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LIES AND THE CONSTITUTION

Is there a First Amendment right to lie? Although the Supreme Court declared almost forty years ago that “there is no constitutional value in false statements of fact,”¹ the Court in *United States v Alvarez*² ruled that the First Amendment protects at least some—and perhaps many—intentional lies from government prohibition.³ In *Alvarez*, the Court considered the Stolen Valor Act, a federal statute that made it a crime for any person to state falsely that he or she had received a military decoration or medal.⁴ Xavier Alvarez was convicted under that statute after he intentionally and falsely claimed to have received the Congressional Medal of Honor while introducing himself at a meeting as a newly elected water district

Helen Norton is Associate Dean for Academic Affairs and Associate Professor, University of Colorado School of Law.

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¹ *Gertz v Robert Welch, Inc.*, 418 US 323, 340 (1974); see also *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council, Inc.*, 425 US 748, 771 (1976) (“Untruthful speech, commercial or otherwise, has never been protected for its own sake.”); *Garrison v Louisiana*, 379 US 64, 75 (1964) (“[T]he knowingly false statement and the false statement made with reckless disregard of the truth do not enjoy constitutional protection.”).

² 132 S Ct 2537 (2012).

³ *Id.* at 2551.

⁴ 18 USC § 704(b). The act imposed enhanced penalties on those who falsely claimed receipt of the Congressional Medal of Honor. 18 USC § 704(c).

board member.⁵ Alvarez (who apparently did not seek or receive any material benefit from his lie⁶) challenged the constitutionality of the act, and a divided Court struck it down.⁷ In three separate opinions, all of the Justices agreed that the First Amendment permits the government to punish at least some lies, but no majority approach emerged for determining more specifically which lies can be prohibited consistent with the Constitution.

This article addresses that issue. As a general matter, recall that the government cannot constitutionally prohibit speech because of its content unless the government can satisfy the exacting demands of strict scrutiny.⁸ In some cases, however, a less rigorous standard of review applies to the government's punishment of speech that falls within a category of "low-value expression." *Alvarez* raises two related questions. First, when are lies of only low First Amendment value? Second, if a lie is of only low First Amendment value, when does the Constitution permit the government to prohibit it? It turns out that the answers to both questions are complicated.⁹

⁵ *Alvarez*, 132 S Ct at 2542 ("For all the record shows, respondent's statements were but a pathetic attempt to gain respect that eluded him. . . . Here, the statement that the speaker held the Medal was an intended, undoubted lie."); id at 2543 ("Respondent's claim to hold the Congressional Medal of Honor was false. There is no room to argue about interpretation or shades of meaning.").

⁶ Id at 2542 ("The statements do not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal.").

⁷ Id at 2543.

⁸ See, for example, *Turner Broadcasting System, Inc. v FCC*, 512 US 622, 641 (1994); *R.A.V. v City of St. Paul*, 505 US 377, 391-92 (1992). Very few government efforts to punish lies could meet that standard. For the very rare exception in which the Court has upheld the government's regulation of speech under a strict scrutiny analysis, see *Holder v Humanitarian Law Project*, 130 S Ct 2705 (2010) (upholding federal law that criminalized the knowing provision of material support or resources to a foreign terrorist organization as applied to plaintiff's attempt to provide money, training, and advocacy to groups so characterized); see also *Burson v Freeman*, 504 US 198 (1992) (plurality) (upholding content-based ban on political speech within 100 feet of polling place).

⁹ In addressing these questions I define a "lie" as a false statement known by the speaker to be untrue and made with the intention that the listener understand it as true. See Sissela Bok, *Lying: Moral Choice in Public and Private Life* 13 (Oxford, 1978) (defining a lie as "any intentionally deceptive message which is stated"); David Nyberg, *The Varnished Truth* 50 (Chicago, 1993) ("[W]e can say that lying means making a statement (not too vague) you want somebody to believe, even though you don't (completely) believe it yourself, when the other person has a right to expect you mean what you say."); Mark Tushnet, "Telling Me Lies": The Constitutionality of Regulating False Statements of Fact (Harvard Law Sch Pub Law & Legal Theory Working Paper Series, Paper No 11-02, 2011), online at <http://ssrn.com/abstract=1737930> at *2 (defining a lie as a "false statement known by the person making it to be false and made with the intention that at least some listeners will believe the statement to be true, at least for some period before its falsity becomes evident to the listeners").

Part I of this article offers a brief taxonomy of falsehoods that reveals that some lies have First Amendment value in their own right, and that laws prohibiting lies that have no First Amendment value of their own may nonetheless sometimes present serious problems of government overreaching and chilling of valuable speech. The very ubiquity and diversity of lies thus supports a presumption that lies are fully protected by the First Amendment and that government therefore generally may not regulate them unless it satisfies strict scrutiny. That presumption, however, should not govern a specific category of low-value lies that themselves undermine First Amendment interests, and the First Amendment should therefore permit the government to regulate such lies to prevent certain types of harms. Justice Breyer's concurring opinion in *Alvarez* comes closest to this approach, insofar as it applies intermediate scrutiny to the government's regulation of a narrowly defined category of lies.¹⁰

Part II examines the circumstances in which low-value lies might cause harm of a sort that should permit government to prohibit them consistent with the First Amendment. More specifically, it urges that we can better assess the potential harm of the lies targeted by the Stolen Valor Act when we understand them as lies about a speaker's credentials that might cause significant second-party harms to listeners as well as third-party harms to the public trust on which certain important government processes (like the integrity of the military honors system) rely. Even so, however, First Amendment interests in checking the government's power to act as the ultimate arbiter of truth counsel that we take care when regulating such lies. Part II concludes that laws appropriately balance these competing concerns when they target lies that threaten second-party harms that take monetary or similarly tangible form, or lies that cause third-party harms when demonstrably material to high-stakes decisions in circumscribed settings.

I. IDENTIFYING "LOW-VALUE" LIES: A BRIEF TAXONOMY OF FALSEHOODS

Although the three *Alvarez* opinions agreed that some category of lies should be considered of low First Amendment value and thus subject to greater government regulation, each defined

¹⁰ *Alvarez*, 132 S Ct at 2551–52.

that category differently. Justice Kennedy's plurality opinion (joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor) identified this category as comprised of traditionally regulated lies that are associated with "legally cognizable harm."¹¹ Justice Breyer's concurring opinion (joined by Justice Kagan) identified the relevant category as including lies about "easily verifiable facts" that do not concern "philosophy, religion, history, the social sciences, the arts, and the like," and proposed to apply intermediate scrutiny to the government's regulation of lies within that category.¹² Finally, Justice Alito's dissenting opinion (joined by Justices Scalia and Thomas) defined all falsehoods as categorically unprotected by the First Amendment and thus entirely subject to government prohibition except when such regulation threatens to chill truthful speech.¹³ In proposing these various categories, the three opinions discussed a wide range of lies that can help us sketch a rough taxonomy for thinking about various types of falsehoods and their implications for core First Amendment values.

A. SOME LIES HAVE FIRST AMENDMENT VALUE

Some lies have instrumental or even moral value. Justice Breyer's concurring opinion in *Alvarez* offered some examples:

False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.¹⁴

Indeed, even though many lies frustrate core First Amendment values, others may affirmatively further them.

¹¹ Id at 2545.

¹² Id at 2552.

¹³ Id at 2561–62.

¹⁴ Id at 2553; see also *United States v Alvarez*, 638 F3d 666, 673–75 (9th Cir 2010) (Kozinski concurring in denial of rehearing en banc) (listing multiple examples of harmless or even beneficial lies); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum L Rev 334, 355 (1991) ("One should not manipulatively deceive someone casually, but manipulative lying is certainly justified to prevent serious harms. It follows that a serious social problem could justify manipulation of the kind that the persuasion principle forbids.").

More specifically, although most lies directly undermine¹⁵ the First Amendment's interest in furthering the search for truth and the dissemination of knowledge,¹⁶ some lies may actually promote those goals. For example, lies that trigger confrontation and rebuttal may lead to increased public awareness and understanding of the truth,¹⁷ lies by undercover law enforcement or journalists can help expose the truth,¹⁸ and Socratic questioning in which a teacher knowingly asserts a falsehood can help a student to recognize and counter falsity.¹⁹

Lies can also both frustrate and facilitate First Amendment interests in promoting individual autonomy and self-expression.²⁰

¹⁵ See Steven Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla St U L Rev 1, 9 (2008) ("The only purpose of the marketplace of ideas is to advance human understanding about the nature of the world and the best way to live within it; it directly contravenes that purpose if the marketplace is used to keep human society mired in socially dysfunctional misunderstandings about the nature of the world and its history.").

¹⁶ See Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L Rev 1405, 1411 (1987) (describing the values most often located at the heart of the First Amendment as including the search for truth and the discovery and dissemination of knowledge); Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 Cal L Rev 422, 423 (1980) (same); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv L Rev 1765, 1786 (2004) (same); see also Robert C. Post, *Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State* 6 (Yale, 2012) (summarizing and describing the three major proposed purposes of the First Amendment as "cognitive" (advancing knowledge and discovering truth), "ethical" (furthering individual autonomy and self-fulfillment), and "political" ("facilitating the communicative processes necessary for successful democratic self-governance")).

¹⁷ See *New York Times*, 376 US at 279 n 19 ("Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"), quoting J. Mill, *On Liberty* 15 (Blackwell, ed 1947); Jonathan Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L Rev 1107, 1119 (2006) ("[C]onfronting the lie in the arena of public discussion may increase the likelihood that the truth will be clearer and more long-lived, so that the truth is not forgotten."). For a more skeptical view of the First Amendment's ability to uncover truth by protecting falsity, see Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L Rev 897, 900 (2010) ("[T]he persistence of the belief that a good remedy for false speech is more speech, or that truth will prevail in the long run, may itself be an example of the resistance of false factual propositions to argument and counterexample.").

¹⁸ See Varat, 53 UCLA L Rev at 1122 (cited in note 17).

¹⁹ See *Alvarez*, 132 S Ct at 2553 (Breyer, J, concurring) (describing the Socratic method and similar pedagogical techniques as promoting "a form of thought that ultimately helps realize the truth").

²⁰ See *First National Bank of Boston v Bellotti*, 435 US 765, 777 n 12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion."); *United States v Playboy Entertainment Group Inc.*, 529 US 803, 817 (2000) ("It is through speech that our personalities are formed and expressed."); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA

Lies told by speakers to manipulate their listeners obviously undermine those listeners' autonomy.²¹ But lies can promote speakers' autonomy interests in a variety of ways.²² For example, a speaker might lie about her sexual orientation or religion for privacy reasons or to protect herself from discrimination. More generally, autobiographical lies can further a speaker's ability to choose how to define and present himself, a fundamental exercise of self-expression. As David Han has observed,

Choosing what we tell others about ourselves is a vital means by which we portray ourselves to the world; communicating truths, half-truths, and even falsehoods is essential to our ability to craft and calibrate the personas we present to others. . . . [I]f one takes seriously the Supreme Court's repeated assertions that the First Amendment is designed, at least in part, to preserve individual autonomy and self-realization, then courts should accord at least some constitutional weight to the interest in defining one's own public persona.²³

Many lies frustrate First Amendment interests in facilitating democratic self-governance.²⁴ As the Supreme Court has explained,

L Rev 964, 966 (1978) (describing the First Amendment as seeking to protect "individual self-realization and self-determination"); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U Chi L Rev 225, 232–34 (1992) (identifying autonomy as the key First Amendment value).

²¹ See Strauss, 91 Colum L Rev at 354–55 (cited in note 14) ("[L]ying is wrong because it violates human autonomy. Lying forces the victim to pursue the speaker's objectives instead of the victim's objectives. If the capacity to decide upon a plan of life and to determine one's own objectives is integral to human nature, lies that are designed to manipulate people are a uniquely severe offense against human autonomy.").

²² See David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 NYU L Rev 70, 115 (2012) (finding First Amendment autonomy value in "knowing, factual lies about oneself that are intended to influence one's public perception"); but see R. George Wright, *The Constitutional Status of Speech About Oneself*, 59 Cleve St L Rev 489, 511 (2011) (expressing skepticism about the First Amendment value of autobiographical speech on personal or private matters).

²³ Han, 87 NYU L Rev at 72–74 (cited in note 22); see also *id.* at 107 ("At a certain point, the government cannot constitutionally interfere with an individual's right to define himself by his own speech."); *Alvarez*, 638 F3d at 674 (Kozinski concurring in the denial of petition for rehearing en banc) ("Alvarez's conviction is especially troubling because he is being punished for speaking about himself, the kind of speech that is intimately bound up with a particularly important First Amendment purpose: human self-expression. . . . Speaking about oneself is precisely when people are most likely to exaggerate, obfuscate, embellish, omit key facts or tell tall tales. Self-expression that risks prison if it strays from the monotonous reporting of strictly accurate facts about oneself is no expression at all.").

²⁴ See *Garrison*, 379 US at 77 (recognizing "the paramount public interest in a free flow of information to the people concerning public officials, their servants"); Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* 24–25 (Harper, 1948) ("The final aim of the [town] meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible. The welfare of the community requires that those who decide

That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.²⁵

Even so, however, some contend that the government's punishment of lies about political matters itself undermines public discourse at the heart of the First Amendment. Robert Post, for example, has argued that "[t]o the extent that law enforces claims of truth, it suppresses 'political thinking' by excluding from participation those who embrace a different truth from the state."²⁶

To be sure, reasonable people can disagree about the circumstances in which lies have value, and thus about the size of this

issues shall understand them. They must know what they are voting about. And this, in turn, requires that so far as time allows, all facts and interests relevant to the problem shall be fully and fairly presented to the meeting. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said."); Robert Post, *Compelled Subsidization of Speech: Johanns v Livestock Marketing Association*, 2005 Supreme Court Review 195, 213 (2005) (describing First Amendment values as "most conspicuously includ[ing] democratic self-governance and participation in the construction of public opinion"); Cass Sunstein, *Free Speech Now*, 59 U Chi L Rev 255, 263 (1992) ("[T]he First Amendment is fundamentally aimed at protecting democratic self-government.").

²⁵ *Garrison*, 379 US at 75; see also Gey, 36 Fla St U L Rev at 10 (cited in note 15) ("The relevant point for present purposes is that the democratic self-actualization justification for free speech would not logically encompass the protection of those seeking to disseminate empirically disprovable falsehoods. Those seeking to disseminate disprovable falsehoods can in no way be viewed as acting in good faith with their fellow citizens. Rather, they are seeking power through the duplicitous means of the Big Lie. The optimistic Brandeisian concept of democracy would not countenance this kind of collective duplicity. . . . [T]he dissemination of false facts is much more likely to undermine democracy than it is to bolster democracy.").

²⁶ Post, *Democracy, Expertise, Academic Freedom* at 119 n 10 (cited in note 16); see also id at 29 ("The difficulty is that government control over factual truth is in tension with the value of democratic legitimation. Citizens who seek to participate in public discourse, and who are penalized because they disagree with official versions of factual truth, are excluded from the possibility of influencing public opinion. Although we might postulate a world in which reasonable persons do not disagree about factual truth, we all know that as a practical matter this is not the case. Intense and consequential disputes about factual questions abound. Insofar as the state intervenes definitively to settle those disputes, it alienates persons from participation in public discourse."); Brief of Amicus Jonathan D. Varat, *United States v Alvarez*, No 11-210, *13 (filed Jan 19, 2012) (available on Westlaw at 2012 WL 195302) ("To take one current example, assertions by segments of the population that the current President is not a United States citizen are fundamentally factual statements, yet they are inextricably intertwined with the expression of subjective beliefs concerning the trustworthiness and legitimacy of the current President. A regulation aimed at the prohibition of such statements could, therefore, be a vehicle for idea suppression. Many other types of false factual statements similarly are intertwined with the expression of contested ideas, including statements regarding the threat of climate change or statements concerning the impact of legislation on the federal budget. For this reason, even false factual speech may in certain circumstances have inherent worth and require protection for its own sake. . . .").

class of falsehoods.²⁷ Some commentators, like David Nyberg, argue that the universe of valuable lies is quite large.²⁸ Others, like Sissela Bok, maintain that it is very small.²⁹ For my purposes here, I simply contend that there is *some* set of lies that further First Amendment interests and thus deserve First Amendment protection for their own sake.³⁰

²⁷ Philosophers have long struggled to define the size of this set for purposes other than First Amendment analysis. For example, even though St. Augustine viewed all lies as immoral, he identified a hierarchy of immorality among lies. Augustine, in Charles Lewis Cornish, Henry Browne, and Charles Marriot, trans, *On Lying* ¶ 42 (Oxford, 1847) (“In these eight kinds then, however, a man sins less when he tells a lie, in proportion as he emerges to the eighth: more, in proportion as he diverges to the first. But whoso shall think there is any sort of lie that is not sin, will deceive himself foully, while he deems himself honest as a deceiver of other men.”); id at ¶ 25 (describing eight types of lying that vary in moral severity that include lies in religious teaching, lies that harm others and help no one, lies that harm others and help someone, lies told for the pleasure of lying, lies told to “please others in smooth discourse,” lies that harm no one and that help someone, lies that harm no one and that save someone’s life, and lies that harm no one and that save someone’s “purity”).

Aquinas also generated a taxonomy of lies according to their varying moral severity. St. Thomas Aquinas, in Fathers of the English Dominican Province, trans, *The Summa Theologica* 89–90 (Benziger Bros., 1922) (“Now it is evident that the greater the good intended, the more is the sin of lying diminished in gravity. Wherefore a careful consideration of the matter will show that these various kinds of lies are enumerated in their order of gravity: since the useful good is better than pleasurable good, and the life of the body than money, and virtue than the life of the body.”); see also Bok, *Lying* at 78 (cited in note 9) (“Just as lies intended to avoid serious harm have often been thought more clearly excusable than others, so lies meant to *do* harm are often thought least excusable. And lies which neither avoid nor cause harm occupy the middle ground. Throughout the centuries, beginning with Augustine, such distinctions have been debated, refined, altered.”).

²⁸ See Nyberg, *The Varnished Truth* at 24 (cited in note 9) (“My view, on the other hand, is that trust in others is a co-operative, life-preserving relationship that often depends upon the adroit management of deception, sometimes even lying, for its very subsistence.”); id at 5 (“Deception is not merely to be tolerated as an occasionally prudent aberration in a world of truth telling: it is rather an essential component of our ability to organize and shape the world, to resolve problems of coordination among individuals who differ, to cope with uncertainty and pain, to be civil and to achieve privacy as needed, to survive as a species, and to flourish as persons.”).

²⁹ See Bok, *Lying* at 45 (cited in note 9) (“I have to agree that there are at least *some* circumstances which warrant a lie. And foremost among them are those where innocent lives are at stake, and where only a lie can deflect the danger. But, in taking such a position, it would be wrong to lose the profound concern which the absolutist theologians and philosophers express—the concern for the harm to trust and to oneself from lying, quite apart from any immediate effects from any one lie. Individuals, these thinkers claimed, have to consider the long-range effects of lying on human communities; and even if liars have no such forethought, the risks that they themselves run from lying ought to matter to them perhaps most of all.”).

³⁰ For these reasons, Justice Breyer concluded that some lies have First Amendment value. See *Alvarez*, 132 S Ct at 2553. Justice Kennedy’s plurality opinion did not say this directly, although it perhaps did so implicitly by rejecting the government’s claim that false statements of fact possess no First Amendment value. Id at 2547; see also id at 2544 (“Absent from those few categories where the law allows content-based regulation of

B. LIES AND THE CHILLING EFFECT

While some falsehoods may deserve constitutional protection because they have value in their own right, First Amendment interests may also sometimes require the protection of even valueless lies to prevent the chilling of truthful expression. In *New York Times Co. v. Sullivan*,³¹ the Supreme Court famously held that the First Amendment prohibits government from punishing harmful falsehoods when such punishment might chill truthful speech.³² Examples of such harmful expression include negligent false statements about public officials or public figures,³³ which not only frustrate the First Amendment's truth-seeking goals³⁴ but can also inflict reputational damage or cause emotional distress.³⁵ Nonetheless, the Court held that such false statements are protected by the First Amendment, not because the speech itself is valuable, but because government efforts to regulate such speech might chill individuals' willingness to engage in valuable expression. As the Court explained, if speakers could be held liable for unintentionally false statements, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."³⁶

speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee."). In his dissenting opinion, Justice Alito expressly rejected this proposition, insisting that "false statements of fact merit no First Amendment protection in their own right." *Id.* at 2562. Interestingly, however, Justice Alito did not engage Justice Breyer's list of potentially valuable lies, except to note that it did not include lies of the sort targeted by the Stolen Valor Act. *Id.* at 2562–63.

³¹ 376 US 254 (1964).

³² *Id.* at 280 (concluding that the First Amendment prohibits the imposition of liability for a false statement about a public official unless made "with knowledge that it was false or with reckless disregard of whether it was false or not"); see also *Garrison*, 379 US at 73 ("[E]ven where the utterance is false, the great principles of the Constitution which secure freedom of expression . . . preclude attaching adverse consequences to any except the knowing or reckless falsehood.").

³³ See *New York Times*, 376 US at 279; *Gertz*, 418 US at 340.

³⁴ See *Hustler Magazine, Inc. v. Falwell*, 485 US 46, 52 (1988) ("False statements of fact are particularly valueless [when] they interfere with the truth-seeking function of the marketplace of ideas.").

³⁵ See, for example, *Gertz*, 418 US at 347–48 (recognizing "the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation").

³⁶ *New York Times*, 376 US at 279; see also *id.* at 271 ("[T]he erroneous statement is inevitable in free debate.").

All of the Justices in *Alvarez* agreed that the government's punishment even of intentional lies may sometimes unacceptably chill truthful, and thus valuable, speech.³⁷ For example, as Justice Alito explained in dissent:

[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.³⁸

To be sure, however, the Court has also long recognized that government's regulation of lies does not always create unacceptable chilling effects. As just one example, the Court has consistently held that the regulation of fraudulent commercial speech is unlikely to chill truthful speech for a variety of reasons.³⁹

C. LIES AND GOVERNMENT OVERREACHING

Some lies should receive First Amendment protection even if they lack First Amendment value in their own right and even if their regulation would not appreciably chill valuable speech, but instead because their regulation offends First Amendment interests in constraining the government's power to impose its own version

³⁷ See *Alvarez*, 132 S Ct at 2545 (plurality); id at 2552 (Breyer, J, concurring); id at 2564 (Alito, J, dissenting). Ensuring a mens rea requirement—that is, prohibiting only knowing or intentional falsehoods and not those that are merely negligent or accidental—generally addresses these instrumental concerns. The Court, however, has also made clear that the First Amendment permits the regulation of negligently false statements under certain circumstances where chilling is less of a danger. See, for example, *Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749 (1985) (holding that the First Amendment does not require showing of actual malice for recovery of presumed and punitive damages for false statements about private figures on matters of private concern).

³⁸ *Alvarez*, 132 S Ct at 2563–64. Justice Breyer shared this concern about potential chilling effect and thus limited his proposed category of low-value lies to those that do not fall within those subject matter areas. Id at 2552 (“Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise” chilling effect concerns.).

³⁹ See *Virginia State Board of Pharmacy*, 425 US at 772 n 24 (“[C]ommercial speech may be more durable than other kinds. Since advertising is the sine qua non of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.”).

of the truth upon the public.⁴⁰ As the *Alvarez* plurality explained: “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth. Were [the Stolen Valor Act] to be sustained, there could be an endless list of subjects the National Government or the States could single out.”⁴¹ Such subjects could include not only a range of relatively harmless lies, such as “bar stool braggadocio” or other casual forms of boasting, exaggeration, or puffery,⁴² but also potentially more harmful lies, such as lies to loved ones to escape recrimination for one’s bad behavior.⁴³ Either way, the government’s regulation of such lies offends an anti-paternalistic understanding of the First Amendment that limits the government’s power to declare itself the arbiter of truth.⁴⁴ Steven Gey has explained this view in terms of “structural rights,” describing the First Amendment as focused on “constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false

⁴⁰ See Gey, 36 Fla St U L Rev at 3 (cited in note 15) (explaining a “structural rights” view that characterizes the First Amendment as “primarily about constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong”). For a contrary view, see Tushnet at *25 (cited in note 9) (“[T]here is really no social value in the dissemination of falsehood, particularly knowing falsehood. If we can curb it without damage to other social values—including of course other statements covered by the First Amendment—we should. And the Constitution should not be interpreted to bar us from doing so.”).

⁴¹ *Alvarez*, 132 S Ct at 2547; see also *id* at 2555 (Breyer, J, concurring); *id* at 2563–64 (Alito, J, dissenting).

⁴² *Id* at 2555 (Breyer, J, concurring); see *id* at 2547–48 (plurality) (“Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle.”); *id* at 2553 (Breyer, J, concurring) (“[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively . . .”).

⁴³ For examples of such lies both relatively harmless and potentially harmful, see *Alvarez*, 638 F3d at 673–75 (Kozinski concurring in denial of rehearing en banc) (listing multiple examples).

⁴⁴ See Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 Wash L Rev 445, 451 (2012) (describing an antipaternalistic justification for the First Amendment as rooted “primarily on the grounds of distrust of government. . . . An anti-paternalistic approach would lead to a general refusal to regulate false statements—not because we value falsity, but because we are reluctant to hand over to the state the authority to make such determinations”); Nat Stern, *Implications of Libel Doctrine for Nondefamatory Falsehoods under the First Amendment*, 10 First Am L Rev 465, 503 (2012) (“To shelter ideas while leaving factual expression to plenary government control ignores an abiding First Amendment theme: wariness of government’s capacity and motives when acting as arbiter of truth.”).

. . . based on a deep skepticism about the good faith of those controlling the government.”⁴⁵

In sum, people lie frequently and for an astonishingly wide variety of reasons. Some lies have First Amendment value in their own right. In other instances, the government’s regulation of even valueless lies threatens government overreaching or the chilling of valuable speech in ways that undermine important First Amendment interests. The very ubiquity and diversity of lies thus supports a presumption that lies are fully protected by the First Amendment such that government generally may not regulate them unless it satisfies strict scrutiny.⁴⁶

D. LOW-VALUE LIES THAT CAN BE REGULATED SHORT OF STRICT SCRUTINY

Some lies may nevertheless sufficiently frustrate First Amendment interests such that they should be characterized as “low-value” speech and thus be subject to greater government regulation. Indeed, each of the *Alvarez* opinions suggested that some lies are of sufficiently low value that government should be permitted to prohibit them without satisfying the demands of strict scrutiny. The opinions, however, defined these categories in quite different ways.

Some background may be of help. The Supreme Court has over time identified several categories of speech as sufficiently “low value” to permit greater government regulation consistent with the First Amendment.⁴⁷ To be sure, the Supreme Court’s First

⁴⁵ Gey, 36 Fla St U L Rev at 3, 21 (cited in note 15). Professor Gey further described the structural rights view of the First Amendment as “entirely negative” in that it “does not rest on the affirmative claim that free speech will lead to any particular social or political benefits” and instead emphasizes the dangers created “when collective entities are involved in the determination of truth.” *Id* at 17.

⁴⁶ Of course, the First Amendment presumptively protects speech in general. See *Asbcraft v American Civil Liberties Union*, 535 US 564, 573 (2002) (explaining that the First Amendment generally permits the government “no power to restrict expression because of its message, its ideas, its subject matter, or its content”) (citations and internal quotation marks omitted).

⁴⁷ For examples of commentators’ pre-*Stevens* syntheses of the Court’s approach to identifying categories of low-value speech, see Geoffrey R. Stone, *Sex, Violence, and the First Amendment*, 74 U Chi L Rev 1857, 1863–64 (2007) (identifying the key factors as whether the speech primarily advances political discourse, whether it is defined in terms of disfavored ideas or political viewpoints, whether it has a strong noncognitive aspect, and whether it has “long been regulated without undue harm to the overall system of free expression”); Cass R. Sunstein, *Pornography and the First Amendment*, 1986 Duke L J 589, 603–04 (1986) (suggesting that the Court considers the following factors in determining

Amendment doctrine generally applies strict scrutiny to content-based regulation of speech that is not of low value, an analysis that is almost always fatal to the government's restriction.⁴⁸ But as Geoffrey Stone has observed, "One obvious problem with a doctrine that presumptively holds all content-based restrictions unconstitutional is that there may be some types of content that do not merit such protection. Some speech might not sufficiently further the values and purposes of the First Amendment to warrant such extraordinary immunity from regulation."⁴⁹ To date, the categories of expression identified by the Court as "low value" include commercial speech, true threats, incitement to imminent illegal action, "fighting words," obscenity, defamation, fraud, child pornography, and speech that is integral to criminal conduct.⁵⁰

Identifying a category of speech as low value is not, however, the end of the matter. The Court must then determine what test other than strict scrutiny should apply to government regulation of speech within that category.⁵¹ Consider the example of commercial speech. The Court has held that commercial speech that is false, misleading, or related to an illegal activity is entitled to

whether speech is of low value: whether it is "far afield" from the central concerns of the First Amendment, whether there are important "noncognitive" aspects of the speech, whether the speaker seeks to communicate a message, and whether the speech is in an area in which the "government is unlikely to be acting for constitutionally impermissible reasons").

⁴⁸ See Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 Wm & Mary L Rev 189, 189 (1984) (explaining that content-based restrictions are subject to strict scrutiny unless they regulate speech that falls within a "low-value" category).

⁴⁹ Geoffrey R. Stone, *Free Speech in the Twenty-First Century: Ten Lessons from the Twentieth Century*, 36 Pepperdine L Rev 273, 283 (2009); see also Stone, 25 Wm & Mary L Rev at 189 n 24 (cited in note 48) ("The low value theory, or some variant thereof, is an essential concomitant of an effective system of free expression, for unless we are prepared to apply the same standards to private blackmail, for example, that we apply to public political debate, some distinctions in terms of constitutional value are inevitable.").

⁵⁰ See *Alvarez*, 132 S Ct at 2544. Indeed, the Supreme Court has noted "[n]umerous examples . . . of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees." *Ohralik v Ohio State Bar Ass'n*, 436 US 447, 456 (1978) (citations omitted).

⁵¹ See Stone, 25 Wm & Mary L Rev at 195 (cited in note 48) ("The conclusion that a particular class of speech has only low first amendment value does not mean that the speech is wholly without constitutional protection or that government may suppress it at will. Rather, the low value determination is merely the first step in the Court's analysis, for once the Court concludes that a particular class of speech is deserving of only limited first amendment protection, it then employs a form of categorical balancing, through which it defines the precise circumstances in which the speech may be restricted.").

no constitutional protection and thus can be banned altogether.⁵² In contrast, the Court applies intermediate scrutiny to laws regulating other types of commercial speech based on its conclusion that such speech—although still of comparatively low value—can helpfully inform individuals about their choices in the commercial realm.⁵³

The Court first set forth its approach to identifying categories of low-value speech in its 1942 decision in *Chaplinsky v New Hampshire*:⁵⁴

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.⁵⁵

The Court returned to and refined this explanation a half-century later in *R.A.V. v City of St. Paul*:⁵⁶

From 1791 to the present, however, our society, like other free but

⁵² See *Central Hudson Gas & Electric Corp. v Public Service Comm’n of New York*, 447 US 557, 563–64 (1980) (“The First Amendment’s concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.”); see also *Edenfield v Fane*, 507 US 761, 768 (1993) (“[T]he State may ban commercial expression that is fraudulent or deceptive without further justification.”); *Zauderer v Office of Disciplinary Counsel*, 471 US 626, 638 (1985) (“The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction.”) (citation omitted).

⁵³ See *Central Hudson*, 447 US at 564 (“If the communication is neither misleading nor related to unlawful activity, the government’s power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. . . . First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government’s purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.”).

⁵⁴ 315 US 568 (1942).

⁵⁵ *Id.* at 571–72.

⁵⁶ 505 US 377 (1992).

civilized societies, has permitted restrictions upon the content of speech in a few limited areas, which 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.” We have recognized that “the freedom of speech” referred to by the First Amendment does not include a freedom to disregard these traditional limitations.⁵⁷

Adopting a categorical approach to First Amendment protection requires a methodology for identifying the relevant categories. To this end, some understood *Chaplinsky* and *R.A.V.* to mean that the Court would characterize a category of expression as low value if the speech caused injury that outweighed its First Amendment value.⁵⁸ In its 2010 decision in *United States v Stevens*,⁵⁹ however, the Court insisted that historical tradition plays a central role in determining whether any category of expression has only low First Amendment value.⁶⁰ The *Stevens* Court struck down a federal law⁶¹ that criminalized the commercial creation, sale, or possession of depictions of animal cruelty.⁶² In so doing, the Court rejected as “startling and dangerous” what it characterized as the Government’s proposed “free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.”⁶³ Referencing *Chaplinsky*, the Court acknowledged that, “[a]s the Government correctly notes, this Court has often *described* historically unprotected categories of speech as being ‘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

⁵⁷ Id at 382–83, quoting *Chaplinsky*, 315 US at 572.

⁵⁸ See, for example, *R.A.V.*, 505 US at 400 (White, J, concurring) (“[T]he Court has held that the First Amendment does not apply to [certain content-based categories] because their expressive content is worthless or of *de minimis* value to society. We have not departed from this principle, emphasizing repeatedly that, ‘within the confines of [these] given classification[s], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required.’”), quoting *Chaplinsky*, 315 US at 571–72 and *New York v Ferber*, 458 US 747, 763–64 (1982).

⁵⁹ 130 S Ct 1577 (2010).

⁶⁰ Id at 1585–86. The *Stevens* majority thus described *Chaplinsky* and *R.A.V.* as emphasizing the long-standing nature of restrictions on such speech when characterizing it as of low value. Id.

⁶¹ 18 USC § 48.

⁶² *Stevens*, 130 S Ct at 1592.

⁶³ Id at 1585; id (“The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.”).

order and morality.”⁶⁴ The Court continued, however:

But such descriptions are just that—descriptive. They do not set forth a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute’s favor. When we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis . . . [but we have instead] grounded [our] analysis in a previously recognized, long-established category of unprotected speech, and our subsequent decisions have shared this understanding.⁶⁵

The Court found no historic tradition of banning depictions of animal cruelty (as opposed to a tradition of banning animal cruelty itself),⁶⁶ and thus concluded that the prohibited speech did not constitute a low-value category. It then struck the law down as substantially overbroad.⁶⁷

The Court reiterated its emphasis on historical inquiry a year

⁶⁴ Id at 1585–86, quoting *R.A.V.*, 505 US at 383.

⁶⁵ Id at 1586; see also id (those 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. But if so, there is no evidence that ‘depictions of animal cruelty’ is among them. We need not foreclose the future recognition of such additional categories to reject the Government’s highly manipulable balancing test as a means of identifying them.”).

⁶⁶ Id.

⁶⁷ Id at 1592. Some commentators quarreled with the majority’s claim in *Stevens* that its past decisions relied on historical tradition when identifying “low-value” categories of speech. See Han, 87 NYU L Rev at 85–86 (cited in note 22) (criticizing as “fundamentally illusory” *Stevens*’s claim that the Court had always engaged in historical analysis to identify low-value categories of speech); Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2010 Cato Sup Ct Rev 67, 78, and 81 (2009–10) (characterizing *Stevens* as “reformulat[ing]” *Chaplinsky* and concluding that “[t]he *Stevens* approach is essentially backward-looking, treating the finite exceptions that had been generally accepted since the First Amendment’s adoption as a closed, fixed set of all such exceptions. In contrast, *Chaplinsky* invites the very argument that the government made in *Stevens*: that the Court may now and in the future continue the process of recognizing potentially unlimited new categories of unprotected expression, beyond those with a longstanding historical pedigree, so long as the Court deems the expression at issue to fail the open-ended, subjective balancing test that the last sentence of the *Chaplinsky* passage sets out.”); R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 Fla L Rev 759, 765 (2012) (finding “less than convincing” *Stevens*’s characterization of the Court’s earlier approach to identifying low-value categories of speech). For a pre-*Stevens* commentator who predicted the Court’s emphasis on historical inquiry, see Stone, 74 U Chi L Rev at 1863–64 (cited in note 47) (describing the Court’s approach to low-value speech as including an inquiry into whether it has “long been regulated without undue harm to the overall system of free expression”).

later in *Brown v Entertainment Merchants Ass'n*.⁶⁸ There it invalidated a state law restricting the sale or rental of violent video games to minors.⁶⁹ Again characterizing low-value speech categories as confined to those “well-defined and narrowly limited [classes of speech] the prevention and punishment of which have never been thought to raise any Constitutional problem,”⁷⁰ the Court emphasized the importance of history in deciding whether any particular category of expression can be held to be of low First Amendment value: “[W]ithout persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription, a legislature may not revise the ‘judgment [of] the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.’”⁷¹ Finding no such tradition of restricting minors’ access to depictions of violence,⁷² the Court applied strict scrutiny to strike down the law because it was not necessary to achieve a compelling government interest.⁷³

In neither *Stevens* nor *Brown* did the Court explain in any detail *why* historical tradition might be the appropriate means for identifying categories of low-value speech. But as Geoffrey Stone suggested long before those decisions, “[C]onfining the concept of ‘low value’ speech to those categories that have been recognized as ‘low value’ time out of mind lessens the risk that judges will conflate politically unpopular ideas with constitutionally low value speech.”⁷⁴ Indeed, as applied in the First Amendment context, the Court’s historical inquiry tends toward an expansive understanding of individuals’ free speech rights.⁷⁵

⁶⁸ 131 S Ct 2729 (2011).

⁶⁹ Id at 2734 (“[I]n *Stevens*, we held that new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated.”).

⁷⁰ Id at 2733.

⁷¹ Id at 2734, quoting *Stevens*, 130 S Ct at 1585.

⁷² Id at 2736–37. In so doing, the majority continued its reluctance in recent decades to add to its list of less protected speech categories. See, for example, *FCC v Pacifica Foundation*, 438 US 726 (1978) (declining to characterize “indecent” speech that falls short of obscenity as low-value speech); *Cohen v California*, 403 US 15 (1971) (declining to characterize profanity as low-value speech).

⁷³ *Brown*, 131 S Ct at 2738–41.

⁷⁴ Stone, 36 Pepperdine L Rev at 284 (cited in note 49).

⁷⁵ See Strossen, 2010 Cato Sup Ct Rev at 71 (cited in note 67). Professor Strossen noted “a counterintuitive aspect of *Stevens*’s tightened criteria for recognizing a categorical ex-

Each of the *Alvarez* opinions suggested that some category of lies are of sufficiently low value that government should be permitted to prohibit them without satisfying the demands of strict scrutiny. The plurality and dissent both engaged in historical inquiry for these purposes, but each defined the relevant historical tradition—and thus the category of low-value lies—quite differently. Justice Breyer’s concurring opinion, in contrast, relied on purpose-based and pragmatic arguments to identify another category altogether.

1. *Justice Kennedy’s plurality opinion.* In his plurality opinion, Justice Kennedy (joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor) found no long-standing tradition of punishing lies in general and thus rejected the government’s contention that intentional lies, without more, comprise a broad category of low-value speech.⁷⁶ He distinguished the precedents proffered by the government to support its claim that falsehoods are categorically unprotected:

[A]ll derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation. In those decisions

clusion from the First Amendment: by insisting that any such exclusion is not new but simply the explicit identification of historically unprotected speech—whose implicit exclusion is deeply rooted in history and tradition—the Court actually increases free speech protection. Typically, however—or at least stereotypically—anchoring the scope of constitutional rights, including freedom of speech, in history and tradition has had the opposite effect; it has restricted protection of these rights.”); see also *id.* at 87–88 (“Somewhat ironically, the justices who have most consistently stressed these prerequisites for recognizing a new substantive due process right are the justices who generally take the narrowest view of such rights. . . . In the substantive due process context, strictly enforcing these prerequisites for recognizing an implicit right has the effect of limiting the protection for the constitutional right at issue. In stark contrast, in the First Amendment context, strictly enforcing these same prerequisites for recognizing a categorical exemption from the right has the opposite effect: to maximize protection for the constitutional right at issue.”).

⁷⁶ *Alvarez*, 132 S Ct at 2544. When engaging in this historical inquiry, the plurality did not focus on the narrowest applicable historical tradition—that is, a history of proscribing lies about military valor—perhaps because such a choice would have required it to acknowledge multiple separate categories of “low-value” lies. See Brief of Amici Eugene Volokh and James Weinstein, *United States v Alvarez*, No 11-210, *13–14 (filed Dec 27, 2011) (available on Westlaw at 2011 WL 6179424) (explaining the awkwardness of identifying a series of separate, narrow categories of unprotected lies of various types because to do so “would make it impossible for this Court to say, as it has before, that the exceptions to the general ban on content-based restrictions apply” in only a few situations); *id.* at *17 (“[T]he creation of a large array of free speech exceptions ought to be avoided. Having a dozen exceptions for subcategories of knowingly false statements may seem more speech-protective than having a general exception for all knowingly false statements. But such a proliferation of exceptions may ultimately prove to be less speech-protective, because it may open the door to more exceptions that will not be limited to knowing falsehoods.”).

the falsity of speech at issue was not irrelevant to our analysis, but neither was it determinative. The Court has never endorsed the categorical rule the Government advances: that false statements receive no First Amendment protection. Our prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more.⁷⁷

Justice Kennedy instead identified a long-standing tradition of restricting only a subclass of false statements of fact: those associated with “defamation, fraud, or some other legally cognizable harm.”⁷⁸ Rather than defining the concept of “legally cognizable harm,” he instead illustrated it with a discussion of various areas in which government had historically prohibited certain harm-causing lies. For example, he emphasized that perjury laws punish lies that inflict harm to the integrity of the legal system,⁷⁹ and he described statutes prohibiting a speaker from falsely representing herself to be a government official as punishing lies that inflict harms to the integrity of government processes.⁸⁰ After concluding that the Stolen Valor Act regulated lies that did not fall within this tradition, he then applied strict scrutiny and found that the act was not necessary to achieve a compelling government interest. Because the opinion did not specifically define the concept of historically recognized “legally cognizable harm,” some uncertainty remains about precisely what sort of harms are sufficient to treat certain lies as falling within this category of “low-value” speech. The opinion left another area of uncertainty with its failure clearly to identify the analysis to be applied to government’s efforts to regulate speech falling within this category (other than to make clear that the test would be something other than strict scrutiny).

2. *Justice Alito’s dissenting opinion.* In contrast, Justice Alito’s dissenting opinion (joined by Justices Scalia and Thomas) identified the relevant historical tradition much more broadly as punishing false statements in general except where such punishment would chill truthful or other valuable speech (as would be the case, for

⁷⁷ *Alvarez*, 132 S Ct at 2545.

⁷⁸ *Id.*

⁷⁹ *Id.* at 2546.

⁸⁰ *Id.* The plurality described statutory prohibitions on false statements to government officials not directly in terms of harm, but instead as distinguishable from the Stolen Valor Act because they are limited to lies told to certain audiences in certain settings. *Id.* Justice Breyer’s concurrence, in contrast, explained such statutes as directed to “circumstances where a lie is likely to work particular and specific harm by interfering with the functioning of a government department.” *Id.* at 2554.

example, if the government were to punish lies about “philosophy, religion, history, the social sciences, the arts, and other matters of public concern”).⁸¹ Justice Alito rejected the plurality’s efforts to describe long-standing practice more narrowly as restricting only certain harm-causing lies because he found that the asserted harms were often too diffuse or intangible to support such a theory.⁸² He noted, for example, long-standing traditions of punishing lies that caused dignitary rather than pecuniary harm, that threatened likely rather than actual harm, and that caused generalized harm to government processes rather than to specific individuals.⁸³ He concluded that the historical tradition was better understood as prohibiting false statements without more, and thus that “false statements of fact merit no First Amendment protection in their own right.”⁸⁴ In his view, lies do not have First Amendment value of their own, and are thus subject to government prohibition consistent with the Constitution except where their regulation would chill truthful speech.

3. *Justice Breyer’s concurring opinion.* Justice Breyer (joined by Justice Kagan) relied on purpose-based and pragmatic—rather than historical—analysis to identify a category of low-value lies as including those “false statements about easily verifiable facts that do not concern” matters of “philosophy, religion, history, the social sciences, the arts, and the like.”⁸⁵ Such lies frustrate core First Amendment truth-seeking and other values; moreover—and unlike lies about matters involving history, the social sciences, and related topics—their restriction is unlikely to chill truthful speech.⁸⁶

Long attracted to balancing analyses that attend to the competing values on both sides of a constitutional question,⁸⁷ Justice

⁸¹ Id at 2562–63.

⁸² Id at 2563 n 14.

⁸³ Id.

⁸⁴ Id at 2562.

⁸⁵ Id at 2552.

⁸⁶ Id; see also id at 2564 (Alito, J, dissenting) (“[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat.”).

⁸⁷ See, for example, *Bartnicki v Vopper*, 532 US 514, 536 (2001) (Breyer, J, concurring) (“I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions

Breyer then proposed to apply intermediate scrutiny—a type of balancing⁸⁸—to laws regulating lies in this low-value category.⁸⁹ This analysis requires both an assessment of the weight of the government's interest in preventing the harms threatened by the targeted lies as well as an evaluation of the harms to First Amendment values posed by the government's regulation itself. He concluded that the lies prohibited by the Stolen Valor Act harmed both the government and legitimate medal recipients by diluting the value of military awards.⁹⁰ On the other hand, in language suggesting an antipaternalistic view of the First Amendment, he expressed concern that

the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming

on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits? What this Court has called 'strict scrutiny'—with its strong presumption against constitutionality—is normally out of place where, as here, important competing constitutional interests are implicated."); *Nixon v Shrink Missouri Government PAC*, 528 US 377, 402–03 (2000) ("In such circumstances—where a law significantly implicates competing constitutionally protected interests in complex ways—the Court has closely scrutinized the statute's impact on those interests, but refrained from employing a simple test that effectively presumes unconstitutionality. Rather, it has balanced interests. And in practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative)."); see also Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 Yale L J 1675, 1689–90 (2006) (describing Justice Breyer's balancing analyses).

⁸⁸ See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U Colo L Rev 293, 301 (1992) (Intermediate scrutiny "tends to make the articulation and comparison of competing rights and interests more explicit," "makes outcomes far less predictable," and "makes the Court more vulnerable to the charge of 'legislating from the bench.'").

⁸⁹ *Alvarez*, 132 S Ct at 2551–52 (Breyer, J, concurring) ("Those circumstances lead me to apply what the Court has termed 'intermediate scrutiny' here."); see also *id* at 2552 ("[S]ome such approach is necessary if the First Amendment is to offer proper protection in the many instances in which a statute adversely affects constitutionally protected interests but warrants neither near-automatic condemnation (as 'strict scrutiny' implies) nor near near-automatic approval (as is implicit in 'rational basis' review).").

⁹⁰ *Id* at 2555 ("To permit those who have not earned those honors to claim otherwise dilutes the value of the awards. Indeed, the 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.").

to have been a war hero, while ignoring members of other political groups who might make similar false claims.⁹¹

He found that the act failed intermediate scrutiny, concluding that the government's interest in preventing the harms caused by the targeted lies was outweighed by the statute's harms to First Amendment interests in empowering the government to prosecute lies told "in family, social, or other private contexts, where lies will often cause little harm"⁹² as well as lies told in political contexts where the danger of selective government enforcement is high.⁹³

4. *Assessing the three approaches.* Of the three *Alvarez* opinions, I find the dissent the least persuasive due to its failure to recognize that many lies have First Amendment value and that the regulation of even valueless lies often threatens government overreaching in a way inimical to important First Amendment interests.⁹⁴ Indeed, Justice Alito's approach would empower the government to regulate a breathtakingly wide variety of lies that include not only bragging and other relatively harmless lies but also potentially valuable lies told for a range of humanitarian, self-expressive, or other purposes.⁹⁵

In contrast, both the plurality and the concurring opinions ap-

⁹¹ Id at 2553; see also id ("The statute before us lacks any such limiting features. It may be construed to prohibit only knowing and intentional acts of deception about readily verifiable facts within the personal knowledge of the speaker, thus reducing the risk that valuable speech is chilled. But it still ranges very broadly. And that breadth means that it creates a significant risk of First Amendment harm.").

⁹² Id.

⁹³ Id.

⁹⁴ For example, while Justice Breyer identified a relatively narrow category of lies as low value, id at 2552, Justice Alito indicated that the regulation only of a relatively narrow category of lies threatens instrumental harm to the First Amendment. Id at 2564.

⁹⁵ See notes 14–30 and accompanying text. Justice Alito identified the political process as the appropriate remedy for such concerns. See id at 2565 (Alito, J, dissenting) ("The safeguard against such laws is democracy, not the First Amendment. Not every foolish law is unconstitutional."). This response offers little comfort in light of the large universe of speech potentially at risk of government regulation under his approach. See Varat, 53 UCLA L Rev at 1109 (cited in note 17) ("[A]ccepting unlimited government power to prohibit all deception in all circumstances would invade our rights of free expression and belief to an intolerable degree, including most notably—and however counterintuitively—our rights to personal and political self-rule. A regime of zero tolerance for any form of deception, enforced at will by government officials or random opponents, undoubtedly would curtail unacceptably the willingness of the people to speak, especially in ways that might anger, or merely involve, the antideception police. Ironically, perhaps, but realistically, policing deception would tend to undermine the enlightenment function of free expression. Such a regime also could interfere with expressive autonomy and tend to inhibit creativity and experimentation, privacy, and the joys and solace that may come from spreading small, private, or otherwise benign delusions.").

appropriately sought to cabin the category of low-value lies that are subject to greater government regulation.⁹⁶ To this end, Justice Kennedy concluded that the First Amendment permits the government to forbid lies that have been historically restricted because they cause or threaten to cause a “legally cognizable” harm. Justice Breyer, in contrast, concluded that the First Amendment permits the government to prohibit lies about “easily verifiable facts” that do not concern matters of “philosophy, religion, history, the social sciences, the arts, and the like” if the regulation satisfies intermediate scrutiny.

On balance, I prefer Justice Breyer’s approach for several reasons. First, his opinion is more transparent than the plurality in acknowledging that some lies should be understood to have First Amendment value in their own right.⁹⁷ Second, by focusing on lies about “easily verifiable” facts in certain areas⁹⁸—such as whether one received the Congressional Medal of Honor—Justice Breyer’s proposed category lessens the risk of erroneous liability findings, and thus ameliorates chilling-effect concerns as well as the danger that the government will engage in partisan abuse or selective enforcement.⁹⁹

Unlike the plurality opinion (which failed to identify the standard with which it would evaluate government’s regulation of lies categorized as low value), Justice Breyer clearly identified intermediate scrutiny as the standard to be applied to laws regulating his proposed category of low-value lies. Of course, intermediate

⁹⁶ It remains unclear whether the Kennedy and Breyer approaches would generate different results in many cases. For example, one could certainly conclude that the First Amendment permits the government to regulate defamatory or fraudulent lies under both the plurality’s historical analysis as well as the intermediate scrutiny proposed by the concurrence. Similarly, both analyses found that the First Amendment did not permit the government to punish the lies targeted by the Stolen Valor Act. On the other hand, historical analysis might well support the regulation of false statements to the government and false statements that one is a government official because such regulations have a long historical pedigree, while the fate of such statutes under intermediate scrutiny will likely depend on the degree to which the laws are tailored to address the relevant harm. See notes 139–66 and accompanying text.

⁹⁷ See *Alvarez*, 132 S Ct at 2553.

⁹⁸ Of course, just as we can anticipate uncertainty about what is and is not “legally cognizable harm” under the plurality’s approach, we can also anticipate uncertainty about whether certain lies do or do not fall within the relevant subject matter areas under Justice Breyer’s approach.

⁹⁹ See Stern, 10 First Am L Rev at 485 (cited in note 44) (noting that the objectivity of certain information “makes it subject to official review without fear of partisan overreaching by the state”).

scrutiny and other forms of balancing analyses have both advocates and critics. Advantages include their flexibility and thus their ability to accommodate nuance and context.¹⁰⁰ Moreover, many see virtue in such analyses' transparency in acknowledging and assessing important competing interests.¹⁰¹ Perhaps in recognition of these strengths, the Court has adopted intermediate scrutiny and other balancing analyses in a number of First Amendment contexts.¹⁰² On the other hand, such approaches invite understandable concerns about unpredictability and judicial subjectivity.¹⁰³ Such unpredictability, however, may be unavoidable in this challenging context and perhaps in most judicial enterprises.¹⁰⁴ As just one example, the historical approach to identifying categories of low-value speech is not without its own subjectivity—as illustrated by the fact that the plurality and dissent both engaged in historical inquiry, only to identify very different categories of low-value lies.¹⁰⁵

¹⁰⁰ See Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 NYU L Rev 375, 436–37 (2009); Pierre Schlag, The Legal Argument Project (unpublished manuscript, 2012, on file with the author) *24–25 (observing that indeterminacy has a number of virtues, including maintaining flexibility, accommodating future change, postponing decision making, and deferring to other decision makers).

¹⁰¹ See *District of Columbia v Heller*, 554 US 570, 719 (2008) (Breyer, J, dissenting) (extolling balancing's "necessary transparency [which] lays bare the judge's reasoning for all to see and to criticize"); Schlag at *33 (cited in note 100) ("[E]ven if the choice is intuitionist or ungrounded, balancing may nonetheless contribute to the process of decision. When a court or other legal officials announce a balancing test, they often indicate what it is that is to be balanced—the factors or considerations that matter (and, by omission, those that don't). In this regard, balancing has the virtue of providing a checklist (things which a decisionmaker should consider).").

¹⁰² See, for example, *Pickering v Board of Education*, 391 US 563, 568 (1968) (assessing public employees' First Amendment claims by weighing the individual employee's interest as a citizen in commenting on matters of public concern against the government's interest as an employer in efficiently providing public services); *Central Hudson*, 447 US at 564 (applying intermediate scrutiny to government's regulation of commercial speech that is neither false, misleading, nor related to illegal activity). Indeed, less flexible approaches can sometimes pose dangers to free speech rights precisely because of their rigidity. See Blocher, 84 NYU L Rev at 384–85 (cited in note 100) ("Justice Black's preference for categoricalism did not mean that he would give all speech-like acts complete immunity from regulation. Justice Black trimmed the most problematic results of his absolutist test by finding categorical exceptions to the categorical rule. Indeed, he was quicker than many balancing-inclined Justices to find that certain speech acts fell completely outside the bounds of the First Amendment.").

¹⁰³ See, for example, Stone, 36 Pepperdine L Rev at 275–76 (cited in note 49) (noting that balancing approaches can "produce a highly uncertain, unpredictable, and fact-dependent set of outcomes that would leave speakers, police officers, prosecutors, jurors, and judges in a state of constant uncertainty").

¹⁰⁴ See Stephen Breyer, *Active Liberty* 124–33 (Knopf, 2005).

¹⁰⁵ A number of thoughtful commentators suggested the manipulability of this test even

In sum, Justice Breyer's approach appropriately presumes that lies are fully protected by the First Amendment and that government therefore generally may not regulate them unless it satisfies strict scrutiny, while recognizing a specific category of low-value lies that remain subject to government regulation under certain circumstances. Part II examines the circumstances in which low-value lies might cause harm of the sort that should permit government to prohibit them consistent with the First Amendment.

II. ASSESSING THE HARMS OF LOW-VALUE LIES

Unless we are willing to protect all lies or no lies from government regulation, we must make some difficult judgments in determining when the Constitution permits government to punish intentional falsehoods. As David Strauss has observed, "If the category of false statements of fact is not defined very narrowly, [governmental efforts to prohibit lies] can, of course, become highly problematic. But there is a core area in which the harm of private manipulation seems great enough to justify government restrictions on speech."¹⁰⁶ Defining that core area poses a considerable challenge.

Both the Kennedy and Breyer approaches defined that core area largely in terms of harm. Justice Kennedy identified as low value those lies that have been historically restricted because they are associated with a "legally cognizable" harm.¹⁰⁷ Justice Breyer applied intermediate scrutiny to balance the government's interest

before the *Alvarez* decision. See Han, 87 NYU L Rev at 88 (cited in note 22) ("There is no purely 'neutral' means of historical analysis. A court can characterize the speech in question in multiple ways and craft analogies to 'longstanding tradition' at varying levels of generality and abstraction. In the end, the relative value and harm associated with the speech in question remains central to the analysis, since it is a court's sense of these values that will influence how it conducts the historical analysis."); Horwitz, 87 Wash L Rev at 461 (cited in note 44) ("Despite its emphasis on history, however, the Court has not rejected interest-balancing altogether. In order to determine whether false statements of fact fall within a traditional (albeit 'heretofore unrecognized') category, it will inevitably have to ask whether they share the fundamental characteristic of such categories."); Tushnet at *15 (cited in note 9) ("A purely historical inquiry cannot determine the level of generality at which the historically determined categories should be described."); id at *16 (suggesting that the relevant historical category is one in which legislatures have judged certain lies to trigger serious social problems); see also Allen Rostron, *Justice Breyer's Triumph in the Third Battle Over the Second Amendment*, 80 Geo Wash L Rev 703 (2012) (describing lower courts' struggles with the challenges of historical analysis in the Second Amendment context).

¹⁰⁶ Strauss, 91 Colum L Rev at 366 (cited in note 14).

¹⁰⁷ *Alvarez*, 132 S Ct at 2545.

in preventing the harms caused by certain low-value lies against the harm to First Amendment values caused by the government's regulation of such lies.¹⁰⁸ More specifically, although Justice Breyer concluded that the Stolen Valor Act failed intermediate scrutiny, he suggested that the outcome might have been different had the act required "a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm."¹⁰⁹ Either approach thus requires us to consider more precisely when and how low-value lies cause harm.

Frederick Schauer has thoughtfully explored the relationship between harm and the First Amendment in other contexts, observing that

We take an important first step when we recognize that much First Amendment argument is about consequential and often harmful speech, but the necessary second step is to understand the nature of those harms, for without that we cannot hope to evaluate (or generate) the data that would enable courts to determine the extent of the harms involved, and whether the doctrine should allow any redress against them.¹¹⁰

He thus suggests that we take care to disaggregate various speech-related harms "because free speech cases involving genuine harm seem far more likely to implicate or even require the kinds of empirical assessments that transparently preposterous claims of harm do not."¹¹¹ To this end, we might helpfully separate the second- and third-party harms of lies when thinking about whether and when such harms should justify government intervention.

More specifically, lies often harm second parties—that is, the listeners to whom the lie is told—in individualized ways that may or may not be tangible; compare, for example, fraudulent lies that cause monetary harm¹¹² to cruel lies that cause emotional

¹⁰⁸ Id at 2551–52.

¹⁰⁹ Id at 2553–54 (Breyer, J, concurring).

¹¹⁰ See Frederick Schauer, *Harm(s) and the First Amendment*, 2011 Supreme Court Review 81, 107 (2011); see also id ("[I]t is impossible to evaluate these harms, or even to know which harms we are talking about, unless we have a better sense of exactly what kinds of harms are at issue, and thus what kind of evidence would bear, one way or another, upon their existence and extent.")

¹¹¹ Id.

¹¹² See *Illinois ex rel Madigan v Telemarketing Associates, Inc.*, 538 US 600, 619 (2003) (describing contexts in which the First Amendment permits the regulation of fraudulent speech); Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 Geo L J 449, 449 (2012) (describing the [private] "law of deception" to include "the torts of

harm.¹¹³ Lies can also harm individual third parties (i.e., someone other than the listener)—as is the case with defamation, where the harm is generally suffered not by the listener but by the subject of the lie.¹¹⁴ Third-party harms can include more generalized harms to government institutions when, for example, lies undermine the public's confidence in important government processes that require the public's trust for their effectiveness. The more generalized and the less tangible the harms threatened by the targeted lies, however, the greater the concerns about selective or partisan enforcement. The remainder of this part thus explores in more detail the sorts of second- and third-party harms threatened by a speaker's lies about her credentials—that is, the sorts of lies prohibited by the Stolen Valor Act—and under what circumstances they should justify government punishment of such lies.¹¹⁵

A. SECOND-PARTY HARMS: LIES THAT HARM LISTENERS

Lies frequently cause second-party harms by undermining listeners' autonomy in a wide variety of ways, some considerably more tangible (and thus susceptible to proof) than others.¹¹⁶ Sissela

deceit, negligent misrepresentation, nondisclosure, and defamation; criminal fraud statutes; securities law, which includes both disclosure duties and penalties for false statements; false advertising law; labeling requirements for food, drugs, and other consumer goods; and, according to recent scholarship, information-forcing penalty defaults in contract law and elsewhere”).

¹¹³ See, for example, *Cantrell v Forest City Publishing Co.*, 419 US 245 (1974) (upholding liability under false light tort for knowingly false and offensive statements); *Time, Inc. v Hill*, 385 US 374 (1967) (same).

¹¹⁴ See *Gertz*, 418 US at 347–48 (recognizing “the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation”); id at 342, quoting *Rosenblatt v Baer*, 383 US 75, 92 (1966) (Stewart, J, concurring) (describing such harms as including “impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering”). Lies that cause both individualized and tangible harm to third parties include lies that threaten physical and financial injury by creating a public panic. See, for example, *Schenck v United States*, 249 US 49, 52 (1919) (anticipating the harms of falsely yelling “fire” in a crowded theater); *United States v Keyser*, 2012 WL 6052248 *6 (9th Cir 2012) (upholding defendant's conviction for communicating anthrax hoax: “False and misleading information indicating an act of terrorism is not a simple lie. Instead, it tends to incite a tangible negative response. Here, law enforcement and emergency workers responded to the mailings as potential acts of terror, arriving with hazardous materials units, evacuating buildings, sending the samples off to a laboratory for tests and devoting resources to investigating the source of the mailings.”).

¹¹⁵ See Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 BU L Rev 587, 592 (2008) (describing studies confirming that the more credible a speaker, the more likely her message will persuade her listeners regardless of the message's content).

¹¹⁶ See note 27 and accompanying text (describing philosophers' efforts to identify a hierarchy of lies based on their moral harm).

Bok, for example, has emphasized the moral threat to listeners' autonomy posed by lies, and characterized such a threat as a form of coercion akin to violence:

Deceit and violence—these are the two forms of deliberate assault on human beings. Both can coerce people into acting against their will. . . . The knowledge of this coercive element in deception, and of our vulnerability to it, underlies our sense of the *centrality* of truthfulness. . . . [I]ts potential for coercion and for destruction is such that society could scarcely function without some degree of truthfulness in speech and action. . . . To the extent that knowledge gives power, to that extent do lies affect the distribution of power; they add to that of the liar, and diminish that of the deceived, altering his choices at different levels.¹¹⁷

Indeed, people generally resent being lied to precisely because such deception feels manipulative and disrespectful.¹¹⁸

Because individual self-fulfillment and autonomy are often identified as among the primary values served by the Free Speech Clause,¹¹⁹ we might therefore understand lies that harm listener autonomy as themselves frustrating a core First Amendment interest.¹²⁰ For these reasons, David Strauss has concluded that ma-

¹¹⁷ Bok, *Lying* at 18–19 (cited in note 9).

¹¹⁸ Lies are morally wrong from a Kantian perspective, for example, when speakers undermine listener autonomy by seeking to use their listeners as a means to the speakers' own ends, rather than treating listeners as ends in themselves. See Immanuel Kant, trans. James W. Ellington, *Grounding for the Metaphysics of Morals* 63–65 (3d ed 1993). Others are reluctant to find that many lies pose significant harms to their targets. See Nyberg, *The Varnished Truth* at 9 (cited in note 9) (“I know in my own case that I want neither to tell nor to hear all the truth that could be said about myself.”).

¹¹⁹ See Joseph Raz, *The Morality of Freedom* 372 (Oxford, 1980) (“[T]o be author of one’s life, one’s choices must be free from coercion and manipulation by others.”); Tamara Piety, *Brandishing the First Amendment* 81 (Michigan, 2012) (“To be autonomous is not merely to be free of coercion by others. Rather, it encompasses some notion of a free mind as well as a free body, of self-possession.”); Han, 87 NYU L Rev at 102–03 (cited in note 22) (describing a vision of autonomy “based on the simple and deeply rooted anti-paternalist principle that each person is entitled to a limited sphere within which she is free from external coercion or interference. . . .”).

¹²⁰ Varat, 53 UCLA L Rev at 1108–09 (cited in note 17) (“[O]ther theories of the function of free expression—especially theories of autonomy—tend to support government restrictions on deception, at least when adopted to preserve the autonomy of those whom deceptive speakers otherwise might manipulate. . . .”). In this article I focus only on the regulation of affirmatively false statements—putting aside secrets, nondisclosure and the many other ways in which speakers may seek to deceive their listeners and thus offend their autonomy—in part because lying arguably poses the greater threat to listener autonomy. See Stuart P. Green, *Lying, Misleading, and Falsely Denying: How Moral Concepts Inform the Law of Perjury, Fraud, and False Statements*, 53 Hastings L J 157, 177 (2001) (distinguishing deception as “afford[ing] the listener the opportunity for more precise questioning, which bald-faced lies generally do not”); Strauss, 91 Colum L Rev at 356 (cited in note 14) (“Ordinarily, withholding information is not as effective as lying [in offending listener autonomy] because a lie affirmatively throws the hearer off the track.”).

nipulative lies are unprotected by the First Amendment's fundamental "persuasion principle," which "holds that the government may not suppress speech on the ground that the speech is likely to persuade people to do something that the government considers harmful."¹²¹ As he explained in more detail,

The persuasion principle does not apply to government restrictions of false statements of fact because those restrictions do not manipulate or deny autonomy. No one wants to make decisions on the basis of false information. When the government prevents people from making decisions on the basis of false information, it does not manipulate their mental processes to serve the government's ends. Rather, it enables those processes to function as they should, to promote the ends of the listener.¹²²

Under an autonomy-based approach, the decision in *Alvarez* might turn on whether the lie had the capacity to influence listeners' decision making in a way injurious to their autonomy. This view turns not only on the context in which the lies were told but also on how one defines the constitutionally relevant autonomy injury. For example, Mr. Alvarez's lies were told when he introduced himself at a meeting as a newly elected water district board member in a context in which he was unlikely to influence listeners' thinking on decisions with any material consequences. For this reason, the lie may not seem terribly manipulative.

To be sure, however, his lie inflicted *some* autonomy injury, as he likely sought to shape his listeners' opinion of him. Indeed, lies can undermine listener autonomy in a wide variety of ways, manipulating listeners' choices about how to spend their money, whom to recommend or hire for a job, with whom to spend their time, with whom to engage in an intimate relationship, and many other decisions. As Eugene Volokh has pointed out,

[T]rying to affect private citizens' behavior through falsehoods creates

Such a distinction can also be defended on more instrumental grounds, on the theory that permitting the government to regulate the much larger universe of deception poses even greater chilling and overreaching concerns than those threatened by the government's regulation of lies. See Bok, *Lying* at 13–14 (cited in note 9) ("We can [deceive] through gesture, through disguise, by means of action or inaction, even through silence. . . . Deception, then, is the larger category, and lying forms part of it."); Nyberg, *The Varnished Truth* at 63–80 (cited in note 9) (describing the large universe of deception).

¹²¹ Strauss, 91 Colum L Rev at 335, 339 (cited in note 14).

¹²² Id at 357; see also id at 339 ("[B]ecause false statements of fact do not appeal to reason, their use does not constitute persuasion and they are therefore not protected by the persuasion principle.").

a significant harm—sometimes less significant, sometimes more significant, but significant nonetheless, because it involves manipulating people through deception. And if there is a substantial government interest in protecting people from being deceived into giving \$50 to a charitable fundraiser, there is likewise a substantial government interest in protecting people from being deceived into giving others votes, respect, or attention.¹²³

Indeed, lies that shape listeners' decision making about whether to confer or withhold respect or affection can be among the most painful. One might thus well choose to privilege listeners' First Amendment autonomy interests throughout this wide range of settings, as Volokh suggests.¹²⁴

Doing so, however, would empower government to punish a wide swath of lies and thus frustrate an antipaternalistic understanding of the First Amendment.¹²⁵ The less tangible the harms threatened by prohibited lies, for example, the greater our concerns about government bias and partisanship in enforcing such laws. For these reasons, some commentators would permit government to punish only lies that threaten monetary and similarly material harm to the listener.¹²⁶ Others resist such a financial focus

¹²³ See Brief of Amici Eugene Volokh and James Weinstein at *31–32 (cited in note 76) (“[P]eople who lie about decorations generally do so for a reason: they may want to get elected to public office, to get more credibility for their own statements in another’s election campaign, to get more credibility in some nonelectoral political debate, or even just to get more respect from neighbors, acquaintances, potential business associates, or potential romantic partners. They are thus trying to manipulate listeners’ behavior through falsehood, and their statements are quite likely to indeed affect listeners’ behavior, particularly since having a military decoration is often seen as an especially important mark of merit.”).

¹²⁴ Sissela Bok, for these reasons, proposes a test of “publicity” for assessing whether lies are justifiable. Bok, *Lying* at 93 (cited in note 9) (“The test of publicity asks which lies, if any, would survive the appeal for justification to reasonable persons. It requires us to seek concrete and open performance of an exercise crucial to ethics: the Golden Rule, basic to so many religious and moral traditions. We must share the perspective of those affected by our choices, and ask how we would react if the lies we are contemplating were told to us.”).

¹²⁵ See Varat, 53 UCLA L Rev at 1114 (cited in note 17) (“Lies to defraud someone into parting with something of value might fit the account best: the one-to-one targeting of the deception raises the concern not only about the unique control of the speaker over the listener’s reasoning process, but also about the deceived listener’s direct response in giving up something to the decisionmaker in a manner most akin to theft.”).

¹²⁶ See *Alvarez*, 132 S Ct at 2547 (plurality) (“Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment.”); Han, 87 NYU L Rev at 117 (cited in note 22) (“A significant factor in evaluating the government’s regulatory interest might therefore be whether the effect or intended effect of the speech in question can be characterized as material or purely psychological in nature. In other words, was the lie in question aimed at procuring some sort

and instead seek a middle path that targets lies that cause individualized if potentially less tangible harms to listeners, such as lies that may deprive the listener of “something of value” or may cause the listener to change her course of conduct or otherwise rely on the lie to her detriment.¹²⁷

One could plausibly argue that each of these distinctions lacks normative appeal or conceptual coherence or both.¹²⁸ On the one hand, targeting only lies that threaten material harm understates the many other ways in which lies can cause significant—if intangible—autonomy harm. On the other, choosing an approach that targets less measurable harms invites slippery determinations of “value” and “detriment.” Indeed, any of these choices might be criticized as reflecting a line drawn arbitrarily through what is a very broad universe of autonomy-threatening lies.¹²⁹

In short, none of these proposals is completely satisfying; indeed, I write in part to point out their deficiencies. But the conceptually coherent alternatives—that is, that the First Amendment means that liars can never be punished because it protects all lies, or that the First Amendment protects no lies and thus permits the government to regulate them without constraint—are even less appealing from a normative standpoint.¹³⁰ For these reasons, I still prefer Justice Breyer’s proposed balancing analysis, which more transparently grapples with the important competing interests at

of material advantage, monetary or otherwise, or was it made solely in order to influence the speaker’s psychological standing with others?”); see also id at 119 (noting that choosing the appropriate point on this autonomy spectrum at which to regulate lies is challenging but also the sort of choice that courts are frequently called upon to make); Brief of Amicus Jonathan D. Varat at *18–24 (cited in note 26) (arguing that only lies that inflict “targeted” or “concrete” injury should be considered unprotected); id at *17 (“Using speech to gain the respect of others, without harming the speaker’s audience in any tangible or directed way—such as by taking something from the listeners—is a normal and routine part of self-expression that does include statements deliberately exaggerating or falsifying one’s accomplishments. The United States’ ability to control how people express themselves in their everyday lives as they negotiate their egos and insecurities should be extremely limited and narrowly circumscribed.”).

¹²⁷ See *United States v Lepowitch*, 318 US 702, 704 (1943) (interpreting 18 USC § 76 simply to require proof that the defendant “sought to cause the deceived person to follow some course he would not have pursued but for the deceitful conduct”); Stern, 10 First Am L Rev at 507 (cited in note 44) (suggesting the targeting of lies that “induce tangible reliance and improper gain”).

¹²⁸ See Schlag at *11–13 (cited in note 100) (identifying conceptual intelligibility and normative appeal as among the criteria for “sound” legal distinctions). But as Schlag points out, “ideal legal distinctions are elusive.” Id at *16.

¹²⁹ See id at *14 (identifying frequent flaws of legal distinctions).

¹³⁰ See notes 46–47 and accompanying text.

stake.¹³¹ When drawing those lines and managing this balance, however, I suggest that we err on the side of targeting lies that demonstrably threaten monetary and similarly tangible harms to listeners not because other lies are not deeply wounding to listener autonomy, but instead to accommodate our concerns about government bias and partisanship in enforcing such laws.

B. LIES THAT HARM THIRD PARTIES

A speaker's lies about her credentials can also threaten significant harm to third-party individuals or processes, sometimes in ways that are less individualized and even less tangible than the second-party harms discussed in the preceding section. Consider, for example, lies that undermine the public's willingness to participate in important government processes that require the public's trust for their effectiveness.¹³² Ironically, some lies may enhance public trust (as Justice Breyer suggested with his list of socially valuable lies that include those "in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger"¹³³). But many others undermine it. As Sissela Bok explains:

[Liars] often fail to consider the many ways in which deception can spread and give rise to practices very damaging to human communities. These practices clearly do not affect only isolated individuals. The veneer of social trust is often thin. As lies spread—by imitation, or in retaliation, or to forestall suspected deception—trust is damaged. Yet trust is a social good to be protected just as much as the air we breathe or the water we drink. When it is damaged, the community as a whole

¹³¹ Note, however, that the plurality's approach does not avoid this challenge, in that it requires us to determine what is or is not "legally cognizable harm," a determination that ultimately requires similar assessments about when harm is and is not constitutionally sufficient.

¹³² Indeed, the more legitimate (or trusted) a government institution is, the more public cooperation it will engender and the more effective it is likely to be. Jack Balkin has described legitimacy in this context as including "sociological legitimacy—whether people believe that the system is sufficiently fair and just that they can support it." Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 Cardozo L Rev 1689, 1720 (2005). Legitimacy thus measures individuals' trust in leaders' authority and their willingness to comply with those leaders' directives. See Tom R. Tyler and Peter Degoey, *Collective Restraint in Social Dilemmas: Procedural Justice and Social Identification Effects on Support for Authorities*, 69 J Personality and Social Psychology 482, 483 (1995) (examining how authorities' actual or perceived legitimacy influences group members' decisions when facing social dilemmas).

¹³³ *Alvarez*, 132 S Ct at 2553. David Nyberg has more broadly contended that lies frequently add to the stability and success of a society. See Nyberg, *The Varnished Truth* at 80 (cited in note 9) ("To live decently with one another we do not need moral purity, we need discretion—which means tact in regard to truth.").

suffers; and when it is destroyed, societies falter and collapse.¹³⁴

Perjury prohibitions offer perhaps the strongest examples of laws that bar lies that pose a range of third-party harms.¹³⁵ To be sure, such lies threaten individualized and concrete third-party harms to litigants when they lead to erroneous verdicts.¹³⁶ But these statutes also target such lies' more generalized third-party harms to the public's ability to trust in the integrity of the justice system.¹³⁷ Indeed, an earlier Court proclaimed perjury as "at war with justice."¹³⁸ By targeting lies that are material to high-stakes decisions in circumscribed settings, perjury laws rely on legal distinctions that are both normatively appealing and conceptually coherent.

Related but somewhat less targeted laws include the wide variety of statutes that prohibit lies to the government.¹³⁹ Consider, for instance, the Federal False Statements Act,¹⁴⁰ which began as a Civil War-era effort to protect the federal government from monetary scams by military contractors.¹⁴¹ Congress expanded the statute's reach during World War I to prohibit any lie made with the intent to cheat or swindle the government out of money or prop-

¹³⁴ Bok, *Lying* at 26–27 (cited in note 9).

¹³⁵ See, for example, 18 USC § 1621; *United States v Debrow*, 346 US 374, 376 (1953) (explaining federal perjury law as prohibiting a "false statement willfully made as to facts material to the hearing" under an oath authorized by federal law and taken before a competent tribunal, officer, or person).

¹³⁶ See Geoffrey R. Stone, *A Free and Responsible Press*, 1993 U Chi Legal F 127, 132 (1993) ("The rules of evidence do not permit the presentation of knowingly false evidence. The reasons for this rule are clear. Such evidence serves no legitimate purpose in the effort to determine the truth. But it is worse than that, for such evidence is also destructive of the factfinding process. It attempts to distort, distract, and mislead. At best, such evidence will waste time and effort in requiring energy to be devoted to demonstrating that the testimony is false; at worst, the falsehood will not be revealed and the jury will reach the wrong substantive result.").

¹³⁷ See *Alvarez*, 132 S Ct at 2546 (explaining that perjury "undermines the function and province of the law and threaten[s] the integrity of judgments that are the basis of the legal system").

¹³⁸ *In re Michael*, 326 US 224, 227 (1945).

¹³⁹ See note 80.

¹⁴⁰ 18 USC § 1001 (prohibiting knowingly and willfully making "any materially false, fictitious or fraudulent statement or representation . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States"). For a list of many other similar statutes, see *United States v Wells*, 519 US 482, 505–07 and nn 8–10 (1997) (Stevens, J, dissenting) (citing more than one hundred federal statutes prohibiting false statements to government officials in various settings).

¹⁴¹ See Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act*, 43 John Marshall L Rev 111, 125 (2009).

erty.¹⁴² With the New Deal and its dramatic growth in regulatory programs that relied on self-reporting, however, “[t]he Government’s concern was no longer merely with the direct loss of property or money; it now had a strong interest in preventing the loss of information through inaccurate and untruthful reporting.”¹⁴³ Congress therefore expanded the act still further to prohibit any lie to the government without regard to whether the lie was intended to obtain a monetary benefit or whether it caused any material harm to the government.¹⁴⁴ To be sure, the act and similar statutes prohibit lies that may cause quite tangible harms by skewing government decisions that have material consequences. These laws, however, cast a wider net than perjury laws. For example, some target those lies that are “predictably capable of affecting” government decision making;¹⁴⁵ such decisions can take a wide variety of forms, including decisions to grant a benefit or contract, as well as decisions about whether and how to deploy the government’s investigative resources.¹⁴⁶ Such statutes thus broadly target “material” falsity in communications with the government.¹⁴⁷ In an effort to tighten the connection between the targeted lies and demonstrable harm—and thus limit the potential for government overreaching—Justice Ginsburg is among those to suggest a more circumscribed focus for the act that targets lies “designed

¹⁴² See *id.* at 126.

¹⁴³ Green, 53 *Hastings L J* at 192 (cited in note 120).

¹⁴⁴ See *Morrison*, 43 *John Marshall L Rev* at 127 (cited in note 141); see also *United States v Yermian*, 468 US 63, 71 (1984) (describing how the act was originally interpreted to apply to lies intended to defraud the federal government out of its property or money, but was later amended to more broadly prohibit deceptive communications that interfered with or obstructed lawful government functions); *id.* at 79–80 (Rehnquist, J, dissenting) (same); *Brogan v United States*, 522 US 398, 412 (1998) (same).

¹⁴⁵ See, for example, *Kungys v United States*, 485 US 759, 771 (1988) (explaining that a statement is “material” if “predictably capable of affecting” government decision).

¹⁴⁶ See *United States v Gilliland*, 312 US 86, 93 (1941) (“The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described.”); Varat, 53 *UCLA L Rev* at 1114–15 (cited in note 17) (“Lies in the course of official government proceedings risk producing false beliefs in the minds of official investigators, risking perversion of the investigative process. Arguably, the deceptions in those instances also interfere with the reasoning processes of—and the respect owed to—the deceived parties, and are likely to influence their behavior.”).

¹⁴⁷ See, for example, 18 USC § 1001 (prohibiting knowingly and willfully making “any materially false, fictitious or fraudulent statement or representation . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States”).

to elicit a benefit from the Government or to hinder Government operations.”¹⁴⁸

Recall too the wide range of laws that prohibit individuals from falsely representing that they speak on behalf of the government or from falsely impersonating a government official.¹⁴⁹ To be sure, such lies may cause second-party harms to listener autonomy, as listeners may make very different decisions in response to speech that they attribute to a government official.¹⁵⁰ But such laws also seek to address third-party harms by prohibiting lies that create doubt in the public’s mind about who speaks for the government and thus whether purported government officials can be trusted. As the Supreme Court explained nearly a century ago,

In order that the vast and complicated operations of the government of the United States shall be carried on successfully and with a minimum of friction and obstruction, it is important—or at least, Congress might reasonably so consider it—not only, that the authority of the governmental officers and employees be respected in particular cases, but that a spirit of respect and good will for the government and its officers shall generally prevail. And what could more directly impair this spirit than to permit unauthorized and unscrupulous persons to go about the country falsely assuming, for fraudulent purposes, to be entitled to the respect and credit due to an officer of the government?¹⁵¹

Under what circumstances do such lies threaten third-party harms to the public trust of the sort that would justify their regulation consistent with the First Amendment? Recall that each of the *Alvarez* opinions attended to the related possibility that the

¹⁴⁸ *Brogan v United States*, 522 US 398, 409 (1998) (Ginsburg, J, concurring); see also Morrison, 43 John Marshall L. Rev. at 139 (cited in note 141) (urging that the act be interpreted or amended to prohibit lies told to the government with the capacity to secure money, jobs, benefits, or “other things of value” or that “giv[e] false information which frustrates lawful regulation”).

¹⁴⁹ See, for example, 18 USC § 912 (criminalizing the actions of those who “falsely assume[] or pretend[] to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof, and acts as such”); 18 USC § 709 (prohibiting a speaker’s unauthorized use of federal agencies’ names in a manner reasonably calculated to convey the impression that the speaker’s message was approved or endorsed by the agency).

¹⁵⁰ See Norton, 88 BU L. Rev. at 592–94 (cited in note 115) (describing how a message’s perceived governmental source may change the credibility with which listeners receive it).

¹⁵¹ See *United States v Barnow*, 239 US 74, 78 (1915); *id.* at 80 (“It is the aim of the section 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.”).

lies targeted by the Stolen Valor Act threatened generalized and intangible third-party harm by undermining the government's interest in the integrity of its military honor system.¹⁵² Indeed, all three of the *Alvarez* opinions analogized the Stolen Valor Act to trademark law,¹⁵³ which provides a helpful (but by no means perfect) parallel for thinking about such harms.¹⁵⁴ More specifically, trademark infringement actions recognize the possibility that lies about the source of products and thus their perceived quality may not only cause second-party harms to listeners who may be deceived into making different purchasing decisions, but may also pose third-party harms to legitimate trademark holders.¹⁵⁵ Trademark infringement actions thus seek to prevent one party from capitalizing on the additional persuasive effects of having its message's (or product's) source misattributed to another, potentially more credible, party.¹⁵⁶ The Stolen Valor Act similarly sought to

¹⁵² More specifically, the government claimed that Mr. Alvarez's lies about receiving the Medal of Honor damaged the public's trust in the government's program of awarding medals to individuals who in fact deserved them and that lies about the receipt of military medals thus undermine the message it seeks to convey by awarding such medals. See Reply Brief of the United States, *United States v Alvarez*, No 11-210, *13 (filed Feb 13, 2012) (available on Westlaw at 2012 WL 454625) ("The government employs military honors to convey a message to the public that the recipient has been endorsed by the government as part of a select group. The aggregate effect of false claims undermines this purpose, not by harming public opinion of the awards or true recipients, but by diluting the medals' message of prestige and honor. By creating the misimpression that the claimant has received a medal for fictitious conduct that likely bears no relation to the government's standards for awarding each medal, false claims undermine the government's efforts to maintain selectivity and to convey information about recipients' conduct.").

¹⁵³ See *Alvarez*, 132 S Ct at 2547 (plurality), citing *San Francisco Arts & Athletics, Inc. v United States Olympic Comm.*, 483 US 522, 539-40 (1987); id at 2554 (concurring opinion) ("Statutes prohibiting trademark infringement present, perhaps, the closest analogy to the present statute."); id at 2559 (dissent) (drawing analogy to trademark law).

¹⁵⁴ Trademarks are a form of speech about the source of products upon which consumers rely for information that gives them confidence that those products will have the qualities that they expect from that source. See, for example, Robert G. Bone, *Taking the Confusion Out of "Likelihood of Confusion": Toward a More Sensible Approach to Trademark Infringement*, 106 Nw U L Rev 1307, 1311-12 (2012).

¹⁵⁵ See id at 1312 ("[T]rademark law protects sellers as well as consumers."). Along the same lines, federal trademark law also gives rise to an action for "dilution by tarnishment," which refers to 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 USC § 1125(c)(2)(C); see also *Starbucks Corp. v Wolfe's Borough Coffee, Inc.*, 588 F3d 97, 110 (2nd Cir 2009) ("A trademark may be tarnished when it is linked to products of shoddy quality or is portrayed in an unwholesome or unsavory context, with the result that the public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiff's unrelated goods.").

¹⁵⁶ See Ann Bartow, *Likelihood of Confusion*, 41 San Diego L Rev 721, 745 (2004) ("Legal protections for trademarks are doctrinally justified by the need to prevent consumer confusion, which potentially disadvantages both individuals who are tricked by confusing or

prevent parties from wrongly capitalizing on the prestige of military honors in ways that might cause second-party harm by shaping listeners' decisions as well as third-party harms by undermining the value of the honors themselves to the medal winners and the government.

But such third-party harms are considerably less tangible and more diffuse than many other types of harm, raising especially challenging problems of proof and causation that may embolden government to punish lies for partisan or other illegitimate purposes.¹⁵⁷ Justice Kennedy's plurality opinion thus appropriately counseled caution in this regard.¹⁵⁸ In contrast to the concurring and dissenting opinions—which assumed such harm without requiring, much less evaluating, any evidence of its existence¹⁵⁹—Justice Kennedy found that the government had not proven a causal connection between the regulated lies and its compelling interest in preventing the dilution of the value of military honors.¹⁶⁰ Although he did not identify the sort of proof he would

deceptive trademarks into purchasing goods and services other than those they intended to procure, and the providers of goods or services who lose sales when consumers are confused or deceived.”); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 Mich L Rev 2020, 2021 (2005) (“Trademarks exist only to the extent that consumers perceive them as designations of source. Infringement occurs only to the extent that consumers perceive one trademark as referring to the source of another.”).

¹⁵⁷ For related reasons, a number of scholars have urged that trademark law focus not simply on consumer deception but instead more precisely on actual harm to consumers and trademark holders. See, for example, Bone, 106 Nw U L Rev at 1308 (cited in note 154) (criticizing multifactor test for assessing likelihood of confusion as “an open-ended and relatively subjective approach that generates serious litigation uncertainty, chills beneficial uses of marks, and supports socially problematic expansions of trademark law”); Mark A. Lemley and Mark McKenna, *Irrelevant Confusion*, 62 Stan L Rev 413, 414–16 (2010) (criticizing trademark law as undermining important speech interests by focusing on whether the allegedly infringing mark confuses consumers rather than on whether it materially affects consumers' purchasing decisions); Rebecca Tushnet, *Running the Gamut from A to B: Federal Trademark and False Advertising Law*, 159 U Pa L Rev 1305, 1344–45 (2011) (urging trademark law to focus on misleading communications that materially affect consumers' decision making).

¹⁵⁸ See *Alvarez*, 132 S Ct at 2549–50.

¹⁵⁹ See *id* at 2555 (Breyer, J., concurring) (“To permit those who have not earned those honors to claim otherwise dilutes the value of the awards. Indeed, the 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 2559 (Alito, J., dissenting) (“[T]he proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps”).

¹⁶⁰ *Id* at 2549 (“The Government must demonstrate that unchallenged claims undermine the public's perception of the military and the integrity of its award system. This showing has not been made. . . . There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government's interest in protecting

have found probative of this causal connection, we might look for confirmation that such lies actually shaped meaningful decisions in specific contexts.¹⁶¹

For example, consider the many statutes that punish lies about a different type of credential: one's status as a law enforcement officer.¹⁶² Because police officers' unusual power means that members of the public generally consider all interactions with law enforcement as potentially high-stakes in nature, such lies threaten not only significant second-party harms to their individual listeners¹⁶³ but also third-party harms to the public's trust in, and thus the effectiveness of, law enforcement. Members of the public who cannot be confident that police officers are who they claim to be will be less likely to cooperate with the police.¹⁶⁴ In light of the significant second- and third-party harms in play, courts have thus appropriately interpreted the statutory language—which generally prohibits lies about one's status as a law enforcement officer that seek to obtain “something of value”¹⁶⁵—fairly broadly to prohibit a range of lies that shape the public's interaction with (purported) law enforcement. Examples include such lies as those told in an

the integrity of the military honors system and the Act's restriction on the false claims of liars like respondent has not been shown.”).

¹⁶¹ In contrast, the Stolen Valor Act was not limited to any particular context, nor did it focus on any specific decisions.

¹⁶² See, for example, Va Code Ann § 18.2-174 (making it a crime to pretend or assume to be a law enforcement officer). Note that at least one federal judge has relied on *Alvarez* in dissent to cast doubt on such statutes, questioning whether lies about one's police officer status should be treated any differently for First Amendment purposes than about one's status as a Congressional Medal of Honor winner. *United States v Chappell*, 691 F3d 388, 402 (4th Cir 2012) (Wynn dissenting) (dissenting from majority decision that upheld constitutionality of state law that prohibits individuals from falsely assuming or pretending to be a law enforcement officer).

¹⁶³ *Id* at 392, 398 (majority) (“By protecting unsuspecting citizens from those who falsely pretend to be law enforcement officers, the statute serves the Commonwealth's critical interest in public safety. . . . In addition to promoting public safety, the statute deters individuals from pretending to be police officers in an attempt to evade fines, incarceration, and other state-imposed sanctions. . . .”).

¹⁶⁴ See *Locurto v Guilani*, 447 F3d 159, 178–79 (2d Cir 2006) (“Police officers and firefighters alike are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to the respect that police officers and firefighters accord the members of that community. . . .”).

¹⁶⁵ See, for example, 18 USC § 912 (criminalizing the actions of anyone who “falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency, or officer thereof” and who “in such pretended character demands or obtains any . . . thing of value”); 18 USC § 76 (making it a crime to “demand or obtain from any person or from the United States . . . any money, paper, document, or other thing of value” while falsely assuming or pretending to be a federal government official or employee).

effort to avoid speeding tickets, or to convince a listener to share information she was otherwise unwilling to divulge.¹⁶⁶

I close with a short note on campaign lies. To be sure, a political candidate's lies about her credentials pose an especially challenging First Amendment question. Such lies should fall into the category of low-value lies because lies about having a degree or a military decoration are "easily verifiable" and do not concern matters involving philosophy, religion, history, and similar areas that trigger substantial chilling effects and government overreaching. Moreover, such lies pose second-party autonomy harms to their listeners (especially if they can be shown as material to a voter's vote) and may also pose significant if intangible third-party harms if they undermine public confidence in the integrity of the political process.¹⁶⁷ On the other hand, such laws themselves threaten significant First Amendment harms because they regulate expression in a context in which we especially fear government overreaching and partisan abuse.¹⁶⁸ In short, such lies frustrate important First Amendment interests—but in a context where the countervailing First Amendment dangers are unusually acute. These competing and very substantial concerns illustrate why this is such a difficult constitutional issue, and I have little to add to the many commentators who have thoughtfully examined this question in detail.¹⁶⁹ As Frederick Schauer has observed, "this is an area in which it is easy to suspect that any cure could be substantially worse than

¹⁶⁶ See *Lepowitch*, 318 US at 705 ("[A] person may be defrauded although he parts with something of no measurable value at all," as the Court found to be the case where defendant's lie about being an FBI agent caused his listener to divulge information about another person's location); *United States v Ramos-Arenas*, 596 F3d 783 (10th Cir 2010) (interpreting the statute to prohibit the defendant's lie about being a federal law enforcement officer when told to prevent a state trooper from ticketing the defendant's friend for speeding); id at 788 (noting that such lie provided value to the liar "if only in elevating his status in [his girlfriend's] eyes").

¹⁶⁷ See William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U Pa L Rev 285, 294–96 (2004).

¹⁶⁸ See *Alvarez*, 132 S Ct at 2556 (Breyer, J, concurring) ("expressing [no] view on the validity of those cases" rejecting First Amendment challenges to statutes prohibiting certain campaign lies); see also Marshall, 153 U Pa at 297–300 (cited in note 167).

¹⁶⁹ The many thoughtful discussions of these issues include Gerald G. Ashdown, *Distorting Democracy: Campaign Lies in the 21st Century*, 20 Wm & Mary Bill Rts J 1085 (2012); Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?* (UC Irvine School of Law Research Paper No 2012-68, Sept 24, 2012), online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2151618; Marshall, 153 U Pa L Rev 285 (cited in note 167).

the disease.”¹⁷⁰ In short, I do not pretend that the approach suggested in this article will generate easy answers to hard First Amendment controversies about the regulation of lies, but I do hope that it offers a framework for transparently acknowledging and grappling with the relevant interests.

III. CONCLUSION

Is there a First Amendment right to lie? As is so often the case, the answer is “it depends.” People lie frequently and for a wide variety of reasons. Some lies are morally and instrumentally more troubling than others; some lies may even be morally or instrumentally valuable. Because some lies may have First Amendment value in their own right and because the regulation of many other lies threatens government overreaching or the chilling of valuable speech, we should presume that lies are fully protected by the First Amendment such that government generally may not regulate them unless it satisfies strict scrutiny. On the other hand, a category of lies about certain objectively verifiable facts within the speaker’s personal knowledge sufficiently frustrates First Amendment interests to justify their treatment as a “low-value” category in which greater government regulation may be permitted to prevent certain harms.

The great number and variety of lies thus undermine efforts to characterize all—or none—as fully protected by the First Amendment. This requires us to draw some uncomfortable distinctions. Justice Breyer’s approach does not relieve us of this discomfort, but instead challenges us to confront it by transparently grappling with the important competing interests at stake. I have suggested that we can better assess the potential harm of the sorts of lies targeted by the Stolen Valor Act when we understand them as lies about a speaker’s credentials that might cause significant second-party harms to listeners as well as third-party harms to the public trust on which certain important government processes rely. Even so, however, First Amendment interests in checking the government’s power to act as the ultimate arbiter of truth counsel that we take care when regulating such lies. Laws appropriately balance

¹⁷⁰ Schauer, 57 UCLA L Rev at 915 (cited in note 17); see also Varat, 53 UCLA L Rev at 1131–32 (cited in note 17) (“When core speech on controversial matters of public concern is implicated in this way, there is great danger in leaving the ascertainment of truth so readily to judicial rather than public determination.”).

these competing concerns when they target lies that threaten second-party harms that take monetary or similarly tangible form, or lies that cause third-party harms when demonstrably material to high-stakes decisions in circumscribed settings.

