

“WHAT IS THAT HONOR?”: RE-THINKING FREE SPEECH IN THE “STOLEN VALOR” CASE

R. GEORGE WRIGHT*

I.	INTRODUCTION	847
II.	THE <i>ALVAREZ</i> CASE IN PERSPECTIVE.....	856
	A. <i>A Narrow Sub-Class of Lies Versus a Broad Class of False Statements</i>	856
	B. <i>Content, Viewpoint, and Genuine Burden on Free Speech</i>	857
	C. <i>Slippery Slopes, Principles, and Reasonable Judgment</i>	859
	D. <i>Issues of Government Interests and Tailoring in Alvarez</i>	861
III.	CONCLUSION: JUDICIAL MODESTY IN CIRCUMSTANCES OF UNUSUAL UNCERTAINTY AND LOW RISK TO CONSTITUTIONAL VALUES.....	864

I. INTRODUCTION

The recent Supreme Court case of *United States v. Alvarez*¹ attempts to address the constitutional status of lying in the context of military honor.² More particularly,

* Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law. The title above quotes Sir John Falstaff’s question-and-answer “catechism” on the nature and value of honor. Set out in expository form, Falstaff concludes as follows: “Can honor set a leg? No. Or an arm? No. Or take away the grief of a wound? No. Honor hath no skill in surgery, then? No. What is honor? A word. . . . What is that honor? Air. A trim reckoning! Who hath it? He who died a’ Wednesday. Doth he feel it? No. Doth he hear it? No. ‘Tis insensible, then? Yea, to the dead. But will it not live with the living? No. Why? Detraction will not suffer it. Therefore I’ll none of it.” WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY VI* act 5, sc. 1. While Falstaff is not an infallible guide to honor, his conclusion that we may react pathologically to the honorable seems borne out by cases such as *Alvarez*.

¹ *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

² For a sample of diverse perspectives, beyond that of Falstaff, on one conception or another of honor, see, e.g., ARISTOTLE, *Other Moral Virtues*, in *THE NICOMACHEAN ETHICS* bk. V, at 95 (J.A.K. Thomson trans., rev. ed. 2004) (c. 384 B.C.E.) (“[H]onour is the prize of virtue, and is rendered to the good.”); CONFUCIUS, *THE ANALECTS OF CONFUCIUS* (Chichung Huang trans., 1997); HOMER, *THE ILIAD* 614 (Robert Fagles trans., 1998) (“[G]athering once again they shared a splendid funeral feast in Hector’s honor, held in the house of Priam, King by will of Zeus. And so the Trojans buried Hector breaker of horses.”); MOZI, *BASIC WRITINGS* 20 (Burton Watson trans., 2003) (“Let us suppose that one wishes to increase the

number of skilled archers and chariot drivers in the state. One must set about enriching and honoring such men, respecting and praising them. Once this has been done, one will have no difficulty in obtaining a multitude of them.”); *id.* at 23 (“[W]hy do they fail to perceive that honoring the worthy is the foundation of government?”); PLATO, *THE REPUBLIC* (Francis M. Cornford trans., 1941) (1980 ed.) (discussing the broader character of the person driven by honor (*time*), intermediate between the philosophical rulers focused on wisdom, and the persons whose passions focus on wealth or other appetites); *THE WAY OF LAO TSU* 115 (Wing-Tsit Chan trans., 1963) (“To be proud with honor and wealth [i]s to cause one’s downfall. Withdraw as soon as your work is done.”); *id.* at 103 (“Do not exalt the worthy, so that the people shall not compete.”). *But cf.* *THE WAY OF LAO TSU* 8-9 (“Honour is felt to depend more on those who confer than on him who receives it; and we feel instinctively that the good is something proper to its possessor and not easily taken from him. Again, people seem to seek honour in order to convince themselves of their own goodness . . .”). *See also* *THE BHAGAVAD-GITA: KRISHNA’S COUNSELS IN TIME OF WAR* 68 (Barbara Stoller Miller trans., 1986) (“[A]ny man who acts with honor cannot go the wrong way.”); CICERO, *ON OBLIGATIONS* 96 (P.G. Walsh trans., 2000) (“[I]f we are born to embrace the honourable, and this must either be our sole pursuit (as Zeno thought) or at any rate must be accounted to have immeasurably greater weight than all else (as Aristotle argues), then the necessary conclusion is that the honourable is either the sole or the highest good. Now what is good is certainly useful, and so whatever is honourable is useful.”); MENCIVS bk. VI, pt. A, ¶ 16, at 259 (D.C. Lau trans., rev. ed. 2003) (“Men of antiquity bent their efforts toward acquiring honours bestowed by Heaven[] and honours bestowed by man followed as a matter of course.”). *But cf.* *THE BHAGAVAD-GITA: KRISHNA’S COUNSELS IN TIME OF WAR* 113 (Barbara Stoller Miller trans., 1986) (“Impartial to foe and friend, honor and contempt, cold and heat, joy and suffering, he is free from attachment.”) (note that English preserves the distinction between doing the honorable thing, and any public honors that may or may not be bestowed in response). *See also* FRANCIS BACON, *THE ESSAYS* 219 (John Pitcher ed., 1985) (“The winning of honour is but the revealing of a man’s virtue and worth without disadvantage.”); BOETHIUS, *THE CONSOLATION OF PHILOSOPHY* 32 (P.G. Walsh trans., 1999) (~524) (“What comment should I [Lady Philosophy] make on positions of honour and power, which you men in ignorance of true worth and power exalt to the heavens?”); MIGUEL DE CERVANTES, *DON QUIXOTE OF LA MANCHA* pt. 1, ch. 1, at 59 (Walter Starkie trans., 1957) (1964) (1605) (“He would follow their life, redressing all manner of wrongs and exposing himself to continual dangers, and at last, after concluding his enterprises, he would win everlasting honor and renown.”); THOMAS CLEARY, *CODE OF THE SAMURAI: A MODERN TRANSLATION OF THE BUSHIDO SHOSHINSU* 60 (1999) (~1700) (“A warrior performs distinguished military feats on the battleground and earns the highest honor only after accepting the fact that he is going to die.”) (for further commentary, see G. Cameron Hurst III, *Death, Honor, and Loyalty: The Bushido Ideal*, 40 *PHIL. E. & W.*, no. 4, Oct. 1990, at 511); *THE COMPLETE ESSAYS OF MONTAIGNE* bk. II, ch. 7, 276 (“Of Honorary Awards”) (Donald M. Frame trans., 1943) (2004) (1580) (“[S]ince these honorary awards have no other value and prestige than this, that few people enjoy them, in order to annihilate them we have only to be lavish with them.”); PIERRE CORNEILLE, *LE CID* (1636) (for a sense of some of the pathologies of a complex medieval European code of honor); G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 327 (Allen W. Wood ed., H.B. Nisbet trans., 1991) (“[V]alour for the sake of honour, and knightly valour are not its true forms. . . . Not personal courage but integration with the universal is the important factor here.”); THOMAS HOBBS, *LEVIATHAN* 59 (J.C.A. Gaskin ed., 2009) (“To value a man at a high rate, is to honour him; at a low rate, is to dishonor him.”); WILLIAM JAMES, *THE MORAL EQUIVALENT OF WAR* (1906), available at www.Constitution.org/wj/meow.htm; IMMANUEL KANT, *LECTURES ON ETHICS* 20 (Peter Heath ed. & trans., reprint ed. 2001) (“The pursuit of honour is more harmful to morality than any other passion. . . . I depart entirely from my inner state of moral goodness, and try to improve it with something external. . . . The pursuit of honour will perhaps be [entirely] suspended in beings somewhat higher than ourselves; with us, it is still useful as a counter to greater

immorality, and to stiffen our resolve against extreme laziness, and thus it is needed for the lesser morality of mankind.”); *id.* at 174 (“The love of honour we approve on all occasions in anyone, but the craving [of honour] we never do.”); G.W. LEIBNIZ, THEODICY 404 (E.M. Huggard trans., 1985) (2007) (1709) (one should honor not just power, but “wisdom, goodness, justice and other perfections”) (on Thomas Hobbes); THOMAS MALORY, LE MORTE D’ARTHUR: KING ARTHUR AND THE LEGENDS OF THE ROUND TABLE (Keith Baines trans., 1962) (for some extraordinarily exotic aspects of a version of medieval honor); BERNARD DE MANDEVILLE, INQUIRY INTO THE ORIGIN OF HONOR AND THE USEFULNESS OF CHRISTIANITY IN WAR 8 (first dialogue) (2003) (1732) (“When A performs an action which, in the eyes of B, is laudable, B wishes well to A, and to show him his satisfaction, tells him, that such an action is an honor to him, or that he ought to be honored for it.”); BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk. IV, § II, at 32 (Thomas Nugent trans., 1949) (1748) (“[T]hose things which honor forbids are more rigorously forbidden, when the laws do not concur in the prohibition; and those it commands are more strongly insisted upon, when they happen not to be commanded by law.”); FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 63 (Helen Zimmern trans., 2005) (1886) (“At present . . . throughout Europe the herding-animal alone attains to honours and dispenses honours . . .”); FRANCOIS DE LA ROCHEFOUCAULD, COLLECTED MAXIMS AND OTHER REFLECTIONS 63 (E.H. & A.M. Blackmore et al. trans., 2008) (1665) (“In warfare, most men expose themselves to danger enough to preserve their honour” and will not be prevailed upon to advance one step farther.); ARTHUR SCHOPENHAUER, ESSAYS AND APHORISMS 112 (R.J. Hollingdale trans., 1970) (1851) (“[W]hen a man feels tempted to commit a crime, . . . the first thing he thinks of in opposition to the idea is the punishment appointed for it and the probability of its falling upon him; the second consideration is the risk to his honour. On these two objections he will, if I am not mistaken, ponder for hours before religious considerations so much as occur to him.”); WILLIAM SHAKESPEARE, TROILUS AND CRESSIDA act 5, sc. 3 (“Life every man holds dear; but the [brave] man holds honour far more precious-dear than life.”); GEORG SIMMEL, CONFLICT & THE WEB OF GROUP AFFILIATIONS 164-65 (Kurt H. Wolff & Reinhard Bendix trans., 1964) (“[D]ifferent aspects of the individual can be subsumed under different codes of honor which reflect the different groups to which the person belongs simultaneously.”); *id.* at 165 (“[T]he feeling of honor suffices, in lieu of external methods of coercion, to make the individual conform to those norms which are required for the stability of the group.”); ST. AUGUSTINE, THE CITY OF GOD pt. I, bk. V, at 279 (Demetrius B. Zema & Gerald G. Walsh trans., abridged ed. 1958) (describing human honor as “smoke that weighs nothing”); Otto von Bismarck, *as quoted in* FRANK HENDERSON STEWART, HONOR 51 (1994) (“[M]y honor lies in no-one’s hand but my own.”) (1881); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 618 (J.P. Mayer ed., George Lawrence trans., 2000) (1848) (“The medieval nobility reckoned military valor as the greatest of all the virtues, and indeed let it take the place of many of them. . . . It was therefore natural to glorify courage above all other virtues. Every manifestation thereof, even at the expense of common sense and humanity, was therefore approved and often even ordained by the manners of the time.”); *id.* at 625 (“Honor among democratic nations, being less defined, is of necessity less powerful . . . [thus] the comparative weakness of honor in democracies.”); THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 31 (1953) (1899) (“Under this [unsophisticated] common-sense barbarian appreciation of the worth of honor, the taking of life—the killing of formidable competitors, whether brute or human—is honorable in the highest degree.”); BERNARD WILLIAMS, SHAME AND NECESSITY 102 (1993) (“[S]hame continues to work for us, as it worked for the Greeks, in essential ways. By giving through the emotions a sense of who one is and of what one hopes to be, it mediates between act, character, and consequence, and also between ethical demands and the rest of life.”); WILLIAM WORDSWORTH, *Poems Dedicated to National Independence and Liberty*, in THE COMPLETE POETICAL WORKS Sonnet 17 (1888) (“Say what is Honour?—’Tis the finest sense of ‘justice’ which the mind can frame, intent each lurking frailty to disclaim . . .”), available at <http://www.bartleby.com/145/wv354.html>.

the Court in *Alvarez* struck down the Stolen Valor Act³ on free speech grounds.⁴ The Stolen Valor Act, as apparently construed by the Court, criminalized most⁵ intentional lying⁶ claims to have been awarded any of a number of military medals,⁷ especially the Congressional Medal of Honor,⁸ whether the claimant thereby sought any material advantage or not.⁹ In any event, we shall treat the Stolen Valor Act as criminalizing what could be called pure lying in a discrete, extremely narrow,¹⁰ range of cases.

³ See 18 U.S.C.A. § 704 (West 2012) (codifying the Stolen Valor Act of 2005, 120 Stat. 3266) [hereinafter the Act].

⁴ See generally *Alvarez*, 132 S. Ct. at 2551 (plurality opinion); see also *id.* at 2551 (Breyer & Kagan, JJ., concurring). For most purposes, the plurality opinion in *Alvarez*, rather than the opinion of Justices Breyer and Kagan concurring in the judgment, would convey the holding of the Court, pursuant to the guidance of *Marks v. United States*, 430 U.S. 188, 193 (1977) and *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341-48 (1936) (Brandeis, J., concurring). Roughly put, the plurality strikes down the Stolen Valor Act on constitutional free speech strict scrutiny, whereas Justices Breyer and Kagan do so on a mid-level or intermediate scrutiny balancing test, despite the regulation's content-basis. For most purposes and in most contexts, the plurality's approach would seem "narrower" and less constitutionally dramatic. Justice Breyer, though interested in broad balancing, extends this particular speech only modest protection. See R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167 (1997), for further discussion of the idea of narrowness.

⁵ See *Alvarez*, 132 S. Ct. at 2547 (excluding theatrical performances explicitly, and presumably, by reasonable implication, obvious satire, humor, and other non-assertive instances); *id.* at 2557 (Alito, J., dissenting).

⁶ The plurality opinion is replete with explicit references both to (intentional) lying and to the far broader idea of a false claim. Justice Kennedy distinctively begins his opinion with the sentence "Lying was his habit." *Id.* at 2542 (plurality opinion). We address the plurality's multiple references both to lying and to false statements below. Justices Breyer and Kagan would read the Stolen Valor Act "as criminalizing only false factual statements made with knowledge and the intent that they be taken as true." *Id.* at 2552-53 (Breyer, J., concurring). The dissenting opinion of Justice Alito, joined by Justices Scalia and Thomas, similarly would restrict the scope of the Act to claims personally known to be false beyond a reasonable doubt. See *id.* at 2556-57, n.1 (Alito, J., dissenting). These two latter opinions, it might be noted, comprise five votes, in the context of the plurality's arguable equivocality, or lack of clarity, on the issue. See Thomas L. Carson, *Lying and Deception and Related Concepts*, in PHILOSOPHY OF DECEPTION 153 (Clancy Martin 2009), for an excellent book-length analysis of the ideas of lying and attempted deception. See, e.g., R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131; R. George Wright, *Electoral Lies and the Broader Problem of Strict Scrutiny*, 64 FLA. L. REV. 759 (2012).

⁷ See *Alvarez*, 132 S. Ct. at 2542; see also 18 U.S.C.A. § 704(b) (West 2012).

⁸ See *Alvarez*, 132 S. Ct. at 2543, 2548; see also 18 U.S.C.A. § 704(c) (West 2012).

⁹ See *Alvarez*, 132 S. Ct. at 2548.

¹⁰ Neither the Stolen Valor Act, nor *Alvarez*, nor for the most part this Article, addresses ideas of honor in any of the dozens of important historical and cultural contexts not directly bearing upon military honor. Among the closer legal conceptions not addressed would be, for example the idea, whether obsolete or not, of honor in a business fiduciary capacity. See, e.g., the classic case of *Meinhard v. Salmon*, 164 N.E. 545, 546 (1928) (Cardozo, C.J.) (a trustee as bound by "[n]ot honesty alone, but the punctilio of an honor the most sensitive"). The scope

Below, we work through the logic of the *Alvarez* plurality in some detail.¹¹ For convenience, though, we should at this early point suggest, without much explanation or defense, some of the Article's main conclusions.

First, it would have been better if somehow, perhaps through luck and judicial ingenuity, it had been possible to avoid deciding the *Alvarez* case on the constitutional free speech merits. Whether the Stolen Valor Act was to be struck down, or upheld, on free speech grounds, the case's potential for direct and indirect damage to the law of freedom of speech and to jurisprudence more generally exceeds its affirmative value.

This preferability of avoiding the free speech merits is not primarily because of any possible presumption that federal statutes should be considered constitutional,¹² or of the value of judicial "passive virtues."¹³ For whatever the classification might be worth,¹⁴ the Stolen Valor Act is ordinarily classified as a regulation of speech that is based on the content of speech.¹⁵ And whether justifiably or not, the typical rule seems to be that such content-based regulations of speech deserve, if anything, a presumption of unconstitutionality.¹⁶

of the Act is, in theory, subject to some complication. Lying claims to have been personally awarded a military medal may take place in a wide range of circumstances, and for various purposes. Conceivably, one might thus lie (rather than lie about, say, one's specialized military training) with the sole intention of intimidating a violent aggressor who is threatening an innocent third party. For most constitutional purposes, however, it will be sensible to view the scope of the lies prohibited by the Stolen Valor Act as vanishingly narrow, in the sense that, in relative terms, nearly all contemporary (military- and non-military-related) lies are on subjects utterly unrelated to the Stolen Valor Act. Virtually every conceivable subject could be lied about. Perhaps a denial that one exists in any form at all could qualify as an exception. See generally RENE DESCARTES, DISCOURSE ON METHOD AND RELATED WRITINGS (Desmond M. Clarke ed., 1999) (1637). But the Stolen Valor Act covers a nearly infinitesimally narrow range of possible and actual lies. Nor is it easy to imagine any political, social, or cultural idea that could not be as easily, cheaply, conspicuously, forcefully, or articulately made without violating the Act.

¹¹ See discussion *infra* Section II.

¹² See, e.g., *United States v. Morrison*, 529 U.S. 598, 607 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."). But see *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000) ("When the government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed.") (quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.")).

¹³ See, e.g., ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 199-200 (1962); Alexander M. Bickel, *The Supreme Court 1960 Term, Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519 (2012).

¹⁴ See R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006), for a generally somewhat skeptical view of the usefulness of the distinction between content-based and content-neutral restrictions of speech.

¹⁵ See *United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012) (plurality opinion).

¹⁶ See cases cited *supra* note 12; see also *Alvarez*, 132 S. Ct. at 2544 (quoting *Ashcroft v. ICLU*, 542 U.S. 656, 660 (2004)).

Instead, the desirability, in the ideal, of not deciding *Alvarez* on the free speech merits reflects several factors more or less distinctive to the circumstances of the *Alvarez* case. First, a statute that can be interpreted to prohibit only deliberately lying about having been personally awarded a military medal is, for all practical purposes, an extremely minimal, if not practically undetectable, restriction on the defendant's meaningful freedom of speech.¹⁷ It is difficult even to imagine circumstances under which someone wishes to make some more or less coherent political, social, or cultural point, and reasonably concludes that there is no equally articulate, inexpensive, conspicuous, or forceful way to make the point apart from deliberately lying about having personally been awarded a military medal.¹⁸ The realistic direct or indirect burden of the Stolen Valor Act on freedom of speech is thus vanishingly small. The Court majority, however, was in this case unwilling to wait for the rare instance in which free speech is significantly implicated under the Act.

Relatedly, the Stolen Valor Act's minimal speech impact is also remarkably even-handed, if not entirely neutral, as to the speaker's viewpoint on matters such as the value of military medals, military honor, honors in general, the process of awarding such medals, or any controversial military practice or policy. One could say that the Stolen Valor Act is literally based on speech content,¹⁹ but much more significantly, not based on the viewpoint or likely viewpoint, if any, taken by violators of the Act.

Even if we ignore the fact that political satire is outside the scope of the Act,²⁰ we can imagine the statute being violated by someone who covets the medal and envies its recipients; by someone who is indifferent to or disdainful of such medals and their recipients but who seeks to somehow benefit, tangibly or intangibly, from claiming to have been awarded such a medal; and even by someone who objects to some aspect of military policy or to the awarding of medals, who has perhaps not minimally reflected on alternative ways of expressing their point.²¹ It is difficult to see the Stolen Valor Act as realistically burdening or advantaging one viewpoint or another, systematically, in any meaningful public policy debate.²²

More basically, and again without much elaboration, the need to decide the *Alvarez* case on the free speech merits becomes even more elusive when we consider, as a second factor, the only minimal relation between typical violations of

¹⁷ See *supra* note 10.

¹⁸ See *id.*

¹⁹ See *supra* note 14.

²⁰ See *supra* note 5 and accompanying text.

²¹ See *supra* note 10 and accompanying text. The fact that the Stolen Valor Act apparently does not prohibit a deliberate lie to the effect that one was not awarded a medal seems constitutionally irrelevant.

²² It is barely conceivable that claiming, deliberately falsely, to have been personally awarded a medal could attract media attention not attainable through, say, conspicuously destroying a medal. But if it is precisely the illegality of the method of protest that attracts increased media attention, there is an odd instability in claiming both that the lie should be legally protected, and that the deliberate illegal lie was chosen in order to maximize media attention. If the lie is held to be legally protected, the assumed unique advantage of lying illegally in order to disseminate some message would presumably disappear.

the Act and the recognized basic reasons for constitutionally protecting speech in general. As the various Stolen Valor Act prosecutions²³ predictably suggest, the extent to which deliberate lying about one's having been awarded a military medal promotes any of the basic reasons for constitutionally protecting speech typically ranges from minimal, to zero, to, rather frequently, some negative magnitude. Roughly put, violating the Act typically has at best no free speech value.

Briefly, it is widely assumed that the basic purposes underlying the free speech clause include promoting the collective search for truth, of one sort or another; promoting one conception or another of the idea of character, self-fulfillment, or self-actualization; and promoting meaningful democratic self-government and appropriate checks on the exercise of official authority.²⁴

It is difficult to see the intentional lie that one has personally been awarded a particular military medal as meaningfully contributing, in a typical case, to any of the above basic purposes of protecting free speech. This remains true even if we take account of indirect effects, slippery slopes, vague boundaries, chilling effects, breathing spaces, imprecision of language, and the risks of judicial error. We can certainly imagine circumstances in which a lie in general could promote the discovery or dissemination of important truths, or some other cognizable value.²⁵ But to imagine, for example, that calculated mendacity specifically under the Stolen Valor Act typically promotes, say, the search for truth is to lose oneself in fanciful hypothetical cases.²⁶

Yet more briefly, the third general consideration suggesting the desirability of seeking to avoid deciding *Alvarez* on the free speech merits focuses on characterizing and somehow weighing the public interests arguably at stake in the Stolen Valor Act. Generally, those interests, whatever their weight, are neither tangible nor pecuniary. They are not generally amenable to empirical demonstration. The public interests at stake could be thought of as not only abstract, but as focused largely on certain presumed virtues.²⁷ To a substantial degree, the asserted public

²³ See, e.g., *United States v. Strandlof*, 667 F.3d 1146 (10th Cir. 2012); *United States v. Robbins*, 759 F. Supp. 2d 815 (W.D. Va. 2011); *United States v. Perelman*, 737 F. Supp. 2d 1221 (D. Nev. 2010).

²⁴ See generally JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., 1985) (1859); THOMAS I. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 1-4 (1966); FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989). On character in particular, see Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1571 (1999) (including in particular the trait of "respect for evidence," which hardly seems typically advanced by self-serving conscious lies with minimal social import).

²⁵ See generally Wright, *supra* note 6. Justice Breyer's opinion is also concerned that false statements in policy debates may hone or enliven our sense of the truth, and that some prohibitions on false statements—again, if not calculated personally-focused lies—may chill or inhibit valuable speech. See *Alvarez*, 132 S. Ct. at 2551, 2553.

²⁶ See GEORGE ORWELL, 1984 APPENDIX: THE PRINCIPLES OF NEWSPEAK 298 (Signed ed. 1977) (1949) for the intentional, systematic, institutionalized, and extreme case where the truth-telling/lying distinction is entirely abandoned.

²⁷ For broader introductions to aretaic or virtue ethics, see Julia Annas, *Virtue Ethics*, in THE OXFORD HANDBOOK OF ETHICAL THEORY ch. 18 (David Copp ed., 2007); Rosalind Hursthouse, *Virtue Ethics*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. ed. 2012),

interests are symbolic, expressive, identity-constitutive, or deontic, and thus especially difficult to measure, unless we want to say that to adopt and enforce the statute just is to thereby promote the relevant public interest, whatever its weight.

Worse, the public interests at stake center on one dimension of a particular conception of honor. The basic problem is that our contemporary legal culture, along with our broader culture, seems largely remote from this particular conception of honor. The proper weight of the relevant conception of military honor seems, at this point, hopelessly indeterminate. To grossly oversimplify, perhaps we, as a culture, fall somewhere between the above extremes of Falstaff²⁸ and Quixote²⁹ when we think about honor in the relevant sense. What weight should be given to considerations of honor in the relevant sense is thus grossly indeterminate. But this underlying severe indeterminacy is hardly sufficient grounds for developing a fully responsible Supreme Court constitutional analysis. And it is, further, entirely unclear why federal courts are better placed than Congress, or have even a genuine comparative advantage³⁰ over Congress, in assessing the value of promoting, to one degree or another, the particular notion of military honor in question.

The fourth and final general consideration that counsels against deciding *Alvarez* on the free speech merits is closely related to the indeterminacies of the various public interests arguably at stake in *Alvarez*. This consideration, however, focuses on the degree of “tailoring” or “fit” between the scope of the Act’s prohibitions and the promotion of one or more of the relevant public interests.³¹ How overinclusive or underinclusive, one might ask, is the Act, given its purposes? Or, perhaps more vaguely, how necessary is the Act, as drafted or as permissibly interpreted, to the more or less effective promotion of one or more of the Act’s purposes? Would a significantly less speech-burdensome regulation promote the Act’s purposes as well, or nearly as well?

This inquiry again presumes that the Act, as reasonably interpreted, does indeed significantly burden freedom of speech and the basic purposes for protecting freedom of speech, which again seems quite doubtful. What relevant point, argument, or political perspective can the defendant not easily, articulately, and fervently make, to an otherwise available audience, under the Act?

One might then wonder why we do not simply presume that if the Act has symbolic or expressive goals, the Act, unless it is somehow “inarticulate,” naturally

available at www.stanford.edu/entries/ethics-virtue. See also CHRISTINE SWANTON, *VIRTUE ETHICS: A PLURALISTIC VIEW* (2003). See generally, R. George Wright, *Constitutional Cases and the Four Cardinal Virtues*, 60 CLEV. ST. L. REV. 195 (2012).

²⁸ See SHAKESPEARE, *supra* note * and accompanying text.

²⁹ See CERVANTES, *supra* note 2, at 59.

³⁰ Even if courts are not absolutely better than Congress at this sort of assessment, it might be argued, however implausibly, that the courts hold, at least by some loose analogy, what the economists refer to as a Ricardian comparative advantage, and that this should be decisive. See generally Ralph Byrns, *Comparative Advantage and Absolute Advantage* (2011), www.unc.edu/depts/econ/byrns_web/Economicae/Essays/ABS_Comp_Adv.htm.

³¹ See Wright, *supra* note 6, for discussion. And again, at least by analogy, we should be asking here whether the courts hold a Ricardian comparative advantage over Congress or over expert administrative agencies in determining, or re-determining, such questions. See Byrns, *supra* note 30.

fulfills such goals. A Labor Day tribute typically expresses appreciation for labor. A largely symbolic or expressive statute could conceivably send a garbled or distorted message, but the sensible presumption would run the other direction.³² Any traditional tailoring inquiry may thus seem oddly misplaced.

More specific to *Alvarez* is the attempt to address tailoring questions in the context of the relevant conceptions of military honor. If courts in particular have understandable difficulties in mapping the interests, symbolic and non-symbolic, served by the Stolen Valor Act,³³ it is difficult to imagine how the courts could determine whether the Act is overly inclusive or underinclusive as to its purposes. The point is not merely that courts inevitably face difficulties in determining the presence or absence of narrow tailoring. Rather, the courts will face exceptional difficulties in non-arbitrarily deciding questions of tailoring regarding the exceptionally murky, perhaps unfamiliar,³⁴ subtle, and contested idea of military honor and its promotion. Under these rare circumstances, whether some alternative statutory or non-statutory scheme would in practice have a similar effect on the various complex and partly intangible aspects of military honor is inescapably quite speculative. For the courts to proceed first through all of the preceding steps, and then to attempt a narrow tailoring analysis, amounts to compounded judicial speculation, of a sort that the social theorist Michael Oakeshott referred to—critically—as “rationalism.”³⁵

These four general considerations, jointly, thus suggest that if at all possible, *Alvarez* and similar Stolen Valor Act cases should not have been decided on the

³² By loose analogy, an official's pronouncing persons, under the prescribed conditions, to be thereby married may indeed constitute them as married. See generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* ch. 1 (2d ed. 1975) (1955) (discussing “performatives”).

³³ Consider, in the extreme, the Falstaff versus Quixote conflict. SHAKESPEARE, *supra* note *; CERVANTES, *supra* note 2, at 59; see also *supra* note 2 and accompanying text (considering the variously diverse understandings of the scope of military honor on display).

³⁴ See FRANK HENDERSON STEWART, *HONOR* 9 (1994) (“[H]onor no longer plays much part in our thinking.”); Whitley Kaufman, *Understanding Honor: Beyond the Shame/Guilt Dichotomy*, 37 *SOCIAL THEORY & PRAC.* 557, 557 (2011) (“For most of the modern era, the idea of honor as a code of conduct has been treated as at best a historical curiosity and at worst a primitive and violent value system.”); Sharon R. Krause, *Review of Kwame Anthony Appiah, The Honor Code*, 25 *ETHICS & INT’L AFF.* 475, 475 (2011) (“The language of honor is apt to strike the modern reader as quaint, even obsolete, if not downright pernicious.”). Written use of the (obviously ambiguous) word “honor” (or “honour”), along with several cognates and associated terms, including “valor,” “valiant,” “shameful,” and “disgraceful,” seems to be flat, if not trending downward. The reader is invited to enter these and related forms into the GOOGLE NGRAM VIEWER, <http://books.google.com/ngrams/graph?content>.

³⁵ MICHAEL OAKESHOTT, *RATIONALISM IN POLITICS AND OTHER ESSAYS* I-4 (reprint ed. 1984) (1947); see *id.* at 2 (referring in particular to “the rapidity with which [the Rationalist] reduces the tangle and variety of experience to a set of principles which he will then attack or defend only upon rational grounds,” and to the Rationalist as incapable of “accepting the mysteries and uncertainties of experience without any irritable search for order and distinctiveness”). Relatedly, Friedrich Hayek points to the unrealism of assuming that “we possess all the relevant information, [and that we] can start out from a given system of preferences and . . . we command complete knowledge of all available means.” F.A. Hayek, *The Use of Knowledge in Society*, 35 *AM. ECON. REV.* 519, 519 (1945).

constitutional free speech merits. As it happened, of course, *Alvarez* was in fact decided on just those grounds.

And that is regrettable. But the especially interesting point is that even if *Alvarez* is to be decided on free speech grounds, the four considerations enumerated above do not in the slightest lose their importance. As we now illustrate in discussing the *Alvarez* plurality, these four considerations should, in a different sense, still be thought of as crucial. The above four considerations counseling against deciding the case on free speech grounds also operate, collectively, to clearly suggest that on the merits of the free speech claim, *Alvarez* was wrongly decided. Our four considerations thus also suggest that, as reasonably interpreted, the Stolen Valor Act should not have been judicially struck down.

II. THE *ALVAREZ* CASE IN PERSPECTIVE

A. *A Narrow Sub-Class of Lies Versus a Broad Class of False Statements*

Justice Kennedy's opinion for the plurality in *Alvarez* combines classic free speech rhetoric, drawn from subversive advocacy cases,³⁶ with an application of what might be called "rationalism."³⁷ The judicial formulas applied by Justice Kennedy in *Alvarez* do not map well onto the actual terrain of the *Alvarez* case and its facts. If, as has been claimed, generals have a tendency to re-fight the previous war,³⁸ the Court as well has a tendency to deform new kinds of free speech cases in an attempt to fit them into favored, if not especially relevant, historical templates.

One of the crucial moves in *Alvarez* is to characterize the category of speech being restricted not as deliberate lies told merely about one's having been awarded a military medal, but much more broadly, as something like any and all false statements in general.³⁹ While it is indeed true that all lies on a particular narrow

³⁶ As though the Act tended to suppress some disfavored political view, the plurality, re-fighting the Court's historically most institutionally glorious battles against the censorship of unpopular ideologies, invokes within the same paragraph both Justice Brandeis's historic endorsement of a "more speech" remedy and Justice Holmes's legendary "marketplace of ideas" metaphor. See *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) ("[I]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." (quoting *Whitney v. California*, 274 U.S. 256, 277 (1927) (Brandeis, J., concurring)); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.").

³⁷ OAKESHOTT, *supra* note 35, at 2.

³⁸ See, e.g., G. TERRY MADONNA & MICHAEL YOUNG, *FIGHTING THE LAST WAR* (June 4, 2002), available at <http://www.fandm.edu/politics/politically-uncorrected-column/2002-politically-uncorrected/fighting-the-last-war>.

³⁹ Justice Breyer's opinion sensibly construes the statute to regulate only intentional, personal lies as to entitlement to military medals, but then goes on to see this as a remarkably broad field of public and private discourse, including cases where the necessary mens rea cannot be shown, as well as cases of barroom banter. See *Alvarez*, 132 S. Ct. at 2551, 2555 (Breyer, J., concurring). Justice Scalia preferred the lowest level of descriptive generality realistically applicable in the fascinating visitation rights case of *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). See Jack Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613 (1994), for discussion in this context of judicially settling upon one level of descriptive generality or another.

subject also fall within the immensely broad category of "false statements,"⁴⁰ treating the issue as whether false statements in general—without more⁴¹—should be prohibitable drains the case of most of its distinctiveness, meaning, and interest value.

We can all think of many different kinds of false statements—even deliberate lies—that should be immune from legal prohibition, based on the speaker's intent and the direct or indirect consequences. Some false statements may be necessary to ward off an immense evil to innocent third parties.⁴² Other false statements, at little social cost, promote sheer decency and civility in social life.⁴³ As to the latter, consider a public declaration that a new outfit makes a beloved elderly friend or relative look "wonderful," where that assessment is not actually entertained. Yet other false statements should be protected, as in the case of good faith reasonably researched critiques of official conduct, lest we discourage the optimal level of public scrutiny and debate over the operations of government.⁴⁴

Treating the *Alvarez* case as though it were a matter of whether false statements in general can be prohibited thus makes the case substantially easier than it is, and skews the outcome. And to then assume, as the Court occasionally seems to do, that the Act penalizes false speech "without more," or with no further judicially cognizable harm, such as fraud, theft, or obtaining improper pecuniary benefits,⁴⁵ further begs the constitutional question against the statute. If we find some meaningful substantive, symbolic, or expressive public interest being promoted by the Act, why would that interest, whatever its weight, not count as "more," beyond merely an arbitrary statutory distaste for lying, apart from any adverse public consequences?

B. Content, Viewpoint, and Genuine Burden on Free Speech

The *Alvarez* plurality then characterized the Stolen Valor Act as a content-based restriction on speech,⁴⁶ which in some obvious and mechanical sense it clearly is.

⁴⁰ See, e.g., *Alvarez*, 132 S. Ct. at 2544-45 (plurality opinion) (expanding the judicial focus to false statements in general). See, e.g., THOMAS L. CARSON, LYING AND DECEPTION: THEORY AND PRACTICE 30 (2010), for discussion in this context of judicially settling upon one level of descriptive generality or another. Whether a lie must also include some sort of realistic intent to deceive is more controversial. See *id.*; Roy Sorensen, *Bald-Faced Lies! Lying Without the Intent to Deceive*, 88 PAC. PHIL. Q. 251, 252 (2007).

⁴¹ Distinguishing prior cases involving false statements associated with some distinct cognizable legal harm, the plurality asserts that "[o]ur prior decisions have not confronted a measure, like the Stolen Valor Act, that targets falsity and nothing more." *Alvarez*, 132 S. Ct. at 2545 (emphasis added).

⁴² See Wright, *supra* note 6 (discussing Shoah and Fugitive Slave cases).

⁴³ See *United States v. Alvarez*, 638 F.3d 666, 674-75 (9th Cir. 2011) (Kozinski, J., concurring) (denying rehearing en banc), for a listing in the lower court opinion of Judge Alex Kozinski.

⁴⁴ See, e.g., *Alvarez*, 132 S. Ct. at 2545 (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 280 (1964) (providing for constitutional breathing space for merely negligently false claims of fact, to minimize chilling effects on robust public debate)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 2543, 2544.

Prohibiting any and all criticism of the military, of military policy, or of medal awards or the process of awarding them would, however, be subjected to precisely the same test.⁴⁷ Content-based regulations generally evoke strict judicial scrutiny, with the burden on the government to show the effective promotion of a compelling government interest by necessary or narrowly tailored means.⁴⁸ But in practice, not all content-based restrictions on speech are created equal, or have even remotely analogous effects on the freedom of speech.

As we have already seen,⁴⁹ *Alvarez*, and the typical Stolen Valor Act cases, if the Act is reasonably interpreted, do not present considerations of legal right, interest, or policy that would justify the application of a stringent strict scrutiny test. As we have seen, *Alvarez*, and typical cases under the Act, clearly do not meaningfully implicate any of the significant reasons⁵⁰ for specially protecting speech in the first place.⁵¹ It is difficult to see why a demanding content-based strict scrutiny test is appropriate where the logic and interests underlying such a test are inapplicable.

In general, the Act did not impose any significant burdens on *Alvarez* or on the typical defendant with respect to any minimally coherent social point, view, argument, or perspective, whether factual or normative, that they might wish to convey, with regard to any recognizable subject.⁵² Suppose a potential defendant wished to make some social point, either critically or supportively, about military medals, honor, a culture of honor, gender bias, military aggression, pacifism, individual or collective public guilt, contemporary imperialism, militarism, neo-colonialism, hierarchy, or essentially any other topic. How does the Stolen Valor Act, appropriately interpreted, raise the costs, or impair the use of the obvious channels, in doing so? The Act penalizes a remarkably narrow class of personalized, self-serving lies, but leaves policy debate in all meaningful respects essentially unaffected.

There is thus simply no pragmatic value—no worthwhile purposes—in subjecting the Act to a rigorous strict scrutiny test. To adapt the language of the Supreme Court and of Seventh Circuit Judge Richard Posner from a different First Amendment context: “The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent.”⁵³ The typical violator of the Act as sensibly interpreted will be making no purportedly

⁴⁷ See Wright, *supra* note 14, at 333.

⁴⁸ See *Alvarez*, 132 S. Ct. at 2544, 2549.

⁴⁹ See *supra* notes 24-35 and accompanying text.

⁵⁰ See *supra* note 24 and accompanying text.

⁵¹ See *supra* notes 24-26 and accompanying text.

⁵² See *supra* notes 17-23 and accompanying text.

⁵³ *Lee v. Weisman*, 505 U.S. 577, 598 (1992) (quoting *Sch. Dist. v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)); *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 877 (7th Cir. 2012) (en banc) (Posner, J., dissenting) (citing *Brandt v. Bd. of Educ.*, 480 F.3d 460, 465 (7th Cir. 2007) (determining that public school student’s shirt with a contextualized protest meaning did not enter into the competitive marketplace of ideas or amount to the expression of ideas or opinions in a constitutionally cognizable sense)). See generally R. George Wright, *What Counts as “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217 (2010).

socially meaningful point beyond, at best, some claustrophobically narrow expression of narcissistic,⁵⁴ self-focused,⁵⁵ calculated mendacity.

C. *Slippery Slopes, Principles, and Reasonable Judgment*

It is possible to imagine circumstances—whether subject to likely prosecution or not—under which, say, an innocent person is credibly informed that a bomb will be detonated in a crowded public space unless the innocent party publicly claims, falsely, to have been awarded a military medal. Beyond any defense of necessity or duress, we would presumably not want to burden this victim with a misdemeanor offense. We can thus at least imagine a hard case under the Act, whether free speech-related or not.

Some thought, relatedly, should certainly be given to what other statutes might also have been held constitutional, in the future, if the Stolen Valor Act had been upheld as against a free speech claim. There are, in the more general decisional law, occasionally some treacherously slippery slopes.⁵⁶ Is it not possible that upholding the Act could have licensed courts to similarly uphold other statutes, where there might be real burden on free speech? There will, admittedly, never be a concrete, invariably sound, non-manipulable, non-abusable, unambiguous public rule allowing judges to say which cases are more like a typical Stolen Valor Act case, and which cases should instead be distinguished.

The plurality in fact argues that:

Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper,⁵⁷ would endorse government authority to compile a list of subjects about which false statements are punishable.⁵⁸ That governmental power has no

⁵⁴ Narcissism, in its broadest senses, does not seem currently undersupplied. See, e.g., CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM: AMERICAN LIFE IN AN AGE OF DIMINISHING EXPECTATIONS* (rev. ed. 1991); JEAN M. TWENGE & W. KEITH CAMPBELL, *THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT* (paperback ed. 2010).

⁵⁵ See R. George Wright, *The Constitutional Status of Speech About Oneself*, 59 CLEV. ST. L. REV. 489 (2012), for discussion of the relation between speech for constitutional purposes and a subject-matter focus on the self.

⁵⁶ See generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985). See also *Jailbert Leasing, Inc. v. Mass. Port Auth.*, 449 F.3d 1, 5 (1st Cir. 2006).

⁵⁷ The plurality actually raises the “whispered” assertion scenario twice. See *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012) (plurality opinion). One cannot help but note that, say, a whispered slander, a whispered blackmail threat, and whispered fraud, where otherwise actionable, do not gain free speech protection because of their whispered status.

⁵⁸ Actually there do seem to be subjects lying about which can expose one to misdemeanor liability. Or at the very least, falsely claiming, even in a whisper, to be an Internal Revenue Service (IRS) or Federal Bureau of Investigation (FBI) agent is presumably prosecutable, whether one extracts money from one’s auditors or not, as the plurality recognizes. *Id.* at 2546. To distinguish such cases from the Stolen Valor Act, the plurality suggests that such criminal prohibition serves a public interest in reputation and dignity. See *id.* Apparently, such interests are not thought to be paralleled in the Stolen Valor Act cases. Consider also the case of perjury with no effect on the verdict.

clear limiting principle.⁵⁹ Our constitutional tradition stands against the idea that we need Oceania's⁶⁰ Ministry of Truth.⁶¹

Each of these claims, as the corresponding footnotes below suggest, is contestable. But at the end of the day, even the most sensitively drawn rule or principle separating protected from unprotected speech much inevitably run out. Rather than attribute free speech value to particular narrow, concrete, self-focused, easily limited categories of speech, quite apart from viewpoint, where such free speech value is clearly lacking, courts should instead rely first upon a minimal degree of legislative prudence and discretion, and then if necessary adopt the best distinctions available.

On this point, we can again draw from Judge Posner's observation in a separate first amendment context: "the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."⁶² Ultimately, once our best available principles have provided all the guidance they can, we have no choice but to apply our faculties of judgment,⁶³ in seeking to apply the general principle to the particular case,⁶⁴ as the philosopher Immanuel Kant reminds us.⁶⁵ If and when, say, a statute makes diplomatic fibbing to an obtuse would-be suitor into a crime, such a case can then be adjudicated on one grounds or another, whether those grounds might be of some constitutional nature or otherwise

If courts try to avoid exercising practical judgment, they merely push the inescapable problem a level deeper, without resolving it. There is no clear principle to tell us what counts as speech for constitutional purposes in the first place, and what does not.⁶⁶ We must apply our best judgment, with limited guidance of principle, in drawing this distinction. If we refuse to draw the best such distinction we can, avoiding or otherwise managing any slippery slopes where we detect them, we are driven to either count literally everything as speech or else nothing as speech. Judgment on the basis of developing principles is realistically inescapable.

The impulse to avoid exercising sensible judgment, as distinct from rule-application, even where the rule is evidently inappropriate, may help account for the

⁵⁹ The absence of a concrete, articulable, clear "limiting principle" inherent in some rule or case holding, does not seem to take the exercise of state police powers, up until some constitutional conflict is thought to arise, outside of the rule of law. See, e.g., *Keystone Bituminous Coal Co. v. DeBenedictus*, 480 U.S. 470 (1987); see also *South Carolina v. Barnwell Bros., Inc.*, 303 U.S. 177 (1938).

⁶⁰ Whether Oceania's Ministry of Truth determines, on sound or unsound grounds, which subjects are such that (genuinely) false statements on those subjects should be prohibitable is subject to doubt.

⁶¹ *Alvarez*, 132 S. Ct. at 2547.

⁶² *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 877 (7th Cir. 2012) (en banc) (Posner, J., dissenting).

⁶³ See IMMANUEL KANT, *EDUCATION* 71 (Annette Churton trans., Ann Arbor paperback ed. 1960) (1803).

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See generally *Wright*, *supra* note 53.

plurality's approach in another respect. The plurality, as we have seen, describes the relevant speech category in *Alvarez* with remarkable breadth, as "false speech,"⁶⁷ apparently in general.

On the basis of this unduly broad characterization,⁶⁸ the *Alvarez* plurality then endorses⁶⁹ the idea that the list of viewpoint-neutral categories of literal speech that are outside the scope of the free speech clause's protection is, largely,⁷⁰ historically closed.⁷¹ The plurality imagines that the argument for not stringently constitutionally protecting violations of the Stolen Valor Act relies on a balancing of the costs and benefits of the Act.⁷²

In reality, while nearly any argument can be cast in cost-benefit terms, our argument has instead emphasized that typical Stolen Valor Act cases simply do not significantly implicate the basic reasons for protecting speech,⁷³ and closely relatedly, that there will typically be no meaningful burden on the defendant's freedom of speech.⁷⁴ This is more a matter of the logical inapplicability of the free speech clause than of an attempt to broadly balance interests. The free speech clause serves particular interests and purposes; it is not an idol to which we must sacrifice our interests and purposes.

D. *Issues of Government Interests and Tailoring in Alvarez*

The *Alvarez* plurality then tests the Stolen Valor Act by strict scrutiny.⁷⁵ As the plurality will eventually find a lack of sufficiently narrow tailoring for the Act to survive,⁷⁶ the plurality's discussion of any public interest or interests underlying the Act is, in a sense, ultimately inconsequential. But it is also fair to say that the plurality's discussion of possible public interests underlying the Act does not fully reassure the reader that the Court has reflected more deeply on ideas of military honor, or of military honor in our culture, than has the Congress that enacted the legislation in question. In this case, the analyses of the interests at stake and of the question of narrow tailoring are actually largely inseparable.

⁶⁷ See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2546-47 (2012) (plurality opinion); see also *supra* notes 6, 10, 38-45 and accompanying text.

⁶⁸ See discussion *supra* Part II.A.

⁶⁹ See *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010) and *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2734 (2011), for prior statements. See R. George Wright, *Judicial Line-Drawing and the Broader Culture: The Case of Politics and Entertainment*, 49 SAN DIEGO L. REV. 341 (2012), for criticism of this logic. See also Wright, *supra* note 31, at 764-66.

⁷⁰ See *Alvarez*, 132 S. Ct. at 2547 (citing *Stevens*, 130 S. Ct. at 1586 and *Brown*, 131 S. Ct. at 2734) (holding open the possibility of historical but as yet judicially unrecognized exceptions to this rule of closure).

⁷¹ See *Alvarez*, 132 S. Ct. at 2544, 2547.

⁷² See *id.*

⁷³ See *supra* notes 20-26 and accompanying text.

⁷⁴ See *supra* notes 20-26 and accompanying text.

⁷⁵ See *Alvarez*, 132 S. Ct. at 2548-49, 2551.

⁷⁶ See *id.* at 2548-51.

The plurality, again, can afford to stipulate to the existence of a compelling government interest underlying the Act, as the Act is independently struck down on grounds of lack of narrow tailoring.⁷⁷ But there is, nonetheless, an unnerving lack of precision, clarity, and consistency in the plurality's discussion of the level or weight of the public interest at stake.⁷⁸ The plurality first characterizes the underlying interests as "not without significance."⁷⁹ This initial, perhaps only preliminary description does not seem especially enthusiastic, let alone potentially constitutionally sufficient.

The plurality then refers to the military medal award program as serving an "important public function."⁸⁰ This sounds like an upgraded characterization. But typically, important government interests may suffice only for mid-level scrutiny,⁸¹ and not under the more rigorous strict or exacting scrutiny standards applied to content-based regulations of speech.⁸²

More ambiguously, the plurality then refers to the "interest in protecting the integrity of the Medal of Honor [in particular as] beyond question."⁸³ Whether this means the interest is merely legitimate, or that it is constitutionally sufficient, is unclear, but this uncertainty then appears to be rendered moot by the plurality's apparent recognition of the government's interests, jointly or individually, as "compelling."⁸⁴ In turn, the plurality's reference to the government's interest as "compelling" is again itself rendered moot by the plurality's later finding of a lack of sufficient narrow tailoring.⁸⁵

Concretely, the plurality recognizes a number of relevant government interests. In particular, the plurality seems to endorse "recognizing and expressing gratitude for acts of heroism and sacrifice in military service,"⁸⁶ fostering "morale, mission accomplishment and esprit de corps among service members,"⁸⁷ promoting "a virtuous ambition . . . as well as . . . every species of military merit,"⁸⁸ reinforcement

⁷⁷ *See id.*

⁷⁸ *See id.* at 2548-49.

⁷⁹ *Id.* at 2548.

⁸⁰ *Id.*

⁸¹ *See, e.g.,* *United States v. VMI*, 518 U.S. 515, 533 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980); and *Craig v. Boren*, 429 U.S. 190, 197 (1976), for examples of this standard mid-level scrutiny terminology, under which "important" governmental interests are linked to a mid-level equal protection test.

⁸² *See, e.g., Alvarez*, 132 S. Ct. at 2548; *Wright, supra* note 14.

⁸³ *Alvarez*, 132 S. Ct. at 2549.

⁸⁴ *Id.*

⁸⁵ *See id.* at 2549-51.

⁸⁶ *Id.* at 2548. *See* ALLEN MIKAELEIAN, *MEDAL OF HONOR: PROFILES OF AMERICA'S MILITARY HEROES FROM THE CIVIL WAR TO THE PRESENT* 1-18 (2002), for a sense of exemplary cases, including the exceptional case of Civil War physician Dr. Mary Walker.

⁸⁷ *Alvarez*, 132 S. Ct. at 2548.

⁸⁸ *Id.*

of "the pride and national resolve that the military relies upon to fulfill its mission,"⁸⁹ and "the integrity of the military honors system in general, and the Congressional Medal of Honor in particular."⁹⁰

The plurality does not make it entirely clear whether any single one, or any subset, of these interests rises to the level of the "compelling." We might uncontroversially say that successful national defense, in general, amounts to a compelling public interest. Whether any of the more specific and more instrumental interests listed above are, themselves, also compelling is less clear. Some seem to involve contributing to national defense, but to an apparently unspecified and unprovable degree. This murkiness of the interests at stake, and of their boundaries, must also affect any narrow tailoring analysis.

It is also possible to argue that the above interests rise to the level of the compelling, but only when they are taken together, and added up. This interpretation may initially seem more appealing. But it is not hard to detect among the above interests a great deal of overlap. Courts must avoid double-counting of interests.

Crucially, to the extent that the above interests do not overlap, and are compelling only when taken jointly, any test for narrow tailoring inevitably becomes unmanageably complex and unavoidably arbitrary. How likely is it that any statute that effectively promotes, say three or four distinct and jointly sufficient public interests will also be genuinely narrowly tailored as to all of them? This would apparently require being neither overinclusive nor underinclusive with respect to, presumably, all three or four of the distinct and jointly necessary interests at stake. Realistically, few statutes in such cases will really be so narrowly tailored; any such statute would inevitably be thus constitutionally vulnerable. Some courts, however, out of sympathy might choose to conclude otherwise.

In any event, we must take account of the controversy associated with the idea of military honor, its value, its perceived or actual consequences, and its possible irreplaceability. Only then can we appreciate how artificial, speculative, and ultimately arbitrary the plurality's evaluation of the degree of statutory "effectiveness," the weight of the various interests, and the degree of tailoring must unavoidably be. And certainly, legal rules regarding personal references to one's having been awarded a military medal are far narrower in scope than the idea of military honor in general.

Ultimately, judicial modesty and a general sense of institutional "comparative advantage" would counsel against the courts' taking some definitive stance on these unmanageable questions. At the very least, and as the dissenters in *Alvarez* observe, courts should be reluctant to second-guess Congress on such matters where the free speech or other constitutional interests in doing so are minimal at best.⁹¹ The Court's

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ See *supra* notes 17-26 and accompanying text. Justice Alito's dissenting opinion observes that "[b]oth the plurality and Justice Breyer argue that Congress could have preserved the integrity of military honor by means other than a criminal prohibition, but Congress had ample reason to believe that alternative approaches would not be adequate." *Alvarez*, 132 S. Ct. at 2537, 2559 (Alito, J., dissenting). This judgment as to the weight of the evidence on effectiveness, viable alternatives, and narrow tailoring is in its own way just as speculative and contestable as the plurality's contrary conclusion. Rather than reach any conclusion on the merits of the question of narrow tailoring—which in this case is nearly

efforts in doing so result, at a minimum, in less attention by the Court to other matters, including other issues and other cases, where the Court may hold a comparative advantage over Congress and its legislative staff.

III. CONCLUSION: JUDICIAL MODESTY IN CIRCUMSTANCES OF UNUSUAL UNCERTAINTY AND LOW RISK TO CONSTITUTIONAL VALUES

Judicial modesty in *Alvarez* makes perfect sense in the context of a contemporary culture with diverse strains of thought and preference on the subject of military honor, ranging, as we have suggested, at least from Falstaff⁹² to Quixote.⁹³ The contemporary political philosopher Charles Taylor has briefly summarized the history of one side of our ambivalence toward military honors:

[t]he ethic of honour and glory, after receiving one of its most inspiring expressions in Corneille, is subjected to a withering critique in the seventeenth century. Its goals are denounced as vainglory and vanity, as the fruits of an almost childish presumption. We find this with Hobbes as well as with Pascal, La Rochefoucauld, and Moliere. But the negative arguments in these writers are not new. Plato himself was suspicious of the honour ethic, as concerned with mere appearances. The Stoics rejected it; and it was denounced by Augustine as the exaltation of the desire for power. . . .⁹⁴

The inclination to disparage military-related honor in particular was, of course, hardly exhausted in the seventeenth century.⁹⁵

Another contemporary political philosopher, Kwame Anthony Appiah, takes a more ambivalent, if not warily favorable, approach to military honor. Professor Appiah writes that

[t]hose who train our armies claim that military honor is essential in both motivating and civilizing the conduct of warfare. . . . I am inclined to believe them. But the trouble, of course, is that sentiments [of military honor]—and what even moderately sensitive soul does not feel the temptation of responding to the call of those bugles?—make us more likely to go to war.⁹⁶

hopelessly complex—the Court should have taken an agnostic approach, and deferred to the apparently reasonable if fallible judgment of Congress, given the minimal free speech interests genuinely at stake.

⁹² See SHAKESPEARE, *supra* note *.

⁹³ See CERVANTES, *supra* note 2, at 59.

⁹⁴ CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 214 (1989); see also Kaufman, *supra* note 34, at 557; Krause, *supra* note 34, at 475.

⁹⁵ See, e.g., *supra* note 2 and accompanying text.

⁹⁶ KWAME ANTHONY APPIAH, *THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN* 190 (2010); see James Bowman, *The Right Thing: A Philosopher Misunderstands Humanity's Code*, WKLY. STANDARD, Jan. 17, 2011, available at www.jamesbowman.net/articleDetail.asp?pubID=2076, for a review of Professor Appiah's book.

And of course, there are more unambiguously favorable assessments of the value of military and related forms of honor as well.⁹⁷ Among contemporary writers, Alexander Welsh⁹⁸ and Sharon Krause⁹⁹ both note that honor can inspire the valuable subordination, or even the complete sacrifice, of one's most basic personal interests, potentially for the community's greater good.¹⁰⁰

The range of plausible evaluations of military honor, and of the necessity for particular formal systems thereof, varies widely. What would be implausible is the claim that what is necessary in order to cost-effectively assess such matters is legal training, a judicial temperament, and exposure to a judicial record. Assessing such matters is ultimately a matter of the best cost-effective practical wisdom¹⁰¹ and prudential¹⁰² judgment a culture, or some particular institution, can bring to bear.

In the absence of any serious free speech values meaningfully hanging in the balance,¹⁰³ the Court should have sought to avoid deciding *Alvarez* on constitutional free speech merits.¹⁰⁴ If the latter course was indeed unavoidable, the Court should have acknowledged its lack of any decisive comparative advantage over Congress in judging such contestable matters, and deferred to any reasonable congressional regulatory scheme.¹⁰⁵ An appropriate judicial modesty, in the absence of any significant countervailing values, would have discouraged any more ambitious judicial undertaking.

⁹⁷ See, e.g., *supra* note 2 and accompanying text.

⁹⁸ ALEXANDER WELSH, *WHAT IS HONOR? A QUESTION OF MORAL IMPERATIVES* (2008).

⁹⁹ Sharon Krause, *The Politics of Distinction and Disobedience: Honor and the Defense of Liberty in Montesquieu*, 31 *POLITY* 469 (1999).

¹⁰⁰ See WELSH, *supra* note 98, at 4 ("honor . . . can . . . induce a sense of obligation that overrides both immediate desires and long term interests"); Krause, *supra* note 99, at 471 ("honor . . . cannot be reduced to self-interest, even self-interest well-understood, because honor may motivate the sacrifice of one's most fundamental interest, life itself") (sympathetically expounding Montesquieu's position); see also *id.* at 477 (honor "reminds us that there is more to being human than getting by"); *id.* at 494 ("democratic alternatives to honor, such as self-esteem, dignity, and recognition, cannot replace honor"). See Douglas MacArthur, *Sylvanus Thayer Award Acceptance Address: Duty, Honor, Country* (May 12, 1962), www.americanrhetoric.com/speeches/douglasmacarthurthayeraward.html, for an even more enthusiastic defense of the value of military honor.

¹⁰¹ See, e.g., Rosalind Hursthouse, *Practical Wisdom: A Mundane Account*, 106 *PROC. OF THE ARISTOTELIAN SOC'Y* 283 (2006).

¹⁰² See, e.g., J.D. Mabbott, *Prudence*, 36 *PROC. OF THE ARISTOTELIAN SOC'Y* 51, 56 (Supp. vol. 1962); Nathan Rotenstreich, *Prudence and Folly*, 22 *AM. PHIL. Q.* 93 (1985).

¹⁰³ See *supra* notes 23-26 and accompanying text; see also discussion *supra* Part II.B.

¹⁰⁴ See *supra* notes 13-35 and accompanying text.

¹⁰⁵ See discussion *supra* Part II.

