous books on the subject or closely related matters have been published.¹⁷ Many have been highly critical of American communists during the McCarthy era and antagonistic to the revisionist view,¹⁸ although one of the glaring exceptions is the articulate—if controversial—defense of the revisionist view made by Ellen Schrecker in her book *Many Are the Crimes: McCarthyism in America*.¹⁹ Even after the revelations of Venona, Schrecker (who, in the paperback edition of her book, candidly acknowledged that “[f]or some reason, this book touched an ideological nerve”) wrote openly of “the political repression of the McCarthy era” and the “[d]istorted” perception of “a lockstep party and the automatons within its ranks.”²⁰ Although she conceded “that some genuinely damaging espionage did take place,”²¹ she also sought to defend those involved. “Unlike Soviet agents later in the Cold War,” she argued, “the men and women who gave information to Moscow in the 1930s and 1940s did so for political, not pecuniary, reasons. They were already committed to communism and they viewed what they were doing as their contribution to the cause.”²² Schrecker further asserted that American communists were simply “internationalists,” whose loyalty went beyond national boundaries.²³ Finally, she noted, “most of their espionage took place during World War II, when the United States and the Soviet Union were on the same side. These people were not, therefore, spying for an enemy.”²⁴ Thus, although Schrecker does not completely dismiss the impact of the Venona documents,²⁵ she does seek to dilute or deflect the force of their impact.

In contrast to Schrecker, a number of revisionist scholars have ac-

knowledgeed the untenability of their position in light of the revelations of Venona.²⁶ At the same time, since the revelations of the Comintern and Venona documents, a number of anticommunist commentators have claimed varying degrees of vindication for the treatment given to American communists during the cold war.²⁷ As Haynes and Klehr have argued, “[w]hat Ellen Schrecker is still unable to understand is that American communism declined *because* of the determined campaign by anticommunists of every political hue.” Soviet intelligence agencies abandoned use of the CPUSA, they claim, “not because they had developed ethical objections to this strategy or because the CPUSA had developed moral objections to it. Soviet intelligence abandoned use of the CPUSA for espionage *because it had become risky*. Had the U.S. government and the American public not adopted anticommunist policies, [Soviet intelligence agencies] would have happily continued as before.”²⁸

Although the debate among historians has continued unabated, an important perspective appears to have been ignored by all involved. None of the historians on either side of the historical debate has attempted an in-depth consideration of the implications of the theory of free expression for a proper understanding of the McCarthy era in a post-Venona world. The point to be made in this book is that the post-Venona McCarthy era is sorely in need of close examination through the lens of constitutional analysis. When one adds to the debate the perspectives of the First Amendment right of free speech and the political theory of free expression, I believe, one is able to recognize complexities on both sides of the historical debate that have been largely ignored by the historians.

Initially, when one includes the First Amendment perspective in assessing the implications of the Comintern and Venona documents, it becomes clear that the modern anticommunist commentators have grossly overstated the logical implications of the revelations, even assuming their total accuracy. This is in no way to suggest that the revelations contained in these documents are insignificant. The point, rather, is that the documents’ revelations do not free the government from all moral and political condemnation for its behavior during the McCarthy era. To be sure, the Venona documents clearly appear to support the allegations of and prosecutions for espionage against numerous American communists, many of whom served at shockingly high levels of the federal government, including Assistant Secretary of the Treasury Harry Dexter White, administrative assistant to the president Lauchlin Currie, and high-ranking State Department official Alger Hiss.²⁹ There now appears to be little question that many of the allegations of espionage made during the 1940s that seemed wild to many were, in fact, completely accurate.

Several scholars and commentators on the political left have ques-

tioned the veracity of the documents, but absent some affirmative reason to doubt their validity, it would seem reasonable to assume their accuracy. Because code names were used in the decoded messages, one might raise doubt as to the conclusions reached as exactly to whom the messages refer. But even assuming that these doubts are reasonable as to specific individuals, it does not alter the fact that *somebody* engaged in the behavior described in the messages. Unless the inquiry in question focuses on the identity of a particular individual, then, any doubt as to specific names is largely irrelevant to the broader issue of the role played by American communists in Soviet espionage.³⁰ There can of course be no doubt that, assuming their accuracy, these revelations are of enormous historical interest and value. But to suggest that as a result the government's treatment of American communists was totally justified amounts to a non sequitur because it completely ignores what I call the "act-response dissonance." Although a limited portion of the government's legal response focused on prosecutions for espionage or espionage-related activities,³¹ much of it did not. On the contrary, among the most noteworthy—and controversial—elements of the government's legal strategy during the period was the prosecution of the leaders of the CPUSA, not for espionage but rather for conspiracy to violate the Smith Act's criminal prohibitions on organizing the teaching or advocacy of the government's violent overthrow.³²

Commentators have been far too quick to treat these two forms of behavior as fungible. For example, Haynes and Klehr, by far the most important and perceptive anticommunist historians, assert that the information contained in the Venona documents at the time "lay behind the 1948 decision by the Truman administration to prosecute Eugene Dennis and other CPUSA leaders under the sedition sections of the Smith Act."³³ They also treat the concepts of espionage and subversion as if the two were interchangeable forms of behavior.³⁴ However, from the perspective of free speech theory, as well as political reality, there are enormous differences between the two types of activity. Espionage consists of the communication or transfer of classified or otherwise secret information or documents to foreign powers. In contrast, advocacy of unlawful conduct does not, by its nature, involve such transfers. Instead, its focus is an attempt to persuade free-thinking individuals to adopt a particular course of behavior.

In its narrowest and most direct form, at least,³⁵ espionage is of little or no concern to the values sought to be fostered by the First Amendment's guarantee of free expression. Probably no theory of free expression would extend protection to this form of communication. The clandestine passage of classified information to agents of a foreign power fails

meaningfully to advance the democratic process or further personal self-realization through intellectual development of either speaker or listener. Nor does espionage advance the state of public knowledge. Indeed, it is arguable that such activity should not even be deemed “speech” in the first place, but rather the use of communicative powers to perform a non-expressive act.³⁶ To the extent any self-realization value is involved in the conduct of espionage, regulation of the act is focused primarily on its nonexpressive consequences.

Most forms of “subversion” through expression, in contrast, go to the very heart of what the First Amendment right of free speech is all about.³⁷ At its foundation, the First Amendment right of free expression is concerned with the ability of one free-willed individual to persuade or inform other free-willed individuals within the polity, for the purpose of having the readers or listeners take certain actions or assume certain social, political, or aesthetic positions.³⁸ Although the classic form of espionage inherently fails to achieve these ends, political advocacy of any variety generally does so. It is true that not all attempts to persuade others to engage in illegal conduct receive First Amendment protection.³⁹ But the Supreme Court has long recognized the serious dangers to First Amendment protection flowing from governmental efforts to suppress attempts by private individuals at political persuasion.⁴⁰ In light of the total absence of evidence presented by the government to demonstrate even the remotest beginnings of an active American communist plan to attempt overthrow,⁴¹ the “subversion” for which communist leaders were prosecuted in the 1940s and 1950s effectively amounted to very little more than punishment for the holding of unpopular ideas.⁴² From a constitutional perspective, such suppression is therefore far more invidious than punishment for espionage. Moreover, the fact that an individual has engaged in such unprotected behavior as espionage in no way logically revokes constitutional protection for activity that falls under the First Amendment’s umbrella. Thus, the argument that the Venona documents’ revelations of extensive espionage or espionage facilitation on the part of American communists somehow justifies a governmental open season on American communists of the period is logically unsupportable.

The preceding reference to the questionable logic of the government’s response to American communist behavior underscores the central recurring theme throughout this book. I have chosen to title this book *The Logic of Persecution*. The term *logic* possesses several conceivable connotations in the context of First Amendment analysis, depending on the specific context in which the term is used. In one sense, the term may have an openly ironic use, as the famed excerpt from Justice Holmes’s dissent in *Abrams v. United States*,⁴³ with which this chapter began, ef-

fectively illustrates. When Holmes asserts that “[p]ersecution for the expression of opinions seems to me perfectly logical,” he is most assuredly not suggesting his agreement with such action. Rather, he intends the term to be viewed from the perspective of some perverse form of logic, where one has “no doubt of your premises or your power and want a certain result with all your heart.” Thus, where a political society is grounded in an unwavering, transcendent *ex ante* commitment to a particular substantive value structure, the suppression of expression either attacking that value structure or advocating an alternative value structure makes perfect sense. In such a society, the logic of persecution is quite clear: such renegade speech is at best a nuisance and at worst directly harmful to the society’s transcendent value system. For example, where a theocracy punishes blasphemers or the cold war nations of communist-run Eastern Europe punished anticommunist speech, it would be difficult to challenge the logic of such suppression, at least when viewed within the confines of that particular society’s contours. Unwavering *ex ante* commitment to a higher normative moral framework logically justifies—indeed, dictates—the persecution of anyone who urges departure from that moral framework.

Yet presumably Justice Holmes did not intend to imply that our society actually possesses such an *ex ante* transcendental commitment. On the contrary, as the remainder of his famous quotation quite clearly demonstrates, it was his view that in our constitutional democracy, “the ultimate good desired is better reached by free trade in ideas.” Modern scholars have quite reasonably criticized Holmes’s misguided reliance on a metaphor to the commercial marketplace.⁴⁴ Even if the metaphor is misplaced, however, I believe Holmes was appropriately seeking an understanding of free expression that is logically grounded in our society’s fundamental commitment to the values of the democratic process—self-rule through representation and accountability. A foundational commitment to a democratic system necessarily implies total rejection of government’s power to censor expression on the basis of normative disagreement with the views sought to be expressed.

Political philosophers have long recognized the link between the right of free expression and the facilitation of the democratic process. This perspective begins with the premise that in a democracy, the voters are the real governors and those who function in government merely their agents.⁴⁵ Individuals are capable of performing their governing function in the voting both more effectively if they are able to read and listen to the expression of a wide variety of information and opinion concerning issues that face the polity. But because a democratic society is defined not by the substance of the decisions made but rather by the use of processes

of self-rule, popular sovereignty, and public accountability,⁴⁶ the external imposition of a priori substantive limitations on what society may do necessarily runs counter to the concept of a democracy as a definitional matter. It is of course true that the popular sovereignty inherent in the democratic form of government is today invariably constrained by constitutional limitations that seek to ensure the maintenance of minority rights and a free society. But even when a democracy is constrained by a countermajoritarian constitution, as ours is, ultimately the people, through the use of a predetermined supermajoritarian process, may amend that constitution to provide whatever they want it to provide.⁴⁷

Democracy, then, inherently requires that sovereignty ultimately reside in the people. Because free expression is designed, at least in part, to facilitate the workings of the democratic process, it logically follows that government may no more censor expression solely on grounds of normative disagreement with the views expressed than it may prohibit the populace from altering either the society's substantive policies or foundational governing structure. It is for this reason that the modern-day Supreme Court has invariably recognized that viewpoint-based restrictions of expression are unconstitutional.⁴⁸

One might reasonably ask, if the guarantee of free expression is grounded at least in part in notions of popular sovereignty, does it not logically follow that a majority of the populace be permitted to suppress the expression of views which that majority deems ideologically offensive? Such reasoning, however, is both shortsighted and overly simplistic. If every majority-backed government in power were automatically authorized to suppress the minority with whose views it disagrees, there would immediately be nothing left of the very democracy that put that majority in power in the first place. Instead, what began as a democratic society would have degenerated into a political state of nature, where all that matters is the struggle for political power. It is for that very reason that our democracy is restrained by a complex supermajoritarian constitutional structure. The framers recognized the reality of the democratic paradox, in which the foundations of democracy are preserved only by restraining the simple majority that happens to hold power. Thus, a democratic society must commit itself to a principle of epistemological humility: no governmental body may impose restrictions on expression on the basis of predetermined moral values. The concept of epistemological arrogance that Justice Holmes mocked in his *Abrams* dissent, then, is "logical" only if one begins with internal premises concerning the relationship between a government and its populace that are anathema to our nation's commitment to foundational principles of popular sovereignty. When viewed from the perspective of American constitutional and

political theory, the persecution of American communists for nothing more than the offensiveness of their ideology would have been far from logical.

One might respond, however, that in light of the dramatic revelations in the early 1990s of the Comintern documents, it should now be clear that American communists were clearly something other than mere free-willed ideologues. It is true that those documents unambiguously establish the existence of a close connection between American communist organizations and the government of the Soviet Union. Invariably, the policies of the Communist Party of the United States were dictated, either directly or indirectly, by the Soviet government.⁴⁹ It is also certainly the case that these revelations make clear that the CPUSA was far from a traditional political party of the type that functions within the borders of the United States. But it does not follow either that the expressive activities of American communists were as a result excluded from the First Amendment's protective scope or that their punishment in the Smith Act trials amounted to anything more than thinly veiled viewpoint-based persecution.

It is today certainly conceivable that many organizations operating within the United States possess substantial allegiances to foreign governments or to political forces operating within other nations. This may be so for domestic organizations that support such nations as Israel, Italy, Ireland, or Palestine. Indeed, the list could go on and on. In many cases, these private organizations may, either formally or practically, link their own policies to those of a foreign power whose interests may or may not necessarily coincide with those of the United States. Yet it would be unreasonable on that basis to assume that the members of these organizations should automatically be deprived of their First Amendment rights. In deciding whether or not to view members of those organizations as free-willed individuals worthy of basic free speech protections, it is important to keep in mind that to the extent the members of these organizations adopt the positions of a foreign government, it is those members' voluntary choice to do so. That their chosen positions happen to align automatically with those of a foreign power may well justify political criticism of their method of adopting political views, but it in no way justifies the suppression of those views. This does not mean, of course, that American communists could legally engage in espionage on behalf of the Soviet Union, any more than it means that American Jews could legally engage in espionage on behalf of Israel or that Irish Americans could engage in espionage on behalf of Ireland. It means only that citizens do not automatically lose their First Amendment right of free expression because they have chosen to make an unwavering commitment of political alle-

giance to another nation or because they seek to influence the nation's policies on behalf of that nation.

In contrast to the persecution of American communist leaders for their ideologically driven viewpoints, which can be deemed "logical" only if one starts from political and constitutional postulates that are very different from our own, the punishment of American communists for engaging in classic espionage makes perfect sense, both on logical and practical grounds. As a general matter, a society has the inherent right to preserve its secrets from the eyes of foreign powers. Although the widespread public revelation of classified information could conceivably give rise to complex issues of First Amendment theory and doctrine,⁵⁰ when the information is clandestinely passed to the agents of a foreign power—as the Venona documents so clearly tell us it was both before and after the cold war began—none of those potential constitutional concerns arises.

It is this vitally important distinction in forms of American communist behavior that appears to have been completely lost on both sides of the historical debate over the McCarthy era. The persecution of American communists for the expression of an unpopular viewpoint, even one that contemplates violent overthrow at some point (at least absent even a semblance of concrete planning or proximity), is "logical" only in the ironic sense described by Justice Holmes in his *Abrams* dissent—a logic that flows from undemocratic premises that presume a society's unquestioning acceptance of a particular set of externally derived substantive moral truths. Such epistemological arrogance, however, has no place in a democratic society, where even the very foundations of the society's form of government must themselves always remain open to public debate.

Just as it is essential that the dichotomy between persuasion and espionage be recognized by the participants in the modern debate over the McCarthy era, it is equally important to point out that this insight does not necessarily imply that the repression of American communists was insupportable in all contexts. We have already seen that penalization of classic espionage activities is always appropriate, simply as a matter of societal self-preservation. But the same may be said of a number of other areas of so-called McCarthy-era repression which have long been the subject of disdain by liberal scholars. Two examples of McCarthy-era repression that automatically trigger negative reactions among many modern observers are the blacklists of entertainers with present or past communist connections and the dismissal of public schoolteachers with communist affiliations. Both have traditionally been condemned by many liberal critics as political persecution of the lowest form, because in both cases individuals are unambiguously penalized for nothing more than the

offensiveness of their political views. Closer analysis, however, reveals that these issues are by no means as simple as many assume.

It is certainly true that the blacklists were not limited to those communist entertainers who had participated in espionage activities (if, indeed, there were any),⁵¹ nor were they confined to those entertainers who had themselves advocated violent overthrow. In fact, there appears to have been little basis from which to infer any significant unlawful conduct on the part of the left wing entertainment community of the period. The basis for inclusion on the blacklists, rather, appears to have been nothing more than an unrepudiated affiliation with the Communist Party at some point in one's life.⁵² Similarly, schoolteachers who lost their jobs were usually guilty of nothing more than their refusal to sign a loyalty oath.⁵³ Surely such a refusal did not automatically imply criminal behavior, in the form of either espionage or attempted overthrow. If, as I argue in this book, punishment of any American communists who did nothing more than openly advocate violent overthrow should have been deemed protected by the First Amendment,⁵⁴ it would seem to follow logically that punishment of American communists who did nothing more than join the party or refused to sign a loyalty oath is an even more unacceptable form of ideological repression. Thus, one might at first be tempted to accept the liberal criticism of the McCarthy-era blacklists. Viewed from this perspective, the response that the inconsistency between the values of communism and those of American society was so great as to justify repression appears reminiscent of the epistemological arrogance that the First Amendment universally condemns. As is the case on so many questions of free expression during the McCarthy era, however, the constitutional reality is far more complex than either the standard liberal or conservative positions on the issues might suggest.

At the outset, it is necessary to distinguish the paradigmatic unlawful advocacy issue from the blacklist and public education contexts on several grounds. Initially, at least as a theoretical matter and perhaps as a practical matter, the blacklists were imposed by private individuals and organizations.⁵⁵ For the most part, it was private anticommunist organizations and individuals who made the choices both to shun those with communist affiliations and to urge others to do the same. This fact dramatically alters the underlying First Amendment dynamic. If one views the issues of free expression raised by the blacklists from the perspective not of the shunned individuals but of those doing the shunning, it becomes clear that the shunning represents the exercise of the private anti-communists' First Amendment right of nonassociation, which is itself constitutionally guaranteed. Although the First Amendment, properly construed, insulates American communists from governmental punish-

ment solely on the basis of a collective perception of the offensiveness of their ideology or the unfounded or manufactured fear of criminal behavior, that constitutional provision simultaneously guarantees other private individuals the option to disassociate themselves from those whose views they deem offensive. This, in short, describes the First Amendment right of nonassociation.⁵⁶

This First Amendment right, it should be noted, most certainly does not encompass a private right to discriminate on the basis of factors other than viewpoint or ideology—for example, race or gender. Rather, the right of nonassociation that is grounded in the constitutional guarantee of free expression is properly viewed as an outgrowth of the well-established First Amendment precept that one may not be compelled to utter views which he deems offensive.⁵⁷ So viewed, the right must logically be confined to shunning that is motivated by ideologically or viewpoint based considerations.

When the blacklists of the McCarthy era are viewed through the lens of the First Amendment right of nonassociation, their constitutionally protected status becomes clear. Included among the anticommunists were individuals and organizations motivated by a variety of concerns, including strongly held differences in economic, political, or religious philosophy.⁵⁸ Under the anticommunist umbrella were political and economic conservatives, liberals, socialists, and Eastern European Catholics.⁵⁹ Their anticommunist views were often held with a fervor that matched or exceeded those held by the communists themselves. To have penalized them in some way for making the choice to disassociate themselves from those whose views they deemed morally offensive would have given rise to many of the very same constitutional harms caused by forced expression. If one accepts this assertion, it logically follows that penalizing others for either making these anticommunists aware of others' communist beliefs or affiliations or urging others to boycott those with communist beliefs or affiliations would violate the First Amendment. It hardly makes sense to allow government to punish private individuals for urging others to exercise their constitutionally protected rights.

Thus, as offensive as many today find the blacklists of the 1950s to have been, viewing them from the perspective of the theory of free expression should dramatically alter our constitutional and political viewpoints on the question. The traditional view on the part of liberal commentators has been that the blacklists seriously threatened First Amendment rights by punishing individuals for their beliefs.⁶⁰ But although this position would be entirely accurate if we were discussing the possibility of most forms of *governmental* shunning on the basis of ideology, the exact opposite is true for *private* shunning. Although the First

Amendment insulates private individuals from governmental punishment for their beliefs, other private individuals possess a corresponding First Amendment right to choose not to deal with those individuals for no reason other than the repugnance of their ideological beliefs.

Perhaps the point could be best understood by means of a thought experiment. In considering the moral or constitutional appropriateness of privately operated, ideologically based shunning, replace the word *communist* with the words *Nazi* or *Ku Klux Klan member*. Let us hypothesize that private individuals wish to organize a blacklist against all actors or athletes who have affiliations with these extreme right-wing groups. I am willing to wager that in that revised political context, the concept of blacklisting does not sound nearly as troublesome or offensive to many as it does when the process is applied to those possessing communist beliefs or affiliations.

If my prediction is accurate, then the widespread disdain of blacklists surely does not derive from a process-based concern about the interference with the constitutional rights of those who are being shunned for their beliefs. Presumably, as an abstract matter, Nazis or Ku Klux Klan members have the same right to constitutional protection against ideologically based shunning as did the communists of the 1950s. Instead, the difference would be entirely one of substantive agreement or disagreement with the basis for the shunning. However, there existed a variety of very strong reasons to disdain communists and all they stood for during the McCarthy era. For example, many of the Eastern European Catholics who wished to shun them had witnessed the horrors of Stalin in their own countries and had seen what his forces had done to those who practiced their religion. Indeed, many knew individuals who had been shipped to Stalin's gulags.⁶¹ In addition, political liberals of the day saw the American communists as a serious threat to their value system, which was premised on a belief in the supremacy of the democratic process and the value of individual rights—values that communism, by its nature, rejected. Moreover, these liberals rightly saw the American communists as a serious threat to the meaningful exercise of their own rights of association because of the danger of furtive communist infiltration into their ranks. It is for this reason that the constitution of the Americans for Democratic Action, an organization that had been formed by many of the leading liberals of the period, expressly excluded communists from membership.⁶² Finally, from a First Amendment perspective, whatever one thinks of the merits of the strong philosophical disagreements that economic and political conservatives had with the communists is, for these purposes, completely beside the point. First

Amendment rights do not turn on what the enforcer thinks of the normative correctness of the views sought to be expressed or protected.

To find the blacklists of the McCarthy era to fall within the First Amendment's protective reach does not necessarily imply political agreement with either the substantive political views underlying the blacklists or the very tactic of using them in the first place. There is much expressive activity with which one may disagree—in fact, which one finds deeply offensive—that the First Amendment protects. Indeed, that is the very point made by those who criticize governmental actions during the McCarthy era for punishing or suppressing the politically unpopular views held by American communists. But as already explained, the principle of epistemological humility may not be utilized selectively, lest the First Amendment degenerate into little more than a tool of those in political power. If it is accepted that the First Amendment ensures a right of nonassociation in the first place,⁶³ and that the right would encompass the choice of private individuals to shun Nazis or Ku Klux Klan members, then simple political disagreement with those who seek to shun American communists most assuredly cannot justify exclusion of their actions from the First Amendment's protective scope.

One might argue that the reason for concern about the blacklists was not their invasion of American communists' rights of belief and expression but rather their inaccuracy. On more than one occasion, the lists mistakenly included names of entertainers who had never had any affiliation with the American Communist Party or any of its related organizations.⁶⁴ However, for the most part, it seems that the blacklists were accurate in their descriptions of those with communist beliefs or affiliations. According to historian Ellen Schrecker, “[d]espite the widespread contention that McCarthy and his colleagues picked on innocent liberals, most of the men and women who lost their jobs or were otherwise victimized were not apolitical folks who had somehow gotten on the wrong mailing lists or signed the wrong petitions. Rather . . . they had once been in or near the American Communist party. Whether or not they *should* have been victimized, they certainly were not misidentified.”⁶⁵ In any event, such privately inflicted harms are appropriately handled by the law of defamation, which authorizes those injured to be compensated for the loss as a result of falsehoods.⁶⁶ The mere possibility of mistakes cannot justify a total prohibition of the creation and distribution of even totally accurate lists.

Possibly even more counterintuitive are the implications of First Amendment analysis for determining the appropriate way to view the impact of McCarthyism in the public schools. Today it is the view of many,

quite understandably, that the use of a teacher's refusal to sign a loyalty oath or current or past communist affiliation as an automatic basis for dismissal or refusal to hire constitutes a blatantly unconstitutional penalization for the holding of unpopular views, in derogation of the precept of epistemological humility that is so essential to a viable guarantee of free expression. Moreover, in the case of public schools, the private nonassociational interests relied upon to justify the blacklists are irrelevant as a conceivable justification because governmentally operated organs of course possess no such constitutionally protected right. Nevertheless, as is true in so many other areas of McCarthy-era repression, the proper constitutional calculus is considerably more complex than at first it might appear.

To a certain extent, the public schools are appropriately seen as a means by which a society's fundamental sociopolitical-economic values are conveyed to impressionable young minds. At the very least, it would, as a practical matter, be virtually impossible to prevent the public educational system from being utilized to achieve that end because basic societal values are inherently intertwined with the substantive choices made in the shaping of the curriculum. For example, a school system's choice whether to portray Columbus as a racist genocidal murderer rather than a heroic explorer, or its choice to assign to students the works of Toni Morrison rather than Ernest Hemingway, will inevitably convey important elements of the community's value system. *Something* has to be taught in school, and the decisions of what those things are will be made by representatives of the community.

Although the First Amendment implications of this value conveyance process are not entirely clear,⁶⁷ one thing that *is* clear is that a community has the largely unreviewable authority to establish the curriculum for the public schools. For the most part, the First Amendment right of free expression does not authorize the judiciary to review or otherwise interfere with a community's decision to choose courses or the content of those courses because the community has a legitimate interest in seeing that the information and opinion it has chosen to convey to its youth is, in fact, conveyed effectively.⁶⁸ But if the community may, consistent with the First Amendment, select the curricula for its courses, it logically follows that the community may also select those who will teach those courses. For example, if a public school system chooses to teach courses in economics and American history, and in those courses it wishes to convey the view that the capitalist system is the most fair, effective, and efficient form of political economy, that school system may decline to hire a teacher who refuses to teach the intended message. Although of course that teacher has the First Amendment right to hold contrary positions on the question, that First

Amendment right does not extend to the authority to teach students one's own views as part of the public school system. This is true, even though the so-called right-privilege distinction, which posits that the First Amendment cannot be violated when government merely refuses to provide a benefit or a privilege, was quite properly discredited many years ago.⁶⁹

If a school system may properly refuse to assign a teacher to a class when that teacher refuses to convey the substantive material in the designated manner, it is not an undue extension of such reasoning to suggest that the school system may refuse to assign a teacher whose political views make it highly doubtful that she could convey the material as effectively as the school system would desire. For example, if a school district taught a course in race relations, it would not seem unreasonable for that district to refuse to assign members of the Ku Klux Klan to teach the course, regardless of the teacher's expressed willingness to teach the values of integration and racial harmony. District leaders could properly reason that it would be unduly burdensome for them constantly to oversee the teacher's performance, and that it is appropriate for them to refuse to assign a teacher whose predetermined sociopolitical views cast significant doubt on her effectiveness in the classroom.

If one superimposes this view of the First Amendment and public education onto the McCarthy era, one is left with some conclusions that will no doubt seem surprising to many. Under this analysis, in selecting teachers to teach courses in American history, social studies, or economics, a school district of the 1950s could appropriately take into account the fact that an applicant for a teaching position held communist beliefs, just as today a school district presumably could, consistent with the First Amendment, choose not to assign a member of the American Nazi Party to teach a course about race relations in the United States. In these situations, the community necessarily retains for itself the discretion to shape the substance of the curriculum as it deems fit, and to choose the teachers on the basis of its assessment of who will most effectively convey the substance of the course as the community wishes it to be conveyed.

It does not follow from this conclusion, however, that school districts of the 1950s could constitutionally refuse to hire those with communist beliefs or affiliations for the purpose of teaching any subject at all. Unless the school district could somehow establish a link between a teacher's political beliefs and the effective communication of the particular subject matter, its refusal to hire or retain the teacher would clearly constitute a First Amendment violation. For in such situations the refusal would amount to nothing more than the unadorned imposition of governmental punishment for the holding of a particular political belief. Such retributive behavior would undoubtedly constitute an unambiguous

“abridgement” of the freedom of expression, in violation of the terms of and policies underlying the First Amendment.⁷⁰

The intersection between the constitutional right of free expression and the regulation of public education during the McCarthy era gives rise to a broader theoretical concern about how the First Amendment intersects with the processes of public elementary and secondary education in general. As already explained, it is difficult to see how, as either a practical or theoretical matter, the First Amendment right of free expression can be thought to impose significant restrictions on a community’s decision as to how to structure the substance of its school curricula. How a community teaches subjects such as history, sociology, or physics for the most part must be beyond the judiciary’s constitutional province. But this fact should not obscure the potentially significant constitutional dangers that inhere in the process of public education.

Ironically, although there is little doubt that a democratic society cannot function effectively absent an effective system of public education, by its nature, the public educational system is an authoritarian operation. Agents of the government—either members of the board of education, school administrators, or teachers—decide exactly what it is that impressionable young citizens learn. To the extent a community uses its educational system as either a direct or indirect means of inculcating societal values in its youth, a troubling inconsistency between the values of free thought underlying the constitutional right of free expression and the functions performed by public education necessarily arises. This is what I refer to as the “democratic-educational paradox.”⁷¹ It is therefore advisable to develop a First Amendment model to set out the constitutional limits on a community’s ability to inculcate values in its students. That model, I believe, should draw a distinction between the incidental inculcation of values which inevitably flows from a community’s exercise of its discretion to establish the substance of the curriculum on the one hand, and the direct and purposeful inculcation of values, either as a curricular or extracurricular matter, on the other. It is both inadvisable and impractical for the judiciary, as enforcers of the First Amendment, to police the former; it is, I believe, essential that the First Amendment be construed to prohibit the latter.

The preceding examination of all the ways in which the repression of the McCarthy era and the First Amendment right of free expression intersect establishes two key points, both of which provide the basis for all of the chapters that follow. One of these points concerns the proper way to understand the history of the period; the other focuses on the broader implications of this historical-constitutional analysis for the future of First Amendment theory. First, it should by now be clear that, when

viewed through the lens of free speech theory, the repression of the McCarthy era is morally, politically, and constitutionally far more complex than historians on either side of the current historical debate have assumed. Thus, it is impossible to characterize the appropriate view of this troubled period in American history as categorically either liberal, conservative, or anticommunist. Each of those historical viewpoints, when relied upon to provide the exclusive modern perspective, grossly oversimplifies the complexities that inhere in the deep moral and political structural problems growing out of the era. Second, by viewing the McCarthy era through the lens of First Amendment theory, we are able to draw important inferences about the scope and application of that theory in a variety of modern doctrinal contexts. It is this symbiotic interaction between the past and the future, between constitutional theory and American history, and between constitutional law and American politics that provides the foundation for the analysis contained in this book. Essentially, the purpose of this book is to determine what First Amendment theory tells us about the McCarthy era, and vice versa.⁷²

The book does not purport to be an encyclopedic examination of either the McCarthy era itself or the First Amendment's relationship to it. Rather, it is intended to provide a new perspective on the theoretical and historical understanding of that interaction. It does so first by exploring certain basic structural aspects of the First Amendment's intersection with the McCarthy era, and then by selecting three important areas of First Amendment theory and doctrine in which that intersection is at the most intense level.

In the next chapter, I establish the historical framework for the constitutional analysis that follows. The chapter explores the broad contours of the McCarthy era, including a description of the different forms of repression imposed during the era. The chapter will also explore the relatively limited role that Senator McCarthy himself actually played in the era that bears his name.⁷³ Although it is inevitable that the explication of this framework will deal to a certain extent with surrounding constitutional issues, I have reserved several of those issues—specifically, constitutional protection of unlawful advocacy, the intersection between the Hollywood blacklist and the House Committee on Un-American Activities on the one hand and the First Amendment right of nonassociation on the other, and the First Amendment implications of McCarthyism and the public schools—for detailed discussion in subsequent chapters. These three areas have been selected for special treatment because they have certain characteristics that distinguish them from other areas of First Amendment theory and doctrine affected by the McCarthy era. First, I believe it is fair to say that they are the doctrinal areas most heavily af-

fected by the repressive policies of the McCarthy era. Second, they are probably the First Amendment doctrines where careful synthesis of history and constitutional theory gives rise to the most counterintuitive conclusions.

Chapter 3 begins the examination of the constitutional-historical intersection that provides the book's core. It considers the extent to which the repression of the McCarthy era constitutes an illustration of what free speech theorists have on occasion referred to as a "pathological" period in American history, and the extent to which interpretation of the First Amendment should be restructured in order to deal specifically with such periods of political stress. The chapter will also consider whether that interpretive model effectively implements the values sought to be protected by the constitutional right of free expression.⁷⁴ It has been suggested that the scope of the First Amendment guarantee of free expression should be shaped exclusively to respond to the periods in American history in which government presents a far greater threat to the interests of free speech than it does during more normal periods, and the McCarthy era is always cited as one of the relatively few pathologically driven times in the nation's history.⁷⁵ In Chapter 3, I respond to the pathological theorists by arguing that it is much wiser to fashion the First Amendment's scope without any special regard for or concern with these so-called pathological periods—if, indeed, such confined episodes can even be carved from the broader flow of American political history in the first place.⁷⁶

Chapter 4 tackles the difficult issue of the degree to which the First Amendment should be construed to protect the advocacy of unlawful conduct. In doing so, it explores the implications for the unlawful advocacy issue of the revelations of the Comintern and Venona documents.⁷⁷ I begin the analysis with heavy criticism of the Supreme Court's infamous decision in *Dennis v. United States*,⁷⁸ where the Court upheld the convictions of the leaders of the American Communist Party against First Amendment attack. I then consider the implications of the revelations of the Comintern and Venona documents for that First Amendment critique, concluding that those revelations have absolutely no relevance to the serious First Amendment problems that plague the Court's various opinions in *Dennis*.⁷⁹ In critiquing *Dennis* and distinguishing between the expressive activity suppressed in that case with the communications revealed by the Comintern and Venona projects, the analysis argues that current theoretical and doctrinal approaches to the protection of unlawful advocacy are inadequate and suggests an entirely new model for resolving these troubling questions.⁸⁰

Chapter 5 explores the triangular intersection among the Hollywood blacklists of the McCarthy era, the House Un-American Activities Com-

mittee, and the First Amendment right of nonassociation. It concludes that whatever one thinks of the political or moral justifications for the blacklists, to the extent they were privately created and operated, they represented a constitutionally protected exercise of the First Amendment right of nonassociation. There were many anticommunists who had legitimate reasons for their hatred of communism, and their decision to disassociate themselves from any theatrical activity in which Communist Party members or sympathizers were involved was a legitimate exercise of their nonassociational rights. I then consider the implications of this conclusion for the modern structure of the right of nonassociation. In doing so, I shape an entirely new model of the nonassociational right that is grounded in constitutional principles far different from those relied on by the modern-day Supreme Court.⁸¹ The new model seeks to rationalize the constitutional right of nonassociation, not exclusively as an auxiliary means of fostering the constitutional right of association, but rather as a logical implication of the widely recognized First Amendment right not to speak. When revised in this manner, the nonassociational right's underlying theory gives rise to a categorization process that separates out noncognitively based discrimination (which is *not* protected by the First Amendment) from shunning that grows exclusively out of the offensiveness of the shunned individual's cognitive positions and views, which should be found to come under the First Amendment's protective umbrella.

In Chapter 6, I turn to the impact of the McCarthy era's repression on the field of public education. There I suggest that the First Amendment should be deemed relevant to governmental control of curricular and extracurricular activities in the public schools, because the values inculcation that is inevitably brought about in young, impressionable minds threatens the values of free thought that provide the foundation for—indeed, the *sine qua non* of—the First Amendment right of free expression.⁸² To a certain extent, as a practical matter, government will inevitably possess authority to inculcate values, if only indirectly through its choices of textbooks and its shaping of the substance of each course. However, anything beyond what is minimally inherent in the shaping of the content of the curriculum should be deemed beyond governmental control. Thus, no agent of government (school board, principal, or teacher) should constitutionally be authorized to inculcate values directly through the conduct of assemblies or extracurricular activities or through the teaching of courses whose entire purpose is to convey a particular set of values. But because communities may choose to shape the content of particular courses virtually any way they wish free from constraint by the First Amendment right of free expression, it should not have been

deemed unconstitutional for state or local governments to refuse to hire or retain teachers who were not likely to teach the subjects in the prescribed manner. Thus, school systems could constitutionally refuse to hire communists to teach social studies when the community had chosen to portray American capitalism in a positive light. However, to refuse to hire communists to teach math or physics would amount to nothing more than the governmental punishment of teachers for their sociopolitical and economic views—a clearly unconstitutional result.⁸³

Although I hope in these pages to present a fusion of historical and constitutional analysis that has never before been attempted, it is important to emphasize what this book is not. First, I should make clear that I make no claim to being a historian. I purport to introduce no new historical data to the debate over the McCarthy era. Over the period of the last ten years or so, historians—particularly Haynes and Klehr—have done an excellent job of unearthing and analyzing valuable new information about that period of American history. Thus, although portions of this book deal directly with the history of the period, those discussions should be viewed as primarily an attempt to provide a historical foundation for the insights of constitutional theory that are to follow.

This does not mean that my analysis is intended to have no impact on the historical debate. Despite the book's primary concern with the constitutional implications of the McCarthy era, it is also intended to influence the historical assessment of that period. I hope and expect that adding the perspective of free speech theory to the historical analysis will dramatically alter the moral, political, and constitutional perceptions of that turbulent time in American history. But as my descriptions of subsequent chapters clearly demonstrate, this book is about considerably more than how one should perceive the constitutional and political implications of the McCarthy era. It is also about how the First Amendment should be shaped in modern times. Each of the analyses of a particular aspect of the First Amendment's relevance to the McCarthy era is simultaneously intended to provide new (and often controversial) insights into how the First Amendment should be shaped today. It is the intersection of historical analysis and constitutional theory in this manner that I hope will be this book's lasting contribution.