

AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Free Speech/Advocacy

United States v. Alvarez, 567 U.S. ____ (2012)

Xavier Alvarez knowingly lied when he informed people that he played professional hockey, was formerly married to a movie star, and was awarded a Congressional Medal of Honor in 1987. The last lie violated the Stolen Valor Act of 2005, which declared, “whoever falsely represents himself or herself . . . to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined. . . , imprisoned . . . , or both.” The local federal district court rejected Alvarez’s claim that this provision violated the First Amendment, but that decision was reversed by the Court of Appeals for the Ninth Circuit. The United States appealed to the Supreme Court.

The Supreme Court by a 6–3 vote agreed that the Stolen Valor Act was unconstitutional. Justice Kennedy’s plurality opinion insisted that the ban on lying about receiving military honors was a content-based speech restriction and that such lies are constitutionally protected speech. How did Justice Kennedy distinguish lies that the government may forbid from lies the government may not forbid? How did the concurring and dissenting opinions make that distinction? Do you agree that government may not forbid some intentional falsehoods? On what basis? Notice the unusual line-up on justices in the plurality. What do you think explains the divisions in this case?

*Free speech claimants were generally successful in 2012. The Supreme Court in Alvarez declared the Stolen Valor Act unconstitutional. The justices in *American Tradition Partnership v. Bullock* struck down a Montana law restricting independent corporate expenditures on behalf of political candidates. A 7–2 majority in *Knox v. Service Employees International Union, Local 1000* (2012) held that the First Amendment requires public service unions to permit persons to “opt out” whenever any change takes place in the percentage or amount of union dues being used to fund political activities. Justice Alito’s majority opinion asserted, “nonmembers should not be required to fund a union’s political and ideological projects unless they choose to do so after having ‘a fair opportunity’ to assess the impact of paying for nonchargeable union activities.” Broadcasters triumphed on due process grounds in *F.C.C. v. Fox Television Stations, Inc.* (2012) when the justices unanimously reversed on vagueness grounds an FCC decision to sanction broadcasters after fleeting and spontaneous expletives occurred on their shows. Justice Kennedy’s majority opinion asserted, “The Commission policy in place at the time of the broadcasts gave no notice to Fox or ABC that a fleeting expletive or a brief shot of nudity could be actionably indecent.”*

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE GINSBURG, and JUSTICE SOTOMAYOR join.

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“[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” As a result, the Constitution “demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.”

In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as “startling and dangerous” a “free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits.” Instead, content-based

restrictions on speech have been permitted, as a general matter, only when confined to the few “‘historic and traditional categories [of expression] long familiar to the bar,’ Among these categories are advocacy intended, and likely, to incite imminent lawless action, obscenity, defamation, speech integral to criminal conduct, so-called “fighting words,” child pornography, fraud, true threats, and speech presenting some grave and imminent threat the government has the power to prevent. . . .

Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements. This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee.

...
Although the First Amendment stands against any “freewheeling authority to declare new categories of speech outside the scope of the First Amendment,” the Court has acknowledged that perhaps there exist “some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law.” Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with “persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.” The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech on this basis.

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. . . [T]he sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain.

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth. . . . Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment. But the Stolen Valor Act is not so limited in its reach. Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if free speech, thought, and discourse are to remain a foundation of our freedom.

...
The Government is correct when it states military medals “serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,” and also “‘foste[r] morale, mission accomplishment and esprit de corps’ among service members.” . . . Time has not diminished this idea. In periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission.

...
But to recite the Government’s compelling interests is not to end the matter. The First Amendment requires that the Government’s chosen restriction on the speech at issue be “actually necessary” to achieve its interest. There must be a direct causal link between the restriction imposed and the injury to be prevented. The link between the Government’s interest in protecting the integrity of the military honors system and the Act’s restriction on the false claims of liars like respondent has not been shown. . . . The Government points to no evidence to support its claim that the public’s general perception of military awards is diluted by false claims such as those made by Alvarez. As one of the

Government's amici notes "there is nothing that charlatans such as Xavier Alvarez can do to stain [the Medal winners'] honor." . . .

The lack of a causal link between the Government's stated interest and the Act is not the only way in which the Act is not actually necessary to achieve the Government's stated interest. The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements "Alvarez was perceived as a phony." Once the lie was made public, he was ridiculed online, his actions were reported in the press, and a fellow board member called for his resignation. There is good reason to believe that a similar fate would befall other false claimants. Indeed, the outrage and contempt expressed for respondent's lies can serve to reawaken and reinforce the public's respect for the Medal, its recipients, and its high purpose. . . .

The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth. . . . The First Amendment itself ensures the right to respond to speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.

. . .
In addition, when the Government seeks to regulate protected speech, the restriction must be the "least restrictive means among available, effective alternatives." There is, however, at least one less speech-restrictive means by which the Government could likely protect the integrity of the military awards system. A Government-created database could list Congressional Medal of Honor winners. . . . The Solicitor General responds that although Congress and the Department of Defense investigated the feasibility of establishing a database in 2008, the Government "concluded that such a database would be impracticable and insufficiently comprehensive." Without more explanation, it is difficult to assess the Government's claim, especially when at least one database of Congressional Medal of Honor winners already exists.

. . .
The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment.

JUSTICE BREYER, with whom JUSTICE KAGAN joins, concurring in the judgment.

As the dissent points out, "there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech." Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like raise such concerns, and in many contexts have called for strict scrutiny. But this case does not involve such a law. The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas. And the government often has good reasons to prohibit such false speech. But its regulation can nonetheless threaten speech-related harms. Those circumstances lead me to apply what the Court has termed "intermediate scrutiny" here.

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. . . False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick

with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.

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Further, the pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.

[M]any statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful. Those prohibitions, however, tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm.

Fraud statutes, for example, typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury. Defamation statutes focus upon statements of a kind that harm the reputation of another or deter third parties from association or dealing with the victim. Torts involving the intentional infliction of emotional distress (like torts involving placing a victim in a false light) concern falsehoods that tend to cause harm to a specific victim of an emotional-, dignitary-, or privacy-related kind.

Perjury statutes prohibit a particular set of false statements—those made under oath—while requiring a showing of materiality. Statutes forbidding lying to a government official (not under oath) are typically limited to circumstances where a lie is likely to work particular and specific harm by interfering with the functioning of a government department, and those statutes also require a showing of materiality.

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The statute before us lacks any such limiting features. . . . As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. Further, given the potential haziness of individual memory along with the large number of military awards covered (ranging from medals for rifle marksmanship to the Congressional Medal of Honor), there remains a risk of chilling that is not completely eliminated by mens rea requirements; a speaker might still be worried about being prosecuted for a careless false statement, even if he does not have the intent required to render him liable. And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm.

...

We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is "yes." Some potential First Amendment threats can be alleviated by interpreting the statute to require knowledge of falsity, etc. But other First Amendment risks, primarily risks flowing from breadth of coverage, remain. As is indicated by the limitations on the scope of the many other kinds of statutes regulating false factual speech, it should be possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute. For example, not all military awards are alike. Congress might determine that some warrant greater protection than others. And a more finely tailored statute might, as other kinds of statutes prohibiting false factual statements have done, insist upon a showing that the false statement caused specific harm or at least was material, or focus its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm.

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JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

...

[T]he lies proscribed by the Stolen Valor Act inflict substantial harm. In many instances, the harm is tangible in nature: Individuals often falsely represent themselves as award recipients in order to obtain financial or other material rewards, such as lucrative contracts and government benefits. In other cases, the harm is less tangible, but nonetheless significant. The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards. And legitimate award recipients and their families have expressed the harm they endure when an imposter takes credit for heroic actions that he never performed. One Medal of Honor recipient described the feeling as a “slap in the face of veterans who have paid the price and earned their medals.”

It is well recognized in trademark law that the proliferation of cheap imitations of luxury goods blurs the “signal” given out by the purchasers of the originals.” In much the same way, the proliferation of false claims about military awards blurs the signal given out by the actual awards by making them seem more common than they really are, and this diluting effect harms the military by hampering its efforts to foster morale and esprit de corps. Surely it was reasonable for Congress to conclude that the goal of preserving the integrity of our country’s top military honors is at least as worthy as that of protecting the prestige associated with fancy watches and designer handbags.

Both the plurality and Justice BREYER argue that Congress could have preserved the integrity of military honors by means other than a criminal prohibition, but Congress had ample reason to believe that alternative approaches would not be adequate. The chief alternative that is recommended is the compilation and release of a comprehensive list or database of actual medal recipients. If the public could readily access such a resource, it is argued, imposters would be quickly and easily exposed, and the proliferation of lies about military honors would come to an end.

This remedy, unfortunately, will not work. The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001.

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The plurality and the concurrence also suggest that Congress could protect the system of military honors by enacting a narrower statute. The plurality recommends a law that would apply only to lies that are intended to “secure moneys or other valuable considerations.” In a similar vein, the concurrence comments that “a more finely tailored statute might . . . insist upon a showing that the false statement caused specific harm.” But much damage is caused, both to real award recipients and to the system of military honors, by false statements that are not linked to any financial or other tangible reward. Unless even a small financial loss—say, a dollar given to a homeless man falsely claiming to be a decorated veteran—is more important in the eyes of the First Amendment than the damage caused to the very integrity of the military awards system, there is no basis for distinguishing between the Stolen Valor Act and the alternative statutes that the plurality and concurrence appear willing to sustain.

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Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value. Consistent with this recognition, many kinds of false factual statements have long been proscribed without “rais[ing] any Constitutional problem.” Laws prohibiting fraud, perjury, and defamation, for example, were in existence when the First Amendment was adopted, and their constitutionality is now beyond question.

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These examples amply demonstrate that false statements of fact merit no First Amendment protection in their own right. It is true, as Justice BREYER notes, that many in our society either approve or condone certain discrete categories of false statements, including false statements made to prevent harm to innocent victims and so-called “white lies.” But respondent’s false claim to have received the Medal of Honor did not fall into any of these categories. His lie did not “prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child’s innocence.”

Nor did his lie “stop a panic or otherwise preserve calm in the face of danger” or further philosophical or scientific debate. Respondent’s claim, like all those covered by the Stolen Valor Act, served no valid purpose.

...

While we have repeatedly endorsed the principle that false statements of fact do not merit First Amendment protection for their own sake, we have recognized that it is sometimes necessary to “exten[d] a measure of strategic protection” to these statements in order to ensure sufficient “breathing space” for protected speech. Thus, in order to prevent the chilling of truthful speech on matters of public concern, we have held that liability for the defamation of a public official or figure requires proof that defamatory statements were made with knowledge or reckless disregard of their falsity.

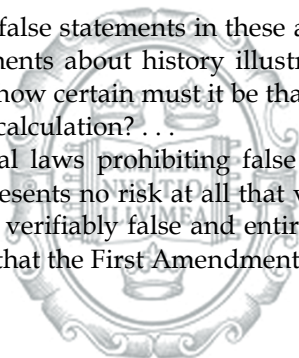
These examples by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection. On the contrary, there are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.

...

Allowing the state to proscribe false statements in these areas also opens the door for the state to use its power for political ends. Statements about history illustrate this point. If some false statements about historical events may be banned, how certain must it be that a statement is false before the ban may be upheld? And who should make that calculation? . . .

In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the Stolen Valor Act presents no risk at all that valuable speech will be suppressed. The speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect. . . .

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