

ENCOURAGING CONGRESS TO ENCOURAGE SPEECH:  
REFLECTIONS ON *UNITED STATES V. ALVAREZ*

*Jeffery C. Barnum\**

Like many Supreme Court decisions, *United States v. Alvarez*<sup>1</sup> answered many questions. Can the government proscribe false statements solely because they are false? (No.) What must the government establish before regulating or proscribing speech? (Likely or actual harm.) Also like many Supreme Court decisions, *Alvarez* created (or resurrected) at least as many questions as it answered. How *much* harm is required before the government can regulate speech? How do courts and lawmakers discern the holding when no opinion garnered a majority of Justices?

Both judges and lawmakers look to the Court for guidance. While judges have the advantage of actual parties and concrete facts, legislators must gaze into the future to craft legislation that comports with the Court's decision while meeting the needs of their constituents. This challenging task is made all the more difficult when the Court's decision is fractured, with no single legal theory attracting the votes of five Justices. This article attempts to shed some light on the path forward for the legislative branch, bifurcating (as does the *Alvarez* decision) to address the harms posed by false claims of military awards. This article starts by examining the pre-*Alvarez* legal landscape of proscribing content-based speech,<sup>2</sup> then examines how the Court treated its own precedent in *Alvarez*, including an analysis of Justice Breyer's

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\* Jeffery C. Barnum graduated with high honors from the University of Washington School of Law, and is admitted to practice in the State of Washington. The author wishes to express his deep gratitude to Professor Ronald K. Collins for his assistance, feedback, and guidance on this article. Also, the author is eternally grateful for the continuing patience and support of his wife and daughters. Although Mr. Barnum is currently serving as a lieutenant with the United States Coast Guard, the views expressed in this article are those of the author alone and do not reflect an official position of the United States Coast Guard, Department of Homeland Security, or any other U.S. government agency.

<sup>1</sup> *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>2</sup> See discussion *infra* Part I.

concurrence and its application of intermediate scrutiny to content-based speech.<sup>3</sup> Of particular note is the emphasis on—and the differing treatments of—counterspeech, and its effect on the constitutional analysis.<sup>4</sup> Finally, both approaches to false statements of fact are applied to various approaches to addressing the harm of false claims of military valor: the plurality’s approach as applied to the Stolen Valor Act of 2012 (which recently passed the House by a vote of 410 to 3), and Justice Breyer’s intermediate scrutiny as applied to a statute designed to protect the reputation of military awards.<sup>5</sup>

### I. PROHIBITING LYING IS CONTENT-BASED REGULATION

Everyone agrees: proscribing falsehoods is a content-based regulation of speech.<sup>6</sup> Because content-based restrictions are presumptively invalid,<sup>7</sup> this fact presented problems for Craig Missakian,<sup>8</sup> the Assistant United States Attorney defending the Stolen Valor Act (SVA or the Act) before the Ninth Circuit. To successfully defend the SVA, Mr. Missakian had to establish that either the First Amendment didn’t apply to false statements of fact, or, if the First Amendment protected those falsehoods, the SVA either satisfied the rigors of strict scrutiny or fell into a “well-defined” exception.<sup>9</sup>

The Ninth Circuit majority—Judges Milan D. Smith, Jr.<sup>10</sup> and the

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<sup>3</sup> See discussion *infra* Part II.

<sup>4</sup> See discussion *infra* Part III.C.

<sup>5</sup> See discussion *infra* Part IV.

<sup>6</sup> *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012) (stating that “[t]he Act is plainly a content-based regulation of speech”); *see id.* at 1219 (Bybee, J., dissenting); *see also* *United States v. Strandlof*, 667 F.3d 1146, 1153, *vacated*, 684 F.3d 962 (10th Cir. 2012) (describing the Act as “a content-based restriction on speech”); *id.* at 1170 (Holmes, J., dissenting).

<sup>7</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

<sup>8</sup> Craig Missakian served as an Assistant United States Attorney for the Southern District of California from 2001 until 2010. *Craig Missakian*, WESTLAND INDUSTRIES, INC., <http://www.imn.org/pages/biography.cfm?personid=4BE4AA641888> (last visited Jan. 12, 2013). In addition to prosecuting Mr. Alvarez, Mr. Missakian prosecuted intellectual property, espionage, and terrorism. *Id.*

<sup>9</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942)).

<sup>10</sup> President George W. Bush appointed Judge Smith to the Ninth Circuit on February 14, 2006, and the Senate confirmed his appointment on May 16, 2006. *Biography of Milan D. Smith Jr.*, FED. JUD. CENTER, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Jan. 12,

late Thomas Nelson<sup>11</sup>—started by “presumptively protect[ing] *all* speech against government interference,”<sup>12</sup> including false statements of fact. The majority also rejected the contention that the SVA was the least restrictive means to achieve the government’s ends,<sup>13</sup> a point conceded<sup>14</sup> by the lone dissenter, Judge Jay Bybee.<sup>15</sup>

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2013) (search “Biographical Directory of Federal Judges, 1789–present” for “Smith”; then follow hyperlink for “Smith, Milan Dale Jr.”). In addition to his opinion in *Alvarez*, Judge Smith has championed the First Amendment in other cases, finding violations when the Everett, Washington school board banned an instrumental version of Franz Biebl’s “Ave Maria” during a high school graduation ceremony, *Nurre v. Whitehead*, 580 F.3d 1087, 1099 (9th Cir. 2009) (Smith, J., dissenting in part, but concurring in the judgment), striking down a Redondo Beach ordinance prohibiting day-workers from soliciting business, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 950 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1566 (2012), and finding that a Seattle scheme requiring permits from street performers in a public park violated the performer’s guarantee of free speech, *Berger v. City of Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (en banc).

<sup>11</sup> President George H. W. Bush appointed Thomas G. Nelson to the Ninth Circuit in 1990, where Judge Nelson served until his death on May 4, 2011. *Biography of Thomas G. Nelson*, FED. JUD. CENTER, <http://www.fjc.gov/public/home.nsf/hisj> (last visited Jan. 12, 2013) (search “Biographical Directory of Federal Judges, 1789–present” for “Nelson”; then follow hyperlink for “Nelson, Thomas G.”). Although Judge Nelson joined Judge Smith’s opinion in *Alvarez*, he authored an opinion upholding the constitutionality of the criminal prohibition on false claims of United States Citizenship. *United States v. Esparza-Ponce*, 193 F.3d 1133 (9th Cir. 1999). The statute upheld in *Esparza-Ponce* provides for criminal penalties for anyone who “falsely and willfully represents himself to be a citizen of the United States.” 18 U.S.C. § 911 (2006). The statutory language of § 911 appears to be as broad as the Stolen Valor Act, because on its face, an individual violates § 911 whether the claim was “shouted from the rooftops or made in a barely audible whisper.” *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (Kennedy, J., plurality opinion). However, Judge Nelson adopted a long-standing limiting construction, such that criminal liability attaches only when the claim is made “to a person having some right to inquire or adequate reason for ascertaining a defendant’s citizenship,” *Esparza-Ponce*, 193 F.3d at 1137–38 (citations omitted), restricting the statute to situations where there is a probability of tangible harm resulting from the false statement.

<sup>12</sup> *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010), *aff’d*, 132 S. Ct. 2537 (2012).

<sup>13</sup> *Id.* at 1217.

<sup>14</sup> *Id.* at 1232 n.10 (Bybee, J., dissenting) (“I agree with the majority that if the Stolen Valor Act were subjected to strict scrutiny, the Act would not satisfy this test.”).

<sup>15</sup> Judge Jay S. Bybee, appointed to the Ninth Circuit by President George W. Bush in 2003, is perhaps best known as the author of the “torture memo,” which concluded that while “certain acts may be cruel, inhuman, or degrading, [the acts may] not [necessarily] produce pain and suffering of the requisite intensity to fall within Section 2340A’s proscription against torture.” Memo from Jay S. Bybee, Asst. Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President 1 (Aug. 1, 2002), *available at* <http://news.findlaw.com/nytimes/docs/doj/bybee80102mem.pdf>. While on the Ninth Circuit, Judge Bybee authored opinions protecting tattooing under the First Amendment, *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010), and denying qualified immunity to an Arizona Sherriff for an alleged retaliatory arrest of a newspaper publisher,

Thus, the only remaining avenue to save the Act was to construe it as a member of a “well-defined and narrowly limited class[] of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”<sup>16</sup> The Supreme Court enumerated these “narrow classes” in *United States v. Stevens*, and indicated that while the list was not finite, discovery of additional classes of unprotected speech would be rare.<sup>17</sup>

Although *Stevens* had not been decided when *Alvarez* was argued at the Ninth Circuit on November 4, 2009, Xavier Alvarez’s attorney, Assistant Federal Public Defender Jonathan Libby (who would also represent Alvarez before the Supreme Court),<sup>18</sup> successfully argued that the SVA did not fall into any of the categorical exceptions later collected by the *Stevens* Court.<sup>19</sup> The Ninth Circuit’s decision, handed down just over four months after *Stevens*, was one of the first applications of *Stevens*’s categorical approach.<sup>20</sup>

## II. APPLICATION OF *STEVENS* IN *ALVAREZ*

### A. Justice Kennedy’s Plurality Remains Faithful to *Stevens*

If Justice Kennedy’s plurality is the benchmark, the Ninth Circuit decision in *Alvarez* was right on the mark. Both opinions are structurally similar: first, they identify the supremacy of the categorical analysis;<sup>21</sup> second, they attempt (and fail) to shoehorn

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Lacey v. Maricopa Cnty., 693 F.3d 896, 923 (9th Cir. 2012) (en banc).

<sup>16</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942)).

<sup>17</sup> *Stevens*, 130 S. Ct. at 1586 (“Our decisions . . . cannot be taken as establishing a freewheeling authority to declare new categories of speech outside the scope of the First Amendment. Maybe there are some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law.”).

<sup>18</sup> Transcript of Oral Argument at 1, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210) [hereinafter *Alvarez* Oral Argument Transcript], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/11-210.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-210.pdf).

<sup>19</sup> See Unofficial Transcript of Oral Argument, *Alvarez*, 617 F.3d at 1202 (No. 08-50345), *aff’d*, 132 S. Ct. 2537 (2012), 2009 WL 4059182, at \*1–2 (arguing that lies were protected speech).

<sup>20</sup> See *Alvarez*, 617 F.3d at 1206.

<sup>21</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (Kennedy, J., plurality opinion); *Alvarez*, 617 F.3d at 1206.

the SVA into a category of unprotected speech, either by construing the Act as fitting into one of the enumerated *Stevens* categories (defamation, fraud, etc.),<sup>22</sup> or by creating an additional category of unprotected speech;<sup>23</sup> and third, because the speech does not fall into an “unprotected” category, the Court applies “exacting” scrutiny,<sup>24</sup> and invalidates the statute.<sup>25</sup>

There are two aspects of Kennedy’s plurality which deserve special note, in part because they are reinforced in Breyer’s concurrence. The first is the necessary (but not sufficient) requirement of a cognizable harm before the speech may be proscribed.<sup>26</sup> The second is the mandate for what Kennedy termed “counterspeech,” which requires the government to encourage and enable *more* speech before considering proscription.<sup>27</sup>

Yet because Kennedy’s analysis tracks closely with the categorical approach of *Stevens*, the plurality also suffers from some of *Stevens*’s weaknesses, especially in the arena of false speech. Quite apart from the categories identified in *Stevens*<sup>28</sup> (later expanded in *Alvarez*),<sup>29</sup> there are a number of instances where false statements are subject to proscription—even without fitting into a category of unprotected speech or meeting strict scrutiny.<sup>30</sup> The plurality

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<sup>22</sup> See, e.g., *Alvarez*, 617 F.3d at 1206–15 (failing to fit the speech addressed by the SVA into one of the historically enumerated categories of unprotected speech).

<sup>23</sup> See, e.g., *Alvarez*, 132 S. Ct. at 2544–47 (failing to create a category of unprotected speech whereby the SVA would withstand challenge).

<sup>24</sup> Justice Kennedy notes that “[w]hen content-based speech regulation is in question, however, exacting scrutiny is required.” *Id.* at 2543. Previous cases (including those authored by Justice Kennedy) noted required a content-based regulation to satisfy strict scrutiny. See *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (Kennedy, J.) (“Since [the regulation] is a content-based speech restriction, it can stand only if it satisfies strict scrutiny.”) In *Alvarez*, Justice Kennedy notes that “exacting scrutiny” requires a compelling interest, “a direct causal link between the restriction imposed and the injury to be prevented,” and that the government employ the least-restrictive means to achieve the desired ends. *Alvarez*, 132 S. Ct. at 2549, 2551.

<sup>25</sup> *Alvarez*, 132 S. Ct. at 2548; *Alvarez*, 617 F.3d at 1215–17.

<sup>26</sup> *Alvarez*, 132 S. Ct. at 2545 (noting that descriptions of false statements as “valueless” occurred in cases where there was a “legally cognizable harm,” and the falsity of speech “was not irrelevant to [the Court’s] analysis, but neither was it determinative”).

<sup>27</sup> *Id.* at 2550 (“The remedy for speech that is false is speech that is true. . . . The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”).

<sup>28</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

<sup>29</sup> *Alvarez*, 132 S. Ct. at 2544.

<sup>30</sup> See Brief of Appellee-Respondent at 27–32, *Alvarez*, 132 S. Ct. 2537 (No. 11-210); see also Brief of Professors Eugene Volokh & James Weinstein as Amici Curiae In Support of

identifies that these examples (including false statements to federal officials, perjury, or impersonating government officials) involve some potential cognizable harm, setting them apart from statutes “merely restricting false speech.”<sup>31</sup>

Apart from the observation that there is a difference between testimony under oath and mere falsehoods, the plurality does not identify the path to constitutionality for these statutes—do they fall into one of the categories, or do they constitute a new category of unprotected speech?<sup>32</sup> The plurality does not say. Although both *Stevens* and *Alvarez* did not limit the categories of unprotected speech,<sup>33</sup> this categorical approach is useful only so far as the categories can be readily identified.

Professor Collins addresses this need in his well-researched foreword to this issue of the *Albany Law Review*.<sup>34</sup> In contrasting the number of categorical exceptions in the original *Chaplinsky* decision with the number extant when *Stevens* was decided, Professor Collins astutely observes that the currency of categorical exceptions “as a jurisprudential theory depends on a specified, *limited* number of exceptions.”<sup>35</sup> Indeed, a limited number of categorical exceptions assist the legislative branch in passing constitutional laws: the bounds are relatively well known, as are the consequences for transgressing those boundaries. Legislators, instead of seeking an additional exception to permit regulation, must explore the breadth of a particular category.<sup>36</sup>

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Petitioner at 2–11, *United States v. Alvarez*, 132 S. Ct. 2537 (2011) (No. 11-210) (outlining a partial list of restricted categories of knowing falsehoods).

<sup>31</sup> *Alvarez*, 132 S. Ct. at 2546.

<sup>32</sup> *See id.*

<sup>33</sup> *Stevens*, 130 S. Ct. at 1584 (describing the “historic and traditional categories” as “including” certain categories of speech); *Alvarez*, 132 S. Ct. at 2544 (listing individual examples as “[a]mong these categories [of speech]).

<sup>34</sup> Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, The First Amendment, and The New Absolutism*, 76 ALB. L. REV. 409 (2013).

<sup>35</sup> *Id.* at 441.

<sup>36</sup> The last session of the 112th Congress illustrated this intra-category exploration. The House passed a bill criminalizing fraudulent claims of military decorations “with intent to obtain money, property, or other tangible benefit,” Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 2 (2012). The Senate passed a similar provision, but also expanded the definition of “tangible benefit” to include “to a board or leadership position of a non-profit organization.” National Defense Authorization Act for Fiscal Year 2013, S.3254, 112th Cong. § 5013 (2012). The Senate expansion of a fraudulent transaction may be the first step in exploring the breadth of the fraudulent speech exception to the First Amendment. In one case involving an impersonation of a federal officer, the Supreme Court noted that “a person may be defrauded

Although a categorical approach may provide guidance to legislatures, it also fails to account for certain categories of speech for which regulation may be desirable, but do not fit into any of the enumerated categories. For example, the *Alvarez* plurality noted the “unquestioned constitutionality of perjury statutes,”<sup>37</sup> justifying this statement by observing that “[s]worn testimony is quite distinct from lies not spoken under oath.”<sup>38</sup> True enough, but where does perjury fit among the limited categories of proscribable speech? Do all perjury statutes satisfy strict scrutiny? Does perjury fall into an as-yet-undefined category of unprotected speech? Or does the fraudulent speech exception stretch to include fraud on the court? The categorical approach, as re-iterated by the plurality in *Alvarez*, fails to address these questions.

*B. Breyer’s Concurrence Charts Path for Lawmakers, if Not for Judges*

Although Justice Breyer (joined by Justice Kagan) provided the necessary votes to invalidate the speech restrictions of the Stolen Valor Act, his concurrence represents an erosion of *Stevens’s* strict categorical approach.<sup>39</sup> This departure is significant because Breyer’s opinion (when combined with the three dissenting votes) provides a roadmap to lawmakers enacting future versions of the Stolen Valor Act (or any statute proscribing harmful false factual speech).<sup>40</sup>

As the Supreme Court explained in *Marks v. United States*,<sup>41</sup> “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”<sup>42</sup> The *Marks* analysis can be relatively straightforward

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although he parts with something of no measurable value at all.” *United States v. Lepowitch*, 318 U.S. 702, 705 (1943).

<sup>37</sup> *Alvarez*, 132 S. Ct. at 2546 (quoting *United States v. Grayson*, 438 U.S. 41, 54 (1978)).

<sup>38</sup> *Alvarez*, 132 S. Ct. at 2546.

<sup>39</sup> *Id.* at 2551 (Breyer, J., concurring in the judgment).

<sup>40</sup> *Id.* at 2555–56.

<sup>41</sup> *Marks v. United States*, 430 U.S. 188 (1977).

<sup>42</sup> *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell and Stevens, JJ.)).

“when one opinion is a logical subset of other, broader opinions.”<sup>43</sup> Where none of the opinions would command a majority of five Justices, the “narrowest ground” analysis becomes more problematic.<sup>44</sup>

For that reason, identifying the holding in *Alvarez*—the first fractured First Amendment decision since *Stevens*—is difficult.<sup>45</sup> By foreseeing permissible regulation of harmful false speech (but not in this case), Breyer’s concurring opinion resembles Justice O’Connor’s concurring opinion in *Pennsylvania v. Delaware Valley Citizens’ Council for Clean Air*.<sup>46</sup> Just as O’Connor’s concurrence foresaw a different result with different facts,<sup>47</sup> Breyer’s concurrence anticipates that a statute that does not wreak “disproportionate constitutional harm” would pass constitutional muster.<sup>48</sup> The lack of a “narrow grounds” out of which to craft a holding could present problems for judges examining other false-speech statutes.<sup>49</sup>

However, *Marks* is a tool of judicial interpretation and not binding on lawmakers.<sup>50</sup> While the “narrowest grounds” analysis may (or may not) anoint Kennedy’s plurality as controlling, lawmakers could draft a statute that proscribes false statements

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<sup>43</sup> *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991).

<sup>44</sup> *Id.* (“In essence, the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.”); see also Damien M. Schiff, *When Marks Misses the Mark: A Proposed Filler for the “Logical Subset” Vacuum*, 9 ENGAGE: J. FEDERALIST SOC’Y PRAC. GRPS. 119, 120–22 (2008).

<sup>45</sup> Cf. Schiff, *supra* note 44, at 119 (discussing the difficulty in discerning the narrowest holding when no one opinion is a logical subset of any of the others).

<sup>46</sup> *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 483 U.S. 711, 731 (1987) (O’Connor, J., concurring in part and concurring in the judgment). In *Delaware Valley*, a case about enhancement for statutorily authorized contingency fees, a plurality of four justices found the enhancement “impermissible.” *Id.* at 727. Four other justices dissented, and would have allowed enhancements “in most circumstances.” *Id.* at 741 (Blackmun, J., dissenting). Justice O’Connor concurred with the dissent’s standard, but agreed with the plurality that the standard had not been met in the instant case. *Id.* at 731 (O’Connor, J., concurring in part and concurring in the judgment).

<sup>47</sup> See *id.* at 734.

<sup>48</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2556 (2012) (Breyer, J., concurring in the judgment).

<sup>49</sup> See, e.g., *King v. Palmer*, 950 F.2d 771, 785 (D.C. Cir. 1991) (“We have done our best to apply *Delaware Valley*[] but have been unable to derive a governing rule from the opinion. Considering our struggle to understand and apply *Delaware Valley*[] as well as the difficulties our sister circuits have experienced, we urge the Supreme Court to clarify its position.”).

<sup>50</sup> See *Marks v. United States*, 430 U.S. 188, 193 (1977).

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(garnering the votes of the three dissenting justices)<sup>51</sup> in a manner that does not give rise to “disproportionate constitutional harm.”<sup>52</sup> Thus, at least for purposes of crafting a new statute, Breyer’s “intermediate scrutiny” standard provides a viable path to constitutionality.<sup>53</sup>

### III. BREYER’S CONCURRENCE DEPARTS FROM STEVENS BUT INCENTIVIZES THE GOVERNMENT TO ENCOURAGE MORE SPEECH

Breyer’s standard permits content-based regulation of speech without meeting the nearly impossible strict-scrutiny standard, while not providing a free pass to the government under rational-basis review.<sup>54</sup> While potentially permitting more regulation, Breyer also strengthens two important aspects of the plurality by emphasizing the government’s twin responsibilities of establishing the harmfulness of the speech and encouraging the mitigating effects of counterspeech.<sup>55</sup>

For Breyer, intermediate scrutiny involves three elements: (1) harmfulness of the speech, (2) mitigating effects of “counterspeech,” and (3) potential constitutional harm in the regulation, suggesting the following equation to determine if the content-based speech regulation is constitutional:

$$\text{(Harmfulness of Speech x Probability of Harm) - Counterspeech} > \text{Constitutional Harm}$$

Unlike economic regulations, analyzing a First Amendment regulation by means of a simple equation presents difficulties because unlike dealing with commonly valued units (e.g., dollars and cents), speech regulation deals in quantum of harm—both of the speech itself and the constitutional harm.<sup>56</sup> This quantum varies for person to person (or more importantly, from judge to

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<sup>51</sup> *Alvarez*, 132 S. Ct. at 2562 (Alito, J., dissenting) (“[F]alse statements of fact merit no First Amendment protection in their own right.”).

<sup>52</sup> *Id.* at 2556 (Breyer, J., concurring in the judgment).

<sup>53</sup> *See id.*

<sup>54</sup> *Id.* at 2551–52.

<sup>55</sup> *See id.* at 2555–56.

<sup>56</sup> *See* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 25–26 (1986).

judge) based upon the value that the individual attaches to the discrete harm or constitutional values at play.<sup>57</sup> Nonetheless, distilling Breyer's methodology to an equation at least identifies the variables which inform the judicial decision—even if the values of the individual variables remain difficult to quantify.

After examining the discrete elements of Breyer's standard, two observations stand out: first, intermediate scrutiny erodes *Stevens's* bright-line approach not only by permitting content-based regulation of speech without meeting strict scrutiny, but permitting it by employing a balancing test; second, intermediate scrutiny incentivizes and encourages government to increase the amount of speech in the marketplace.<sup>58</sup>

### A. Harmfulness of Speech / Probability of Harm

In *Alvarez*, the Court shifted the primary inquiry from the relative *value* of the false speech to the *harms* the false speech is likely to inflict.<sup>59</sup> During oral argument in *Alvarez*, Justice Sotomayor asked “what harm are we protecting here?” noting that an “emotional reaction to offensive speech is not enough.”<sup>60</sup> While acknowledging previous Supreme Court opinions may have identified false speech as without “value,” both the plurality and concurrence take pains to point out that in each instance the case

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<sup>57</sup> See *id.* at 24, 25 (listing the partiality of the decision maker, as well as the values and experience of the decision maker usually “middle-aged, upper-middle-class, politically and socially conventional men and (increasingly) women” as some of the bases for the high “costs of legal error” associated with economic-based regulation of speech).

<sup>58</sup> See *Alvarez*, 132 S. Ct. at 2551–52.

<sup>59</sup> Compare *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) (“[T]here are categories of communication and certain special utterances to which the majestic protection of the First Amendment does not extend because they ‘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.’” (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942))), with *Alvarez*, 132 S. Ct. at 2544–45 (Kennedy, J., plurality opinion) (rejecting the government's contention that “false statements have no value and hence no First Amendment protection.”). Professor Smolla has described this shift as the ascendance of the “marketplace theory.” Rodney A. Smolla, *Words “Which by Their Very Utterance Inflict Injury”: The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 359–60 (2009) (noting that “the linkage requirements—the doctrinal rules that express the required connection between the potentially dangerous utterance and the ensuing harm—have tightened”).

<sup>60</sup> *Alvarez* Oral Argument Transcript, *supra* note 18, at 23.

involved some form of cognizable harm.<sup>61</sup> Harm is the *sine qua non* of the regulation of false speech, otherwise the governmental power to limit speech would be without any “limiting principle.”<sup>62</sup> Though it’s useful to acknowledge that regulation of speech requires some form of harm, it also generates a rash of follow-on queries: how much harm is sufficient to support the regulation? How certain? How direct?

Although Justice Breyer does not directly answer these questions in his concurrence, he lists several examples of potential harm which can be roughly categorized into two groups: direct harm, where the victim is targeted by the false speech; and indirect harm, where the victim is not targeted by the speaker, but nonetheless suffers harm as a result of the false speech.<sup>63</sup> Because the Stolen Valor Act purported to address both direct and indirect harms, a closer examination of these categories will help identify where the Stolen Valor Act fell short, and (potentially) point to a path for future legislative action.<sup>64</sup>

#### 1. Direct Harm: Where the Victim is the Target of the False Speech

When an individual uses false speech to harm a specific individual (or entity), the speech wreaks direct harm. The harm might be targeted at the listener (as in the case of intentional infliction of emotional distress),<sup>65</sup> or it might induce third parties to treat the victim in a different fashion (as in the case of defamation).<sup>66</sup> False speech creating a direct harm can either be

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<sup>61</sup> *Alvarez*, 132 S. Ct. at 2545 (Kennedy, J., plurality opinion); *id.* at 2554–55 (Breyer, J., concurring in the judgment).

<sup>62</sup> *Id.* at 2547 (Kennedy, J., plurality opinion); *see also id.* at 2555 (Breyer, J., concurring in the judgment) (explaining that most statutes place “limitations of context, requirements of proof of injury . . . [to] narrow the statute to a subset of lies where specific harm is more likely to occur”). Although harm seems to be a necessary predicate for most speech regulation, obscenity may be proscribed without any showing of harm. *See, e.g.*, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 60–61 (1973) (“Although there is no conclusive proof of a connection between antisocial behavior and obscene material, the legislature of Georgia could quite reasonably determine that such a connection does or might exist.”).

<sup>63</sup> *Alvarez*, 132 S. Ct. at 2553–54.

<sup>64</sup> *Id.* at 2555–56.

<sup>65</sup> *See, e.g.*, Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 100–02 (describing the harm of “verbal assault” using *Snyder v. Phelps* as an illustrative example).

<sup>66</sup> *See, e.g., id.* at 97–99 (“An advocacy . . . harm exists when a speaker is heard (or read) by

targeted at an individual, or it may also be directed at the government, as is the case with false statements to federal officials or perjury.<sup>67</sup>

Person-to-person harms generally require some proof of damages.<sup>68</sup> This not only aids in establishing the magnitude of the injury,<sup>69</sup> but also serves to establish the harmfulness of the speech in question. For example, in a case addressing fraudulent speech, the Supreme Court noted that Illinois required that the listener actually rely upon the fraudulent misrepresentation.<sup>70</sup> It's not that the fraudulent speech was not harmful prior to the listener's reliance, it's that the listener's reliance validates the harmfulness of the speech.<sup>71</sup> The listener's reliance serves an evidentiary function, conclusively demonstrating the harmfulness of the fraudulent speech.<sup>72</sup> The implication of these "[e]xacting proof requirements" is that some harmful speech falls under the protection of the First Amendment.<sup>73</sup> This is the free-speech corollary to Justinian's maxim concerning the criminal justice system<sup>74</sup>: it is better to allow some potentially harmful speech go unpunished than to proscribe protected speech.

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a sympathetic listener, who then proceeds to commit some nonspeech act as a result of the intentional or unintentional urging or inspiration or assistance by the speaker.”).

<sup>67</sup> *Alvarez*, 132 S. Ct. at 2554.

<sup>68</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525 (1977) [hereinafter RESTATEMENT (SECOND)] (limiting liability to the “pecuniary loss caused . . . by . . . justifiable reliance upon the [fraudulent] misrepresentation”); *id.* § 621 (“One who is liable for a defamatory communication is liable for the *proved, actual harm* caused to the reputation of the person defamed.” (emphasis added)); *id.* § 46 (limiting recovery for intentional infliction of emotional distress to “severe distress,” further noting that “[s]evere distress must be proved”).

<sup>69</sup> *See, e.g.*, *Nichols v. Busse*, 503 N.W.2d 173, 182 (Neb. 1993) (requiring “sufficient proof of damages so that the jury could reach its award without awarding an uncertain, speculative recovery” (citations omitted)).

<sup>70</sup> *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003) (“[T]o prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and *succeeded in doing so.*” (emphasis added)).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 620–21.

<sup>73</sup> *Id.*

<sup>74</sup> 4 THE DIGEST OF JUSTINIAN bk. 48, 19.5 (Alan Watson ed., Theodor Mommsen & Paul Krueger trans., 1985) (proving an English translation of Justinian's *Corpus Iuris Civilis*) (“[F]or it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned.”); *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES \*358 (“[B]etter that ten guilty persons escape than that one innocent suffer.”).

Yet actual harm is not a *necessary* precondition to the regulation of speech. Otherwise, criminal liability could not be imposed if the listener lacked either the ability or gullibility to rely upon the fraudulent speech.<sup>75</sup> The proof requirement seems to be particularly absent when the false speech is intended to deceive the government. Most cite the prohibition on making false statements to federal officials,<sup>76</sup> but the criminal codes are replete with statutes that punish false speech aimed at deceiving government officials<sup>77</sup> without any requirement that the government officials are actually deceived by the false speech.<sup>78</sup> Similarly, a perjured statement need not *actually* influence the jury to sustain a conviction for perjury.<sup>79</sup>

However, if the harm in question is not supported by proof of damages, then the statute must contemplate “that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm.”<sup>80</sup> Statutes where the potential harm is fairly apparent (as with false statements to federal officials), or where the magnitude of the harm is potentially significant (as with perjured testimony) help develop a sufficient quantum of harm to support the regulation of the

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<sup>75</sup> See, e.g., *United States v. DeSantis*, 237 F.3d 607, 612–13 (6th Cir. 2001) (discussing sentencing guidelines for attempted fraud and noting that “the relevant substantive offense . . . is the fraud itself, not fraudulent deprivation of a particular sum”).

<sup>76</sup> 18 U.S.C. § 1001 (2006). See also 10 U.S.C. § 907 (2006) (prohibiting false official statements under the Uniform Code of Military Justice). States also prohibit unsworn statements to public officials. See, e.g., GA. CODE ANN. § 16-10-20 (2012); HAW. REV. STAT. § 710-1063 (2012); UTAH CODE ANN. § 32B-4-504 (LexisNexis 2012); WASH. REV. CODE § 9A.76.175 (2012).

<sup>77</sup> See, e.g., 14 U.S.C. § 88(c) (2006) (false distress call to the U.S. Coast Guard), 18 U.S.C. § 911 (2006) (falsely claiming to be a United States citizen), 18 U.S.C. § 1035 (2006) (false statements when applying for a federally funded health benefit), 18 U.S.C. § 1038(a)(2) (2006) (false statement regarding the death, injury, or capture of a member of the United States armed forces).

<sup>78</sup> For example, a prosecution under § 1001 requires only that the statement is “material,” defined as “capable of influencing, the decision of the decisionmaking body to which it was addressed.” *United States v. Gaudin*, 515 U.S. 506, 509 (1995) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). See also *United States v. Turner*, 551 F.3d 657, 663–64 (7th Cir. 2008) (collecting cases).

<sup>79</sup> See, e.g., *United States v. McKenna*, 327 F.3d 830, 839 (9th Cir. 2003) (“The government need not prove that the perjured testimony actually influenced the relevant decision-making body.”). See also *United States v. Lee*, 359 F.3d 412, 416 (6th Cir. 2004) (noting that perjured testimony need not actually influence the decision-maker); *United States v. Gremillion*, 464 F.2d 901, 905 (5th Cir. 1972) (noting that under the perjury statute, whether the testimony is *capable* of influencing the decision-making body is the proper test).

<sup>80</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2554 (2012) (Breyer, J., concurring in the judgment).

speech.<sup>81</sup> On the other hand, if the harm is uncertain, either in probability or magnitude, the statute is less likely to survive.<sup>82</sup> The judge's appreciation for the harm is therefore critical to the statute's survival.<sup>83</sup>

## 2. Indirect Harm: Speech That Is Foreseeably but Incidentally Harmful

Certain speech can injure reputation, even if, unlike defamation, such harm is incidental.<sup>84</sup> For example, when a forger floods the marketplace with fake Rolex watches, the forger's goal is to make money by selling the watches.<sup>85</sup> The harm to Rolex's reputation is not the forger's primary motivation, but nonetheless a necessary incident.<sup>86</sup> Although actual harm is not necessary to establish liability, the injured party must at least prove the likely consumer confusion,<sup>87</sup> "a showing that tends to assure that the feared harm will in fact take place."<sup>88</sup>

While trademark infringement protects private entities, statutes also protect government symbols from injury. The governmental symbol may indicate a product meets certain specified criteria,<sup>89</sup> or it may relate to government service.<sup>90</sup> While injury may befall a

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2555 (noting concern over the application of the Act in "family, social, or other private contexts, where lies will often cause little harm").

<sup>83</sup> Compare *id.* at 2554–55, with *id.* at 2558 (Alito, J., dissenting) ("[T]he lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits.")

<sup>84</sup> *Id.* at 2549 (Kennedy, J., plurality opinion) (discussing the implications of false claims of military merits). While the perpetrator may have financial interests in mind, their acts incidentally harm the Government and those who have received military honors by diminishing the honorable purpose and exclusivity of the awards. *Id.*

<sup>85</sup> See, e.g., *id.* (inferring that incidental harms arise as a result of the unlawful action, regardless of the actual intent of the actor in committing the crime, and the effect of these incidental harms can be substantial).

<sup>86</sup> See *id.*

<sup>87</sup> See, e.g., *Borinquen Biscuit Corp. v. M.V. Trading Corp.*, 443 F.3d 112, 116 (1st Cir. 2006) ("Before a party can succeed in an infringement action, it must demonstrate both that its mark merits protection and that the allegedly infringing use is likely to result in consumer confusion.")

<sup>88</sup> *Alvarez*, 132 S. Ct. at 2554 (Breyer, J., concurring in the judgment) (citations omitted).

<sup>89</sup> See, e.g., 7 U.S.C. § 6501 (2006); 7 C.F.R. § 205.102 (2012) (restricting use of the term "organic" to foods produced per USDA regulations).

<sup>90</sup> See, e.g., 18 U.S.C. §§ 912–17 (2006) (prohibiting impersonation of *inter alia* officers of

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single individual, the injury to the reputation of the government service is a separate cognizable harm.<sup>91</sup>

However, as with direct harm,<sup>92</sup> judges must also understand the magnitude of the potential harm. For example, while judges seem to understand the potential harm resulting from unauthorized wearing of a military uniform (such as gaining access to military bases, or the symbolic integrity of the military uniform),<sup>93</sup> there is less understanding about the injury incurred when somebody falsely claims a military honor.<sup>94</sup>

Understanding the variations on potential harm is important because establishing each type of harm requires different evidence.<sup>95</sup> The Stolen Valor Act purported to protect against direct harm<sup>96</sup> and indirect harm,<sup>97</sup> and therefore understanding the difference is critical to charting a path forward.<sup>98</sup>

### B. Constitutional Harm

Proving actual or potential harm does not automatically grant the government a license to regulate or proscribe speech—the regulation must not, according to Justice Breyer, wreak “disproportionate constitutional harm.”<sup>99</sup> Justice Breyer does not articulate what encompasses “constitutional harm,” though he suggests the traditional vices of overbreadth and selective

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the United States, foreign diplomats, 4-H members, or Red Cross volunteers).

<sup>91</sup> *United States v. Barnow*, 239 U.S. 74, 80 (1915) (“It is the aim of the section [prohibiting impersonation of federal officials] not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority, but to maintain the general good repute and dignity of the service itself.”).

<sup>92</sup> See discussion *supra* Part III.A.1.

<sup>93</sup> *Schacht v. United States*, 398 U.S. 58, 61 (1970) (“Our previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face.”).

<sup>94</sup> *Alvarez*, 132 S. Ct. at 2549 (Kennedy, J., plurality opinion) (“The Government points to no evidence to support its claim that the public’s general perception of military awards is diluted by false claims such as those made by Alvarez.” (citation omitted)).

<sup>95</sup> See *infra* Part IV.

<sup>96</sup> 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad). (“These imposters use fake medals—or claim to have medals that they have not earned—to gain credibility in their communities. These fraudulent acts can often lead to the perpetration of very serious crimes.”).

<sup>97</sup> See Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006).

<sup>98</sup> See *infra* Part IV.

<sup>99</sup> *Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring in the judgment).

enforcement.<sup>100</sup> The remainder of the First Amendment protections (e.g., vagueness, viewpoint-discrimination) would also likely qualify as “constitutional harm” to be weighed against the harmfulness of the speech.<sup>101</sup>

However, there is another consideration for evaluating constitutional harm: the character of the speech itself.<sup>102</sup> This harkens back to *Chaplinsky’s* “slight social value” language,<sup>103</sup> except that instead of being of “slight social value” the inquiry is whether the speech “occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”<sup>104</sup> And, if the speech is valuable, then the importance of allowing that speech may outweigh any potential (or actual) harm.<sup>105</sup>

The recent case of *Snyder v. Phelps* illustrates this concept.<sup>106</sup> In *Snyder*, members of the Westboro Baptist Church picketed near the military funeral of Lance Corporal Matthew Snyder, United States Marine Corps.<sup>107</sup> Lance Corporal Snyder’s father, Albert Snyder, reacted to the appalling messages<sup>108</sup> by suffering from “emotional anguish [which] resulted in severe depression and . . . exacerbated pre-existing health conditions.”<sup>109</sup> Even so, the Court found that because “Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under

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<sup>100</sup> *See id.* at 2555–56.

<sup>101</sup> *See id.* at 2551.

<sup>102</sup> *Id.* at 2552 (“The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter [as] philosophy, religion, the social sciences, the arts, and the like. . . . Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas.”).

<sup>103</sup> *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (“[S]uch utterances . . . 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.”).

<sup>104</sup> *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)) (internal quotation marks omitted).

<sup>105</sup> *Snyder*, 131 S. Ct. at 1220 (noting that speech on public issues, no matter how hurtful, is entitled to First Amendment protection).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1213.

<sup>108</sup> *Id.* at 1216–17 (“The placards read ‘God Hates the USA/Thank God for 9/11,’ ‘America is Doomed,’ ‘Don’t Pray for the USA,’ ‘Thank God for IEDs,’ ‘Fag Troops,’ ‘Semper Fi Fags,’ ‘God Hates Fags,’ ‘Maryland Taliban,’ ‘Fags Doom Nations,’ ‘Not Blessed Just Cursed,’ ‘Thank God for Dead Soldiers,’ ‘Pope in Hell,’ ‘Priests Rape Boys,’ ‘You’re Going to Hell,’ and ‘God Hates You.’”).

<sup>109</sup> *Id.* at 1214.

the First Amendment.”<sup>110</sup> Although acknowledging that Albert Snyder’s suffered “great pain,” the Court denied recovery.<sup>111</sup>

In valuing Westboro’s speech over Albert Snyder’s injury, the Court articulated a policy choice: “As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”<sup>112</sup> Of course, this policy choice is not groundbreaking, as it mirrors the choice in *New York Times v. Sullivan*,<sup>113</sup> where the Court protected defamatory statements about public officials unless made with “actual malice,”<sup>114</sup> and *Curtis Publishing Co. v. Butts*,<sup>115</sup> where the Court noted that “[t]he dissemination of the individual’s opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an ‘unalienable right’ that ‘governments are instituted among men to secure.’”<sup>116</sup> While characterizing speech as being of public concern can be difficult,<sup>117</sup> suffice it to say that the constitutional harm inherent in regulating or proscribing “valuable” speech can wreak a measure of constitutional harm, and thus must be considered when considering whether the speech-regulating statute wreaks “disproportionate constitutional harm.”<sup>118</sup>

### C. Counterspeech

Breyer’s formula does not end with comparing the harm caused by the speech with the harm caused by the regulation.<sup>119</sup> In addition, one must also look to the mitigating effects of

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<sup>110</sup> *Id.* at 1219.

<sup>111</sup> *Id.* at 1220.

<sup>112</sup> *Id.* See also Schauer, *supra* note 65, at 108 (“[T]he Snyders bore or were required to absorb the cost of the First Amendment, in the sense that they were required simply to ‘take’ the harm to them, without the possibility of a constitutional[ly] permissible remedy. . . . [W]e might say that the First Amendment cost the Snyders five million dollars.”).

<sup>113</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>114</sup> *Id.* at 279–80.

<sup>115</sup> *Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967).

<sup>116</sup> *Id.* at 149 (Harlan, J., plurality opinion).

<sup>117</sup> See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2733 (2011) (“[W]e have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try.”), *quoted in* Schauer, *supra* note 65, at 89 n.36.

<sup>118</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2552, 2556 (2012) (Breyer, J., concurring in the judgment).

<sup>119</sup> *Id.* at 2551.

counterspeech.<sup>120</sup> Unlike the previous variables, counterspeech appears to be a dependent constant with its value fixed by the subject matter of the speech regulation.<sup>121</sup> The government is held responsible for *any* possible mitigating effects of counterspeech—whether or not such measures were undertaken or even contemplated.<sup>122</sup> Thus, the mitigating effect of counterspeech is determined not by the government action (or inaction), but by the subject matter being regulated and the harm targeted by the statute.<sup>123</sup>

To support speech regulation, the government must not only contemplate and implement effective counterspeech measures, but also convince the court that the counterspeech measures are insufficient to prevent the harm.<sup>124</sup> In its brief in *Alvarez*,<sup>125</sup> the government cited to a Department of Defense report which stated that it was too difficult to create a publicly-accessible database, and, in any event, such a database would not fulfill the intended anti-fraud purpose.<sup>126</sup> The plurality noted that “[w]ithout more explanation, it is difficult to assess the Government’s claim, especially when at least one database of Congressional Medal of Honor winners already exists.”<sup>127</sup> Further, the brevity of the government’s justification led to speculation as to the theoretical mitigating effect of the counterspeech.<sup>128</sup> For example, Justice Kennedy noted that “without verifiable records, successful criminal prosecution under the Act would be more *difficult* in any event.”<sup>129</sup>

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<sup>120</sup> *Id.* at 2549–50 (Kennedy, J., plurality opinion); *id.* at 2556 (2012) (Breyer, J., concurring in the judgment) (“[M]ore accurate information will normally *counteract* the lie. . . . [I]t is likely that a more narrowly tailored statute *combined with such information-disseminating devices* will effectively serve Congress’ end.” (emphases added)).

<sup>121</sup> *See id.* at 2549–50 (Kennedy, J., plurality opinion) (describing that it is necessary to consider the mitigating effects of counterspeech and how, in this case, the subject matter increases the mitigating value of counterspeech).

<sup>122</sup> *See generally id.* (indicating that the government had a responsibility to counteract the lie by any means possible, suggesting, for example, a database of military award recipients).

<sup>123</sup> Brief for the United States at 49–50, *Alvarez*, 132 S. Ct. 2537 (No. 11-210).

<sup>124</sup> *Id.* at 50–51.

<sup>125</sup> *Id.* at 50, 55.

<sup>126</sup> OFFICE OF THE UNDERSECRETARY OF DEF., DEP’T OF DEF., REPORT TO THE SENATE AND HOUSE ARMED SERVICES COMMITTEES ON A SEARCHABLE MILITARY VALOR DECORATIONS DATABASE (2009) [hereinafter DOD REPORT].

<sup>127</sup> *Alvarez*, 132 S. Ct. at 2551.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 2550 (emphasis added).

Yet, in the following sentence, he asserts that “in cases where public refutation will not serve the Government’s interest, the Act will not either.”<sup>130</sup> However, there are many ways that the government can prove that a defendant could not have received a military honor (introducing employment records showing presence stateside instead of in a combat zone, for instance) that may not be easily distilled into a publicly-accessible database record.<sup>131</sup> A cursory treatment of the availability of counterspeech (or a cursory dismissal of the feasibility of the effort) invites judicial speculation—errors and all.

Although both the plurality and the concurrence examine counterspeech, they do so from very different perspectives, which have consequences for the legislative incentive to encourage speech.<sup>132</sup> The plurality uses the lack of counterspeech as evidence that the government did not employ the least restrictive means,<sup>133</sup> thus failing the second prong of the “exacting scrutiny” analysis.<sup>134</sup> In contrast, the concurrence examines the mitigating effect of counterspeech upon the harmfulness of the speech, elevating counterspeech from mere evidence of non-compliance to being directly relevant in the constitutional analysis.<sup>135</sup> Breyer suggests that “an accurate, publicly available register of military awards . . . may well adequately protect the integrity of an award against those who would falsely claim to have earned it,”<sup>136</sup> noting that the “more accurate information will normally *counteract* the lie.”<sup>137</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *See id.* at 2550–51.

<sup>132</sup> *Id.* at 2551.

<sup>133</sup> *Id.* (“There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners.”).

<sup>134</sup> Justice Kennedy described the test as exacting scrutiny, which appears to require both a compelling interest and that the “chosen restriction on the speech at issue be ‘actually necessary’ to achieve its interest.” *Id.* at 2549 (quoting *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct., 2729, 2738 (2011)). For more on the methodology of the *Alvarez* decision, see Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 497 (2013).

<sup>135</sup> *Alvarez*, 132 S. Ct. at 2551; *id.* at 2556 (Breyer, J., concurring in the judgment).

<sup>136</sup> *Id.* at 2556.

<sup>137</sup> *Id.* (emphasis added).

*D. Eroding Stevens: Employing Balancing in a First Amendment Test*

The plurality and concurrence generally agree on the variables employed in analyzing the constitutionality of a false speech-suppressing statute.<sup>138</sup> However, it is how these variables are employed that causes concern.<sup>139</sup> Justice Breyer advocates “proportionality,”<sup>140</sup> or balancing the speech-related harm against the potential for constitutional harm to see if the statute “works disproportionate constitutional harm.”<sup>141</sup> Conversely, the plurality rejected any malleable (and thus subject to manipulation) balancing test, quoting Justice Roberts’s language from *United States v. Stevens*<sup>142</sup>: “this Court has rejected as ‘startling and dangerous’ a ‘free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.’”<sup>143</sup>

Although Breyer’s embrace of a flexible standard has caused some concern,<sup>144</sup> the application is much narrower than the balancing

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<sup>138</sup> See, e.g., *id.* at 2543–44 (Kennedy, J., plurality opinion) (stating the government’s interest in “preserv[ing] the integrity and purpose of the Medal,” and that “the Constitution demands that content-based restrictions on speech be presumed invalid”) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (internal quotation marks omitted)); *id.* at 2551 (Breyer, J., concurring in the judgment) (stating that the Court will “take[] account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so”).

<sup>139</sup> See David L. Hudson, Jr., *Breyer’s Concurring Opinion is Cause for Concern*, FIRST AMENDMENT CTR. (June 29, 2012), <http://www.firstamendmentcenter.org/breyer’s-concurring-opinion-is-cause-for-concern> (discussing *Alvarez*, 132 S. Ct. at 2551–52).

<sup>140</sup> *Alvarez*, 132 S. Ct. at 2551–52 (quoting *Randall v. Sorrell*, 548 U.S. 230, 249 (2006) (Breyer, J., plurality opinion); *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989); *In re R.M.J.*, 455 U.S. 191, 203 (1982)) (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting); *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 402–03 (2000) (Breyer, J., concurring); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–52 (1994); *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

<sup>141</sup> *Alvarez*, 132 S. Ct. at 2556.

<sup>142</sup> *United States v. Stevens*, 130 S. Ct. 1577 (2010).

<sup>143</sup> *Alvarez*, 130 S. Ct. at 2544 (Kennedy, J., plurality opinion) (quoting *Stevens*, 130 S. Ct. at 1585).

<sup>144</sup> See, e.g., Hudson, *supra* note 139 (discussing *Alvarez*, 132 U.S. at 2551–52 (Breyer, J., concurring in the judgment)). See also Collins, *supra* note 34, at 443 (“Ad hoc balancing . . . often tends to diminish the domain of free speech rights.”).

soundly rejected in *Stevens*.<sup>145</sup> First, Breyer's balancing only applies to *harmful* speech,<sup>146</sup> while *Stevens* rejected a balancing test based upon "a categorical balancing of the value of the speech against its societal costs."<sup>147</sup> Thus, while intermediate scrutiny allows for comparing the speech-related harms with the harms caused by the regulation, intermediate scrutiny would not permit balancing the relative social value of the category of speech merely because the speech has a tendency to offend or disgust, or is simply not "worth" protecting.<sup>148</sup>

#### IV. AMENDING THE STOLEN VALOR ACT TO SATISFY INTERMEDIATE SCRUTINY

The Court's opinions have several audiences, including judges who must interpret the law (if the law survives).<sup>149</sup> If the Court strikes down a federal law, it sends a message right across First Street to the Congress who must craft a statute either overturning

<sup>145</sup> *Stevens*, 130 S. Ct. at 1585 (quoting Brief for United States at 8, 12, *Stevens*, 130 S. Ct. 1577 (No. 08-769)); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)).

<sup>146</sup> *Alvarez*, 132 S. Ct. at 2551 (describing intermediate scrutiny as taking into "account of the seriousness of the speech-related harm the provision will likely cause").

<sup>147</sup> *Stevens*, 130 S. Ct. at 1585 (quoting Brief for United States, *supra* note 145, at 8) (internal quotation marks omitted).

<sup>148</sup> *Stevens*, 130 S. Ct. at 1585; *see also* *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If 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." (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Bolger v. Youngs Drug Prods. Corp.*, 436 U.S. 60, 65, 72 (1983); *Carey v. Brown*, 447 U.S. 455, 462–63 (1980); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 63–65 (1976) (*Stevens*, J., plurality opinion); *id.* at 67–68 (*Powell*, J., concurring in part and concurring in the judgment); *Buckley v. Valeo*, 424 U.S. 1, 16–17 (1976) (*per curiam*); *Grayned v. Rockford*, 408 U.S. 104, 115 (1972); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *Bachellar v. Maryland*, 397 U.S. 564, 567 (1970); *United States v. O'Brien*, 391 U.S. 367, 382 (1968); *Brown v. Louisiana*, 383 U.S. 131, 142–43 (1966); *Stromberg v. California*, 283 U.S. 359, 368–69 (1931)). However, under intermediate scrutiny, free-speech protecting decisions such as *Brown v. Entertainment Merchants Ass'n* are called into doubt. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011). Justice Breyer dissented in *Brown*, articulating elements of what was later termed intermediate scrutiny. *See Brown*, 131 S. Ct. at 2766 (Breyer, J., dissenting) (citing *Burson v. Freeman*, 504 U.S. 191, 210 (1992)). He also found substantial speech-related harm, and that the statute "imposes no more than a modest restriction on expression." *Id.* at 2766, 2767–68.

<sup>149</sup> Sarah K. Delaney, *Stare Decisis v. The "New Majority": The Michigan Supreme Court's Practice of Overruling Precedent, 1998–2002*, 66 ALB. L. REV. 871, 874 (2003) (citing BLACK'S LAW DICTIONARY 1414 (7th ed. 1999)).

the Court's statutory interpretation<sup>150</sup> or respecting its constitutional interpretation.<sup>151</sup>

Although Justice Breyer's formulation may provide some comfort to litigants and judges who appreciate the flexibility of a balancing test, his "proportionality" test can prove vexing for lawmakers because it is difficult to know when the balance tips towards constitutionality.<sup>152</sup> The First Amendment prohibits Congress from *making* any law which abridges the freedom of speech,<sup>153</sup> thus violations are complete when the law is passed (or enforced), and not when a court interprets the statute after the fact.<sup>154</sup>

*Alvarez* is not entirely without guidance. Every Justice in *Alvarez* recognized the importance of the government interest in protecting the integrity of the military awards,<sup>155</sup> and both the plurality and concurrence indicate that Congress could pass a different law addressing at least a portion of the speech-related harm.<sup>156</sup>

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<sup>150</sup> See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified as amended in scattered sections of 29 and 42 U.S.C.)

<sup>151</sup> See, e.g., Animal Crush Video Prohibition Act of 2010, Pub. L. No. 111-294, 124 Stat. 3177 (2010) (codified at 18 U.S.C. § 48 (2006 & Supp. IV 2010)) (demonstrating Congressional response to previous version of statute being declared unconstitutional in *United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010)).

<sup>152</sup> See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2560 (2012) (Alito, J., dissenting) ("Justice BREYER also proposes narrowing the statute so that it covers a shorter list of military awards, but he does not provide a hint about where he thinks the line must be drawn. Perhaps he expects Congress to keep trying until it eventually passes a law that draws the line in just the right place.")

<sup>153</sup> U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .")

<sup>154</sup> See, e.g., *Alvarez*, 132 S. Ct. at 2543–44 (Kennedy, J., plurality opinion) (citing *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)).

<sup>155</sup> *Alvarez*, 132 S. Ct. at 2548–49 ("The Government's interest in protecting the integrity of the Medal of Honor is beyond question."); *id.* at 2555 (Breyer, J., concurring in the judgment) ("[The Stolen Valor Act] has substantial justification. . . . [T]he Nation cannot fully honor those who have sacrificed so much for their country's honor unless those who claim to have received its military awards tell the truth."); *id.* at 2565 (Alito, J., dissenting) ("Congress was entitled to conclude that falsely claiming to have won the Medal of Honor is qualitatively different from even the most prestigious civilian awards and that the misappropriation of that honor warrants criminal sanction.")

<sup>156</sup> *Id.* at 2547 (Kennedy, J., plurality opinion) ("Where false claims are made to effect a fraud or secure moneys or other valuable considerations . . . it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen Valor Act is not so limited in its reach.") (citing *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771 (1976)); *id.* at 2556 (Breyer, J., concurring in the judgment) ("The Government has provided no convincing explanation as to why a more finely tailored statute would not work. In my own view, such a statute could significantly reduce

However, the plurality and concurrence differ on *how* Congress might address the speech related harm consistent with the First Amendment.<sup>157</sup> Under the plurality's approach, the new act must either fit into one of the historical exceptions *or* satisfy "exacting scrutiny,"<sup>158</sup> meaning the proposed statute would almost definitely have to conform to one of the historical exceptions.<sup>159</sup> Under intermediate scrutiny, Congress would have to craft a law that does not inflict disproportionate constitutional harm.<sup>160</sup>

The Stolen Valor Act of 2005 purported to address two separate harms,<sup>161</sup> and examining how each separate harm could be addressed provides an opportunity to see how the two jurisprudential approaches differ. On the one hand, the Act was designed to prevent direct harm<sup>162</sup> by preventing those who falsely claim military honors from defrauding others.<sup>163</sup> On the other, the Act also attempted to prevent indirect harm<sup>164</sup> by protecting "the reputation and meaning of military decorations and medals."<sup>165</sup>

#### A. *Protecting Against Direct Harm: Amending the Stolen Valor Act to Combat Fraud*

If Congress amended the Stolen Valor Act to target the use of unearned military honors as a means to defraud, then the speech targeted by the statute would no longer be shielded by the First Amendment.<sup>166</sup> Black's defines "fraud" as "knowing

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the threat of First Amendment harm while permitting the statute to achieve its important protective objective.").

<sup>157</sup> See *infra* notes 158–60 and accompanying text.

<sup>158</sup> *Id.* at 2544, 2548 (Kennedy, J., plurality opinion).

<sup>159</sup> See, e.g., *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."). As to the relationship between "exacting scrutiny" and "strict scrutiny," see Smolla, *supra* note 134.

<sup>160</sup> See *Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring in the judgment).

<sup>161</sup> See *infra* notes 162–65 and accompanying text.

<sup>162</sup> See discussion *supra* Part III.A.1.

<sup>163</sup> See, e.g., 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad) ("These imposters use fake medals—or claim to have medals that they have not earned—to gain credibility in their communities. These fraudulent acts can often lead to the perpetration of very serious crimes.").

<sup>164</sup> See discussion *supra* Part III.A.2.

<sup>165</sup> Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006).

<sup>166</sup> *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) ("[T]he First Amendment does not shield fraud.") (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974); *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948)).

misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”<sup>167</sup> Although the Court has not spelled out the precise requirements of an anti-fraud statute, the Court stated that “[e]xacting proof requirements . . . provide sufficient breathing room for protected speech.”<sup>168</sup> Additionally, the government bears the burden of proof in a criminal fraud action.<sup>169</sup>

As it happens, the House passed an amended version of the Stolen Valor Act in September 2012.<sup>170</sup> The Stolen Valor Act of 2012 (SVA of 2012) prohibits anyone “with intent to obtain money, property, or other tangible benefit, [to] fraudulently hold[] oneself out to be a recipient of” a certain military honor.<sup>171</sup> The proposed version makes many changes over the one struck down in *Alvarez*.<sup>172</sup> First, the statute requires the representation to be “fraudulent,” which encompasses not only knowledge of the falsity of the statement, but also intent for the listener to rely upon the false statement to their detriment.<sup>173</sup> Second, the statute requires

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<sup>167</sup> BLACK’S LAW DICTIONARY 731 (9th ed. 2009).

<sup>168</sup> *Madigan*, 538 U.S. at 620 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)). The Court listed examples such as proving reliance by the listener, a heightened burden of proof (such as clear and convincing evidence), and providing for de novo appellate review. *Madigan*, 538 U.S. at 620–21.

<sup>169</sup> *Id.* at 620.

<sup>170</sup> H.R. REP. NO. 112-650 (2012). The Senate also passed an amended version of the Stolen Valor Act. National Defense Authorization Act for Fiscal Year 2013, S.3254, 112th Cong. § 5013 (2012). Although there are some differences between the two measures (for example, the House bill prohibits claims of a combat badge, and the Senate bill includes obtaining a position on a non-profit board as a “tangible benefit”), both purport to protect against false statements made with the intent to obtain a tangible benefit. Although neither bill was enacted into law, Rep. Heck (the sponsor of original House bill) re-introduced his bill in the 113th Congress. Stolen Valor Act of 2013, H. R. 258, 113th Cong. (2013).

<sup>171</sup> *Id.* at 6. Of note, the SVA of 2012 also struck the prohibition on merely wearing a military medal, subsuming the fraudulent wearing as evidence of “hold[ing] oneself out to be a recipient” of such medal. *See id.*; *see also* *United States v. Perelman*, No. 10-10571, 2012 U.S. App. LEXIS 18269, \*11 (9th Cir. Aug. 28, 2012) (“[A] person violates the [prohibition on authorized wear of a military medal] only if he or she has an intent to deceive.”).

<sup>172</sup> The statute struck down in *Alvarez* read:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.

18 U.S.C. § 704(b) (2006), *invalidated by* *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

<sup>173</sup> *See* BLACK’S LAW DICTIONARY 731 (9th ed. 2009) (defining “fraud”); H.R. REP. NO. 112-

specific intent to obtain “money, property, or other tangible benefit,” further narrowing the application of the statute to speech that causes (or is likely to cause) a legally cognizable harm.<sup>174</sup> Finally, the SVA of 2012 limits its scope by criminalizing claims of a subset of military awards.<sup>175</sup> It is likely that, as passed by the House, a court would characterize the SVA of 2012 as an anti-fraud measure.<sup>176</sup>

Once categorized as an anti-fraud measure, the First Amendment inquiry is at its end.<sup>177</sup> There is no need to discuss the compelling state interest or analyze whether the statute is the least restrictive means available.<sup>178</sup> And there is no need to examine the adequacy of any counterspeech because the “First Amendment does not shield fraud.”<sup>179</sup>

Ironically, the plurality opinion, with its fidelity to *Stevens* and its progeny, encourages the government to restrict speech rather than to incentivize placing more speech in the marketplace.<sup>180</sup> Instead of

650, at 6 (2012).

<sup>174</sup> H.R. REP. NO. 112-650, at 6.

<sup>175</sup> *Id.* The SVA of 2012 limits its application to false claims of the Medal of Honor, the Distinguished Service Cross, Navy Cross, Air Force Cross, a Silver Star, or a Purple Heart. Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 2 (2012). The bill also criminalized the claims of a Combat Badge or Award. *Id.* A Combat Badge or Award indicates actual performance in contact with the enemy. See DEP’T OF THE ARMY, ARMY REGULATION 600-8-22: MILITARY AWARDS 97-103 (2011), available at [http://www.apd.army.mil/pdffiles/r600\\_8\\_22.pdf](http://www.apd.army.mil/pdffiles/r600_8_22.pdf); Department of the Navy, SECNAVINST 1650.1H, 8-11-8-12 (Aug. 22, 2006), available at <http://www.marines.mil/Portals/59/Publications/SecNavInst%201650.1H.pdf>; *Air Force Combat Action Medal*, AIR FORCE PERSONNEL CENTER (Aug. 4, 2010), available at <http://www.afpc.af.mil/library/factsheets/factsheet.asp?id=11444>. In contrast, the Senate bill applies to “any decoration, medal, ribbon, or other device authorized by Congress or pursuant to Federal law for the Armed Forces of the United States.” S.3254, 112th Cong. § 5103 (2012).

<sup>176</sup> The anti-fraud requirements in House Bill 1775 are similar to other federal anti-fraud statutes which have not been successfully challenged on First Amendment grounds. See, e.g., 18 U.S.C. § 1344 (2006) (“Whoever knowingly executes . . . a scheme or artifice . . . to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises.”).

<sup>177</sup> *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003) (citing *Donaldson v. Read Magazine, Inc.*, 333 U.S. 178, 190 (1948)).

<sup>178</sup> See *Madigan*, 538 U.S. at 612 (citing *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)).

<sup>179</sup> *Madigan*, 538 U.S. at 612 (citing *Donaldson*, 333 U.S. at 190; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1973)).

<sup>180</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (Kennedy, J., plurality opinion).

encouraging the deployment of databases of recipients of military honors, the plurality's approach encourages passing a speech-restricting statute (albeit a statute that addresses fraudulent speech).<sup>181</sup> Of course, the plurality's categorical approach does not *preclude* the government from deploying a publicly-accessible database of military honors. However, in the current fiscal climate, financing the development of a database is more difficult.<sup>182</sup> Moreover, because such an effort lacks a judicially enforceable mandate, the upkeep of the database would require to be justified annually, and would be vulnerable to the then-current fiscal reality.<sup>183</sup>

*B. Protecting Against Indirect Harm: Protecting the Reputation of the Award*

Of course, the proposed SVA of 2012 only protects against part of the harm inflicted when somebody falsely claims a military award.<sup>184</sup> As noted by Justice Alito in his *Alvarez* dissent, “[t]he lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed.”<sup>185</sup> Just as the reputation of a particular brand can be damaged by poorly manufactured imitations,<sup>186</sup> reliance upon false claims of valor can damage the meaning of military honors.<sup>187</sup>

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<sup>181</sup> See *id.* at 2547–48 (discussing a narrower statute).

<sup>182</sup> See, e.g., DOD REPORT, *supra* note 126 (discussing the cost of creating a publicly accessible database).

<sup>183</sup> See *Alvarez*, 132 S. Ct. at 2551.

<sup>184</sup> *Id.* at 2558–59 (Alito, J., dissenting) (explaining both the tangible and less tangible harm).

<sup>185</sup> *Id.* at 2559 (citations omitted).

<sup>186</sup> Dilution by tarnishment is defined as an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.” 15 U.S.C. § 1125(c)(2)(C) (2006). Interestingly, a plaintiff need not prove “the presence or absence of actual or likely confusion, of competition, or of actual economic injury” to obtain injunctive relief. *Id.* § 1125(c)(1). See also *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1371–73 (Fed. Cir. 2012) (examining the elements for dilution by tarnishment).

<sup>187</sup> See Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment’s “False Statements of Fact” Exception*, 6 STAN. J. C.R. & C.L. 343, 353–54 (2010) (listing some of the reputational enhancements gained when falsely claiming military awards); Jeffery C. Barnum, Comment, *False Valor: Amending the Stolen Valor Act to Conform with the First*

However, protecting the reputation of a *symbol* does not fit into any of the enumerated categories of unprotected speech. It isn't fraud, because the targeted false speech need not be employed to induce detrimental reliance.<sup>188</sup> Nor is it defamation, because defamation is actionable upon harm to the reputation of persons<sup>189</sup> or corporations,<sup>190</sup> but not to governmental symbols.<sup>191</sup> And, although false claims of military honors may anger legitimate recipients of military awards,<sup>192</sup> they cannot usually be categorized as "fighting words."<sup>193</sup>

Thus, to protect the reputation of the military awards, Congress would have to craft a statute which satisfies intermediate scrutiny, appropriately identifying and supporting the harm, limiting the potential constitutional harm, and, most importantly, identifying the mitigating effect of counterspeech.

### 1. Establishing Harm to the Integrity of the Military Awards System

The government attempted to justify the Stolen Valor Act by observing that "it is common sense that false representations have the tendency to dilute the value and meaning of military awards."<sup>194</sup> Although Justice Kennedy (who later authored the plurality striking down the Act) understood the *existence* of the harm,<sup>195</sup> the

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*Amendment's Fraudulent Speech Exception*, 86 WASH. L. REV. 841, 846–48 (2011) (listing examples of reliance upon false claims of military awards).

<sup>188</sup> See, e.g., RESTATEMENT (SECOND), *supra* note 68, § 525 (stating that fraudulent misrepresentation made "for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation").

<sup>189</sup> *Id.* § 559.

<sup>190</sup> *Id.* § 561.

<sup>191</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring that the "defamatory falsehood [be] injurious to a private individual" to lose First Amendment protection).

<sup>192</sup> Brief of American Legion as Amicus Curiae Supporting Petitioner at 23, *United States v. Alvarez*, 132 S. Ct. 2537 (2011) (No. 11-210) ("For true heroes and recipients, it's akin to a slap across the face when false heroes take credit—and receive benefits—for actions they never performed." (citation omitted)).

<sup>193</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971) ("'[F]ighting words,' [are] those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." (citation omitted)).

<sup>194</sup> Brief for the United States, *supra* note 123, at 54.

<sup>195</sup> *Alvarez* Oral Argument Transcript, *supra* note 18, at 32 ("MR. LIBBY: . . . [Congress] made a broad general finding that false statements harm the reputation. JUSTICE

actual quantum of harm was not adequately supported, either in the legislative history of the Act or in the government's brief defending the Act before the Supreme Court. In its brief, the government claimed that "[i]n the aggregate, false representations threaten to make the public skeptical of any claim to have been awarded a medal . . . [and that] false claims diminish the value and prestige of the medals for servicemembers by creating the impression that many more people have received military honors than is actually the case."<sup>196</sup> Neither statement was supported by evidence, leading the plurality to note that the "Government points to no evidence to support its claim that the public's general perception of military awards is diluted by false claims such as those made by Alvarez."<sup>197</sup>

How then to marshal sufficient evidence of harm? There are two potential audiences whose perception of an award's prestige may be affected by a false claim: the public and other military members. For the public, harm might be established through the use of public opinion polling data; provided that the questions were not skewed so as to direct the result.<sup>198</sup> For the military, harm might be established through testimony from military leaders describing the negative effect of false claims upon military morale,<sup>199</sup> or the negative effect of a government unable to adequately protect the integrity of the military awards system.<sup>200</sup> In any event, a "common

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KENNEDY: . . . it's a matter of common sense . . . that [false claims] demean[] the medal."). See also *United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (Kennedy, J., plurality opinion) ("It must be acknowledged that when a pretender claims the Medal to be his own, the lie might harm the Government by demeaning the high purpose of the award, diminishing the honor it confirms, and creating the appearance that the Medal is awarded more often than is true.").

<sup>196</sup> Brief for the United States, *supra* note 123, at 42.

<sup>197</sup> *Alvarez*, 132 S. Ct. at 2549.

<sup>198</sup> See, e.g., *Pub. Utils. Comm'n of D.C. v. Pollak*, 343 U.S. 451, 459–60 (1952) (using polling data as sufficient justification for an administrative agency decision).

<sup>199</sup> Justice Ginsburg hinted at this evidentiary gap in the legislative history when she asked whether the military asked for the passage of the Act, and Solicitor General Verrilli admitted that the military had not. *Alvarez* Oral Argument Transcript, *supra* note 18, at 25. Justice Scalia attempted to reform this concession by asking if the Commander-in-Chief signed the legislation. *Id.* at 26.

<sup>200</sup> Solicitor General Verrilli accurately described this during the last minutes of his argument when he stated that military honors are awarded

for doing something very important after a lot of scrutiny. And for the government to say this is a really big deal and then to stand idly by when one charlatan after another makes a false claim to have won the medal does debase the value of the medal in the

sense” understanding of harm should be verified by some empirical means and used as a foundation for the ensuing legislation.<sup>201</sup>

## 2. Minimizing the Constitutional Harm of the Statute

The SVA targeted a relatively narrow band of speech.<sup>202</sup> First, the Act addressed objective, verifiable facts, avoiding the constitutional pitfall of the government ordaining the truth or falsity of “statements about historical figures, historical events, war news, or scientific theories. The truth about such matters is especially likely to be uncertain, and outside the speaker’s personal knowledge.”<sup>203</sup> Second, the Act addressed facts that are well within the speaker’s personal knowledge; as an individual would be well aware whether or not they received a military decoration.<sup>204</sup> Third, the Act does not discriminate on the basis of viewpoint, as the Act applied to *any* false statement about military honors.<sup>205</sup>

However, certain improvements could be made. Instead of requiring the government and the judiciary to wring a knowledge requirement from vague statutory text,<sup>206</sup> the statute should make the knowledge requirement explicit. Further, although the plurality noted that the Act “can be assumed that it would not apply to, say, a theatrical performance,”<sup>207</sup> an explicit—viewpoint-neutral—exception would be helpful in narrowing the potential constitutional harm. Finally, Justice Breyer suggested narrowing

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eyes of the soldiers. It does do that. That is the government’s interest, and we think that is a real and substantial interest.

*Id.* at 25.

<sup>201</sup> See, e.g., H.R. REP No. 112-650, at 2–3 (2012) (describing some of the frauds facilitated by the false claims of military honors).

<sup>202</sup> See *infra* notes 203–05 and accompanying text.

<sup>203</sup> Volokh, *supra* note 187, at 352.

<sup>204</sup> *Id.* (citing *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (noting that in commercial speech cases it is easier for the speaker—and correspondingly difficult for the listener—to determine the truth of the statement)).

<sup>205</sup> See Volokh, *supra* note 187, at 354; *cf.* *Schacht v. United States*, 398 U.S. 58, 62–63 (1970) (striking down a clause that allows the wearing of a military uniform for theatrical performances *only if* the portrayal does not discredit the military).

<sup>206</sup> See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2557 n.1 (2012) (Alito, J., dissenting) (stating the language used in the Act implies there to be a knowledge requirement); see also Brief for the United States, *supra* note 123, at 16 (“[The statute] does not use the term ‘knowing’ or ‘knowingly,’ its prohibition on ‘falsely represent[ing]’ that one has received a military award requires knowledge of falsity.”).

<sup>207</sup> *Alvarez*, 132 S. Ct. at 2547 (Kennedy, J., plurality opinion).

the awards protected under the Act,<sup>208</sup> which may also tailor the reach of the Act.<sup>209</sup>

### 3. Encouraging Effective Counterspeech

In addition to articulating the speech related harm and mitigating the constitutional consequences of regulation, the government must develop and deploy effective counterspeech measures—if possible. Before drafting the statute, the government must ask if there is any way to counteract the harm—or even to mitigate the harm—by *encouraging* speech as opposed to restricting it. To protect the integrity of the military awards system, many parties (and Justices) have suggested that a credible threat of public exposure—via a publicly available database of military awards—will either sufficiently deter false claims or, at least, counteract the harm to the reputation of the award.<sup>210</sup>

Of course, the publicly-available database of valor may not mitigate all of the harm caused by false claims of military honors. The publicly searchable valor database must be comprehensive to be *completely* effective. There are several obstacles to compiling a list of all living decorated veterans along with all of their awards. First, many awards were awarded in the field, with the citation deposited in the service record,<sup>211</sup> and a fire in 1973 destroyed between sixteen and eighteen million records.<sup>212</sup> Second, because the Privacy Act prohibits the release of personally identifiable information (such as

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<sup>208</sup> *Id.* at 2556 (Breyer, J., concurring in the judgment) (“For example, not all military awards are alike. Congress might determine that some warrant greater protection than others.”).

<sup>209</sup> *See, e.g., supra* note 175 and accompanying text (describing the subset of military awards protected under the proposed Stolen Valor act of 2012). *But see Alvarez*, 132 S. Ct. at 2560 (Alito, J., dissenting) (“Justice BREYER also proposes narrowing the statute so that it covers a shorter list of military awards, but he does not provide a hint about where he thinks the line must be drawn. Perhaps he expects Congress to keep trying until it eventually passes a law that draws the line in just the right place.” (citation omitted)).

<sup>210</sup> *See, e.g., id.* at 2549–50 (Kennedy, J., plurality opinion) (noting the way in which Alvarez was ridiculed when the lie became public and believing that the outrage in response to these lies would reinforce respect for the Medal by the public); Brief of The Reporters Committee for Freedom of the Press and Twenty-Three News Media Organizations as Amici Curiae Supporting the Respondent at 29–34, *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210).

<sup>211</sup> DOD REPORT, *supra* note 126.

<sup>212</sup> *Id.*

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Social Security number or date of birth),<sup>213</sup> the utility of the database may be reduced by the existence of certain common names (such as Smith, Garcia, and Lee).<sup>214</sup>

However, as military members may attest, just because something is difficult doesn't mean that the effort is wasted. The scope of the database could be restricted to time periods for which there are records (the latest record destroyed in the 1973 fire was from 1964).<sup>215</sup> The scope could be restricted as to awards protected, similar to the restrictions in the proposed Stolen Valor Act of 2012.<sup>216</sup> Indeed, the government launched just such a database<sup>217</sup> on July 23, 2012, with President Obama noting that "we will launch a new website, a living memorial, so the American people can see who's been awarded our nation's highest honors."<sup>218</sup>

The crux here is whether counterspeech alone sufficiently mitigates the purported harm to bypass regulation altogether. Even if the harm was sufficiently articulated and supported, it's

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<sup>213</sup> 5 U.S.C. § 552a(b) (2006); DOD REPORT, *supra* note 126.

<sup>214</sup> DOD REPORT, *supra* note 126.

<sup>215</sup> *Id.*

<sup>216</sup> Stolen Valor Act of 2012, H.R. 1775, 112th Cong. § 2 (2012).

<sup>217</sup> *Military Awards for Valor – Top 3*, U.S. DEPT OF DEF., <http://valor.defense.gov> (last visited Jan. 12, 2013). The website does not purport to be a complete list. Indeed, there is a lengthy disclaimer:

Security, privacy, and administrative reasons preclude a complete list of awards recipients. Agencies with a requirement to verify valor award recipients should contact the appropriate military service. If you believe this list to be in error or if you would like your name removed from this list, please use the Military Service contact information provided under "Contact Us" to submit your concern to the appropriate Military Service. The sole purpose of the information provided on this website is to publicly recognize those U.S. military members who are recipients of a Medal of Honor, Service Cross, or Silver Star for actions beginning after September 11, 2001. This information is based on awards reporting made available to the Military Departments. In making this information public, DoD does not represent that all those members who are entitled to wear the subject awards are identified. The public should not rely on the information on this website as a definitive identification of all those members who are recipients of the subject awards. Specifically, the information made available on this website should not be used to confirm whether or not an individual was awarded the subject awards for any purpose. DoD disclaims any liability arising from reliance on the information on this website.

*U.S. Marine Corps Medal of Honor Recipients*, U.S. DEPARTMENT OF DEF. (July 20, 2012), <http://valor.defense.gov/Recipients/MarineCorpsMedalofHonorRecipients.aspx>. Even with this disclaimer, the Department of Defense could also include information about other methods of verification (such as the purported recipient's discharge form (DD-214)).

<sup>218</sup> Carlo Munoz, *DOD Unveils 'Stolen Valor' Database*, THE HILL (July 25, 2012, 11:42AM), <http://thehill.com/blogs/defcon-hill/policy-and-strategy/240011-dod-unveils-stolen-valor-database>.

possible that merely enabling meaningful, credible, counterspeech could sufficiently protect the government's interest, obviating the need for a criminal statute. Or the criminal statute could be further tailored to accommodate the spotty record availability, perhaps with a sunset clause. In any event, the limitations of the counterspeech must be fully explained to a court; otherwise the government risks the judiciary overestimating the mitigating value of the counterspeech.

Even if it is difficult, the government should encourage the deployment of speech into the marketplace. Instead of relying upon a handful of Assistant United States Attorneys<sup>219</sup> as a bulwark against the hordes of false valor fraudsters, effective counterspeech democratizes the effort against false claims, enlisting ordinary Americans in the battle against false claims of military honor and valor. Although it was Justice Breyer's methodology that incentivized the government to enable effective counterspeech, this approach vindicates Justice Kennedy's observation that "[t]ruth needs neither handcuffs nor a badge for its vindication."<sup>220</sup>

## V. CONCLUSION

Forecasting the constitutional landscape from a position of uncertainty is a difficult undertaking. Yet, this is how lawmakers must view the world while trying to address the very real concerns of their constituents. *Alvarez* clarified the picture somewhat, but to continue the jurisprudential dialogue between the legislative and judicial branches, Congress must act.

The issue of harmful false speech is by no means settled. For example, the Senate is considering a bill designed to prohibit deceptive practices in federal elections.<sup>221</sup> While the bill articulates

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<sup>219</sup> There are over 5400 Assistant U.S. Attorneys, serving both in the civil and criminal divisions. DEP'T OF JUSTICE, FY 2013 BUDGET REQUEST (2012), *available at* <http://www.justice.gov/jmd/2013summary/pdf/fy13-usa-bud-summary.pdf>. With the U.S. population estimated at 315,155,847, that is a single Assistant U.S. Attorney for approximately every 58,362 Americans. *U.S. & World Population Clocks*, U.S. CENSUS BUREAU, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 13, 2013).

<sup>220</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (Kennedy, J., plurality opinion).

<sup>221</sup> Deceptive Practice and Vote Intimidation Prevention Act of 2011, S. 1994, 112th Cong. (2011). Deceptive practices include communicating false information about: voting places and procedures, voter qualifications, or political endorsements. *Id.* § 3.

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actual harm,<sup>222</sup> and supports the findings of harm,<sup>223</sup> the harm is non-pecuniary, and may not qualify for the anti-fraud exception. Although the statute proposes criminal penalties, it also provides for counter-speech, mandating that upon a credible report of deceptive election practice, the Attorney General must “communicate to the public, by any means, including by means of written, electronic, or telephonic communications, accurate information designed to correct the materially false information.”<sup>224</sup> If this bill comes before the Court, whether and how the Court addresses the counterspeech provisions will determine whether the “ordinary course in a free society” is, in fact, that truthful speech will counteract the harms of falsehoods.<sup>225</sup>

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<sup>222</sup> *Id.* § 2.

<sup>223</sup> *See, e.g., Prohibiting the Use of Deceptive Practices and Voter Intimidation Tactics in Federal Elections: Hearing on S. 1994 Before the S. Comm. on the Judiciary, 112th Cong. (2012)* (statement of Tanya Clay House, Dir. of Pub. Policy, Lawyers’ Comm. for Civil Rights Under Law).

<sup>224</sup> S. 1994 § 4(b).

<sup>225</sup> *Alvarez*, 132 S. Ct. at 2550.