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THE FIRST AMENDMENT: REFLECTIONS ON FREE SPEECH RIGHTS IN THE UNITED STATES

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ABSTRACT

The civic rights regarding freedom of speech in the First Amendment to the U. S. Constitution, despite a multitude of legal interpretations, still remain somewhat unclear regarding a specific definition of what constitutes free speech. The factors that follow support this assertion. First, historical Supreme Court decisions have demonstrated that the recognition of speech, contrary to the thinking of perhaps a majority of the American citizenry, is dependent on its impact or the effects it produces in society. As a result, courts have made several decisions in which they either accepted certain actions as protected speech or rejected them as unprotected speech.Second, in an attempt to determine what unprotected speech would signify, the U.S. Supreme Court established the *fighting words* doctrine in *Chaplinsky v. New Hampshire* in 1942. But, the Court's reversal of several *fighting words* convictions, post-*Chaplinsky*, has contributed to a climate of confusion regarding the exact meaning of *fighting words*. Third, partlyas a result of theconfusion caused by the contradictory manner in which the lower courts have interpreted *fighting words*, much uncertainty and controversy continue to linger regardingthe meaning of *fighting words*.

Introduction

Citizens of western democracies have a tendency to boast about their constitutional rights which some perceive as non-existent in totalitarian as well as in most authoritarian political systems. In

the U.S., freedom of speechandfreedom of religion are two major rights that are contained in the First Amendment to the U.S. Constitution.Thus, given that free speech is understood to be the ability to do and say things as one may choose, many Americans generally perceive free speech rights to imply that citizens can indeed engage in seemingly"lawful actions"but without necessarily having to take into accountthe impact of such actions on the society at large.On the other hand, however, many Americans also perceive freedom of religion rights to implythe right of citizens to practice their religious faiths without having to endure criticisms or mockery from those who may not approve of such practices. These two positions, as can be deciphered, appear to be inherently contradictory. This is because free speech would appear to imply the ability of one citizen to criticize or even make fun of the religion of another citizen; an effort which, at the same time, would be regarded by the recipients of that criticism or mockery as provocativeand insulting.

Given this apparent contradiction,the tendency for citizens to be adamant about the exercise of their free speech rights has inevitably come into direct conflict with those who equally espouse their inalienable rights to the exercise of their religious freedoms*(Patrick Garry,2012, 1* and *RobertO'Neil, 2002, 1)*. This politically-polarizing climate, which generated tensions between Islamic groups and free speech groups,manifested itself in the U.S. in 2015 in Garland, Texas. In this example, free speech advocates employed the rights to free speech to rationalize their actions regarding the caricaturingof the *Prophet Mohamed*. But, on the other hand, the Muslims - apparently advocating their own rights to practice their religion freely - regarded those actions as provocative, insulting, contemptuous, disrespectful, and demeaning of the founder of their religion *(Nick Gillespie,2015, 1-3*; *David Harsanyi,2015, 1-3*; and *Ronald Bailey,2015, 1-4)*.

Given this brief background, an attempt will be made in this essay to demonstrate that: one, as a result of the historical evolution of the U.S. Supreme Court'sinterpretations of free speech rights;two, the Supreme Court's imposition of the *fighting words* doctrine and the subsequent Supreme Court reversal of *fighting words* convictions from the lower U. S. courts; and three, confusion among the lower courts in their interpretations of what speech constitutes *fighting words*, American citizens will be unable to determine the absolute legality of their actions under the assumed protection of free speech.

Toward the fulfillment of these objectives, this exercisewill be conductedspecifically from a three-dimensional perspective. These perspectives consist of: one, the historical evolution of the U.S. Supreme Court's interpretation of free speech; two, the Supreme Court's attempt to regulate speech through the application of the*fighting words* doctrine and its reversal of fighting words convictions from the lower courts; and three, confusion among thelowercourts in theirinterpretations of what speech constitutes *fightingwords*.

The Historical Evolution of the United States Supreme Court's Interpretation of FreeSpeech Rights in the First Amendment: A Two-Pronged Approach

In this category, the first academic approach constitutes a brief examination of the Sedition Act of 1798 and the Gag Rules of 1836; which involved the manner in which the federal legislative and executive branches of government, in the early history of the republic, struggled with their understanding of what constituted free speech rights. The purpose of this approach is toreveal the tempestuous political atmosphere that prevailed in which the government had been seen by certain citizens as oppressive of their free speech rights; especially given the fact that there had been no Supreme Court interpretations for free speech as yet. In other words, the confrontational political climate emerged because the citizens' understanding of free speech appeared to have been radically different from the government's own comprehension of the concept. Given these destabilizing developments, it is hardly a surprise that the Supreme Court found it necessary to intervene in an apparent attempt at stabilizing the political system.

The second academic approach will address a selected number of court cases, largely conducted in the twentieth century, in which the U.S. Supreme Court itself struggled to provide interpretations of which actions constituted free speech (albeit under certain specified conditions) and which ones did not constitute free speech*(United States Courts Online, 1)*.In addition, given the fact that the court had to struggle in order to establish some semblance of meanings for free speech, was a strong indication that a definitive and comprehensive definition for free speech simply did not or perhaps could not exist. Therefore,the process of determining exactly what constituted free speech, which had been conductedfragmentally on a case-by-case basis, had steadfastly evolved over the decades. This evolutionaryprocess or "deciding-as-you-go" has

consisted of either acknowledging or not acknowledging actions, depending on their societal impact, as tantamount to free speech.

There are three purposes for embarking on this second academic approach. The first purpose is to establish the position that, since the court had to struggle or "muddle-through" in order to interpret free speech rights, this effort thus appeared to have represented more of an attempt at balancing interests between the government and the governed.The second purpose is to highlight the point that, since free speech rights are premised on certain conditions that are not clearly defined, it would therefore follow that a comprehensive and clear definition for free speech might not be ascertainable. This situation would thus imply that citizens cannot be so certain that particular actions they might undertake might be protected. The third purpose is to show that many of the court's interpretations have been based on, or have been in response to, certain developments in the society which appeared to require responses that would have a tendency to bring about domestic political tranquility.

First Academic Approach: The Sedition Act of 1798 and the Gag Rules of 1836

The Sedition Act of 1798 and the Gag Rules of 1836, reflect the turmoil that had ensued in the nation partly as a result of the vacuum created by the lack of Supreme Court pronouncements, prior to the twentieth century, of what constituted free speech rights. This vacuum may have, in turn, prompted political actors at all levels of government to engage in legislative and executive actions quite a few of which were deemed "unconstitutional" by certain segments of the public. The net effect of this confrontation was the development of political tensions between the government and certain groups and individuals in society.

Thus, along with the adoption of the Fourteenth Amendment into the Constitution in 1868, setting the stage for the implementation of *selective incorporation*, it follows that this domestic instability may also have been pivotal in prompting the Supreme Court to take an aggressive stance designed to nationalize selected aspects of the Bill of Rights. As an operational concept, *selective incorporation* is the process by which the U.S. Supreme Court, in a series ofcases which had been adjudicated almost exclusively in the twentieth century, incorporated aspects of the Bill of Rights into the Fourteenth Amendment, thereby holding the states responsible for and

accountable totheir principles *(Benjamin Ginsburg et al, 2013, 96).*Prior to *selective incorporation* only the national government had been held accountable to and responsible for adhering to the Bill of Rights. This strategy thus cleared the path for the Court to make Bill of Rights decisions that would affect the states as well - not just the national government.

The Sedition Act of 1798

In 1798, *President John Adams* signed the *Alien and Sedition Acts* into law. The *Sedition Act* convicted individuals found guilty of uttering(free speech) or publishing(free press) false, scandalous, and malicious statements against the U.S. government *(First Amendment Timeline, 2)*. But, in an apparent attempt at defying this law because of the prevailing view that"… the Sedition Act exceeded the enumerated powers of the federal government and violated the First Amendment guarantee of free speech and press freedom" *(Joseph M. Bessette et al, 2012, 191),* legislatures in the states of Kentucky and Virginia enacted the *Kentucky* and *Virginia Resolutions* respectively. The *Kentucky Resolutions* declared that "… each state could decide for itself whether federal acts were unconstitutional and therefore [could be] void[ed]"; and the *Virginia Resolutions* declared that states could "… interpose for arresting the progress of the evil" *(Joseph M. Bessette et al,2012, 75).*

These federalism and free speech squabbles, between the federal and state governments, later led some states to adopt the *nullification or interposition principle,* which connoted "the idea that a state may refuse to acknowledge or enforce federal laws within its boundaries" *(Joseph M. Bessette et al, 2012,75),* if that state should deem such a response expedient. But, despite the potential calamities and anxieties created by this device, which specifically appeared to have posed a continuing threat to the survival of the U.S. as a nation, *interposition* ended abruptly at the close of the Civil War in 1865 when federal forces defeated the southern confederate states that had attempted to secede from the union *(John Q.Wilson et al, 2011, 57).*

Thus, although the U.S. Supreme Court never made a ruling regarding the constitutionality of the *Sedition Act* of 1798, perhaps realizing its potential illegality and also probably attempting to avoid a continued confrontation with the states - a strategy that did not materialize and hence the Civil War of 1861 to 1865- , the U.S. Congress allowed the law to expire in 1801*(Joseph*

M.Bessette et al, 2012, 91). In addition, after having won the presidential election against *President John Adams* in 1800, the newly-elected *President Thomas Jefferson* proceeded to pardon all those persons who had been convicted under this law *(First Amendment Timeline, 2)*.

The Gag Rules of 1836

In 1836, the U.S. House of Representatives adopted the "gag rules". Prompted by the representatives of southern states who were bent on continuing with the institution of slavery and the slave trade, these measures were a concerted attempt to prevent the House chamber from holding discussions regarding the ever increasing number of petitions from abolitionists, who were also determined toabolish slavery*(Jenkins and Stewart III, 2012, 1)*. These rules, which also prevented American citizens from petitioning their representatives - an apparent violation of the First Amendment since the Constitution guarantees citizens the right to petition the government for a redress of grievances - remained in effect until 1844 when they were eventually repealed by the House. But the repeal took place only after massive pressure had been exerted on congress-members by the persistent antislavery groups along with the tireless work of *Representative John Quincy Adams* of the state of Massachusetts *(Struggles over Slavery: The Gag Rule, 1)*.

Second Academic Approach: Selected Free Speech Cases of the U.S. Supreme Court

Efforts by the Supreme Court to begin interpreting the Bill of Rights in the twentieth century, given the fact that it had been an integral part of the U.S. Constitution since 1791 (eighteenth century), came rather late.Therefore, in an apparent attempt to explain the reason for this lateness, some academics have noted that the court's non-intervention stance, as reflected in its admittance of only 12 First Amendment cases between 1791 and 1889,was a direct response to its reasoning that the Bill of Rights applied only to the federal government and not the states *(First Amendment Timeline, 2)*. But,as stated earlier, the principle of *selective incorporation*, largely conducted in the twentieth century when the court increased its acceptance of Bill of Rights cases, promptly nullified this notion.In addition to this reasoning, some have speculated that the Court may also have accepted a larger number of First Amendment cases in this period because of the emergence of social upheavals such massive immigration, World War I, and the

threat posed by the spread of socialism*(First Amendment Timeline, 2)*.All of these developments appeared to have interjected significant threats to the national security of the U.S.

The tests that follow emerged from cases which constitute examples through which the Supreme Court imposed restrictions on speech. These restrictions set precedents suggesting that the rights to free speech are notabsolute since they are based on certain conditions. This concept of limited speech is specifically articulated by the Supreme Court when it stated that "… the protection accorded expression [would depend] on the effects it is likely to produce" *(Rossum and Tarr, 2014, 198)*. In the long run,however, in an apparent attempt designed to balance the interests of the government relative tothose of the citizenry in a changing political climate,the Court also made an effort to limit the extent to which the government may deny citizens of free speech rights.

Thus, in a collective sense, these First Amendment Standards or tests represented models that had beendesigned to regulatethe policiesof the government, as well as the behavior ofcitizens, within the arena of free speech. The type or nature of each test imposed was an attempt by the Court to address certain political problems or concerns that were prevalent within each particular period.In other words, the movement from one test to the other was a reflection of the political conditions that were prevalent in the society during that particular period which the Court was attempting to address. In sum, thesetests or standardsof regulation were referred to as the bad tendency test, the clear and present danger test, the balancing test, and the strict scrutiny test *(Rossum and Tarr, 2014, 200-201)*. These tests, and their selected corresponding Supreme Court cases, are addressed below.

First, through *the Bad Tendency Test*, the Supreme Court allowed the U.S. Congress to enact laws prohibitingany speech which might have atendency to incite actions that are deemed illegal *(David Schultz et al, 2011, 796)*.A common feature of the decisions made in the three cases addressed below is

that they empowered the applicablegovernment to perform its vital operational function of protecting the securityinterests within its jurisdiction by preventing anyone from obstructing that function under the guise of free speech.

The three major political conditions that were prevalent in this period, against which the established political order reacted, follow. One, the success of the *1917 Bolshevik Revolution*in Russia, which brought the communists to power, generatedfear that similar calls for the violent overthrow of governments, which would usherin anarchy, might take root in the U.S. If this were to transpire, it would then pose a serious threat to the established political order. Two,the massive immigrationof Eastern Europeans into the U.S. was a cause for grave concern because of thesecurity threat which it appeared to pose. The primary fear was that the immigrants may have attempted to spread radical political ideologies that were deemed inconsistent with those of the American political system. Three, the refusal of certain citizens to cooperate with the federal government's draft measures, for the purpose of fighting World War I in Europe, was also seen as a danger to national security.The following are examples of the cases involved in this model: *Abrams v. United States (1919), Gitlow v. New York (1925), and Whitney v. California (1927).*

In *Abrams v. United States (1919),* the Supreme Court upheld the convictions of five persons who had been charged with violating the *Espionage Act of 1917* when, thinking that they had the free speech rights to do so, they circulated pamphlets that were critical of the U. S. government's involvement in World War I*(First Amendment Timeline, 3).* The *Espionage Act* made it a crime "to willfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or navalforces of the United States … or to willfully obstruct the recruiting or enlistment service of the United States" *(First Amendment Timeline, 3)*. In sum, this case set the precedent that, when there wasa compelling national security interest in enacting a law, the government certainly possessed the right to do so even at the expense of the speech rights of the citizenry.

In *Gitlow v. New York (1925),* the Supreme Court upheld the state of New York's 1902 *Criminal Anarchy Statute* that had convicted *Benjamin Gitlow* for writing and distributing a socialist document referred to as*The Left-Wing Manifesto*. The law made it a felony to advocate "the doctrine that organized government should be overthrown by force or violence, or by assassination … or by any unlawful means, or to publish a writing so advocating" *(Harvard Law Review, 199).* In sum because, by virtue of his behavior,*Gitlow* appeared to have advocated the violent overthrow of government -an act deemed athreat to security and stability - the court did

not accept the view that he was entitled to this type of free speech or expression. As a result, the New York's*Anarchy Law* was allowed to stand clearing the path for *Gitlow's* incarceration.

In *Whitney v. California (1927),* the Supreme Court upheld the 1919 State of California's *Criminal-Syndicalism Law* that had convicted *Charlotte AnitaWhitney,* for allegedly helping to organize the *Communist Labor Party* which, the state argued, advocated the violent overthrow of the government *(Notable First Amendment Court Cases, 2)*. Particularly, the California law established "as the essence of criminal syndicalism, the use of force or violence directed against eitherperson or property to effect a change in industrial or political organization" *(California Law Review, 1922, 512)*. In sum, by her conviction, the Supreme Court allowed the security of the U. S. to take precedence over the speech rights of a citizen whose alleged actions were deemed inimical to the performance of a vital governmental function.

Second, through *the Clear and Present Danger Test*, the Supreme Court agreed that "Congress had the right to legislate against actions that led to a clear and present danger that Congress, in turn, had the right to prevent" *(DavidSchultz et al, 2011, 796).*But although this test is similar to the bad tendency test, given its lack of recognition of speech that produces harmful effects, it is nevertheless less restrictive in the sense that it "… requires the government to demonstrate that the specific speech, in the context in which it occurred, created a danger to the achievement of permissible governmental objectives and that the likelihood of harm is both substantial (clear) and proximate (present)" *(Rossum and Tarr, 2014, 200).*

There were, at least, two major political conditions that were prevalentin this period whichappeared to have prompted thepromulgation of the clear and present danger doctrine. One, World Wars I and II posed national security concerns to which the Court responded by limiting speech; although not as stringently as in the bad tendency test. Two,the "Dissatisfaction with the suppression of speech and publications [which had been] possible under the bad tendency test, as shown in the prosecution of opponents of World War I and of political radicals during the so-called Red Scare following the war, also led to thedevelopment of an alternative test" *(Rossum and Tarr, 2014, 200).*

In other words, the Court was pressured by domestic political factions such as the *Civil Liberties Bureau* (which later became the *American Civil Liberties Union*),having been formed in 1917 in opposition to the *Espionage Act*,to be more lenient in granting more free speech and free press rights to citizens. Thus, in this situation of national security concerns amidst the application of domestic political pressure for more rights, the Court appeared to have performed a balancing act by granting some rights while still denying others as the political circumstancesdictated.The following cases, in which the assertions above are demonstrated, are examplesthat are typical of this model: *Schenck v. United States (1919), Herndon v. Lowery (1937) Dennis v. United States (1951), Brandenburg v. Ohio (1969)(Rossum and Tarr, 2014, 200-201*.

In *Schenck v. United States (1919),* the Supreme Court affirmed the conviction of *Schenck* for conspiring to violate the *Espionage Act of 1917* by attempting to incite insubordination in the armed forces and interfere with the recruitment and enlistment efforts of the U.S. government as it prepared to fight in World War I. In this regard,the court disagreed with *Schenck's* defense that his actions were protected by the First Amendment in the sense that such actions were dangerous to U.S. national security especially in times of war. In his opinion,*Justice Wendell Holmes*provided a succinct explanation of this concept: "When a nation is at war, many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right" *(Joshua Waimberg, 2015, 6)*. In sum, the defendant (Schenck) did not have the free speech rights which he thought were at his behest when he engaged in actions that apparently ran counter to a compelling governmental interest in the arena of national security.

In *Herndon v. Lowery (1937),* the Supreme Court reversed the state of Georgia's conviction of *Angelo Herndon*for allegedlyhaving distributed communist paper materials which advocated the overthrow of the government. According to the decision of the Supreme Court,*Georgia's Insurrection Statute* was in violation of the First Amendment to the U.S. Constitution *(Brown-Nagin, 2011, 285)*. In this case, the Court granted "… broader protection to revolutionary speech than it had in *Gitlow v. New York*,ruling that a state must be able to show a direct connection between the speech and an actual attempt to overthrow the government" *(Hendrik Booraem, 2002, 1)*.In addition, "It was also the first time a state law had been overruled on those grounds

and the decision heralded a major expansion in federal court protection of free speech" *(Hendrik Booraem, 2002, 5)*. In sum,perhaps because of an apparent decline of the threat of anarchy in the U. S., this ruling differed radically from the ruling in *Gitlow* in which speech rights had beenseverely curtailed by the Court.

In *Dennis v. United States (1951)*, however, the Supreme Court upheld the convictions of 12 Communist Party members for violating the *Smith Act of 1940*. The *Smith Act*, also known as the *Alien Registration Act of 1940*, made it unlawful to advocate or belong to a group that advocated the violent overthrow of the government. In this decision, the court stated that speech which possessed the potential to cause anarchy would not be regarded as protected speech.With this decision, the Court appeared to have resorted to curtailing speech rights perhaps because of the threat posed by the *Cold War* between the U. S. and the Soviet Union; in addition to the domestic influences of the renowned anti-communist congress-member *Senator Joseph McCarthy*. In addition, because of the striking similarities between the *Herndon*and the *Dennis*cases, the Court's rulings in both cases appear to have contradicted each other.

In *Brandenburg v. Ohio (1969)*, the Supreme Court reversed the conviction of *Clarence Brandenburg* on the basis that the *Ohio Criminal Syndicalism Act* of 1919, under which he had been convicted for allegedly advocating violence, violated his right to free speech. The Ohio statute had made it illegal for any person to advocate "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" *(Brandenburg v. Ohio 395 U. S. 444 [1969] ACLU of Ohio, 1)*. Specifically, "The court found that the Ohio Criminal Syndicalism Statute ignored whether or not the advocacy it criminalized actually led to imminent lawless action" *(Brandenburg v. Ohio 395 U. S. 444 [1969] ACLU of Ohio, 1)*.

In this case, two issues are worthy of observation. One, the security threats to the U.S., which had typified the era in which the bad tendency test had been prevalent, were not necessarily present in this era of the clear and present danger test. As a result, this manifestation appeared to have provided the climate within which the Court was able to cede more First Amendment rights to citizens. Two, the Court's rulings in the *Dennis Case* and the *Brandenburg Case* also appeared to have contradicted each other. In support of this contention, some have stated that "In point of

fact, *Brandenburg* completely did away with *Dennis'* central holding and held that "mere advocacy" of any doctrine, including one that assumed the necessity of violence or law violation, was *per se* protected speech" *(Brandenburg v. Ohio- Wikipedia, 3)*.

Third, through *the Balancing Test*, the Supreme Court imposed the principle of "…[weighing] the importance of the interest advanced by the challenged governmental action against the degree to which it [the government] restricts expression" *(David S. Bogen, 1979, 387)*. In other words, this test was applied in cases in which so-called constitutionally-protected individual rights came into conflict with governmental interests in order to determine which interests outweighed the other in importance *(Legal Dictionary)*.The selected cases applied in this category are:*Kovacs v. Cooper (1949)* and *Barenblatt v. United States (1959)(Rossum and Tarr, 2014, 201)*.

In *Kovacs v. Cooper (1949)*, the Supreme Court upheld *Charles Kovacs'* conviction of "violating Ordinance 430 of the City of Trenton, which prohibited the use of sound amplifiers and other instruments that emitted 'loud and raucous noises' on public streets" *(Kovacs v. Cooper, the OyezProject at IIT, 1)*. In an effort balance the liberty interests of *Kovacs* relative to the governing interests of the City of Trenton, the Court stated that"Since the ordinance furthered Trenton's interest in maintaining the quiet and tranquility so desirable for city dwellers, the ordinance did not violate the Free Speech Clause" *(Kovacs v. Cooper, the Oyez Project at IIT, 1)*. In this case, a compelling governmental interest, which was the preservation of a public interest, took precedence over the assumed liberty rights of a citizen to play loud music in the streets.

In *Barenblatt v. United States (1959)*, the Supreme Court upheld the conviction of *Lloyd Barenblatt* for contempt of Congress because of his refusal(claiming free speech and association rights) to respond to questions posed to him by members of the House Committee on Un-American Activities (HCUA) regarding his affiliation with the Communist Party and his harboring of other political and religious beliefs *(Barenblatt v. United States,the Oyez Project atIIT)*. In an attempt to balance the First Amendment interests of *Barenblatt* relative to the governmental interests of Congress based on national security considerations, the Court determined that the First Amendment does not protect a witness from all lines of questioning. Therefore, according to the Court, for as long as the Congressional enquiry was conducted with

the objective of assisting the legislative process in protectinga compelling governmental interest, it would therefore follow that the contempt citation was legitimate *(Barenblatt v. United States, the Oyez Project at IIT, 1)*.

Again, in this case, the Court's balancing of interests favored those of the government over those of the citizen.Moreover, it is significant to note that this post-World War II period was also epitomized by the *Cold War*, which generated a fear of communism that was also referred to as the *Red Scare*. Given this political climate, committees - such as the HCUA - were formed in Congress to prevent the likelihood that communist influences might pose a destabilizing threat to the survival of the U.S. as a free and democratic society.*Senator Joseph McCarthy* or *McCarthyism* had also emerged in this period as bulwark against any likely communist encroachments into the U. S.

Fourth, through *the Strict Scrutiny Test*, regarded as the Court's current approach *(Rossum and Tarr, 2014, 202)*, the Supreme Court requires "… that [when interests collide] the government must *show*[prove] that it has a compelling interest, and also that the law addressing that interest is both narrowly tailored and [among other policy alternatives] the least restrictive means of securing that interest" *(David Schultz et al, 2011, 802)*.In sum, under this test, the burden of proof is placed directly on the government by the Court. The landmark case addressed in this category, regarding citizens and their rights to government employment, is *Elrod v. Burns (1976)(Rossum and Tarr, 2014, 202)*.

In *Elrod v. Burns (1976)*, because certain government employees were given an ultimatum to either switch their political loyalty to the political party in power or lose their employment, "The court concluded that dismissal of non-policymaking employees solely because of political affiliation impermissibly infringed [on] their first amendment rights of free political association"*("Elrod v. Burns: Chipping at the Iceberg of Political Patronage", 1977, 226)*. In this case, the Sheriff's Department of Cook County, Illinois, where the employees had been dismissed, was unable to prove "… the existence of some vital, as opposed to merely legitimate, state interest which is furthered by the practice of patronage dismissal" *(Bill Steffes, 1977, 994)*.

However, even though the burden of proof in this test is the responsibility of the government and not necessarily that of the citizenry, which *appears* to have increased the chances that citizens might win First Amendment cases against the government, there are still some uncertainties regarding the so-called absolute *right* of citizens to government employment. For example, "Other [federal] courts had circumvented the constitutional question [First

Amendment rights] by either characterizing government employment as a 'privilege' which could be terminated at will or by holding that employees who had accepted patronage positions had impliedly 'waived' their right to challenge subsequent discharge on the same basis"*(Steffes, 1977, 992).*Also, in this case, "The plurality [the Court's majority that decided the case], although agreeing that partisan discharge falls within the broad prohibitions of that case, noted that first amendment rights are not absolute and that their exercise can be restrained for appropriate reasons"*(Steffes, 1977, 994)*. Thus, as demonstrated, the issue as to whether citizens can be deprived of their so-called First Amendment rights (speech and association) through patronage dismissals in government employment still remains somewhat unclear.

The Supreme Court's Attempt to Regulate Speech through the Application of the Fighting Words Doctrine and its Reversal of Fighting Words Convictions

In this category, an attempt will be made to achieve two major objectives. First, an examination of the origin, the stated meaning, and attempted application of the *fighting words* doctrine as promulgated in *Chaplinsky v. New Hampshire*. Second, an examination of the Supreme Court's reversal of *fighting words* convictions which emanated from the lower U. S. courts.

Chaplinsky v. New Hampshire (1942)

In this case, the U.S Supreme Court upheld the conviction of *Walter Chaplinsky* under New Hampshire's *Offensive Conduct Law*, which stated that "No 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" *(Burton Caine, 2004,446).Chaplinsky*, a

Jehovah'sWitnessPreacher,was said to have insulted a public official along with the government of Rochester, New Hampshire, when he uttered these face-to-face statements to *James Bowering*, the City of Rochester's Marshall, in a public place in an apparent violation of the law stated above: "You area God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists and agents of Fascists" *(Burton Caine, 2004, 446).*

The principle that emerged from the Court's decision, referred to as *fighting words* has continued to be controversial not only because of its purported inequity perpetrated as a form of religious persecution against the *Jehovah's Witnesses* during the 1940's; but also, as a result of the confusion it has generated regarding attempts by other courts to apply it sensibly and reasonably to real cases. Thus, in its majority decision, written by *Justice Frank Murphy*, the Supreme Court attempted to provide a range of limitations, including *fighting words*, to free speech rights. According to *Murphy*, "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 utterance inflict injury or tend to incite an immediate breach of the peace"*(David Hudson, 2012, 2)*. In other words, it appears, that for statements to constitute *fighting words* they should have been provocativeenough to elicit some type of negative reaction or "trouble"from the recipient, immediately after they have been uttered.

However, some critics have complained about the lack of clarity of the meaning for *fighting words*. *Caine*, for example has stated that "In view of the imprecision of an opinion [in *Chaplinsky*] strewn with rambling and loose language, it is not easy to determine the specific parameters of 'fighting words' …" (*Burton Caine*, 2004, 450). Thus, in an effort to demonstrate the

magnitude of this imprecision or difficulty in comprehending the meaning of the Court's attempted fighting words definition, *Caine* proceeds to advance a ten-point model of what he theorizes the Court may have meant when it advanced this concept in *Chaplinsky* (*Burton Caine, 2004, 450-451)*.It is important to take into consideration that, in his model, *Caine* excludes the

following situational categories: "… addresses [made] to crowds or [addresses made] to more than one individual targeted for insult; communications by telephone, letter, public media, or third persons; and insults, which provoke a violent response but should not" *(Burton Caine, 2004, 451)*. The itemizations below constitute a summary of the salient aspects of *Caine's* model.

"Words advanced to another individual face-to-face in a public place 'which by their very utterance inflict injury' upon the addressee".

Words addressed to another individual face-to-face in a public place 'which by their very utterance inflict injury' upon another person, institution, or place".

"Words addressed to another individual face-to-face in a public place which 'have a direct tendency to cause acts of violence by the person' addressed by reason of insult to the addressee [recipient]".

"Words addressed to another individual face-to-face in a public place which 'have a direct tendency to cause acts of violence by the person addressed', by reason of insult to persons other than the addressee".

"Words addressed to another individual face-to-face in a public place which 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'".

"Words addressed to another individual face-to-face in a public place which 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 … morality'".

"'Epithets' addressed to another individual face-to-face in a public place".

"Words addressed to another individual face-to-face in a public place, which amount to 'personal abuse'".

"Words addressed to another individual face-to-face in a public place that do not convey information".

"Words addressed to another individual face-to-face in a public place that do not convey opinion".

In addition to the constitutional vagueness of *fighting words*, as *Caine* has determined, other academics have implied that the Court also appeared to have had a political motive for the application of *fighting words* directed at *Chaplinsky* and the *Witnesses* within the particular period in which the concept was promulgated. According to the *First AmendmentCenter*, *Shawn Francis Peters*has indicated that: "He [*Chaplinsky*] was in court because he was the victim of religious persecution, not because local authorities had a genuine interest in regulating public behavior" *(DavidHudson, 2012, 3).*

Therefore, in an effort to elaborate on this theme, *Peters* proceeds to posit historical accounts, itemized below,which highlight the political climate that was dominant in the U.S. that may haveset the stage for the Supreme Court'sconcocted *Chaplinsky* decision*(Shawn Francis Peters, 1990, 282-285).*

"… in the early and mid-1940s, vigilantes in every state of the union brutalized Jehovah's Witnesses. Targeted largely because they refused to salute the American flag, Witnesses throughout the United States were pummeled in everything from riots involving hundreds of people to scuffles among a handful of men".

Jehovah's Witness members "were beaten, kidnapped, tarred and feathered, throttled on castor oil, tied together and chased through streets, castrated, maimed, hanged, shot, and otherwise consigned to mayhem".

"The Supreme Court of the United States' notorious ruling in *Minersville School District v. Gobitis [Gobitas]*, handed down in June of 1940, helped to ignite some of the worst anti-Witness violence of the period. In an opinion written by Justice Felix Frankfurter, the Supreme Court dismissed a claim that the enforcement of a public school district's compulsory flag salute regulation violated the Witnesses' right to free exercise of religion".

The timing of the *Gobitis* ruling was unfortunate for the *Jehovah'sWitnesses* because "A number of European countries, including France, were in the process of being overrun by Germany in the spring of 1940, and many Americans believed that a secret network of Nazi spies and saboteurs – a 'fifth Column', it was called – was at work in the United States. [The] Witnesses, who not only spurned the flag salute but also

denigrated 'patriot' groups like the American Legion, were accused of distributing un-American propaganda and thus attempting to lay the groundwork for a German invasion".

The ruling in the *Gobitis* case was thus, perhaps deliberately, "misinterpreted as [an] official confirmation of their [*Jehovah's Witnesses'*] disloyalty [to the United States]".

"Authorities in dozens of states and communities for instance, enacted new laws or applied existing ones to suppress their [*Jehovah's Witnesses'*] First Amendment freedoms of religion, speech, and assembly".

"Throughout the war years, the American Civil Liberties Union and the Justice Department received hundreds of complaints from highly qualified women and men who had been fired from or forced to quit their longtime jobs because they wouldn't salute the American flag".

It is significant to note that, prior to the eruption of the public sentiments that this religious sect was a looming threat to national security - given the security concerns engendered by World War II - the Supreme Court wassaid to have liberally extended First Amendment protections to the *Jehovah's Witnesses*. For example, even"Justice Murphy who wrote the *Chaplinsky* opinion, was known for his sensitivity to First Amendment freedoms" *(David Hudson, 2012, 2),*whichbenefited the *Jehovah's Witnesses* in the cases over which he had presided.These are a small sample of cases, before and even after 1942,in which the Court ruled in favor of the *Witnesses*:one, the leafleting decision in *Lovell v. City of [Griffin] (1938)*; two,the free exercise of religiondecision in*Cantwell v. Connecticut (1940)*; and three, the flag salute decision in *West Virginia Board of Education v. Barnette (1943)(DavidHudson, 2012, 2)*. However, when the largely security-generated political pendulum swung against the *Witnesses*, they lost not only the *Chaplinsky* case in 1942 but also the*Cox v. New Hampshire* case in 1941. Therefore, based solely

on the history of the Court's interpretation of First Amendment rights, this is further evidence of the conditional nature(not the absolute nature) of free speech in the U.S.

The U. S. Supreme Court's Reversal of Fighting Words Convictions from the Lower United States Courts

Despite the lack of clarity of the *fighting words* doctrine and the vigorous criticisms levied against it as a result, and despite the fact that"… the Supreme Court has [itself] reversed almost every conviction [emanating from the lower courts]based on arguments that the speaker has used 'fightingwords'" (*Ginsberg et al, 2013, 105)*;the Supreme Court has never made any concerted effort to overturn the *Chaplinsky* decision (David Hudson, 2012, 3).This has, in turn, meant that the *Chaplinsky* decision continues to have an enormous impact on First Amendment law amidst the confusion it also continues to ferment among the citizenry.*Robert O'Neil*, a noted First Amendment scholar,has highlighted this view when he stated that "the Chaplinsky decision has caused no end of confusion during the ensuing six decades" *(David Hudson, 2003, 2)* following its initial promulgation in 1942.

Therefore, in this sub-category, an attempt will be made to addressa sample of *fighting words*convictions from the lower courts which the Supreme Court reversed, and the Court's reasoning underlying those reversals. These cases will reveal an enormous amount of confusion, regarding the Court's apparently contradictory interpretation of *fighting words*. Explained from another perspective, the Court's "definition/explanation"of what constitutes *fighting words* in *Chaplinsky* appeared radicallydifferent from its "definition/explanation"of the same doctrine in its reversal of the lower courts' *fighting words* convictions. Viewed from another standpoint, even though the gravity of the actions of some of the defendants appeared to have been much worse than, or at the very least equal to, the actions of *Chaplinsky* regarding their potential for "breaching the peace", the Court nevertheless chose to dismiss those actions as not falling within the parameters of the *fighting words* doctrine.These actions of the Court constitute further proof that the rights to free speech are based on a set ofconditionsthat are to be identified by the Court. The cases to be examined are limited to: *Terminiello v. City of Chicago (1949); Cohen v. California (1971); and Gooding v. Wilson (1972);(David Hudson, 2003, 2-6).*

In *Terminiello v. City of Chicago (1949)*, the Supreme Court overturned the conviction of Catholic*Father Arthur Terminiello* who the City of Chicago had accused of uttering *fighting words* when he gave asupposedly racist and anti-Semitic inflammatory speech, in a Chicago auditorium, to the *Christian Veterans of America*. At the same time,the priest was said to have taunted and ridiculed approximately 1,000restless and angry people protesting the speech outside the auditorium that the police were unable to keep under control. The reasoning underlying the Court's decision, that *Terminiello's* actions did not constitute *fighting words*, is encapsulated in its majority opinion:"Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at the prejudices and preconceptions and have profound unsettling effects as it presses for acceptance"*(David Hudson, 2003, 3)*.

A more detailed description of the *Terminiello* incident follows: "As he [*Terminiello*] spoke window panes were being shattered by bricks and other missiles hurled from outside, doors battered in, and ice-picks, rocks and bottles thrown at police stationed at the doors. Cursing and other threatening utterances, easily audible inside the auditorium, emanated from without during the entire session. It was in this electrifying atmosphere that the defendant [*Terminiello*] proceeded to deliver an explosive and infuriating speech, vehemently denouncing those outside and certain other individuals and groups in the most vicious terms of contempt imaginable. The response from his audience, friendly for the most part, was instantaneous and many became aroused and enraged" *(Thomas Bolan, 2013, 83)*. In addition, *Terminiello* also condemned communism and implied that the ideology was a threat to the U.S. *(Metapedia, "Arthur Terminiello", 3-5)*.

Thus, given the specifics underlying the *Terminiello* case asoutlined in the previous paragraph,and given the technical issues that have been addressed so far including parts of the model posited by *Caine* andthe Court's opinion in *Chaplinsky*, fiveprobing questions will be advanced regarding the validity of the Court's reversal of the lower court's conviction of *Terminiello*. First, did the protesters, as individuals, resort to unruly behavior because they felt "injured" by *Terminiello's* contemptuous categorization of them? Second, did *Terminiello's*

deliverance of his "explosive and infuriating speech", which may have been heard by individual protesters not in the auditorium, contribute to their "excessive" rioting behavior? Third, were "many" individual members of the audience (in the auditorium) face-to-face, "enraged" as a direct result of *Terminiello* "vehemently denouncing …individuals and groups in the most vicious terms of contempt imaginable? Fourth, since *Champlinsky*and his *Jehovah's Witnesses* wereperceived, perhapsmomentarily,as anti-establishment figures; whereas, *Terminiello*, by virtue of his nationalism rhetoric,may have been perceived as a pro-establishment figure, could this difference had played a role in the diverging outcome of these cases at the Supreme Court?Fifth, given the characteristics of the *Chaplinsky* and *Terminiello* incidents, which one clearlydemonstrateda much stronger capacity to have "incite[d] an immediate breach of the peace"?

In *Cohen v. California (1971),* the Supreme Court overturned the conviction of *Paul Cohen* who had been found guilty of violating a California law which prohibited the malicious and willful disturbance of "the peace or quiet of any neighborhood or person by … offensive conduct" *(David Hudson, 2003, 3),* which would be tantamount to *fighting words*. *Cohen* had expressed his opposition to the Vietnam War by wearing a jacket with a four-letter word (an expletive) that was inscribed on it in an effort to protest the draft.In its decision, "… the Court reasoned that the expletive, while provocative, was not directed toward anyone; besides, there was no evidence that people in substantial numbers would be provoked into some kind of physical action by the words on his jacket" *("Cohen v. California" Oyez, 2016, 2).*

The issues to be considered regarding this decision follow. First, in as much as "… there was no evidence that people in substantial numbers would be provoked into some kind of physical action by the words on his [*Cohen's*] jacket"; how does the reasoning underlying this ruling compare to the ruling in *Terminiello* in which there was abundant evidence that people in substantial numbers (about 1,000) were provoked into physical action, by *Terminiello's* speech directed at the Jews and the protesters,which ultimately resulted in damage to property? Second, according to *Robert O'Neil*, "Cohen and Chaplinsky cannot coexist indefinitely, because one [Chaplinsky] declares that offensive epithets are 'no essential part of any exposition of ideas'; while the other

[Cohen], insists with equal conviction that 'one man's vulgarity is another's lyric'" *(David Hudson, 2003, 3)*.

In *Gooding v. Wilson (1972)*, the Supreme Court overturned the conviction of *James Wilson*, who had been convicted by the state of Georgia, for having violated a breach-of-the-peace statute when he hauled vulgarities at a Police Officer*(David Hudson, 2003, 3)*. The Georgia statute established that "… any person who shall, without provocation, use to 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" *("Gooding v. Wilson" Oyez, 2016, 1)* to be prosecuted as *fighting words*.But even though the Court reversed the state's conviction partly because "… other Georgia courts had interpreted the statute to apply to more than fighting words" *(David Hudson, 2003, 3)*;*Wilson's* expletives, appeared to have been much more representative of *fighting words*(using *Caine's* fighting words model as well as the Court's own decision in the *Chaplinsky* case)than the words uttered by*Chaplinsky*to the City Marshall for which his conviction was allowed to stand.

Confusion amongthe Lower Courts in their Interpretations of what Speech Constitutes Fighting Words

In an attempt to explain the challenges in determining what is and what is not free speech at the lower courts (federal and state courts that operate below the Supreme Court), two major objectives will be undertaken. These objectives are: one, an examination of the contradictory interpretations of *fighting words* in various lower U.S. courts; and two, an examination of the confusion underlying the applicationof the*qualified immunity*concept in *fighting words* cases.

Contradictory Interpretations of Fighting Words in the Lower Courts

In the cases that follow, certain lower courts have ruled that, despite their highly inflammatory tone, the expletives or insults used by citizens against security officialsdid not amount to *fighting words*. These cases are:*U. S. v. McDermott (1997)*, adjudicated by the Eastern District Court of Pennsylvania; *Brendle v. City of Houston (2000)*, adjudicated by the Court of Appeals of the State of Mississippi;*Johnson v. Campbell (2003)*, adjudicated by the third Federal Circuit;

and*Cornelius v. Brubaker (2003),*adjudicated by the Minnesota District Court *(David Hudson, 2003, 4-5).*

But at the same time, in the cases that follow, other lower courts ruled that, despite their similarities in magnitude to the cases stated above, the expletives hauled at government officials and other citizens did amount to *fighting words*. These cases are: *State v. Clay (1999),* adjudicated by the Minnesota Court of Appeals; *State v. York (1999),* adjudicated by the Maine Supreme Judicial Court; *State v. Hubbard (2001),* adjudicated by the Minnesota Court of Appeals; *In Re: John M. (2001),* adjudicated by the Arizona Court of Appeals; and *Wisconsin v. Ovadal (2003),* adjudicated by the Wisconsin Court of Appeals *(David Hudson, 2003, 5).*

Another significant dimension of the two sets of cases above is that, despite the strikingsimilaritiesof the circumstances involved in the cases relative to the "possible" definitions for *fighting words* as delineated in *Caine's*model, the rulings in both sets of cases still differed radically. In other words, when the circumstances in both sets of cases are applied to *Caine's* model, they show clearly that: the individuals involved interacted face-to-face in a public place; the words uttered had the capacity to inflict injury (even though *Caine* alsostressed that the Court was unclear about exactly what constitutes injury [note 41 page 450]); the words have a tendency to provoke violence emanating from their recipients (even though some courts, including the U. S. Supreme Court, have also determined that police officers are to be held to a higher standardof behavior if the speech uttered is likely to lead to an immediate breach of the peace); the words (insults) are no essential part of the exposition of ideas; the words may amount to personal abuse; and the words neither convey any information of value nor do they convey any opinions.

Further, other courts have also held that it may not be necessary to take the response of the recipient of the speech into account in order to determine whether that speech qualifies as *fighting words* or not. This particular concept is illustrated clearly bythe Minnesota Court of Appeals in its decisionin *State v. Clay (1999)*:"A defendant can be convicted for disorderly conduct based on the utterance of fighting words without the prosecution having to prove that violence actually resulted. The focus is properly on the nature of the words and the

circumstances in which they were spoken rather than on the actual response. The actual response of the addressee [recipient] or object of the words is relevant, but not determinative, of the issue of whether the utterances meet the fighting words test" (*David Hudson, 2003, 5).*

Regarding the varied nature of these rulings in the U. S., it should be emphasized that, in as much as lower federal courts may have a tendency to follow the lead of the U. S. Supreme Court in determining the outcome of *fighting words* cases, state courts might not necessarily conduct themselves in this manner. Thus, decisions regarding *fighting words* may vary extensively across the states as demonstrated in the limited examples of cases listed above.

Confusion Underlying the Application of Qualified Immunity in Fighting Words Cases

Another avenue of confusion is when *qualified immunity* is employed as a defense mechanism in *fighting words* cases *(David Hudson, 2009, 5).* As a concept,*qualified immunity,* which emerged from the Supreme Court's decision in*Harlow v. Fitzgerald (1982),* is explained as follows: "… a public official [who performs] a discretionary function enjoys qualified immunity in a civil action for damages, provided his or her conduct does not 'violate clearly established statutory or constitutional rights of which a reasonable person would have known'" *(Karen Blum, 2008, 502).* In other words, a major question of enquiry in such cases "… becomes whether a reasonable police

officer should have known that he or she violated clearly established constitutional law [or statutory law] in arresting an individual for disorderly conduct or breach of the peace partly because of the person's profane or insulting language" *(David Hudson, 2009, 5).* Therefore, in this regard, " If it is unclear whether an individual engaged in fighting words, the [government] official may receive qualified immunity even if the official wrongly assume[d][that] the individual uttered fighting words" *(David Hudson, 2009, 1).* This confusion is highlighted by thesecases: *Purtell v. Mason (2008)* and *Pearson v. Callahan (2009)(David Hudson, 2009, 5-6).*

In *Purtell v. Mason (2008),* the Appeals Court of the Seventh Federal Circuit made two rulings which addressed *fighting words* and *qualified immunity* respectively. In the *fighting words* ruling, the court stated that *Purtell's* behavior or speech, in erecting tombstones with insults inscribed

on them that were supposedly directed at his neighbor, did not amount to *fighting words*. This ruling, in effect, nullified the charge which had originally been levied against *Purtell* by *Police OfficerMason*. According to the court's reasoning, the words were not abusive and provocative to the extent that they might have incited an immediate breach of the peace. In the *qualified immunity* ruling, on the other hand, the court granted *Officer Mason qualified immunity* because, according to the court, "his mistake in thinking he could constitutionally order *Purtell* to dismantle the tombstone display on pain of arrest [or risk being arrested if he refused] was one a reasonable officer might make in this situation" *(Purtell v. Mason, Seventh Circuit, No. 06-3176, 21).*

In this case, the outcome of the deliberations appeared to have been the direct result of the difficulty posed by the absence of a clear definition for *fighting words*. Proof of this assertion is demonstrated in the court's struggle to rationalize its decision which follows:"Although the fighting words doctrine has been with us for decades,it has not been entirely clear … whether speech that injures but does not incite an immediate breach of the peace is protected or unprotected. And Officer Mason reasonably may have misunderstood the immediacy requirement of the fighting-words doctrine in the context of thiscase. He did have a fight on his hands, and he reasonably believed he had the authority to force the removal of the irritant in order to keep the peace. In misapprehending the constitutionally protected status of the Purtells'

tombstone speech, Officer Mason did not violate clearly established rights. First Amendment line-drawing is often difficult, even in hindsight. Officer Mason's on-the-street judgment, though mistaken, is entitled to qualified immunity" *(Purtell v. Mason, Seventh Circuit, No. 06-3176, 21-22).*

In *Pearson v. Callahan (2009),* the U. S. Supreme Court arrived at a decision regarding *qualified immunity* which altered the legal landscape in constitutional cases.*Hudson* explains this phenomenon by stating that "Previously, in considering qualified immunity, a court – as the 7thCircuit did in Purtell – first had to determine whether there was a constitutional violation. Then the court would consider whether the law was clearly established. But in Pearson v. Callahan (2009), the Supreme Court ruled that judges can decide the 'clearly established'

question first without having to tackle the often-difficult question of whether there was a constitutional violation" *(David Hudson, 2009, 6)*. In other words, this Supreme Court's ruling allowed the lower courts, in their decision-making, to handle the issues of constitutional violations and established laws at their own discretion *(Pearson et al. v. Callahan, Oyez, Chicago-Kent College of Law, 3)*.

This decision, which constituted a radical departure from the modus operandi of the past, is expected to have a tremendous impact on *fighting words* cases that involve *qualified immunity*. This is because, in the case of police officers for example, courts may completely avoid the question as to whether "certain profane or insulting speech [directed at the officers]constitute fighting words" (the constitutionality issue) and, instead; simply rule in their favorby claiming that they have not violated established law (the statutory issue) *(David Hudson, 2009, 6)*.This strategy appears to have been designed to make the work of government officials, in which discretion is exercised, much less complicated, thereby enabling them to function in their various capacities. Thus, "The varying decisions in the lower courts [coupled with] the complexity of the qualified immunity doctrine, show that judges struggle with whether profane speech crosses the line from protected criticism or protected expression into the realm of unprotected fighting words" *(David Hudson, 2009, 6)*.

Conclusion

Quite a few of the First Amendment restrictions which government had imposed on citizensfor the purpose of regulating speechand other related actions are still in effect. One dimension of regulating speech, despite some people's thinking to the contrary, is to prevent citizens from engaging in actions which the government has deemed notto be inthe public or national interest. As a result, pieces of Congressional legislation and Supreme Court rulings have remained active despite vigorous efforts by organized advocates of free speech rights to repeal or overturn them as the case may be. Selected examples of these landmark regulations, which are addressed in sequence below, are: one, the *Espionage Act of 1917*, two, the *Smith Act of 1940*, and three, the *Chaplinsky ruling of 1942*.

The Espionage Act of 1917

The *Civil Liberties Bureau*, which later became the *American Civil Liberties Union (ACLU)*, was established in 1917 as already stated. Since the impetus underlying its formation was the enactment of the *Espionage Act (First Amendment Timeline, 3)*, which limited the speech rights of American citizens, the organization's primary purpose then became an effort to prevent the government from continuing to restrict, what the groupconsidered to be, the First Amendment rights of American citizens. However, although the ACLU's condemnation of this particular lawhas been on-going for approximately 100 years, the law has neither been repealed by Congress nor has it been overturned by the U. S. Supreme Court.

As a matter of fact, after the Court had allowed the conviction of *Schenck* to stand on the basis of the*clear and present danger* doctrine, a number of other *Espionage Act* charges have been imposed over the ensuing decades*(Joshua Waimberg, 2015, 9)*.A few examples of such charges follow. First, "In *Debs v. U.S. [1919]*, the U. S. Supreme Court [upheld] the conviction of socialist and presidential candidate Eugene V. Debs under the Espionage Act for making speeches opposing World War I" *(First Amendment Timeline, 3)*. Second,*Julius* and *Ethel Rosenberg* were charged, tried, convicted, and executed in the 1950's for "… allegedly passing atomic [weapons] secrets to Russia" *(David Casalaspi, Cold War Museum, 1)*.In specific terms, the couple had been charged with violating both the *Espionage Act of 1917* and the *Smith Act of 1940*.

Third, in the early 1970's, *Daniel Ellsberg* was charged for leaking portions of the *Pentagon Papers* containing information regarding the conduct of the on-going war in Vietnam *(Michael Ray, 2016, 1)*. Fourth, in 2013, *Bradley Manning* was sentenced to 35 years in prison for having leakedcertain classified information regarding the on-going war in Afghanistan *(Ed Pilkington, 2013, 1-2)*. Fifth, in 2013, *Edward Snowden* was charged with "theft … unauthorized communication of national defense information and willful communication of classified communications intelligence information to an unauthorized person" *(Finn and Horwitz, 2013, 1)*. Along with other examples that are not mentioned, the continuation of prosecutions under the

Espionage Act is evidence that, given vital national security considerations, the government might never be inclined to even contemplate the removal of the *Espionage Act* from its books.

The Smith Act of 1940

Since the *Smith Act of 1940* had been based on the prevention of the semblance of any form of advocacy toward the violent overthrow of the government, manyof those who had been charged under this lawwere members of the Communist and Socialist Workers Parties. The major trials of the *Smith Act* fall into three categories: one, the *Minneapolis Sedition Trial of 1941;* two, the *Great Sedition Trial of 1944;* and three, the *Communist Party Trials of 1949 and thereafter (Metapedia, "Smith Act of 1940", 1-4).*

First, the Minneapolis trials consisted of the prosecution of the leaders of the *Socialist Workers Party (SWP)* and the *U. S. Communist Party (USCP)*. The charges levied by the government are that "The SWP had advocated strikes and the continuation of labor union militancy during World War II under its Proletarian Military Policy; [in addition to having] some influence in Minneapolis [as a result of] its involvement with the Teamsters [labor]Union" *(Metapedia, "Smith Act of 1940", 1)*. Thus, given the manifestation of these supposed subversive activities, the party leaders were accused of attempting to conduct a violent overthrow of the government. In addition to this indictment, the USCP, whichhad opposed theparticipation of the U. S. in World War II, was particularly accused of interfering with the war effort as a result of the party's distribution of propaganda literaturepurportedly designed to dissuade public support for the war.

Second, "The Great Sedition trial of 1944, held in Washington, D.C., [consisted of] a group of some 30 individuals indicted for sedition, in the form of violations of the Smith Act" *(Metapedia, "Smith Act of 1940", 2)*. In particular, they were accused of having been an integral part of a global fascist conspiracy at the height of World War II. With the influences of *Benito Mussolini* of Italy and *Adolph Hitler* of Germany during World War II, fascism or extreme right-wing politics, was seen as incompatible with the mainstream political values of the U. S. However, even though the trial failed to convict any of the accused, since a mistrial was eventually declared *(Metapedia, "Smith Act of 1940", 3)*, it was nevertheless a manifestation of

the government's steadfast determination to ensure that citizens will not be granted free speech rights that may be detrimental to the survival of the state.

Third, the Communist Party Trials of 1949 began following the end of World War II in 1945. After 1945, the U. S. and the Soviet Union, who had been World War II allies in the defeat of the fascist regimes, began their ideological confrontation in the form of the *Cold War*. Therefore, by employing the *Smith Act*, the government turned its attention once again toward addressing this domestic threat through its observation of the activities of American communists. Thus, in 1949, several members of the *Communist Party USA (CPUSA)* were prosecuted under the *Smith Act*. The charges alleged that"they [CPUSA] conspired … to organize as the Communist Party and willfully to advocate and teach the principles of Marxism-Leninism [which is tantamount to an attempt at] overthrowing and destroying the government of the United States by force and violence" *(Metapedia, Smith Act of 1940", 3)*. On appeal, in 1951, the U. S. Supreme Court proceeded to uphold the conviction of the party membersby a majority vote of 6-2.

The trials of the American communists, under the *Smith Act*, did not end in 1949. Again in 1951, a total of 23 communists were prosecuted; and indeed by 1957, although the communist trials and indictments appeared to have receded somewhat, due to certain Supreme Court decisions favorable to party members that had beenmade in *Yates v. United States* and *Watkins v. United States*, over 140 communists werestill charged under this law *(Metapedia, "Smith Act of 1940", 3)*. Also in 1961, only a few years after 1957; the Supreme Court reverted to uphold the conviction of *Junius Scales* from a North Carolina court, under the membership clause of the *Smith Act (Metapedia, "Smith Act of 1940", 3)*.Even though the North Carolina indictment had been conducted in 1954, and *Junius Scales* had actually abandoned his communist party membership in 1956, the Supreme Court – without any further consideration - still upheld his conviction to serve a six-year sentence for having affiliated himself with the Communist Party*(Metapedia, "Smith Act of 1940, 3)*. This judicial behavior demonstrated not only the determination of the government to eliminate all influences of communism in the U. S., but also; it showed that the granting of speech rights is premised only under certain conditions as determined by the government.

The Chaplinsky Ruling of 1942

When the Supreme Court made its ruling against *Walter Chaplinsky*, it appeared as if *Chaplinsky' s* motivation, which led him to utter his speech for which he was convicted, had not been taken into judicial consideration adequately. For example, *Caine* has stated that *Chaplinsky* "… charged that City Marshall Bowering called him [an expletive], which [in turn] provoked him into responding in kind" *(Burton Caine, 2004, 448)*. In addition, according to *Caine*, apparently echoing one of his "possible definitions" for *fighting words* in his model, there "… was [also] no evidence that City Marshall Bowering was provoked to violence or that any mythical reasonable man [for that matter] would have been so provoked" *(Burton Caine, 2004, 454)*. This having been the case, then why was City Marshall Bowering himself, a state government official, not cited for having provoked *Chaplinsky* into uttering his so-called *fighting words*?

The response to the question above may have something to do with*Chaplinsky's* political speech in the streets; in addition to the religious behavior of the *Jehovah's Witnesses* as a group. It has already been established earlier in this essay that, although the *Witnesses* had been confronted by public resentment because of their religious practices, including *proselytizing* (preaching and attempting to convert others to one's faith), and their refusal to salute the U. S. flag, the Supreme Court had been forthcoming in protecting their First Amendment rights in prior cases.

The *Witnesses* had not, however, been so lucky when it came to the protection of their political speech which certain segments of the local public regarded as inflammatory and provocative. For example, in his evangelizing, *Chaplinsky's* speech included critical statements such as: the perfidy (treachery) of the Catholic Church; the idolatry of salutingthe flag (regarding the flag as God-like figure); "the real truth about President Roosevelt's envoy to Europe";

his condemnation of the appointment of Myron C. Taylor as the American Envoy to the Vatican which he regarded as "the most astounding piece of business thus far perpetrated by an elected servant of the people"; referring to priests as racketeers and all religions as a racket; and distributing religious and political literature to passers-by that some found to be distasteful *(Shawn Francis Peters, 1999, 286)*. This barrage of speeches then constituted the background

that ignited the confrontation between *Chaplinsky* and some of the passers-by who had been offended by his oratory.

The row that emerged from this confrontation, in turn, attracted the attention of the authorities. But when the authorities arrived at the scene, after *Chaplinsky* had already been assaulted physically by an angry mob, only *Chaplinsky* was arrested.Absolutely none of those who had beat and insulted him because of his speech was apprehended. In this regard, it is significant to note that, even though the mob responded violently to *Chaplinsky*, because its members felt provoked by his speech, the Supreme Court's *Chaplinsky* decision was based, not on the squabbles that had transpired between *Chaplinsky* and the mob which were extremely violent *(Shawn Francis Peters, 1999, 287)*, buton the verbal confrontation between *City Marshall Bowering*and *Chaplinsky* which was non-violent.

Exactly why the Court chose *Chaplinsky* to propound the *fighting words* doctrine would be a matter of speculation to some; although others, such as*Peters*, regard the act as an exercise in religious persecution as already stated. Nevertheless, it would be reasonable to mention that the manner in which the doctrine was developed by the Court appearsto have been somewhat incomprehensible. This is because, based on *Justice Murphy's* own categorization of *fighting words*; the doctrine would thus appear to have been more applicable to *Chaplinsky's* speech toward the crowd, which invoked a violent reaction from them, than it wouldhave to his confrontation with the City Marshall which did not invoke a violent response from the City Marshall.

Finally, American citizens will be unable to determine the absolute legality of their actions under the assumed protection of free speech for a number of reasons that have already been belabored in this essay. First, as free speech rights have evolved and continue to evolve both the legislatures and the courts, including the U. S. Supreme Court, have struggled to provide interpretations of which actions are to be protected and which ones are not to be protected as free speech. Second, after the Supreme Court eventually established the *fighting words* doctrine in 1942, in an attempt to separate speech that is unprotected from speech that is protected, it has continued to struggle extensively in its effort to provide an effective definition for exactly what

constitutes*fighting words*. Third, partly because the Court itself has not been very clear regarding an operational definition for *fighting words*, the lower courts in the country have themselves continued to make conflicting, confusing, and contradictory decisions in *fighting words* cases. Fourth, one major consequence of the factors stated above is that the government may randomly decide what speech is unprotected as it may deem expedient.

As he battled his case in court, *Chaplinsky* staged a very fierce defensein an effort to support what he had passionately believed to be his First Amendment rights under freedom of religion and freedom of speech *(Shawn Francs Peters, 1999, 287-296)*. But, most unfortunately for him, the New Hampshire State government and the federal government appeared to have been more preoccupied withlarger domestic security matters when they bothdisagreed with his assumptions decisively. Given these circumstances, it would appearas if *Chaplinsky's* case was particularly selected for the purpose of promulgating a doctrine with the potential to prevent Americans from using free speech rightsas leverage to engage in actions which the government might have deemed detrimental to the national interest.

Toward the fulfillment of this goal, the *Espionage Act* and the *Smith Act* constitute additional defense mechanisms which would ensure that no American citizen will ever be able toclaimor sustain free speech rights that the government might have deemed perilous to the U. S.After all, of what use is a Constitutionif the survival of the stateis to be endangeredas a result of the actions of citizens due to a lack of effective regulation of their constitutional rights.Therefore, given the fact that no clear definition for *fighting words* exists, and given the threat to national security caused bythe on-going domestic and global jihadism, do those who intend to continue"insulting" the *Prophet Mohamed* - with all the violent reactions that this form of speech is known to have provoked - still think that they would be ableto do so *ad infinitu m*under the assumed protection of free speech?

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