

THE *NEW YORK TIMES* SOLUTION TO THE NINTH CIRCUIT'S 'STOLEN VALOR' PROBLEM

CASE NOTE & COMMENT

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I. INTRODUCTION

Before the summer of 2010, only four Idaho residents could legally claim to be Medal of Honor recipients.¹ Until that time, the Stolen Valor Act of 2006 prescribed misdemeanor penalties for any other Idahoan who falsely claimed that he or she, too, had received such an honor.² But when the Ninth Circuit Court of Appeals held the Stolen Valor Act to be unconstitutional in the summer of 2010, legitimate medal recipients lost the right to make that claim exclusively. The court reasoned that the Act is unconstitutional because the First Amendment Free Speech Clause protected the false speech that the Act criminalized.³ Some commentators responded by speculating that the Ninth Circuit had broken new ground by recognizing a constitutional “right to lie.”⁴

The extent to which the First Amendment protects the right of an individual to tell a lie—to make a false statement of fact—is an unsettled area of constitutional law.⁵ This article argues that this question should be resolved on a statute-by-statute basis, following the analytic framework adopted by the Supreme Court in *New York Times v. Sullivan*. This analysis validates laws like the Stolen Valor Act, which regulate valueless false speech without putting valuable speech at risk. The Ninth Circuit followed an analysis different from the one contemplated by *New York Times* when it attempted to resolve the issue in *U.S. v. Alvarez*, so this article also argues that the Ninth Circuit reached the wrong result in that case.

While generally unclear, some aspects of the relationship between the First Amendment and false statements of fact are settled. The Supreme Court has routinely stated that false speech has little or no value for the purpose of constitutional analysis. But it remains unclear whether “low value” means that false statements of fact comprise a category of speech that is wholly excluded from the protection of the First Amendment. If so, Congress would be given significant latitude to regulate any speech that contained an element of factual falsity.

The Stolen Valor Act of 2006 has given federal courts an opportunity to resolve the questions surrounding First Amendment protection for false statements of fact because it criminalizes speech that contains an element of factual falsity. In close succession, four federal courts—the Ninth Circuit Court of Appeals, the Central District of California, the District of Colorado, and the Western District of Virginia—all confront-

1. GAYLE E. ALVAREZ, *IDAHO'S MEN OF VALOR* vii–viii (3d ed. 2009). There are 42 medal of honor recipients, from the Civil War to Vietnam, with substantial Idaho connections. *See id.* Only four were living in the state as of 2009. *Id.* at viii.

2. 18 U.S.C. § 704(b) (2006).

3. U.S. CONST. amend. I.

4. Josh Gerstein, *9th Circuit Finds a Right to Lie*, UNDER THE RADAR (Aug. 17, 2010), http://www.politico.com/blogs/joshgerstein/0810/9th_Circuit_finds_a_right_to_lie.html.

5. Proposed Brief for Eugene Volokh as Amicus Curiae at 1 *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010) (No. 09-cr-00497-REB) [hereinafter Volokh Brief]; *see also* CALVIN MASSEY, *AMERICAN CONSTITUTIONAL LAW* 889 (3d ed. 2009).

ed First Amendment challenges to the Act. These courts have followed varying approaches and reached varied conclusions.

While varied, the approaches these court have taken are incomplete. There are several reasons for this. Most significantly, courts have not separated analysis of the justification for the law from analysis of the justification for protecting speech. Their failure to do so is not surprising: the Supreme Court's indications that false statements of fact have little to no constitutional value, together with the Court's failure to clarify what exactly that means in the context of a full-fledged First Amendment analytical framework does not give lower courts much to go on. As outlined below, analyzing the justification for a law separate from the justification for protecting speech is the key to applying existing passages in Supreme Court case law consistently and effectively.

This article proposes a two-step approach that keeps these analyses separate. The first step analyzes the justification for a law that regulates false speech; the second step analyzes whether protecting some of that speech is justified. This approach is faithful to Supreme Court precedent because it allows for treatment of false statements of fact as low value speech, but, consistent with the Court's recent holding in *United States v. Stevens*, does not go so far as to consider false statements of fact themselves to be a category of unprotected speech. This analysis also incorporates First Amendment policy considerations to determine when protecting false speech is justified. In doing so, it promotes consistency by analyzing current issues against historical reasons for providing that protection. This analysis accounts for the shortcomings of other approaches, which do not distinctly articulate these steps. Strict scrutiny analysis, for example, examines only the justifications for the law, without considering the justifications for protecting speech. In the unclear area of false statements of fact First Amendment jurisprudence, reaching a sound conclusion requires considering both.

Any law that sanctions false speech, but does not fit within one of the historical categorical exceptions, such as defamation or fraud, may be analyzed under this approach. As applied to the Stolen Valor Act, the *New York Times* analysis suggests that the Act is valid. It furthers an interest that is sufficient to justify the law, and the grounds for protecting the regulated speech do not justify curtailing the regulation.

II. THE STOLEN VALOR ACT

A. The Problem of "Stolen Valor"

The problem of "stolen valor" arises when individuals falsely claim that they have received a significant military honor, such as a Purple Heart or Congressional Medal of Honor, in order to take advantage of the intangible benefits that such a status confers. Those medals tend to

enhance the credibility of recipients within their local community.⁶ But that benefit is diluted when others falsely claim that they, too, have received such honors. As a result, the “service and sacrifice” of those who have actually received honors is cheapened.⁷ This problem is illustrated by three individuals who the government prosecuted between 2007 and 2010 for violating the Stolen Valor Act.

The first person to be prosecuted under the current version of the Stolen Valor Act was Californian Xavier Alvarez.⁸ Alvarez violated the Act during a Water District Board meeting when he introduced himself as “a retired marine of 25 years” who “was awarded the Congressional Medal of Honor [in 1987]” after being wounded in combat.⁹ All of this was false, but it perpetuated a fake military hero persona that Alvarez had been crafting for some time.¹⁰ Based on these statements, the government obtained an indictment against Alvarez on September 26, 2007.¹¹

Around the same time in Colorado, Rick Strandlof was making similar claims. Strandlof postured himself as a military hero by falsely claiming that he had received both a Purple Heart and a Silver Star.¹² Strandlof gained enough local credibility from these lies to do a considerable amount of good, including acting as an advocate for homeless veterans in Denver, and founding an organization to provide support to Colorado veterans.¹³ These lies also granted him access to a community that he enjoyed, even though he had not earned the right to be a part of it.¹⁴ But in 2009, those lies led to criminal charges for a Stolen Valor Act violation.¹⁵

In Virginia a veteran enhanced his reputation as a former serviceman by telling similar lies. Ronnie L. Robbins was prosecuted for both lying about the nature of his military service and falsely claiming that he had received particular military awards. Robbins had, in fact, served between 1972 and 1975, but he had never done so “overseas or in any combat capacity.”¹⁶ Nevertheless, by misrepresenting the nature of his

6. 151 CONG. REC. S12,688 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad).

7. *Id.* at 12,689.

8. *United States v. Alvarez*, 617 F.3d 1198, 1201 (9th Cir. 2010), *reh' en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011). The current version of the Act contains the provision that criminalizes falsely claiming military honors. In past versions, the Stolen Valor Act only prohibited individuals who were not the recipients of military awards from wearing them. Pub. L. 107-107, 115 Stat. 1117. Those original provisions of the Act have withstood constitutional challenges in federal court. *See, e.g., United States v. Perelman*, 737 F. Supp. 2d 1221 (D. Nev. 2010).

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

10. *Id.* at 1200–01.

11. *See United States v. Alvarez*, No. 2:07-cr-01035-RGK (C.D. Cal. April 4, 2008) (order denying defendant's motion to dismiss).

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

13. Kevin Simpson, *Many Faces of 'Fake Vet' Rick Strandlof Exposed*, DENVER POST, Jun. 7, 2009, http://www.denverpost.com/commented/ci_12537680.

14. *Id.*

15. *See generally Strandlof*, 746 F. Supp. 2d at 1183.

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

service, he was able to join the Veterans of Foreign Wars, which only admits those who have been deployed into an overseas combat area.¹⁷ While running for public office, Robbins also claimed that he received various medals while serving in Vietnam.¹⁸ Those claims were false, and violated the Stolen Valor Act.

Lies like this are increasingly common.¹⁹ The Federal Bureau of Investigation attributes this to the large number of veterans currently returning from Iraq and Afghanistan.²⁰ This influx, and the societal context in which it is occurring, both contribute to the increasing problem. The large number of veterans returning freshly from combat lowers the inhibitions of award-claiming imposters by giving rise to the belief that false claims will not be noticed amid a greater number of legitimate claimants. Additionally, unlike past military engagements, individuals far removed from the theater of war are able to obtain detailed information about what life is like on the battlefield through modern media sources including “embedded” news reports, internet blogs, video games, and feature films.²¹ This realistic and real-time information permits individuals like Strandlof to formulate stories of valor that are filled with sufficient detail to make them persuasive. Thus, the problem of false claimants of military honors is more acute now than ever because, during prior over-seas conflicts, would-be imposters did not have the resources to make their stories so believable.

Under these conditions, Congress passed the Stolen Valor Act of 2006. Prior to 2006, private citizens had already taken matters into their own hands by keeping records of legitimate honor recipients, and exposing the illegitimate claimants.²² But with the FBI receiving about 50 tips per month²³ of stolen valor cases, these private efforts were no longer sufficient to keep the problem of such claims in check. To adequately curtail the problem, a stronger consequence than merely being exposed as a phony was required.

17. *Id.* at 816–17.

18. *Id.* at 817.

19. Christian Davenport, *One Man's Database Helps Uncover Cases of Falsified Valor*, THE WASHINGTON POST, May 10, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/09/AR2010050903363.html?sid=ST2010051001122>.

20. *Id.*

21. See, e.g., Chip Reid, *Recalling Life as an Embedded Reporter*, MSNBC (March 15, 2004), http://www.msnbc.msn.com/id/4400708/ns/world_news-mideast/n_africa/ (recalling the news reporting technique of embedding reporters along with soldiers to provide real time updates on military engagements); Kevin, *BOOTS ON THE GROUND*, <http://bootsonground.blogspot.com/> (last visited Nov. 17, 2011) (detailing “daily life . . . in Baghdad, Iraq as an [sic] soldier of the United States Army”); *AMERICA'S ARMY*, <http://www.americasarmy.com/aa3.php> (last visited Nov. 17, 2011) (video game); *THE HURT LOCKER* (Voltage Pictures 2008) (film).

22. See, e.g., Davenport, *supra* note 19.

23. *Id.*

B. The Stolen Valor Act

The Stolen Valor Act of 2006 was introduced to the Senate on the day before Veteran's Day.²⁴ The Act sanctions "[w]hoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States" with a six month prison term, a fine, or both.²⁵ The Act is unlike other speech regulations because it prohibits only speech, regardless of whether that speech has caused a demonstrable injury or offense, or is accompanied by a physical act.²⁶ Such factors have a limiting effect, confining the extent to which speech can be regulated.

Other federal laws that punish false statements of fact do not raise the same free-speech issues as the Stolen Valor Act because they contain these limiting factors. Federal anti-fraud statutes, for example, sanction individuals if they falsely claim military service or military awards in order to receive certain benefits.²⁷ Statutes like that operate on a narrower class of speech than the Stolen Valor Act because, under the Act, a speaker may be sanctioned regardless of whether the misrepresentation is fraudulent because employed to dishonestly derive benefits in a transaction.

Likewise, federal impersonation laws make it a crime to falsely claim to be an "officer or employee of the United States," but the claim alone is not enough to trigger sanctions. An individual must "falsely [assume] or [pretend] . . . to be an officer" and "act as such" to violate the law.²⁸ Like the Stolen Valor Act, the purpose of this law is to "preserve the general good repute and dignity" of the government-conferred status it protects.²⁹ Unlike the Act, however, speech can only be restricted if it is accompanied by action. With this limitation in place, the law raises fewer First Amendment concerns than the Stolen Valor Act, which restricts only speech.

These distinctions illustrate why the Stolen Valor Act is important. Anti-fraud laws and impersonation statutes would not reach the lies that individuals like Alvarez told. He did not receive, or attempt to receive, any material benefit from the government through lying, nor was

24. 151 CONG. REC. S12,684 (daily ed. Nov. 10, 2005) (statement of Sen. Conrad).

25. 18 U.S.C. § 704(b) (2006). If the statement concerns receiving the Congressional Medal of Honor then an individual may be sentenced to up to one year in prison. *Id.* at 704(c)(1).

26. *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010), *reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011).

27. *See, e.g.*, 18 U.S.C. § 1001(a)(1) (2006) ("Whoever, in any matter within the jurisdiction of the . . . Government of the United States, knowingly and willfully falsifies . . . a material fact [or] makes any materially false . . . statement . . . shall be fined . . . [or] imprisoned.")

28. 18 U.S.C. § 912 (2006). A person could also violate the law by falsely assuming a status to defraud another person. *Id.*

29. *United States v. Barnow*, 239 U.S. 74, 80 (1915). *See supra* Part II.A for a discussion of the reasons Congress passed the Stolen Valor Act.

his lie accompanied by any act of impersonating another Medal of Honor recipient. All he did was exploit an honorable status in order to win the respect of his audience. While his lie, and lies like it, arguably do reduce the value of military honors for those who have earned them, it would be almost impossible to prove a causal connection between one individual's false statement and a quantifiable diminution of the medal's value. Of course, if the devaluation occurs simply because of dilution, or reduced exclusivity, then the lie itself would *de facto* cause the injury. One more person claiming to be a Medal of Honor recipient means that making that claim is less exclusive to those who have legitimately received the medal. If that is the case, then the telling of the lie itself (so long as a third person hears and understands it) does cause "injury" by diluting the number of medal recipients that the broader community believes exist. A law like the Stolen Valor Act, which punishes only speech, is necessary to prevent this from happening.

When Congress passed the Stolen Valor Act of 2006, it was addressing a growing problem. Since 2006, the Act has likely done little to slow that growth because very few individuals have been prosecuted under the law.³⁰ But it will not have any effect if it is unconstitutional, as the Ninth Circuit concluded. The question of the Act's constitutionality is not clear, however. Given the ways in which the Act differs from other federal laws, it raises novel First Amendment issues that the Supreme Court has not clearly addressed regarding the extent to which Congress may regulate pure speech that includes false statements of fact. This lack of clarity has confronted the Ninth Circuit and other federal courts that have recently analyzed the Stolen Valor Act.

III. FRAMING THE ISSUE: FALSE STATEMENTS & THE FIRST AMENDMENT

The First Amendment doctrine relevant to analyzing laws that prohibit false statements of fact does not clearly resolve whether the Stolen Valor Act is unconstitutional. In the area of protection for false statements of fact, the Supreme Court's jurisprudence has been murky at best.³¹ Recognizing this to be the state of the law, Professor Frederick Schauer recently pointed out that "we have, perhaps surprisingly, arrived at a point in history in which an extremely important social issue about the proliferation of demonstrable factual falsity in public debate is one as to which the venerable and inspiring history of freedom of expression has virtually nothing to say."³² This silence means that there is no clear answer to the question of whether the Stolen Valor Act, as a regulation of false speech, is unconstitutional. This section outlines the

30. *United States v. Robbins*, 759 F. Supp. 2d 815, 817 (W.D. Va. 2011) (order denying motion to quash indictment).

31. See Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 915 n.101 (2010); see also Volokh Brief, *supra* note 5, at 6.

32. Schauer, *supra* note 31, at 908.

aspects of First Amendment doctrine and policy considerations that bear on this point.

A. Free Speech Doctrine and False Statements of Fact

The decisive issue for whether the Stolen Valor Act is constitutional is when, whether, and to what extent the First Amendment protects false statements of fact. In resolving this issue, the most significant question is whether false statements of fact comprise a category of speech that is excluded from First Amendment protection altogether. If they do, the Act is constitutional because it does not infringe at all on a protected right to speak. Even though some courts have reasoned that statements in Supreme Court cases suggest that this could be so, the Court's recent holding in *United States v. Stevens* clarifies that false statements of fact are not a categorical exception.

Categories of unprotected speech are fundamental to First Amendment free-speech analysis. The Supreme Court has described its "First Amendment jurisprudence" as following a "limited categorical approach."³³ Within this approach, a law that regulates speech because of its content is "presumptively invalid."³⁴ To reverse this presumption, a content-based restriction in most cases must survive strict scrutiny through a showing that it is "narrowly tailored to promote a compelling Government interest."³⁵ Alternatively, a law can avoid both presumed invalidity and harrowing strict scrutiny if the prohibited speech falls within one of the "limited areas" that have been identified as unprotected categories of speech.³⁶ Because a categorical exception for speech would impact the First Amendment analysis of a law so substantially, courts addressing the constitutionality of the Stolen Valor Act have devoted most of their reasoning to whether such an exception exists for false statements of fact.³⁷

Under this framework, laws that prohibit speaking false statements of fact would generally be presumed invalid as a content-based restriction. Truth or falsity is a quality that can be determined only by reference to the subject matter of speech, so laws that contain falsity as an element will be content-based in almost every case. This has been the result in practice: In *United States v. Alvarez*, both the majority and the dissent agreed that the Stolen Valor Act was a content-based speech restriction.³⁸ Accordingly, and consistent with the framework outlined above, the *Alvarez* majority reasoned that laws regulating false state-

33. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

34. *Id.* at 382.

35. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

36. *R.A.V.*, 505 U.S. at 382–83.

37. See generally, e.g., *United States v. Alvarez*, 617 F.3d 1198, 1198 (9th Cir. 2010), *reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011). This issue alone takes up most of the majority opinion and Judge Bybee's dissent.

38. *Alvarez*, 617 F.3d at 1202 (majority opinion); *id.* at 1219 (Bybee, J., dissenting).

ments of fact must withstand strict scrutiny unless false statements of fact comprise a categorical First Amendment exception.³⁹ The Supreme Court has disparaged the value of false statements of fact. But under *United States v. Stevens*, it is clear that there is no categorical exception for false statements of fact.

1. False Statements of Fact as Low-Value Speech

In this realm of First Amendment jurisprudence, the Supreme Court has consistently stated two propositions. First, false statements of fact have little to no “constitutional value.”⁴⁰ Second, despite their low value, false statements of fact must be protected when doing so is necessary to protect “speech that matters.”⁴¹ Speech usually receives that protection if, historically, debate on the speech’s subject matter has been valued.⁴² Regulation of false speech raises concerns in those contexts because conscientious speakers may not say anything if they are unsure whether something is true or false. In theory, the fear that speech would later be proven false in court and subject the speaker to criminal liability causes him to remain silent about a subject that society values.⁴³

Consistent with this general framework, the Supreme Court has affirmed that the First Amendment does not protect “untruthful speech . . . for its own sake.”⁴⁴ Even in cases where negligently false statements are protected, knowingly false statements are not.⁴⁵ In fact, in “almost every case” knowingly false statements of fact “do not enjoy constitutional protection.”⁴⁶ This framework has been the backbone for the Supreme Court’s treatment of regulations of false statements of fact in different contexts.⁴⁷

At the same time, it is difficult to generalize from these statements. In each case, the Court’s analysis and conclusion have been specifically tied to the elements of the regulation being scrutinized and the facts of the case. Thus, the cases are frequently decided on very narrow grounds. In *Gertz v. Robert Welch, Inc.*, for instance, the Court analyzed the extent of the First Amendment protection for libel claims brought by

39. *Id.* at 1202.

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

41. *Id.* at 341.

42. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254 (1964) (protecting speech critical of the official conduct of a public official); *see also* *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (protecting speech about public figures that is not knowingly false).

43. *See generally* *New York Times*, 376 U.S. at 271–72 (asserting that protecting free speech requires giving speakers some “breathing space”); *see also* *Time, Inc.*, 385 U.S. at 389.

44. *Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

45. *New York Times*, 376 U.S. at 279–80.

46. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

47. *See generally* *New York Times*, 376 U.S. at 254 (defamation); *see also generally* *Time, Inc.*, 385 U.S. at 374 (right to privacy law).

private individuals against members of the news media.⁴⁸ In *New York Times v. Sullivan*, the Court also analyzed the extent to which the First Amendment protects members of the news media from liability for libel actions, but in that case it was from claims by public officials.⁴⁹ Given the fact-intensive nature of these inquiries, it is difficult to generalize outside of the contexts in which they arise, and it would be particularly difficult to generalize to the level of a categorical exception for false statements.

At the same time, the cases suggest that false statements of fact are not protected at all when the speaker knows that what he or she is saying is false. These statements suggest that there might be a categorical exception for statements of fact that are knowingly false because the Court has described other unprotected categories this way, as “well-defined and narrowly limited classes . . . the prevention and punishment of which have never been thought to raise any Constitutional problem.”⁵⁰ Because false statements of fact are not protected for their own sake and have no constitutional value, it would seem that preventing and punishing them would also not raise any Constitutional problem. It follows, then, that knowingly false statements of fact comprise a class of speech that can be regulated without issue—a categorical exception unto themselves.

Despite this logical consistency, there is no categorical exception for false statements of fact, even false statements of fact that the speaker knows to be false. In *United States v. Stevens*, the Court outlined what is required to comprise a well-defined and narrowly limited class of speech that is excluded from First Amendment protection. False statements of fact do not have those attributes.

2. The *Stevens* Framework for Categorical Exceptions

The Supreme Court set a high bar for new categorical exceptions to First Amendment protection in *United States v. Stevens*. In *Stevens*, the Court held that the First Amendment does not protect categories of speech that have been “historically unprotected” even if all of those categories are “not yet . . . specifically identified or discussed as such in [the] case law.”⁵¹ The Court also held that a new categorical exception to the First Amendment will not be recognized simply because the speech within the class “is deemed valueless or unnecessary, or . . . an ad hoc calculus of costs and benefits” favors regulation.⁵² Applying that principle, the Court concluded that there was insufficient historical evidence of prohibitions of “depictions of animal cruelty” to comprise one of those categories.⁵³ As the Court’s most recent statement on the issue, the *Ste-*

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

49. *See New York Times*, 376 U.S. at 254.

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

51. *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010).

52. *Id.*

53. *Id.* at 1577.

vens framework is likely to be the standard by which new categories of unprotected speech will be identified.

The key to identifying these categories is the meaning of the term “historically unprotected.” This generally means that there must be a historical record of regulation that can be traced to the period in which the First Amendment was adopted. History provides the boundaries for the “well-defined and narrowly limited classes of speech” that the government may regulate freely because, in a sense, it has always done so.⁵⁴ It is also evidence of what speech the First Amendment was intended to protect. The fact that some speech was prohibited by the states when the First Amendment was ratified, even after some states had recognized a right to speech, suggests that “the unconditional phrasing of the First Amendment was not intended to protect every utterance.”⁵⁵

Consistent with this framework, each category of speech that *Stevens* identified as a First Amendment categorical exception was historically regulated in American jurisdictions. The most clear example of this is libel. When the Constitution was ratified in 1792, libel was actionable in thirteen of the fourteen states.⁵⁶ To a lesser extent, obscenity was also regulated at the time of ratification.⁵⁷ By the turn of the 19th century, not long after the Bill of Rights was passed, Connecticut, Massachusetts, New Hampshire, New Jersey, and Pennsylvania all codified prohibitions of obscene speech.⁵⁸ These laws, like libel laws, provided “sufficiently contemporaneous evidence to show that obscenity . . . was outside the protection intended for speech.”⁵⁹ Thus, as these examples demonstrate, under *Stevens*, categorical exceptions to the protection of the First Amendment must be grounded in regulation of that speech in American jurisdictions at the time the First Amendment was adopted.

Consistent with this analysis, new categorical exceptions will not be recognized just because a balancing test, applied to the speech in question, tips in favor of such an exception.⁶⁰ Thus, the *Stevens* Court rejected use of a cost-benefit analysis only in the course of identifying “categories of speech as *fully outside* the protection of the First Amendment.”⁶¹ Indeed, it makes sense that a court must do more than conduct “a simple cost-benefit analysis” before finding that the First Amendment

54. *Id.* at 1584.

55. *Roth v. United States*, 354 U.S. 476, 483 (1957).

56. *Id.* at 482; *see also* *Beuharnais v. Illinois*, 343 U.S. 250, 254–57 (1952) (reciting that “libel of an individual was a common-law crime, and thus criminal in the colonies”).

57. *Roth*, 354 U.S. at 483–85.

58. *Id.* at 483 n.13.

59. *Id.* at 483.

60. The government argued that unprotected categories of speech were determined by conducting “balancing of the value of the speech against its societal costs.” Brief for the United States at 8, *United States v. Stevens*, 130 S. Ct. 1577 (2008) (No. 08-769), available at <http://www.justice.gov/osg/briefs/2008/3mer/2mer/2008-0769.mer.aa.pdf>. To the extent that this was a “free-floating test for First amendment coverage,” the Court found it “startling and dangerous.” *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

61. *Stevens*, 130 S. Ct. at 1586 (emphasis added).

does not protect some speech—doing so is a significant step.⁶² When a categorical exception is identified, the speech that fits within that category may be regulated without further analysis. This permits more extensive regulation of that speech. But, importantly, *Stevens* does not preclude courts from considering the value of speech in other types of analysis; it is only precluded when a court is looking for a categorical exception.

This is particularly relevant to analyzing false statements of fact because the Court frequently makes qualitative assertions about them, namely, that such statements are valueless. If *Stevens* meant that the value of speech could never be considered in First Amendment analysis, then courts analyzing the scope of the First Amendment's protection of false statements of fact must disregard the Court's pattern. Because they are inherently evaluative, the Court's assertions suggest that, when determining whether a law that regulates false statements of fact is constitutional, it is appropriate to consider the value of the speech. That kind of evaluation is also important when it becomes necessary to determine whether the law impacts speech that matters. It would be next to impossible for a court to determine whether, or to what extent, speech mattered, without evaluating how valuable that speech might be. And *Stevens* does not require courts to make that impossible determination, because it only rejected value balancing as a means of identifying unprotected *categories* of speech. Thus, there is still a place in First Amendment analysis for the Court's qualitative statements.

Stevens provides a framework for recognizing categorical exceptions to the First Amendment, allowing that there might be "some categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such."⁶³ Within that framework, identifying those categories can only occur through analyzing the historical record for evidence that the speech at issue was regulated in American jurisdictions around the time the Bill of Rights was adopted. Because false statements of fact have not yet been identified or discussed as such a category, if they are a categorical exception, it will only be on the basis of historical analysis.

3. The *Stevens* Framework Applied to the Stolen Valor Act

Under *Stevens* there is no categorical exception to the First Amendment for false statements of fact because false statements of fact have not been historically regulated as such. The closest to historical regulation of false statements of fact is the general prohibition against lying that appears in the texts of popular religions, such as Christianity and Islam.⁶⁴ Outside the religious context, false statements of fact might

62. *Id.*

63. *Id.*

64. See, e.g., *Proverbs* 12:22; *Surah* 40:28. But, in some contexts, the Qur'an encourages telling lies. See Abdullah Al Araby, *Lying in Islam*, ISLAM REVIEW, <http://www.islamreview.com/articles/lying.shtml> (last visited Nov. 17, 2011).

preclude a speaker from asserting certain defenses, such as the privilege of “fair comment,” a defense to a defamation action.⁶⁵ But neither the states nor the federal government have ever affirmatively regulated plain false statements of fact such that they might form a categorical exception to the First Amendment.

Even if the unprotected category is articulated more narrowly, there is also not a sufficient historical basis for regulating false claims of military medals to form such a categorical exception. The only record of such regulation around the time of the First Amendment’s ratification appears in an order written by General George Washington on August 7, 1782, establishing the Badge of Military Merit, the ancestor of the Purple Heart.⁶⁶ Washington ordered that any member of the army who had performed a “singularly meritorious action” should receive the badge.⁶⁷ Washington believed that rewarding meritorious behavior with a badge opened “[t]he road to glory in [the] patriot army” to all its members.⁶⁸ Washington was also clear that if “any who are not entitled to [wear] these honors [shall] have the insolence to assume the badges of them, they shall be severely punished.”⁶⁹ This “severe punishment” is the extent of the historical record for prohibiting false claims about military medals. Falsely claiming military honors was not popularly recognized as against the law in American jurisdictions at the time that the Bill of Rights were adopted.

This order from General Washington and general prohibitions in popular religious texts are insufficient to establish that false statements of fact were historically unprotected and that the First Amendment does not protect them. Washington’s statement does not reflect a common, society-wide understanding and consensus like libel laws, which were a recognized part of the common law, and obscenity prohibitions, which were installed in the criminal laws of many states at the time of ratification. In those cases, the Framers and the general public would have understood what speech was broadly off limits already, and thus not protected. Nor have Washington’s letter or religious texts ever carried the coercive backing of the federal or state governments. Further, the prohibitions of lying in religious texts do not represent broad norms of American society, but only ethical norms for a narrower subset of that society. Given the limited scope of these prohibitions and the requirements of *Stevens*, neither false statements of fact nor false claims of military honors are entirely excluded from the First Amendment’s protection. As a result, the constitutionality of the Stolen Valor Act must be resolved on other grounds.

65. See Restatement (Second) of Torts § 566 cmt. a (1977).

66. UNCLE SAM’S MEDAL OF HONOR 404 (Theo. F. Rodenbough ed., 1886); Exec. Order No. 11,016, 3 C.F.R. 596 (1959–1963).

67. UNCLE SAM’S MEDAL OF HONOR, *supra* note 66, at 404.

68. *Id.*

69. *Id.*

B. Free Speech Policy and False Statements of Fact

Because First Amendment rules do not settle the extent to which false statements of fact should be protected or may be regulated, justifications for speech protection should be considered. The two most important justifications for protecting speech are ambiguous about whether false statements of fact should be protected. A justification that focuses on individual liberty suggests (as it would for any speech restriction) that the Stolen Valor Act is inconsistent with the theory of the First Amendment. On the other hand, the Stolen Valor Act does not cripple the justification for free speech that supports protecting speech as an instrument to attain truth. While both of these justifications are important, the latter has historically received greater weight in First Amendment jurisprudence. As a result the Stolen Valor Act does not put core First Amendment values at risk when those justifications are given their traditional weight.

It is generally recognized that speech should be protected to ensure “individual self-fulfillment,” to protect its function “as a means of attaining the truth,” to secure the ability of society’s members to participate in society-wide decision making, and to maintain “the balance between stability and change in society.”⁷⁰ These principles embody the “values sought by society in protecting the right to freedom of expression.”⁷¹ Of these values, individual self-fulfillment and the attainment of truth are most relevant to an analysis of false statements of fact and the Stolen Valor Act.⁷² The Supreme Court has also recognized both of these as fundamental reasons for free speech protection: “The First Amendment presupposes that the freedom to speak one’s mind is not only *an aspect of individual liberty*—and thus a good unto itself—but also is essential to *the common quest for truth and the vitality of society as a whole*.”⁷³ Because the Supreme Court has explicitly relied on these justifications, they provide a framework for analyzing the extent to which protecting false statements of fact is consistent with general First Amendment theory.

1. Individual Self-Fulfillment

If protecting false statements and the freedom to falsely claim military medals can be justified at all, it is because speech ought to be protected so that people are free to “find[] . . . meaning and [a] place in the world” by developing and expressing themselves.⁷⁴ This justification fa-

70. See Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79 (1963).

71. *Id.* at 878.

72. The latter two values would be more relevant when considering a law that impacted speech that was inherently political, or patently revealed an ideology.

73. *Bose Corp. v. Consumers Union of the U.S., Inc.*, 466 U.S. 485, 503–04 (1984) (emphasis added).

74. Emerson, *supra* note 70, at 879.

vors robust free speech protection because, even if a person holds a belief or opinion, it “[is] of little account,” unless “he has the right to express” it.⁷⁵ In this view, society’s interest is subordinate to the individual’s interest in verbally expressing himself as he chooses and making himself out to be what he wants to be.

This broad liberty justification favors protecting an individual’s right to make a false statement of fact and, as a result, to falsely claim to have received a military medal. If a person wants to make himself out to be a liar, or a fraudulent Medal of Honor recipient, he has the right to do so. It is his or her prerogative to seek to build up a reputation through lies, taking the risk that his or her reputation will be ruined when the lies are found out. In *United States v. Alvarez*, the Ninth Circuit recognized that this interest is an important one: “the right to speak and write whatever one chooses—including, to some degree, worthless, offensive, and demonstrable untruths—without cowering in fear of a powerful government is, in our view, an essential component of the protection afforded by the First Amendment.”⁷⁶ Society’s interest here is not just subordinated to the individual’s interest in self-identification and expression, but is embodied in the individual’s freedom to make himself what he wants to be. Therefore the individual self-fulfillment justification for free speech favors protecting a person’s right to falsely state the facts and falsely claim military awards. Consequently it would favor invalidating the Stolen Valor Act.

2. Attainment of Truth

The theory that speech ought to be protected because society will attain truth as a result does not provide a reason to protect false statements of fact. This theory is commonly embodied in the metaphor of the “marketplace of ideas,” and is the most familiar justification for free speech.⁷⁷ While today it forms “a pervasive feature of free speech rhetoric,”⁷⁸ the idea initially entered American jurisprudence through the pen of Justice Oliver Wendell Holmes, when he argued that “the best test of truth is the power of the *thought* to get itself accepted in the competition of the market.”⁷⁹ This notion “rests on the premise that there is no proposition so uniformly acknowledged that it may not be lawfully challenged, questioned, and debated.”⁸⁰ Accordingly, when propositions are

75. *Id.*

76. *United States v. Alvarez*, 617 F.3d 1198, 1205 (9th Cir. 2010), *reh’ en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011).

77. Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 6 (2008).

78. Schauer, *supra* note 31, at 898.

79. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasis added).

80. LEARNED HAND, *THE BILL OF RIGHTS* 57 (1962).

duly challenged, questioned, and debated, society will eventually settle on those that are true.

Indeed, the Supreme Court has recognized that the “value” of speech can be determined by whether it promotes the attainment of truth. In *Gertz v. Robert Welch, Inc.*, the Supreme Court reasoned that false statements are “no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”⁸¹ The value that speech has as a “step to truth” is the value it carries in bringing about the realization of truth in society. The Court borrowed that language from free speech philosopher Zechariah Chaffee, who had originally used the phrase “step toward truth” to refer to such speech.⁸² The word “toward” clarifies what Chaffee and the Court meant: if speech would not advance society’s understanding of what was true—moving society “towards” truth—then there was little reason to protect it. Chaffee reasoned that such speech had “a very slight social value,” so society’s interest in “order, morality, the training of the young, and the peace of mind of those who hear and see” was sufficient to justify regulation of the speech.⁸³ The Court later revisited this rationale, noting that “false statements of fact are particularly valueless” because they “interfere with the truth-seeking function of the marketplace of ideas”⁸⁴

False statements of fact interfere with the truth-seeking function of the marketplace of ideas, similar to the way fraud undermines the function of the commercial marketplace. The risk that fraud will cause the commercial marketplace to fail as transactions break down justifies regulating it. Similarly, false statements of fact do not further the “transacting” of ideas in the marketplace of ideas, and risk slowing down society’s advance toward truth. As philosopher John Stuart Mill noted, the market functions to produce truth when false opinions are confronted with “fact and argument.”⁸⁵ But those facts will only produce truth if they are represented honestly—in other words, false statements of fact will not correct a wrong opinion or idea because the statements themselves are false. It is more likely that false statements of fact will produce more wrong ideas, rather than the truth. Thus, in both the commercial market and the marketplace of ideas, fraudulent statements and false statements of fact cripple the market function. For that rea-

81. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)) (quotation marks omitted). The court later qualified that sweeping statement, noting that in some instances false statements need to be protected. *See id.*

82. ZECARIAH CHAFFEE, JR., *FREE SPEECH IN THE UNITED STATES* 150 (1941) (emphasis added). In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), the Supreme Court cited to Chaffee’s work.

83. *Id.*

84. *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988).

85. JOHN STUART MILL, *ON LIBERTY* 21 (David Spitz ed., W.W. Norton & Co. 1975).

son, society's interest in protecting speech to attain truth does not support protecting false statements of fact.

The free speech tradition recognizes a caveat when false statements constitute an opinion or an idea. The caveat is that, as far as opinions and ideas are concerned, the marketplace of ideas welcomes all comers, true or false.⁸⁶ This is because even false ideas or opinions are thought to yield to the forces of the marketplace, so there is no need to regulate them.

Opinions or ideas are usually encountered in the context of discussions regarding normative issues such as morality, politics, or religion.⁸⁷ In most cases, an individual opinion on one of these issues cannot be proven false empirically. Mill argued that such statements deserve protection because majoritarian opinions and ideas have generally been proven false throughout history.⁸⁸ Because of this a government that has been vested with power by the majority should not be allowed to regulate which opinions and ideas are spoken, potentially suppressing the truth. On the contrary, free speech should be protected so that an individual with the correct opinion or version of the facts will speak and convince the others of their error.⁸⁹ When speech is protected, "[w]rong opinions and practices gradually yield to fact and argument," rendering further government intervention unnecessary.⁹⁰ Thus, false opinions and ideas have historically depended on the marketplace of ideas for correction, rather than government regulation.

This caveat does not apply to the speech that the Stolen Valor Act prohibits, and that speech does not further the attainment of truth; thus, the marketplace of ideas does not provide a reason to protect the

86. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) ("Under the First Amendment there is no such thing as a false idea.")

87. Schauer, *supra* note 31, at 904. The Supreme Court has rejected a categorical distinction between facts and opinions that would provide "an additional separate constitutional privilege for 'opinion' . . ." See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990). Instead of simply "opinion," the court recognized a distinction between facts that are demonstrably false and those that are not. Thus, even a statement that is couched as an opinion such as "In my opinion Mayor Jones is a liar," contains a factual statement that is "provably false": that Jones is a liar. *Id.* Thus it should not receive any greater protection than the statement that "Jones is a liar." In contrast a statement like "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin" is not provably false because no quantum of evidence could show that, even if Mayor Jones had accepted the teachings of Marx and Lenin, that it was the result of the trait of his abysmal ignorance (it could be the result of some other predisposition the Mayor has, such as an admiration of Russian political history). *Id.* Should Jones seek remedies for such a statement through a defamation action, he would be required to prove that the factual assertion were demonstrably false; he would be able to do in the first example. *Id.* at 20. In the second, he would be unable to do so, and therefore that sort statement would remain shielded from liability. See *generally id.* at 19–20. Therefore the Court has recognized it is justifiable not to protect speech that contains an element of demonstrable falsity, even though it has refused to recognize that opinions, as a category, receive heightened protection.

88. MILL, *supra* note 85, at 20.

89. *Id.* at 21.

90. *Id.*

regulated speech. It is easy to determine whether or not someone who claims to be a Medal of Honor recipient is telling the truth by simply checking a registry of medal recipients.⁹¹ There is no reason to protect a person's false claims that they are a recipient, believing that society will eventually figure out, through discussion, which individuals are and are not medal recipients. It would be inefficient to encourage public debate on a factual matter that is readily provable as true or false, and society would obtain no benefit if those discussions took place. In those discussions, the only disagreement and public debate would arise over what the facts are, not over opinions or ideas concerning what the facts mean or their significance.⁹² Mill's view that the marketplace of ideas serves as a means for correcting wrong opinions does not justify protecting false claims of military honor—whether an individual is or is not a medal of honor recipient is not a matter of opinion. Accordingly, the Stolen Valor Act does not threaten to abridge society's interest in attaining truth.

C. Conclusion

Neither free speech doctrine nor policy clearly answer whether the Stolen Valor Act is constitutionally valid. Under *United States v. Stevens*, there is no First Amendment categorical exception for false statements of fact. Yet it would not make sense to apply strict scrutiny to any content-based restriction of false speech, because that speech has such a low value. Still, after *Stevens*, the Stolen Valor Act cannot be validated free and clear of more extensive First Amendment analysis.

The justifications for protecting the freedom of speech are ambiguous about whether false statements of fact, and particularly false claims of military honors, should be protected. On one hand, false statements of fact do not contribute to the attainment of truth and may actually undermine it. But on the other hand, prohibiting those claims would infringe on the individual's right to be him or herself, including the freedom to make oneself out to be a liar and an impersonator of military award recipients. These justifications do not indicate when society has an interest in regulating false statements of fact that might overcome the individual's expressive interest, or vice-versa. As a result, these justifications suggest that false statements of fact should be protected in some contexts, but it is not clear that false claims of military honors is one of them. The Ninth Circuit and other courts that have addressed the constitutionality of the Stolen Valor Act have done so against the backdrop of these ambiguities.

91. See, e.g., *Medal of Honor*, U.S. ARMY CENTER OF MILITARY HISTORY, <http://www.history.army.mil/moh.html> (last visited Nov. 17, 2011).

92. The debate would be focused on answering the question, "Am I the recipient of the Congressional Medal of Honor?" rather than "Am I worthy of being a Medal of Honor recipient?" Protecting the latter question is more justifiable because it involves opinion and evaluation, rather than a statement of fact.

IV. SETTLING THE ISSUE? THREE APPROACHES TO ANALYZING
THE STOLEN VALOR ACT

Working within this First Amendment framework, federal courts that have fielded constitutional challenges to the Stolen Valor Act have produced two distinct analytical approaches: (A) the Historical Categories Approach and (B) the Categorical Exclusion Approach. Subpart (C), below, outlines a third approach, applying a framework parallel to that followed in *New York Times v. Sullivan*. The *New York Times* Approach is more consistent with First Amendment doctrine and policy than the two approaches that the courts have followed to this point. Following that approach, the Stolen Valor Act does not violate the First Amendment's protection. This section outlines and analyzes all three of these approaches.

A. The Historical Categories Approach

The Historical Categories Approach emerged out of the Ninth Circuit and the District of Colorado, which both invalidated the Stolen Valor Act after conducting a similar three-step analysis of the false statements of fact exception. First, both courts determined that false statements of fact are not a category of unprotected speech. Second, the courts attempted to fit false claims of military awards into one of the categorical exceptions to the First Amendment that have been historically recognized. Concluding that it does not fit, in the third step both courts applied strict scrutiny. The courts scrutinized the Act under that standard because it is a content-based speech regulation, and both invalidated the Act because it is not narrowly tailored to further a compelling government interest. This analysis is termed the "Historical Categories Approach" because it allows for categorical exceptions to the First Amendment, but attempts to fit the Stolen Valor Act into existing historical categories, applying strict scrutiny when it does not.

1. Categorical Exception Analysis

The Ninth Circuit's analysis of the Stolen Valor Act was shaped by its concern that, if the Act was constitutional, it would "[set] a precedent whereby the government may proscribe speech solely because it is a lie."⁹³ To invalidate the Act, the court was required to deal with the Supreme Court's statements that false statements of fact are not worth protecting.⁹⁴ The solution, the majority reasoned, began with the text of the First Amendment, which provides that "Congress shall make no law

93. *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010), *reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011).

94. *See supra* Part III.A.1.

. . . abridging the freedom of speech”⁹⁵ and creates a presumption that all speech is protected.⁹⁶ This automatically puts the burden on the government to justify any speech regulation, no matter what kind of speech is at issue.⁹⁷ This is significant because it means that all speech equally qualifies for the protection of the First Amendment and, if the regulation is content-based, for strict scrutiny whenever the regulated speech does not fit within a categorical First Amendment exception.

The Ninth Circuit concluded that “false factual speech” is not an exception to the First Amendment “as a general category unto itself,” so the government’s burden remained substantial.⁹⁸ The court argued that *Stevens* supports this finding, but not under the rationale outlined above. Rather, the court relied on the interplay between two Supreme Court opinions to reach its conclusion. It began with the statement in *Gertz v. Robert Welch, Inc.* that false statements of fact are “not worthy of constitutional protection.”⁹⁹ From there, the court noted that when the Supreme Court identified several categories of unprotected speech in *United States v. Stevens*, it named defamation, rather than false statements of fact.¹⁰⁰ This choice of diction eviscerated whatever force the phrase “false statements of fact” may have had as used in *Gertz*. Since the *Stevens* Court named defamation instead of false statements of fact when listing categorical exceptions, even though the *Gertz* court had used that exact phrase, the Ninth Circuit reasoned that when the term “false statements of fact” was used in *Gertz* it must actually have meant “defamation.”¹⁰¹ With the premise that “false statement of fact” in *Gertz* actually meant “defamation,” the court was able to confine the statement in *Gertz* that false statements of fact have no constitutional value to defamation only. Moreover, the court concluded that false statements of fact are still protected by the First Amendment because the *Stevens* Court had the opportunity to mention false statements of fact, but chose not to.¹⁰² The court did not analyze the possibility of an exception for

95. U.S. CONST. amend. I; *Alvarez*, 617 F.3d at 1205. This presumption is questionable because the Supreme Court talks about speech as “qualifying” for First Amendment protection. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 271 (1964). If the First Amendment created a presumption that all speech was protected, it would not make sense to conduct analysis of whether speech “qualified”—that is, met some threshold requirements—to receive that protection on the basis of its content. Speech would presumptively “qualify,” and the only analysis would be whether that speech was disqualified from being protected for some reason.

96. *Alvarez*, 617 F.3d at 1205.

97. *See id.*

98. *Id.* at 1206.

99. *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)) (internal quotation marks omitted).

100. *Alvarez*, 617 F.3d at 1207; *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

101. *See Alvarez*, 617 F.3d at 1207. As Judge Bybee critiqued, concluding that when the Supreme Court said “false statement of fact” it meant “defamation” is problematic because it is reasoning from “what [the court] think[s] the Supreme Court ‘means’ rather than what it actually says.” *Id.* at 1223 (Bybee, J., dissenting).

102. *Id.* at 1207.

false statements of fact beyond this, following *Stevens*' admonition not to exercise a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment."¹⁰³

The District of Colorado took an even more stringent free speech position than the Ninth Circuit in *United States v. Strandlof* when it granted the defendant's motion to dismiss. The court did not analyze whether false statements of fact might be a categorical exception to the First Amendment, even though the Government had raised this argument.¹⁰⁴ Reacting to this, the court accused the government of "[a]ttempting to side-step the First Amendment analysis implicated by the [defendant's constitutional challenge]" by arguing that "false statements enjoy no First Amendment significance at all."¹⁰⁵ But the District Court itself side-stepped substantial First Amendment analysis by avoiding the questions that the Supreme Court's statements about the degree and scope of protection for false statements of fact raise; it did not analyze a potential categorical exception for false statements of fact.

2. Recognized Historical Exceptions

In the second step of analysis, both courts concluded that false claims of military awards could not fit into one of the historically excluded categories named in *Stevens*. The Ninth Circuit reasoned that the exception for defamation did not apply to the Stolen Valor Act because the law does not contain either the injury or state of mind element that is the basis of a defamation action.¹⁰⁶ Similarly, because of the absence of particular elements, both courts reasoned that the Stolen Valor Act did not fit within the exception for fraud. The District of Colorado colorfully described the Stolen Valor Act as prohibiting "fraud in the air, untethered from any underlying crime at all" because the statute does not require the government to prove that an individual was harmed by the speech; as a result, the fraud exception could not apply.¹⁰⁷ Similarly,

103. *Id.* at 1209; *United States v. Stevens*, 130 S. Ct. 1577, 1586 (2010). The District of Colorado cited to the same provision in *Stevens* to reject the government's suggestion that the method to determine whether speech should be excluded from the First Amendment is to estimate the relative value of a given form of speech. *See United States v. Strandlof*, 746 F. Supp. 2d 1183, 1187 (D. Colo. 2010) (order granting motion to dismiss).

104. Supplemental Authority in Support of Defendant's Motion to Dismiss, *United States v. Strandlof*, 746 F. Supp. 2d 1183 (D. Colo. 2010) (No. 09-cr-00497-BNB), 2010 WL 2770904 (noting government raised argument similar to that raised in *Stevens*).

105. *Strandlof*, 746 F. Supp. 2d at 1186.

106. *Alvarez*, 617 F.3d at 1209. Although the conduct that the Act proscribes may cause some injury to the reputation of some medals at some point, the court finds such a harm unsatisfactory to bring the statute within the exception for defamation for two reasons. First, such a requirement does not appear on the face of the Act, requiring the government to prove either that an injury occurred, or that the defendant's conduct proximately caused the injury. *Id.* at 1210. And, second, such an injury would amount to "self-preservation" by the government, which is not a permissible justification for proscribing "pure speech." *Id.* (citing extensively to the Supreme Court's flag burning cases).

107. *Strandlof*, 746 F. Supp. 2d at 1188.

the Ninth Circuit concluded that the Act did not fit within the categorical exception for fraud because it was sufficiently distinguishable from existing fraud statutes.¹⁰⁸ Unlike such statutes, the Act does not require a showing of knowledge and intent to mislead, materiality, and actual misleading of the injured person.¹⁰⁹ The Ninth Circuit concluded that only “certain *subsets* of false factual statements,” including defamation and fraud, have been historically unprotected by the First Amendment, but that none of these categories regulate “pure speech.”¹¹⁰ The upshot is that the speech that the Stolen Valor Act regulates cannot fit any of the relevant historically unprotected categories of speech because neither category excludes speech on its own, unaccompanied by action, injury, or some other element.

3. Strictly Scrutinizing the Stolen Valor Act

In the third step, both the Ninth Circuit and the District of Colorado reviewed the Stolen Valor Act under strict scrutiny.¹¹¹ The “familiar” strict scrutiny standard of review requires the government to “show that the law is narrowly tailored to achieve a compelling government interest.”¹¹² The Ninth Circuit conceded that the government may have a compelling interest in “preserving the integrity of its system of honoring our military men and women for their service . . . and sacrifice.”¹¹³ But the court reasoned that the Act is not narrowly tailored to achieving that end, because, in part, it is neither the “best” nor the “only way to ensure the integrity” of military honors.¹¹⁴ The court itself proposed other means of achieving the goal, such as “using *more* speech, or redrafting the Act to target actual impersonation or fraud.”¹¹⁵ The existence of these alternatives was fatal to the Stolen Valor Act.¹¹⁶

The District of Colorado took a different tack, concluding that the Stolen Valor Act failed strict scrutiny because the government failed to put forth a sufficiently compelling interest.¹¹⁷ The court rejected the “interest of protecting the sacrifice, history, reputation, honor, and meaning associated with military medals and decorations” because the Court has precluded regulation of the kind of messages that government symbols may be used to communicate.¹¹⁸ Likewise, the court found that the

108. *Alvarez*, 617 F.3d at 1211–12.

109. *Id.*

110. *Id.* at 1213.

111. *Id.* at 1215–17; *Strandlof*, 746 F. Supp. 2d at 1189–91.

112. *Alvarez*, 617 F.3d at 1216 (quoting *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876, 898 (2010)).

113. *Id.* at 1216.

114. *Id.* at 1217.

115. *Id.* (emphasis in original).

116. *Id.* at 1218.

117. *United States v. Strandlof*, 746 F. Supp. 2d 1183, 1189–90 (D. Colo. 2010).

118. *Id.* at 1189 (quoting Brief of the United States). For this proposition, the court drew on an analogy to *Texas v. Johnson*, 491 U.S. 397 (1989), which invalidated a conviction

interest in “promoting heroism and sacrifice by . . . military personnel” was not compelling and, in some ways, offended the idea of the awards in the first place: heroism should not be promoted because true heroism is borne out of spontaneous selfless action.¹¹⁹ Finding no compelling interest, the court invalidated the Act without assessing if it was sufficiently tailored.¹²⁰

4. Analysis

The Historical Categories Approach is an incomplete analysis of false statements of fact and the Stolen Valor Act because it provides the stringent protection of strict scrutiny without considering the low value of the regulated speech.¹²¹ The Ninth Circuit and the District of Colorado reached the right conclusion that, under *Stevens*, false statements of fact are not a categorical exception to the First Amendment.¹²² But by then proceeding to apply strict scrutiny, both courts avoided the sort of evaluation that the Supreme Court has historically conducted of laws that restrict false statements of fact. In doing so, the courts “side-step[ped] the First Amendment analysis” that the Stolen Valor Act implicates.¹²³

For a law like the Stolen Valor Act, a complete analysis should parallel the way that the Supreme Court has analyzed laws that regulate false statements of fact. This means conducting a careful analysis of the speech impacted by a law and weighing the importance of that speech against the importance of regulating it.¹²⁴ Such an analysis incorporates policy considerations, which are foreclosed through a simple

under Texas’ flag-desecration statute, while acknowledging that the analogy was “not completely on all fours.” *See id.*

119. *Id.* at 1190.

120. *Id.* at 1192.

121. Thanks to Professor Richard Seamon, University of Idaho College of Law, for pointing out that strict scrutiny operates as protection for speech—protection that low value speech, such as false statements of fact, does not deserve.

122. *Supra* Part III.A.3. Although both courts reached the correct result on this issue, they did so without following a close *Stevens* analysis like this article suggests. The Ninth Circuit concluded that because “the *Stevens* Court saw fit to name defamation specifically, rather than false statements of fact generally, as the historical category excluded from constitutional protection,” *Gertz* and the cases that followed it actually meant “defamation” when they said “false statements of fact.” *United States v. Alvarez*, 617 F.3d 1198, 1207 (9th Cir. 2010), *reh’g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011). Following a different approach, the District of Colorado rejected the proposed recognition of false statements of fact as a category of unprotected speech through implementing a balancing test only because *Stevens* “counsels extreme delicacy in accepting [a] proposal to remove [the speech covered by the Stolen Valor Act] entirely from the realm of First Amendment consideration.” *Strandlof*, 746 F. Supp. 2d at 1187. Neither court followed a historical analysis like that outlined above. *See supra* Part III.A.

123. *Strandlof*, 746 F. Supp. 2d at 1186. The Ninth Circuit’s “presumption” of protection under the First Amendment, *supra* Part IV.A.1, aids in this side-stepping by providing analytical ground to which the court may retreat when it is unable to locate a categorical exception for false statements of fact.

124. *See infra* Part IV.C.

pairing of categorical exceptions and strict scrutiny. These considerations are particularly relevant for evaluating a statute that restricts speech for which the constitutional protection is unclear because evaluating the speech against the traditional justifications for protecting speech would clarify how far regulation may go and remain permissible. Strict scrutiny does not evaluate the justifications for protecting speech; it only evaluates whether the interest that the regulation aims for is sufficiently important and whether the means that the legislature has employed to further that interest are permissible. Because laws that restrict false statements of fact require analysis that is more in depth, strict scrutiny is an unsatisfactory approach for assessing their constitutionality.

The Historical Categories Approach also does not recognize what categorical exceptions to the First Amendment represent: Each category is a class of speech that the government has at least a legitimate interest in regulating, making rational regulation of that speech permissible.¹²⁵ For example, the government's legitimate interest in regulating libel arises from its exercise of the police power to redress reputational harm that individuals have suffered.¹²⁶ A categorical exclusion means that the legislature has the power to regulate the speech within a category in a reasonable way.

As demonstrated by the foregoing, the same per se rule does not apply to false statements of fact. Therefore, a law should not—and will not—be validated only because it restricts a false statement of fact. The government must have a legitimate interest at stake that supports the regulation. When the government can demonstrate such an interest, then it should be permitted more latitude in regulating speech to promote that interest than traditional strict scrutiny permits when the speech it regulates has little value. With this distinction clarified, the Historical Categories Approach to false statements of fact looks to the wrong place for justifying the regulation of the speech when it only considers the speech's low value as a potential justification for the regulation.

B. The Categorical Exclusion Approach

Two federal district courts have held that there is a categorical exception to the First Amendment for false statements of fact. Although

125. The Supreme Court has not required the government to justify a law with more than a legitimate interest before speech-protection concerns demand curtailing that regulation. For instance, in *Gertz* the Supreme Court recognized that the “*legitimate* state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehood.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (emphasis added). The *New York Times* Approach does not contain an analysis of whether the regulation is justified as an original matter; however, where the government has an otherwise legitimate interest in the regulation as a whole and has selected a reasonable means of achieving it, the Approach strikes a balance between protecting some speech and restricting other speech based on the justifications for protecting the speech.

126. *Id.*

this method adopts some of the Supreme Court's statements that false statements of fact have little or no value, it does not apply the holding of *United States v. Stevens* accurately, and—like the Historical Categories Approach—does not consistently apply First Amendment doctrine. For this reason, it too is an incomplete solution for determining when false statements of fact are protected and when they are not.

1. Locating the Categorical Exception

Lower courts have drawn from several statements in Supreme Court cases to conclude that there is a categorical exception for false statements of fact. The Central District of California derived the categorical exception from the statement in *Garrison v. Louisiana* that “the knowingly false statement and the false statement made with reckless regard for the truth, do not enjoy constitutional protection.”¹²⁷ The Western District of Virginia derived the same rule from the passage in *Gertz v. Robert Welch, Inc.*, which stated that “there is no constitutional value in false statements of fact.”¹²⁸ The court further reasoned that “the general exclusion of false statements from First Amendment protection is consistent with Supreme Court” precedent that deals with defamation, fraud, and commercial speech.¹²⁹ Dissenting in *United States v. Alvarez*, Judge Bybee reasoned from these and similar passages that there was a categorical exception to the First Amendment for false statements of fact.¹³⁰

2. Applying the Categorical Approach

Both district courts, along with Judge Bybee, recognized that this category of unprotected speech is subject to an exception. The *Robbins* court captured the whole framework to be that “false statements of fact are generally unprotected, but some speech—‘speech that matters’—is

127. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964); see also *United States v. Alvarez*, No. 07-cr-01035-RGK (C.D. Ca. Apr. 9, 2008) (order denying defendant's motion to dismiss).

128. See *United States v. Robbins*, 759 F. Supp. 2d 815, 818 (W.D. Va. 2011) (quoting *Gertz*, 418 U.S. at 340).

129. *Id.*

130. *United States v. Alvarez*, 617 F.3d 1198, 1222 (9th Cir. 2010) (Bybee, J., dissenting), *reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011). Judge Bybee rejected the argument that the unprotected category of speech referred to in *Gertz* and *Garrison* by the label “false statements of fact” is actually defamation. He argued that the *Alvarez* majority incorrectly reached that conclusion by generalizing from the facts that *Gertz* and *Garrison* analyzed defamation laws, and that *Stevens* used the term “defamation” to “describe one of the categories of unprotected speech” instead of the term “false statement of fact.” *Id.* at 1225. Judge Bybee argued that, under *Stevens*, false statements of fact are unprotected and that defamation is a narrow category of false speech. *Id.* He noted that almost every case in which the Supreme Court has mentioned false statements of fact has been a defamation case, so it was unremarkable that *Stevens* used the term defamation and not “false statement of fact.” *Id.* Instead, he advocated for the principle that the Supreme Court meant false statements of fact when it said “false statements of fact”—it did not mean (as the majority argued) defamation. *Id.*

protected.”¹³¹ To determine whether the speech is “speech that matters,” the *Robbins* court examined several factors that represented “the dominant reasons why some false statements, such as political, historical, or scientific speech, may be protected as speech that matters.”¹³² These factors are discussed below.

Under the general categorical exclusion of false statements of fact from First Amendment protection, both district courts and Judge Bybee held that the Stolen Valor Act was constitutional because Alvarez’s lie did not impact speech that mattered. As the Central District of California recounted the facts, his statement was only a

false statement of fact, made knowingly and intentionally by [Alvarez] at a Municipal Water District Board Meeting. The content of the speech itself [did] not portray a political message, nor [did] it deal with a matter of public debate. Rather, it appears to [have been] merely a lie intended to impress others present at the meeting.¹³³

Both the Central District of California and Judge Bybee argued that, under a plain reading of *Garrison*, the First Amendment does not protect such speech.¹³⁴ The Central District of California specifically relied on the fact that this speech was not speech that mattered because it was not political in nature.¹³⁵ Therefore, the general rule of no protection applied and the speech was not protected by the exception.¹³⁶

In *Robbins*, the Western District of Virginia went further when it concluded that the Stolen Valor Act would not impact speech that mattered when applied to any speech.¹³⁷ It conducted a careful, factor-based analysis to reach this conclusion: The court analyzed whether enforcement of the Act would interrupt the attainment of truth, threaten the expression of political opinions, or be used as a vehicle for suppressing particular ideas.¹³⁸ After it construed the law as only regulating know-

131. *Robbins*, 759 F. Supp. 2d at 818.

132. *Id.* at 819–20.

133. *United States v. Alvarez*, No. 07-cr-01035-RGK (C.D. Ca. Apr. 9, 2008) (order denying motion to dismiss). Judge Bybee further noted that Alvarez was prosecuted for making knowingly false statements and that he did not argue that his false claim of receiving a Congressional Medal of Honor was “misunderstood.” *Alvarez*, 617 F.3d at 1231 (Bybee, J., dissenting). Thus there is no need to shield him from accidental liability.

134. *Alvarez*, No. 07-cr-01035-RGK; *Alvarez*, 617 F.3d at 1231 (Bybee, J., dissenting) (“Under the rules announced in *Garrison* and its progeny, Alvarez’s knowingly false statement is *excluded* from the limited spheres of protection carved out by the Supreme Court for false statements of fact necessary to protect speech that matters, and it is therefore not entitled to constitutional protection.”). Because the statute was constitutional as applied to Alvarez it was also, necessarily, constitutional on its face. *Id.* This is because facial invalidity requires there to be no case in which the application of the statute would be constitutional. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). The validity of the statute’s application to Alvarez therefore defeats any facial challenge.

135. *Alvarez*, No. 07-cr-01035-RGK.

136. *Id.*

137. *Robbins*, 759 F. Supp. 2d at 820.

138. *Id.* at 820–21.

ingly false statements of fact, the court held that the Stolen Valor Act did not threaten speech that mattered, on any of these bases:

[T]he speakers targeted by the law do not advocate any particular political or cultural viewpoint or question prevailing dogma or beliefs about any historical or scientific issue. Therefore, the justification that some false speech strengthens and clarifies the truth is inapplicable Moreover, . . . [t]his is not the sort of regulation that threatens to suppress particular ideas.¹³⁹

Thus, even scrutinized under these factors, the Stolen Valor Act does not impact speech that matters. Accordingly, the Western District of Virginia joined Judge Bybee and the Central District of California in holding that the Act was constitutional because it regulated speech that was categorically excluded from the protection of the First Amendment, and the exception to that lack of protection did not apply.¹⁴⁰

3. Analysis

The Categorical Exclusion Approach that these courts followed does not provide a satisfactory method for analyzing regulations of false statements of fact, even though it provides an exception for speech that matters. This Approach is inconsistent with the Supreme Court's holding in *United States v. Stevens* and does not follow the methodology that the Court has employed when analyzing false statements of fact. As argued above, under *Stevens* speech cannot be categorically excluded from the First Amendment's protection unless there is a historical basis for regulating that speech.¹⁴¹ False statements of fact, even about receiving military honors, do not have that pedigree.¹⁴² Without a historically-based exception, a more extensive analysis is required, which a citation to *Garrison* does not provide on its own.

The full Categorical Exclusion Approach improves on the Historical Categories Approach by analyzing the regulation's impact on speech that matters and incorporating the justifications for protecting speech to determine what speech "matters." But this analysis should not be conducted when analyzing whether the regulation itself can be justified. Instead, it should occur when analyzing the valid scope of a law that has already been determined to be a valid regulation. This is necessary to remain consistent with the Supreme Court's approach to false statements of fact, and the way it has employed the "speech that matters" determination. The Court has only considered whether speech impacted

139. *Id.* Note that the court conducts this analysis after construing the statute to require a showing that the speaker claimed a military award knowing that the claim was false. *Id.* This sort of narrowing should be reserved for protecting "speech that matters," rather than used *a priori* as a statutory construction rule.

140. *Robbins*, 759 F. Supp. 2d at 822.

141. *See supra* Part III.A.2.

142. *See supra* Part III.A.3.

by a regulation is “speech that matters” when determining whether to narrow the scope of valid regulations—not to validate or invalidate a regulation altogether. Therefore, this approach is also unsatisfactory, and federal courts should employ a different test for analyzing laws that regulate false statements of fact.

C. The *New York Times* Approach

Based on the Supreme Court’s analysis in *New York Times v. Sullivan*, the *New York Times* Approach provides an analytical framework that is patterned after precedent and consistent with the justifications for providing free-speech protection. These features make this approach superior to the other analyses that federal courts have followed when assessing the validity of the Stolen Valor Act.

1. Outlining the *New York Times* Approach

The *New York Times* framework consists of a two-step analysis. First, a court will assess whether the justification for the law and the means employed are valid under rational basis review. Requiring laws to only pass rational basis makes sense where the regulated speech is of such low value. While providing a comparatively low threshold for validity, rational basis review also limits the government to only regulating speech in furtherance of legitimate interests.

In the second step, the law may regulate false statements of fact to the extent that it does not impact speech that matters. If the law does impact speech that matters, then the scope of the law is narrowed through the application of the *New York Times* standard, which requires the government to prove that the statement was made with either knowledge that the asserted facts were false or with reckless disregard for whether they are true.¹⁴³ This approach follows Supreme Court precedent by providing greater deference to the legislature where a regulation restricts low value false speech, while at the same time providing sufficient protection for valuable speech by considering the impact that the law has in light of free speech rationales and policy considerations. Thus, application of the *New York Times* standard serves the same purpose that strict scrutiny usually does, of protecting valuable speech from content-based regulation.

At this second stage, a court will conduct the most rigorous analysis to determine whether, and to what extent, a law impacts speech that matters. Initially, the court must determine what speech the law impacts, both directly and indirectly. A law impacts speech directly if that speech satisfies one of the elements of the crime. A law has an indirect impact on speech if the speech is not actually false when spoken, but—if it were actually false—would satisfy an element of the regulation. This wide coverage is necessary, according to *New York Times v. Sullivan*,

143. *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

because the concern with regulating false statements of fact is that speakers who have something worth saying, but are not sure whether it is true or false, will choose not to speak to avoid the risk of liability that something they say might later be proven false in court.¹⁴⁴ Thus, by determining all speech that the law would reach if it were actually false, a court can determine the speech that the law may silence indirectly as a result of instilling fear of liability in individual speakers. If that speech is speech that matters, then some false statements of fact should be protected to ensure that valuable speech is not hindered.

Once the court has determined what speech is impacted by the law, it should analyze whether any of that speech is speech that matters using the factors identified by the Virginia district court. These factors determine whether speech matters by reference to traditional free speech justifications. Accordingly, a court employing these factors would analyze whether restricting the speech at issue will “stifle protected statements,”¹⁴⁵ whether the restricted speech “may actually promote truth and legitimacy,”¹⁴⁶ and whether the government could restrict the speech as a means of silencing a particular political viewpoint.¹⁴⁷

Under the first factor, a speech regulation will stifle protected statements primarily if it will have a tendency to silence speech on public issues. This is because “speech on public issues occupies the highest rung of the hierarchy of First Amendment values—” so high that it is “entitled to *special* protection.”¹⁴⁸ In *New York Times* itself, the Court extended protection to some false statements of fact in order to protect speech about the official conduct of public officials, which the Court emphasized was a public subject.¹⁴⁹ Mainly, this factor accounts for the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁵⁰ Because of the importance of this kind of speech, if a regulation impinges on it then application of the *New York Times* standard is likely almost automatic, and the law can only extend to knowingly false statements.

The second factor brings traditional free speech justifications to bear on whether the impacted speech is speech that matters by analyzing whether it would contribute to the attainment of truth within the marketplace of ideas.¹⁵¹ To the extent that a false statement might do

144. *Id.* at 271–72 (noting that protecting speech that matters requires providing some “breathing space”); *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967) (rejecting a negligence standard for falsity because a speaker may conclude that speaking is not worth the risk that a jury might later find him liable when it concludes that he should have known what he was saying was false).

145. *United States v. Robbins*, 759 F. Supp. 2d 815, 820 (W.D. Va. 2011).

146. *Id.*

147. *Id.*

148. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotations omitted) (emphasis added).

149. *See generally New York Times*, 376 U.S. 254.

150. *Id.* at 270.

151. *See supra* Part III.A.1.

so, it should be protected. Therefore, this factor would favor applying the *New York Times* standard to a law that puts such speech at risk of content-based regulation.

Lastly, the third factor assesses whether the speech regulation could be used as a potential vehicle for viewpoint discrimination, particularly the silencing of certain political perspectives.¹⁵² On this point, the reviewing court must be careful of the law's potential to allow "partisan-ship [to] pervade the protection of speech."¹⁵³ This is a risk when the government is allowed to "police truth and falsity."¹⁵⁴ If the government is allowed to police truth and falsity, then the party in power would be able to silence dissenting political opinions simply by declaring those opinions to be false.

2. The Advantages of *New York Times*

The *New York Times* Approach has three advantages over those followed by the Ninth Circuit and other courts. First, it gives effect to the Supreme Court's statements regarding the low value of false statements of fact by initially validating a law if it passes rational basis review. Second, while taking the low value of false statements into account, it follows *Stevens*'s holding by not analyzing false statements of fact as an excluded category unto themselves. Third, it prompts consideration of the justifications for free speech protection in the context of a particular regulation, rather than avoiding those considerations altogether through reflexively applying strict scrutiny. This subpart elaborates on these advantages.

By initially requiring a law to pass only rational basis scrutiny, this analysis gives effect to the numerous Supreme Court statements regarding the "low-value" of false statements of fact.¹⁵⁵ In addition to being low value speech, the Court has stated that "demonstrable falsehoods are not protected by the First Amendment *in the same manner* as truthful statements."¹⁵⁶ This gives courts a license to review the constitutionality of laws that regulate speech under a standard other than strict scrutiny when the regulated speech is false statements.¹⁵⁷ Rational basis review is appropriate for conducting this review because it protects speech from regulations that are unreasonable or serve illegitimate purposes, but gives the legislature substantial leeway to regulate once those threshold requirements are met.¹⁵⁸ Despite initial scrutiny at this low level, the *New York Times* Approach adequately protects valuable speech by requiring an elevated mental state in the second analytical step.

152. *Robbins*, 759 F. Supp. 2d at 820–21.

153. *Id.* at 820.

154. *Id.*

155. *See supra* Part III.A.2.

156. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982) (emphasis added).

157. Content-based restrictions are ordinarily invalidated in the absence of an applicable categorical exception. *See United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010).

158. *See Volokh Brief, supra* note 5, at 9.

With these features, the *New York Times* Approach improves on the analyses outlined above. Unlike the Historical Categories approach employed by the Ninth Circuit and the District of Colorado, the *New York Times* Approach does not protect false speech in the same way as true speech by reflexively applying strict scrutiny in the absence of a categorical exception. Applying strict scrutiny in a grey area of free speech jurisprudence precludes consideration of free speech justifications because it only analyzes the quality of the legislative judgment regarding means and ends, requiring a near perfect fit between them. In contrast, the *New York Times* Approach recognizes that there is a difference between analyzing whether a law was within the government's power to enact and determining whether the regulated speech is worth protecting. The approach resolves the first question through the rational basis test and the second through a factor-based analysis of the law's impact on speech that matters. The latter analysis considers justifications for First Amendment protection where they would not have been considered under strict scrutiny. Thus, the *New York Times* Approach ensures that the treatment of false statements of fact is consistent and principled. Moreover, such an inclusive approach is helpful when analyzing false statements of fact where neither history nor Supreme Court precedent squarely indicate if, how, and to what extent such speech may be regulated.

This approach is also substantially different from the Categorical approach, some similarities. Initially, the *New York Times* Approach appears to produce the same result as the Categorical approach because both have the practical effect of permitting the regulation of false statements of fact in most cases.¹⁵⁹ Both also curtail government regulation that threatens "speech that matters."¹⁶⁰ But close analysis reveals that there are meaningful differences between them.

The Categorical Approach seeks to justify the regulation through locating a categorical exclusion for false statements of fact.¹⁶¹ Following that approach, the government would not have to provide further justification for a regulation that targeted such statements.¹⁶² Indeed, the *Alvarez* majority correctly pointed out that the court's entire analysis of the Stolen Valor Act would need to be "no more than a few paragraphs in length" under this approach.¹⁶³ Because the Categorical Approach would give the government that broad of a license to regulate speech, it is problematic. Few would argue that the government should be permitted to regulate speech simply because that speech is false.

159. *United States v. Alvarez*, 617 F.3d 1198, 1220–21 (9th Cir. 2010) (Bybee, J., dissenting), *reh'g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011).

160. *Id.* at 1221.

161. *See id.* at 1220–23, 1226, 1228.

162. *See supra* pp. 181–82.

163. *Alvarez*, 617 F.3d at 1208 n.9.

The *New York Times* Approach resolves this issue by employing rational basis review to determine if the regulation is justified. Thus, the Approach separates the justification for a law, which is analyzed through application of rational basis, from factors that might delimit the permissible scope of a valid law. The latter analysis occurs through the application of the *New York Times* “knowingly false” standard. Thus, the difference between the two tests is in the means of protecting speech that matters, if it is necessary to do so. Under the Categorical approach a whole statute would be subjected to, and likely invalidated by, strict scrutiny. But, under the *New York Times* Approach, an entire statute regulating false statements of fact will only be invalidated as a whole if it does not pass rational basis. If it passes, then it might be subject to some narrowing.

With the clear steps of analysis and concise set of factors that the *New York Times* framework provides, courts will be able to effectively follow its analysis when confronted with speech regulations that restrict false statements of fact but do not fit within one of the historical categorical exceptions for fraud, libel, or defamation. The framework is also more flexible than strict means-ends scrutiny because it accounts for sometimes-conflicting free speech justifications. Because of these advantages, the Supreme Court, and lower federal courts that hear constitutional challenges to Stolen Valor Act before the Court rules, should follow the analytical pattern set forth in *New York Times v. Sullivan*.

Courts have understandably taken divergent approaches to the Stolen Valor Act because it is “not clear exactly when false statements of fact” are unprotected.¹⁶⁴ Indeed, the Supreme Court has never expressly addressed whether the First Amendment protects false statements of fact,¹⁶⁵ and the boundaries of the exception remain “not well-defined.”¹⁶⁶ But the *New York Times* Approach compensates for the shortcomings of other analytical approaches and provides a complete and workable outline for analyzing the Stolen Valor Act and other false speech regulations.

One possible objection to this approach is that it applies *New York Times v. Sullivan*, which admittedly dealt with the area of defamation, in a substantially different context. Although originally conceived in the context of common law claims for “defamatory falsehood[s],”¹⁶⁷ the *New York Times* Approach has been applied to other types of regulations where the regulated speech includes an element of falsity.¹⁶⁸ In *Time, Inc. v. Hill* the Court analyzed a New York “right of privacy” statute that provided a “newsworthy person” a “right of action when his name, picture, or portrait [was] the subject of a ‘fictitious’ report or article.”¹⁶⁹

164. Volokh Brief, *supra* note 5, at 2; *see also* CALVIN MASSEY, AMERICAN CONSTITUTIONAL LAW 889 (3d ed. 2009).

165. Pickering v. Bd. of Educ., 391 U.S. 563, 574 n.6 (1968).

166. Volokh Brief, *supra* note 5, at 1.

167. *See* *New York Times v. Sullivan*, 376 U.S. 254, 279–80 (1964).

168. *See Alvarez*, 617 F.3d at 1224–25 (Bybee, J., dissenting).

169. *Time, Inc. v. Hill*, 385 U.S. 374, 384 (1967).

The Court held that this law could not be applied without proof that “the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.”¹⁷⁰ This heightened mental state was required because the law impacted speech that mattered: “sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees.”¹⁷¹ As a result, those misstatements were protected through application of the *New York Times* “knowingly false” standard.¹⁷² As cases like *Time, Inc.* illustrate, the *New York Times* analysis is applicable even outside the defamation context to laws that regulate false statements of fact and may threaten speech that matters.

V. REINSTATING “STOLEN VALOR” IN THE NINTH CIRCUIT

This part analyzes the Stolen Valor Act under the *New York Times* Approach. Under this analysis, the Act is constitutional. Thus, if the Ninth Circuit had applied this test in *Alvarez* it would have reached a different conclusion, and “valor” would still be protected in Idaho and the other states within the Ninth Circuit.

Any statutory analysis begins with the text of the statute.¹⁷³ The Stolen Valor Act prescribes imprisonment for a maximum of six months, or the imposition of a fine, for an individual who “falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”¹⁷⁴ By its text, the Act sanctions speech if it is both false and a representation by the speaker that he has been awarded a military award or medal. This element of falsity brings the Act within the *New York Times* Approach proposed in this article.

At the first step of analysis, the Stolen Valor Act would need to be justified under rational basis review. The rational basis test requires the government to justify a regulation by proving that the law is rationally related to accomplishing a legitimate government interest.¹⁷⁵ The Stolen Valor Act seeks to accomplish interests that are at least legitimate. In *Robbins*, the court held that “restricting such statements supports military discipline and effectiveness, [which is] a legitimate legislative concern under the Constitution.”¹⁷⁶ The Ninth Circuit went even further in *Alvarez*, recognizing that the government’s interest in “preserving the integrity of its system of honoring our military men and women for their

170. *Id.* at 388.

171. *Id.* at 389.

172. *Id.*

173. *See Carciari v. Salazar*, 555 U.S. 379, 387 (2009).

174. 18 U.S.C. § 704(b) (2006).

175. *See City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985) (stating the rule in the context of equal protection analysis).

176. *United States v. Robbins*, 759 F. Supp. 2d 815, 821 (W.D. Va. 2011). The court argues that the Constitutional grant of power to the legislature to “raise and support armies” supports this interest. *See* U.S. CONST. art. I, § 8, cl. 12.

service and . . . sacrifice” was compelling.¹⁷⁷ On either ground, the Stolen Valor Act set out to accomplish a valid government interest.

The Act employs means to achieve this purpose that are reasonable. It would be reasonable to conclude that shady individuals who falsely claim to have received a prestigious award tarnish that award’s reputation. This tarnishing could occur through the impact that such a false claim would have on the hearers of the claim, possibly diminishing the perceived credible character of true Medal of Honor recipients. Such speech could also dilute the perceived exclusivity of the award if the listeners believed the speaker’s claim. Therefore, to protect the reputation of legitimate recipients, it would be rational for the government to restrict that kind of speech to prevent its negative effects. It is further rational to regulate this speech *ex ante* because those harmed by the speech will likely not be present to challenge the speaker when he speaks. Even if they are present, it is even less likely that they will be armed with the facts to show that the speaker is lying. Thus, because the Stolen Valor Act employs this rational means to accomplish a legitimate end, it is justifiable under rational basis review.

Under the second analytical step in the *New York Times* approach, the Stolen Valor Act must be analyzed to determine whether the law has an impact on “speech that matters.” There are two inquiries on this point: First, what speech does the law impact? Second, is the impacted speech that matters? If it is, then under *New York Times*, the government must prove that the speaker made the statement knowing that the facts he asserted were false. Careful analysis shows that the Act does not impact speech that matters.

To determine what speech the Act impacts, both its direct and collateral effect on speech need to be analyzed. The speech that the law directly impacts is the speech that fits within the elements of the law as identified in the statute. Therefore, the Act directly impacts any statement that is a false claim that a person was awarded a military award. A statement such as “I received a Medal of Honor for my service in Vietnam” made by a speaker who had not received the medal is directly impacted by the Act. Under the plain language of the statute, that speaker could be prosecuted for that statement even if he or she made the false statement accidentally. This could occur if, for example, the speaker had in fact received an award, but was mistaken about which award he had received. Yet, because they are tied directly to the elements of the statute, these are the kinds of statements that the law would impact directly, and therefore deter.

The Act has little indirect impact on speech. The test for indirect impact is to determine what individuals might not say, out of concern for prosecution, if they are unsure whether the facts that they speak are

177. *United States v. Alvarez*, 617 F.3d 1198, 1216 (9th Cir. 2010), *reh’g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011).

true or not.¹⁷⁸ The facts that are subject to scrutiny under the Stolen Valor Act are that a person has received an award, and that the award is a “decoration or medal authorized by Congress for the Armed Forces of the United States.”¹⁷⁹ Therefore, if a person is uncertain whether either of these facts is true, she might not say anything about it; the practical effect being that she might not claim to be an award recipient even if she actually was. Thus, the law has the potential indirect effect of silencing some legitimate claims that an individual has received an award. If this is speech that matters, then the statute should be limited in order to ensure that such speech is not inhibited.

Both directly and indirectly, the law does not impact speech that matters. Following the factors identified by the *Robbins* court, speech that matters could be impacted if restricting the speech will “stifle protected statements,”¹⁸⁰ if restricted speech “may actually promote truth and legitimacy,”¹⁸¹ and if the government could restrict speech as a means of silencing particular viewpoints.¹⁸² These factors are analyzed below.

The Act does not impact protected statements because, although it impacts speech that is arguably of public concern, the public concern is actually vindicated by the speech regulation. Recognizing the high value of speech on such matters, the Supreme Court has defined “public concern” broadly. Thus, the definition includes any speech that could be “fairly considered as relating to any matter of political, social, or other concern to the community.”¹⁸³ Public concern can also include topics that are the “subject of legitimate news interest . . . and of value and concern to the public.”¹⁸⁴ Defining public concern so broadly ensures that “courts themselves do not become inadvertent censors.”¹⁸⁵ In *Alvarez*, the Ninth Circuit assumed, without analysis, that speech about military medals was speech about a matter of public concern because it “primarily involves Congressional and military recognition of public service.”¹⁸⁶ Thus, because the law targets speech concerning actions taken by public entities in response to individuals who at one time were in public service, it regulates speech that is a matter of public concern. Given the Supreme Court’s inclusive definition on what constitutes public concern, this makes sense.

178. *Supra* pp. 200–01.

179. 18 U.S.C. § 704(b).

180. *Robbins*, 759 F. Supp. 2d at 820.

181. *Id.*

182. *Id.* at 820–21.

183. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011) (citing *Connick v. Meyers*, 461 U.S. 138, 146 (1983)) (internal quotation marks omitted).

184. *Id.* (quoting *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)) (internal quotation marks omitted).

185. *Id.*

186. *United States v. Alvarez*, 617 F.3d 1198, 1209 (9th Cir. 2010), *reh’g en banc denied*, 638 F.3d 666 (9th Cir. 2011), *cert. granted*, No. 11-210, 2011 WL 3626544 (Oct. 17, 2011).

The context of the statements that have been prosecuted under the Act also indicates that the receipt of a military award is a matter of public concern, but also shows that whether speech should be protected because of that concern is not clear. In most cases, the speaker made claims in order to establish his own credibility in the public eye. For example, Xavier Alvarez claimed to be a Medal of Honor recipient in a joint community Water District Board meeting.¹⁸⁷ Similarly, Rick Strandlof built his military persona through falsely claiming in public that he received military awards in order to rally the community's support for his various organizations.¹⁸⁸ That receiving a military award has this tendency to establish a person's credibility within the community demonstrates that these statements are matters of public concern. The community is particularly concerned with preserving the ability of its members who have received such awards legitimately to take advantage of the credibility that such an award gives. The community has a further concern in being able to rely on the legitimacy of those who do claim military awards so that the credibility with which they are vested is justified and not regularly questioned. All these aspects of claims of military honor indicate that the Stolen Valor Act impacts speech that is a matter of public concern.

However, based on these considerations the public concern factor does not cut against regulation, as it would in a typical case. Usually if a regulation impacts a matter of public concern, that impact is grounds for invalidating it. The public concern with claims of military medals relates to the integrity of the credibility of medal recipients. Thus, somewhat anomalously here, the public concern favors keeping the regulation in place in order to preserve the public concern with maintaining the credibility, integrity, and respectability of the institution of military awards. Because of this ambiguity, resolving whether the Act should be narrowed because of its impact on speech that matters should be deferred to the other factors considered below.

Under the second factor, the fact that this speech touches a matter of public interest is tempered because there is little concern that the Act has an impact on speech that might promote truth. This is because the issue of whether an individual has been awarded a Medal of Honor, or another award, is not really debatable.¹⁸⁹ As Professor Volokh pointed out, "whether [a speaker has] received a military decoration is unusually easy for [the speaker] to be sure about."¹⁹⁰ To make speakers and their audiences even more sure, the United States government publishes lists of those who have been decorated.¹⁹¹ With publications like this available, the question of whether an individual has received a Medal of

187. *See supra* Part II.A.

188. *See supra* Part II.A.

189. The issue would be different if a question was raised about whether a historical figure was a Medal of Honor recipient because then a historical fact would be the subject of debate. *See* Volokh Brief, *supra* note 5, at 7.

190. *Id.* at 8.

191. *See Medal of Honor, supra* note 91.

Honor is similar to the question of whether an individual has a driver's license. That fact is easily and definitively verifiable by a visit to a state department of transportation. If such a fact is not debatable, then there is less of a reason to protect false speech about those facts in order to foster debate about them. The marketplace of ideas is not an efficient arena for arriving at the truth of whether an individual is, or is not, a Medal of Honor recipient because that fact is subject to readily available, independent verification.

It is also unlikely that the Act infringes on the truth-seeking function of the marketplace of ideas since the law only prohibits individuals from speaking about themselves. The law does not prohibit individuals from questioning whether another person who claims to be an award recipient is doing so honestly, or whether that individual deserved the award in the first place. Moreover, "the speakers targeted by the law do not advocate any particular political or cultural viewpoint or question prevailing dogma or beliefs about any historical or scientific issue."¹⁹² Speech on these topics particularly benefits from First Amendment protection because conclusions on the topic are generally debatable, and it is debate that is thought to bring about truth.¹⁹³ That sort of speech is absent here. It is difficult to conceive of a situation where any of these attributes would attach to an individual's false claim that he had received a military award because what is asserted in those contexts is the existence of a demonstrable fact. The speaker does not suggest (explicitly) that the fact has any meaning. Thus, there is no idea or viewpoint that hearers might question or otherwise respond to. The only negative response is to challenge the truth of the speaker's claim. Debates about this kind of hard fact actually make the truth-seeking function of free speech protection less efficient because it would devolve into a "Yes I am," "No you aren't" dispute, which could easily be settled by appeal to a government registry. Thus, the Stolen Valor Act does not endanger speech that could aid in the attainment of truth.

Finally, the Act does not "threaten[] to suppress particular ideas," so it does not raise any general concerns about government overreaching.¹⁹⁴ The content of the regulated speech is closely tied to a demonstrable fact and is unrelated to the communication of any idea or belief. As noted, it is difficult to conceive of a circumstance in which a person would attempt to communicate an idea or a belief while lying about her receipt of a Medal of Honor. The speech is solely a factual assertion and does not express a political, religious, or other ideological viewpoint. As a result, it is unlikely that the government would be able to employ the Stolen Valor Act to suppress particular points of view. Because this danger is absent, this last factor also suggests that the Act does not restrict speech that matters.

192. *United States v. Robbins*, 759 F. Supp. 2d 815, 820 (W.D. Va. 2011).

193. *See supra* Part III.B.2.

194. *Robbins*, 759 F. Supp. 2d at 820–21.

Taken together, these factors indicate that the Stolen Valor Act, as written, does not impact speech that ought to be protected. The Act impacts speech that is a matter of public concern, but that concern is best protected through regulation, rather than speech protection. Moreover, the Act does not impact speech that might promote truth and legitimacy because it regulates speech about facts that are not debatable and would not benefit from, or be a benefit to, the truth-seeking function of the marketplace of ideas. Even if the qualifications, merits, or worth of military honors were debated, the Act would not impact that speech. Further, the law does not impact the speaking of opinions or ideas, so there is little reason to promote further speech on the facts covered. As a result, the law does not need to be narrowed through requiring the government to prove that the speaker knew that what he was saying was false in order to establish a violation of the Act. Thus, the Act is constitutional as written because it passes rational basis review. Courts reviewing the Act should follow this analysis and arrive at the same conclusion.

VI. CONCLUSION

The Stolen Valor Act addresses a relevant social issue and raises novel First Amendment problems. The Ninth Circuit's approach to addressing those problems is one of several that are available, but it is not the best approach because of all that it fails to account for in its legal analysis—namely, the Supreme Court's statements that false claims of have little to no value and the policy justifications for protecting speech. In contrast, the *New York Times* Approach takes these factors into account for laws that restrict false statements of fact but do not fit within a categorical exception. Because it allows for more comprehensive analysis, the *New York Times* Approach is a superior means of analyzing the Stolen Valor Act and other laws that regulate false statements of fact.

If the Ninth Circuit had considered those issues, it would have concluded that the primary justifications for free speech protection do not justify protecting false claims of military honors. Since the Stolen Valor Act targets false statements of highly empirical fact, it regulates speech that is not worth protecting within the marketplace of ideas. As a result, the Stolen Valor Act does not offend the most significant traditional justification for the protection of freedom of speech and should be upheld. Accordingly, *Alvarez* should be reversed on appeal, reinstating sanctions for individuals who falsely claim to be military award recipients, and "saving valor" in Idaho and throughout the Ninth Circuit.

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