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What Lies Ahead?: The Marketplace of Ideas, *Alvarez v. United States*, and First Amendment Protection of Knowing Falsehoods

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I. INTRODUCTION

The theory that an unregulated marketplace of ideas will promote truth holds a curiously ambiguous position in contemporary free speech jurisprudence. On the one hand, it is a rationale for freedom of expression frequently invoked by the United States Supreme Court.[1] It

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[1] *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 476 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)) (referring to "the First Amendment's purpose 'to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail'"); United States v. Nat'l Treasury Emp. Union, 513 U.S. 454, 464 (1995) ("Federal employees who write for publication in their spare time have made significant contributions to the marketplace of ideas."); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) ("[T]he government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace."); Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]here are some

has been referred to as "[t]he most influential argument supporting the constitutional commitment to freedom of speech,"[2] as well as "[t]he most familiar argument for freedom of speech."[3] On the other hand, this rationale has long been trenchantly criticized in the scholarly literature. Nearly thirty-five years ago, Professor Christopher Wonnell noted the "impressive" number of constitutional scholars who "have rejected as false or unproven the central linkage between free speech and truth."[4] In the ensuing decades, the litany of scholars skeptical of the marketplace of ideas rationale has grown steadily.[5]

purported interests—such as a desire to suppress support for a minority party or an unpopular cause, or to exclude the expression of certain points of view from the marketplace of ideas—that are so plainly illegitimate that they would immediately invalidate the rule."); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 183 (1973) (quoting Abrams v. United States, 250 U.S. 616, 630 (1919)) (In 1919, "Mr. Justice Holmes sounded what has since become a dominant theme in applying the First Amendment to the changing problems of our Nation. '[T]he ultimate good,' he declared, 'is better reached by free trade in ideas,' and 'the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .'"); Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."). For a more comprehensive compilation of Supreme Court cases invoking the marketplace of ideas rationale, see Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 825 n.7 (2008); Rodney A. Smolla, *The Meaning of the "Marketplace of Ideas" in First Amendment Law*, 24 COMM. L. & POL'Y 437, 439–41 (2019). I have not been able to find a study of the frequency with which the United States Supreme Court has invoked various rationales for freedom of speech; however, my distinct impression is that the marketplace of ideas rationale is the free speech rationale most often invoked by the Court.

[2] William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995).

[3] Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 130 (1989); *see also* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 15 (1982) (referring to the marketplace of ideas rationale as "the predominant and most persevering" of all the arguments for free speech).

[4] Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 672–73 (1986). Wonnell's list comprises Professors Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319, 1349 (1984); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 967–90 (1978); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 549 (1977); Benjamin S. Duval, Jr., *Free Communication of Ideas and the Quest for Truth*, 41 GEO. WASH. L. REV. 161, 188–94 (1972); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 7 (1984); Martin H. Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591, 616–19 (1982); SCHAUER, *supra* note 3, at 15–34.

[5] *See, e.g.*, Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas*, 77 U. COLO. L. REV. 649, 696 (2006); Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962 (1997); Darren Bush, *The "Marketplace of Ideas": Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1144–45 (2000); Murray Dry, *The First Amendment Freedoms, Civil Peace and the Quest for Truth*, 15 CONST. COMMENT. 325, 326–28 (1998); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 788 (1987); Alvin I. Goldman &

Last year, Professor Joseph Blocher, a participant in this Symposium, published a comprehensive evaluation of the marketplace of ideas rationale.[6] Blocher usefully distinguishes between the "internal" critique of this rationale, which posits that unregulated speech does not maximize truth, and the "external" one, which maintains that truth is not the central value of the First Amendment. He concludes that "the marketplace model is in trouble" on both scores, "as scholars and others have justifiably pointed out its inability to deliver the value—truth—that it is supposedly designed to maximize" and "as competitor theories rooted in autonomy and democracy start to claim more and more of the territory."[7]

In a highly influential "internal critique" of the marketplace of ideas rationale published in 1984, Professor Stanley Ingber explained that under this rationale "[c]itizens must be capable of making determinations that are both sophisticated and intricately rational if they are to separate truth from falsehood."[8] Contrary to this key assumption, however, Ingber observed that "[o]n the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind."[9] Since then, a host of social science studies have documented how cognitive biases interfere with the ability of human beings to perceive truth. In an article reviewing many of the leading studies, Professor Derek Bambauer concludes that the key assumption of the marketplace of ideas that "with time, we will arrive at more truthful conclusions," is "not compatible with research regarding cognitive biases."[10] To the contrary, "[o]ur perceptual filters undercut the conclusion that more information leads to better decisions. . . . [Rather,] we cling stubbornly to facts thoroughly disproved. Even in communications as vital and carefully evaluated as political

James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996); Thomas W. Joo, *The Worst Test of Truth: The "Marketplace of Ideas" as Faulty Metaphor*, 89 TUL. L. REV. 383, 432 (2014); Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1531 (2019); Alberto Bernabe Riefkohl, *Freedom of the Press and the Business of Journalism: The Myth of Democratic Competition in the Marketplace of Ideas*, 67 REV. JURIS. U. P.R. 447, 455 (1998); Frederick Schauer, *The Role of the People in First Amendment Theory*, 74 CAL. L. REV. 761, 776 (1986); Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 668 (1987); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 349 (1991); Tona Trollinger, *Reconceptualizing the Free Speech Clause: From a Refuse of Dualism to the Reason of Holism*, 3 GEO. MASON INDEP. L. REV. 137, 155 (1994).

6 Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439 (2019).

7 *Id.* at 458–59.

8 Ingber, *supra* note 4, at 7.

9 *Id.*

10 Bambauer, *supra* note 5, at 696.

information, our biases greatly affect our decisions."[11] In short, the marketplace of ideas "does not describe how humans behave."[12] And the already dubious premise that unregulated speech produces truth has been further undercut by the increasing role of online sources of information in American society, an environment "besieged by false news and intentional misinformation" and where Americans have become "increasingly siloed in their own echo chambers . . . such that counterspeech may be of limited effect."[13]

With regard to the external critique, I have previously explained why the marketplace of ideas rationale is a particularly poor candidate for the core, let alone an important, First Amendment norm.[14] Concerning the internal critique, in light of the numerous trenchant critiques just mentioned, little would be served by my "piling on" with yet another article arguing that unregulated speech is unlikely to maximize truth discovery.[15] So rather than offering another comprehensive critique of the marketplace of ideas rationale, I will focus instead on a specific misstep that the United States Supreme Court made in invoking this rationale to extend First Amendment protection to knowing misstatements of fact, otherwise known as lies.[16]

In *United States v. Alvarez*,[17] the Court in a 6-3 decision invalidated on First Amendment grounds the Stolen Valor Act, a federal law that criminalized falsely claiming that one had been awarded a military

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[11] *Id.*

[12] *Id.*

[13] Nunziato, *supra* note 5, at 1527–28.

[14] *See* James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 502 (2011). In Part III.D. of this Article, I briefly add to this external critique by showing how the two major competing free speech theories, autonomy and democracy, provide a much better explanation than does the marketplace of ideas for protecting lies made in public discourse.

[15] I generally agree that "[j]ust as we are properly skeptical about our own power always to distinguish truth from falsity, so should we be even more skeptical of the power of any governmental authority to do it for us." SCHAUER, *supra* note 3, at 34. *Accord* Ingber, *supra* note 4, at 7 n.26 ("[T]he political state may be an especially unsuitable body to make the determination of what is true and what is false."). For not only are governmental actors subject to the usual cognitive biases documented by social scientists, but to political bias as well and thus are likely to suppress speech that threatens their power or favored policies. This observation, however, does not save the marketplace of ideas rationale from the internal critique. As argued in Part III.D. of this Article, while some forms of government regulation will impair truth discovery, other interventions will likely promote truth discovery. Thus even when the potential for government regulation of speech to impair truth discovery is accounted for, the basic assumption of the marketplace of ideas rationale that the *net effect* of unregulated speech is the promotion of truth discovery is unverified.

[16] United States v. Alvarez, 567 U.S. 709 (2012).

[17] *Id.*

honor.[18] The decision comprised three opinions: a plurality opinion by Justice Anthony Kennedy, joined by Chief Justice John Roberts and Justices Ruth Bader Ginsburg and Sonia Sotomayor; a concurring opinion by Justice Stephen Breyer, joined by Justice Elena Kagan; and a dissent by Justice Samuel Alito, joined by Justice Antonin Scalia and Clarence Thomas. Invoking Justice Oliver Wendell Holmes' famous dissent that this Symposium commemorates, the plurality opinion held that, as a general matter, the First Amendment prohibits government from punishing even knowingly false factual statements. The concurring and dissenting opinions disagreed, asserting that lies should not be afforded such a broad First Amendment protection. Both of these opinions would, however, extend First Amendment protection to knowingly false factual statements on matters of public concern.[19] And, as did the plurality, both of these decisions invoked the marketplace of ideas as justification for First Amendment protection of lies.[20]

Part II of this Article describes the Supreme Court's jurisprudence prior to *Alvarez* regarding First Amendment protection of false statements of fact.[21] It demonstrates that the prevailing view was that false factual statements have no inherent constitutional value, for truth promotion or otherwise, but are sometimes afforded strategic protection to safeguard speech with constitutional value. It also documents that knowing falsehoods were deemed particularly inimical to constitutional values and thus were not entitled to even instrumental protection. Part III then discusses in sections A, B, and C, respectively, the plurality, concurring and dissenting opinions in *Alvarez*. This discussion pays particular attention to each opinion's invocation of the marketplace of ideas rationale for the protection of false factual statements, including knowingly false ones. It reveals how little relevance this rationale has to the issues presented in this case. Section D of Part III then posits two free speech values far more pertinent to the case than the marketplace of ideas. Part IV concludes the Article by lamenting the undue influence that the marketplace of ideas continues to have on American free speech jurisprudence.

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[18] 18 U.S.C. § 704(b).

[19] *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting); *id.* at 731–32 (Breyer, J., concurring).

[20] *Id.* at 732 (Breyer, J., concurring); *id.* at 746 (Alito, J., dissenting).

[21] By statements of fact, I mean descriptive statements about nature or society as opposed to assertions of values or norms. *Accord* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 900–01 (2010).

II. THE SUPREME COURT'S PRE-*ALVAREZ* JURISPRUDENCE CONCERNING FIRST AMENDMENT PROTECTION OF LIES AND THE MARKETPLACE OF IDEAS

Prior to its decision in *United States v. Alvarez*, the Court had often stated that false statements of fact had no inherent constitutional value; rather, such statements were sometimes afforded instrumental protection to shield speech with First Amendment value. For instance, in *Gertz v. Robert Welch, Inc*., the Court declared that "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."[22] The Court continued by explaining that "[a]lthough the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate."[23] Therefore, "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise,"[24] it "has extended a measure of strategic protection to defamatory falsehood."[25] The Court had long made clear, however, that no such "strategic protection" was appropriate for knowingly false factual statements. Thus, in a 1964 decision, the Court stated that while instrumental reasons might justify the extension of protection to the *carelessly made false assertion of fact* in public debate, "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."[26] For that reason, "[c]alculated falsehood falls into that class of utterances" that "do not enjoy constitutional protection."[27]

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[22] Gertz v. Robert Welch Inc., 418 U.S. 323, 340 (1974) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)); *see also* St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation.").

[23] *Gertz*, 418 U.S. at 340.

[24] *Id.* (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

[25] *Id.*

[26] Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (emphasis added).

[27] *Id.* Along with the outright lie, the Court included "the false statement made with reckless disregard of the truth" as among those categories of speech that "do not enjoy constitutional protection." *Id. Accord* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (allowing public officials to recover for libel if they can show that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."). To prove "reckless disregard" in a defamation suit, it must be shown that the defendant had a "high degree of awareness of their probable falsity," *Garrison*, 379 U.S. at 74, or, similarly, "serious doubts as to the truth" of the defamatory statement, St. Amant v. Thompson, 390 U.S. 727, 731 (1968). Under this definition, falsehoods made with "reckless disregard" for the truth are sufficiently close to a

Two related points are in order regarding the relationship between the marketplace of ideas and knowingly false factual statements in the Court's pre-*Alvarez* jurisprudence. First, the Court most frequently invoked the marketplace of ideas rationale in cases concerning normative statements such as "opinion" and "ideas," not factual assertions. Second, when the Court did speak of the marketplace of ideas in cases involving factual statements, it explained that this rationale was inapplicable to false statements of fact.

Justice Holmes' renowned *Abrams* dissent, which introduced the marketplace of ideas rationale into First Amendment jurisprudence,[28] speaks of "[p]ersecution for the expression of *opinions*," "fighting *faiths*," "free trade in *ideas*," "expression of *opinions* that we loathe and believe to be fraught with death," and the "*creed* that [the defendants] avow,"[29] not of factual statements.[30] Indeed, at the conclusion of his dissent, after

knowingly false misstatement that I will not in this Article distinguish them from outright lies.

[28] Although this dissent represents the first instance in Supreme Court jurisprudence of what was to become known as the "marketplace of ideas" rationale, Holmes makes no mention of a "marketplace" but rather to the "competition of the market" and to "free trade in ideas." The first reference to a "marketplace" of ideas in a Supreme Court opinion is in *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas."). According to Professor Vincent Blasi, the first published use of the term "marketplace of ideas" was so far as he could determine in a letter to the *New York Times*, referring to "men and ideas competing in the market place of ideas where public opinion is formed." *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, SUP. CT. REV. 1, 13 n.41 (2004) (quoting from Letter from David M. Newbold to N.Y. Times (Dec. 28, 1935)). Interestingly, another statement often attributed to Holmes—free speech not protecting "falsely shouting 'Fire!' in a *crowded* theater*," see, e.g.*, SCHAUER, *supra* note 3, at 30 (emphasis added)—also changes what Holmes actually wrote. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

[29] Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting) (emphasis added).

[30] The Espionage Act had (and still has) a provision making it a crime while the United States is at war to "willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies." 18 U.S.C. § 2388(a). For discussion of a case brought under this provision, see *infra* note 34. The defendants in *Abrams* were not, however, charged with violating this provision. Rather, they were charged under different provisions of the Act with conspiracy to "unlawfully utter, print, write and publish . . . 'disloyal, scurrilous and abusive language about the form of government of the United States,' . . . language 'intended to bring the form of government of the United States into contempt, scorn, contumely and disrepute' . . . [and] language 'intended to incite, provoke and encourage resistance to the United States in said war;'" and with "unlawfully and willfully, by utterance, writing, printing and publication to urge, incite and advocate curtailment of production of things and products, to wit,

stating that "[o]nly the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, 'Congress shall make no law . . . abridging the freedom of speech,'" Holmes specifies that "[o]f course, I am speaking *only of expressions of opinion and exhortations,* which were all that were uttered here."[31] Similarly, Justice Louis Brandeis' influential *Whitney* concurrence, which Holmes joined, described free speech as "means indispensable to the discovery and spread of *political truth*" and stated that "discussion affords ordinarily adequate protection against the dissemination of noxious *doctrine*."[32]

As Professor Frederick Schauer has usefully documented, for "the first half of the twentieth century, the issue that dominated the foreground" of First Amendment jurisprudence "was advocacy and not description."[33] Although this advocacy "was replete with inflammatory and exaggerated factual assertions about capitalist bosses, international arms cartels, and political [and] economic conspiracies, the basic issue was repeatedly one of antiwar, antidraft, prounion, and anticapitalist advocacy."[34] In the second half of the twentieth century, the Court

ordnance and ammunition, necessary and essential to the prosecution of the war." *Abrams*, 250 U.S. at 617.

[31] *Id.* at 630–31. In this regard, it is worth noting that the two most influential works arguing that free expression will produce truth, JOHN STUART MILL, ON LIBERTY (1859) and JOHN MILTON, AREOPAGITICA—A SPEECH FOR UNLICENSED PRINTING (1644), focused on normative statements such as political ideas, moral claims and religious doctrine, not factual assertions. *See* Schauer, *supra* note 21, at 904–05; *see also* Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 42 (2012). Holmes had long been familiar with Mill's works, but at the urging of his friend Harold Laski, a young lecturer of history at Harvard University, he re-read *On Liberty* early in 1919. *See* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGES HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA 98 (2013).

[32] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring); *see also id.* at 376–77 (in discussing when "advocacy of lawbreaking" may constitutionally be punished, Brandeis argues that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

[33] Schauer, *supra* note 21, at 906.

[34] *Id.* While Schauer is correct that in the first half of the twentieth century, the issue that dominated the First Amendment jurisprudence "was advocacy and not description," there were cases involving prosecution for the making of false statement of fact. For instance, in *Schaefer v. United States*, 251 U.S. 466 (1920), the Court upheld the conviction of several defendants charged with making false statements in violation of the provision of the Espionage Act. Justice Brandeis, joined by Justice Holmes, dissented. Significantly, Brandeis does not suggest that the First Amendment protects knowingly false statements of fact that can impair the nation's war effort. Rather, he objected that "the government did not attempt to prove that any statement made in any of the news items published in the [newspaper] was false in fact," but relied merely on certain minor variations from the sources from which it was translated. *Id.* at 486–87 (Brandeis, J., dissenting). He also thought that even if these impugned statements could

extended some protection to statements constituting defamation, invasion of privacy, and intentional infliction of emotional distress, as well as to commercial advertising. As a result, the constitutional protection of factual statements became more of a focus of the Court's jurisprudence.

In a watershed 1976 decision, the Court considered whether to afford some measure of First Amendment protection to commercial speech.[35] This sharply raised the issue of whether speech that "does 'no more than propose a commercial transaction'"[36] had any relevance at all to the marketplace of ideas.[37] Over Justice William Rehnquist's strenuous objection,[38] the Court held that "'the relationship of speech to the marketplace of products or of services does not make it valueless in the marketplace of ideas.'"[39] But despite finding *truthful* commercial advertising to have some purchase in the marketplace of ideas, and, therefore, worthy of limited First Amendment protection, the Court deemed that rationale inapplicable to false or even misleading commercial speech.[40] It thus has consistently held such expression to be *categorically* without First Amendment protection.[41]

In a landmark defamation case, the Court more generally expressed the view that the marketplace of ideas rationale was simply not germane to false factual statements: "Under the First Amendment," the Court

be considered false, they "could not have promoted the success of our enemies" and, therefore, were "impotent to produce the evil against which the statute aimed." *Id.* at 493. Allowing "such harmless additions to or omissions from news items" to be criminalized, Brandeis warned, "will doubtless discourage criticism of the policies of the government." *Id.* at 494.

35 Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

36 *Id.* at 762 (citations omitted).

37 *See* Smolla, *supra* note 1.

38 *Va. State Bd. of Pharmacy*, 425 U.S. at 781 (Rehnquist, J., dissenting).

39 *Id.* at 760; *see also id.* at 762 (commercial advertising is not "so removed from any exposition of ideas, and from truth, science, morality, and arts in general . . . that it lacks all protection.") (internal quotations and citations omitted).

40 *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–64 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising. Consequently, there can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity."); *see also id*. at 598 (Rehnquist, J., dissenting) ("[I]n the world of political advocacy and its marketplace of ideas, there is no such thing as a 'fraudulent' idea. . . . [But] [t]he notion that more speech is the remedy to expose falsehood and fallacies is wholly out of place in the commercial bazaar . . . .").

41 *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 495–98 (1996); Peel v. Att'y Registration and Disciplinary Comm'n of Ill., 496 U.S. 91, 100 (1990); Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio, 471 U.S. 626, 638 (1985); *In re* R.M.J., 455 U.S. 191, 203 (1982); *Cent. Hudson*, 447 U.S. at 562; *Va. State Bd. of Pharmacy*, 425 U.S. at 771.

explained, "there is no such thing as a false idea."[42] For the correction of "pernicious" ideas, we instead depend "on the competition of other ideas."[43] In contrast, "there is no constitutional value in false statements of fact."[44] Indeed, in its first case dealing with intentional infliction of emotional distress and the First Amendment, the Court explained that false statements of fact were positively inimical to the marketplace of ideas rationale because "they interfere with the truthseeking function of the marketplace of ideas."[45] And as noted at the beginning of this Part, while carelessly made false factual statements were sometimes extended a measure of strategic protection, knowingly false statements were deemed categorically devoid of First Amendment protection.[46]

In light of this jurisprudence, one would have expected the Court in *Alvarez* to confirm that knowing misstatements of fact were of no constitutional value and were, at most, entitled to strategic protection to guard speech with constitutional value. But as I shall now discuss, a majority of the Court, especially the plurality, took a very different tack.

III. *UNITED STATES V. ALVAREZ*, PROTECTION OF LIES AND THE MARKETPLACE OF IDEAS

When introducing himself as a board member of a water district, Xavier Alvarez made the knowingly false claim that he held the Congressional Medal of Honor.[47] For making this statement, Alvarez was convicted under the Stolen Valor Act,[48] which criminalized falsely claiming that one had been awarded a military honor.[49] In a 6-3 decision, the Court invalidated the Act on First Amendment grounds. There was sharp disagreement among the three opinions about the level of First Amendment scrutiny to be applied to the Stolen Valor Act. One

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42 Gertz v. Robert Welch Inc., 418 U.S. 323, 339 (1974).

43 *Id.* at 339–40.

44 *Id.* at 340. Somewhat inconsistent with this view is the statement in *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting MILL, ON LIBERTY 15 that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'").

45 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

46 *See supra* notes 25–27 and accompanying text.

47 United States v. Alvarez, 567 U.S. 709, 713–14 (2012).

48 18 U.S.C. § 704 (2019).

49 The Act did not expressly require that the speaker know that the claim was false. The Government, however, argued that the Act nevertheless required proof beyond a reasonable doubt of such knowledge, Brief for United States at 17, and both the concurrence and dissent accepted that construction. *See Alvarez*, 567 U.S. at 732 (Breyer, J. concurring) and *id.* at 740 (Alito, J. dissenting); *see also id.* (asserting that the plurality, which did not discuss the issue, "seemingly accept[s]" this position).

thing that all three decisions agreed upon, however, was that the marketplace of ideas rationale justifies the protection of a fairly broad category of lies. There is much to criticize in the Court's handling of this case, particularly the plurality's invocation of strict scrutiny, which I will discuss. In light of the theme of this Symposium, however, I will focus on each of the three opinions' invocation of the marketplace of ideas rationale.

A. *The Plurality Opinion*

Justice Kennedy's plurality opinion, joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor, begins its First Amendment analysis by declaring that "[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."[50] Rather, he explains, "content-based restrictions on speech are allowed, as a general matter, only when confined to the few historic and traditional categories of expression long familiar to the bar."[51] Kennedy then notes that "[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."[52] Because the Stolen Valor Act penalizes speakers for the content of their speech, it must be subject to the "most exacting scrutiny."[53]

To survive this exceedingly demanding test, the government must show that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[54] The plurality seemed to assume that protecting the integrity of military honors, particularly the Congressional Medal of Honor, was a compelling interest.[55] Nonetheless, it found the Stolen Valor Act could not survive strict scrutiny because, among other reasons, "[t]he

50 *Id.* at 716.

51 *Id.* at 717. The exceptions noted by Justice Kennedy 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."

52 *Id.* at 718. Contrary to this claim, as discussed in *supra* note 27 and accompanying text, the Court had previously held that the "[c]alculated falsehood falls into that class of utterances" that "do not enjoy constitutional protection." Garrison v. Louisiana, 379 U.S. 64, 75 (1964). *Garrison* even cites *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), the case that introduced into American free speech jurisprudence the categorical exclusion of certain types of speech from First Amendment protection.

53 *Alvarez*, 567 U.S. at 724.

54 Boos v. Barry, 485 U.S. 312, 321 (1988).

55 *Alvarez*, 567 U.S. at 709.

Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest" in preventing false statements from diluting the value of military awards.[56] At this point in the plurality opinion, Justice Kennedy quotes the seminal phrase from Holmes' dissent that this Symposium commemorates: "The theory of our Constitution," Justice Kennedy declared, "is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[57] Kennedy then explains that this is so because "suppression of speech by the government can make exposure of falsity more difficult, not less so."[58]

There are two serious defects with the plurality's handling of the difficult and important question presented in this case. The first is the holding that strict scrutiny applies to the regulation of intentional factual misstatements unless the lies at issue happen to fall within one of "the few historic and traditional categories of expression long familiar to the bar."[59] The second is the claim that such broad-based protection of lies, including factual statements such as those involved in this case whose falsity can readily be demonstrated, will lead to the finding of truth.

I have long been critical of what I have called the "all-inclusive approach" to speech protection.[60] Under this approach, all content-based speech regulations are subject to strict scrutiny, and thus "near-automatic condemnation,"[61] unless the regulated speech is among the few categories of speech historically excluded from First Amendment protection. It is problematic enough to the extent it is meant to afford, with a few narrow exceptions, virtually irrebuttable First Amendment protection to *all truthful speech*.[62] It is even more so to the extent it

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[56] *Id.* at 726.

[57] *Id.* at 728 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The full sentence from which Justice Kennedy quotes reads:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Id.

[58] *Alvarez*, 567 U.S. at 728.

[59] *See id.* at 717.

[60] *See* Weinstein, *supra* note 14.

[61] *Alvarez*, 567 U.S. at 731 (Breyer, J., concurring).

[62] *See* Weinstein, *supra* note 14, at 492 noting "the large range of speech regulated on account of its content, all without a hint of interference from the First Amendment," including "securities, antitrust, labor, copyright, food and drug, and health and safety

purports to provide such protection to *negligent* factual misstatements.[63] But it borders on judicial malpractice to purport to also afford, as did the plurality, such protection to *all knowingly false* factual statements not fitting into a few narrow categories of expression, including statements, such as involved in the case at hand, which can easily, conclusively, and uncontroversially be shown to be false.

As discussed in Part II, prior to *Alvarez*, the clearly prevalent view reflected in the Court's free speech jurisprudence was that false factual statements had no inherent constitutional value, in terms of truth promotion or otherwise, but were sometimes strategically afforded protection to provide "breathing space" for speech with constitutional value; and that knowingly false statements are inimical to free speech values, particularly the search for truth. Consistent with this sensible approach to protecting false factual statements, the scrutiny applied to a law prohibiting intentional misstatements of fact should be one that provides such "breathing space" to speech having First Amendment value. This is precisely the test that the Government proposed in *Alvarez*:

> Because false factual statements are entitled only to limited instrumental protection, the Court has never applied strict scrutiny to a restriction on such statements. Rather, it has approved content-based restrictions on false factual statements . . . when the restriction in question is supported by a strong government interest and provides adequate 'breathing space' for fully protected speech.[64]

Unfortunately, the plurality failed to give serious consideration to the Government's sensible suggestion, firmly grounded in precedent, for dealing with false factual statements. Instead, the plurality itself made a false factual statement by mischaracterizing the Government's argument as contending for a "categorical rule" that "false statements

laws, together with the array of speech regulated by the common law," such as contract formation.

[63] Will, for instance, malpractice claims against lawyers, accountants, and doctors for rendering negligent advice now be subject to "strict scrutiny"? What about suits against manufacturers for negligently providing incorrect instructions on how to use its project? Is providing recovery, for instance, for a slightly discolored carpet resulting from such deficient instructions really a "compelling interest"?

[64] Brief of United States at 20–21, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6019906 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)) [hereinafter Brief of the United States]. Solicitor General Donald B. Verrilli, Jr., a participant in this Symposium, was counsel of record on this brief and argued the case in the Supreme Court on behalf of the United States.

receive *no* First Amendment protection."[65] Having built this strawman, the plurality then summarily demolished it. It also mischaracterized and curtly dismissed an approach for dealing with knowingly false factual statements that Professor Eugene Volokh and I urged in an amici brief we filed in that case.[66] Immediately after mischaracterizing the Government's argument as contending that "false statements have no value and hence no First Amendment protection,"[67] Justice Kennedy adds: "See also Brief for Eugene Volokh et al. as *Amici Curiae* 2–11."[68] Contrary to the implication of this citation, we did not contend that false statements generally are entitled to no First Amendment protection. Rather, we urged the Court to "treat *knowing* falsehoods as a categorical exception to First Amendment protection."[69] But even with respect to such "calculated falsehoods,"[70] we explained that there should be "some limitations" to such categorical exclusion. We noted, for instance, that there should be protection for knowingly false statements "about the government, science, and history," so as "to avoid an undue chilling effect on true factual statements, statements of opinion, or other constitutionally valuable expression."[71]

The plurality's approach to knowing falsehoods forebodes two unfortunate consequences for First Amendment doctrine. First, it threatens to impede legitimate regulatory goals by protecting speech with no First Amendment value even when its prohibition will not chill speech with such value. Less obviously but more insidiously, such gross *overprotection* of knowingly false statements of fact through the application of strict scrutiny will likely *reduce* the protection that current doctrine affords speech with First Amendment value. In our amici brief, Professor Volokh and I offered a long list of knowingly false

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[65] *Alvarez*, 567 U.S. at 719 (emphasis added); *see also id.* at 718 (stating that the Government contends "that false statements have no value and hence no First Amendment protection."). Justice Kennedy not only mischaracterized the Government's position in this way, but also failed to acknowledge that the Government left open the possibility that, under certain circumstances, even *knowingly* false statements might be entitled to limited First Amendment protection. *See* Brief of United States at 18 ("This Court has long held that knowingly false statements of fact like those prohibited by [the Stolen Valor Act] are entitled, at most, only to limited First Amendment protection, and only to the extent necessary to ensure that restrictions on false factual statements do not unduly inhibit fully protected speech.").

[66] Brief of Eugene Volokh and James Weinstein as *Amici Curiae* in Support of Petitioner, 567 U.S. 709 (2012) (No. 11-210), 2011 WL 6179424 [hereinafter Brief of Volokh and Weinstein].

[67] *Alvarez*, 567 U.S. at 718.

[68] *Id.*

[69] Brief of Volokh and Weinstein at 2 (emphasis added).

[70] *Id.* at 22.

[71] *Id.* at 2.

statements of fact that are currently prohibited, for the most part uncontroversially. These include (1) knowingly false defamatory statements, (2) perjury, (3) fraudulent attempts to obtain money, (4) knowing falsehood constituting intentional infliction of emotional distress, (5) trade libel and slander of title, (6) unsworn knowingly false statements to government officials, (7) knowing falsehoods likely to provoke public panic, (8) knowingly falsely representing oneself as a government official, (9) knowingly falsely representing oneself as having a particular university degree or professional license, and (10) knowingly providing a false social security number.[72]

If challenged on First Amendment grounds, courts, including the Supreme Court, will be strongly inclined to uphold these perfectly reasonable prohibitions and will likely find a way to do so.[73] But adopting the *Alvarez* plurality's approach will pose a dilemma. None of these types of expression are among the "few historic and traditional categories of expression" that have been deemed devoid of First Amendment protection.[74] And they all prohibit speech because of its content. Accordingly, under the plurality's approach, all these laws must be subjected to "most exacting scrutiny."[75] But there's the rub. Strict scrutiny in the Court's First Amendment jurisprudence has been

[72] *Id.* at 3–11.

[73] Thus, the plurality opinion goes out of its way to confirm the constitutionality of three examples of knowingly false statements punishable under federal law: false statements made to law enforcement officials, perjury, and false representations that one is speaking on behalf of government. *See Alvarez*, 567 U.S. at 720. It is understandable that the plurality did not want to imply that laws punishing lies such as these that threaten the "integrity of Government processes" are "vulnerable" to First Amendment challenge. *Id.* at 721. The problem is that none of the "narrow categories" of speech on the plurality's list devoid of First Amendment protection readily encompasses these knowingly false statements. The plurality suggests that "to the extent that [these examples] implicate fraud or speech integral to criminal conduct," they would be categorically excluded from First Amendment protection. *Id.* Notably, the plurality did not specify "the extent" to which these examples would implicate fraud or speech integral to criminal conduct. And the clear implication is that to the extent these prohibitions do *not* implicate these exceptions, the plurality believed that the laws prohibiting them would pass strict scrutiny. As regards the "speech integral to criminal conduct" exception noted by the plurality, I wholeheartedly agree with Volokh that this exception is "indeterminate, dangerous, and inconsistent with more recent cases." Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1285 (2005). The plurality's suggestion that some of the speech in these three examples may be punishable under this exception proves Volokh's point about the indeterminacy of that exception. As to its dangerousness and inconsistency with current doctrine, the exception would seem to allow the punishment of speech urging draft resistance because such expression is integral to that crime.

[74] At least not obviously so. *See supra* note 73.

[75] *Alvarez*, 567 U.S. at 724.

aptly described by Justice Breyer as leading to "near-automatic condemnation"[76] and by Justice Antonin Scalia as "ordinarily the kiss of death."[77] This is as it should be. Strict scrutiny properly poses a near-absolute barrier to government regulating the content of public discourse, the speech by which citizens contribute to public opinion, which is "the final source of government in a democratic state."[78]

The function of phrases such as "compelling interest" and "narrowly drawn" is to establish a test that would allow Americans to say virtually anything they want on matters of public concern "to the end that government may be responsive to the will of the people."[79] For this reason, strict scrutiny, at least as it now exists, will sometimes lead to the invalidation of laws "even though common sense may suggest that they are entirely reasonable."[80] Indeed, for the strict scrutiny test to adequately protect the right of the American people to govern themselves, a law should not survive such an exceedingly rigorous review just because it is reasonable. As the very name of the test connotes, "strict scrutiny" is a much more rigorous test than a "rule of reason." A speech prohibition should survive such exacting scrutiny only where the speech prohibition is the only means available "to avert rare, catastrophic harms."[81] For that reason, the Supreme Court has explained that it is "the rare case" that survives strict scrutiny.[82]

As of this writing, there are just two Supreme Court cases that remain good law in which a speech prohibition has survived such rigorous review.[83] But if I am right that courts will uphold most, if not all, of the laws against knowing factual misstatement listed above, it would no longer be the "rare case" in which a law withstands such scrutiny. As a result, the rigorous, near-absolute protection against content discrimination that is supposed to be provided by the "most exacting scrutiny" will be diluted.[84] While prohibiting the knowing

[76] *See id.* at 731 (Breyer, J., concurring).

[77] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 380 (1995) (Scalia, J., dissenting).

[78] Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

[79] Stromberg v. California, 283 U.S. 359, 369 (1931).

[80] City of Ladue v. Gilleo, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring).

[81] Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1304 (2007).

[82] *See* Williams-Yulee v. Florida Bar, 575 U.S. 433, 444 (2015) (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion)).

[83] *See* Williams-Yulee, 575 U.S. 433; Holder v. Humanitarian Law Project, 561 U.S. 1 (2010).

[84] Justice Breyer has similarly warned that giving too capacious a scope to strict scrutiny will result in "watering down the force" of the test, thereby "weaken[ing] the First Amendment's protection in instances where 'strict scrutiny' should apply in full force." Reed v. Town of Gilbert, 135 S. Ct. 2218, 2235 (2015) (Breyer, J., concurring).

falsehoods listed above may prevent harm, it is not the catastrophic harm that the government must demonstrate for a law to survive strict scrutiny. Rather, many of these laws seek to prevent mundane harms in a way that "common sense may suggest . . . are entirely reasonable."[85] But if strict scrutiny is to retain the rigor necessary to protect the right of Americans to express virtually any idea in public discourse, even dangerous ones, strict scrutiny must not be reduced to a reasonableness test.[86]

If just the ten examples provided above,[87] let alone the host of other regulating lies as well as careless falsehoods, were upheld under an enfeebled versions of strict scrutiny, such a development would breach a crucial bulwark against government suppression of dissent in this country. Fortunately, the plurality's wrongheaded approach was rejected by a majority of the Court in *Alvarez*, rendering it, for the time being at least, essentially a dissenting opinion of four Justices. It is my fondest hope that this misguided approach never attracts a fifth vote.

I now turn to the plurality's use of the marketplace of ideas rationale to support its remarkable position that strict scrutiny should apply to all laws prohibiting knowingly false statements of fact on the basis of their content unless the lies in question happen to fall within one of the "few historic and traditional categories of speech" devoid of First Amendment protection. It is one thing to maintain that the promotion of truth will be served by applying strict scrutiny to laws prohibiting *certain categories* of lies, such as those made about matters of public concern. This is the position adopted by both Justice Breyer's concurring opinion and Justice Alito's dissenting opinion, which I discuss in Section C., below. But to suggest that the truth-promoting function of free speech will be promoted by a powerful presumption against the constitutionality of *all* laws prohibiting knowingly false statements, including lies that one has been awarded a military honor, is nothing short of preposterous.

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85 *Gilleo*, 512 U.S. at 60.

86 The potential of the plurality's approach to weaken strict scrutiny is demonstrated by the two cases mentioned above, note 83, that upheld content-based laws under that standard. For a detailed discussion of the faux strict scrutiny the Court applied in *Holder v. Humanitarian Law Project*, see James Weinstein & Ashutosh Bhagwat, *Bad Law: How the United States Supreme Court Mishandled the Free Speech Issue in* Holder v. Humanitarian Law Project, *in* EXTREMISM, FREE SPEECH AND COUNTER-TERRORISM LAW AND POLICY 162–64 (Ian Cram ed. 2019). Similarly, Justice Scalia's dissent in *Williams-Yulee v. Florida Bar* demonstrates that the test that the majority applied in that case is but "the appearance of strict scrutiny." *Id.* at 466 (Scalia, J., dissenting).

87 *See supra* text accompanying note 72.

In addition to lies about being awarded a military honor, consider knowingly false statements that one has a university degree or professional license; slandering someone's title by filing a knowingly false claim of ownership to property; supplying a social security number that one knows is fabricated; or, to use Holmes' hoary example, "shouting fire in a theatre and causing a panic"[88] when the speaker knew that there was no fire. Is there any plausible claim that laws prohibiting such lies might "chill" people from making truthful statements about these subjects? And are we really to believe that these are the kind of false statements about which government cannot be trusted to fairly adjudicate their veracity, or which "may be deemed to make a valuable contribution to public debate" by producing a "clearer perception and livelier impression of truth, produced by [their] collision with error"?[89] It is bad enough to interpret the First Amendment as imposing a strong presumption against laws prohibiting harmful lies about easily verifiable facts having nothing to do with matters of public concern. But the claim that this rule will promote truth discovery cannot, and should not, be taken seriously. If, as the Court had previously asserted, false statements of fact generally "interfere with the truth-seeking function of the marketplace of ideas,"[90] then a First Amendment rule presuming unconstitutional laws prohibiting knowing falsehoods such as these cannot possibly promote this truth-seeking function.

B. *The Concurring Opinion*

Justice Breyer, joined by Justice Elena Kagan, filed a concurring opinion.[91] Breyer agreed that the Stolen Valor Act was unconstitutional but objected to the plurality's application of strict scrutiny. He acknowledged that strict scrutiny and the "near-automatic condemnation" it entails would be the appropriate level of scrutiny for laws "restricting false statements about philosophy, religion, history, the social sciences, the arts, and the like."[92] With regard to such expression, Justice Breyer agreed with Justice Alito's dissent that such restrictions "would present a grave and unacceptable danger of suppressing truthful speech."[93] In contrast, the Stolen Valor Act prohibited "false statements about easily verifiable facts that do not concern such subject matter," statements that are "less likely . . . to make

88 Schenck v. United States, 249 U.S. 47, 52 (1919).
89 United States v. Alvarez, 567 U.S. 709, 733 (2012).
90 Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).
91 *Alvarez*, 567 U.S. at 730–39 (Breyer, J., concurring).
92 *Id.* at 731.
93 *Id.* (quoting *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting)).

a valuable contribution to the marketplace of ideas."[94] However, because restrictions on false statements not involving such subject matter "can nonetheless threaten speech-related harms," Breyer concluded that the application of "intermediate scrutiny" was called for.[95]

Breyer conceded that the Court has often stated that false factual statements "enjoy little First Amendment protection."[96] Nevertheless, he insisted that, for several reasons, this cannot mean "no protection at all."[97] First, he noted that lies 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."[98]

In addition, in Breyer's view, false factual statements "even if made deliberately to mislead," can "promote a form of thought that ultimately helps realize the truth" or "bring[] about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[99] Furthermore, Breyer continued, criminal sanctions for making a false statement "can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart."[100] Finally, Breyer feared that a broad prohibition on even deliberate misstatement of fact not closely tied to specific harms would allow for selective prosecution against members of "unpopular" groups, or at least make members of such groups apprehensive of such selective prosecution.[101]

Breyer noted that the Stolen Valor Act "applies in family, social, or other private contexts, where lies will often cause little harm," as well as in "political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high."[102] And unlike laws against fraud, perjury, false claims of terrorist attacks, or laws forbidding impersonation of public officials, the Stolen Valor Act does not require a showing that the false statement "caused specific

94 *Id.* at 732.

95 *Id.* Justice Breyer explained that such scrutiny required "'proportionality' review" by which the Court determines "whether the statute works speech-related harm that is out of proportion to its justifications." *Id.* at 730.

96 *Id.* at 733.

97 *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring).

98 *Id.*

99 *Id.* (quoting ON LIBERTY, *supra* note 31, at 16).

100 *Id.* at 733.

101 *Id.* at 734.

102 *Id.* at 736.

harm or at least was material, or focus[ed] its coverage on lies most likely to be harmful or on contexts where such lies are most likely to cause harm."[103] For these reasons, he found that the Stolen Valor Act was not sufficiently "narrowly tailored" to pass intermediate scrutiny.[104]

The argument that the Stolen Valor Act's application to "family, social, or other private contexts" will inhibit would-be speakers "from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart," or otherwise impair the promotion of truth, itself cannot withstand scrutiny, "intermediate" or otherwise. Criminal prosecution for "bar stool braggadocio"[105] about having been awarded a Purple Heart, or a father telling his young children that he was awarded the Silver Medal, would, it is true, infringe upon privacy and thus raise substantial constitutional issues. But contrary to Justice Breyer's surmise, such prosecutions would not likely have inhibited *others* from making true statements about their military honors. Breyer contended that "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),"[106] there is "a risk of chilling that is not completely eliminated by the *mens rea* requirement[]" that the false statements must be "made with knowledge of their falsity and with the intent that they be taken as true."[107] In his view, someone who wanted to talk about his military honors in family, social, or other private settings 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."[108]

Justice Breyer may be right that the "risk of chilling" might not be "completely eliminated" by the *mens rea* requirement. It is doubtful, though, that such a "chilling effect" would be substantial. This is particularly true in the absence of a spate of prosecutions for false statements about military honors made in the familial and social contexts, which was the situation at the time *Alvarez* was decided.[109] But

103 *Alvarez*, 567 U.S. at 738.

104 *Id.* at 730.

105 *Id.* at 737

106 *Id.* at 736.

107 *Id.* at 732.

108 *Id.* at 736.

109 Prosecutions for violating the Stolen Valor Act were "rare." United States v. Perelman, 737 F. Supp. 2d 1221, 1233 (D. Nev. 2010), *aff'd*, 695 F.3d 866 (9th Cir. 2012). Many of those prosecuted lied about military honors in order to fraudulently collect VA benefits. *See, e.g.*, United States v. Amster, 484 F. App'x 338, 340 (11th Cir. 2012); United States v. Perelman, 658 F.3d 1134, 1134 (9th Cir. 2011); McClain v. Shinseki, No. 11-0160, 2012 WL 641606, at *3 (Vet. App. Feb. 28, 2012); United States v. Swisher, 790 F. Supp. 2d 1215 (D. Idaho 2011).

let's assume for the sake of argument that the Stolen Valor Act would likely have inhibited a substantial number of people unsure of which military honors they were awarded from speaking on the subject for fear of prosecution for making a "careless false statement." Even under this assumption, it is not at all clear that such speech inhibition would have reduced the number of true statements about military honors. While such speech inhibition would deter some speakers unsure about their military honors from making true statements, such a "chilling effect" would also deter them from making false statements. Indeed, for all we (or Justice Breyer) know, a law that made people more cautious in making claims about whose veracity they were uncertain would, in this context, *promote* truth by deterring more false statements than true ones. As Justice Breyer had earlier emphasized, whether or not one has been awarded a military honor involves "readily verifiable facts within the personal knowledge of the speaker."[110] So if a speaker, unsure of which military honor she had won, was forced to "bite her tongue" on a particular occasion, she could subsequently verify her award and thereafter speak freely and truthfully on the subject.[111]

Justice Breyer's argument that the Stolen Valor Act's prohibition in "political contexts" will diminish true statements about military honors is similarly unpersuasive. By "political contexts," he seems to mean lies in electoral politics. He thus refers to false statements "leading . . . listeners to vote for [a] speaker" and to prosecutions for such statements "radically changing a potential election result," and discusses at some length false statements by political candidates and their organizations.[112] His main concern here is the high "risk of

[110] *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring in judgment).

[111] It is fanciful to suggest, as does Justice Breyer, that lies in the private context about having been awarded a military honor will "bring[] about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Id.* at 733 (quoting J. MILL, ON LIBERTY 15 (Blackwell ed. 1947)). The claim that such lies in this context will "promote a form of thought that ultimately helps realize the truth," in contrast, raises an interesting issue. *Id.* I must confess that about twenty years ago while reading my then four-year son a Harry Potter novel, I claimed (falsely) that I went to Hogwarts. I told him this lie mostly for the fun of it, but also to engage and improve his critical thinking skills. As I recall, the conversation continued something like this: "Really, daddy?" my son asked quizzically. "So what do you think, Julian? Did I *really* go to Hogwarts?" Julian thought hard about the question for a moment and then replied: "Nah, I don't think so . . . but maybe." Perhaps a lot of parents lie to their children to "promote a form of thought that ultimately helps realize the truth." But taking lies about military honors off the table as a subject matter for honing children's critical thinking skills will not significantly impair such bedtime or dinner table dialogues.

[112] *See id.* at 738. Earlier in his opinion, Breyer mentions a hypothetical selective prosecution against a pacifist who supports this cause by falsely claiming to have been awarded a military honor. *See id.* at 734. Although such expression might commonly be

censorious selectivity by prosecutors."[113] I agree that there are persuasive reasons to distrust government officials' ability to fairly punish false statements, including deliberately false ones, in electoral politics. State and local prosecutors and election officials typically have intimate ties to partisan politics. Accordingly, even when easily verifiable facts are at issue, there is considerable risk that these officials selectively will punish candidates of other parties for campaign lies, while overlooking similar lies by candidates from their party. Perhaps at one time, federal prosecutors could be trusted not to bring prosecutions to try to influence the outcome of elections. But I have much less confidence that this is true in today's highly polarized environment.

I, therefore, agree with Justice Breyer that the Stolen Valor Act presented a substantial risk that it would be selectively applied to candidates for elective office, both state and federal, who lie about having been awarded military honors. It does not follow, however, that selective prosecutions in the political context would result, as Justice Breyer claims, will "inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart."[114]

Suppose that over several election cycles, sixteen candidates for elective office, eight Republicans and eight Democrats, make knowingly false claims about having been awarded military honors. Suppose further that because of selective prosecution, only those from one party were prosecuted. This would be a serious problem for the fairness of electoral politics with troubling constitutional ramifications. Moreover, to the extent a candidate must divert time and resources to defend against these charges, such selective prosecution might skew the information and ideas available to the electorate and, *in that sense*, may be said to interfere with the marketplace of ideas. It is difficult to imagine, however, that inhibiting even careless, let alone knowing, misstatements from candidates that they have been awarded military honors would diminish truth about *that subject*. Rather, such inhibition would more likely promote truth discovery. Indeed, even more so with private "bar stool braggadocio" or claims to one's family, concern for prosecution would likely spur candidates for public office to check the details of an award about which they were uncertain, and thus to make accurate statements on the subject. Of course, even-handedly

referred to as "political speech," it does not seem to be what Breyer means by speech in "political contexts."

113 *Id.* at 736.

114 *Id.* at 733.

prosecuting candidates who lie about military honors would likely further increase this truth promoting function. But even selective prosecution would seem to promote, not diminish, the truth about who has been awarded military honors and which honors they were awarded.[115]

In sum, Justice Breyer makes some valid points about possible unconstitutional applications of the Stolen Valor Act. But in following the alluring scent of the marketplace of ideas rationale, he ends up barking up the wrong tree.[116]

C. *The Dissenting Opinion*

Justice Samuel Alito, joined by Justices Scalia and Clarence Thomas, dissented. Essentially adopting the Government's approach to the case,[117] Alito emphasized the many occasions in which the Court had recognized that "false factual statements possess no intrinsic First Amendment value"[118] and so "do not merit First Amendment protection for their own sake."[119] He recognized, however, 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."[120] After noting the application of such "strategic protection" in defamation and similar cases,[121] Alito cautioned that these examples "by no means exhaust the circumstances in which false factual statements enjoy a degree of instrumental constitutional protection."[122] To the contrary, he noted that 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."[123] Such a threat,

115 For similar reasons, selective prosecution of "unpopular" people or groups such as pacifists who falsely claim to have been awarded military honors, *see id.* at 734, while raising troubling constitutional issues, would not seem to diminish the promotion of truth about who has earned military honors.

116 In finding the Act facially unconstitutional Justice Breyer indicated that "a more finely tailored statute" might comport with the First Amendment. *Alvarez*, 567 U.S. at 737–38. Soon after *Alvarez* was decided, Congress passed, and President Barack Obama signed, the Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448. This law, which applies to a shorter list of military honors than did the invalidated law, makes it a crime with "intent to obtain money, property, or other tangible benefit" to "fraudulently hold[] oneself out to be a recipient" of one of the listed honors. *Id.*

117 *See supra* notes 64–65 and accompanying text.

118 *Alvarez*, 567 U.S. at 746 (Alito, J., dissenting).

119 *Id.* at 750.

120 *Id.* (internal quotation marks and citations omitted)

121 *Id.* at 750–51.

122 *Id.* at 751.

123 *Id.*

for example, would be presented by laws "restricting false statements about philosophy, religion, history, the social sciences, the arts and other matters of public concern."[124] In these areas, it is "perilous to permit the state to be the arbiter of truth" because

> [e]ven where there is a wide scholarly consensus concerning a particular matter, the truth is served by allowing that consensus to be challenged without fear of reprisal. Today's accepted wisdom sometimes turns out to be mistaken. And in these contexts, "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[125]

In the dissent's view, however, in "stark contrast" to "laws prohibiting false statements about history, science, and similar matters," the speech prohibited by Stolen Valor Act "is not only verifiably false" but is also lacking in either intrinsic or instrumental First Amendment value.[126] The law in his view, therefore, "presents no risk at all that valuable speech will be suppressed."[127] Finding the Stolen Valor Act to be "a narrow law enacted to address an important problem," and one that "presents no threat to freedom of expression," Alito would have upheld the law.[128]

While there are other aspects of the dissent that are open to criticism,[129] I want to focus on the claim, echoed in Justice Breyer's concurrence, that "*any* attempt by the state . . . to restrict false statements about philosophy, religion, history, the social sciences, the arts *and other matters of public concern*, would present a grave and unacceptable danger of *suppressing truthful speech*."[130] This claim reflects the classic marketplace of ideas premise that *any* attempt by

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124 *Alvarez,* 567 U.S. at 751 (Alito, J., dissenting).

125 *Id.* at 752 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting ON LIBERTY, *supra* note 31, at 15)). Alito also contended that allowing the state to punish false statements in this context would risk the state using its power for political ends. *Id.*

126 *Id.*

127 *Id.*

128 *Id.* at 755.

129 In particular, it fails to fully engage the plurality's and concurrence's point that the Act applies in private settings and the concurrence's observation that it applies in political contexts. *See infra* text accompanying notes 157–62. The dissent brushes aside these claims by insisting that such application to protected speech would not render the law unconstitutional as substantially overbroad. *Alvarez*, 567 U.S. at 753 (Alito, J., dissenting). It also fails to consider whether the context in which Alvarez lied about winning the Congressional Medal of Honor warranted First Amendment protection of this expression. *See infra* note 147.

130 *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting) (emphasis added).

government to restrict expression on matters of public concern will diminish truth promotion. In addition, it is a view shared by all nine members of the *Alvarez* Court.[131] I do not doubt that allowing government unconstrained power to restrict false statements in public discourse would be unacceptably destructive of core free speech values. What is not so certain, however, is whether permitting government to engage in such speech repression would significantly reduce truth discovery. This is a question to which I will return momentarily. But first I want to challenge the broad assertion that *any* restriction of false statements "on matters of public concern" poses a "grave and unacceptable danger of suppressing truthful speech."

Consider Holocaust denial, a notorious falsehood that would seem to be the type of statement that Justice Alito had in mind when claiming that "restricting false statements about philosophy, religion, *history*, the social sciences, the arts and other matters of public concern would present a grave and unacceptable danger of suppressing truthful speech."[132] A 2008 European Union Framework Decision requires member states to punish as hate speech the "publicly condoning, denying, or grossly trivialising crimes of genocide," including the Holocaust, as criminal offenses.[133] Twenty-two member states currently have laws punishing Holocaust denial, and prosecutions under these laws are not infrequent.[134] It is true that "[e]ven where there is a wide scholarly consensus concerning a particular matter . . . [t]oday's accepted wisdom sometimes turns out to be mistaken."[135] But with certain basic historical facts, such as the Allies won World War II and that during that war the Nazis committed massive genocide against the Jewish people, there is no chance that "the wide scholarly consensus" is going to "turn[] out to be mistaken." Of course, even with such irrefutable historical facts, there are always contested details that need to be worked out. But I have not been able to discover any evidence that the ban on Holocaust denial in Europe has interfered with legitimate academic inquiry or other discussion that is likely to promote a more accurate understanding of the details of the Holocaust.

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131 It is expressly adopted by the concurrence, 567 U.S. at 731 (Breyer, J., concurring), and is entailed in the plurality's view much broader protection of false factual statements in order to promote truth. *Id.* at 723 (plurality opinion).

132 *Id.* at 751 (emphasis added).

133 Council Framework Decision 2008/913/JHA of 28 November 2008 on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, art. 1, 2008 O.J. (L 328) 55.

134 *See* Michael Whine, *Countering Holocaust Denial in the Twenty-First Century*, 14 ISR. J. OF FOREIGN AFF. 53, 55–58, 64 n.3 (2020).

135 *Alvarez*, 567 U.S. at 752 (Alito, J., dissenting).

Of course, this does not mean that some useful dissent about various details of the Holocaust has not been deterred, just that it has not been reported. In addition, it may be that the prohibitions on Holocaust denial have, to some extent, reduced "the clearer perception and livelier impression of truth, produced by its collision with error."[136] Relatedly, that the government has forbidden Holocaust denial has no doubt for some people only served to reinforce their erroneous belief that the Holocaust is a "hoax." On the other hand, to the extent that these laws have deterred Holocaust deniers from sowing seeds of doubt, particularly online, among the European population about the existence of the Holocaust, the speech restrictions may have, on the whole, produced a more accurate understanding of the truth on the subject. What the *net effect* of these laws has been on truth promotion is difficult to say. But there is no reason to assume this overall effect has been truth reduction rather than truth promotion.

For similar reasons, the net effect on truth promotion would be uncertain if making other manifestly false factual statements in public discourse were outlawed. These include smoking does not cause cancer,[137] vaccinations cause autism,[138] human activity has not contributed to climate change,[139] or various conspiracy theories that

136 *Id.* at 752 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964)) (quoting ON LIBERTY, *supra* note 31, at 15) (internal quotation marks omitted).

137 *See* WORLD HEALTH ORG., TOBACCO EXPLAINED: THE TRUTH ABOUT THE TOBACCO INDUSTRY . . . IN ITS OWN WORDS 6 (2019) https://www.who.int/tobacco/media/en/Tobacco Explained.pdf?ua=1 ("Publicly the [tobacco] industry denied and continues to deny that it is clear that smoking causes lung cancer—yet it has understood the carcinogenic nature of its product since the 1950s.").

138 The origin of this false belief is a subsequently retracted publication by English physician Andrew Wakefield claiming the measles-mumps-rubella (MMR) vaccine caused autism in 12 children. *See* Andrew Wakefield, *Ileal-lymphoid-nodular Hyperplasia, Non-specific Colitis, and Pervasive Developmental Disorder in Children*, 351 THE LANCET 637 (1998), *retraction published* 375 THE LANCET 445 (2010). The study was retracted when journalists discovered that Wakefield had failed to disclose that he had applied for a patent on his own vaccine and had been paid by lawyers who were suing manufacturers of MMR vaccines for downplaying the side effects of these vaccines. Shortly thereafter, the British General Medical Council revoked Wakefield's license to practice medicine, whereupon he moved to Texas, where he continued his anti-vaccination campaign. *See Why People Think Vaccines Cause Autism*, Immunization Info.com, https://www.immunizationinfo.com/why-people-think-vaccines-cause-autism (last visited September 5, 2020). Subsequent to the retraction of Wakefield's Lancet article, multiple studies have shown that there is no link between vaccines and autism. *Vaccine Safety: Autism*, Ctrs. for Disease Control and Prevention (March 26, 2020), https://www.cdc.gov/vaccinesafety/concerns/autism.html.

139 *See, e.g.*, Tom DiChristopher, *Trump Revives a Misleading Claim That Global Warming Isn't Happening Because It's Cold Outside*, CNBC (Dec. 29, 2017), https://www.cnbc.com/2017/12/29/trump-revives-misleading-claim-its-cold-so-global-warming-isnt-real.html. The evidence that the has warmed significantly since the

have proliferated about the origins of the novel coronavirus.[140] It would require a leap of faith to confidently conclude that the overall effect of prohibiting these false statements would be to impair the promotion of truth about these subjects.

Significantly, however, in assessing the overall impact on truth promotion, it is not sufficient to consider the impact of each law viewed in isolation. From a doctrinal perspective, a crucial question is what, if any, limiting principle can be identified that would permit the imposition of liability for the false statement at issue but would not give government unbounded power to punish false statements in public discourse. In theory, one such limiting principle would be whether there is any realistic chance that the claim might "turn out" to be true. But while this may be a workable criterion for academic administrators to use in deciding which research projects to fund or which faculty should be granted tenure, it is not one with which government in the United States can be trusted.

late nineteenth century is "unequivocal." *See Facts*, NASA: GLOBAL CLIMATE CHANGE, https://climate.nasa.gov/evidence/; *see also* Rebecca Lindsey & LuAnn Dahlman, *Climate Change: Global Temperature*, NOAA: CLIMATE.GOV (Jan. 16, 2020), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature (discussing evidence showing that "the combined land and ocean temperature has increased at an average rate of 0.07°C (0.13°F) per decade since 1880" but that "the average rate of increase since 1981 (0.18°C / 0.32°F) is more than twice as great"). Even many climate change "skeptics" now agree that it indisputable that the earth has warmed over this period. *See, e.g.*, Vijay Jayaraj, *Four Reasons Alarmists Are Wrong on Climate Change*, MASTERRESOURCE (Apr. 26, 2018), https://www.masterresource.org/alarmism/four-reasons-alarmists-wrong-climate-change/ ("[The] historical data inferred . . . primarily tree-rings and ice cores [,] global mean surface temperature data from thermometers (measured since the 1880s), radiosonde (weather balloon) temperature measurements (first used in 1896 but not common until the 1950s), and temperature data gathered by satellites (since the 1970s)" all show that [g]lobal warming is real. Scientists disagree only on its magnitude and causes and how we should respond to it.").

140 For example, it has been widely claimed that 5G wireless networks caused the coronavirus pandemic. Bruce Y. Lee, *5G Networks and Covid-19 Coronavirus: Here Are the Latest Conspiracy Theories*, FORBES (Apr. 9, 2020), https://www.forbes.com/sites/brucelee/2020/04/09/5g-networks-and-covid-19-coronavirus-here-are-the-latest-conspiracy-theories/#531ca02e6d41 ("[T]his theory claims that the radiation from 5G is what's actually causing COVID-19 symptoms. Another variation of the conspiracy theory asserts that radiation from 5G can weaken your immune system to the point that you are more easily infected by the COVID-19 coronavirus."). There is no scientific evidence for either of these claims. *See* Peter Grad, *Report Linking 5G to COVID-19 Swiftly Debunked*, MEDICALXPRESS (July 27, 2020), https://medicalxpress.com/news/2020-07-linking-5g-covid-swiftly-debunked.html; Rebecca Heilweil, *How the 5G Coronavirus Conspiracy Theory Went from Fringe to Mainstream*, VOX: RECODE (Apr. 24, 2020), https://www.vox.com/recode/2020/4/24/21231085/coronavirus-5g-conspiracy-theory-covid-facebook-youtube (explaining how 5G misinformation spread across the internet).

If federal, state, and local governments in the United States were allowed to penalize factual statements on matters of public concern that in their judgment were indisputably false, there would indeed be a great risk of "censorious selectivity by prosecutors."[141] This would create a "grave and unacceptable danger" that government would target such false statements by speakers with whom it disagrees while not prosecuting similar falsehoods by those with whom it agrees. Worse yet, driven by ideology or ignorance, or a lethal combination of the two, legislators and prosecutors would likely seek to punish seemingly false factual assertions that may well "turn out" to be true. It is no answer that the judiciary could be trusted to invalidate laws that punished seemingly false statements that had some realistic chance of eventually turning out to be true. This is much too uncertain a standard for practical administration, and as such would invite judges, even if quite unconsciously, to smuggle their political ideology into the decision. In any event, such a standard would fail to provide the "breathing space" necessary to avoid "chilling" true factual statements.

In sum, I am doubtful that there is some readily identifiable, practically administrable principle to distinguish false statements about, say, vaccinations causing autism, from the host of other false statements routinely made on highly contentious and politicized matters of public concerns, such as abortion,[142] health care policy,[143] or police brutality against African-Americans.[144] Justice Alito was right to

141 *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring).

142 *See* Marie McCullough, *The Facts Behind 'Partial-Birth' Debate: As the Senate Prepares to Take up the Abortion Issue Again, Some Questions Are Answered*, PHILA. INQUIRER, Sept. 16, 1998, at A01, A14 (noting that Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, confessed that he had "lied through his teeth" in claiming that partial-birth abortions are only rarely performed); Sidney Steele, *Nick Schroer Wrong that More Women Have Died From Legal Abortions Since* Roe v. Wade, POLITIFACT (Apr. 25, 2019) (statement that more women died from illegal abortions after *Roe* rated as a "Pants On Fire"), https://www.politifact.com/factchecks/2019/apr/25/nick-schroer/nick-schroer-wrong-more-women-have-died-legal-abor/.

143 *See* Jon Greenberg, *Nancy Pelosi Says 'Everybody' Will Get More and Pay Less Under the Health Care Law,* POLITIFACT (July 6, 2012) (House Minority Leader Nancy Pelosi's statement that under the ACA, "[e]verybody will have lower rates, better quality and better access" rated as "False"), https://www.politifact.com/factchecks/2012/jul/06/nancy-pelosi/nancy-pelosi-says-everybody-will-get-more-and-pay-/; Sharon Begley, *The Top 5 Lies About Obama's Health Care Reform*, NEWSWEEK, Aug. 28, 2009 (refuting claims that "death panels" would decide who receives care under the Affordable Care Act), https://www.newsweek.com/top-5-lies-about-obamas-health-care-reform-78895.

144 Nick Gass, *'Hands Up, Don't Shoot' Ranked One of Biggest 'Pinocchios' of 2015*, POLITICO (Dec. 14, 2015, 08:28 AM), https://www.politico.com/story/2015/12/hands-up-dont-shoot-false-216736; *Fact Check: False Claims about George Soros*, REUTERS (June

be concerned about the impact on truth promotion if government were allowed broad power to punish false factual statements in public discourse. That being said, such laws would also deter a lot of plainly false speech, much of which reliably deceives a huge portion of the American population "increasingly siloed in their own echo chambers."[145] So even if government in the United States were essentially unconstrained by the First Amendment from penalizing "purportedly false speech"[146] on matters of public concern, it is significant that it could not be said with certainty that the "net" effect of such unconstrained speech prohibitions would be to diminish rather than to promote truth.[147]

D. *Free Speech Values that Would be Impaired by Laws Prohibiting Lies in Public Discourse*

What can, however, be said with confidence is that such unbounded governmental power to punish falsehoods in public discourse would seriously undermine freedom of expression in the United States. A far more "grave and unacceptable danger" to free speech than the uncertain effect that these restrictions might have on truth promotion is the dire consequences to two core democratic values underlying the First Amendment. The first is the right of speakers to engage in public discourse. The second is a basic precept of American popular

18, 2020, 12:11 PM) (debunking claims that George Soros owned ANTIFA and Black Lives Matter and paid protestors), https://www.reuters.com/article/uk-factcheck-false-george-soros-claims/fact-checkfalseclaims-about-george-soros-idUSKBN23P2XJ.

145 Nunziato, *supra* note 5, at 1527–28.

146 *Alvarez*, 567 U.S. at 751 (Alito, J., dissenting).

147 For the most part, both Alito and Breyer cast their discussion of laws that prohibit false factual statements in public discourse as pure dicta. Indeed, Breyer explicitly states that "this case does not involve such as law." 567 U.S. at 732 (Breyer, J., concurring in the judgment). But as is suggested by Breyer's hypothetical about selective prosecution of a pacifist who in promoting this cause falsely claims to have been awarded a military honor, *id.* at 734, the Stolen Valor Act certainly could have had some application to public discourse. Indeed, the very speech that sparked the prosecution in this case—Alvarez's claim at a public meeting of a water board of which he was a member that he had been awarded the Congressional Medal of Honor—might qualify as public discourse. Or, since members of the board are elected, *see Three Valleys' Service Area and Elected Officials' Divisions*, THREE VALLEYS MUNICIPAL WATER DISTRICT—BOARD OF DIRECTORS, https://www.threevalleys.com/board-of-directors, it might qualify as expression in a "political context[]," *see* 567 U.S. at 738 (Breyer, J., concurring in the judgment). The context of Alvarez's speech thus sharply raised the issue of whether the Stolen Valor Act violated the First Amendment as applied to such expression. Since Justice Breyer found the Act unconstitutional on its face, he might be forgiven for failure to discuss this issue. In contrast, Justice Alito, who thought the law was facially valid, should have grappled with the issue.

sovereignty that "We the People" do not need government guardianship to sort out truth from falsity on matters of public concern.

Participation in public discourse is a crucial means by which citizens in a democracy contribute to the public opinion that controls their representatives between elections. Like voting, the opportunity of each citizen to participate freely and equally in public discourse is vital to the legitimacy of the legal system in that it allows individuals to have their say about laws that bind them.[148] In addition to promoting legitimacy in this essential normative sense, the opportunity to participate in public discourse contributes to "the descriptive conditions necessary for a diverse and heterogeneous population to live together in a relatively peaceable manner under a common system of governance and politics."[149] The opportunity to engage in such expression promotes not just the legitimacy of the entire legal system, but also the legitimacy of particular laws. For instance, legal restrictions on those who are dubious about climate change will undermine the legitimacy of applying to them environmental legislation enacted to reduce global warming.

If government had broad power to punish false statements made on matters of public concern, speakers would inevitably be penalized for making statements that they in good faith thought were true. Whether or not this would diminish truth promotion, such inhibition on the ability of citizens to *freely* participate in the speech by which we govern ourselves would significantly impair the core legitimating function of free speech. It is unlikely, moreover, that these baneful effects could be sufficiently mitigated by a *mens rea* requirement limiting prosecutions to only false statements made with knowledge of their falsity or reckless disregard for the truth. Concededly, democratic participation does not, as a theoretical matter, entitle a speaker to try to deceive the public by making knowingly false factual statements. But in the often highly ideological context of public discourse, there are strong pragmatic reasons to distrust the ability of government officials to fairly and accurately determine a speaker's state of mind in making a false statement. Government officials hostile to the speaker's point of view are more likely to believe that the speaker knew that the statement was false, while officials who share the speaker's ideological perspective will

148 For a fuller discussion of how the opportunity to participate in public discourse as speakers promotes political legitimacy, see James Weinstein, *Hate Speech Bans, Democracy and Political Legitimacy*, 32 CONST. COMMENT. 527 (2017) and James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361 (2011) [hereinafter, Weinstein, *Political Legitimacy*].

149 Robert Post, *Legitimacy and Hate Speech*, 32 CONST. COMMENT. 651, 651 (2017).

be more likely to find that any misstatement of fact was an innocent one.[150]

So Justice Breyer was right to emphasize the problem of selective prosecution, but not because it would undermine truth promotion. Such "censorious selectivity" might or might not interfere with truth promotion; it cannot be doubted, however, that selectively prosecuting those with whose speech the government disagrees violates the core democratic precept of *equal* participation in the political process in much the same way as would selective denial of the franchise.[151] Similarly, the Court in *Alvarez* was correct with respect to one of the few points all nine Justices agreed upon: As a general matter, it is too dangerous to allow government to punish even knowing misstatements of fact made by speakers on matters of public concern. But a much better explanation of the mischief of such speech repression than its effect on truth promotion is its damage to political legitimacy.

A second core democratic value underlying the First Amendment also supports the Court's conclusion that the First Amendment should generally foreclose government from punishing lies in public discourse. As James Madison explained, "[t]he people, not the government, possess the absolute sovereignty."[152] The First Amendment presumes that as the ultimate governors of society, we are rational agents capable of sorting out truth from falsity without government supervision. As Justice Robert Jackson eloquently explained more than seventy years ago: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field, every person must be his own watchman for truth . . . ."[153] Justice Kennedy echoed this view in *Alvarez* when he wrote: "Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[154]

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150 For a more detailed discussion of this concern, see James Weinstein, *Climate Change Disinformation, Citizen Competence, and the First Amendment*, 89 U. COLO. L. REV. 341, 351–52 (2018).

151 For a discussion of the core democratic precept of equal participation underlying the First Amendment, see Weinstein, *Political Legitimacy*, *supra* note at 148, at 369–70.

152 James Madison, *Report on the Virginia Resolutions*, in 4 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569–70 (1863).

153 Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). For a more detailed discussion of the precept that the people must be considered in the sovereign capacity capable of sorting out truth from falsehoods, see Weinstein, *supra* note 150, at 361–64.

154 United States v. Alvarez, 567 U.S. 709, 723 (2012) (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949)). Justice Kennedy, alas, does not limit this nifty dictum to citizens acting in their capacity as sovereign.

This is not to say, of course, that humans in general, or the American populace in particular, are, in fact, fully rational. Rather, the attribution of rationality to participants engaging in public discourse is not a *description* but rather an *ascription*. For no other view would comport with the premise that the people are capable of self-governance and thus able to evaluate the veracity of statements relevant to decisions to be made in our role as ultimate sovereign.[155] On this view, then, government prohibiting false statements because it fears we might be misled about some matter of public concern presents not just the pragmatic difficulties I just emphasized in my discussion of speakers' democratic interests; it would also, *in principle*, violate the core precept of American popular sovereignty.[156]

IV. CONCLUSION

United States v. Alvarez vividly demonstrates the bizarre hold that the marketplace of ideas rationale has on American free speech jurisprudence and the Justices of the United States Supreme Court. The concern that a law prohibiting a specific category of knowingly false, readily verifiable factual statements would impede the promotion of truth seems oddly misplaced. Yet, as if in the thrall of some strange spell, all nine Justices focused upon precisely that value in *Alvarez*. Even more problematically, the undue influence of the marketplace of ideas rationale seems to have distracted the Justices from considering two more pertinent free speech rationales. As Justice Breyer's concurrence emphasized, the Stolen Valor Act "applies in family, social, or other private contexts, where lies will often cause little harm."[157] Similarly, Justice Kennedy's plurality opinion noted that the Act applied to "personal, whispered conversations within a home."[158] Regulation of speech in this context plainly implicates individual autonomy, a value of often ascribed as a core First Amendment norm.[159] Breyer also noted

155 In contrast, when we are acting in capacities other than ultimate sovereign, such as consumer, government can treat us in accord with our actual, descriptive rational capacity. Thus, with respect to commercial advertising, government can properly shield us from false or misleading speech. *See supra* text accompanying notes 40–41.

156 This view is not inconsistent with cases affording less than full immunity to defamatory statements in public discourse. In those cases, the Court upholds the legitimate state interest in redressing reputational injury to individuals, not paternalistic concern to prevent the people from being misled by false statements about some decision within our bailiwick as ultimate sovereign.

157 *Alvarez*, 567 U.S. at 736 (plurality opinion).

158 *Id.* at 722.

159 *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 625–29 (1982); Seana Valentine Shiffrin, *Speech, Death, and Double Effect*, 78 N.Y.U. L. REV. 1135, 1158–85 (2003). For an

that the law applies in "political contexts,[160] where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high."[161] And as his example of a pacifist who falsely claims to have been awarded a military honor in promoting this cause reveals, the law also applies to public discourse,[162] a context in which both Breyer and the dissent agree that lies should be afforded First Amendment protection. Punishing lies about military honors in electoral politics or public discourse obviously implicates the core democratic value underlying the First Amendment. Rather than focusing on truth promotion and the marketplace of ideas, a free speech value at most weakly implicated by the Stolen Valor Act, it would have been far more useful if the Court had analyzed the law's effect on the autonomy and democracy bases for free speech. To paraphrase Justice Brandeis' wise observation, "[t]o reach sound conclusions" about free speech, "we must bear in mind why" we have a First Amendment in the first place.[163]

argument that autonomy is not, as a descriptive matter, a core First Amendment value, see Weinstein, *supra* note 14, at 502–04.

160 By which he seems to mean electoral politics. *See supra* text accompanying note 113.

161 *Alvarez*, 567 U.S. at 736 (Breyer, J., concurring).

162 *Id.* at 734.

163 *See* Whitney v. California, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring).