Vanderbilt Law Review

Volume 47
Issue 4 *Issue 4 - May 1994*

Article 9

5-1994

R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine

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RECENT DEVELOPMENTS

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I. INTRODUCTION

Communication contributes to the marketplace of ideas,[1] which is the only way to promote the discovery of

1. Justice Holmes introduced the "marketplace of ideas" notion in his famous dissent in *Abrams v. United States*, 250 U.S. 616 (1919). His premise, which has become a major justification for free speech, stated:

> [W]hen 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. That at any rate is the theory of our Constitution.

truth in society.[2] The importance of communication has led the United States Supreme Court to herald freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom."[3] Indeed, the Court protects few other constitutional rights with such fervor. First Amendment protection is not absolute,[4] however, and the United States Supreme Court consistently has asserted that certain forms or classes of expression may be regulated without violating the Constitution. Generally speaking, the Court has carved exceptions to First Amendment protection when the expression makes no contribution to the marketplace of ideas.[5] One such class of unprotected speech is fighting words.[6] Unfortunately, the Court has experienced great difficulty distinguishing fighting words from merely offensive ideas that clearly are entitled to the highest level of First Amendment protection.

Id. at 630 (Holmes, J., dissenting). See also David F. McGowan and Ragesh K. Tangri, *A Libertarian Critique of University Restrictions of Offensive Speech*, 79 Cal. L. Rev. 825, 834 (1991) (discussing the marketplace of ideas theory). The Court's reliance on the marketplace concept appears in numerous opinions. See, for example, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (stating that "there is no such thing as a false idea"); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (holding that a classroom is a marketplace of ideas); *Hustler Magazine v. Falwell*, 485 U.S. 46, 50-51 (1988) (stating that the free flow of ideas in the marketplace is fundamentally important); *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (asserting that a national commitment exists to the "uninhibited, robust, and wide-open" debate of significant issues); *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) (stating that the government must adopt a neutral position in the marketplace of ideas).

2. Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 Rutgers L. Rev. 287, 289 (1990); Kent Greenawalt, *Speech and Crime*, 1980 Am. Bar Found. Res. J. 647, 671. Professor Greenawalt discusses numerous other justifications for free speech, labeling them as "consequentialist" and "non-consequentialist." He first describes various consequentialist reasons—those justifications that concern the effects of free speech. For example, free speech helps society discover truths, accommodate competing individual interests, expose and deter abuses of authority, promote autenomy, and teach tolerance for differences. Greenawalt, 42 Rutgers L. Rev. at 289; Greenawalt, 1980 Am. Bar Found. Res. J. at 671-72. Non-consequentialist reasoning does not examine the effects of a practice; instead, it considers the denial of a liberty as a wrong. The restriction of speech is an injustice that denies citizens their autonomy and dignity. Greenawalt, 42 Rutgers L. Rev. at 289; Greenawalt, 1980 Am. Bar Found. Res. J. at 673-75.

3. *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

4. See, for example, *Konigsberg v. State Bar of Calif.*, 366 U.S. 36, 49 (1961) (rejecting the idea that First and Fourteenth Amendment protection of free speech and association is absolute); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (stating that freedom of speech is not absolute).

5. For example, maliciously false information generally is not protected because the expression does not lead to the discovery of truth. See *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). For other exceptions, see *Roth v. United States*, 354 U.S. 476 (1957) (allowing regulation of obscenity); *New York v. Ferber*, 458 U.S. 747 (1982) (permitting regulation of child pornography); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (allowing regulation of nude dancing).

6. The Court first introduced the fighting words doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), defining the speech as words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Id. at 572.

The Supreme Court first articulated the fighting words exception in *Chaplinsky v. New Hampshire*[7] but to date has not upheld another law based on the doctrine. Moreover, the exception has caused much debate in recent years because of the increased public focus on hate speech and other bias-motivated concerns. Studies reflect an escalation of hate-motivated violence in society.[8] In response to the increased turmoil, educational institutions and legislatures have passed numerous hate speech codes criminalizing bias-motivated activities.[9] Many of these laws are based on the fighting words exception,[10] even though the fighting words doctrine

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7. 315 U.S. 568 (1942).

8. In the United States, the frequency of hate crimes increased approximately 24.4% from 1991 to 1992. Andrea L. Crowley, Note, R.A.V. v. City of St. Paul: *How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. Rev. 771, 771 (1993) (citing *Leading Law Firm Releases First National Law Enforcement Survey for 1992 Revealing Significant Increases in Hate Crimes*, P.R. Newswire Ass'n (Jan. 14, 1993) (available in LEXIS, NEWS Library, PRNEWS file)). According to the National Institute Against Prejudice and Violence, approximately 250 colleges experienced incidents of racism between 1986 and 1989. Connie Leslie, *Lessons from Bigotry 101*, Newsweek 48, 49 (Sept. 25. 1989). See also *State v. Mitchell*, 485 N.W.2d 807, 810 (Wis. 1992), rev'd, 113 S. Ct. 2194 (1993) (documenting the increase in bias-motivated crime over the last century); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 Duke L. J. 431, 431-44 (describing various incidents of racial violence on college campuses); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 Mich. L. Rev. 2320, 2326-33 (1989) (outlining numerous incidents of racially biased hate speech). One commentater recently asserted that the United States may be "no closer today in our efforts to quell the tide of racism and inequality than we were nearly twenty-five years ago when the Reverend Martin Luther King, Jr. dreamt so fervently of a nation free for all humanity." Victoria L. Handler, *Legislating Social Tolerance: Hate Crimes and the First Amendment*, 13 Hamline J. Pub. L. & Pol. 137, 137 (1992).

9. See, for example, Cal. Penal Code § 422.6 (West 1988); Conn. Gen. Stat. Ann. § 46a-58 (West 1986); Mass. Gen. Laws Ann. ch. 265, § 37 (West 1993); W. Va. Code § 61-6-21 (1988). Congress addressed the problem of bias-motivated crime by enacting the Hate Crimes Statistics Act of 1990, 28 U.S.C. § 534 (Supp. 1992) to create a national data collection system te study and document these crimes but has not enacted any direct restrictions of hate speech. For praises of hate speech regulations, see generally Lawrence, 1990 Duke L. J. 431; Matsuda, 87 Mich. L. Rev. 2320; Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev. 133 (1982). For arguments against hate speech censorship, see generally Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 Duke L. J. 484; Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford U., 1986); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. Ill. L. Rev. 95.

10. For example, Stanford University adopted a hate speech regulation in June, 1990 based on the fighting words exception. The applicable section of the regulation reads:

> Fundamental Standard Interpretation: Free Expression and Discriminatory Harassment
>
> . . .
>
> 4. Speech or other expression constitutes harassment by personal vilification if it:
>
> a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
>
> b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and

has confused courts and led to inconsistent judicial opinions. Moreover, the Court's recent attempt to clarify the exception in *R.A.V. v. City of St. Paul*[11] only further muddled the unsettled construct.

R.A.V., a Minnesota teenager, was charged with disorderly conduct after allegedly burning a cross in an African-American family's yard.[12] He challenged the constitutionality of the relevant St. Paul ordinance, claiming that the law was impermissibly content-based and overbroad.[13] The Supreme Court unanimously ruled the ordinance unconstitutional, yet the majority and concurring Justices' opinions contrast dramatically and contain inconsistent, infeasible approaches to the fighting words exception. If read narrowly, however, Justice White's concurrence implies a version of the doctrine that, if refined, creates a logical, coherent exception to expression protected by the First Amendment.

This Recent Development examines the history of the fighting words concept and explores the possible effects of the *R.A.V.* decision on the doctrine. Part II discusses the Court's narrowing of the exception and the confusing, inconsistent standards that have developed under the guise of fighting words. Part III outlines the Justices' opinions in *R.A.V.* Part IV examines the two opposing fighting words constructs in *R.A.V.* and the possible implications of the Justices' opinions. Considering the concerns raised by both doctrinal definitions, Parts IV and V recommend a version of the fighting words exception implicit in Justice White's concurrence that arguably could resolve the long-standing confusion surrounding the ambiguous doctrine.

> c) makes use of insulting or "fighting" words or non-verbal symbols.
>
> In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Lawrence, 1990 Duke L. J. at 450-51 (cited in note 8). For a favorable discussion of the Stanford regulation see id. at 431. But see Strossen, 1990 Duke L. J. at 507-14 (criticizing the use of the fighting words doctrine in hate speech regulations).

11. 112 S. Ct. 2538 (1992).

12. Id. at 2541. R.A.V. was charged with violating St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Legis. Code § 292.02 (1990). For the language of the ordinance, see note 86.

13. *R.A.V.*, 112 S. Ct. at 2541.

II. LEGAL BACKGROUND

A. *The Origin of the Doctrine:* Chaplinsky v. New Hampshire

The Supreme Court first formulated the fighting words doctrine in *Chaplinsky v. New Hampshire.*[14] Chaplinsky, a Jehovah's Witness, made several statements denouncing organized religion while distributing religious literature on a public street.[15] A police officer led Chaplinsky toward the city police station to protect him from nearby listeners who reacted violently to the derogatory comments. En route to the station, Chaplinsky met a city marshall who previously had cautioned him about the restless crowd.[16] Chaplinsky called the officer several degrading names and denounced all city government officials as fascists.[17] In response to Chaplinsky's statements to the officer, the state charged Chaplinsky under a New Hampshire statute that prohibited the use of offensive, insulting language toward persons in public places.[18] The United States Supreme Court upheld the statute as constitutional, basing its decision on the state court's narrow construction of the offensive speech statute.[19] According to the New Hampshire court, the statute forbade only those words having a direct tendency to cause violent reactions by persons to whom the speech was addressed.[20] Therefore, the Court measured the likelihood of a violent reaction objectively and considered what language would be likely to cause an average person to fight.[21]

The Court intended its opinion in *Chaplinsky* to be narrow.[22] The Court's dicta, however, created the fighting words doctrine:

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14. 315 U.S. 568 (1942).

15. Chaplinsky allegedly called organized religion a "racket." Id. at 570.

16. Id.

17. Chaplinsky called the officer a "God damned racketeer" and "a damned Fascist," further stating that "the whole government of Rochester are Fascists or agents of Fascists." Id. at 569.

18. The entire statute, Chapter 378, § 2 of the Public Laws of New Hampshire, as set forth in *Chaplinsky*, provided that "[n]o person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation." Id. at 569.

19. Id. at 573.

20. Id.

21. Id.

22. See Tinsley E. Yarbrough, *The Burger Court and Freedom of Expression,* 33 Wash. & Lee L. Rev. 37, 53 (1976) (quoting Justice Jackson's statement in regard te *Chaplinsky* that "[t]he Constitution does not include a right to brawl and that's about all that seems to be involved"). Justice Black stated that he joined the *Chaplinsky* opinion only because it was a case in which

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[23]

This vague passage has created much confusion and uncertainty about the substantive content and rationale behind the fighting words doctrine.[24] Commentators have construed two possible definitions for fighting words from the Court's dicta: (1) words "which by their very utterance inflict injury,"[25] and (2) speech that "tend[s] to incite an immediate breach of the peace."[26] The Supreme Court has not upheld any speech restrictions under the injury prong of the fighting words construct; the Court also has not clarified the type of injury required by the doctrine.[27] Instead, its subsequent decisions have

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speech was merely a part of regulable conduct. Id. See also Stephen W. Gard, *Fighting Words as Free Speech*, 58 Wash. U. L. Q. 531, 534 (1980) (asserting that the expansive *Chaplinsky* dicta was not intended to have any doctrinal significance).

23. *Chaplinsky*, 315 U.S. at 571-72 (citations omitted).

24. Compare, for example, Thomas F. Shea, *"Don't Bother to Smile When You Call Me That"—Fighting Words and the First Amendment*, 63 Ky. L. J. 1, 9 (1975) (stating that fighting words are not protected because they are a "medium of something approaching a physical assault"), and Ernest A. Young, Recent Development, *Regulation of Racist Speech:* In Re Welfare of R.A.V., *464 N.W.2d 507 (Minn. 1991)*, 14 Harv. J. L. & Pub. Pol. 903, 910-11 (1991) (quoting Laurence Tribe, *American Constitutional Law* § 12-8 at 837 (Foundation, 2d ed. 1988)) (concluding that no constitutional right exists to use words as "projectiles" because the "blow" usually preempts any further exchange of ideas), with Fran-Linda Kobel, Comment, *The Fighting Words Doctrine—Is There a Clear and Present Danger to the Standard?*, 84 Dickinson L. Rev. 75, 80 n.32 (1979) (arguing that Shea's distinction is "mere fiction" and that *Chaplinsky* classified particular speech as nonspeech). See also Gard, 58 Wash. U. L. Q. at 534 (cited in note 22) (discussing other possible rationales for censoring fighting words).

25. *Chaplinsky*, 315 U.S. at 572.

26. Id. Furthermore, the *Chaplinsky* Court's focus on "the social interest in order and morality" reflects a governmental interest in promoting civility. Note, *The Demise of the* Chaplinsky *Fighting Words Doctrine: An Argument for Its Interment*, 106 Harv. L. Rev. 1129, 1131 (1993). See also Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 Notre Dame L. Rev. 629, 632 (1985); Hadley Arkes, *The Philosopher in the City: The Moral Dimensions of Urban Politics* 56-91 (Princeten U., 1981). Because the *Chaplinsky* Court was motivated by this interest, one commentator suggests that the Court understood the "breach of the peace" prong in terms of expression tending te disrupt general tranquility, not as a narrow exception for words likely to cause retaliatory violence. See Note, 106 Harv. L. Rev. at 1131.

27. Handler, 13 Hamline J. Pub. L. & Pol. at 147 (cited in note 8). Consequently, many commentators believe that the injury prong has been de facte overruled. See, for example, Strossen, 1990 Duke L. J. at 509 (cited in note 9); Note, 106 Harv. L. Rev. at 1137-40. But see Mark C. Rutzick, *Offensive Language and the Evolution of First Amendment Protection*, 9 Harv. C.R.-C.L. L. Rev. 1, 6-7 (1974) (proposing that the injury prong addresses the harm inflicted on the emotions and sensibilities of listeners).

focused narrowly on a statement's perceived propensity to cause a violent reaction by an individual addressed by the speech.[28] Nevertheless, the Court has not rejected the injury prong explicitly, leaving the justification viable for use in future judicial decisions.[29]

B. Narrowing the Doctrine's Scope and Increasing Its Confusion

Seven years after establishing the fighting words exception, the Court reaffirmed the doctrine's existence in *Terminiello v. Chicago*.[30] The Court, however, immediately began narrowing and reshaping the broad scope of the *Chaplinsky* dicta. Terminiello was charged with breaching the peace after he publicly insulted a group of adversaries.[31] The Court did not address whether Terminiello's actual statements were fighting words.[32] Instead, the Court found that the applicable breach-of-the-peace statute was overbroad[33] because the law permitted convictions for both fighting words and constitutionally protected expression.[34] Speech that merely causes anger or outrage is not considered fighting words. In fact, creating disputes is a valuable function of free speech; expression serves its purpose best in the marketplace of ideas when it creates unrest or anger in individuals.[35]

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28. See generally Part II.B.

29. Various Justices and scholars have advocated using the injury prong of the fighting words doctrine. See, for example, Tribe, *American Constitutional Law* § 12-10 at 856 (cited in note 24) (asserting that the Constitution may allow punishment for speech that hurts by being uttered and heard); *Rosenfeld v. New Jersey*, 408 U.S. 901, 906 (1972) (Powell, J., dissenting) (stating that "a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as te be the proper subject of criminal proscription").

30. 337 U.S. 1 (1949).

31. When making a vicious speech denouncing Jewish and African-American persons, Terminiello referred te a mob of protestors as "slimy scum," "snakes," and "atheistic communistic Jew[s]." Id. at 17-21 (Jackson, J., dissenting).

32. Perhaps *Terminiello* represents the Court's early attempt te avoid applying the fighting words doctrine and te lessen any restrictions on political speech. Handler, 13 Hamline J. Pub. L. & Pol. at 148 (cited in note 8).

33. The overbreadth doctrine is a major principle in First Amendment jurisprudence. It posits that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *Zwickler v. Koota*, 389 U.S. 241, 250 (1967) (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964)). A statute is overbroad if (1) the speech affected by the law substantially involves expression that is protected by the First Amendment, *Grayned v. Rockford*, 408 U.S. 104, 115 (1972), and (2) the overbreadth is "real [and] substantial . . . judged in relation te the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

34. *Terminiello*, 337 U.S. at 5. The trial court defined the statute to encompass speech that "stirs the public to anger, invites dispute, brings about a cendition of unrest, or creates a disturbance. . . ." Id. at 4.

35. The Court's assertion, repeatedly noted as a justification for free speech, stated that "a function of free speech under our system of government is to invite dispute. It may indeed best

Therefore, the Court found that speech is protected unless the expression is likely to produce a clear and present danger of a serious, intolerable evil that rises above mere inconvenience or annoyance.[36] By requiring more than anger or unrest, the Court emphasized that it would not assume that certain words inevitably provoke violent reactions by individuals. Instead, the Court considered the likelihood of an uncontrollable reaction to be a factual inquiry that relies on the circumstances surrounding the use of the language.[37] The analysis scrutinized the context in which the words were used, not just the content of the words themselves.

Twenty years after *Terminiello*, the Court reaffirmed the viability of the fighting words doctrine in *Street v. New York*.[38] Street was convicted of a malicious misdemeanor after burning an American flag to protest the shooting of civil rights leader James Meredith.[39] During the burning, Street made a defiant comment about the flag.[40] The Supreme Court reversed Street's conviction because his words, a possible factor in his conviction, were protected by the First Amendment.[41] Street's statement did not constitute fighting words because it was not directed to incite a violent response by any individual.[42] Moreover, the Court re-emphasized that the mere offensiveness of words does not strip speech of constitutional protection.[43] Fighting words must present an actual immediacy of violent confrontation, not just offensive content.

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serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." Id. This emphasis on the free exchange of ideas clearly reflects the Holmesian marketplace of ideas notion. See note 1.

36. *Terminiello*, 337 U.S. at 4.

37. Gard, 58 Wash. U. L. Q. at 551 (cited in note 22). This approach contradicts the *Chaplinsky* notion that offensiveness of speech equals a violent reaction. See Tribe, *American Constitutional Law* § 12-10 at 850 (cited in note 24) (asserting that *Chaplinsky* focused primarily on the content of speech, not the context); Kobel, Comment, 84 Dickinson L. Rev. at 79-80 (cited in note 24) (stating that *Chaplinsky* stressed the content of fighting words over the likelihood of a violent reaction).

38. 394 U.S. 576 (1969).

39. Id. at 578-79. The statute under which Street was convicted, New York Penal Law § 1425, made it a misdemeanor to "publicly mutilate, deface, defile, or defy, trample upon, or cast contempt upon either by words or act [any flag of the United States]." Id. at 577-78.

40. Street asserted, "We don't need no damn flag." Id. at 579.

41. Id. at 589-91.

42. Id. at 592. Moreover, in a recent flag-burning case, *Texas v. Johnson*, 491 U.S. 397 (1989), the Court held that burning an American flag was not fighting words under the circumstances of the case because the act neither directly insulted an individual nor invited a fight. Id. at 409.

43. *Street*, 394 U.S. at 592 (stating, "[S]uch a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. . . . It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). This statement demonstrates the Court's refinement of the *Chaplinsky* injury prong: offending or shocking an individual is not a sufficient

Although *Terminiello* and *Street* held that offensive, disturbing speech warrants protection, the Court expanded its constitutional tolerance of this expression in *Cohen v. California*.[44] Cohen was arrested and convicted for disturbing the peace after wearing a jacket that bore the words "Fuck the Draft" in a county courthouse corridor.[45] The Supreme Court, concluding that Cohen's expression did not constitute fighting words, continued to revise the *Chaplinsky* fighting words model radically.[46] Even though Cohen's jacket displayed terminology often used in a "personally provocative manner,"[47] Cohen's statement was not a direct insult toward any individual in the courthouse and consequently could not be regulated as fighting words.[48] In fact, the Court effectively limited the fighting words exception to face-to-face personal insults[49] by requiring a speaker to arouse an actual

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injury to deny constitutional protection to speech. See also *Johnson*, 491 U.S. at 414 (stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable").

44. 403 U.S. 15 (1971).

45. Id. at 16. Cohen was convicted under the portion of California Penal Code § 415 that stated:

> Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct, or threatening, traducing, quarreling, challenging to fight, or fighting, or who, on the public streets of any unincorporated town . . . use[s] any vulgar, profane, or indecent language within the presence or hearing of women or children, in a loud and boisterous manner, is guilty of a misdemeanor.

Id. at 16 n.1

46. Tribe, *American Constitutional Law* § 12-10 at 851-52 (cited in note 24). The *Cohen* opinion seemingly reflected the Court's continually changing views of the First Amendment. See Richard D. Bernstein, Note, *First Amendment Limits on Tort Liability for Words Intended to Inflict Emotional Distress*, 85 Colum. L. Rev. 1749, 1757 (1985) (stating that nothing since the origin of the fighting words doctrine has made profanity or insults more related to the exposition of ideas; tolerance for these forms of speech is caused by the Court's changed perception of the First Amendment).

47. *Cohen*, 403 U.S. at 20.

48. The prosecution introduced no evidence at Cohen's trial that anyone who saw Cohen's jacket in the courthouse was violently aroused or that Cohen intended to create such a violent result. Id.

49. Mark A. Rabinowitz, *Nazis in Skokie: Fighting Words or Heckler's Veto?*, 28 DePaul L. Rev. 259, 266 (1979). Many commentators have asserted that by focusing on the context of words, the Court has shifted the fighting words standard away from the *Chaplinsky* objective criteria of "what would be words likely to cause an average addressee to fight." These scholars believe that the modern fighting words doctrine embodies a subjective standard requiring a clear and present danger of a violent reaction by the actual addressee of the offensive speech. See Tribe, *American Constitutional Law* § 12-8 at 838 (cited in note 24); Kobel, Comment, 84 Dickinson L. Rev. at 88 (cited in note 24); Rabinowitz, 28 DePaul L. Rev. at 266. But see Gard, 58 Wash. U. L. Q. at 554-56 (cited in note 22) (arguing that the Court has not abandoned the *Chaplinsky* objective "average addressee" standard); Michael J. Mannheimer, Noto, *The Fighting Worde Doctrine*, 93 Colum. L. Rev. 1527, 1544 (1993) (proposing that the Court has developed a two-part test—an objective

violent reaction or intend to provoke such a reaction by the offended addressee.[50]

The Court continued to adhere to a narrow, context-based fighting words doctrine in *Gooding v. Wilson*.[51] Wilson was convicted under an abusive language statute[52] after he threatened and insulted two police officers.[53] The Court declared the Georgia statute unconstitutionally overbroad because the law condemned both protected and unprotected speech.[54] Looking at the dictionary definitions of the statute's terminology, the Court held that the statute's adjectives "opprobrious" and "abusive" reached beyond the scope of fighting words.[55] In reaching its conclusion, the majority reaffirmed the *Cohen* notion that words may not be banned merely because of their offensive or vulgar nature.[56] The *Gooding* Court also utilized the *Cohen* actual addressee standard to determine whether speech would incite

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prong measuring violence-creating potential and a subjective prong evaluating the actual likelihood that violence will result).

50. See Philip Weinberg, R.A.V. *and* Mitchell*: Making Hate Crime a Trivial Pursuit*, 25 Conn. L. Rev. 299, 310-11 (1993). The Court's focus on context, although contrary to *Chaplinsky*, has been used by the Court in later fighting words cases. See, for example, *Hess v. Indiana*, 414 U.S. 105, 107 (1973); *Houston v. Hill*, 482 U.S. 451, 462 (1987). See also notes 51-66 and accompanying text.

After determining that Cohen's slogan could not be regulated as fighting words, the Court considered whether the state, as a guardian of public morality, could punish Cohen's speech. *Cohen*, 403 U.S. at 22-23. The Court rejected this argument, asserting a broader view of expressive freedom than established by *Chaplinsky*. Justice Harlan, writing for the *Cohen* majority, stated that the government could protect citizens by prohibiting discourse only when substantial privacy interests are invaded in an intolerable manner. Id. at 21. Concluding that communication serves both cognitive and emotive functions, the Court explicitly recognized that the First Amendment safeguards the emotive elements of speech. Moreover, the emotive force often is the more important element of the communicated message. Id. at 26.

The Court emphasized two additional reasons te protect offensive speech. First, it is difficult te distinguish offensive words from other language because "one man's vulgarity is another's lyric." Id. at 25. Second, censorship of particular words may lead to the unconstitutional suppression of ideas. Id. at 26. Nonetheless, the fighting words doctrine remained intact after *Cohen*, although in a narrower form than previously established by the *Chaplinsky* dicta.

51. 405 U.S. 518 (1972).

52. Georgia Code Ann. § 26-6303 provided: "Any person who shall, without provocation, use te or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor." Id. at 518-19.

53. Wilson, a Vietnam War protester, threatened one officer, screaming, "White son of a bitch, I'll kill you" and "You son of a bitch, I'll choke you to death." Wilson also threatened another police officer, "You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces." Id. at 520 n.3.

54. Id. at 528.

55. Id. at 525. Webster's Dictionary defined "opprobrious" as "conveying or intended to convey disgrace" and defined "abusive" as including "harsh insulting language." Id.

56. As previously discussed, this approach contradicted the *Chaplinsky* notion that equated offensive and abusive speech with expression that incites violence. See note 37. See also McGowan and Tangri, 79 Cal. L. Rev. at 849 (cited in note 1); Weinberg, 25 Conn. L. Rev. at 311 (cited in note 50).

violence. The Court appeared to narrow the standard further,[57] however, by requiring proof that the specific individual addressed would be likely to react in an immediate, violent manner.[58] The majority found the law unconstitutional because the statute allowed a speaker of abusive statements to be convicted, even though the addressee could not respond immediately because of surrounding circumstances.[59] This extremely narrow approach toward fighting words led the dissent to assert that the Court merely was paying lip service to *Chaplinsky*.[60]

The Court's decisions after *Gooding* also emphasized the context in which abusive language is used and inquired whether the statement would incite violence in the actual addressee of the speech. For example, the Court simultaneously considered three fighting words cases only three months after *Gooding*[61] and remanded each of these cases to the appropriate state courts in light of the *Gooding* decision. *Lewis v. City of New Orleans*,[62] one case in this trilogy, later returned to the Supreme Court on appeal.[63] On prior remand, the Louisiana Supreme Court upheld a statute that banned the use of obscene language toward any city police officer serving in the line of duty.[64] Even though the Louisiana court maintained that the law prohibited only fighting words, the Supreme Court rejected the state court's narrow construction and struck down the law as facially overbroad.[65] The Court concluded that the offensive, opprobrious insults regulated under the statute may provoke only anger in an officer, not a violent reaction, and therefore warranted constitutional protection.[66]

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57. Weinberg, 25 Conn. L. Rev. at 311 (cited in note 50).
58. *Gooding*, 405 U.S. at 528.
59. Id. at 526.
60. Id. at 537 (Blackmun, J., dissenting).
61. *Rosenfeld v. New Jersey*, 408 U.S. 901 (1972); *Brown v. Oklahoma*, 408 U.S. 914 (1972); *Lewis v. New Orleans*, 408 U.S. 913 (1972).
62. 408 U.S. 913 (1972).
63. 415 U.S. 130 (1974).
64. The statute's language made it unlawful "wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." Id. at 132.
65. When her son was being arrested, Ms. Lewis called the arresting officers "god damn m[other] f[ucking] police." Id. at 131 n.1.
66. Id. at 133-34. Justice Powell suggested that offensive language uttered to an arresting officer may never be considered fighting words because of the circumstances surrounding arrest and the position of a police officer. Id. at 135-36 (Powell, J., concurring). At least one lower court has agreed that abusive language spoken to officers should not be labeled fighting words because an immediate violent reaction is unlikely to result. See *Garvey v. State*, 537 S.W.2d 709, 711 (Tenn. Crim. App. 1975).

As discussed in this subpart, judicial precedent prior to *R.A.V.* clearly demonstrates that the Court diluted the fighting words doctrine exception after *Chaplinsky*. The Court seems to have eliminated the *Chaplinsky* injury prong, relying exclusively on the likelihood that expression would prompt a violent reaction.[67] Moreover, the Court focused on the context in which the fighting words were used, not the content of the speech. Mere offensiveness of expression does not strip speech of First Amendment protection. Instead, the later cases considered whether the words were used as a direct personal insult likely to cause a violent reaction in the actual addressee.[68]

C. Doctrinal Flaws in the Fighting Words Exception

Because the Supreme Court developed such a narrow fighting words exception prior to *R.A.V.*, many scholars speculated that the doctrine had no strength in First Amendment jurisprudence.[69]

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67. Note that in *R.A.V.*, the concurring Justices found the St. Paul ordinance unconstitutional based on overbreadth grounds because the ordinance prohibited expression that caused hurt feelings or resentment. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2560 (1992) (White, J., concurring). This holding further reflects the Court's willingness te eliminate the injury prong. Note, 106 Harv. L. Rev. at 1129-30 (cited in note 26).

68. Weinberg, 25 Conn. L. Rev. at 312 (cited in note 50); Note, 106 Harv. L. Rev. at 311-12 (cited in note 26) (stating that *Cohen* rejected the *Chaplinsky* notion that states may punish expression that merely disturbs public tranquility). But see Greenawalt, 42 Rutgers L. Rev. at 298 (cited in note 2) (stating that neither statutery nor constitutional standards should require a particular addressee te act violently).

Even though the Supreme Court appeared to support a subjective fighting words standard that focused on the context of the speech, state courts adopted varying interpretations of the fighting words construct before *R.A.V.* Compare, for example, *People v. Dietze*, 75 N.Y.2d 47, 549 N.E.2d 1166, 1168 (1989), and *Estes v. State*, 660 S.W.2d 873, 875 (Tx. Ct. App. 1983) (adopting a *Chaplinsky*-type standard observing the content of the questionable speech), with *State v. Fratzke*, 446 N.W.2d 781, 785 (Iowa 1989), and *City of Maryville v. Costin*, 805 S.W.2d 331, 332 (Mo. Ct. App. 1991) (observing the context of the questionable speech).

69. See, for example, Shea, 63 Ky. L. J. at 1-2 (cited in note 24) (asserting that the Supreme Court gradually has concluded that fighting words are a protected form of speech); Gard, 58 Wash. U. L. Q. at 536 (cited in note 22) (proposing that the fighting words doctrine is no more than a "quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"); *Gooding*, 405 U.S. at 537 (Blackmun, J., dissenting) (stating that the Court is "merely paying lip service to *Chaplinsky*"). See also Strossen, 1990 Duke L. J. at 510-11 n.130 (cited in note 9). Strossen quotes a letter from Professor Gerald Gunther to Professor George Parker, Chair of the Student Conduct Legislative Council at Stanford University (May 1, 1989), which stated:

> [T]here has been only *one* case in the histery of the Supreme Court in which a majority of the Justices has ever found a statement to be a punishable resort to "fighting words." . . . More important, in the nearly half-century since *Chaplinsky*, there have been repeated appeals to the Court to recognize the applicability of the "fighting words" exception. . . . [I]n every one of the subsequent attempted reliances on that exception, the Supreme Court has refused to affirm the challenged convictions. In short, one must wonder about the strength of an exception which, while theoretically recognized, has ever since 1942 not been found apt in practice.

Moreover, some commentators advocate abandoning the fighting words notion.[70] Their writings emphasize numerous flaws in the exception. First, individuals criticize the doctrine's focus on the likelihood of violent reactions by an addressee. The commentators acknowledge that degrading epithets arouse anger and annoyance in addressees; however, they contend that the statements are not likely to provoke an uncontrollable, reflexive violent reaction as required by the doctrine.[71] The frequency of derogatory comments has promoted the belief that a reasonable addressee should tolerate them as ordinary jostling, not as language justifying a violent reaction.[72] Furthermore, fighting words may cause certain persons to withdraw, not fight, because individuals subject to verbal abuse often internalize their harm rather than escalate to conflict.[73]

Second, some commentators maintain that the fighting words construct is gender-biased because it recognizes and validates stereotypically male responses to abusive speech.[74] As previously discussed, the Court has shifted to an actual addressee standard, inquiring whether the speech in dispute would be likely to incite an immediate violent reaction by the actual addressee of the speech.[75] The standard seems absurd, however, if one considers that a person insulting a strong man with violent tendencies could be punished, yet a woman or trained police officer could be insulted freely because they probably would not react violently to a derogatory comment.[76] Moreover, the fighting words doctrine problematically assumes that violence is an appropriate, sensible reaction to abusive speech in some circum-

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Id. (emphasis in original).

70. See, for example, Gard, 58 Wash. U. L. Q. at 581 (cited in note 22); Note, 106 Harv. L. Rev. at 1140-46 (cited in note 26) (outlining various reasons te eliminate the doctrine).

71. See, for example, Gard, 58 Wash. U. L. Q. at 573 (cited in note 22). See also Greenawalt, 42 Rutgers L. Rev. at 299 (cited in note 2) (proposing that the hurt in particular instances may not be correlated with the willingness to fight).

72. Sean M. SeLegue, *Campus Anti-Slur Regulations: Speakers, Victims, and the First Amendment*, 79 Cal. L. Rev. 919, 933-34 (1991); Matsuda, 87 Mich. L. Rev. at 2355 (cited in note 8).

73. Matsuda, 87 Mich. L. Rev. at 2355-56 (cited in note 8); Toni M. Massaro, *Equality and Freedom of Expression: The Hate Speech Dilemma*, 32 Wm. & Mary L. Rev. 211, 233 (1991).

74. These critics emphasize that the focus on retaliation is based on a male psychological phenomenon that has no application to a more "feminine" or physically weaker individual. See SeLegue, 79 Cal. L. Rev. at 932 (cited in note 72); Matsuda, 87 Mich. L. Rev. at 2355 (cited in note 8); Marianne Wesson, *Sex, Lies and Videotape: The Pornographer as Censor*, 66 Wash. L. Rev. 913, 934 (1991).

75. See notes 49-50, 57-66, and accompanying text.

76. Shea, 63 Ky. L. J. at 22 (cited in note 24). See also Greenawalt, 42 Rutgers L. Rev. at 297 (cited in note 2); Kathleen M. Sullivan, *The First Amendment Wars*, New Republic 35, 40 (Sept. 28, 1992).

stances.[77] Governments should not condone violent responses to ethnic slurs or insults, no matter how offensive the speech. The fighting words exception, in contrast, allows a socially undesirable response to dictate the legal standard, an approach inconsistent with other areas of law.[78]

Third, many scholars fear that the fighting words exception increases the risk that governmental officials may use the doctrine to censor unpopular groups or apply the exception in frivolous cases.[79] The vast majority of fighting words cases involve derogatory comments addresssed to police officers.[80] In these instances, officers may abuse fighting words regulations to suppress disrespectful comments or sincere allegations of misconduct.[81] Furthermore, courts have encountered great difficulty distinguishing fighting words from protected, offensive expression.[82] Some state courts improperly have classified abusive language as fighting words when individuals have voiced their opinions on political or social issues[83]— expression that clearly contributes to the marketplace of ideas and merits the highest level of constitutional protection.

As evidenced by the numerous criticisms and various approaches to the fighting words doctrine, courts and scholars repeatedly have disagreed about the the application and viability of the concept. The Supreme Court has diluted the *Chaplinsky* fighting words model drastically, yet the Court often has reasserted the opinion's broad dicta. After fifty years of inconsistent applications and murky standards, the fighting words doctrine needed judicial clarification. In the

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77. SeLegue, 79 Cal. L. Rev. at 932 (cited in note 72).

78. See Note, 106 Harv. L. Rev. at 1141 & n.84 (cited in note 26).

79. Id. at 1142. See also Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 474 (1985) (implying that standards such as the fighting words doctrine are unfavorable because they fail to curb the discretion of officials from imposing current majoritarian values).

80. Gard, 58 Wash. U. L. Q. at 565 (cited in note 22).

81. Id. at 566. Various Supreme Court opinions reflect the belief that officials may abuse their discretion to suppress expression. See, for example, *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (requiring laws restraining expression to provide "narrowly drawn, reasonable and definite standards for officials to follow"); *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 964 n.12 (1984) (stating that a statute that "plac[es] discretion in the hands of an official . . . creates a threat of censorship that by its very existence chills free speech").

82. For a general discussion of lower courts' application of the fighting words doctrine, see Kobel, Comment, 84 Dickinson L. Rev. at 90-95 (cited in note 24).

83. See Gard, 58 Wash. U. L. Q. at 565 (cited in note 22). Many commentators assert that lower courts have applied the doctrine improperly in many cases. See, for example, id.; Strossen, 1990 Duke L. J. at 512 (cited in note 9). Justice Douglas also expressed concern about the state courts' application of the doctrine. See *Karlan v. City of Cincinnati*, 416 U.S. 924, 928 (1974) (Douglas, J., dissenting) (stating that "[s]tate courts . . . have consistently shown either inability or unwillingness to apply its teaching"). Ironically, *Chaplinsky*, the Supreme Court decision establishing the fighting words doctrine, involved the expression of a purely political opinion.

midst of this doctrinal confusion, the United States Supreme Court granted certiorari to *R.A.V. v. City of St. Paul.*[84]

III. RECENT DEVELOPMENT: THE SUPREME COURT'S DECISION IN *R.A.V. V. CITY OF ST. PAUL*

On the night of June 21, 1990, R.A.V. and five other young men burned a cross in the fenced yard of an African-American family's home.[85] R.A.V. was charged with a misdemeanor under the St. Paul Bias-Motivated Crime Ordinance,[86] but the trial court dismissed the charge against R.A.V. It held that the ordinance was substantially overbroad and impermissibly content-based, violating the First Amendment on its face.[87] The Minnesota Supreme Court reversed the trial court's decision and upheld the law as constitutional.[88] It rejected R.A.V.'s overbreadth claim,[89] interpreting the statute to prohibit only fighting words[90] and conduct that is likely to incite imminent lawless action.[91] The court conceded that the ordinance should have been drafted more carefully; nevertheless, it reasoned that the law could be interpreted to ban only expressions of hatred that were unprotected by the First Amendment.[92]

The United States Supreme Court reversed the Minnesota Supreme Court and declared the ordinance violative of the First Amendment. Although all nine Justices agreed that the statute was unconstitutional, the foundations of the majority and concurring decisions were markedly different.

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84. 112 S. Ct. 2538 (1992).

85. Id. at 2541. Before the *R.A.V.* incident, the family were subjects of other forms of racial harassment. For example, the tires on the family's car were slashed, and their children were called various degrading names. Young, Recent Development, 14 Harv. J. L. & Pub. Pol. at 905 (cited in note 24).

86. *R.A.V.*, 112 S. Ct. at 2541. The ordinance provided: "Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited te, a burning cross or Nazi swastika, which one knows or has reasonable grounds te know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor." Id. (quoting St. Paul Bias-Motivated Crime Ordinance, St. Paul, Minn. Leg. Code § 292.02 (1990)).

87. *R.A.V.*, 112 S. Ct. at 2541.

88. *In the Matter of the Welfare of R.A.V.*, 464 N.W.2d 507, 511 (Minn. 1991).

89. Id. at 510.

90. Id. (reciting both prongs of the *Chaplinsky* fighting words definition). But see Weinberg, 25 Conn. L. Rev. at 301 (cited in note 50) (contending that the Minnesota Supreme Court's construction was "overly simplistic" and that the St. Paul ordinance "plainly encompasse[d] far more speech than the narrow, unprotected class of . . . fighting words").

91. *R.A.V.*, 464 N.W.2d at 510 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).

92. *R.A.V.*, 464 N.W.2d at 511.

A. The Majority Opinion

Justice Scalia delivered the majority opinion, writing for five of the nine Justices.[93] The majority accepted the state court's assertion that the ordinance banned only fighting words, defined as speech "that itself inflicts injury or tends to incite immediate violence."[94] Justice Scalia, however, construed the *Chaplinsky* fighting words doctrine differently than the Court's prior decisions. According to the majority opinion, fighting words are void of constitutional protection because the mode of the expression—the "nonspeech" element of communication—is unprotected, yet the content of fighting words is safeguarded under the First Amendment.[95] Justice Scalia analogized fighting words to a noisy sound truck; the government may regulate the use of the vehicle because the loudness of the truck's speaker annoys city residents, but it may not regulate the vehicle's use based on the message conveyed over the loudspeaker. In other words, the noisiness of the truck (a nonspeech element) does not invoke First Amendment protection, even though the message (a speech element) is constitutionally protected. Therefore, a state could prohibit a particular mode of communication—for example, loud sound trucks—provided that the time, place, or manner regulation is not aimed at the content of the expression conveyed by the mode.[96] Similarly, fighting words are not protected because the expression embodies a "particularly intolerable (and socially unnecessary) mode of expressing whatever idea the speaker wishes to convey,"[97] yet the message conveyed by fighting words may not be regulated but for the intolerable mode used to convey the idea.

Even though the majority accepted that the St. Paul ordinance regulated only fighting words, the Court declared the law facially invalid.[98] Unlike a constitutional time, place, or manner restriction,

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93. Chief Justice Rehnquist and Justices Kennedy, Thomas, and Souter joined Justice Scalia.

94. *R.A.V.*, 112 S. Ct. at 2541-42 (quoting *R.A.V.*, 464 N.W.2d at 510 (citing *Chaplinsky*, 315 U.S. at 572)).

95. *R.A.V.*, 112 S. Ct. at 2545.

96. Time, place, or manner restrictions regulate modes of expression based on the loudness, brightness, or other disturbing aspects of the communicative form, regardless of the message conveyed by the speech. Justice Scalia's sound truck analogy is based on *Kovacs v. Cooper*, 336 U.S. 77 (1949). For other content-neutral time, place, or manner restrictions, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a regulation prohibiting camping in certain national parks when applied to a group of demonstrators); *City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (upholding a city ordinance banning the posting of signs on public property).

97. *R.A.V.*, 112 S. Ct. at 2549.

98. Id. at 2542.

the St. Paul ordinance regulated particular fighting words based on the content of the expression. The ordinance prohibited only certain types of fighting words—those insults based on race, color, creed, religion, or gender—because of the disfavored message conveyed by the speech, yet did not regulate fighting words based on other less disfavored ideas—for example, political affiliation or homosexuality.[99]

The sound truck analogy better explains this concept. As previously discussed, a government may prohibit the use of sound trucks because the noise may annoy residents of a community provided that the regulation applies to all sound trucks, regardless of the message conveyed. In contrast, a city could not prohibit only sound trucks used by Republican candidates yet allow Democrats to campaign with the same mode of communication. This type of regulation targets the constitutionally protected content of the speech, not the method used to convey the message.[100] Likewise, the St. Paul ordinance sought to regulate certain types of fighting words based on hostility toward the offensive content of the particular expression—for example, abusive invective based on race or gender—but did not regulate other fighting words conveying other messages—for example, abusive language toward homosexuals. Therefore, the St. Paul ordinance was facially unconstitutional.[101]

Although contending that content discrimination between subclasses of fighting words is presumptively invalid,[102] the Court concluded that the First Amendment does not place an absolute prohibition on content discrimination in areas of otherwise unprotected speech.[103] According to the Court, content discrimination poses no threat of driving certain ideas or viewpoints from the marketplace of ideas in four situations. First, if the discrimination is based on the same reason that an entire category of speech is excluded from First Amendment protection, the content distinction is constitutional.[104] Justice Scalia illustrated this exception with several examples. For instance, threats of violence as a class of speech receive no First Amendment protection because the threats create a fear of violence,

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99. Id.

100. Justice Scalia cited several examples to demonstrate the difference between regulations aimed at the content of speech and regulations aimed at the mode of speech. For example, he argued that the government may criminalize threats of violence against the President; however, they may not criminalize only threats against the Chief Executive that allude to his policy on inner city aid. Id. at 2546.

101. Id. at 2547.

102. Id. at 2542.

103. Id. at 2545.

104. Id.

disrupt society, and may erupt into the actual threatened act.[105] The government could prohibit all violent threats based on these reasons, or it could criminalize only violent threats against the President of the United States because the same factors—fear, disruption, and actual violence—apply with special force to the President. The regulation of such threats, although limited only to ones against the President, is grounded in sufficiently neutral reasoning that constitutionally excludes the entire class of violent threats; therefore, the discrimination poses no serious danger of viewpoint or idea discrimination.[106] In contrast, the government could not prohibit only violent threats against the President regarding his policy on aid to inner cities because the law would seek to stifle expression based on a particular viewpoint—disagreement with presidential policy—and would unconstitutionally suppress the opinion from the marketplace of ideas.[107]

According to the *R.A.V.* majority, the St. Paul ordinance clearly did not fall within this first exception. As previously discussed, fighting words receive no constitutional protection because the expression embodies an intolerable mode of communication.[108] Under this first exception, a content-discriminatory fighting words regulation must depend on the intelerableness of the mode of communication, not on the offensiveness of the expression's content. The content discrimination in the St. Paul ordinance clearly was not based on the mode of the expression. The ordinance did not single out any particularly offensive manner of expression; rather, the law sought to regulate expressions of racial, gender, or religious hatred.[109] An individual could insult an African-American and a homosexual in the same intolerable manner yet only be punished for the racial invective. This suppression of particular ideas, according to the Court, clearly conflicts with the First Amendment.[110]

The majority next proposed a second exception for content discrimination between subclasses of proscribable speech. The government may treat content-defined subclasses differently if the government is concerned not with the offensiveness of the content, but rather with certain "secondary effects" associated with a particular con-

105. Id. at 2546.
106. Id. at 2545-46.
107. See id. at 2546.
108. See text accompanying notes 95-97.
109. *R.A.V.*, 112 S. Ct. at 2549.
110. See id.

tent."[111] *Renton v. Playtime Theatres, Inc.*[112] best demonstrates the secondary effects analysis. In *Renton*, the Court upheld a city zoning ordinance that required placement of all adult theaters at least 1000 feet from any residential zone, single- or multiple-family dwelling, church, park, or school.[113] The Court maintained that the ordinance did not aim to suppress the content of adult movies. Rather, the zoning scheme sought to curb the harmful secondary effects of adult theaters in the community—increased crime, lower property values, an unhealthy retail industry, and a lesser quality of life.[114] The *R.A.V.* Court, however, held that the secondary effects doctrine did not apply to the St. Paul ordinance.[115] The city claimed that the law protected against the victimization of persons who historically have been subjected to discrimination.[116] The Court rejected this secondary effects argument, concluding that the ordinance sought solely to suppress the emotive force of speech.[117] A listener's reactions to offensive speech are not legitimate secondary effects;[118] the reactions are direct effects of the expression that contribute to the marketplace of ideas and are therefore protected.

Third, the Court asserted that content-based subclasses of unprotected speech may be regulated if the expression is included incidentally within the scope of a statute aimed at conduct rather than speech.[119] As long as the government does not target conduct based on its expressive content, acts are not constitutionally protected merely because they depict a discriminatory idea.[120] According to Justice Scalia, Title VII[121] exemplifies this third exception. The use of sexually derogatory fighting words in the workplace—a content-based subclass of unprotected speech—could constitute a violation of Title VII, which regulates employment discrimination based on sex. Nevertheless, regulation of this subclass does not violate the First

111. Id. at 2546.
112. 475 U.S. 41 (1986).
113. Id. at 43.
114. Id. at 47-48.
115. *R.A.V.*, 112 S. Ct. at 2549.
116. Id.
117. Id. at 2549 n.7.
118. *Boos v. Barry*, 485 U.S. 312, 321 (1988) (holding unconstitutional a law prohibiting the display of any sign within 500 feet of a foreign embassy tending to bring a foreign government into "public odium").
119. *R.A.V.*, 112 S. Ct. at 2546.
120. Id. at 2546-47.
121. See 42 U.S.C. § 2000e-7 (1988 & Supp. 1992).

Amendment; the law seeks to proscribe discriminatory conduct, not the sexual content of the prohibited speech.[122]

Lastly, the Court created a catch-all exception allowing selective regulation of unprotected speech if the nature of the discrimination reflects that no governmental suppression of ideas could be involved.[123] As previously discussed, the Court strongly rejected the notion that the St. Paul ordinance did not aim to suppress ideas.[124] The statute selectively prohibited the use of fighting words that addressed specific disfavored subjects—race, gender, and religion—clearly resulting in the governmental suppression of certain messages.[125]

Even though the St. Paul ordinance was a content-based restriction on expression, the Court still maintained that the law would be constitutional if (1) a compelling governmental interest supported the ordinance, and (2) the content-discriminatory nature of the law was necessary to serve that interest.[126] The Court concluded that the ordinance served a compelling interest because it protected members of groups who historically have been subjected to discrimination.[127] The ordinance, however, failed to meet the second prong of the test. Content discrimination was not reasonably necessary to achieve the law's compelling interest. Instead, a content-neutral law prohibiting all fighting words, not just insults based on religion, gender, or race, would protect the rights of individuals sufficiently and survive constitutional scrutiny.[128]

B. The Concurring Opinions

The concurring Justices agreed that the St. Paul ordinance violated the First Amendment, but their agreement with the majority ended there. In his concurrence, Justice White sharply attacked the majority opinion, arguing that the ordinance should be invalidated on overbreadth grounds.[129] Justice Stevens joined in part with Justice White, agreeing that the law was overbroad and unconstitutional.[130] He contended, however, that both Justices Scalia and White were

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122. *R.A.V.*, 112 S. Ct. at 2546-47. The City of St. Paul did not assert that the bias-motivated ordinance solely targeted conduct; hence, the Court did not address the ordinance in light of this exception.

123. Id. at 2547.

124. See text accompanying notes 98-101.

125. *R.A.V.*, 112 S. Ct. at 2548.

126. Id. at 2549-50.

127. Id. at 2549.

128. Id. at 2550.

129. Id. (White, J., concurring). See also Part III.B.1.

130. *R.A.V.*, 112 S. Ct. at 2561 (Stevens, J., concurring).

incorrect with their absolutist approaches to the First Amendment. Instead, Justice Stevens proposed that the Court should consider a variety of factors when addressing First Amendment questions.[131] Justice Blackmun also filed a short opinion emphasizing the possible problematic effects of the majority opinion.[132]

1. Justice White's Opinion

Justice White authored a concurring opinion on behalf of three other Justices.[133] Although he agreed that the St. Paul ordinance violated the First Amendment, he adopted a view of the fighting words doctrine completely different than the Court's view. His opinion strongly attacked the majority's reasoning, accusing them of ignoring well-established First Amendment principles.[134]

First, he criticized the majority for safeguarding categories of expression traditionally not protected by the First Amendment.[135] According to Justice White, certain categories of expression are void of constitutional protection because the expressive content of the speech is "worthless" or "of de minimis value to society."[136] The expression is excluded from the First Amendment because the speech makes no contribution to the marketplace of ideas.[137] For example, the First Amendment does not protect maliciously false information because the communication does not promote the discovery of truth in society.[138] Fighting words, Justice White asserted, is one such category of unprotected speech. The unprotected element of fighting words, however, is not an intolerable mode of communication as claimed by Justice Scalia. In contrast, the content of the speech—the message conveyed by the expression—makes no contribution to the marketplace of ideas. Fighting words are not a means of exchanging views, rallying supporters, or registering a protest; they are words directed

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131. Id. at 2567. See also Part. III.B.2.

132. *R.A.V.*, 112 S. Ct. at 2560-61 (Blackmun, J., concurring).

133. Justices O'Counor and Blackmun joined Justice White's opinion. Justice Stevens also joined this opinion in part.

134. *R.A.V.*, 112 S. Ct. at 2551 (White, J., concurring).

135. Id. at 2553.

136. Id. at 2552.

137. For a description of the marketplace of ideas notion, see note 1 and accompanying text.

138. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that false information about a public official for public acts printed with actual malice is not protected under the First Amendment); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-46 (1974) (holding that false information printed about private persons generally is not protected under the First Amendment).

against individuals solely to incite violence or inflict injury.[139] Because the content of fighting words warrants no First Amendment protection, a prohibition on fighting words is not a content-neutral time, place, or manner restriction as suggested by the majority opinion. It is a ban on a class of unprotected speech that may be regulated freely for any rational reason.[140]

Justice White next criticized Justice Scalia for developing a list of "ad hoc exceptions" to the Court's unprecedented fighting words doctrine.[141] Justice White contended that the first exception drawn by the Court—one allowing content-based restrictions of unprotected speech when the distinctions are based on the same reason that the entire class of speech is unprotected[142]—essentially undercuts the majority's rule that content-based regulations of unprotected speech are presumptively unconstitutional.[143] Furthermore, the St. Paul ordinance reflected the weaknesses of this exception. Fighting words are unprotected because the content of the speech has no value in the marketplace of ideas.[144] Governments may choose to regulate fighting words because the speech conveys a message of personal injury and imminent violence, a message of special concern when directed against groups who historically have been subjected to discrimination.[145] Therefore, the St. Paul ordinance, a content-based subclass of fighting words addressing race, religion, or gender issues, clearly fits within the majority's exception.[146]

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139. *R.A.V.*, 112 S. Ct. at 2553 (White, J., concurring).

140. See id. at 2556-57.

141. Id. at 2556. Justice White maintained that these exceptions may have been an effort to restrict the effects of the Court's decision to the facts of this specific case or an attempt to anticipate some of the questions arising from the majority's revision of the First Amendment. Id. Whatever the purpose, Justice White believed that the exceptions only added confusion to the First Amendment. Id. at 2558.

142. For a discussion of this exception, see text accompanying notes 104-10.

143. *R.A.V.*, 112 S. Ct. at 2556 (White, J., concurring).

144. See id. at 2553.

145. Id. at 2556.

146. Justice White also criticized Justice Scalia's secondary effects and conduct regulations exceptions, claiming that the majority created the exceptions solely to uphold hostile work environment claims in light of the majority's fighting words analysis. Id. at 2557. Otherwise, Title VII's prohibition of sexually derogatery language in the workplace would be unconstitutional because the statute prohibits expression on a "disfavored topic"—sexual harassment. Id. Justice White, however, argued that the exceptions carved out by the majority, under close analysis, actually do not justify hostile work environment claims. The secondary effects analysis does not apply because hostile work environment claims protect the emotional impact of the derogatory expression on the worker, the same primary effect reached by the St. Paul ordinance. Id. Furthermore, the Court's focus on Title VII's regulation of discriminatory conduct ignored the language of the statute that directly reaches expression creating a hostile work environment—language constituting more than a mere "incidental" effect on speech. Id.

Finally, Justice White criticized the majority for creating what he called an "underinclusiveness" standard. Under Justice Scalia's analysis, a content-discriminatory law prohibiting a subclass of unprotected speech is unconstitutional if the expression could be regulated sufficiently by a broader law banning the entire category of unprotected speech. In other words, a law prohibiting only a subset of fighting words—insults based on race, for example—would be unconstitutional if the racial slurs could be regulated under a law proscribing all fighting words without reference to the message conveyed by the speech. According to Justice White, this analysis is senseless and ultimately has an adverse effect on the First Amendment. Under the concurring Justices' construct, fighting words receive no protection solely because the message conveyed by the speech does not contribute to the marketplace of ideas. Consequently, any subclass of the unprotected speech may be regulated if the legislature observes a need for the legislation. For example, prohibiting fighting words that abuse persons on the basis of race would diminish the "social evil[s]" of racial insults without eliminating any viewpoints contributing to the marketplace.[147] The majority's "underinclusiveness" standard, however, would not allow a legislature to focus its efforts on a particular type of fighting words unless the ordinance included a catch-all phrase prohibiting "'all other fighting words that may constitutionally be subject to this ordinance.'"[148] Under the Court's standard, the content of fighting words possesses enough value in the marketplace of ideas that the words may not be prohibited selectively, even though the speech traditionally has been excluded from First Amendment protection. By protecting the content of the speech, the majority ultimately legitimizes fighting words as a form of public discourse—a conclusion that seemingly contradicts all past First Amendment jurisprudence.[149]

Instead of using an underinclusiveness doctrine riddled with confusing exceptions, Justice White concluded that *R.A.V.* should be decided on traditional overbreadth grounds. He found the St. Paul ordinance substantially overbroad because the law unconstitutionally criminalized a substantial amount of protected expression.[150] Although the Minnesota Supreme Court attempted to follow *Chaplinsky*, Justice White believed that the state court erred in its

147. Id. at 2553.
148. Id.
149. Id. at 2553-54.
150. Id. at 2559.

application and rendered the ordinance facially overbroad.[151] The state court emphasized that the law censored expression known to create anger, alarm, or resentment in individuals; however, these reactions do not deprive speech of constitutional protection.[152] In fact, this type of hostile reaction often indicates that the expression contributes significantly to the marketplace of ideas. Therefore, Justice White found the ordinance facially invalid.

2. Justice Stevens's Opinion

Justice Stevens agreed that the St. Paul ordinance was overbroad and unconstitutional,[153] but he criticized Justice Scalia's and Justice White's opinions for developing unworkable, overly rigid fighting words constructs.[154] First, Justice Stevens attacked the majority's assertion that a government must regulate the entire category of fighting words or none at all.[155] He strongly opposed the notion that content-based regulations of unprotected speech are presumptively unconstitutional.[156] In contrast, he contended that regulations of content are a legitimate aspect of First Amendment jurisprudence.[157] The Court's opinion, he argued, "turn[ed] First Amendment law on its head" and elevated the protection of fighting words—a traditionally unprotected form of speech—to a level equivalent with core political speech, the most highly protected form of discourse in the marketplace of ideas.[158]

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151. Id.

152. Id. at 2559-60 (citing *Terminiello v. Chicago*, 337 U.S. 1 (1949), and *Cohen v. California*, 403 U.S. 15, 20 (1971), among other cases).

153. *R.A.V.*, 112 S. Ct. at 2561 (Stevens, J., concurring).

154. Id. at 2567.

155. Id. at 2562-63.

156. Id. at 2564.

157. Id. at 2563-64. For example, Justice Stevens cited *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (upholding a restriction on broadcasting specific indecent words), and *Young v. American Mini Theatres*, 427 U.S. 50 (1976) (upholding zoning ordinances regulating movie theaters based on the content of films shown).

158. *R.A.V.*, 112 S. Ct. at 2564-65 (Stevens, J., concurring). Because the majority prohibited selective regulations of fighting words, Justice Stevens felt that the Court provided more protection for fighting words than for commercial speech. The Supreme Court affords commercial speech only quasi-protection under the First Amendment. Weinberg, 25 Conn. L. Rev. at 304 (cited in note 50) (citing *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980)). Unlike the fighting words methodology proposed by Justice Scalia, the Court allows content-based discrimination for commercial speech. Weinberg, 25 Conn. L. Rev. at 304 (cited in note 50) (citing *Posadas De Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 345-46 (1986) (holding that the "greater power" to regulate casino gambling included the "lesser power" to regulate advertising to particular persons); *Board of Trustees, State Univ. of N.Y. v. Fox*, 492 U.S.

Next, Justice Stevens rejected Justice White's categorical approach to the First Amendment. According to Justice Stevens, stripping protection from certain categories of expression based on the content of the speech "sacrifices subtlety for clarity" and ultimately is unsound.[159] He asserted that drawing bright lines between "protected" and "unprotected" speech and between "content-based" and "content-neutral" regulations presented an overly simplistic approach that could not be applied in a workable, coherent fashion.[160] Instead, he advocated adopting a multifactor test to determine the constitutionality of ordinances regulating speech: a court should scrutinize the content of the regulated speech, the context in which the expression is used, the nature of the restriction, and the scope of the regulation.[161]

Applying his multifactor test, Justice Stevens concluded that the St. Paul ordinance, if limited to fighting words, would be a legitimate regulation of unprotected speech.[162] First, the ordinance hypothetically prohibited only fighting words, a "low-value" speech according to Justice Stevens.[163] Moreover, the ordinance banned expressive conduct, not written or spoken communication, and the government has more flexibility to regulate this activity.[164] Second, the context of the speech—a burning cross directed toward a family trapped in their home—amounted to nothing more than crude intimidation embroiled with racial hostility.[165] Lastly, the restriction was an evenhanded regulation of fighting words based on the harm caused by the speech to insulted individuals.[166] The ordinance did not seek to suppress certain viewpoints or favor one side of any debate. Instead, the law uniformly prohibited any person, whether they advocated tolerance or intolerance, from using fighting words based on race, gender, or religion.[167] Therefore, if the St. Paul ordinance had not been overbroad, Justice Stevens would have upheld the law as constitutional.[168]

469, 475 (1989) (holding selective regulation of commercial speech constitutional if the ban promoted safety, security, and residential tranquility)).

159. *R.A.V.*, 112 S. Ct. at 2566 (Stevens, J., concurring).
160. Id. at 2569.
161. Id. at 2567-69.
162. Id. at 2571.
163. Id. at 2569.
164. Id. at 2568.
165. Id. at 2569.
166. Id. at 2571.
167. Id.
168. Id.

3. Justice Blackmun's Opinion

Justice Blackmun wrote a short opinion expressing his concerns about the possible effects of the majority's opinion. He asserted that the case may or may not serve as a precedent for future judicial decisions. Nevertheless, Justice Blackmun concluded that both options produce disheartening results.[169]

If cited as precedent, Justice Blackmun believed the opinion will weaken the Court's traditional protections of speech. In order to regulate unprotected expression that injures others, the majority opinion requires states to regulate unprotected expression that may not cause problems in society. This approach appears to give all speech, whether or not traditionally safeguarded under the First Amendment, the same level of protection; content-based restrictions of any speech—protected or unprotected—will be invalid unless the regulation narrowly addresses a compelling state interest. Justice Blackmun contended that this identical treatement of all expression inevitably will weaken the level of protection for all traditionally safeguarded speech.[170]

In contrast, Justice Blackmun argued that the opinion will not alter First Amendment jurisprudence significantly if the case is regarded as an instance in which the Court invalidated an ordinance simply because the Justices opposed the law's premise.[171] This action, however, would reflect the Court's digression from its proper task. Justice Blackmun feared that the majority strayed from the issue before the Court to decide controversial issues of political correctness and cultural diversity. According to Justice Blackmun, this result might be even more disheartening than if the case served as harmful precedent in the future.[172]

IV. THE POSSIBLE IMPLICATIONS OF THE JUSTICES' OPINIONS

As previously discussed, the Justices proposed drastically different interpretations of the fighting words doctrine. In the majority opinion, Justice Scalia reinvigorated the fighting words exception, a doctrine virtually eliminated by cases after *Chaplinsky*.[173]

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169. Id. at 2560 (Blackmun, J., concurring).

170. Id.

171. According to Justico Blackmun, the premise behind the St. Paul ordinance was "that racial threats and verbal assaults [cause] greater harm than other fighting words." Id. at 2560-61.

172. Id. at 2561.

173. See generally Part II.B.

Unfortunately, his opinion only increases the confusion surrounding the fighting words doctrine, a concept that has plagued the Court throughout the last fifty years. Justice White proposed an exception that more closely conforms with the Court's fighting words precedent, yet his opinion also uses the ambiguous fighting words rhetoric employed by the Court in those cases—rhetoric that includes notions of injury, imminent violence, and other subjective standards allowing extreme judicial discretion. One can abstract a narrow workable version of the fighting words doctrine from his opinion, however, that provides a constitutional exception sensibly conforming with First Amendment jurisprudence.

A. Justice Scalia's Analysis

Justice Scalia's opinion proposed a fighting words construct never embraced previously by the Court. Under his analysis, fighting words are categorically excluded from First Amendment protection because the speech embodies an unprotected mode of expression. The content of fighting words, in contrast, contributes to the marketplace of ideas and thus receives First Amendment protection. Therefore, according to Justice Scalia, government may not base fighting words restrictions on hostility toward the message conveyed by the speech. The regulations are time, place, or manner restrictions that solely limit the mode of expression.[174]

Justice Scalia suggested a new, unprecedented approach to the fighting words doctrine, but in his search for an innovative method, he failed to realize numerous faults in his reasoning. First, he analogized fighting words to a sound truck, asserting that both modes of expression may be regulated by time, place, or manner restrictions.[175] Unfortunately, Justice Scalia failed to complete his analysis. He claimed that fighting words embody an unprotected nonspeech element of communication, yet he never clearly described what nonexpressive aspect of the speech strips fighting words of First Amendment protection.[176] Admittedly, he commented that the St. Paul ordinance legimately could have regulated only fighting words that communicated ideas in a threatening, as opposed to obnoxious,

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174. See text accompanying notes 95-97.

175. For a discussion of time, place, or manner regulations, see note 96.

176. Ironically, Justice Scalia accepted the city's assertion that the St. Paul ordinance only prohibited fighting words, *R.A.V.*, 112 S. Ct. at 2542, yet he did not explain what nonexpressive element of speech was regulated by the ordinance.

manner. His example, however, further exemplifies another major weakness in his opinion: in order to determine if words are threatening—that is, if they are fighting words—a court inevitably must look at the content of the speech, not merely the mode of expression. When an individual hurls threatening language at another person, the addressee does not feel intimidated merely by the noise or loudness of the speaker's voice; he experiences intimidation because of the speaker's choice of words and the message conveyed by the expression. Contrary to Justice Scalia's assertion, the impact of speech—whether the expression embodies "an especially offensive mode"[177]—is inseparable from the offensive content of speech. Hence, the "fighting" element of Justice Scalia's fighting words analysis, contrary to his assertions, is the offensive message conveyed by the speech.

Although Justice Scalia's analysis appears at face value to embody a narrow fighting words exception, his construct actually could justify shockingly broad intrusions into the First Amendment. Justice Scalia proposed that content-discriminatory ordinances regulating subclasses of fighting words are unconstitutional unless the content discrimination is necessary to serve a compelling state interest.[178] In other words, if a content-specific law like the St. Paul ordinance can be replaced by a broader regulation prohibiting *all* fighting words, then the former law would unconstitutional. This approach, however, directly contradicts the traditional First Amendment notion that government should interfere minimally with expression and narrowly tailor speech regulations. By mandating legislatures to enact only sweeping prohibitions of fighting words, the majority requires the states to regulate problems that may not exist in society.[179] Furthermore, legislatures might construe this emphasis on broad, content-neutral regulations as an invitation to place a blanket prohibition on offensive speech. As previously discussed, Justice Scalia's fighting words analysis removes fighting words from First Amendment protection essentially because the language conveys a disturbing message. The offensiveness of the mode of expression, which Justice Scalia asserts may be regulated, actually is created by the offensive content of the expression. Hence, under Justice Scalia's

177. Id. at 2549.

178. See id. at 2549-50.

179. The concurring Justices also found this consequence of the "underinclusive" standard problematic. See id. at 2553-54 (White, J., concurring); id. at 2562 (Stevens, J., concurring). Furthermore, the majority's methodology appears to conflict with the Court's recent assertion that the First Amendment does not require the government to regulate nonexistent problems. See *Burson v. Freeman*, 112 S. Ct. 1846, 1856 (1992).

analysis, a fighting words regulation is not a content-neutral time, place, or manner restriction; the regulation inevitably targets the speech's offensive content. Carrying his analysis further, a fighting words restriction may not prohibit certain types of offensive speech—for example, distasteful insults based on race, gender, or religion. Instead, the ordinance must prohibit the entire category of fighting words, a class of speech that under Justice Scalia's analysis is actually void of constitutional protection because of its offensive nature. Thus, under his fighting words construct, a state arguably can pass a regulation prohibiting all offensive expression, a regulation that clearly undercuts the general foundations behind the First Amendment.

A final major flaw in Justice Scalia's opinion may present a serious problem in future First Amendment cases. At the end of his opinion, Justice Scalia suggested that the compelling interest test is the appropriate standard of scrutiny when ordinances prohibit speech based on hostility toward the expression's protected ideological content.[180] A content-discriminatory ordinance that seeks to suppress a particular idea would be constitutional if the discrimination is narrowly tailored to serve a compelling state interest.[181] Justice Scalia's conclusion, however, contradicts First Amendment precedent. Before *R.A.V.*, the Supreme Court absolutely protected First Amendment speech when the government deliberately suppressed the expression based on the content of the speech.[182] The content contributes to the discovery of "truth" through the marketplace of ideas and may not be repressed by majoritarian preferences.[183] Unfortunately, Justice Scalia's application of the compelling interest test in *R.A.V.* could open the door to unprecedented abridgement of protected speech. In effect, the application of a compelling interest standard endorses censorship if the government could assert an ideological interest great enough to be labeled a compelling interest. Such censorship flies in the face of past First Amendment jurisprudence.

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180. See *R.A.V.*, 112 S. Ct. at 2549.

181. Id.

182. See, for example, *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (stating that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because government finds the idea itself offensive or disagreeable"); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (quoting *Johnson*); *Cohen v. California*, 403 U.S. 15, 18 (1971) (stating that "the State certainly lacks the power to punish Cohen for the underlying content of the message" conveyed by his jacket); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (striking down the statute that prohibited advocacy of illegal conduct because the law suppressed expression based on the message conveyed).

183. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

B. Justice White's Opinion: A Possible Solution?

Justice White proposed a completely different fighting words construct: fighting words are unprotected because the content of the speech does not contribute to the marketplace of ideas.[184] In his words, fighting words are "worthless" and of "de minimis value to society."[185] The speech is not mere offensive expression that causes anger, alarm, or resentment in nearby listeners.[186] In contrast, fighting words consist of purely insulting language addressed directly to another person, speech that essentially invites the addressee to fight.[187]

If one carefully construes Justice White's emphasis on the insulting nature of fighting words, a logical fighting words construct emerges from his opinion: fighting words are pure interpersonal insults directly addressed to another person in a private setting. By limiting fighting words to this narrow construct, the exception becomes consistent with the primary foundation behind the First Amendment—promoting the discovery of "truth" through the marketplace of ideas.[188] Pure personal insults spoken to an individual in a private setting convey no expressive message to the marketplace; the speaker does not attempt to persuade the listener to adopt any viewpoint, change the addressee's opinion, or contribute to our organization as a society. In contrast, the speaker expresses herself solely to hurt the addressee, degrade the individual, and intimidate him from exercising his legal rights. Furthermore, this construct does not undercut the holdings in cases like *Cohen* and *Gooding*. The fighting words are not excluded from constitutional protection because of their offensive nature. They are unprotected because truly interpersonal insults do not add any expressions of opinion or values into the marketplace of ideas.

Note that for direct, interpersonal insults to be excluded from First Amendment protection, the insults must be expressed in a purely private setting. Insulting language spoken in a public forum, in contrast, requires some level of constitutional protection. Direct insults addressed to another person clearly could convey a message to the general public that may lead to a further exchange of ideas among listeners. In fact, expressions of dislike in public are "the type of

184. *R.A.V.*, 112 S. Ct. at 2551-52 (White, J., concurring).
185. Id. at 2552.
186. Id. at 2559.
187. Id. at 2553 n.4.
188. See note 1 and accompanying text.

ideological communications that are within the very core of the protection accorded by the first amendment."[189] The public use of such language, although reprehensible to many people, may express the speaker's opinions or values, or even qualify as pure political speech in certain circumstances. For example, if a pro-life advocate publicly insults a pro-choice supporter by calling her a murderer or baby-killer, these interpersonal insults cannot be separated from the viewpoints being debated in public and therefore must be protected. Furthermore, a speaker's motive should not determine whether her opinions are protected in a public setting. Although the speaker may express insults with the sole motive to hurt the addressee, hateful speech directed at another in public may contribute to the marketplace by leading to further discussion, regardless of motive, thereby expressing a message that must be tolerated[190] to maintain the strength of the First Amendment.

Thus, if limited to private, direct, personal insults, fighting words clearly are an unprotected form of communication. The entire class of private, one-on-one insults are not entitled to First Amendment protection because these insults simply do not contribute to the marketplace of ideas. As long as the government possesses a rational basis to regulate such speech, the state could choose to prohibit some insults, yet not others, and the regulation would not infringe on the First Amendment in any way. Hence, the government could proscribe only those types of fighting words addressing matters that present an imminent concern in society.[191]

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189. Mannheimer, Note, 93 Colum. L. Rev. at 1559 (cited in note 49) (quoting Gard, 58 Wash. U. L. Q. at 569 (cited in note 22)).

190. See note 2 (outlining tolerance as one justification for free speech). Some commentators have argued that by encouraging teleration of hate speech, the government implicitly endorses the message expressed, a message that contradicts fundamental values in the United States. See, for example, Note, *A Communitarian Defense of Group Libel Laws*, 101 Harv. L. Rev. 682, 690-91 (1988). This argument is unfounded. Allowing individuals to express controversial speech—for example, racial epithets—does not show support for the viewpoint expressed. In contrast, protecting such discussion, although offensive to some individuals, is at the core of the marketplace of ideas notion. Moreover, the government may choose to combat hate speech and violence through other means. For example, the state may use educational forums te discourage individual prejudices, or the government may choose te regulate acts other than speech. See Greenawalt, 42 Rutgers L. Rev. at 305 (cited in note 2).

191. Admittedly, this version of fighting words, although logically sound and consistent with the purposes of the First Amendment, only excludes a narrow category of speech from constitutional protection. The class of pure, interpersonal insults is extremely limited and may be hard te distinguish from a crude statement of views protected by the First Amendment. For example, calling someone a "stupid nigger" or a "greedy Jew" are pure interpersonal insults that could be regulated as fighting words if spoken in a private setting. Similar statements spoken te an audience including African-Americans or Jewish persons, however, would be protected. See, for example, *Brandenburg v. Ohio*, 395 U.S. 444, 446 n.1 & 447 (1969) (protecting statements like

V. CONCLUSION

Since its creation, the fighting words doctrine has been a problematic First Amendment exception and has produced inconsistent jurisprudential analyses and results. The Supreme Court neither has interpreted nor applied the doctrine clearly. Moreover, the two starkly opposing fighting words constructs in *R.A.V.* exemplify the unclearness of the doctrine, and taken at face value, their opinions appear to further confuse the already muddled doctrine. The majority advocated a time, place, and manner approach to regulate fighting words, yet they did not explain the practical application of their methodology. Furthermore, the majority's underinclusiveness approach could weaken the fabric of the First Amendment inexcusably, possibly justifying a blanket prohibition of offensive speech.

In contrast, Justice White's concurrence, if refined, embodies a possible solution to the fighting words confusion. The fighting words exception should be limited to direct, interpersonal, purely private insults—insults that have no value in the marketplace of ideas. This narrow view of fighting words provides a logical exception to the First Amendment that will not infringe on areas of protected expression. It adheres to traditional First Amendment foundations because it only prohibits speech that makes no valuable contribution to the marketplace of ideas. Moreover, the approach eliminates the ambiguous, manipulable fighting words rhetoric traditionally used by courts.

The Supreme Court's future treatment of fighting words is unpredictable. The *R.A.V.* Court clearly reinvigorated the fighting words doctrine, but the exception's scope is unclear from the decision. By limiting fighting words to purely private, direct, interpersonal insults, however, the Court could clarify over fifty years of confusion and create a constitutionally sound fighting words doctrine.

*Melody L. Hurdle**

"I believe the nigger should be returned to Africa, the Jew returned to Israel" and "Bury the niggers"). Because the line between unprotected personal insults and protected speech may be hard to distinguish at times, legislatures may tend to overregulate beyond the scope of this fighting words exception and infringe into areas of protected expression. Nevertheless, if a legislature carefully draws lines and proscribes only those private, personal insults that do not impact our organization as a society—those that do not contribute to the marketplace of ideas—the ordinance could provide a constitutionally sound piece of legislation that lies within a logical fighting words exclusion.

* The Author would like to express her appreciation to Professor Tom McCoy of Vanderbilt School of Law for his helpful comments and suggestions during the writing of this Recent Development.