

TRUTH, LIES, AND STOLEN VALOR: A CASE FOR PROTECTING FALSE STATEMENTS OF FACT UNDER THE FIRST AMENDMENT

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ABSTRACT

The Stolen Valor Act of 2005 (the Act) makes it a crime to lie about having received a medal authorized by Congress for the military. In 2010, in United States v. Alvarez, the Ninth Circuit found the Act unconstitutional under the First Amendment, holding that false statements of fact, like other content-based restrictions on speech, are subject to strict scrutiny. The Act failed this test because, according to the court, it was not narrowly tailored to serve a compelling government interest. The decision highlights the uncertainty of First Amendment protections for false speech. Though the Supreme Court has held that certain categories of false speech—such as fraud and defamation—are proscribable, it has not ruled directly on a case in which false speech had been barred without respect to context, intent, or harm. This Note argues that false speech should be presumptively protected by the First Amendment, with exceptions for certain classes of speech that result in concrete harm to individuals. Such protection would limit government control of speech, avoid chilling worthy speech, promote privacy and autonomy, and result in easier administration for courts.

INTRODUCTION

In the summer of 2007, Xavier Alvarez stood before a meeting of the Three Valleys Municipal Water Board to introduce himself.¹ He

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told those in attendance: “I’m a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I’m still around.”² The summer before he was elected to the district’s water board, Alvarez told people he had been awarded the Medal of Honor for rescuing the American ambassador during the Iranian hostage crisis.³

At about the same time that Alvarez was introducing himself as a decorated war hero, a man who went by the name Rick Duncan was telling people in Colorado that he had received the Purple Heart during his service as a Marine.⁴ Duncan said that he was an Annapolis graduate who had survived the September 11 attack on the Pentagon and three tours of duty in Iraq.⁵ He had become known in Colorado through his antiwar politicking in the run-up to the 2008 election and had earned respect for his work on behalf of homeless veterans in Colorado Springs.⁶

Alvarez and Duncan appeared to be dedicated Americans, men who had served their country honorably in the armed forces and had continued on as public servants once their tours were complete. But Alvarez and Duncan were not as they appeared. Alvarez had never been a Marine, and he had never received the Medal of Honor.⁷ Rick Duncan was not even the Colorado man’s real name; he was actually Rick Glen Strandlof, a high school dropout and small-time criminal who had never served in the armed forces.⁸

When Alvarez and Strandlof were exposed as liars, they faced more than scorn and public humiliation. Each was charged with violating the Stolen Valor Act of 2005 (the Act).⁹ The statute makes it a crime for an individual to “falsely represent[] himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”¹⁰

1. United States v. Alvarez, 617 F.3d 1198, 1200 (9th Cir. 2010).

2. *Id.*

3. *Id.* at 1201.

4. Kevin Simpson, *Many Faces of ‘Fake Vet’ Rick Strandlof Exposed*, DENVER POST, June 7, 2009, at A1.

5. *Id.*

6. *Id.*

7. *Alvarez*, 617 F.3d at 1200–01.

8. Simpson, *supra* note 4.

9. Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

10. *Id.*

On July 16, 2010, the U.S. District Court for the District of Colorado dismissed the charges against Strandlof on First Amendment grounds.¹¹ Alvarez, however, pled guilty to the charges against him but appealed the First Amendment issue to the U.S. Court of Appeals for the Ninth Circuit.¹² On August 17, 2010, a three-judge panel ruled 2–1 that the Stolen Valor Act was unconstitutional because “regulations of false factual speech must, like other content-based speech restrictions, be subjected to strict scrutiny unless the statute is narrowly crafted to target the type of false factual speech previously held proscribable because it is not protected by the First Amendment.”¹³ Judge Jay Bybee dissented, arguing that his colleagues had misconstrued the Supreme Court’s First Amendment jurisprudence to find protection for false statements of fact that did not exist.¹⁴ He wrote, “False statements are unprotected by the First Amendment except in a limited set of contexts where such protection is necessary ‘to protect speech that matters.’”¹⁵ In March, the Ninth Circuit denied the government’s request to rehear *United States v. Alvarez*¹⁶ en banc.¹⁷ The government filed a petition for a writ of certiorari with the Supreme Court on August 18, 2011.¹⁸ Prosecutors in Strandlof’s case appealed to the Tenth Circuit, which heard oral argument in May 2011.¹⁹

The debate over the constitutionality of the Stolen Valor Act highlights a fundamental disagreement over the scope of protection for false statements of fact under the First Amendment. Though the Supreme Court announced in *Gertz v. Robert Welch, Inc.*²⁰ that “there is no constitutional value in false statements of fact,”²¹ it has never evaluated the constitutionality of a statute such as the Stolen Valor

11. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1192 (D. Colo. 2010).

12. *Alvarez*, 617 F.3d at 1201.

13. *Id.* at 1200. The majority opinion was written by Judge Milan Smith, Jr. and joined by Judge Thomas Nelson. *Id.* at 1199.

14. *Id.* at 1219 (Bybee, J., dissenting).

15. *Id.* at 1218–19 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

16. *United States v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010).

17. *United States v. Alvarez*, 638 F.3d 666, 666 (9th Cir. 2011) (order denying the government’s petition for panel rehearing and rehearing en banc).

18. Petition for Writ of Certiorari, *United States v. Alvarez*, No. 11-210 (U.S. Aug. 18, 2011).

19. John Ingold, *Free Speech Versus Vets’ Valor Argued*, DENVER POST, May 13, 2011, at B1.

20. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

21. *Id.* at 340.

Act, which punishes false speech without regard to context, intent, or harm.²² Moreover, it has never adequately explained the reasoning behind its blanket statement that false statements of fact have no constitutional value.²³ At the heart of the disagreement over the Stolen Valor Act is a question of framing: Does the First Amendment presumptively protect all speech without regard to truth or falsity, with exceptions for certain types of false speech such as defamation, false light, and fraud?²⁴ Or is false speech presumptively unprotected, subject to spheres of protection for certain classes of speech—such as defamatory statements about public officials that are made without actual malice—that must be protected to avoid chilling other worthy speech?²⁵

This Note argues that First Amendment protection should extend to speech without regard to truth or falsity, subject to exceptions for the already well-defined classes of false speech—defamation and fraud—that create concrete, individualized harm. This protection would promote the goals of the First Amendment by limiting government control of speech, and it would avoid the difficulties inherent in sorting truth from fiction, resulting in greater ease of administration for courts.²⁶ The Stolen Valor Act seeks to regulate speech based on its content, and the speech it seeks to regulate does not fall into any of the standard categorical exceptions. Thus, the Act should be subject to strict scrutiny.²⁷ It fails the rigorous requirements of strict scrutiny because it does not advance a compelling governmental interest and is not narrowly tailored.²⁸

22. See *infra* Part I.A.2.

23. See *infra* Part I.A.2.

24. See Eugene Volokh, *Restricting Recklessly/Knowingly False Statements About Political Candidates*, THE VOLOKH CONSPIRACY (Oct. 5, 2007, 3:33 PM), <http://volokh.com/2007/10/05/restricting-recklessly-knowingly-false-statements-about-political-candidates> (framing the issue in the context of the Washington Supreme Court's decision in *Rickert v. State Public Disclosure Commission*, 168 P.3d 826 (Wash. 2007)); see also Mark Tushnet, 'Telling Me Lies': *The Constitutionality of Regulating False Statements of Fact* 15 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 11-02, 2011), available at <http://ssrn.com/abstract=1737930> (framing the argument as a "level of generality" problem).

25. *United States v. Alvarez*, 617 F.3d 1198, 1220–21 (9th Cir. 2010) (Bybee, J., dissenting) ("Thus, the general rule is that false statements of fact are not protected by the First Amendment. There is, however, an important exception to this principle: where protecting a false statement is necessary 'in order to protect speech that matters.'" (footnote omitted) (quoting *Gertz*, 418 U.S. at 341)).

26. See *infra* Parts II, III.C.

27. See *infra* Part III.B.

28. See *infra* Part III.B.

Though the impulse to protect the integrity of military honors is noble, such protection does not serve a compelling interest. People frequently lie about military service and honors,²⁹ and it is hard to imagine that those lies significantly affect the ability of the military to recruit and carry on its mission effectively. Even if the protection of medals were a compelling interest, the Act would fail the prong requiring that the law be narrowly tailored because it punishes pure speech without regard to context or harm.³⁰ The Ninth Circuit majority and the district court judge in Colorado, therefore, were correct in striking down the law as unconstitutional.

This Note proceeds in three Parts. Part I examines the case law and legal theory on false statements of fact under the First Amendment, arguing that the jurisprudence lacks clarity as to whether false statements of fact like those made by Alvarez and Strandlof are protected. Part II discusses reasons for protecting false statements of fact, including limiting government control over the content of speech, promoting the privacy and autonomy of individuals, allowing for easy administration, and avoiding the chilling of protected speech. Part III applies the analytical framework of Parts I and II to the Stolen Valor Act, concluding that the Ninth Circuit and the federal district court in Colorado were correct to declare the Act unconstitutional. Even if the Act is constitutional under relevant case law, the Supreme Court should clarify this muddled area and move away from its blanket statement that false statements of fact have no constitutional value.

I. FALSE SPEECH AND THE FIRST AMENDMENT

A. *The Supreme Court's Approach to Freedom of Expression and False Speech*

The text of the First Amendment's protection of expression is deceptively plain: "Congress shall make no law . . . abridging the freedom of speech"³¹ Though the language appears to provide

29. For instance, then-Connecticut Attorney General Richard Blumenthal frequently misrepresented himself as having served in the Vietnam War. See Raymond Hernandez, *Candidate's Words Differ from His History*, N.Y. TIMES, May 18, 2010, at A1. The falsity of his statements garnered much media attention during his 2010 run for the U.S. Senate, which was ultimately successful despite the unflattering publicity. *Id.*

30. See *infra* Part III.B.2.

31. U.S. CONST. amend. I.

absolute immunity against government restrictions on all kinds of speech, the Free Speech Clause has not been interpreted as providing such unlimited protection.³² As Justice Holmes wrote in 1919, “[T]he First Amendment . . . cannot have been, and obviously was not, intended to give immunity for every possible use of language.”³³ Such an extreme vision of the First Amendment would foreclose restrictions on expression that have been accepted as essential to the orderly functioning of society, such as prohibitions against perjury and the solicitation of murder.³⁴ The Court has instead created a complex web of categorical exceptions to the general rule that speech is constitutionally protected.³⁵

1. *First Amendment Theory and Case Law.* Because of the broad language of the First Amendment, scholars and courts have struggled to develop a coherent theory of First Amendment protection for the freedom of expression.³⁶ In the absence of clear evidence of the Framers’ intent,³⁷ scholars and judges have crafted their own theories

32. See John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1295–96 (1993) (arguing that although “[t]he plain language of the First Amendment indicates that the Framers intended to establish a rule of absolute immunity,” the inclusion of the article “the” indicates that “the draftsmen intended to immunize a previously identified category or subset of speech”). See generally FREDERICK F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 89 (1982) (discussing the meaning of “speech” and noting that “[r]ights of course are not unlimited in scope” and that a right to free speech does not include “a ‘right’ to commit perjury, or to extort, or to threaten bodily harm, although all of these are speech acts”).

33. *Frohwerk v. United States*, 249 U.S. 204, 206 (1919).

34. See *id.* (“We venture to believe that neither Hamilton nor Madison, nor any competent person then or later, ever supposed that to make criminal the counselling of a murder within the jurisdiction of Congress would be an unconstitutional interference with free speech.”); DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 411 n.1 (2008) (“[D]eception and perjury . . . [have never] been seen as falling within the protection of the First Amendment under any serious theoretical approach to the subject . . .”).

35. Stephen G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 5 (2008) (“In the modern era, the basic First Amendment rule is that speech is constitutionally protected in the absence of proof that the speech creates a much more individualized and concrete harm than simple offense.”).

36. See, e.g., Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 877 (1963) (discussing the failure of theorists to develop an “adequate or comprehensive theory of the first amendment” and noting that “[t]he Supreme Court did not seriously commence the task of interpretation until [*United States v. Schenck*, 249 U.S. 47 (1919)]”).

37. See generally LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960) (noting that the freedom of expression had almost no history as a concept prior to the First Amendment, and thus no reasoned analysis existed of what it meant, how far it extended, and under what circumstances it might be

to guide their inquiries into what types of speech the First Amendment was designed to protect. The four leading theories are: the marketplace-of-ideas theory, the self-governance theory, the individual-self-fulfillment theory, and the safety-valve theory.³⁸

The marketplace-of-ideas theory is premised on the belief that freedom of expression is “the best process for advancing knowledge and discovering truth.”³⁹ It assumes that the best judgment comes from considering all the facts before arriving at a decision.⁴⁰ Under this theory, the exchange of knowledge should not be restricted because suppressing discussion perpetuates errors and blocks the generation of new ideas.⁴¹ Justice Holmes articulated the marketplace-of-ideas theory in his dissent in *Abrams v. United States*⁴²: “[T]he ultimate good desired is better reached by free trade in ideas[,] . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market, and . . . truth is the only ground upon which [men’s] wishes safely can be carried out.”⁴³

Another influential theory of protection for speech, the self-governance theory, provides a more narrow conception of freedom of speech than does the marketplace-of-ideas theory. It holds that speech should be protected because it allows speakers to engage in decisionmaking “through a process of open discussion which is available to all members of the community.”⁴⁴ The self-governance theory becomes problematic when taken to its extreme, however: if self-governance is the sole or most important reason for protecting

limited); RODNEY A. SMOLLA, 1 SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 1:1–2, :7, :11 (2010) (“There is . . . precious little record of what freedom of speech and of the press really meant to the framers.”).

38. See Emerson, *supra* note 36, at 878–86 (discussing the four theories and labeling the safety-valve theory the “balance between stability and change”); Gey, *supra* note 35, at 6–14 (labeling the four theories the marketplace of ideas, the facilitation of democracy, the safety valve, and the protection of individual liberty and autonomy).

39. Emerson, *supra* note 36, at 881.

40. *Id.* Like all the leading theories of First Amendment protection for free speech, the marketplace-of-ideas theory has limits. It is understood to be based on the assumptions that there is an objective truth to be discovered and that an open marketplace will lead to the discovery of that truth. 1 SMOLLA, *supra* note 37, § 2:18–19. But because “the modern mind is likely to be suspicious that truth in any absolute sense is within human capability, . . . [t]he marketplace theory is thus best understood *not* as a guarantor of the final conquest of truth, but rather as a defense of the *process* of an open marketplace.” *Id.*

41. 1 SMOLLA, *supra* note 37, § 2:18–19.

42. *Abrams v. United States*, 250 U.S. 616 (1919).

43. *Id.* at 630 (Holmes, J., dissenting).

44. Emerson, *supra* note 36, at 882.

speech, it follows that only speech related to politics or self-governance should be protected.⁴⁵ A wide range of speech, notably nonpolitical artistic and literary expression, could be excluded from protection under this view.⁴⁶

The individual-self-fulfillment theory grounds freedom of expression in the “widely accepted premise of Western thought that the proper end of man is the realization of his character and potentialities as a human being.”⁴⁷ Theorists differ in their emphases on the importance of self-actualization. Some formulate a theory of self-fulfillment that emphasizes free speech as an end in itself. This theory of free speech was expounded by Justice Marshall in *Procurier v. Martinez*⁴⁸: “The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”⁴⁹ Under this theory, it is expression itself—regardless of its truth or falsity—that is the good to be protected. Other theorists emphasize self-fulfillment as a quest for truth—a kind of smaller-scale marketplace-of-ideas theory.⁵⁰ Professor Thomas Emerson, for

45. 1 SMOLLA, *supra* note 37, § 2:6; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 93–94 (1948) (arguing that the freedom of speech is derived from the necessities of self-government); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20 (1971) (“Constitutional protection should be accorded only to speech that is explicitly [*sic*] political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”). Despite its rejection of this narrow conception of protected speech, the Court still affords political speech the utmost protection, stating that “[t]he First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) (*per curiam*) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

46. *See* Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891, 899–900 (1949) (reviewing MEIKLEJOHN, *supra* note 45) (pointing out the weakness in Meiklejohn’s distinction between public and private speech and noting that “[an individual] can get help from poems and plays and novels,” even “if Shakespeare and Whitehead do seem very far away from the issues of the next election”).

47. Emerson, *supra* note 36, at 879. *But see* Bork, *supra* note 45, at 25 (criticizing this view on the basis that the self-fulfillment theory does not provide a neutral ground for protecting speech).

48. *Procurier v. Martinez*, 416 U.S. 396 (1974).

49. *Id.* at 427; *see also* *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503–04 (1984) (“The First Amendment presupposes that the freedom to speak one’s mind is . . . an aspect of individual liberty—and thus a good unto itself . . .”).

50. Emerson, *supra* note 36, at 880. Professor Robert Bork, for example, divides the self-fulfillment goals of free speech into two separate categories: the development of the faculties of the individual and the happiness to be derived from engaging in the activity. Bork, *supra* note 45, at 25.

example, describes such a theory, noting that “[t]o cut off [man’s] search for truth, or his expression of it, is thus to elevate society and the state to a despotic command and to reduce the individual to the arbitrary control of others.”⁵¹ A self-fulfillment theory that is conceptualized as an individual’s quest for betterment through knowledge and truth would seem to be less protective of speech because speech that does not further this quest would not be protected.⁵²

The safety-valve theory holds that protecting expression is important because repressing speech leads to negative consequences.⁵³ This theory is not usually one of the leading justifications for protecting false statements of fact, but it does have some utility. Some scholars argue, for instance, that the United States should not punish Holocaust denial because to do so would only invigorate anti-Semitic forces.⁵⁴ Allowing people to express their views—however offensive or untrue—avoids the more harmful consequences associated with suppressing their speech.

Although each of the theories of freedom of expression protects only certain types of speech, the Supreme Court has resisted adopting a conception of speech that conforms to a single theory. Instead, it has declared that “[t]he guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government”⁵⁵ and has maintained that the protections of the First Amendment “are not confined to any field of human interest.”⁵⁶

51. Emerson, *supra* note 36, at 880.

52. Although Professor Emerson frames the theory as an individual search for truth, he does not limit the theory based on that aim. *See id.* (“[F]reedom of expression, while not the sole or sufficient end of society, is a good in itself . . .”).

53. Gey, *supra* note 35, at 10 (“The notion [of the safety-valve justification] is that the First Amendment allows those who disagree strongly with the political status quo to vent their anger and therefore release pressure that could otherwise potentially build into a revolutionary conflagration.”).

54. *See, e.g.*, Lyrissa Barnett Lidsky, *Where’s the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1101 (2008) (arguing that, even though Holocaust denial “poses a real threat of dignitary harm, pollution of public discourse, and even incitement of discrimination and violence against Jews” and there is little to fear from government regulation, the government should not criminally punish Holocaust denial because “punishment of believers will only tend to strengthen their convictions”).

55. *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

56. *Thomas v. Collins*, 323 U.S. 516, 531 (1945).

Under this broad conception of protection for speech, content-based restrictions are generally subject to strict scrutiny, which requires the government to show that a restriction is narrowly tailored to further a compelling interest.⁵⁷ Content-based restrictions on speech are those that “suppress, disadvantage, or impose differential burdens upon speech because of its content.”⁵⁸ Over the years, though, the Court has carved out categories of speech that are not subject to this exacting standard. The Court famously articulated its approach to categorical exceptions to First Amendment protections in *Chaplinsky v. New Hampshire*⁵⁹:

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.⁶⁰

In *United States v. Stevens*,⁶¹ the Court reiterated its reliance on this categorical approach, and identified the historical and traditional categories that may be restricted as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.⁶²

Moreover, the government may not further restrict speech that falls into proscribable categories on the basis of the viewpoint it communicates. In order to avoid viewpoint discrimination, which targets speech based on the particular position it expresses,⁶³ the

57. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (“Content-based regulations are presumptively invalid.”); *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 786 (1978) (“Especially where, as here, a prohibition is directed at speech itself, . . . the State may prevail only upon showing a subordinating interest which is compelling Even then, the State must employ means closely drawn to avoid unnecessary abridgement” (third omission in original) (quoting *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960); *Buckley v. Valeo*, 424 U.S. 1, 25 (1976) (per curiam))) (internal quotation marks omitted)).

58. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

59. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

60. *Id.* at 571–72 (footnotes omitted).

61. *United States v. Stevens*, 130 S. Ct. 1577 (2010).

62. *Id.* at 1584.

63. 1 SMOLLA, *supra* note 37, § 3:9; see, e.g., *City of Madison Joint Sch. Dist. No. 8 v. Wisc. Emp’t Relations Comm’n*, 429 U.S. 167, 175–76 (1976) (“To permit one side of a debatable

Court has limited permissible content discrimination within proscribable categories to discrimination in which “the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.”⁶⁴ For example, the state may prohibit obscenity that is especially prurient, because the very reason obscenity is unprotected is its prurience. In such a case, “no significant danger of idea or viewpoint discrimination exists.”⁶⁵ It may not, however, prohibit only obscenity that contains offensive political messages, because political messages both have nothing to do with the reason obscenity is proscribable and are protected in their own right.⁶⁶ The prohibition against viewpoint discrimination within categories of proscribable speech further illustrates the First Amendment’s presumption against allowing the government to favor one kind of speech over another.

The theories of First Amendment protection—marketplace of ideas, self-governance, individual self-fulfillment, and safety valve—as well as prevailing First Amendment doctrine are essential to understanding the Court’s approach to false statements of fact.

2. *False Speech Under the First Amendment.* The complexity of First Amendment doctrine is heightened in the area of false speech because of a lack of clarity as to whether false speech is presumptively protected. False speech as an overarching category was not included in *Chaplinsky*’s proscribable-speech categories.⁶⁷ Instead, the Court singled out a certain kind of false speech—libel—that was

public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.”).

64. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

65. *Id.*

66. *Id.*

67. *See supra* text accompanying notes 59–60. Indeed, most of the categories listed in *Chaplinsky*, including lewd and profane speech, now receive at least some protection, and the fighting-words doctrine itself is generally regarded to be a dead letter. *See* 1 SMOLLA, *supra* note 37, § 2:70 n.32 (noting that the Supreme Court’s decisions since *Chaplinsky* have narrowed the doctrine). The categorical approach still retains its utility, however. *See R.A.V.*, 505 U.S. at 383 (“Our decisions since the 1960’s have narrowed the scope of the traditional categorical exceptions for defamation and for obscenity, but a limited categorical approach has remained an important part of our First Amendment jurisprudence.” (citations omitted)). More recently, the Supreme Court rejected the government’s argument that a claim for a categorical exclusion from First Amendment protection should be based on a simple balancing of the value of the speech against its societal costs, calling such a test “startling and dangerous.” *See Stevens*, 130 S. Ct. at 1585 (“The First Amendment’s guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits.”).

unprotected because of its injurious consequences.⁶⁸ Other particular kinds of deceptions—including false commercial speech⁶⁹ and fraudulent statements⁷⁰—have also been found to be outside the purview of the First Amendment.⁷¹ In *Stevens*, the Court reiterated the distinction, identifying the historical and traditional categories of speech that may be restricted as obscenity, defamation, fraud, incitement, and speech that is integral to criminal conduct.⁷² Thus, although the Court specified two types of unprotected false speech—defamation and fraud—it did not list false speech as a category unto itself.

The Court has, however, spoken more generally about false speech. In 1974, the Court stated that there is no value in false statements of fact:

Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *But there is no constitutional value in false statements of fact.* Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues.⁷³

This statement, made in the context of a defamation case,⁷⁴ plays a pivotal role in the *Alvarez* opinions, with the majority and dissent interpreting it in starkly different ways.⁷⁵ Though the *Gertz* Court did

68. See *supra* text accompanying notes 59–60.

69. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771–72 (1976) (“The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow[s] cleanly as well as freely.”).

70. Illinois *ex rel.* Madigan v. Telemarketing Assocs., 538 U.S. 600, 606 (2003) (“[W]hen nondisclosure is accompanied by intentionally misleading statements designed to deceive the listener, the First Amendment leaves room for a fraud claim.”).

71. See Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1108 (2006) (discussing governmental efforts to “control deceptions in the interest of protecting from serious harm our people, our institutions, and our very form of self-governing representative democracy”).

72. *Stevens*, 130 S. Ct. at 1584.

73. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339–40 (1974) (emphasis added) (footnote omitted) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

74. In *Gertz*, the Court decided not to extend the protections of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to statements about private individuals. *Gertz*, 418 U.S. at 347–48 n.10.

75. On the one hand, the majority stated that “*Gertz*’s statement that false factual speech is unprotected, considered in isolation, omits discussion of essential constitutional qualifications on that proposition.” *United States v. Alvarez*, 617 F.3d 1198, 1203 (9th Cir. 2010). The dissent,

not qualify its statement that “there is no constitutional value in false statements of fact,” the Court’s subsequent jurisprudence belies the claim that the statement represented a bright line rule. The Court has generally required more than mere falsity to bring false speech outside the purview of First Amendment protection.⁷⁶ Unprotected false speech usually has two characteristics: scienter and individualized harm.⁷⁷ For instance, a fraud action requires a plaintiff to prove that a representation was made with intent to mislead.⁷⁸ Similarly, defamation actions generally require harm to an individual’s reputation.⁷⁹

To ensure the protection of so-called worthy speech, the Court has extended First Amendment protection to libel by requiring a heightened scienter. In *New York Times Co. v. Sullivan*,⁸⁰ the Court held that defamation of public officials was not actionable unless it could be shown that the false statements at issue were made with “actual malice”—knowledge that the statements were false or reckless disregard as to whether they were true or false.⁸¹ In setting

on the other hand, argued that “The majority has effectively overruled *Gertz* and inverted the whole scheme. The Supreme Court has told us consistently that the general rule is that false statements of fact are unprotected, and has carved out certain limited exceptions to this principle in certain contexts.” *Id.* at 1223 (Bybee, J., dissenting).

76. See *infra* notes 78–103 and accompanying text.

77. See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992) (“Defamation and deception are actionable wrongs [because] . . . they vindicate private rights invoked by, or at least on behalf of, private individuals.”); see also *Alvarez*, 617 F.3d at 1211 (“It is obvious . . . that [the] categories [of fraud and speech integral to criminal conduct] also include limiting characteristics to what speech may be proscribed beyond mere falsity, just as defamation law does.”).

78. *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 621 (2003).

79. *Sullivan*, 376 U.S. at 267. In the context of defamation, no cause of action for libel on the government exists, nor does a cause of action exist for general public frauds, deceptions, or defamations. *Id.* at 291 (“[N]o court of last resort in this country has ever held, or even suggested, that prosecutions for libel *on government* have any place in the American system of jurisprudence.” (emphasis added) (quoting *City of Chicago v. Tribune Co.*, 139 N.E. 86, 88 (Ill. 1923)) (internal quotation marks omitted)); *Weatherhead v. Globe Int’l, Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) (“Under group libel, ‘if . . . the statement concerns a group sufficiently large that it cannot reasonably be understood to apply to plaintiff particularly, it is not actionable in the absence of content or circumstances reasonably specifying the plaintiff individually.’” (omission in original) (quoting 2 FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR S. GRAY, *THE LAW OF TORTS* § 5.7 (2d ed. 1986))); see also Fried, *supra* note 77, at 238 (“[T]he First Amendment precludes punishment for generalized ‘public’ frauds, deceptions, and defamation.”).

80. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

81. *Id.* at 283. The Court extended this protection to statements about public figures in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

this standard, the Court articulated its theory of why defamatory statements should be protected: not because the statements themselves were valuable, but because overregulating those statements could impermissibly chill protected speech.⁸² Justice Brennan opined:

A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable “self-censorship.” . . . [W]ould-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 They tend to make only statements which steer far wider of the unlawful zone.⁸³

The same year the Court decided *Sullivan*, it held in *Garrison v. Louisiana*⁸⁴ that the same standards applied to criminal libel statutes.⁸⁵ It held unconstitutional a statute that punished both true statements made with actual malice and false statements made against public officials without regard to whether the statements were made with knowledge of their falsity or with reckless disregard to their truth or falsity.⁸⁶ Justice Brennan stated that because “the use of the known lie as a tool is . . . at odds with the premises of democratic government . . . the knowingly false statement and the false statement made with reckless disregard of truth, do not enjoy constitutional protection.”⁸⁷ Despite finding that false statements of fact are worthless, the Court nevertheless acknowledged the need to protect certain false statements to avoid chilling speech it deemed more worthy.⁸⁸

In *Time, Inc. v. Hill*,⁸⁹ the Court applied heightened scienter requirements, similar to those required by *Sullivan* and *Garrison*, to a

82. *Sullivan*, 376 U.S. at 279.

83. *Id.* (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (internal quotation marks omitted).

84. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

85. *Id.* at 67.

86. *Id.* at 77–78.

87. *Id.* at 75.

88. *See id.* at 78 (“The *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false.”).

89. *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

false-light claim.⁹⁰ The appellee claimed that *Time* magazine, in a story about a play, gave the impression that the play was an accurate portrayal of his family's experience of being held hostage.⁹¹ In fact, the play was based on a novel that fictionalized the experience, and the appellee sued under a New York privacy statute.⁹² The Court held that "the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth."⁹³

In considering false speech in the context of a campaign, the Court has likewise required an element of heightened intent. In 1976, the Court in *Schwartz v. Vanasco*⁹⁴ summarily affirmed a three-judge district court ruling that facially invalidated a portion of the New York campaign code.⁹⁵ The challenged sections banned, among other things, "[m]isrepresentation of any candidate's qualifications," including "personal vilification" and "scurrilous attacks,"⁹⁶ as well as any misrepresentation of a candidate's position,⁹⁷ party affiliation, or endorsement.⁹⁸ After citing *Garrison's* language about the "use of the known lie as a tool," the district court stated that if the political statement were made with "actual malice," it did not enjoy

90. *Id.* at 389 ("[S]anctions against either innocent or negligent misstatement would prevent a grave hazard of discouraging the press from exercising the constitutional guarantees."). False light is a theory of invasion of privacy. *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245, 248 n.2 (1974). As the Court has explained, "Publicity that places the plaintiff in a false light in the public eye is generally recognized as one of the several distinct kinds of invasions actionable under the privacy rubric." *Id.*

91. *Cantrell*, 419 U.S. at 378.

92. *Id.*

93. *Id.* at 387–88.

94. *Schwartz v. Vanasco*, 423 U.S. 1041 (1976), *aff'g mem.* 401 F. Supp. 87 (E.D.N.Y. 1975).

95. *Id.* at 1041. The case arose out of a lawsuit filed by two candidates for the New York State Assembly. *Vanasco v. Schwartz*, 401 F. Supp. 87, 89–90 (E.D.N.Y. 1975), *aff'd mem.*, 423 U.S. 1041 (1976). Roy Vanasco was found to have misrepresented his party affiliation by distributing materials with "Republican-Liberal" on them when he was on the ballot as simply a Republican. *Id.* at 89. Joseph Ferris was found to have made misrepresentations about his opponent's voting record in campaign literature and in remarks to a local newspaper. *Id.* at 89–90. A third plaintiff, Robert Postel, filed suit after he was ordered to stop distributing literature that his opponent had complained about to the elections board. *Id.* at 90.

96. Fair Campaign Code § 6201.1(c)–(f), N.Y. COMP. CODES R. & REGS. tit. 9, § 6201.1(c)–(f) (1974), *reprinted in Vanasco*, 401 F. Supp. at 101–02.

97. *Id.* § 6201.1(e).

98. *Id.* § 6201.1(f).

constitutional protection.⁹⁹ The problem with New York's code, the district court found, was that it did not limit punishment to those statements made with knowledge of the statements' falsity or with reckless disregard for the truth.¹⁰⁰ As such, the statute risked chilling protected political speech.¹⁰¹ Had the statute been more narrowly drawn to protect misrepresentations that were neither knowingly nor recklessly made, the provision might have been upheld.¹⁰² The Supreme Court's summary affirmance of the district court's ruling thus suggested a willingness to exclude recklessly or knowingly false statements from First Amendment protection in the context of political campaigns, but the Court has never ruled directly on the issue.¹⁰³

99. *Vanasco*, 401 F. Supp. at 91 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)) (internal quotation marks omitted). The court went on to say that, keeping in mind that political speech about public officers and public figures is the area in which the First Amendment "has its fullest and most urgent application[.] . . . we can agree with the Board's argument that calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected." *Id.* at 93 (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)) (internal quotation marks omitted).

100. *Id.* at 96.

101. *Id.* at 97.

102. *See id.* at 100 ("Nothing in our decision downgrades the state's legitimate interest in insuring fair and honest elections. Undoubtedly, deliberate calculated falsehoods when used by political candidates can lead to public cynicism and apathy toward the electoral process.").

103. The Court's willingness to regulate false speech in the context of political campaigns could be based on its recognition of a compelling interest in protecting the integrity of the electoral process. In *Brown v. Hartlage*, 456 U.S. 45 (1982), the Court recognized that "the States have a legitimate interest in preserving the integrity of their electoral processes." *Id.* at 52. Despite that fact, the Court held that a Kentucky corruption statute had been applied unconstitutionally to invalidate the election of the defendant. *Id.* at 62. The defendant had promised to serve at a lower salary than that fixed by law if elected, a promise that was barred by the statute. *Id.* at 48. As the defendant could not deliver on the promise, the Court analyzed it as a falsehood, and found that the statute did not provide the "breathing space" necessary for free expression, *id.* at 61 (quoting *N.Y. Times v. Sullivan*, 376 U.S. 254, 272 (1964)) (internal quotation marks omitted), because it required the defendant's "election victory [to] be voided even if the offending statement was made in good faith and was quickly repudiated." *Id.* According to the court, the chilling effect of such absolute accountability for factual misstatements in the course of political debate is incompatible with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." *Id.* (internal quotation marks omitted); *see also* *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 788-89 (1978) ("Preserving the integrity of the electoral process, preventing corruption, and 'sustain[ing] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government' are interests of the highest importance." (alteration in original) (footnote omitted) (quoting *United States v. UAW*, 352 U.S. 567, 575 (1957))); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam) ("In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.").

Though the Supreme Court has said that false statements of fact are unworthy of constitutional protection, its jurisprudence reveals that, generally, only false statements of fact that are made with a culpable state of mind and that result in individualized harm are unprotected. Because the Court has not ruled on a case in which a speaker made a false statement of fact that was not defamatory, fraudulent, or sufficiently misleading to satisfy the requirements of a false-light claim, lower courts have drawn from the ill-fitting contours of *Chaplinsky*, *Sullivan*, and *Gertz* on the rare occasions when they have considered such cases.¹⁰⁴

The Court's statements in those cases make clear that its jurisprudence dealing with false statements of fact and other categories of unprotected speech is grounded in the truth-seeking function of free speech advanced by both the marketplace-of-ideas theory and the self-governance theory of First Amendment protection for speech. In *Chaplinsky*, the Court explicitly said as much, stating that the unprotected categories of speech are "no essential part of any exposition of ideas, and are of . . . slight social value as a step to truth."¹⁰⁵ Such a conception of the value of speech presupposes that value is based on a contribution to the search for truth. Speech that does not enhance this value is not worthy of protection. In *Sullivan*, the Court relied on a similar conception of speech to come to its decision that some erroneous statements of fact must be protected not because they have inherent value, but because regulating them too harshly might chill other, worthier speech.¹⁰⁶ *Gertz* similarly found that false statements of fact lack constitutional value because they do not "materially advance[] society's interest in the 'uninhibited, robust, and wide-open' debate on public issues."¹⁰⁷ Despite its frequent reliance on these theories, the Court has not explained its basis for the assumption that the sole, or most important, reason for protecting speech is its ability to advance the search for truth. Part II argues that reasons exist to protect false speech, even if such speech does not aid in the search for truth.

104. See *infra* Part I.B.

105. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

106. See *Sullivan*, 376 U.S. at 271–72 (“[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’” (second omission in original) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

107. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Sullivan*, 376 U.S. at 270).

B. Lower Court Decisions Dealing with False Statements of Fact

As discussed,¹⁰⁸ the Supreme Court has not yet considered a case like *Alvarez* in which a deceptive statement that does not fall within the traditionally unprotected categories is punished without regard to its context, intent, or harm. Many lower court decisions that reference false statements of fact and the First Amendment outside of the campaign context concern defamation and false-light claims¹⁰⁹ or claims about the right of public employees to make false statements on matters of public concern.¹¹⁰ The decisions that do not concern defamation often involve speech in a specific context, such as a prison,¹¹¹ that makes the interest in restricting speech compelling.¹¹²

108. See *supra* Part I.A.2.

109. See, e.g., *Carr v. Forbes, Inc.*, 259 F.3d 273, 282 (4th Cir. 2001) (holding that a developer who had sued a publisher for defamation was a limited public figure who was required to show that the publisher had acted with actual malice); *Horne v. Russell Cnty. Comm'n*, 379 F. Supp. 2d 1305, 1341 (M.D. Ala. 2005) (granting the defendants' summary judgment motion in response to the plaintiff's action, which combined claims for both false light and invasion of privacy, because the plaintiff had shown no evidence that rumors about her were spread with knowledge of falsity or reckless disregard as to whether they were false).

110. See, e.g., *Brasslett v. Cota*, 761 F.2d 827, 844 (1st Cir. 1985) (“[E]rroneous statements of public concern will be protected unless they are shown to have interfered with the employee's performance or the regular operation of his governmental agency.”).

111. For example, in *Nicholas v. O'Connor*, No. 98-2049, 2000 WL 253700 (2d Cir. Mar. 1, 2000), the Second Circuit rejected a prison inmate's claim that his First Amendment rights had been violated, holding that he had no constitutional right to make false statements to correctional officers. *Id.* at *1. The court cited *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), for the proposition that there is no constitutional value in false statements of fact. *Nicholas*, 2000 WL 253700, at *1 (citing *Milkovich*, 497 U.S. at 18). It also cited the Supreme Court's decision in *Turner v. Safley*, 482 U.S. 78 (1987), which upheld restrictions on inmate-to-inmate correspondence that were reasonably related to “legitimate penological interests.” *Nicholas*, 2000 WL 253700, at *1 (citing *Turner*, 482 U.S. at 89, 91).

112. Lower court decisions related to false statements of fact outside the traditionally unprotected categories often involve unique fact situations. In *Chaker v. Cogan*, 428 F.3d 1215 (9th Cir. 2005), the Ninth Circuit held that a law making it a crime to knowingly file a false report of peace-officer misconduct was impermissible viewpoint discrimination because it did not also punish knowingly filing a false report in support of a peace officer. *Id.* at 1227–28. In *Michigan Protection & Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695 (E.D. Mich. 1992), the U.S. District Court for the Eastern District of Michigan rejected an argument that defendants who present facts instead of opinions during a protest lose their First Amendment rights. *Id.* at 721 n.50. The court noted that it had not found

any case law stating that private persons engaging in valid, nondefamatory protest activities lose their First Amendment protection if they make a false statement of fact. Rather, those cases holding that false statements of fact are not protected are generally libel or defamation suits or statements by public officials. The Court is unaware of any decision that has held that a private, nonlibellous comment may be denied First Amendment protection simply because it is alleged to be based on fact rather than on opinion.

Id. (citations omitted).

Alvarez thus poses a unique constitutional question that most lower courts have yet to tackle and on which the Supreme Court has yet to offer guidance.

Lower courts have shown a willingness to uphold restrictions on false speech in the campaign context when those restrictions require an element of intent. In *Pesttrak v. Ohio Elections Commission*,¹¹³ the Sixth Circuit upheld provisions of an Ohio election statute that allowed the Commission to initiate investigations into false statements made during campaigns, to refer matters for prosecution, and to state its opinion on the truth or falsity of matters within its purview.¹¹⁴ In doing so, the Sixth Circuit relied on the Supreme Court's statements in *Gertz* to find that portions of the statute that punished making a false statement either knowingly or with reckless disregard to its falsity came within the Supreme Court's holdings in *Garrison* and *Sullivan*.¹¹⁵ The court interpreted those cases to mean that "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth."¹¹⁶

Likewise, in *Tomei v. Finley*,¹¹⁷ the U.S. District Court for the Northern District of Illinois granted an injunction against the Democratic defendant's use of the acronym "REP" during a campaign.¹¹⁸ The Democrats had formed the "Representation for Every Person Party" and used the campaign slogan "Vote REP April 7" on campaign literature, signs, and buttons.¹¹⁹ The court noted that use of the acronym "reflected what the trademark infringement cases term a strong 'likelihood of confusion'" because the acronym REP is frequently used to refer to Republicans.¹²⁰ In reaching its decision to grant the injunction, the court relied on language from *Garrison* explaining that "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."¹²¹ The court wrote that the acronym was not an expression

113. *Pesttrak v. Ohio Elections Comm'n*, 926 F.2d 573 (6th Cir. 1991).

114. *Id.* at 575.

115. *Id.* at 577.

116. *Id.*

117. *Tomei v. Finley*, 512 F. Supp. 695 (N.D. Ill. 1981).

118. *Id.* at 696.

119. *Id.* at 696–97.

120. *Id.* at 697.

121. *Id.* at 697–98 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964)).

of ideas at all, or that if it were, it was a deliberately false expression.¹²²

The Washington Supreme Court, however, has struck down restrictions on speech in the campaign context as violating the First Amendment, despite the Supreme Court's apparent willingness to regulate deceptive campaign speech in *Schwartz v. Vanasco*.¹²³ In *State ex rel. Public Disclosure Commission v. 119 Vote No! Committee*,¹²⁴ the Washington court struck down a statute that prohibited any person from sponsoring, with actual malice, a political advertisement containing a false statement of material fact.¹²⁵ The court reasoned that the statute sought to regulate protected political speech, and that the truth or falsity of the speech was irrelevant to the constitutional inquiry.¹²⁶ The court proceeded to apply strict scrutiny to the statute, holding that the state's interest in "foster[ing] an informed electorate" did not justify its intrusion on protected speech.¹²⁷ It found the state's reliance on *Gertz* and the law of defamation to be inapposite, as the state was seeking to punish speech when there had been no harm to an individual.¹²⁸

In 2007, the Washington Supreme Court revisited the issue in *Rickert v. State Public Disclosure Commission*,¹²⁹ striking down a law that attempted to address the attributes that had made the statute unconstitutional in *119 Vote No! Committee*.¹³⁰ The new statute provided that it would be a violation to sponsor, with actual malice, "[p]olitical advertising or an electioneering communication that

122. *Id.* at 698.

123. *See supra* Part I.A.2.

124. *State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691 (Wash. 1998).

125. *Id.* at 699. The state's Public Disclosure Commission brought suit against the 119 Vote No! Committee over its political advertisement suggesting that Initiative 119, if passed, would have allowed assisted suicide. *Id.* at 693. The commission alleged that the advertisement misrepresented the initiative by suggesting that it invited assisted suicide without sufficient safeguards. *Id.*

126. *Id.* at 695 ("The State asserts that it may prohibit false statements of fact contained in political advertisements. This claim presupposes the State possesses an independent right to determine truth and falsity in political debate. However, the courts have 'consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker.'" (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1963))).

127. *Id.* at 697.

128. *Id.*

129. *Rickert v. State Pub. Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007).

130. *Id.* at 827.

contains a false statement of material fact about a candidate for public office.”¹³¹ Lawmakers apparently hoped that by limiting the statute’s regulations to statements made “about a candidate for public office,” they could avoid the problem of the statute’s punishing speech that did not harm an individual, which was the problem that the court had identified in *119 Vote No! Committee*.¹³² The court held that the additional language did not prevent invalidation because the statute applied to protected speech and was thus subject to strict scrutiny, which it failed.¹³³ The court extended First Amendment protection to the speech at issue because it was political speech, which is entitled to the utmost protection.¹³⁴ It noted that lawmakers might have intended to limit the statute’s scope to unprotected defamatory statements, but that the statute did not require proof of the defamatory nature of punishable statements.¹³⁵ In applying strict scrutiny, the court held that protecting candidates was not a compelling interest, and that, in any case, the statute did not address the reputational harms that it purported to combat.¹³⁶ Further, according to the court, the statute was not narrowly tailored to address the asserted interest in preserving the integrity of elections because it did not prohibit lies told about oneself.¹³⁷

The preceding discussion shows that, although lower courts often cite the Supreme Court’s statements that there is no constitutional value in false statements of fact, they may be hesitant to find all false statements of fact as outside First Amendment protection. Campaign-speech cases in particular indicate that much confusion still exists among lower courts about how to treat false statements that do not rise to the level of defamation, fraud, or false light. The next Part argues that such statements deserve protection.

131. WASH. REV. CODE ANN. § 42.17.530(1) (West 2006).

132. *Rickert*, 168 P.3d at 827; see also *supra* text accompanying notes 123–128.

133. *Rickert*, 168 P.3d at 832.

134. *Id.* at 828 (“[T]he First Amendment has its fullest and most urgent application to speech uttered during a campaign for political office.” (alteration in original) (quoting *Burson v. Freeman*, 504 U.S. 191, 196 (1992) (plurality opinion)) (internal quotation marks omitted)).

135. *Id.* at 829.

136. *Id.* at 830.

137. *Id.* at 831.

II. REASONS FOR PROTECTING FALSE STATEMENTS OF FACT

As noted in Part I, the Supreme Court seems to have accepted the proposition that false statements of fact are unworthy of protection for their own sake.¹³⁸ This analysis is grounded in the idea that “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”¹³⁹ Though it puts the intentional lie and the careless error on equal footing for their lack of contribution to public discourse, the Court affords the careless error—or at least the error made without “actual malice”—some protection to avoid chilling speech it deems worthy.¹⁴⁰ It has yet to directly address whether the intentional lie should likewise be protected to avoid adverse constitutional consequences. This Part argues that, regardless of whether false statements have constitutional value, there are important reasons for protecting them.

Some scholars and philosophers argue that false statements have intrinsic value.¹⁴¹ Justice Brennan quoted John Stuart Mill when he addressed the inherent value of false speech in a footnote in *Sullivan*: “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

138. See *supra* text accompanying note 73.

139. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

140. *Id.* at 340–41.

141. See, e.g., JOHN STUART MILL, ON LIBERTY 18 (David Spitz ed., W.W. Norton & Co. 1975) (1859) (“[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose . . . the clearer perception and livelier impression of truth produced, by its collision with error.”). Professor R. George Wright argues in a forthcoming article that lies have value in and of themselves and may contribute to the values that underlie the First Amendment. See R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. (forthcoming). He discusses lies told to protect fugitive slaves before the Civil War and Jews during World War II as examples of lies that have value and advance First Amendment goals. *Id.* Professor Mark Tushnet argues that both “white lies” and lies that allow people to “re-construct” themselves may have social value. Tushnet, *supra* note 24, at 11. But see Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 905 (2010) (arguing that John Stuart Mill “makes clear that his conclusions about the liberty of thought and discussion pertain to issues of ‘morals, religion, politics, social relations, and the business of life,’” but not to science or other demonstrable facts (quoting MILL, *supra*, at 36)).

with error.”¹⁴² Nevertheless, as discussed in the previous Part, the Court has not embraced this theory.

Assuming that false statements of fact have no inherent value, there are still compelling reasons to protect false statements that are not defamatory or fraudulent. These reasons generally fall into two categories. The first category comprises liberty concerns, which include avoiding setting up the government as an arbiter of truth, promoting privacy and autonomy, and protecting other valuable speech. The second category contains pragmatic concerns, which include avoiding the difficulty of separating truth from fiction and facts from opinions, and promoting ease of administration.

A. *Liberty Concerns*

Various First Amendment scholars have noted the danger inherent in allowing the government to routinely decide matters of truth and falsity.¹⁴³ Indeed, the First Amendment seems designed to avoid such government control of truth, thought, and belief, with its prohibition on government establishment of religion and abridgement of speech.¹⁴⁴ This notion of liberty underlies several of the theories of First Amendment protection, including the individual-self-fulfillment theory and the self-governance theory.¹⁴⁵ To have the free exchange of ideas necessary to the self-governance and truth-seeking functions

142. *Sullivan*, 376 U.S. at 279 n.19 (quoting J.S. MILL, ON LIBERTY (1859), reprinted in J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 1, 15 (R.B. McCallum ed., Basil Blackwell 1947)). *But see* Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 668–69 (1987) (attacking the idea that a competition between true and false statements will increase knowledge as dependent on the contradictory assertion that the government cannot—but individual people can—be trusted to sort truth from fiction); Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1203–04 (2008) (arguing that the benefits of false speech do not accrue to speech that is insincere).

143. *See generally* SCHAUER, *supra* note 32, at 85–86 (“Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, [and] an appreciation of the fallibility of political leaders . . .”); Gey, *supra* note 35, at 16–22 (“[C]ollective political control of speech is inconsistent with democratic self-governance not because it will lead to more social evils in the form of bad political results, but rather because free speech regulation undermines the very character of the democratic political system itself.”); Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 140 (noting “the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate”).

144. *See* Gey, *supra* note 35, at 18 (“[A]s in the religion area, the government is prohibited by the speech clauses . . . from using the law to enforce its ideology on those who disagree.”).

145. *See supra* Part I.A.1.

of the First Amendment, the government must allow free debate. If the government were to involve itself in fact-checking speech, it would expand its control over the content of speech.

Another potential danger in allowing the government to punish false statements of fact is the prospect of government intrusion into people's lives. If the government could punish false statements of fact without regard to context, intent, or harm, it could ostensibly punish any false statement a person makes, even about himself.¹⁴⁶ To determine truth or falsity, the government would need to investigate a person's background. Most Americans would likely balk at the prospect of such an investigation.¹⁴⁷ Though it may be far-fetched to imagine the government attempting to regulate such private aspects of our lives as statements made online or to friends,¹⁴⁸ liberty and privacy interests are nevertheless best served by a blanket protection that limits the ability of government to take a step down such a road of regulation.

Protection for false statements of fact also promotes autonomy and self-fulfillment. If self-fulfillment is framed in terms of the autonomy of the individual to control his life and his self image, the freedom to make false statements has some inherent value.¹⁴⁹ History, literature, and popular culture are filled with examples of people who have lied about their pasts. For instance, Jay Gatsby claimed he was a wealthy dilettante and war hero, but he was revealed to be a bootlegger.¹⁵⁰ James Frey's memoir, *A Million Little Pieces*,¹⁵¹ was

146. See *infra* Part III.C.

147. Professor Frederick Schauer notes that the debate during the 1950s between an absolutist vision of the First Amendment and a balancing approach was framed by a Supreme Court that was "largely passive in the face of McCarthyism." Frederick Schauer, *Freedom of Expression Adjudication in Europe and America: A Case Study in Comparative Constitutional Architecture* 18 (John F. Kennedy Sch. of Gov't, Harvard Univ., Faculty Research Working Papers Series, Paper No. RWP05-019, 2005), available at <http://ssrn.com/abstract=668523>. Professor Schauer explains that "the debate . . . was significantly about a distrust of discretion and significantly about a fear of the official ability to assess accurately the dangers that might come from speaking, writing, and printing." *Id.* at 18–19.

148. See *infra* Part III.C.

149. See Varat, *supra* note 71, at 1109 ("Such a regime [of regulation of deception] 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.").

150. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 78–80, 160–61 (1925).

151. JAMES FREY, *A MILLION LITTLE PIECES* (2003).

found to be filled with exaggerations and falsehoods.¹⁵² Motives for such false statements differ and may include creative expression, the desire to impress others, or the need to bury past trauma, but all of these motives share the common thread of allowing a person to shape the image he presents to the world.¹⁵³ The closest the Court has come to expressing concern for the autonomy of the individual is Justice Marshall's statement in *Procurier* that the First Amendment serves the need of the human spirit for expression.¹⁵⁴ This conception would necessarily protect both true and false statements about oneself.¹⁵⁵

Finally, the value of protecting false speech to avoid chilling valuable protected speech is well entrenched in First Amendment doctrine.¹⁵⁶ It is raised as a principal reason in *Sullivan* for requiring actual malice in actions for defamation of public officials.¹⁵⁷ Likewise, the Court in *Gertz* noted that “[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate.”¹⁵⁸ Punishing false statements, absent a heightened scienter requirement, could impermissibly chill political dissent. Moreover, regulating false ideas could infringe on belief systems, since opinions on policy matters are often based on disputed

152. *A Million Little Pieces* was discovered to be filled with falsehoods and exaggerations, though it was billed as a memoir. Edward Wyatt, *Writer Says He Made Up Some Details*, N.Y. TIMES, Jan. 12, 2006, at A20. Frey's falsehoods come closer to fraud because he used them to sell books for profit.

153. See Varat, *supra* note 71, at 1108 (discussing kinds of deception, including “intentionally concealing one’s identity in order to conduct undercover operations, maintain privacy, ward off retaliation for unpopular belief, or disguise who is really funding a candidate or a ballot measure”).

154. See *supra* notes 48–49 and accompanying text.

155. Of course, one person’s autonomy may interfere with another’s. If a candidate for office lies about having served in a war, he takes away the voters’ autonomy in choosing a candidate who aligns with their beliefs and criteria for what makes a good leader. See *supra* note 29. This infringement on the voters’ ability to choose also ties into the self-governance theory: when candidates lie, the ability of voters to govern themselves is diminished.

156. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964) (“That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive’ was also recognized . . . in [*Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942)].” (first omission in original) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

157. *Id.* at 279 (“A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to a comparable ‘self-censorship.’ . . . Under such a rule, 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.”).

158. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

facts. For example, despite significant evidence that global warming is occurring and is largely caused by human activity,¹⁵⁹ opinions on the seriousness of the phenomenon differ,¹⁶⁰ and some skeptics even doubt its existence.¹⁶¹ Political dissent could be chilled were the government to restrict speech on certain facts that underlie opinions.

The same liberty concerns that underlie free-speech doctrine—government interference with speech, government intrusion into private lives, individual autonomy, and the chilling of protected speech—are implicated by and weigh in favor of protection for false statements of fact.

B. Pragmatic Concerns

There are also practical reasons to favor presumptive protection of false speech. Related to the danger inherent in giving the government control over the content of speech is the substantive difficulty in differentiating truth from fiction.¹⁶² If there were a bright line between truth and fiction or fact and opinion, it would be easier to regulate false statements of fact without risking harm to other protected speech.

In reality, however, the lines are often blurry. Some statements are clearly verifiable facts: “He was born in New York” or “Water freezes at thirty-two degrees Fahrenheit.” Some statements are

159. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 1, 10 (Susan Solomon et al. eds., 2007), available at http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm (“Most of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic greenhouse gas concentrations.”).

160. *Poll: Global Warming Fears Cooling*, CNN (Mar. 14, 2011, 10:31 AM ET), <http://politicalticker.blogs.cnn.com/2011/03/14/poll-global-warming-fears-cooling> (reporting that 41 percent of respondents to a Gallup poll think “the seriousness of global warming is ‘exaggerated’”).

161. Oriana Zill de Granados, *The Doubters of Global Warming*, FRONTLINE (Apr. 24, 2007), <http://www.pbs.org/wgbh/pages/frontline/hotpolitics/reports/skeptics.html> (profiling “five . . . famous skeptics” who question “whether global warming is really occurring, whether human activity is truly to blame and whether rising temperatures are such a bad thing”).

162. See Gey, *supra* note 35, at 17 (“[T]he structural-rights perspective relies on a metaphysical assertion about the nature of truth and the role of collective entities in ascertaining that truth. The structural interpretation assumes, in the properly construed Holmesian tradition, that all assertions of truth are incomplete, inevitably flawed, and probably tendentious.”). See generally Christopher P. Guzelian, *True and False Speech*, 51 B.C. L. REV. 669, 689–96 (2010) (examining aspects of speech that hinder courts from arriving at predictable results—literalism, semiotics, and the requirement that defamatory speech be “provably false”—and arguing that a better standard is “knowably false” speech).

clearly opinion: “I think that candidate is the best person for the job.” Others are less easily categorized. The Supreme Court explained in *Milkovich v. Lorain Journal Co.*¹⁶³ that a statement of opinion can imply a statement of fact: “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth.”¹⁶⁴ The Court thus refused to create an “artificial dichotomy” between fact and opinion in defamation law.¹⁶⁵ Professor Mark Tushnet notes the danger in allowing the government to regulate facts that are “ideologically inflected” or associated with wider views about politics: “One might be nervous about licensing the government to regulate—and specifically to impose criminal sanctions on—the dissemination of false statements in this category, because the government might use the false statements as a lever for suppressing the wider ideological views”¹⁶⁶ For instance, the government could punish Holocaust denial as a way to reach right-wing extremist organizations whose other views are protected by the First Amendment.¹⁶⁷

The same difficulty inheres in distinguishing truth from fiction. Some statements are clearly either true or false, but others are harder to classify.¹⁶⁸ People often use language to technically say one thing while implying another. A perusal of the archives of any organization that fact-checks politicians’ statements confirms as much.¹⁶⁹ For example, Senator Rand Paul said in 2010 that the average federal employee earned \$120,000 per year, whereas the average private-

163. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

164. *Id.* at 18.

165. *Id.* at 19.

166. Tushnet, *supra* note 24, at 18.

167. *Id.*

168. If a man was born in New York but says he was born in Oregon, he is making a false statement. If he says he was born in New York, he is making a true statement. For a discussion of the dearth of attention paid to “questions of hard fact” in First Amendment theory, see *Schauer*, *supra* note 141, at 899.

169. See, e.g., Robert Farley, *Michele Bachmann Claims There Has Been Just One New Oil Drilling Permit Issued Since Obama Took Office*, POLITIFACT.COM (Mar. 29, 2011, 6:02 PM), <http://www.politifact.com/truth-o-meter/statements/2011/mar/29/michele-bachmann/michele-bachmann-claims-there-has-been-just-one-ne> (explaining that presidential candidate Michele Bachmann’s claim that President Obama has issued only one new oil-drilling permit is “ridiculously false”); Eugene Kiely, Lori Robertson, D’Angelo Gore, Brooks Jackson, Michael Morse & Lara Seligman, *Budget Spin*, FACTCHECK.ORG (Feb. 16, 2011, 5:43 PM), <http://factcheck.org/2011/02/budget-spin> (“Democrats and Republicans disagree strongly about elements of President Obama’s 2012 budget, but they are alike in one respect: Both sides are misrepresenting important facts.”).

sector employee earned \$60,000.¹⁷⁰ The figures were technically true, but they included salary and benefits.¹⁷¹ In salary alone, the average federal employee earned about \$80,000, whereas the average private-sector employee earned \$50,000.¹⁷² Considering these figures, the gap thus shrank from \$60,000 to \$30,000. Senator Paul's statement, although technically true, was likely calculated to mislead the average listener by making the gap between public and private salaries seem wider. These kinds of misrepresentations, and even outright lies, abound in the political discourse.¹⁷³

Moreover, facts that are accepted as true may turn out to be false, and vice versa.¹⁷⁴ Thus, giving the government the power to suppress speech it deems to be false may ultimately suppress speech that is actually true. History is replete with facts that were accepted as beyond question but that were later disproved. For example, until the mid-twentieth century, medicine was based around the idea of the "four humors," a theory that has now been discredited.¹⁷⁵ Under a system that suppresses all supposedly false ideas, proponents of more modern scientific views would not have been allowed to state their ideas—and then those truths would not have gained traction and been verified and accepted.

This difficulty in differentiating truth from fiction is heightened in the context of lies about oneself. Take, for instance, a statute that punishes résumé lies in private contexts. Though it might be fairly easy to determine whether someone worked for a certain company or went to a certain school, it might not be so easy to determine what his job entailed. Statements are open to differing interpretations, and the

170. Louis Jacobson, *Rand Paul Says Federal Workers Paid \$120,000, Private-Sector Workers Only \$60,000*, POLITIFACT.COM (Nov. 11, 2010, 10:30 AM), <http://www.politifact.com/truth-o-meter/statements/2010/nov/11/rand-paul/rand-paul-says-federal-workers-paid-120000-private>.

171. *Id.*

172. *Id.*

173. *See supra* note 169.

174. *See* MILL, *supra* note 141, at 18 (“[T]he opinion which it is attempted to suppress by authority may possibly be true. Those who desire to suppress it, of course deny its truth; but they are not infallible.”).

175. LOIS N. MAGNER, *A HISTORY OF THE LIFE SCIENCES* 25–27 (3d ed. 2002). Doctors believed that the human body contained four fluids or humors—black bile, yellow bile, phlegm, and blood—and that people were healthy when the four were in balance. *Id.*

line between misstatements and lies is often unclear.¹⁷⁶ For example, an employee may believe that he supervised a certain project, but his employer may think that he merely participated. If a statute differentiating between truth and fiction were in place in this jurisdiction, courts would be put in the unenviable position of sorting out the truth of the person's background. Though courts have proven themselves capable of sophisticated line drawing in the defamation context, efficiency interests would be better served if courts were not required to engage in the exercise unnecessarily. Because of the difficulty that inheres in separating truth from fiction, a rule that presumptively protects false statements of fact would be easier for courts to administer. Although efficiency interests must always be balanced against the interest in the fair administration of justice, little harm exists in presumptively protecting false statements of fact, given that lies that create concrete harm are already subject to regulation.¹⁷⁷

III. APPLYING THE FRAMEWORK TO THE STOLEN VALOR ACT

As Parts I and II argue, uncertainty persists as to whether false statements of fact that fall outside the clearly defined categories of unprotected false speech are protected under the First Amendment, but there are compelling reasons why they should be. This Part applies the foregoing discussion to the Stolen Valor Act to show that the Ninth Circuit was correct in striking down the Act as unconstitutional.

A. *The Stolen Valor Act and Related Litigation*

The portion of the Stolen Valor Act that prohibits false claims of military decoration provides:

Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or

176. See Spottswood, *supra* note 142, at 1226 (“[T]here is in fact a continuum of belief states, representing incremental increases or decreases in our confidence regarding certain facts about the world.”).

177. See *supra* Part I.A.2.

medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.¹⁷⁸

The statute was added to an existing provision that criminalizes knowingly wearing, purchasing, or selling any decoration or medal authorized by Congress for the armed forces.¹⁷⁹ At the time the statute was enacted, Congress made findings that fraudulent claims about medals damage the reputation and meaning of the decorations and medals.¹⁸⁰ Congress also found that federal law-enforcement officers have limited abilities to prosecute such fraudulent claims, and that legislative action was necessary to protect the reputation and meaning of the medals.¹⁸¹

Although prosecutions under the Stolen Valor Act appear to have been rare in the first five years following its passage, several cases have garnered attention. Alvarez was charged with violating the Stolen Valor Act after he made a false claim about receiving the Congressional Medal of Honor at a meeting of the local water board.¹⁸² The FBI obtained a recording of the meeting and indicted him in the District Court for the Central District of California for violating the Act,¹⁸³ which provides enhanced penalties for claims made about the Congressional Medal of Honor.¹⁸⁴ He pled guilty and was sentenced to pay a \$100 special assessment and a \$5,000 fine, to serve a three-year term of probation, and to perform 416 hours of community service.¹⁸⁵ The Ninth Circuit held the Act unconstitutional in August 2010, thus overturning his conviction.¹⁸⁶

Similarly, Strandlof's web of lies¹⁸⁷ began to unravel in April 2009 when a Fort Carson legislative liaison called to check on Strandlof's claim that he had worked for Senator Mark Udall.¹⁸⁸ After the truth was revealed, Strandlof was charged with violating the Stolen Valor Act, but the charges were dismissed by the U.S. District Court for the

178. Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

179. 18 U.S.C. § 704 (2000).

180. Stolen Valor Act of 2005, Pub. L. No. 109-437, § 2, 120 Stat. 3266, 3266 (2006).

181. *Id.*

182. *See supra* notes 1–3 and accompanying text.

183. *United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir. 2010).

184. 18 U.S.C. § 704(c)(1) (2006).

185. *Alvarez*, 617 F.3d at 1201.

186. *See id.* at 1200 (holding the Stolen Valor Act of 2005 unconstitutional under the First Amendment).

187. *See supra* notes 4–6 and accompanying text.

188. Simpson, *supra* note 4.

District of Colorado.¹⁸⁹ The government appealed to the Tenth Circuit, which heard oral argument in May 2011.¹⁹⁰

A third man, Ronnie Robbins, was charged with violating the Act after he distributed campaign materials that said he was a recipient of the Vietnam Service Medal and the Vietnam Campaign Medal.¹⁹¹ Though Robbins had served in the Army from 1972 to 1975, he never served overseas or in a combat capacity, and he did not earn any medals.¹⁹² In January 2011, the District Court for the Western District of Virginia disagreed with the Ninth Circuit and the District of Colorado and held that the Stolen Valor Act was constitutional.¹⁹³ In that case, *United States v. Robbins*,¹⁹⁴ Judge James Jones concluded that the statute should be read narrowly to require that the defendant intended to deceive.¹⁹⁵ Having adopted this construction, Judge Jones found that the false speech at issue in the Act fell outside First Amendment protection.¹⁹⁶

Judge Jones's adoption of a limiting construction to avoid striking down the Stolen Valor Act illustrates the breadth of the Act's language. As Judge Jones noted, the language does not require an element of scienter, referring only to one who "falsely represents himself" as having received medals.¹⁹⁷ Nor does it require any concrete harm, such as that required by defamation statutes.¹⁹⁸ Instead, it criminalizes the mere claim that one had earned a medal. Finally, the statute contains no contextual limit. Although the Court

189. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1185 (D. Colo. 2010). In August 2011, the U.S. District Court for the District of Maryland also dismissed charges brought under the Stolen Valor Act, holding that they were unconstitutional under the First Amendment. *United States v. Lawless*, No. 11-173M (D. Md. Aug. 29, 2011). Aaron Lawless, a former member of the Marine Corps and Army, was charged with violating the Act after he claimed to have received a Silver Star, four Purple Hearts, and two Bronze Stars. *Id.*, slip. op. at 2. After making these claims, he received the 2008 Glock Hero Award, given each year by the firearms manufacturer to a soldier or law-enforcement officer who demonstrates great courage. *Id.*

190. Dan Frosch, *Courts Weigh Efforts To Guard Valor and Speech*, N.Y. TIMES AT WAR BLOG (May 20, 2011, 1:10 PM), <http://atwar.blogs.nytimes.com/2011/05/20/courts-weigh-efforts-to-guard-valor-and-speech>.

191. *United States v. Robbins*, 759 F. Supp. 2d 815, 816–17 (W.D. Va. 2011).

192. *Id.* at 816.

193. *Id.* at 822.

194. *Id.* at 815.

195. *Id.* at 819; *see also* Tushnet, *supra* note 24, at 5 n.22 (arguing that the Stolen Valor Act should be construed to require knowledge of the statement's falsity).

196. *Robbins*, 759 F. Supp. 2d at 819.

197. *Id.* at 816, 819 (quoting Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006)).

198. *See supra* notes 79 and accompanying text.

has shown some willingness to punish false speech in the context of a political campaign,¹⁹⁹ the Stolen Valor Act's restrictions are not limited to speech made on the campaign trail, nor to any other context. Presumably the restrictions apply wherever speech may happen—at a public event in front of an audience, in a public space to one person, or even in the privacy of one's own home.

B. The Stolen Valor Act Fails Strict Scrutiny

The Stolen Valor Act is a content-based restriction on speech. It singles out a specific statement—that someone has received a military honor when he has not—for punishment.²⁰⁰ Although it is unclear whether statements such as those punished by the Stolen Valor Act are protected, the Court has never indicated that false statements are a proscribable category unto themselves,²⁰¹ and there are strong liberty-based and pragmatic reasons for protecting such statements.²⁰² Thus, false statements of fact should be protected, and the Stolen Valor Act should be subject to strict scrutiny.

To meet the exacting standard of strict scrutiny, the Stolen Valor Act must serve a compelling governmental interest and must be narrowly tailored to further that interest.²⁰³ The Act fails both prongs of the test. Protecting the integrity of military honors is not an interest that is compelling enough to warrant abridging First Amendment freedoms. And even if it were, the Stolen Valor Act is not narrowly tailored. It therefore fails strict scrutiny and is unconstitutional.

1. *There Is No Compelling Interest.* The government asserted in *Strandlof* that the Stolen Valor Act is intended to protect the “sacrifice, history, reputation, honor, and meaning associated with military medals and decorations.”²⁰⁴ This goal is certainly noble, as the nation depends greatly on the sacrifice of soldiers who earn military medals. The Court has previously held, however, that the protection

199. See *supra* notes 94–103 and accompanying text.

200. The court noted this fact in *Strandlof*, stating, “The government does not seriously contest that the Stolen Valor Act criminalizes speech on the basis of its content.” *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1188 (D. Colo. 2010).

201. See *supra* Part I.A.2.

202. See *supra* Part II.

203. See *supra* note 57 and accompanying text.

204. *Strandlof*, 746 F. Supp. 2d at 1189 (quoting Amended Government's Supplemental Brief at 15, *Strandlof*, 746 F. Supp. 2d 1183 (No. 09-cr-00497-REB)).

of symbols is not a compelling interest. There is no cause of action for libel on the government, nor is there a cause of action for general public frauds, deceptions, or defamations.²⁰⁵ The *Alvarez* court drew from this tenet the statement that “[t]he right against defamation belongs to natural persons, not to governmental institutions or symbols.”²⁰⁶ Both the *Alvarez* and *Strandlof* opinions relied on *Texas v. Johnson*,²⁰⁷ a flag-burning case, to make the same point.²⁰⁸ In *Johnson*, the government argued that banning flag desecration served a compelling interest in “preserving the flag as a symbol of nationhood and national unity.”²⁰⁹ The Court rejected the argument, stating that “[t]o conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries.”²¹⁰ The government’s interest in protecting the integrity of its military medals, which are symbols of achievement on the battlefield, fails to rise to the level of a compelling interest. And though lies about military medals may offend or anger veterans and others, the First Amendment prohibits punishing speech merely because it offends.²¹¹

In addition to protecting the medals themselves, the government asserts that the Act serves the compelling interest of promoting heroism and sacrifice by military personnel: “[D]iluting the meaning

205. See *supra* note 79 and accompanying text.

206. *United States v. Alvarez*, 617 F.3d 1198, 1210 (9th Cir. 2010).

207. *Texas v. Johnson*, 491 U.S. 397 (1989).

208. *Alvarez*, 617 F.3d at 1210; *Strandlof*, 746 F. Supp. 2d at 1189–90. Despite this statement, the *Alvarez* court seemed willing to accept the protection of medals as a compelling interest. See *Alvarez*, 617 F.3d at 1216 (“Especially at a time in which our nation is engaged in the longest war in its history, Congress has an interest, even a compelling interest, in preserving the integrity of its system of honoring our military men and women for their service and, at times, their sacrifice.”).

209. *Johnson*, 491 U.S. at 410.

210. *Id.* at 417. The government in *Strandlof* countered this argument by noting that the defendant in *Johnson* had “intended to convey a particular viewpoint or political opinion.” *Strandlof*, 746 F. Supp. 2d at 1190. In its opinion, the court dispensed with this distinction by determining that *Johnson* dealt with expressive conduct, as opposed to pure speech, so “a determination that the defendant intended to express a particular opinion was a precondition to the First Amendment analysis.” *Id.* The court held that “[n]o such condition precedent applies when the restriction impacts pure speech,” and the Stolen Valor Act impacts pure speech. *Id.*

211. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 414 n.13 (1992) (“[T]he First Amendment protects offensive speech . . .”). As noted, Americans are free to deny the Holocaust by making statements that are just as verifiably untrue and arguably more offensive and harmful than false claims about medals. See Lidsky, *supra* note 54, at 1093 (“The pernicious effects of Holocaust denial stem from its capacity to pollute and corrupt public discourse.”).

or significance of medals of honor, by allowing anyone to claim to possess such decorations, could impact the motivation of soldiers to engage in valorous, and extremely dangerous, behavior on the battlefield.”²¹² As Judge Robert Blackburn noted in *Strandlof*, and as the Ninth Circuit cited approvingly in *Alvarez*,²¹³ the idea that “soldiers may well lose incentive to risk their lives to earn such awards”²¹⁴ is not only unsubstantiated but “unintentionally insulting to the profound sacrifices of military personnel the Stolen Valor Act purports to honor.”²¹⁵ The idea that soldiers pause on the battlefield to consider whether their actions will result in awards is hard to believe. It is more likely that such medals are the byproducts of heroic acts in battle, not the goal of such acts. If the medals are irrelevant to the behavior of soldiers on the battlefield, there can be no compelling interest in promoting heroism through the protection of the medals.

The legislative history of the Act reveals that some legislators were also concerned about fraud perpetrated by people falsely claiming military medals.²¹⁶ In his statement introducing the bill on the Senate floor, Senator Kent Conrad spoke of “use” of the medals to perpetrate crimes²¹⁷: “These imposters use fake medals—or claim to have medals that they have not earned—to gain credibility in their communities. These fraudulent acts can often lead to the perpetration of very serious crimes.”²¹⁸ In closing, he expressed the “hope that this legislation will serve to honor the courageous heroes who have rightfully earned these awards.”²¹⁹ In doing so, he emphasized fraud again: “We must never allow their service and sacrifice to be cheapened by those who wish to *exploit these honors for personal gain*.”²²⁰

212. *Strandlof*, 746 F. Supp. 2d at 1190 (quoting Government Response to Amicus Curiae Brief of the Rutherford Institute at 11, *Strandlof*, 746 F. Supp. 2d 1183 (No. 09-cr-00497-REB)) (internal quotation marks omitted).

213. *Alvarez*, 617 F.3d at 1217.

214. *Strandlof*, 746 F. Supp. 2d at 1190 (quoting Government Response to Amicus Curiae Brief of the Rutherford Institute, *supra* note 212, at 8–9) (internal quotation marks omitted).

215. *Id.*

216. See 151 CONG. REC. 25,769 (2005) (statement of Sen. Kent Conrad).

217. *Id.*

218. *Id.*

219. *Id.* at 25,770.

220. *Id.* (emphasis added). Alvarez may have intended for his lie to result in reputational benefit, but it ultimately resulted in reputational damage. Lies that are not discovered may

Although the interest in disallowing the use of medals for fraudulent purposes could be compelling, the statute is simply not written as a fraud statute.²²¹ As the Ninth Circuit noted, “Fraud statutes must be precisely crafted to target only specific false statements that are likely to cause a bona fide harm.”²²² Further, laws about perjury or fraudulent administrative filings “require at a minimum that the misrepresentation be willful, material, and uttered under circumstances in which the misrepresentation is designed to cause an injury, either to the proper functioning of government . . . or to the government’s or a private person’s economic interests.”²²³ The Stolen Valor Act does not require proof of the critical elements of “materiality, intent to defraud, and injury.”²²⁴ Alvarez may have intended for his statement to result in a reputational benefit, but no court made a finding that he defrauded anyone.²²⁵ Ultimately, because the Stolen Valor Act does not fit the fraud framework, the prevention of fraud cannot be a compelling interest for the Act.

2. *The Statute Is Not Narrowly Tailored.* Even assuming, as the Ninth Circuit did,²²⁶ that the government has advanced a compelling interest for the Stolen Valor Act, the Act still fails strict scrutiny. A law is not narrowly tailored when less speech-restrictive means exist to achieve its compelling interest.²²⁷ The Stolen Valor Act’s broad language fails to provide any limits that would prevent it from also prohibiting protected speech. It contains no contextual limitation, no

result in reputational benefits, but the resulting harm is probably not great enough to warrant punishment.

221. A bill is pending in the House of Representatives that would amend the Stolen Valor Act to require that the misrepresentation be made “with intent to obtain anything of value.” Stolen Valor Act of 2011, H.R. 1775, 112th Cong. (2011).

222. *United States v. Alvarez*, 617 F.3d 1198, 1211 (9th Cir. 2010); *see also id.* (“[I]n a properly tailored fraud action the State bears the full burden of proof. False statement alone does not subject a [speaker] to fraud liability. . . . [T]o prove a defendant liable for fraud, the complainant must show that the defendant made a false representation of a material fact knowing that the representation was false; further, the complainant must demonstrate that the defendant made the representation with the intent to mislead the listener, and succeeded in doing so.” (alterations and omission in original) (quoting *Illinois ex rel. Madigan v. Telemarketing Assocs.*, 538 U.S. 600, 620 (2003))).

223. *Id.*

224. *Id.* at 1212.

225. *Id.* at 1213 (“Alvarez was not prosecuted for impersonating a military officer, or lying under oath, or making false statements in order to unlawfully obtain benefits.”).

226. *See supra* note 208.

227. *Reno v. ACLU*, 521 U.S. 844, 846 (1997).

requirement of intent, and no requirement of concrete, individualized harm.²²⁸

It is not hard to imagine contexts in which it would be appropriate to punish lies about one's receipt of military medals. If someone used such a claim to receive government benefits, he could be prosecuted for fraud under a properly drawn statute.²²⁹ The government might arguably punish such a statement if it were made during a political campaign.²³⁰ The Stolen Valor Act, however, does not include any such contextual limits, and neither Alvarez nor Strandlof was running for office when he made the false statements for which he was punished.²³¹ The Act simply punishes any false representation of having received a military medal.²³² The Ninth Circuit recognized the importance of context, noting in *Alvarez* that "[p]erhaps, in context, many of these lies are within the government's legitimate reach."²³³ Though Alvarez and Strandlof both made their statements in public settings,²³⁴ the statute appears to punish such statements regardless of where they are made: on the Internet, in a bar, or at home. The statute is thus not narrowly drawn to punish only false claims that would have a demonstrable negative effect on a valid compelling interest.

As noted by Judge Jones, the statute also fails to require an element of intent, an element that is generally necessary in criminal statutes.²³⁵ As such, it might punish those who are mistaken about

228. See *supra* Part I.A.2.

229. See *supra* notes 77–78 and accompanying text.

230. See *supra* Parts I.A.2, I.B.

231. See text accompanying note 3. Alvarez apparently had also made such statements during his campaign, but the statement for which he was charged was uttered after he had already been elected. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010).

232. Stolen Valor Act of 2005, 18 U.S.C. § 704(b) (2006).

233. *Alvarez*, 617 F.3d at 1200.

234. Alvarez's opening brief on appeal argued that "[t]he Court's scrutiny of the law should be especially demanding here, where the statement was made by an elected official, during a public meeting, on an issue of public concern: his qualifications for office." Appellant's Opening Brief at 10, *Alvarez*, 617 F.3d 1198 (No. 08-50345). Strandlof made his claims in many contexts, including while he was advocating for antiwar efforts in the run-up to the 2008 presidential election. Simpson, *supra* note 4.

235. *Alvarez*, 617 F.3d at 1209; see also *Dennis v. United States*, 341 U.S. 494, 500 (1951) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence."). *But see* Tushnet, *supra* note 24, at 8–9 (arguing that legislatures may be able to impose strict liability for some false statements).

their award status.²³⁶ Even if a requirement of knowledge or intent is read into the statute, the statute still identifies no concrete, individualized harm that the actor must intend. As the defense noted in its opening brief, “Essentially, Congress has created a strict liability offense making it a crime to tell a lie about oneself.”²³⁷ This concern came to the fore in the case of Strandlof, who claimed that schizophrenia and bipolar disorder played a role in his behavior.²³⁸ “When I talked with people about my passion about vets’ issues, . . . I believed that was the truth,” he said.²³⁹ Likewise, during his sentencing, the district court suggested that Alvarez’s stories might be related to “a psychological problem” or that “alcohol may be one of the problems.”²⁴⁰

When statutes are not narrowly tailored, they run the risk of restricting protected speech. As Alvarez’s opening brief argued, the statute could apply to innocent bragging, satire, or artistic endeavors such as plays and movies, all of which are almost certainly protected by the First Amendment.²⁴¹ Moreover, the brief argued that Alvarez’s statements were “plainly incredible and not worthy of actual belief,”²⁴² making his punishment a violation of the protection for “speakers whose statements cannot reasonably be interpreted as allegations of fact.”²⁴³ A statute that would punish run-of-the-mill exaggeration, artistic portrayals of decorated veterans, or satiric writing about war is not narrowly tailored.

As the Ninth Circuit noted, there are many other ways to protect against concrete harm caused by imposters’ claiming medals.²⁴⁴ The

236. See Tushnet, *supra* note 24, at 9–10 (arguing that Senator Mark Kirk may have mistakenly “claimed that he personally had won an honor that had actually been awarded to the unit in which he was serving”).

237. Appellant’s Opening Brief, *supra* note 234, at 9. The government argued that “[t]he Act would not tend to reach the innocent because it prohibits only falsity by a person about himself, and it has no tendency to reach any protected speech.” Government’s Answering Brief at 14, *Alvarez*, 617 F.3d 1198 (No. 08-50345).

238. Simpson, *supra* note 4.

239. *Id.* (quoting Strandlof) (internal quotation marks omitted).

240. Appellant’s Opening Brief, *supra* note 234, at 19 n.5.

241. *Id.* at 18–19.

242. *Id.* at 19.

243. *Id.* (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1074 (9th Cir. 2005)); see also *id.* (“By protecting [such speakers], courts provide[] assurance that public debate will not suffer for lack of imaginative expression or the rhetorical hyperbole which has traditionally added much to the discourse of our Nation.” (second alteration in original) (quoting *Knievel*, 393 F.3d at 1074) (internal quotation marks omitted)).

244. *United States v. Alvarez*, 617 F.3d 1198, 1216–17 (9th Cir. 2010).

Act could be redrafted to “target actual impersonation or fraud.”²⁴⁵ If the government were particularly concerned about protecting the integrity of elections, it could draft a statute that would punish lies only in that context.²⁴⁶ The government could also simply rely on the marketplace for the correction of lies.²⁴⁷ Indeed, both Alvarez’s²⁴⁸ and Strandlof’s lies were eventually discovered,²⁴⁹ and both men probably experienced much embarrassment and scorn after their lies were exposed. The potential for public shaming is enough to keep many people from making false claims. Thus, it is hard to find the value in punishing Alvarez and Strandlof after their lies have been discovered, when they did not use their lies to defraud others—unless one accepts the idea that lies about having received medals will have a demoralizing effect on troops in battle. Because the Stolen Valor Act contains no limitations with regard to context, intent, or harm, it risks punishing protected speech and is not sufficiently narrowly tailored to pass constitutional muster.

C. The Stolen Valor Act and Similar Statutes Infringe on Free-Speech Values

The Stolen Valor Act targets speech about oneself, and it punishes that speech regardless of its context or whether it results in any concrete harm to a third party. In this way, the speech it punishes differs from the more narrowly drawn categories of false speech that are already subject to restriction. Recognizing this distinction, the Ninth Circuit correctly noted that “[t]he Act . . . concerns us because of its potential for setting a precedent whereby the government may proscribe speech solely because it is a lie.”²⁵⁰ Such a precedent is troubling in light of both the liberty and the pragmatic concerns discussed in Part II.

The liberty concerns implicated by the Stolen Valor Act are particularly salient. Punishing false statements of fact puts the government in the position of determining truth, which could result in

245. *Id.* at 1217.

246. *See supra* notes 102–103 and accompanying text.

247. *Alvarez*, 617 F.3d at 1216 (“Here, Alvarez’s lie, deliberate and despicable as it may have been, did not escape notice and correction in the marketplace. The preferred First Amendment remedy of ‘more speech’ thus was available to repair any harm.” (quoting *Brown v. Hartlage*, 456 U.S. 45, 61 (1982))).

248. *Id.*

249. Simpson, *supra* note 4.

250. *Alvarez*, 617 F.3d at 1200.

undue intrusion into citizens' private lives. The Ninth Circuit noted this concern: "[T]he government's approach would give it license to interfere significantly with our private and public conversations. Placing the presumption in favor of regulation . . . would steadily undermine the foundations of the First Amendment."²⁵¹ Moreover, as discussed in Part II, the blurry lines between truth and fiction and fact and opinion create the potential for unfair and arbitrary punishment.²⁵² A person's claim to a medal may be ambiguous. There is a fine line between saying "I received a Congressional Medal of Honor" and alluding more opaquely to a military honor. Because differentiating between these statements involves an inherent value judgment, the potential for arbitrary and abusive punishment exists.

Perhaps the strongest theoretical argument against the Stolen Valor Act is raised by privacy concerns that implicate the autonomy theory of First Amendment protection.²⁵³ Even in those instances in which the government serves as a recordkeeper, most people would not want the government to examine the myriad kinds of personal information necessary to fact-check their statements, at least not without a compelling reason. Privacy concerns become even more problematic when law-enforcement agencies must investigate and determine the truth of claims that have no connection to a government-granted medal. Take, for instance, Judge Milan Smith, Jr.'s example:

[I]f the Act is constitutional under the analysis proffered by Judge Bybee, then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway.²⁵⁴

251. *Id.* at 1204.

252. *See supra* Part II.B.

253. *See supra* Part II.A.

254. *Alvarez*, 617 F.3d at 1200. Chief Judge Alex Kozinski made a similar point in his concurrence in the denial of rehearing en banc:

If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a bit. Phrases such as "I'm working late tonight, hunny," "I got stuck in traffic" and "I didn't inhale" could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as "rational basis review."

To determine the truth of such claims, the government would have to probe the most private aspects of a person's life: his sexual history and private habits. Few Americans would likely be comfortable with the government's questioning such aspects of their private lives.

Moreover, it may have been an act of self-fulfillment for Strandlof to claim a military medal he had never earned.²⁵⁵ In other contexts, it may be the manifestation of a legitimate belief for someone to lie about himself. Someone may exaggerate past activities to present a better face to the world or may lie to hide past actions that he does not feel accurately reflect the person he has become.²⁵⁶ Such exaggerations and omissions blur the line between truth and lies because they implicate perceptions about oneself that may not be easily categorized.²⁵⁷

Finally, the Stolen Valor Act may chill protected speech. This danger arises when a speaker is not certain what speech is protected and, as a consequence, self-censors expression.²⁵⁸ In other words, if a person is scared of being prosecuted for any misstatement or exaggeration about himself, he may refrain from speech altogether. This result is untenable under the Court's First Amendment doctrine, as it could result in the suppression of highly protected political speech.²⁵⁹

There are also practical reasons to favor a presumption of protection for false statements of fact and to strike down laws such as

United States v. Alvarez, 638 F.3d 666, 673 (9th Cir. 2011) (order denying a petition for panel rehearing and rehearing en banc) (Kozinski, C.J., concurring).

255. See *supra* notes 47–52.

256. Professor Tushnet uses the example of Don Draper's backstory in *Mad Men* (AMC television series). Tushnet, *supra* note 24, at 11 n.49.

257. Judge Diarmuid O'Scannlain's response to Chief Judge Kozinski's dissent to the denial of a rehearing of *Alvarez* en banc demonstrates the difficulty of line-drawing. He says that some of the "lies" Kozinski writes about are not lies at all but "opinions," "expressions of emotion or sensation," "predictions or plans," "exaggerations," and "playful fancy." *Alvarez*, 638 F.3d at 686 (9th Cir. 2011) (O'Scannlain, J., dissenting). This recharacterization serves to highlight the difficulty with distinguishing truth from falsehood.

258. See 1 SMOLLA, *supra* note 37, § 6:4 ("This overbreadth doctrine is derived in part from the elemental proposition that a litigant has always had the right to be judged in accordance with a constitutionally valid rule of law. . . . [S]weeping laws . . . tend to deter speakers who *do* have a legitimate right to speak but are afraid that the law would be used against them" (footnote omitted) (quoting Henry Paul Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 3) (internal quotation marks omitted)).

259. The Court generally construes the prohibition against chilling speech broadly. See *id.* ("The overbreadth doctrine . . . is one of those rare constitutional rules in which an admittedly 'guilty' person may be set free . . . because the law is so broad that it might be used against another person who had engaged in protected activity.").

the Stolen Valor Act. Criminalizing lies about oneself puts the government in the position of policing an enormous number of statements. Detection of such statements and subsequent prosecution could result in enormous manpower costs.²⁶⁰ Were the protected interests compelling, these expenses might be justified. But there is little to be gained from prosecuting Alvarez and Strandlof, who have already been publicly exposed and shamed. Although they might have offended the people who were deceived and veterans who had legitimately earned medals, that offense does not rise to the level of harm required to make speech punishable.²⁶¹ Harm to the integrity of the medals themselves does not justify the cost of prosecuting and imprisoning these men.²⁶² The government is better off relying on the marketplace to uncover and correct false statements, as occurred in these cases.²⁶³

First Amendment tests are rarely simple or easy to apply, but false statements of fact are an area in which the Court could chart a simpler course going forward. A rule presumptively protecting false statements of fact is much easier to apply than one that allows prosecution for such statements, and there is little harm to weigh against such a protection.

CONCLUSION

The opinions in *Alvarez*, *Strandlof*, and *Robbins* demonstrate the varying ways in which federal judges interpret the Supreme Court's opinions on false statements of fact. Although the Court has not squarely addressed the question at issue in *Alvarez*, *Strandlof*, and *Robbins*, its emphasis on scienter and individualized harm in punishing false speech undermines its statement that "there is no constitutional value in false statements of fact."²⁶⁴ Such a statement, without more, is an oversimplification that clashes with First Amendment values. The Court has never gone so far as to uphold a

260. Journalists and fellow citizens could reveal many false claims. For instance, a group of veterans runs a site called ReportStolenValor.org, which maintains a database of military citations. REPORTSTOLENVALOR.ORG, <http://www.reportstolenvalor.org> (last visited Oct. 7, 2011).

261. See *supra* Part I.A.2.

262. See *supra* Part III.B.1.

263. See *supra* notes 247–249 and accompanying text. But see generally *Schauer*, *supra* note 141 (examining the "increasing and unfortunate acceptance of factual falsity in public communication" and the failure of the marketplace to correct it).

264. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

statute that punishes false statements of fact simply because they are false.²⁶⁵ As such, it is not clear that false statements of fact are unprotected and thus subject to a lower standard of scrutiny than other statements.

The Stolen Valor Act may seem like a harmless statute intended to protect the honor and integrity of those who have made great sacrifices for the United States. Although few would argue that this goal is ignoble, it must be considered in light of the fundamental right to freedom of speech under the First Amendment. The broad sweep of the statute, which punishes lies without regard to context, intent, or harm, is dangerous because it presents the potential for a great expansion of government control over speech. Such an expansion is not justified by a compelling interest, nor is it even necessary given that existing laws protect against the most harmful kinds of false speech, such as defamation and fraud.

A rule that presumptively protects false statements of fact, with exceptions for those categories of speech that create concrete harm, would best protect the values that underlie the First Amendment. It would protect against government control of speech and would promote privacy and autonomy, and it would allow for ease of administration. Moreover, there is little harm to weigh against such protection. The Ninth Circuit's approach is thus the appropriate course to follow in considering regulations that seek to punish false statements of fact. A presumption that false statements of fact are protected, and that regulations are thus subject to strict scrutiny, is in line with the central importance of freedom of expression in American jurisprudence and society.

Litigation over the Stolen Valor Act could present an opportunity for the Court to clarify its false-speech jurisprudence. The split among lower courts reveals confusion in the area of false statements of fact that do not fall into the clear categories of defamation and fraud. Free-speech jurisprudence would benefit from a determination of whether false speech is a category unworthy of protection and subject to lower scrutiny, or whether speech is presumptively protected without regard to its truth or falsity. Absent clarification, this uncertainty presents a great potential for chilling protected speech, as well as an undesirable encroachment on individual liberty.

265. See *infra* Part I.A.2.