Washington and Lee University School of Law

Washington and Lee University School of Law Scholarly Commons

Scholarly Articles | Faculty Scholarship

2012

Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez

Rodney A. Smolla

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlufac

Part of the Constitutional Law Commons, and the First Amendment Commons

Recommended Citation

Rodney A Smolla, Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez, 76 Alb. L. Rev. 499 (2012).

This Article is brought to you for free and open access by the Faculty Scholarship at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Scholarly Articles by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

CATEGORIES, TIERS OF REVIEW, AND THE ROILING SEA OF FREE SPEECH DOCTRINE AND PRINCIPLE: A METHODOLOGICAL CRITIQUE OF *UNITED STATES V. ALVAREZ*

*Rodney A. Smolla**

I. INTRODUCTION

In *United States v. Alvarez*,[1] the Supreme Court struck down the Stolen Valor Act of 2005,[2] in a splintered decision with no five-Justice majority.[3] The failure of five Justices to agree on a single rationale, rather than the merits of the case itself, is the principal focus of this article.

The modest hypothesis of this article is that the Supreme Court has lacked doctrinal discipline in adhering to any consistent and clear set of doctrinal principles when analyzing content-based regulation of speech. This lack of disciplined consistency, highly visible in *Alvarez*, diminishes stability and predictability in First Amendment analysis. Such instability poorly serves legislative bodies, by diminishing the quality of constructive guidance as to what forms of speech regulation are or are not constitutional. The instability also handicaps lower courts tasked with judicial review of speech regulation.

Setting the formulaic world of legal doctrine aside, *Alvarez* offers a good rough and ready guide to three very different judicial sensibilities regarding the preferred position of freedom of speech in the constitutional hierarchy. Visible in the spread of the three opinions in *Alvarez* are (1) the view, represented by Justice Kennedy's plurality opinion, that freedom of speech occupies an exalted position, rarely trumped by other societal values,[4] (2) the view, represented by Justice Breyer's concurrence, that freedom of

* President, Furman University.

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

[2] 18 U.S.C. § 704 (2006).

[3] *Alvarez*, 132 S. Ct. at 2542 (Kennedy, J., plurality opinion).

[4] *Id.* at 2542–51.

speech deserves some elevated stature in the constitutional scheme, but not a stature so elevated that it cannot be overtaken by well-crafted laws vindicating other significant society values,[5] and (3) the view, represented by Justice Alito's dissent, that speech may be divided into that speech which serves some plausible positive purpose, which is deserving of constitutional protection, and that speech which advances no legitimate end worth crediting, yet is highly offensive to good order and morality, which is not deserving of any protection.[6]

II. THE GHOST OF *CHAPLINSKY V. NEW HAMPSHIRE*

First Amendment analysis has long been plagued by the ghost of *Chaplinsky v. New Hampshire*,[7] in which the Supreme Court suggested that the best way to handle judicial review of laws regulating speech was simply to list certain classes of speech as outside of the First Amendment's coverage.[8] In one of the most famous passages in the history of free speech jurisprudence, the Court in *Chaplinsky* confidently declared:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[9]

This passage has haunted free speech law for sixty years. The struggle of the Justices in *Alvarez* to unify behind any one coherent test for measuring the validity or invalidity of the Stolen Valor Act is the most recent example.[10]

Purely as a *description* of contemporary First Amendment case outcomes, the *Chaplinsky* standard is all but worthless. *Chaplinsky* is both an overstatement and an understatement of the state of play.

Chaplinsky is an overstatement in that many of the classes of

---

[5] *Id.* at 2551–56 (Breyer, J., concurring).
[6] *Id.* at 2556–65 (Alito, J., dissenting).
[7] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[8] *Id.* at 571–72.
[9] *Id.*
[10] *See supra* text accompanying notes 4–6.

speech listed by the Court as not "rais[ing] any Constitutional problem" have come to be understood as raising big constitutional problems.[11] Indeed, elaborate bodies of law have evolved to resolve those problems, providing substantial constitutional protection for speech that is lewd, obscene, profane, libelous, and insulting.[12]

Take—as an especially graphic example—the legal fate of the "F Word," the mother of all words commonly labeled lewd or profane, in the years since *Chaplinsky*. In *Cohen v. California*,[13] the Court held the phrase "Fuck the Draft," worn on a jacket in a public place, was protected by the First Amendment.[14] And most recently, in *FCC v. Fox Television Stations, Inc.*,[15] the Court overturned an attempt by the Federal Communications Commission to penalize broadcasters for broadcasting the "F Word" as an impermissible "fleeting expletive[]."[16] In the 2002 Billboard Music Awards, broadcast by Fox, "the singer Cher exclaimed during an unscripted acceptance speech: 'I've also had my critics for the last 40 years saying that I was on my way out every year. Right. So f[uck] 'em.'"[17] In the Billboard Music Awards in 2003, Nicole Richie adlibbed while presenting an award: "Have you ever tried to get cow s[hit] out of a Prada purse? It's not so f[uck]ing simple."[18]

Congress long ago banned the broadcast of "any obscene, indecent, or profane language."[19] The Supreme Court sustained the power of the FCC to enforce this provision in its famous decision in *FCC v. Pacifica Foundation*,[20] in which the Court sustained the Commission's determination that George Carlin's "Filthy Words" monologue was indecent.[21] The *Pacifica* case, however, left open the question of whether fleeting episodes of indecency or vulgarity could be punished, consistent with the First Amendment.[22] As the *Fox* litigation reached the Supreme Court, it was thought that the Court

---

[11] *See Chaplinsky*, 315 U.S. at 572 (footnote omitted).

[12] *See* Rodney A. Smolla, *Words "Which By Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 323–60 (2009) (discussing free speech regulation in the years after the *Chaplinsky* decision).

[13] Cohen v. California, 403 U.S. 15 (1971).

[14] *See id.* at 16, 26.

[15] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012).

[16] *Id.* at 2311, 2320.

[17] *Id.* at 2314 (citation omitted).

[18] *Id.* (citation omitted) (internal quotation marks omitted).

[19] 18 U.S.C. § 1464 (2006).

[20] FCC v. Pacifica Found., 438 U.S. 726 (1978).

[21] *Id.* at 729, 741.

[22] *See id.* at 750.

might retreat from *Pacifica*, and hold that changes in technology and culture, and perhaps even the evolution of First Amendment doctrine, had formed enough of a perfect storm to undermine *Pacifica*.[23] The Court in *Fox* ducked these large issues, leaving them for another day, instead deciding on narrow grounds that the actions of the FCC were unconstitutional because they failed provide fair notice of the conduct prohibited.[24]

The fate of the "F Word," now constitutionally protected in many circumstances notwithstanding *Chaplinsky*, is one of many examples of *Chaplinsky* as an overstatement of current outcomes in free speech cases. The rich seam of First Amendment law emanating from *New York Times Company v. Sullivan*,[25] articulating the complex constitutional standards that now apply to the law of defamation, is yet another highly visible refutation of the *Chaplinsky* formulation as an accurate doctrinal descriptor.[26]

If *Chaplinsky* is an overstatement of categories of speech that the First Amendment does not protect, it is also an understatement, failing to account for the many cases of the last sixty years in which speech that is *not* within any of the delineated *Chaplinsky* categories has nonetheless been held outside the protection of the First Amendment in certain circumstances.[27] Any number of examples might be picked, but an especially telling line of cases involve student speech, in which the Supreme Court has sustained regulation of speech by students in three major cases in which the speech itself was pallid in its offensiveness, yet still outside the protection of the Constitution when expressed in connection with school activities.[28] The Court thus upheld the discipline of a student for a sexually suggestive, but not at all explicit, speech given while running for student office,[29] it upheld regulation of a student journalist for a student newspaper exposé on teenage

---

[23] *See* Tony Mauro, *High Court to Revisit 'Indecent' Language Issue*, N.Y. L.J., Mar. 18, 2008, at 2.

[24] FCC v. Fox Television Stations, Inc., 132 S. Ct. 2307, 2320 (2012).

[25] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 284 (1964) (facing an appeal from a challenge for libel for an advertisement in a newspaper that made false statements).

[26] *See generally* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–49 (1974) (creating a complex matrix of fault and damages rules based on whether a plaintiff is a public or a private figure).

[27] *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 61–62 (2000).

[28] *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988); Morse v. Frederick, 551 U.S. 393, 409–10 (2007).

[29] *Fraser*, 478 U.S. at 677, 685.

pregnancy,[30] and most famously of all, it sustained disciplinary action against a student for unfurling a banner proclaiming "BONG HiTS 4 JESUS."[31]

I believe coherent First Amendment doctrines can be brought to bear to inform principled analysis of all the myriad conflicts that arise in the ongoing evolution of free speech law in America. The categorical approach of *Chaplinsky*, however, will not cut it. This doesn't mean that under alternative approaches there won't often be extremely close and difficult cases, or that predicting how the Supreme Court will eventually rule in those close and difficult cases will ever be an exact science. It does mean, however, that the rules of the game can be more precisely defined, and the principles that animate those rules more thoughtfully explained. In providing guidance to policymakers and reviewing courts, this would be an improvement.

III. *ALVAREZ* AND THE STOLEN VALOR ACT

Alvarez is the latest example of why the categorical approach of *Chaplinsky* works so poorly. *Alvarez* is, in my view, a very close and difficult case. Under any plausible doctrinal standard, the outcome would be difficult to predict, because each side had strong arguments, with logical and policy heft, and solid precedential support.[32] In both resolving the actual case before the Court in *Alvarez* and in attempting to puzzle out what *Alvarez* means for future cases involving false statements about military honors, the invocation of a *Chaplinsky*-style categorical approach did more harm than good.

The plurality opinion in *Alvarez* striking down the Stolen Valor Act was written by Justice Kennedy and joined by Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor.[33] Justice Breyer's opinion concurring in the judgment, joined by Justice Kagan, provided the additional two votes against the Act.[34] Justice

[30] *Kuhlmeier*, 484 U.S. at 263–64, 276. The exposé also discussed the impact of divorce on students. *Id.* at 263.

[31] *Morse*, 551 U.S. at 397, 409–10 (internal quotation marks omitted).

[32] *See* Josh M. Parker, Comment, *The Stolen Valor Act as Constitutional: Bringing Coherence to First Amendment Analysis of False-Speech Restrictions*, 78 U. CHI. L. REV. 1503, 1528–30 (2011).

[33] United States v. Alvarez, 132 S. Ct. 2537, 2542–51 (2012) (Kennedy, J., plurality opinion).

[34] *Id.* at 2551–56 (Breyer, J., concurring in the judgment).

Alito, joined by Justices Scalia and Thomas, dissented.[35]

The protagonist in the case, Xavier Alvarez, was described by Justice Kennedy as a compulsive liar.[36] Alvarez had falsely claimed to have played hockey for the Detroit Red Wings, to have married a starlet from Mexico, to have been awarded the Congressional Medal of Honor, and to have been wounded in combat.[37] These false "statements were but a pathetic attempt to gain respect that eluded him."[38] For these pathetic attempts, Alvarez was convicted of violating the Stolen Valor Act, which among other things, criminalized a false declaration that one has received the Congressional Medal of Honor.[39]

Justice Kennedy's plurality opinion made liberal use of the vocabulary of "historic categories"[40] in analyzing the validity of the Act, stating "content-based restrictions on speech have been permitted, as a general matter, only when confined to the few 'historic and traditional categories [of expression] long familiar to the bar.'"[41] The plurality opinion listed as examples: incitement, obscenity, defamation, speech integral to criminal conduct, child pornography, fighting words, fraud, true threats, and speech presenting grave and imminent danger.[42] (This list of categories, it

---

[35] *Id.* at 2556–65 (Alito, J., dissenting).

[36] *Id.* at 2542 (Kennedy, J., plurality opinion).

[37] *Id.* As recounted by the Court:

> In 2007, respondent attended his first public meeting as a board member of the Three Valley Water District Board. The board is a governmental entity with headquarters in Claremont, California. He introduced himself as follows: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."

Id.

[38] *Id.*

[39] 18 U.S.C. § 704 (2006). Section 704 of the Act provided in pertinent part:

> (b) FALSE CLAIMS ABOUT RECEIPT OF MILITARY DECORATIONS OR MEDALS.—Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States . . . shall be fined under this title, imprisoned not more than six months, or both. (c) ENHANCED PENALTY FOR OFFENSES INVOLVING CONGRESSIONAL MEDAL OF HONOR.—(1) IN GENERAL.—If a decoration or medal involved in an offense under subsection (a) or (b) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

Id.

[40] *Alvarez*, 132 S. Ct. at 2539 (syllabus).

[41] *Id.* at 2544 (quoting United States v. Stevens, 130 S. Ct. 1577, 1584 (2010)) (alteration in original) (internal quotation marks omitted).

[42] *Alvarez*, 132 S. Ct. at 2544 (citing Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("Among these categories are advocacy intended, and likely, to incite imminent lawless action."); Miller v. California, 413 U.S. 15, 16 (1973) (obscenity); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271 (1964) (providing protection for speech regarding public figures in

is parenthetically worth noting here, is an *expansion* of the list in *Chaplinsky*). "These categories have a historical foundation in the Court's free speech tradition,"[43] the plurality reasoned, arguing that "[t]he vast realm of free speech and thought always protected in our tradition can still thrive, and even be furthered, by adherence to those categories and rules."[44] The plurality held that the list of categories of speech that may be regulated does not include any general exclusion of protection for false statements.[45] The plurality dismissed various quotations from prior Supreme Court opinions seeming to indicate that false statements do not deserve constitutional protection, arguing that when considered in context, they were not properly understood as creating a wholesale First Amendment exemption for false statements of fact.[46] Such prior references, the plurality reasoned, "all derive[d] from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."[47] The element of falsity may have

---

defamation suits); Gertz v. Robert Welch, Inc., 418 U.S. 323, 325, 347, 352 (1974) (imposing limits on liability for defamation of a private figure); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495 (1949) (discussing freedom of speech in relation to criminal conduct); Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (fighting words); New York v. Ferber, 458 U.S. 747, 749, 765–66 (1982) (child pornography); Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (fraud); Watts v. United States, 394 U.S. 705, 708 (1969) (per curiam) (true threats); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931) (speech presenting grave and imminent danger)). "A restriction under the last category is most difficult to sustain." *Alvarez*, 132 S. Ct. at 2544 (citing N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971)).

[43] *Alvarez*, 132 S. Ct. at 2544.

[44] *Id.*

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

[46] *Id.* at 2545 ("That conclusion would take the quoted language far from its proper context. For instance, the Court has stated '[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas[]' . . . and that false statements 'are not protected by the First Amendment in the same manner as truthful statements.'" (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Brown v. Hartlage, 456 U.S. 45, 60 (1982))) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake." (quoting *Va. Bd. of Pharmacy*, 425 U.S. at 771)); ("Spreading false information in and of itself carries no First Amendment credentials." (quoting Herbert v. Lando, 441 U.S. 153, 171 (1979))); ("[T]here is no constitutional value in false statements of fact." (quoting *Gertz*, 418 U.S. at 340)); ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." (quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964))) (alterations in original).

[47] *Alvarez*, 132 S. Ct. at 2545.

been germane to the analysis in those cases, the plurality argued, but it was not determinative.[48] As the plurality saw it, "[t]he Court ha[d] never endorsed [a broad principle] . . . that false statements receive no First Amendment protection," and no prior decision had confronted a law that targeted "falsity and nothing more."[49]

At the same time, the plurality did not insist that the list of categories of unprotected speech was a finite and complete set, closed to new entries; the plurality thus observed that:

> Although the First Amendment stands against any "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," . . . the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law."[50]

But prior to "exempting a category of speech from the normal prohibition on content-based restrictions,"[51] the plurality maintained, "the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription.'"[52]

Invoking the imagery of George Orwell's classic novel *Nineteen Eighty-Four*, the plurality declared that "[o]ur constitutional tradition stands against the idea that we need Oceania's Ministry of Truth."[53] Employing what amounted to a "falsity plus" test,[54] the plurality emphasized the critical difference between penalizing falsehood merely because it is falsehood, and penalizing falsehood when it is uttered to obtain some material advantage:

> Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition. The mere potential for the exercise of that power casts a chill, a chill the First Amendment cannot permit if

[48] *Id.*
[49] *Id.*
[50] *Id.* at 2547 (quoting United States v. Stevens, 130 S. Ct. 1577, 1586 (2010)).
[51] *Alvarez*, 132 S. Ct. at 2547.
[52] *Id.* (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011)).
[53] *Id.* (citing GEORGE ORWELL, NINETEEN EIGHTY-FOUR 4 (centennial ed., 2003) (1949)).
[54] *See Alvarez*, 132 S. Ct. at 2547.

> free speech, thought, and discourse are to remain a foundation of our freedom.[55]

Justice Breyer, joined by Justice Kagan, joined the judgment of the Court, but rejected the plurality's "strict categorical analysis."[56] Justice Breyer's opinion applied "intermediate scrutiny" review but did not persuasively explain why intermediate scrutiny review was appropriate, other than to maintain that when reviewing the constitutionality of a statute under the First Amendment, the Court "often found" it useful to apply what was sometimes called "intermediate scrutiny," "proportionality review," or "examination of 'fit.'"[57] The cases cited by Justice Breyer were, to be sure, all examples of "intermediate scrutiny."[58] But contrary to Justice Breyer's statement, which seemed to suggest that they merited this level of scrutiny because they involved review of statutes, they in fact are all cases commonly understood as meriting intermediate scrutiny because they fall within areas of specialized legal doctrine in which intermediate scrutiny has evolved as the doctrine of choice.[59] Perhaps the one exception is *Bartnicki v. Vopper*,[60] involving trafficking in illegally intercepted phone conversations, in which the level of review employed by the concurring opinion (written by Justice Breyer) was ambiguous, and in which it was difficult to characterize the regulation at issue as content-based or

---

[55] *Id.* at 2547–48.

[56] *Id.* at 2551 (Breyer, J., concurring in the judgment).

[57] *Id.* at 2551–52 ("In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications. Sometimes the Court has referred to this approach as 'intermediate scrutiny,' sometimes as 'proportionality' review, sometimes as an examination of 'fit,' and sometimes it has avoided the application of any label at all." (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–52 (1994) (intermediate scrutiny); Randall v. Sorrell, 548 U.S. 230, 249 (2006) (Breyer, J., plurality opinion) (proportionality); Bd. of Trustees of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989) (discussing a "fit" between means and ends that is proportionate to the interest)). "[I]nterference with speech must be in proportion to the [substantial governmental] interest served." *Alvarez*, 132 S. Ct. at 2552 (alterations in original) (quoting *In re* R.M.J., 455 U.S. 191, 203 (1982)) (internal quotation marks omitted) (citing Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968)).

[58] *Id.* at 2552.

[59] *See, e.g.*, *Randall*, 548 U.S. at 249; *Turner Broad. Sys., Inc.*, 512 U.S. at 641–52; *Fox*, 492 U.S. at 480; *In re R.M.J.*, 455 U.S. at 203; *Pickering*, 391 U.S. at 568.

[60] Bartnicki v. Vopper, 532 U.S. 514 (2001).

content-neutral.[61] In the end, without much real analysis or explication, Justice Breyer in *Alvarez* simply announced, "in this case, the Court's term 'intermediate scrutiny' describes what I think we should do."[62] Applying this level of review, Justice Breyer gave example of the social utility of some false statements:

> False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth.[63]

Justice Breyer cited laws that prohibit trademark infringement as the closest analogy to the Stolen Valor Act.[64] Just as trademark infringement may cause harm by inducing confusion among potential customers as to the source of goods, thereby "diluting the value of the mark to its owner, to consumers, and to the economy,"[65] he argued, "a false claim of possession of a medal or other honor creates confusion about who is entitled to wear it, thus diluting its value to those who have earned it, to their families, and to their country."[66] Trademark laws, however, are focused on actual commercial harm.[67] Much like the plurality, Justice Breyer ultimately settled on the principle that few, if any statutes simply prohibit the telling of a lie.[68]

And again, much like the plurality, Justice Breyer's opinion then went on to posit alternative avenues that would largely vindicate the government's proffered interests, concluding that "[t]he Government has provided no convincing explanation as to why a more finely tailored statute would not work."[69] He held out the possibility, however, that a more narrowly tailored statute "could

[61] *Id.* at 535–41 (Breyer, J., concurring).
[62] *Alvarez*, 132 S. Ct. at 2552.
[63] *Id.* at 2553 (citations omitted).
[64] *Id.* at 2554.
[65] *Id.*
[66] *Id.*
[67] *See id.*
[68] *Id.* at 2555.
[69] *Id.* at 2556.

significantly reduce the threat of First Amendment harm while permitting the statute to achieve its important protective objective."[70]

Justice Alito, joined by Justices Scalia and Thomas, wrote a spirited dissent, holding out the valor of those who are awarded the Congressional Medal of Honor:

> Only the bravest of the brave are awarded the Congressional Medal of Honor, but the Court today holds that every American has a constitutional right to claim to have received this singular award. The Court strikes down the Stolen Valor Act of 2005, which was enacted to stem an epidemic of false claims about military decorations. These lies, Congress reasonably concluded, were undermining our country's system of military honors and inflicting real harm on actual medal recipients and their families.[71]

Justice Alito concluded "that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[72]

IV. CATEGORIES AND TIERS OF JUDICIAL REVIEW

First Amendment free speech doctrine can be mystifying because it has never really settled in on a consistent analytical methodology.

If one compares free speech to equal protection analysis, and grades on the basis of clarity, consistence, and coherence, then equal protection wins. In equal protection analysis, there are the familiar tiers of review, the "strict scrutiny," "intermediate scrutiny," and "rational basis" formulas that laws students commit to memory in their Constitutional Law course.[73]

Free speech analysis, however, cannot be so neatly summarized in two sentences. At times, it seems to resemble equal protection analysis, with the Supreme Court applying strict scrutiny to most

[70] *Id.*

[71] *Id.* (Alito, J., dissenting).

[72] *Id.* at 2557.

[73] *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457–58 (1988) ("Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." (citing Lyng v. Int'l Union, UAW, 485 U.S. 360, 370 (1988); Plyler v. Doe, 457 U.S. 202, 216–17 (1982); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16–17 (1973))).

content-based regulation of speech,[74] and intermediate scrutiny to content-neutral regulations.[75] The neatness of that picture dissolves, however, when the Court approaches free speech doctrine through categories. At times, the categories are characterized as on/off switches. If speech falls within the ambit of a defined category, such as obscenity, the First Amendment is entirely turned off to it.[76] At other times, however, the category does not operate as an on/off toggle, but more like a volume control knob, so that the speech protection within a certain category is dialed up or dialed down. Commercial speech is a prime example.[77]

The hierarchical place of speech within a certain category may evolve over time. Commercial speech was once treated as outside of all First Amendment protection,[78] but now is treated as within the protection of the First Amendment, but not at "full volume," receiving an intermediate scrutiny standard of review.[79] As many as four Supreme Court Justices have suggested at various times in recent years that the intermediate standard for commercial speech should be discarded, and it should graduate to full volume First Amendment protection.[80]

There are also times in which the approach to First Amendment analysis focuses not just on the content of the speech itself, but on nature of the harm the speech is alleged to have caused; for

---

[74] *See, e.g.*, Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2817 (2011) ("Laws that burden political speech are' accordingly 'subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." (quoting Citizens United v. Fed. Elec. Comm'n, 130 S. Ct. 876, 898 (2010)) (internal quotation marks omitted).

[75] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–52 (1994) (applying intermediate scrutiny to content-neutral cable "must carry" rules).

[76] *See, e.g.*, Miller v. California, 413 U.S. 15, 23, 36–37 (1973).

[77] *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

[78] *See* Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).

[79] *See Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566.

[80] Over the years, a number of Justices have suggested that they might be willing to abandon the *Central Hudson* test in favor of a commercial speech standard more closely aligned with the higher levels of protection now applied to non-commercial speech. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 518 (1996) (Thomas, J., concurring in part and concurring in judgment); Rubin v. Coors Brewing Co., 514 U.S. 476, 493 (1995) (Stevens, J., concurring in judgment). Indeed, at various times as many as four different Justices have expressed doubts about adhering to *Central Hudson*. *See, e.g.*, Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring in judgment); *44 Liquormart, Inc.*, 517 U.S. at 501, 510–14 (opinion of Stevens, J., joined by Kennedy, and Ginsburg, JJ.); *id.* at 517 (Scalia, J., concurring in part and concurring in judgment); *id.* at 518 (Thomas, J., concurring in part and concurring in judgment).

example, there are First Amendment tests for incitement,[81] true threats,[82] and fraud.[83]

Finally, there are times when Justices, either openly or more covertly, apply ad hoc "balancing" of free speech interests and competing societal interests, case-by-case.[84]

The lack of consistency in free speech methodology is evident in the various opinions in *Alvarez*.[85] Justice Breyer's opinion, joined by Justice Kagan, appeared to invoke no principled methodology at all, other than to announce that intermediate scrutiny was the proper standard.[86] Justice Kennedy's plurality opinion at times seemed grounded entirely in the "categorical" approach, yet at other times appeared to apply something akin to the *analysis* commonly associated with "strict scrutiny," while borrowing *language* commonly associated with "intermediate scrutiny."[87] And Justice Alito, while not openly adopting an ad hoc balancing test, in fact appeared to employ essentially such a test, as he has been willing to employ in other cases,[88] a balancing methodology that was willing to openly disparage the weight of offensive speech, reducing it to near zero in the balance, and elevate the competing societal interests to be weighed against that speech.[89]

Justice Breyer's opinion in *Alvarez* at times reads like that of a judicial Hamlet, torn and indecisive.[90] In contrast, both the plurality opinion of Justice Kennedy and the dissent of Justice Alito, whatever their doctrinal persuasiveness, were fired in passionate conviction.[91] As against the emotive strength of both

---

[81] Brandenburg v. Ohio, 395 U. S. 444, 447 (1969) (per curiam).

[82] Virginia v. Black, 538 U.S. 343, 359–60 (2003).

[83] Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

[84] Those Justices most openly willing to admit that they engaged in ad hoc balancing articulated those views in the 1950s. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109, 126 (1959) (opinion of Justice Harlan for the majority); Dennis v. United States, 341 U.S. 494, 524–25 (1951) (Frankfurter, J., concurring); Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 399 (1950) (opinion of Chief Justice Vinson for the majority). But as noted in the text, Justice Breyer's approach often appears to be a form of such pragmatic case-by-case balancing, a view that might also be attractive to Justice Kagan, and Chief Justice Roberts in his *Stevens* opinion accused the then-Solicitor General Kagan of adopting that position on behalf of the United States. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

[85] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012); *see also supra* Part III.

[86] *See supra* notes 56–70 and accompanying text.

[87] *See supra* notes 40–55 and accompanying text.

[88] *See supra* notes 71–72 and accompanying text.

[89] *See supra* notes 71–72 and accompanying text.

[90] *See Alvarez*, 132 S. Ct. at 2551–56 (Breyer, J., concurring); *see also supra* notes 56–70 and accompanying text.

[91] *See Alvarez*, 132 S. Ct. at 2542–51 (Kennedy, J., plurality opinion), 2556–65 (Alito, J.,

Justice Kennedy's opinion for the four Justices forming the plurality and the three-Justice dissent authored by Justice Alito, the somewhat ambivalent middle opinion of Justices Breyer and Kagan is cool, one might say even tepid, in its pallid (not to mention conclusory) preference for "intermediate scrutiny."[92] Justices Breyer and Kagan seem like two Justices torn between the magnetic appeal of two charismatic arguments, who end up splitting the difference by voting with the plurality, while keeping the doors open for a second try by Congress in which they would entertain the possibility that they might side with the dissenters and uphold a more narrowly drawn law.[93] Justice Breyer took a very similar approach in *Bartnicki v. Vopper*, in which he voted with a plurality opinion to sustain a First Amendment challenge to the imposition of liability for trafficking in a purloined cell phone recording on the factually dubious ground that the recording showed evidence of an intent to engage in criminal violence, but held out the possibility that he would be willing to vote the other way and deny any First Amendment protection to those who publish stolen cell phone conversations in a fact pattern that did not involve speech suggesting an intent to do violence.[94]

If the placid opinion of Justice Breyer in *Alvarez* may be faulted for its seemingly "one-off" jurisprudence, Justice Kennedy's plurality opinion also had its failings of clarity.[95] Strangely, the plurality opinion in *Alvarez* avoided any crisp articulation of the standard of review being applied. One might have expected a straightforward invocation of "strict scrutiny" review, requiring that the law be justified by a compelling government interest and narrowly tailored, that is, employing the "least restrictive means" to effectuate that interest.[96] Instead, the plurality used the phrase "exacting scrutiny,"[97] and at times borrowed language often seen in intermediate scrutiny cases, such as commercial speech cases, and

dissenting); *see also supra* notes 36–55, 71–72 and accompanying text.

[92] *See supra* Part III.

[93] *See supra* notes 56–70 and accompanying text.

[94] *See* Bartnicki v. Vopper, 532 U.S. 514, 535–41 (2001) (Breyer, J., concurring); *see also* Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1126, 1143 (2002) (discussing Justice Breyer's cost-benefit balancing analysis).

[95] *See Alvarez*, 132 S. Ct. at 2542–51 (Kennedy, J., plurality opinion).

[96] *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[97] *Alvarez*, 132 S. Ct. at 2543, 2548 (quoting Turner Broad. System, Inc v. FCC, 522 U.S. 622, 642 (1994)).

at time phrases usually seen in classic strict scrutiny review.[98] The plurality, in short, seemed to move back and forth between its "categorical" approach to the case, a methodology under which the government lost because the Stolen Valor Act did not fit into any existing categorical exception to First Amendment protection, and a not very clearly defined level of scrutiny, which it seemed to employ to determine whether a new category of unprotected speech should be recognized.[99]

Considering again the opinion of Justices Breyer and Kagan, a clue perhaps emerges as to why the plurality opinion reads this way. Perhaps Justice Kennedy had hopes that either Justice Breyer or Justice Kagan or both would join his opinion, supplying a clean 5-4 or 6-3 decision.[100] The actual weighing of the competing factors at issue contained in the plurality opinion and the opinion of Justices Breyer and Kagan are essentially identical.[101] Justices Breyer and Kagan do not like First Amendment "categories" as a mode of analysis.[102] In what was somewhat of a belt-and-suspenders approach then, the plurality first explained why the Stolen Valor Act failed under categorical analysis,[103] and then went over it again, applying a mélange of strict and intermediate scrutiny,[104] perhaps hoping this successfully recruits a fifth or sixth vote.

What if, from the beginning, Justice Kennedy had simply applied "strict scrutiny"? What if his opinion had invoked the position often articulated in prior cases that content-based restrictions on speech are presumptively invalid and can be justified only if the government sustains its burden of proof that the law is narrowly tailored to vindicate a compelling governmental interest?[105]

---

[98] *Compare Alvarez*, 132 S. Ct. at 2544, 2547 (discussing exceptions to First Amendment protection such as fraud but citing commercial speech cases), *with id.* at 2549 (discussing the compelling interests the government provided, that they be necessary).

[99] *See id.* at 2543–48.

[100] *Id.* at 2542, 2551 (Breyer, J., concurring), 2556 (Alito, J., dissenting) (noting that *Alvarez* was a 4–2–3 opinion).

[101] *Compare id.* at 2547 (Kennedy, J., plurality opinion) (recognizing that the statute's expansive scope would unjustifiably apply to false statements made in any environment), *with id.* at 2555 (Breyer, J., concurring) (arguing that the statute, without any limiting safeguards, poses too great a risk of liability or criminal punishment).

[102] *Id.* at 2551 (Breyer, J., concurring).

[103] *Id.* at 2547 (Kennedy, J., plurality opinion).

[104] *Id.* at 2547–51.

[105] *See* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny." (quoting Davenport v. Wash. Educ. Ass'n., 551 U.S. 177, 188 (2007) (citing R. A. V. v. City of St. Paul,

Taking what the plurality opinion of Justice Kennedy actually reasoned, the result would have been the same, and all the cumbersome baggage of "strict categories" avoided. In strict scrutiny review, it is common for courts to acknowledge that a proffered governmental interest is "compelling," at least in the abstract, but to then attack the law as not narrowly tailored.[106] This would easily have worked in *Alvarez*. In *Alvarez*, the plurality thus recognized the significance of the government's proffered interest, agreeing that "[i]n periods of war and peace alike public recognition of valor and noble sacrifice by men and women in uniform reinforces the pride and national resolve that the military relies upon to fulfill its mission."[107] While the government's interests were "compelling" (note the use of a strict scrutiny term), however, the plurality held that the law could not survive "exacting" scrutiny.[108]

The plurality in *Alvarez* thus found the broad sweep of the law to be one of its major infirmities.[109] The law applied "to a false statement made at any time, in any place, to any person."[110] If the government could label this speech a criminal offense, the plurality reasoned, such a holding "would endorse government authority to compile a list of subjects about which false statements are punishable."[111]

The plurality heavily emphasized that "[t]he First Amendment requires that the Government's chosen restriction on the speech at

505 U.S. 377, 382 (1992)). *See also* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2738 (2011) ("Because the Act imposes a restriction on the content of protected speech, it is invalid unless California can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest.") (citations omitted); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991).

[106] *See, e.g.*, *Simon & Schuster, Inc.*, 502 U.S. at 118, 121. The Court found the State of New York possessed "a compelling interest in ensuring that victims of crime are compensated by those who harm them," but that the State's "Son of Sam" law, which required the proceeds from works describing a convicted criminal's crime to be placed in escrow and made available to the victims, was not sufficiently narrowly tailored. *Id.*

[107] *Alvarez*, 132 S. Ct. at 2548.

[108] *Id.* at 2548–49.

[109] *See id.* at 2547–48.

[110] *Id*. at 2547 ("Still, the sweeping, quite unprecedented reach of the statute puts it in conflict with the First Amendment. Here the lie was made in a public meeting, but the statute would apply with equal force to personal, whispered conversations within a home. The statute seeks to control and suppress all false statements on this one subject in almost limitless times and settings. And it does so entirely without regard to whether the lie was made for the purpose of material gain." (citing S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 539–40 (1987))).

[111] *Alvarez*, 132 S. Ct. at 2547.

issue be 'actually necessary' to achieve its interest."[112] Strongly emphasizing causality, the plurality stated that "[t]here must be a direct causal link between the restriction imposed and the injury to be prevented."[113] (This language, common in commercial speech cases, is essentially part of what is now the commercial speech intermediate scrutiny test).[114] Against this test, the plurality found an insufficient link between the government's interest in protecting the integrity of the military honors system and the Act's restriction on the false claims of liars.[115] The government had produced no actual *evidence* that the public perception of military awards was diluted by false claims such as those made by Alvarez.[116] In an important passage, the plurality also emphasized the importance of counterspeech in the balance, and the requirement that the government show that counterspeech will not work to vindicate its interests.[117] Alvarez was ridiculed at the public meeting where he made the false claims, and later online.[118] As the plurality proclaimed, "[t]he remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth."[119] Echoing Oliver Wendell Holmes, the plurality admonished that "[t]he theory of our Constitution is 'that the best test of truth is the power of the thought to get itself accepted in the competition of the market.'"[120] In a classic restatement of First Amendment theory, the plurality observed:

The First Amendment itself ensures the right to respond to

[112] *Id.* at 2549 (quoting Brown v. Entm't Merchs. Ass'n., 131 S. Ct. 2729, 2738 (2011)).

[113] *Alvarez*, 132 S. Ct. at 2549 (citing *Brown*, 131 S. Ct. at 2738).

[114] Note, *Making Sense of Hybrid Speech: A New Model for Commercial Speech and Expressive Conduct*, 118 HARV. L. REV. 2836, 2844 (2005).

[115] *Alvarez*, 132 S. Ct. at 2550.

[116] *See id.* at 2549–50.

[117] *Id.* at 2549 ("The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. The facts of this case indicate that the dynamics of free speech, of counterspeech, of refutation, can overcome the lie. Respondent lied at a public meeting. Even before the FBI began investigating him for his false statements, 'Alvarez was perceived as a phony.'" (quoting United States v. Alvarez, 617 F.3d 1198, 1211 (9th Cir. 2010))).

[118] *Alvarez*, 132 S. Ct. at 2549.

[119] *Id.* at 2550 (citing Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.")).

[120] *Alvarez*, 132 S. Ct. at 2550 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

> speech we do not like, and for good reason. Freedom of speech and thought flows not from the beneficence of the state but from the inalienable rights of the person. And suppression of speech by the government can make exposure of falsity more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.[121]

The plurality concluded "that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal."[122] The same, the plurality argued, could be said for the interest offered by the government; the American people do not need a criminal prosecution to express their esteem for their heroes.[123] "Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."[124]

Moreover, to invoke decisions such as *New York Times Company v. Sullivan*,[125] which were designed to be protective of speech, in order to fashion a rule that would restrict speech, would turn First Amendment principle on its head:

> The Government thus seeks to use this principle for a new purpose. It seeks to convert a rule that limits liability even in defamation cases where the law permits recovery for tortious wrongs into a rule that expands liability in a different, far greater realm of discourse and expression. That inverts the rationale for the exception. The requirements of a knowing falsehood or reckless disregard for the truth as the condition for recovery in certain defamation cases exists [sic] to allow more speech, not less. A rule designed to tolerate certain speech ought not blossom to become a rationale for a rule restricting it.[126]

The plurality rejected the attempt of the government to analogize

---

[121] *Alvarez*, 132 S. Ct. at 2550.
[122] *Id.*
[123] *Id.*
[124] *Id.* at 2550–51.
[125] N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).
[126] *Alvarez*, 132 S. Ct. at 2545 (Kennedy, J., plurality opinion).

the Stolen Valor Act to other laws in which restrictions on false speech are permissible, such as laws prohibiting "false statement[s] made to a Government official, . . . laws punishing perjury," or impersonating a government official.[127] In each instance, the plurality maintained, societal interests going beyond the prevention of the falsehood itself were at stake.[128] Most pointed, for example, perjured statements are not simply unprotected because they are false, but because they are "at war with justice"[129] and may "cause a court to render a 'judgment not resting on truth.'"[130] Moreover, "[u]nlike speech in other contexts, testimony under oath has the formality and gravity necessary to remind the witness that his or her statements will be the basis for official governmental action, action that often affects the rights and liberties of others."[131] Sworn testimony, the plurality reasoned, is thus distinct from the ordinary lie "simply intended to puff up oneself."[132] Similarly, the plurality reasoned, laws prohibiting the impersonation of government officials serve to preserve "the integrity of government[al] processes."[133]

The plurality also pointed to another simple expedient that would have largely vindicated the government's interest: a simple government-run database that listed all Congressional Medal of Honor winners.[134] The plurality concluded by stating that "[t]he Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace."[135]

All of the argument employed by the plurality in *Alvarez* would have fit very comfortably and very persuasively within the matrix of a straightforward application of strict scrutiny. And indeed, the same might be said of Justice Alito's dissent.[136]

If one of the strategies often employed by courts striking down laws under the strict scrutiny standard is to concede (at least for the

---

[127] *Id.* at 2545–46 (citations omitted)

[128] *See id.* (discussing other injuries stemming from false statements which are not protected).

[129] *Id.* at 2546 (quoting *In re* Michael, 326 U.S. 224, 227 (1945)) (internal quotation marks omitted).

[130] *Alvarez*, 132 S. Ct. at 2546 (quoting *In re Michael*, 326 U.S. at 227).

[131] *Alvarez*, 132 S. Ct. at 2546.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 2551.

[135] *Id.*

[136] *See supra* notes 71–72 and accompanying text.

sake of appearances or argument) that the government interest held up to justify the law may indeed be "compelling," and then to strike down the law nonetheless because it lacks narrow tailoring, one of the classic counter-strategies employed to *uphold* a law examined under strict scrutiny is to engage in a narrowing judicial construction of the law, thereby supplying the narrow tailoring required to survive the strict scrutiny's second prong.[137] Justice Alito's opinion in *Alvarez* offered several such narrowing arguments.[138] First, he argued, "the Act applies to only a narrow category of false representations about objective facts that can almost always be proved or disproved with near certainty."[139] Next, "the Act concerns facts that are squarely within the speaker's personal knowledge."[140] Third, as both the plurality and concurrence appeared to concede, the law "require[d] proof beyond a reasonable doubt that the speaker actually knew that the representation was false."[141] Fourth, the law can be appropriately construed as applicable only to actual factual assertions, and not to expressions such as "dramatic performances, satire, parody, hyperbole, or the like."[142] Finally, and perhaps most interestingly, Justice Alito argued that the law was "strictly viewpoint neutral."[143] The law, he reasoned, applied to all false statements, without regard to any connection to a particular "political or ideological message."[144]

Under an application of strict scrutiny analysis, in sum, both sides could marshal reasonably strong arguments—which is why *Alvarez* was a close case, and why lower courts were divided as they struggled over the constitutionality of the Stolen Valor Act.[145] Had all the Justices joined issue under this one standard, however, the stability and predictability of free speech conflict resolution would have been enhanced, as the stability and predictability of the law is always enhanced when the Justices do not talk past one another, and agree on a single test and a common vocabulary, even though

[137] *Alvarez*, 132 S. Ct. at 2557 (Alito J., dissenting)
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *See id.* at 2542 (Kennedy, J., plurality opinion) (detailing the procedural history of the case and this issue).

they may divide on the application of law to fact.

V. FINDING A FREE SPEECH PRINCIPLE IN A ROILING DOCTRINAL SEA

Is it possible to find an authentic "free speech principle" amidst the roiling doctrinal sea? Not if we look for only one. There are, rather, competing free speech principles at large, principles that have existed in opposition for some time. I mean to set formal legal doctrine aside here, and search instead for underlying animating principles. At one pole is the view that freedom of speech occupies an exalted position, so exalted as to almost never be trumped by other societal values. At the opposite pole is a view first elegantly articulated in *Chaplinsky*, that speech may be divided into that speech which serves some plausible positive purpose or redeeming social value, which is deserving of constitutional protection, and that speech which advances no legitimate end worth crediting, yet is highly offensive to good order and morality, which is not deserving of any protection.[146] And then there is a middling compromise position, that freedom of speech deserves some serious elevated stature in the constitutional scheme, but not so serious or elevated that it cannot be overcome by well-crafted laws appropriately trimmed to vindicate other significant society values.

The two most vocal proponents of the first most robust conception of freedom of speech on the Court at this time are Chief Justice Roberts and Justice Kennedy.[147] Justice Alito is the consistently courageous proponent of the opposing "order and morality" principle.[148] Various other Justices lean more or less to one side or the other, not always consistently.

Justice Kennedy and his colleagues Chief Justice Roberts, Justice Ginsburg, and Justice Sotomayor, embraced in *Alvarez* a robust interpretation of the Free Speech Clause.[149] This principle, which has received eloquent articulation over the years in a variety of forms, at its core asserts that government may not abridge speech

---

[146] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942) (discussing speech that is not protected).

[147] In fairness on this point, perhaps Justices Ginsburg and Sotomayor ought to be included, as they have tended to join strong free speech opinion written by the Chief Justice or Justice Kennedy. *See, e.g.*, *Alvarez*, 132 S. Ct. at 2542 (announcing the opinions of the Court).

[148] *See* Snyder v. Phelps, 131 S. Ct. 1207, 1223 (2011) (Alito J., dissenting) (quoting *Chaplinsky*, 315 U.S. at 572).

[149] *See Alvarez*, 132 S. Ct. at 2543–47 (Kennedy, J., plurality opinion) (discussing the Free Speech Clause of the First Amendment).

solely because it finds the message disagreeable.[150] Under this principle, the mere capacity of speech to offend, disturb, or disgust is not enough, standing alone, to justify its abridgement.[151] This principle largely dominates contemporary free speech law, at least when the speech occurs in the open marketplace of ideas, and not in some specially sheltered setting, such as within the confines of government employment or public schools.[152] The three most high-profile offensive speech cases in recent years illustrate the dominance of the principle, *United States v. Stevens*, the animal cruelty case, *Snyder v. Phelps*, the military funerals case, and *Alvarez* itself. Chief Justice Roberts wrote for the majority in *Stevens* and *Snyder*,[153] Justice Kennedy for the plurality in *Alvarez*,[154] and in all three, Justice Alito passionately dissented.[155]

In *United States v. Stevens*, the Court struck down a federal law prohibiting the distribution of images depicting violence to animals,[156] including disgusting "crush videos" in which women wearing stilettos engaged in the fetish of crushing helpless animals with their high heels.[157] The case turned out to be an 8-1 crushing of the act of Congress.[158] The law contained an exception, borrowed from the long-standing First Amendment standard governing obscenity under *Miller v. California*,[159] that exempted any depiction "that has serious religious, political, scientific, educational, journalistic, historical, or artistic value."[160] In an opinion written by Chief Justice Roberts, the Court not only struck down the federal law, but also severely chastised the government for the sweeping arguments it advanced to defend the law.[161] The Court noted that it

[150] Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.") (citations omitted).

[151] *Id.*

[152] Waters v. Churchill, 511 U.S. 661, 671–72 (1994) (permitting broader proscription of speech by government employees as opposed to open public speech) (citing Cohen v. California, 403 U.S. 15, 24–25 (1971)); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685–86 (1986) (permitting the proscription of non-obscene but offensive speech when given at a school assembly).

[153] *Snyder*, 131 S. Ct. at 1212 (majority opinion); United States v. Stevens, 130 S. Ct. 1577, 1582 (2010).

[154] *Alvarez*, 132 S. Ct. at 2542 (Kennedy J., plurality opinion).

[155] *Id.* at 2556; *Snyder*, 131 S. Ct. at 1222; *Stevens*, 130 S. Ct. at 1592.

[156] 18 U.S.C. § 48 (2006 & Supp. IV 2010).

[157] *Stevens*, 130 S. Ct. at 1583.

[158] *Id.* at 1583, 1592.

[159] Miller v. California, 413 U.S. 15 (1973).

[160] 18 U.S.C.A. § 48(b).

[161] *Stevens*, 130 S. Ct. at 1592.

had historically recognized certain categories of speech not deemed protected by the First Amendment, such as obscenity, defamation, fraud, incitement, or speech integral to criminal conduct.[162] The Court emphatically rejected the claim that depictions of animal cruelty should be added to the list.[163] More significantly, the Court rejected the notion that government has the power to add to the list by simply concluding that the harms caused by a given category of speech outweigh the benefits of the speech.[164] The Court described this claim, as a "free-floating test for First Amendment coverage,"[165] as being "startling and dangerous."[166] In a stern rebuke of the government's argument, the Court declared:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it. The Constitution is not a document "prescribing limits, and declaring that those limits may be passed at pleasure."[167]

While the Court had in the past often described historically unprotected categories of speech as being "of such slight social value as a step to truth that any benefit that may be derived from them is

---

[162] *Id.* at 1584 ("These 'historic and traditional categories long familiar to the bar,' . . . are 'well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.'" (quoting Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment); Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (fraud); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942)) (citing Brandenburg v. Ohio, 395 U.S. 444, 447–49 (1969) (per curiam) (incitement); Roth v. United States, 354 U.S. 476, 483 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250, 254–55 (1952) (defamation); Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) (speech integral to criminal conduct)); *see also* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011) ("There was no American tradition of forbidding the *depiction* of animal cruelty—though States have long had laws against *committing* it.").

[163] *Stevens*, 130 S. Ct. at 1585.

[164] *Id.* ("The Government thus proposes that a claim of categorical exclusion should be considered under a simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.'").

[165] *Id.*

[166] *Id.*

[167] *Id.* (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803)).

clearly outweighed by the social interest in order and morality,"[168] the Court explained this was not "a test that may be applied as a general matter to permit the Government to imprison any speaker so long as his speech is deemed valueless or unnecessary, or so long as an ad hoc calculus of costs and benefits tilts in a statute's favor."[169] The Court similarly rejected the assertion that speech that fails to demonstrate any affirmative "serious literary, artistic, political, or scientific value,"[170] in the words of *Miller v. California*, could on that basis alone be disqualified from First Amendment protection.[171]

Justice Alito alone dissented.[172] The lynchpin of his argument was that the crush videos that were the principal target of Congress were inextricably intertwined with the criminal violence against the animals themselves:

> The First Amendment protects freedom of speech, but it most certainly does not protect violent criminal conduct, even if engaged in for expressive purposes. Crush videos present a highly unusual free speech issue because they are so closely linked with violent criminal conduct. The videos record the commission of violent criminal acts, and it appears that these crimes are committed for the sole purpose of creating the videos. In addition, as noted above, Congress was presented with compelling evidence that the only way of preventing these crimes was to target the sale of the videos. Under these circumstances, I cannot believe that the First Amendment commands Congress to step aside and allow the underlying crimes to continue.[173]

In *Snyder v. Phelps*, the Supreme Court dealt with the highly charged and notorious protests of the Westboro Baptist Church.[174] The Westboro Baptist Church was founded by Fred Phelps in Topeka, Kansas in 1955.[175] The "congregation believes that God hates and punishes the United States for its tolerance of

[168] *Stevens*, 130 S. Ct. at 1585 (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992)) (internal quotation marks omitted).
[169] *Stevens*, 130 S. Ct. at 1586.
[170] Miller v. California, 413 U.S. 15, 24 (1973).
[171] *Stevens*, 130 S. Ct. at 1591.
[172] *Id.* at 1592 (Alito, J., dissenting).
[173] *Id.* at 1598–99.
[174] Snyder v. Phelps, 131 S. Ct. 1207, 1213 (2011).
[175] *Id.*

homosexuality, particularly in America's military."[176] For more than two decades, the Church has used, as a tactic for propagating its message, the picketing of military funerals, in a manner often deeply offensive to mourning family members and friends, and for that matter, most Americans of good will.[177] In holding that the First Amendment stood as a bar to the imposition of tort liability for such picketing, Chief Justice Roberts' opinion again strongly endorsed a robust conception of freedom of speech:

> Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and—as it did here—inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate. That choice requires that we shield Westboro from tort liability for its picketing in this case.[178]

Justice Alito again wrote an impassioned dissent. His opening statement framed his argument:

> Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case.
>
> Petitioner Albert Snyder is not a public figure. He is simply a parent whose son, Marine Lance Corporal Matthew Snyder, was killed in Iraq. Mr. Snyder wanted what is surely the right of any parent who experiences such an incalculable loss: to bury his son in peace. But respondents, members of the Westboro Baptist Church, deprived him of that elementary right. They first issued a press release and thus turned Matthew's funeral into a tumultuous media event. They then appeared at the church, approached as closely as they could without trespassing, and launched a malevolent verbal attack on Matthew and his family at a time of acute emotional vulnerability. As a result, Albert Snyder suffered severe and lasting emotional injury.[179]

In this trilogy of cases, the two polar free speech principles are vividly on display, with the robust conception of free speech

---

[176] *Id.*
[177] *Id.*
[178] *Id.* at 1220. Justice Breyer wrote a concurring opinion, emphasizing what he considered the confined scope of the Court's ruling. *Id.* at 1221 (Breyer, J., concurring).
[179] *Id.* at 1222 (Alito, J., dissenting).

generally prevailing, and Justice Alito fighting an often lonely rearguard action.[180]

VI. SOME CONCLUDING NOTES ON VOTES

For those Justices who adhere to a robust interpretation of the free speech principle, the on-again, off-again invocation of "categories" of unprotected speech may reflect a feeling of unease over the long-term resiliency of their strong version of the free speech principle, a worry that they need to invoke those categories to inoculate First Amendment doctrine against the persistent insurgency of the *Chaplinsky*-style insistency that only speech plausibly contributing redeeming social value to the marketplace and not corrosive of order and morality is deserving of First Amendment protection.

When strict scrutiny *alone* is employed to buttress the robust free speech values of Chief Justice Roberts or Justice Kennedy, it might be thought, short-term victories in certain battles may not guarantee long-term victory in the war. For after all, if a law can be persuasively cast as narrowly drawn, even the application of the strict scrutiny test might not be enough to ensure that a speech-restrictive law is struck down. When highly sympathetic claims undergird the supporting governmental interests—and in cases such as *Alvarez*, *Stevens*, or *Snyder*, the interests in curtailing speech *were* highly sympathetic—then strict scrutiny comes down to a quibble over how overly broad or sufficiently narrow the regulatory mechanism is.

In *Stevens* and *Snyder*, the laws were broad,[181] and thus the victory for the broad free speech principle. In *Alvarez*, however, the law was narrowly targeted enough to place the outcome in doubt.[182] Justice Alito was able to lure two other solid votes to his side, Justices Scalia and Thomas, and did not seem so far from luring Justices Breyer and Kagan as well.[183] Justice Kagan, it should be

---

[180] *See* Clay Calvert, *Justice Samuel A. Alito's Lonely War Against Abhorrent, Low-Value Expression: A Malleable First Amendment Philosophy Privileging Subjective Notions of Morality and Merit*, 40 HOFSTRA L. REV. 115, 115–19 (2011).

[181] *See Snyder*, 131 S. Ct. at 1214 (explaining that the underlying laws were common law torts); *see also* United States v. Stevens, 130 S. Ct. 1577, 1588 (2010) ("We read § 48 to create a criminal prohibition of alarming breadth.").

[182] *See* United States v. Alvarez, 132 S. Ct. 2537, 2557 (2012) ("[T]he Act applies to only a narrow category of false representations.").

[183] *See, e.g.*, *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) (agreeing with dissent's assertion that the government had a compelling interest in penalizing an individual for

remembered, was the very Solicitor General who defended the animal cruelty law in *Stevens*, advancing the argument that drew fire and ire from the Chief Justice, an argument squarely resting on the jurisprudential approach advanced consistently by Justice Alito.[184]

In short, to Justice Kennedy or Chief Justice Roberts, there may be a feeling of greater *solidity* to the categorical approach. There is something arguably more comforting in repeatedly warning: "These limited categories and no more!"

The surface appeal of this tactic, however, is offset by the impressive attractiveness of the counter-position, advanced so passionately, if still unsuccessfully, by Justice Alito. For once it is conceded that the First Amendment should be governed by the "categories game," by what rules shall that game itself be governed? If the answer is the formulation in *Chaplinsky*, embracing the theory that we ought to disqualify from First Amendment protection those utterances that "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,"[185] then why *not* add categories like videos of grossly disgusting and cruel illegal animal abuse, or brazenly self-righteous and exploitative intentional infliction of emotional distress targeting the grieving families of slain war heroes, or the ridiculous and pathetic false claims that one has been awarded the sacred Congressional Medal of Honor?

When measured by the yardstick of *Chaplinsky*, when new categories come knocking at the door that seem every bit as deserving as the categories that made the original list—the lewd, profane, obscene, the libelous, and fighting words—why *not* grant them entry? Recall, after all, that even the list of categories acknowledged by the plurality in *Alvarez* as *already* recognized as exceptions to the First Amendment included categories of speech beyond those first noted in *Chaplinsky*.[186]

That is why, in the end, staking the future of a robust free speech principle on the strict scrutiny test may be the better bet. Crucial to the success of that bet, however, is a certain discipline in articulating what proffered governmental interests may

falsely claiming military honors).

[184] *See supra* notes 88, 148 and accompanying text.

[185] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[186] *See supra* note 162 and accompanying text.

legitimately qualify as "compelling."

It is here that the real traction may be gained. When the governmental interest offered up is grounded in aversion to the content of the message and nothing more, then the interest ought never be credited as compelling, if the integrity of a robust free speech principle is to be maintained.[187]

Justice Kennedy's plurality opinion in *Alvarez* actually comes quite close to this position, with its "falsehood plus" test.[188] Even more vivid was the opinion by the Chief Justice in *Stevens*, quoted with approval in *Alvarez*, with its open hostility to the whole notion of "categories" as a legitimate approach to First Amendment analysis.[189]

In the end, however, on the Supreme Court, as in democratic elections and the actions of legislative bodies, it all comes down to votes. On that score, *Alvarez* stands as a cautionary tale. With the Court's voting patterns in flux, First Amendment doctrine remains a complicated work in progress.

---

[187] *See supra* note 164 and accompanying text.
[188] *See supra* notes 54–55 and accompanying text.
[189] *See supra* notes 160–71 and accompanying text.