
CATEGORIZING LIES

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INTRODUCTION

Lies—or, more precisely, false statements of fact—come in many varieties and contexts. People might lie about the condition of their business to defraud an investor, or they might lie about the tastiness of a meal to spare the cook’s feelings. They might lie about their past exploits to burnish their public image, or lie about another person’s actions to damage that person’s reputation. Although most broadly deem lies to be wrongful and immoral in the abstract, most would

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also acknowledge the considerable distance between, say, the relatively harmless “white lies” often told in the context of everyday social interaction and the sorts of lies that tarnish reputations, cheat people out of their money, or inflict severe emotional distress.

Until recently, however, the First Amendment’s treatment of false statements of fact appeared to be both simple and clear. In *Gertz v. Robert Welch, Inc.*, the Supreme Court had bluntly maintained that “there is no constitutional value in false statements of fact”¹—a position that it would reiterate in subsequent cases.² Under this view, any constitutional protection extended to false statements of fact is for purely prophylactic purposes—that is, “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”³

All of this changed, however, in *United States v. Alvarez*.⁴ In *Alvarez*, the Court struck down the Stolen Valor Act, a federal statute that criminalized lies about having received military honors. Although the splintered opinions in *Alvarez* failed to produce a clear constitutional standard governing lies, *Alvarez* made clear that not all lies, in isolation, qualify as low-value speech, like defamation or fraud. That is—contrary to the Court’s prior statements in *Gertz* and its progeny—at least some false statements of fact are entitled to constitutional protection, and this entitlement does *not* rest solely on prophylactic considerations.

Thus, in a post-*Alvarez* world, false speech cannot be treated monolithically. Rather, the First Amendment accords different treatment to different kinds of lies. In effect, the *Alvarez* Court mandated that courts undergo the same process of categorization and doctrine-building in the context of lies that they have long undertaken with respect to truthful speech. *Alvarez* itself, however, provided only limited guidance as to how this doctrinal structure should be crafted. And while the existing doctrinal framework applicable to truthful speech provides some helpful guidance, false statements of fact pose a

1. 418 U.S. 323, 340 (1974).

2. *See, e.g.,* *Hustler Mag. v. Falwell*, 485 U.S. 46, 52 (1988) (“False statements of fact are particularly valueless”); *see also* *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1983) (“[F]alse statements are not immunized by the First Amendment right to freedom of speech”).

3. *Gertz*, 418 U.S. at 341.

4. 567 U.S. 709 (2012).

number of unique issues that suggest a distinctive approach to classifying lies.

This article seeks to provide some structure and organization to this doctrinal vacuum by surveying all of the substantive and structural considerations that courts must consider. It then proposes one possible framework for categorizing and organizing lies in a post-*Alvarez* world. In Part I, I briefly summarize the present state of the doctrine after *Alvarez*. Part II then outlines the variety of substantive factors that drive our basic intuitions as to how different lies ought to be categorized for differential treatment. These include the social value and harms associated with the lie in question, concerns regarding chilling effects and government abuse—which encompass factors such as objective verifiability, degree of fault, and the nature of the underlying speech category—and privacy-based concerns.

In Part III, I survey the basic structural questions underlying a post-*Alvarez* doctrinal framework for lies: the number of tiers of protection that ought to be established, the standards of review to be applied, and what (if any) default standard ought to apply to uncategorized lies. I argue that courts should organize lies into three distinct tiers of protection: fully protected lies, for which content-based regulations are subject to strict scrutiny; partially protected lies, for which such regulations are subject to intermediate scrutiny; and unprotected lies, which garner little to no constitutional protection. Furthermore, I argue that courts should adopt intermediate scrutiny as the default standard applicable to content-based regulation of lies absent an affirmative basis for classifying the lies in question as fully protected or fully unprotected.

Finally, in Part IV, I highlight some broad principles for applying these substantive and structural factors to different subsets of lies. First, courts should adopt a heavy presumption that all lies related to the highest-value core speech are fully protected, since concerns regarding chilling effects and government abuse are at their apex in these contexts. Second, cost-benefit considerations should play a significant role only when compelling prophylaxis or government abuse concerns are absent, and in these contexts, intermediate scrutiny should be the most onerous standard of review applied. Finally, in conducting cost-benefit analyses, direct, material harms

associated with the lies in question should carry more weight than broad, systemic harms to public discourse. Based on these principles, I outline one version of what this three-tiered doctrine might look like in practice.

I. *ALVAREZ* AND THE CURRENT DOCTRINE GOVERNING LIES

Before its decision in *Alvarez*, the Supreme Court had been both clear and blunt regarding the constitutional status of false statements of fact. In *Gertz*, the Court asserted that “there is no constitutional value in false statements of fact,” since “[n]either the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust, and wide-open’ debate on public issues.”⁵ Although the Court recognized that the First Amendment might “require[] that we protect some falsehood in order to protect speech that matters,”⁶ it broadly classified false statements of fact as low-value speech, deeming them “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.”⁷ Thus, the traditional understanding was that false statements of fact carry no inherent constitutional value in and of themselves but might nevertheless be protected as a sort of doctrinal buffer zone to ensure adequate protection for fully protected truthful speech.⁸

Alvarez, however, upended this understanding of false statements of fact. In that case, Xavier Alvarez, during a joint meeting between two neighborhood water-district boards, introduced himself by stating: “I’m a retired marine of 25 years. I retired in the year of 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy.”⁹ Alvarez, however, was never awarded the Congressional Medal of Honor; he had in fact never served in

5. 418 U.S. at 340 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

6. *Id.* at 341.

7. *Id.* at 340 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942)).

8. See Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 707 (1978) (describing how the possibility of chilling effects “forces us to protect” certain false speech “not because it is intrinsically worth protecting, but in order to ensure that [intrinsically valuable speech] is not mistakenly penalized”).

9. *Alvarez*, 567 U.S. at 714 (plurality opinion).

the armed forces.¹⁰ He was thus prosecuted under the Stolen Valor Act, a federal statute that criminally punished anyone who “falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States.”¹¹

A splintered Court struck down the Act. Writing for a four-Justice plurality, Justice Kennedy applied the purely historical *Stevens* test for identifying low-value speech¹²—that is, whether the category of speech sought to be regulated was amongst the “historic and traditional categories [of low-value expression] long familiar to the bar” or whether regulation of such speech was “part of a long (if heretofore unrecognized) tradition of proscription.”¹³ Observing that longstanding history and tradition did not include a “general exception to the First Amendment for false statements,”¹⁴ the plurality deemed the lies covered by the Act to be protected speech, noting the absence of a “legally cognizable harm” associated with such lies.¹⁵ As such, it applied “exacting scrutiny” and struck down the Act under this standard.¹⁶

In an opinion concurring in the judgment, Justice Breyer, joined by Justice Kagan, argued that intermediate scrutiny—rather than strict or “exacting” scrutiny—was the appropriate standard of review for the Stolen Valor Act, since “the regulations concern false statements about easily verifiable facts” that do not involve “statements about philosophy, religion, history, the social sciences, the arts, and the like.”¹⁷ Applying that standard, Justice Breyer deemed the Act insufficiently tailored to the government’s regulatory interests to pass constitutional muster.¹⁸

Alvarez thus made clear that lies cannot be viewed

10. *United States v. Alvarez*, 617 F.3d 1198, 1200–01 (9th Cir. 2010).

11. *Alvarez*, 567 U.S. at 715 (plurality opinion).

12. *See United States v. Stevens*, 559 U.S. 460, 470–71 (2010).

13. *Alvarez*, 567 U.S. at 717 (plurality opinion).

14. *Id.* at 718.

15. *Id.* at 719.

16. *Id.* at 724.

17. *Id.* at 732 (Breyer, J., concurring in the judgment).

18. *Id.* at 736–38. In dissent, Justice Alito, joined by Justices Scalia and Thomas, argued that the speech regulated by the Act is not entitled to First Amendment protection because it is “verifiably false,” “entirely lacking in intrinsic value,” and “fails to serve any instrumental purpose that the First Amendment might protect.” *Id.* at 752 (Alito, J., dissenting).

monolithically as low-value speech and that some lies—like the lies criminalized by the Stolen Valor Act—are entitled to some constitutional protection for reasons other than prophylaxis. Beyond this, however, *Alvarez* offered little concrete guidance; the fragmented opinions produced no majority as to the standard of review applicable to constitutionally protected lies and only scattered guidance as to how courts might distinguish unprotected lies from protected lies.

II. SUBSTANTIVE FACTORS INFLUENCING THE ANALYSIS

If lies can no longer be categorized monolithically, what distinguishes constitutionally protected lies from unprotected lies? As scholars exploring this issue have observed,¹⁹ lies can be categorized for distinct treatment primarily under two broad rationales. The first is prophylaxis: some lies may garner greater protection than others because subjecting those lies to sanction may create substantial chilling effects on valuable truthful speech.²⁰ Closely intertwined with this rationale is a broad concern with government abuse—that is, the risk that the government will use regulation of lies as a means of distorting or manipulating public discourse.²¹

The second primary means of distinguishing amongst different lies is by cost-benefit analysis—that is, by weighing the social value of the lies in question against the associated social harms. As described above, *Alvarez* represented a fundamental shift in the constitutional understanding of false statements of fact, as it made clear that some lies may be entitled to constitutional protection in and of themselves rather

19. See, e.g., Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 163–72; Alan J. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1441–54 (2015).

20. See, e.g., Chen & Marceau, *supra* note 19, at 1448–51 (discussing the chilling effect rationale for protecting lies); Norton, *supra* note 19, at 169–70 (same).

21. See, e.g., Norton, *supra* note 19, at 170–72 (observing that some lies should be protected “because their regulation offends First Amendment interests in constraining the government’s power to impose its own version of the truth upon the public”); Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 20 (2008) (articulating a “structural interpretation of the First Amendment” that “is predicated on the premise that government has no authority to enforce through legal proscriptions any ideology or use the law to protect any set of favored ideas”); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1116–17 (2006).

than as a product of purely prophylactic considerations. Thus, both the social benefits produced by the lies in question²² and the types and degree of social harm produced by them²³ may dictate differential treatment of lies.

Beyond these primary rationales is a third and more limited rationale for distinguishing amongst lies: privacy considerations. That is, some lies may warrant constitutional protection simply because they occur in private settings that should be free of government regulation.²⁴ These considerations ultimately rest on the broad constitutional meta-principle—reflected in a wide variety of doctrinal contexts—that the government cannot invade the most intimate and personal aspects of people’s lives.²⁵ I will walk through each of these rationales in turn.²⁶

22. See, e.g., *Alvarez*, 567 U.S. at 733 (Breyer, J., concurring in the judgment) (describing the “useful human objectives” that can be served by “[f]alse factual statements”); Chen & Marceau, *supra* note 19, at 1454–72 (describing investigative deceptions as “high value lies” because they “fundamentally advance the First Amendment’s values”); Norton, *supra* note 19, at 164–68 (surveying the different ways in which lies may carry constitutional value).

23. See, e.g., *Alvarez*, 567 U.S. at 719 (plurality opinion) (distinguishing between protected and unprotected lies based on the presence of “legally cognizable harm”); David S. Han, *Autobiographical Lies and the First Amendment’s Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 115–19 (2012) (describing different types of harms caused by lies and proposing a materiality threshold).

24. See Han, *supra* note 23, at 108.

25. *Id.* at 108–10.

26. Of course, in evaluating a content-based restriction on lies, the tailoring of the restriction—which is an integral component of both intermediate scrutiny and strict scrutiny review—will also play a significant role in evaluating its constitutionality. As the *Alvarez* plurality noted, “[t]here must be a direct causal link between the restriction imposed and the injury to be prevented,” 567 U.S. at 725, and the regulation in question must represent either the least speech-restrictive alternative (under strict scrutiny), see, e.g., *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989), or be no more extensive than necessary to advance the government’s interest (under intermediate scrutiny), see, e.g., *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). Thus, even if the government can identify a compelling or important interest justifying regulation, the regulation in question may be struck down if it is insufficiently tailored in scope. For present purposes, however, I will set tailoring considerations to the side, as my central inquiry here is how lies, in the abstract, should be categorized, rather than an examination of the different means by which the government might choose to regulate a subset of lies. There is of course substantial overlap between these questions, as the substantive factors discussed in this Part can serve as a basis for evaluating whether the government’s regulation is sufficiently tailored. But the tailoring analysis can also involve a wide range of context-specific factors that are independent from the nature of the lies themselves and thus fall outside of the scope of my discussion here.

A. *Prophylaxis and Fear of Government Abuse*

Even when the government seeks to regulate only unprotected speech, risk-averse speakers who wish to partake in protected speech may be reluctant to do so for a variety of reasons, such as vagueness in the regulatory standard, the risk of judicial error (whether intentional or unintentional), or evidentiary difficulties.²⁷ Thus, extending constitutional protection to lies may be warranted to create a prophylactic buffer zone limiting these chilling effects on speakers.²⁸ This basic idea—that some lies may be entitled to constitutional protection for purely prophylactic purposes—has been long established, stretching back to the Court’s seminal opinion in *New York Times Co. v. Sullivan*.²⁹ In holding that the First Amendment mandates limits on state defamation law, the *Sullivan* Court observed “[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they need to survive.”³⁰ The Court reiterated this rationale in *Gertz*, stating that “[a]lthough the erroneous statement of fact is not worthy of constitutional protection,” sanctioning such speech “may lead to intolerable self-censorship”; as a result, “[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters.”³¹

Closely related to prophylaxis considerations is the fear of government abuse. Anytime the government is afforded the freedom to regulate speech based on its content, such freedom is accompanied by the risk that the government will manipulate the marketplace of ideas for its own purposes.³² Thus, as Justice Breyer recognized in his *Alvarez* concurrence, the government might silence disfavored viewpoints by selectively enforcing broad or vague regulations of lies.³³ Or the government might use subject matter-based regulations of

27. David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1160.

28. See Schauer, *supra* note 8, at 685.

29. 376 U.S. 254 (1964).

30. *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

31. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340–41 (1974).

32. See Norton, *supra* note 19, at 170–71.

33. See *United States v. Alvarez*, 567 U.S. 709, 737 (2012) (Breyer, J., concurring in the judgment) (observing that the Stolen Valor Act “may be applied . . . subtly but selectively to speakers that the Government does not like”).

lies—for example, a ban on “lies about the war against terrorism”—as a means of removing an issue of public concern from the public discourse or as a proxy to target particular viewpoints.³⁴ Thus, to the extent that the vagaries, uncertainties, and fears of judicial error accompanying the content-based regulation of lies would chill potential speakers, such factors may also supply the government with powerful tools to distort and manipulate the marketplace of ideas.

Both the risks of harmful chilling effects and the potential for government abuse will vary based on a number of factors. The primary drivers in determining the scope of these concerns include the underlying category of false speech sought to be regulated, the objective verifiability of the speech in question, and the fault standard attached to the speech.

1. The Underlying Category of False Speech

Probably the single most significant factor in measuring the degree of harmful chilling effects and the risk of government abuse is the underlying category of lies sought to be regulated. The more valuable the category of speech in question, the greater the risk of chilling valuable speech and the greater the potential for harmful government abuse.

As an initial matter, the value of speech ultimately rests on the theoretical rationales underlying the Free Speech Clause.³⁵ The more the speech in question advances the underlying theoretical rationales as to *why* speech is afforded special protection in the first place, the greater its constitutional value and the greater the protection to which it is entitled. The most prominent of these theoretical rationales are speech’s value in uncovering truth, speech’s central role in democratic self-governance, and speech’s position as an essential aspect of individual autonomy.³⁶

34. See *id.* at 723 (plurality opinion) (observing that permitting regulation of false speech on the basis of falsity alone “would endorse government authority to compile a list of subjects about which false statements are punishable” and “would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition”).

35. See David S. Han, *Middle-Value Speech*, 91 S. CAL. L. REV. 65, 74 (2017) (“If speech is constitutionally entitled to special protection because it is particularly valuable in some way, our intuitions as to *when* the value of speech justifies stringent constitutional protection are driven by these foundational theoretical justifications.”).

36. *Id.*

Although the Court has never settled on any singular rationale for protecting speech and has, in different circumstances, articulated these (and other) rationales in crafting the First Amendment's doctrinal framework,³⁷ it has tended to rely most heavily on the democratic self-governance theory in shaping its judgments regarding the value of speech.³⁸ Under this theory, unfettered speech must be protected as a necessary component of democratic decisionmaking: if the citizens in a democracy are the ultimate sovereigns, they must have the freedom to openly debate and discuss matters of public concern to govern effectively.³⁹ Thus, on this basis, the Court has consistently singled out speech regarding issues of public concern⁴⁰—and political speech specifically⁴¹—as uniquely valuable speech that resides at the very core of First Amendment protection.⁴² By contrast, the Court has described speech on issues of private concern⁴³ and

37. *Id.*

38. *See, e.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (describing “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”); *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964)) (observing that “speech concerning public affairs is more than self-expression; it is the essence of self-government”); *see also* Ashutosh Bhagwat, *Free Speech Without Democracy*, 49 U.C. DAVIS L. REV. 59, 61 (2015) (observing that “[t]he self-governance rationale . . . has over the years gained broad acceptance as the primary, if not necessarily the only, reason why the First Amendment protects free speech”).

39. *See, e.g.*, ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 22–27 (1948); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 497–98 (2011).

40. *See, e.g.*, *Boos v. Barry*, 485 U.S. 312, 318 (1988) (observing that the Court has “consistently commented on the central importance of protecting speech on public issues”); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”).

41. *See, e.g.*, *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech, of course, is at the core of what the First Amendment is designed to protect.”).

42. *See, e.g.*, *Snyder*, 562 U.S. at 452 (“The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”); *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964) (“[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”).

43. *See, e.g.*, *Snyder*, 562 U.S. at 452 (“Not all speech is of equal First Amendment importance, . . . and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”).

truthful commercial speech⁴⁴ as holding relatively less First Amendment value.

Whenever the government seeks to regulate lies regarding the highest-value speech, it creates substantial risks of chilling effects and potential government abuse. Take, for example, the issue of “fake news,” which I will define as false factual news reporting on issues of legitimate public concern. News reporting on issues of legitimate public concern clearly stands at the very core of speech protected by the First Amendment, as an informed citizenry is an essential aspect of sound democratic self-governance.⁴⁵ Thus, if the government were to institute any sort of content-based regulation of fake news, concerns regarding chilling effects and the risk of government abuse would be at their apex: the speech that would be chilled is the highest-value core speech (truthful news reporting), and such regulation would give the government direct opportunities to control and manipulate information that is critical to the political process.⁴⁶

By contrast, when the government regulates lies regarding lower-value speech, both chilling effects and the dangers of government abuse are correspondingly reduced. Take, for example, regulations on false advertising. As noted above, the Court has clearly identified commercial speech as less constitutionally valuable than political speech;⁴⁷ thus, to the extent chilling effects would result from such regulation, only less valuable commercial speech—rather than high-value ideological speech or truthful news reporting—would be chilled. Furthermore, as the Court has observed, commercial speech

44. See, e.g., *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455–56 (1978) (characterizing commercial speech as holding a “subordinate position in the scale of First Amendment values”).

45. See *Bartnicki v. Vopper*, 532 U.S. 514, 533–34 (2001) (stating that a statute “implicates the core purposes of the First Amendment because it imposes sanctions on the publication of truthful information of public concern”); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 571–72 (1968) (observing that “free and open debate is vital to informed decision-making by the electorate”).

46. See William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 298–99 (2004) (“[P]roscribing false political speech is constitutionally problematic because it empowers the government to decide what is true and false in politics.”).

47. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976) (observing that “[t]here are commonsense differences between speech that does no more than propose a commercial transaction and other varieties”).

may be “more durable” and less susceptible to chilling effects than core protected speech since “advertising is the sine qua non of commercial profits.”⁴⁸ And any concerns regarding government abuse of the political process would be muted significantly given the purely commercial nature of the regulation.⁴⁹

The value of the underlying category of false speech is the primary driver of any concerns related to prophylaxis or the potential for government abuse. When the lies sought to be regulated are related to the highest value core speech—like political speech or news reporting—the potential for chilling effects and the risks of government abuse are at their maximum. But when the lies are related to lower-value categories of speech—like commercial speech—both of these concerns are far more limited.

2. Objective Verifiability

Another factor influencing the magnitude of chilling effects and the potential for government abuse is the objective verifiability of the regulated falsehoods.⁵⁰ As discussed above, chilling effects on speakers are a product of uncertainty, whether rooted in a vague regulatory standard, the risk of judicial error, or a difficult-to-meet evidentiary standard. The more objectively verifiable the statement in question, the lesser this degree of uncertainty, and thus the lesser the chilling effects.⁵¹ Take, for example, a law that forbids speakers from lying about where they graduated from college. Such a law is

48. *Id.* But see Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 637 (1990) (observing that “[m]uch expression is engaged in for profit but nevertheless receives full first amendment protection” and arguing that “the durability of speech is not purely a function of the economic interest behind it”).

49. *See, e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 388 (2002) (Breyer, J., dissenting) (observing that “restrictions on commercial speech . . . rarely interfere with the functioning of democratic political processes”).

50. *See United States v. Alvarez*, 567 U.S. 709, 732 (2012) (Breyer, J., concurring in the judgment) (observing that “[t]he dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts”).

51. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762–63 (1985) (plurality opinion) (observing that because the false statements in that case were “more objectively verifiable than speech deserving of greater protection, . . . any incremental ‘chilling’ effect of libel suits would be of decreased significance”).

likely to breed little to no chilling effects on speakers since speakers will presumably know where they went to college, and any statements subject to the law can be easily and objectively verified through the judicial process (by, for example, obtaining records from the institution in question).⁵²

Contrast this to laws that forbid speakers from lying about their state of mind, or distant historical facts, or the validity of a scientific theory. Although the statements subject to these sorts of laws may be factual in nature (and thus may be true or false as a purely metaphysical matter), objective verification of their truthfulness through the judicial process would likely be extremely difficult (if not impossible) and freighted with potential ideological biases.⁵³ Thus, when these sorts of lies are regulated, chilling effects will be far more substantial: risk-averse speakers will be far less likely to speak—even if they believe that their statements are true—given the substantial risk of judicial error and the potential difficulty of mustering sufficient proof to support their assertions.

Similarly, the less objectively verifiable the speech in question, the greater the potential for government abuse. The same uncertainty that leads risk-averse speakers to refrain from speaking also provides the government with greater wiggle room to manipulate public discourse through selective enforcement or biased judicial decision-making. A law criminalizing lies about scientific theories, for example, might be selectively enforced against scientists holding different views about climate change than the governing administration. Or a judge or jury evaluating the veracity of a factual statement regarding controversial historical events (for example, the number of civilian casualties in the Iraq War) might consciously or subconsciously place a thumb on the scale based on their personal views on the issue. By contrast, the potential for government abuse in, say, regulating lies about

52. Cf. Eugene Volokh, *Amicus Curiae Brief: Boundaries of the First Amendment's "False Statements of Fact" Exception*, 6 STAN. J. C.R. & C.L. 343, 352–53 (2010) (observing that “[w]hether I have received a military decoration is unusually easy for me to be sure about,” and “[t]he truth of such claims is also unusually easy for the jury to determine with precision”).

53. See *id.* at 352 (observing that the truth of matters such as “statements about historical figures, historical events, war news, or scientific theories . . . is especially likely to be uncertain,” such that “[r]esolving what is true may be an especially politicized endeavor, with judges, prosecutors, and jurors of different ideological persuasions reaching different conclusions”).

the identity of one's alma mater is minimal. Regulations of these sorts of lies leave the government little wiggle room to exploit, since such statements are easily verifiable by methods that are generally objective, clear, straightforward, and agreed upon by all (such as obtaining the institution's graduation records).⁵⁴

3. Fault Standard

Finally, the degree of chilling effects and the risk of government abuse will vary based on the degree of fault required by the regulation in question.⁵⁵ For example, regulating lies under a strict liability standard—that is, punishing lies made without any fault—would create massive chilling effects on those wishing to speak regarding the covered subject.⁵⁶ Under such a regime, speakers would face a large risk of unwittingly violating the statute—even when they reasonably believe their statements to be true—thus incentivizing them to remain silent. Furthermore, instituting such a standard would greatly expand the scope of potential liability, thus opening the door for government abuse through selective enforcement or biased decision-making.

On the other hand, as the Supreme Court has recognized in its defamation jurisprudence, regulating lies under a more stringent fault standard would limit the scope of chilling effects. For example, the Court instituted an actual malice standard⁵⁷ for defamation claims against public figures regarding issues of public concern,⁵⁸ observing that this heightened fault standard was necessary to give speech the

54. See Norton, *supra* note 19, at 183 (observing that an approach “focusing on lies about ‘easily verifiable’ facts in certain areas” ultimately “lessens the risk of erroneous liability findings, and thus ameliorates . . . the danger that the government will engage in partisan abuse or selective enforcement”).

55. See Alvarez, 567 U.S. at 733 (Breyer, J., concurring in the judgment) (“[T]he Court emphasizes *mens rea* requirements that provide ‘breathing room’ for more valuable speech by reducing an honest speaker’s fear that he may accidentally incur liability for speaking.”).

56. Cf. Smith v. California, 361 U.S. 147, 152–53 (1959) (highlighting the significant chilling effects on booksellers as a basis for striking down a statute criminalizing the possession of obscene material under a strict liability standard).

57. Under this standard, a plaintiff must prove that the defendant made the statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

58. See *id.*; Gertz v. Robert Welch, Inc., 418 U.S. 323, 336–37 (1974).

“breathing space” needed to survive.⁵⁹ Given that it is obviously far more difficult for the government or a private litigant to prove either actual knowledge of falsity or recklessness (as compared to the strict liability standard of common law defamation),⁶⁰ this elevated fault standard reduces speakers’ fears that they will unwittingly face defamation liability and limits the potential for government abuse.

Thus, both potential chilling effects and the potential for government abuse increase as the fault standard for the regulation of lies decreases from intent to recklessness to negligence to strict liability.

B. Cost-Benefit Considerations

Although the Court has long recognized that some lies may be constitutionally protected for purely prophylactic reasons, *Alvarez* made clear that prophylaxis is *not* the only basis for extending such protection. In prohibiting lies about receiving military honors, any concerns with chilling effects were marginal at best: speakers are usually highly certain about facts regarding their own lives, and these sorts of facts are easily verifiable.⁶¹ It was therefore natural that in striking down the Stolen Valor Act, neither the plurality nor the concurrence in *Alvarez* focused their analysis on prophylaxis considerations. And although both opinions discussed the potential for government abuse raised by the Act,⁶² neither relied on this consideration as the sole or primary basis for striking it down.⁶³

59. *Gertz*, 418 U.S. at 342–43.

60. See RODNEY A. SMOLLA, 1 LAW OF DEFAMATION § 1:7 (2d ed. West 2017 Update) (“[T]he American common law of defamation was a strict liability tort.”).

61. See Volokh, *supra* note 52, at 348 (“[B]ecause claims about having gotten a medal are so objective and verifiable, punishing false statements in this field is especially unlikely to deter true statements.”); Han, *supra* note 23, at 94.

62. See *United States v. Alvarez*, 567 U.S. 709, 722–25 (2012) (plurality opinion); *id.* at 732, 736 (Breyer, J., concurring in the judgment).

63. Indeed, in discussing the potential for government abuse, both opinions focused primarily on the ramifications of a broad ruling that falsity alone may be punished, rather than on the specific risks of abuse posed by the Stolen Valor Act itself. See *id.* at 723 (plurality opinion) (“Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable.”); *id.* at 734 (Breyer, J., concurring in the judgment) (“[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or

Rather, both relied heavily on cost-benefit considerations, focusing on the social value and harms associated with the lies in question. The plurality, for example, emphasized that as a historical matter,⁶⁴ falsity alone was insufficient to render speech unprotected, and it distinguished the lies covered by the Stolen Valor Act from historically unprotected lies like fraud and perjury based largely on the absence of a “legally cognizable harm” associated with the lies prohibited by the Act.⁶⁵ In his concurrence, Justice Breyer similarly focused on the Act’s lack of a “material” or “tangible” harm requirement,⁶⁶ and he also observed that “[f]alse factual statements can serve useful human objectives,” such as “prevent[ing] embarrassment, protect[ing] privacy, [or] shield[ing] a person from prejudice.”⁶⁷

Direct cost-benefit considerations based on the social value and harms associated with the lies in question can thus play a vital role in delineating the degree of constitutional protection to be extended. In other words, the protection extended to lies may depend not on external concerns regarding chilling effects on truthful speech or the potential for government abuse, but rather on the social value and harm associated with the lies themselves: the more social benefit and less social harm produced by a particular subset of lies, the greater the degree of constitutional protection to which it may be entitled.

1. The Benefits of Lies

There is, of course, a longstanding view amongst many

without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more.”).

64. Although the plurality purported to apply the purely historical *Stevens* test, *see id.* at 717–22 (plurality opinion), this test—as I have previously argued at length—is inevitably driven by the sorts of fundamental cost-benefit value judgments that the *Stevens* Court purported to reject. *See* David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 384 (2015). Historical inquiry necessarily operates by analogical reasoning, and such reasoning is inevitably based on value judgments: a reviewing court must identify analytically significant characteristics of a historically excluded category of speech in order to meaningfully compare that category to the category of speech in question, and such judgments cannot be made without at least some underlying judgment about the constitutional value and harms associated with the historically excluded speech. *Id.* at 385.

65. *Alvarez*, 567 U.S. at 719 (plurality opinion).

66. *Id.* at 734, 738 (Breyer, J., concurring in the judgment).

67. *Id.* at 733.

that lies are categorically immoral.⁶⁸ But as Justice Breyer recognized in his *Alvarez* concurrence, lies can also produce significant social benefits on a purely instrumental level.⁶⁹ For example, they might serve to advance the instrumental goals of the First Amendment, like in the context of investigative lies made by journalists seeking to expose others' wrongdoing.⁷⁰ Let's say that a journalist lies about her identity to gain short-term employment at a feedlot, and in doing so, she is able to collect information about the feedlot's illegal and unsavory practices, which in turn leads to a series of articles exposing these practices to the public.⁷¹ If the purpose of the First Amendment is—at least to a significant extent—to promote democratic self-governance, then a strong argument can be made that these sorts of investigative lies significantly advance First Amendment values. After all, the net result is uncovering news of significant and legitimate public concern, which is essential to well-informed democratic decision-making.⁷²

Lies can also serve to smooth social interactions. We might say that a person looks great when in fact we think they look terrible; we might tell a friend that we have other plans when in fact we're just not in the mood to go out; or we might smile and say that we're happy to do something when in fact we really don't want to do it. Whatever one might think about the morality of these sorts of "white lies,"⁷³ they allow people to avoid difficult conversations in social contexts where the costs of absolute truthfulness are outweighed by the benefits of keeping social interactions smooth and nonconfrontational.

There are many other ways in which lies can produce

68. Under the Kantian view of lies, lying in any form is a clear moral offense because it manipulates others to serve the speaker's own ends. *See, e.g.*, David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 355 (1991) (noting that "lying is wrong because it violates human autonomy" as it "forces the victim to pursue the speaker's objectives instead of the victim's own objectives").

69. *See Alvarez*, 567 U.S. at 733–34 (Breyer, J., concurring in the judgment).

70. For a thoughtful and in-depth examination of the constitutional status of investigative lies, see generally Chen & Marceau, *supra* note 19.

71. *See id.* at 1466–71 (discussing lies made by journalists and animal rights investigators to expose animal abuse).

72. *Id.* at 1474–75.

73. Seana Shiffrin has argued that these sorts of everyday falsehoods are not really lies since they are made in social contexts where "the speaker's (potential) insincerity is reasonable and justifiable" and a listener cannot reasonably expect a truthful answer. SEANA VALENTINE SHIFFRIN, *SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW* 16–19 (2014).

social benefits.⁷⁴ We may lie to protect others—like, for example, lying to would-be murderers who are searching for a victim. Police officers may lie to investigate crimes and bring criminals to justice.⁷⁵ We may lie to shield children from harmful truths (for example, telling them that a deceased pet is at a nice farm upstate). We may lie to protect our own privacy or someone else’s privacy. As I’ve argued elsewhere, we may tell harmless half-truths or falsehoods about ourselves to craft and calibrate the public personas we present to others.⁷⁶ And there are many other potential social benefits from lies; as Justice Breyer noted in his *Alvarez* concurrence, lies might “shield a person from prejudice, . . . stop a panic or otherwise preserve calm in the face of danger; . . . [or] promote a form of thought that ultimately helps realize the truth.”⁷⁷

2. Social Harms Associated with Lies

On the other hand, lies can of course cause a wide array of social harms. A detailed and comprehensive taxonomy of these harms is beyond the scope of this brief survey; for present purposes, I will focus on three particular types of harms: direct harms on individuals or organizations, institutional harms to important government functions, and abstract harms to the public discourse as a whole.

Some lies cause direct, targeted harms focused on particular individuals or organizations. Thus, for example, lies might cause financial loss to an individual or company, like in the context of a fraudulent commercial transaction. They might cause emotional distress; indeed, one of the paradigmatic examples of the tort of intentional infliction of emotional distress is falsely telling someone that a loved one has been severely injured.⁷⁸ Lies might ruin reputations, like in the defamation context, or cause physical injury.⁷⁹ Beyond these

74. See Norton, *supra* note 19, at 164–76 (cataloguing ways in which lies may advance “core First Amendment values”); Ariel Porat & Omri Yadlin, *A Welfarist Perspective on Lies*, 91 IND. L.J. 617, 619–21 (2016) (outlining four categories of instrumentally beneficial lies: productive-information lies, anti-abuse lies, truth-revealing lies, and paternalistic lies).

75. See Chen & Marceau, *supra* note 19, at 1461–63.

76. See Han, *supra* note 23, at 72.

77. *United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring in the judgment).

78. See RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (AM. LAW INST. 1965).

79. For instance, if someone lies about the dangerousness of a product or the

examples, there are countless other types of direct harms caused by lies, which vary both in their scope and in the mechanism by which they create such harm.

Lies can also produce institutional harm to the integrity of important government functions. Perjured testimony, for example, “threatens the integrity of judgments that are the basis of the legal system.”⁸⁰ Similarly, lies to federal officials and investigators⁸¹ can hamstring vital government functions ranging from law enforcement to economic regulation to foreign affairs. The same is true of false claims about being a government official,⁸² which interfere with the proper functioning of government by eroding public trust in state institutions.⁸³

Finally, lies can cause more abstract, systemic harms to the public discourse. Fake news, for example, may not cause a direct, material harm on particular individuals like financial loss or emotional distress. It also may not directly undermine the functioning of government institutions in the same manner as perjury or lies to federal investigators. But it can broadly erode the machinery of democratic self-governance by infecting public discourse; for example, a fake news story alleging corruption on the part of elected officials might ultimately influence people to vote “incorrectly” based on inaccurate information.⁸⁴

Again, my discussion here is not meant to be comprehensive, and there are certainly other ways of characterizing and distinguishing the different harms associated with lies.⁸⁵ But as I will discuss below, some categorical division of the different types of harms associated

hazardousness of a physical activity.

80. *Alvarez*, 567 U.S. at 720–21 (plurality opinion).

81. *See* 18 U.S.C. § 1001 (2012) (prohibiting making false statements “in any matter within the jurisdiction of the executive, legislative, or judicial branch”).

82. *See, e.g.*, 18 U.S.C. § 912 (2012) (criminally sanctioning anyone who “falsely assumes or pretends to be an officer or employee acting under the authority of the United States”).

83. *See* Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, in *LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* 167–68 (Austin D. Sarat ed., 2015).

84. *Cf.* Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 *MONT. L. REV.* 53, 55 (2013) (“False campaign speech might trick voters into voting for the ‘wrong’ candidate or voting the ‘wrong’ way on a ballot measure.”).

85. *See, e.g.*, Norton, *supra* note 19, at 185–200 (distinguishing between second-party harms and third-party harms caused by lies).

with lies is ultimately necessary to construct a workable doctrinal framework.⁸⁶

C. *Privacy*

Finally, the constitutional protection afforded to lies may rest on privacy considerations. Such considerations are rooted in a broad constitutional meta-principle that the government cannot invade the most intimate and personal aspects of people's lives—a principle reflected not only in certain speech contexts,⁸⁷ but also in other constitutional contexts such as substantive due process,⁸⁸ the Fourth Amendment's protection against unreasonable searches and seizures,⁸⁹ and the Free Exercise Clause.⁹⁰

Thus, some lies may be constitutionally protected simply because they occur in intimate and personal settings within which the government cannot interfere.⁹¹ Let's say that the government prohibited lies, made in private, between close relations (like, for example, telling your spouse that you were working late when you were actually out with friends).⁹² The primary instinct as to why these sorts of lies might be entitled to constitutional protection isn't likely prophylaxis, government

86. See *infra* Section IV.B.

87. See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (describing the defendant's "right to satisfy his intellectual and emotional needs in the privacy of his own home" in striking down a ban on mere possession of obscene material).

88. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (holding that the Constitution protects "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," since these matters "involv[e] the most intimate and personal choices a person may make in a lifetime").

89. See, e.g., *Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) ("The reasonableness of a search [under the Fourth Amendment] depends on the totality of the circumstances, including . . . the extent to which the search intrudes upon reasonable privacy expectations.").

90. See *Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878–82 (1990) (generally denying Free Exercise Clause challenges to "neutral law[s] of general applicability," but recognizing certain contexts in which the government cannot constitutionally penalize people for acting in a manner dictated by their religious beliefs).

91. Cf. *United States v. Robbins*, 759 F. Supp. 2d 815, 821 (W.D. Va. 2011) (arguing that "the Constitution's privacy protection would better apply to prevent" unwarranted government regulation of "wholly private interactions" such as lying about "one's weight or age or smoking habits").

92. Cf. *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion) (observing, in striking down the Stolen Valor Act, that it "would apply with equal force to personal, whispered conversations within a home").

abuse, or cost-benefit considerations. Rather, it's likely based on privacy concerns—the idea that the government simply cannot regulate within a certain sphere of intimate communication.⁹³

III. A PROPOSED DOCTRINAL FRAMEWORK

A. *Structural Factors in Building a Framework*

Having canvassed the substantive considerations in distinguishing amongst lies, what are the *structural* considerations that must be taken into account in building a doctrinal framework regarding lies?

As an initial matter, I will focus my present discussion solely on a traditional scrutiny-based framework for categorizing and organizing lies. In the context of defamation and other speech torts, the Court has accounted for First Amendment considerations not through varying levels of scrutiny, but rather by instituting constitutionally mandated substantive standards (such as requiring that plaintiffs prove actual malice in certain cases).⁹⁴ That approach, however, is somewhat *sui generis* and unlikely to be extended outside of the speech-tort context. The Court has broadly adhered to the traditional scrutiny-based framework in evaluating direct government regulations of speech outside of the private law context,⁹⁵ and both the plurality and concurring opinions in *Alvarez* made clear that this would be no different with respect to direct government regulation of lies.⁹⁶

So how should courts structure a doctrinal framework governing lies? This question boils down to three basic inquiries: (1) how many distinct tiers of lies should be recognized; (2) what standard of review should apply to each

93. Han, *supra* note 23, at 109–10.

94. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–43 (1974) (requiring that plaintiffs prove actual malice by clear and convincing evidence in defamation cases dealing with public figures and issues of public concern); *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (requiring the plaintiff to prove actual malice in a suit for intentional infliction of emotional distress).

95. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980).

96. See *Alvarez*, 567 U.S. at 715 (plurality opinion) (“When content-based speech regulation is in question, . . . exacting scrutiny is required.”); *id.* at 731 (Breyer, J., concurring in the judgment) (“[I]n this case, the Court’s term ‘intermediate scrutiny’ describes what I think we should do.”).

tier; and (3) what, if any, default standard should apply to any otherwise uncategorized lies. And the obvious initial point of comparison is to the doctrinal structure that currently governs truthful speech. Truthful speech is generally divided into two tiers: fully protected speech, for which any content-based regulation is subject to strict scrutiny, and unprotected low-value speech.⁹⁷ Furthermore, strict scrutiny serves as the default standard for truthful speech—that is, all speech, by default, is presumed to be fully protected, and any low-value speech must be affirmatively designated as falling within a categorical exception to this default position.⁹⁸ But of course, the doctrinal framework that courts design for lies need not parallel the one designed for truthful speech.

Beyond this, the Court has provided only limited guidance as to how the doctrinal framework governing lies should be structured. *Alvarez* made clear that there must be at least two different tiers of lies: unprotected lies (like fraud, perjury, and so forth) and protected lies (like the lies covered by the Stolen Valor Act).⁹⁹ And it has long been established that regulations of unprotected lies—like other low-value speech—are subject to a highly deferential standard akin to rational basis review.¹⁰⁰ But the splintered *Alvarez* decision provided little guidance beyond this, leaving open the question of how many tiers of lies should be recognized and what standard or standards of review should apply to protected lies.

Theoretically, one could subdivide lies into any number of tiers. As a purely practical matter, however, there are only three well-established constitutional standards of review for government regulations: strict scrutiny, intermediate scrutiny, and rational basis review. And this set of three standards makes sense: strict scrutiny carries a heavy presumption of unconstitutionality; rational basis review carries a heavy presumption of validity; and intermediate scrutiny effectively

97. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468–69 (2010). The most notable exception to this general rule is truthful commercial speech, which the Court has effectively treated as middle-value speech subject to intermediate scrutiny. See *Cent. Hudson*, 447 U.S. at 566.

98. See *Stevens*, 559 U.S. at 468–69.

99. See *supra* Part I.

100. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (“There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem.”).

represents a more open-ended balancing analysis.¹⁰¹ While it may be theoretically possible to institute additional tiers beyond these three cornerstone standards of review—as the Court has occasionally suggested in its opaque and inconsistent use of the phrase “exacting scrutiny”¹⁰²—it would make little practical sense to do so, as any benefits of finer gradation would be outweighed by the substantial difficulties in developing a novel standard and administering a more complex framework.¹⁰³

There are thus only two realistic options available to courts: a two-tiered doctrinal structure and a three-tiered structure. A two-tiered structure would divide lies into protected and unprotected lies, with content-based regulation of protected lies subject to either strict scrutiny or intermediate scrutiny. A three-tiered structure would divide lies into protected lies, partially protected lies, and unprotected lies, with content-based regulation of these lies subject to strict scrutiny, intermediate scrutiny, and a rational basis-like standard of review respectively.

Beyond the number of tiers and the applicable standards of review is the question of which standard of review—if any—should be the default standard.¹⁰⁴ By default standard, I mean

101. See Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296–97 (1992) (characterizing strict scrutiny and rational basis review as “a de facto categorical mode of analysis” and intermediate scrutiny as “an overtly balancing mode”).

102. At times, the Court seems to use this phrase as merely a synonym for strict scrutiny. See, e.g., *McCutcheon v. Fed. Election Comm’n*, 134 S. Ct. 1434, 1444 (2014) (plurality opinion) (“Under exacting scrutiny, the Government may regulate protected speech only if such regulation promotes a compelling interest and is the least restrictive means to further the articulated interest.”). This appears to be how the *Alvarez* plurality used the term. See 567 U.S. 709, 724–29 (calling the government’s interest “compelling” but holding that the restriction was not “the least restrictive means among available, effective alternatives”). At other times, however, the term seems to denote a standard of review more stringent than intermediate scrutiny but less stringent than strict scrutiny. See, e.g., *Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (citations omitted) (stating that “exacting scrutiny” requires “a ‘substantial relation’ between the [regulation] and a ‘sufficiently important’ governmental interest”).

103. It is difficult to see, for example, how courts would practically delineate intermediate scrutiny from “exacting” (but not strict) scrutiny. Theoretically, the latter standard would involve a somewhat heavier thumb on the scale in favor of unconstitutionality, but in practice, it seems highly unlikely that courts could articulate and apply the distinction between these two standards in a meaningful and consistent manner.

104. There is an extensive academic literature regarding the role and effects of default rules on individual decisionmaking, which has typically focused on private

the presumptive standard that courts will apply when the speech in question does not fall into any preexisting categories. If there is no default, then courts generally have more work to do when faced with a novel subset of regulated speech¹⁰⁵: they have to affirmatively classify it into one of the designated tiers of speech in a categorical manner, and they need to give reasons for doing so. If there is a default standard, however, they need not do so; they can simply presume that the speech falls into a given category simply because it does not fall into any categorical exceptions to the default.¹⁰⁶

If a default standard is instituted, there's the additional question of what that standard should be. Where one sets the default effectively represents a broad judgment as to how the entire category of speech should be characterized, whether based on the value of the speech in question or the potential for government abuse in regulating such speech.¹⁰⁷ For example, if one were to set the default rule at strict scrutiny (as is the case for truthful speech), this would presumably reflect a judgment that the entire span of regulated speech is broadly of the highest value, or that the dangers of government abuse are particularly acute, or both. And any default rule would of course carry with it significant inertia since it represents the path of least resistance when courts are confronted with novel regulations and/or novel speech.¹⁰⁸

law doctrine and broad issues of social policy. *See, e.g.*, Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); RICHARD THALER & CASS SUNSTEIN, *NUDGE* (2008); Ryan Bubba & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2014); Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1 (2013).

105. *Cf.* Sunstein, *supra* note 104, at 46–47 (observing that “active choosing,” as opposed to default rules, “can impose large burdens on choosers,” given the time and resources invested in making such decisions).

106. *Cf. id.* at 5 (observing that default rules “count as prime ‘nudges,’ understood as interventions that maintain freedom of choice, that do not impose mandates or bans, but that nonetheless incline people’s choices in a particular direction”).

107. In other words, any default standard applied to uncategorized lies should reflect our best guess as to how most of these lies would or should be classified. *Cf. id.* at 31 (“If we know that a particular default rule would place people in the situation that informed people would bargain their way to or select, we have good reason to select that default rule (with the understanding that those who differ from the majority may opt out).”).

108. *See infra* note 122 and accompanying text.

B. A Proposed Doctrinal Framework

In my view, the best of these assorted options is a three-tiered doctrinal framework governing lies, with a default standard of intermediate scrutiny for content-based regulations of lies. In other words, courts should characterize lies as either fully protected, partially protected, or unprotected, with a default presumption that lies are partially protected in the absence of any affirmative basis for classifying them as fully protected or unprotected.

As I noted above, however, in the context of truthful speech, the Court has broadly adopted a two-tiered approach rather than a three-tiered approach, treating speech as fully protected by default while carving out limited categories of unprotected low-value speech. Why not simply extend this approach to false statements of fact?

The two-tiered framework applied to truthful speech is highly rigid and overprotective by design. Two tiers of speech value are obviously insufficient to account for the near-infinite variety of speech covered by the First Amendment, and this disconnect has created considerable strain within the existing doctrine.¹⁰⁹ Nevertheless, when it comes to truthful speech, courts have made the judgment that a rigid and overprotective approach is necessary to protect speech adequately, as additional flexibility and discretion in the doctrine might open the door to biased decision-making by judges and juries.¹¹⁰ Furthermore, a rigid and overprotective doctrine might be necessary to correct any systemic tendency to undervalue the more abstract benefits of free speech in favor of more concrete regulatory interests,¹¹¹ and it might serve to limit harmful

109. See Han, *supra* note 35 (observing that the present doctrinal structure “produces considerable strain . . . simply because it applies the same onerous strict scrutiny standard to content-based regulations of all non-low-value speech, even though the vast expanse of such speech encompasses not only the core, highest-value speech for which such stringent protection is clearly warranted, but also—and to a rapidly increasing extent—less valuable speech to which the application of strict scrutiny is often dissonant”). This strain has produced doctrinal distortion by courts seeking to avoid anomalous results in cases where the onerous strict scrutiny default rule doesn’t seem to fit. See *id.*

110. See, e.g., Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 73–74 (1987); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985).

111. See, e.g., Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 744 (2002); Frederick Schauer,

chilling effects by giving clear guidance to speakers, legislators, and courts.¹¹² On the other hand, adopting an additional tier of protection would produce more judicial discretion and less clarity *ex ante*, which can produce harmful chilling effects on protected speech, systemic underprotection of speech, and biased decision-making by courts.¹¹³

Even if one agrees that these concerns justify a two-tiered structure for truthful speech, however,¹¹⁴ in the context of *lies*, the balance of costs and benefits associated with a more flexible doctrine is quite different. Unlike truthful speech, false statements of fact effectively have a strike against them at the outset: we broadly consider lies to be less valuable and more harmful than truthful speech simply because of their falsity. Lies broadly undermine rather than strengthen the process of democratic self-governance as they lead citizens to make decisions based on incorrect information.¹¹⁵ Furthermore, liars violate the individual autonomy of others by manipulating them to accomplish the speaker's own ends.¹¹⁶ And although, in the abstract, truthful speech can often cause just as much social harm as false speech, the mechanism by which lies cause such harm—through falsity and deception—is broadly recognized as illegitimate.¹¹⁷ All of this is not to say that

Categories and the First Amendment: A Play in Three Acts, 34 VAND. L. REV. 265, 304 (1981).

112. See, e.g., Stone, *supra* note 110, at 72; Frederick Schauer, *Codifying the First Amendment*: New York v. Ferber, 1982 SUP. CT. REV. 285, 288 (“Extreme subdivision of the First Amendment magnifies the risk that an increasingly complex body of doctrine, even if theoretically sound, will be beyond the interpretative capacities of those who must follow the Supreme Court’s lead—primarily lower court judges, legislatures, and prosecutors.”).

113. See Han, *supra* note 35.

114. I have elsewhere argued in depth that courts should adjust First Amendment doctrine to better account for a third category of “middle-value” speech. See generally Han, *supra* note 35.

115. See, e.g., Marshall, *supra* note 46, at 294 (“Democracy is premised on an informed electorate. Thus, to the extent that false ads misinform the voters, they interfere with the process upon which democracy is based.”). John Stuart Mill, however, argued that lies can have instrumental value as a means of uncovering truth, as a false statement can bring about “the clearer perception and livelier impression of truth, produced by its collision with error.” JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kate eds., Yale Univ. Press 2003) (1959). But see Gey, *supra* note 21, at 8–9 (observing that “disputes about facts have completely different characteristics” than “normative disagreements,” and as such “[t]he marketplace of ideas justification for free speech provides a much weaker footing for protecting [such] expression . . . than it does for normative advocacy”).

116. See *supra* note 68.

117. See, e.g., Strauss, *supra* note 68, at 354 (comparing manipulation by lies

particular lies can *never* be deemed as valuable as truthful speech—merely that in the abstract, lies broadly carry less First Amendment value than truthful statements.

Because lies are broadly less valuable than truthful speech, any concerns regarding broadened judicial discretion or the dilution of speech protection carry less weight when lies are regulated. We care far less—if at all—about chilling lies as opposed to chilling truthful speech. And any potential judicial abuse in evaluating and applying content-based regulations of lies is naturally limited by the fact that false speech (rather than true speech) is targeted. This is not to say, of course, that regulation of lies can never chill truthful speech, or that such regulation can never be the basis for government abuse; as I discussed above, such risks may be substantial in particular regulatory contexts.¹¹⁸ It is simply to say that from a wholesale perspective, these costs are substantially lower given the less valuable nature of lies as a whole.

Thus, in crafting a doctrinal framework for lies, my sense is that any concerns associated with chilling effects, biased decision-making, or underprotection of speech are outweighed by the substantial benefits of a more flexible, three-tiered doctrinal structure that better accounts for the wide variety of different lies. A three-tiered structure does a far better job of capturing the complexity of different types of lies, driven by the various substantive factors discussed above.¹¹⁹ There is simply too much variation in lies to group them into “government always wins” and “government always loses” categories, or into “government always wins” and “government might win” categories; classifying lies in such a rigid and restrictive manner would likely create significant strain in the doctrine, as has been the case with truthful speech.¹²⁰

A three-tiered approach, however, can better capture the nuances amongst the countless different types of lies, such as investigative lies, fake news, defamation, fraudulent statements, campaign lies, “white lies,” academic lies, and

to coercion since “[b]oth are ways of exerting control over the victim” and “[b]oth are deliberate efforts to make a person do not what that person wants but what another person—the liar or coercer—wants”); Varat, *supra* note 21, at 1110 (describing “the manipulative, domineering, and fundamentally disrespectful invasion of autonomy worked by deception”).

118. See *supra* Section II.A.

119. See *supra* Part II.

120. See *supra* note 109 and accompanying text.

impersonation. Such an approach allows courts to say, in effect, that the government can freely regulate some lies; it can't regulate other lies at all (at least absent highly exceptional circumstances); and it can regulate yet other lies as long as it can make an adequate showing. This framework better fits our natural intuitions regarding the wide variety of lies, and it carries far less potential risk to fundamental First Amendment values as compared to similar regulation of truthful speech.

Furthermore, in applying this three-tiered framework, courts should institute a default standard of intermediate scrutiny with respect to content-based regulations of lies. In other words, any otherwise uncategorized lies should be presumed to be partially protected.

As an initial matter, it makes sense to have a default standard generally as it makes the doctrine more administrable. If no default exists, then courts would always have to affirmatively classify the lies in each case within one of the designated tiers of speech and provide justifications for these classifications.¹²¹ This would open up the possibility of divergent standards applied by different courts with respect to similar speech. With a default standard, however, courts would have more guidance in dealing with novel speech regulations: they can simply presume that the speech falls into the default category, absent an affirmative basis for classifying them within a designated categorical exception to the default. Any default standard will thus carry with it significant inertia, since it represents the path of least resistance when courts are confronted with novel regulations and/or novel speech.¹²² As such, a reasonably calibrated default standard¹²³ would help to

121. Cf. Sunstein, *supra* note 104, at 46–47 (describing the additional effort that must be invested by those making “active choices” as opposed to simply following default rules).

122. Cf. *id.* at 5 (observing that “default rules . . . have a large impact, because they tend to stick”); *id.* at 17 (observing that “[t]o change the default rule, people must make an active choice to reject that rule,” and because such a choice requires affirmative effort, “it is tempting to defer the decision or not to make it at all”).

123. If the default standard is substantially miscalibrated, these benefits in doctrinal consistency may not be realized, as such miscalibration may lead to frequent opt-outs on the part of courts. Cf. *id.* at 27 (observing that “extreme’ defaults are less likely to stick”). It is difficult to argue, however, that my proposed default standard of intermediate scrutiny would represent this sort of extreme miscalibration; as I argue below, such a standard seems to best reflect our prevailing intuitions regarding false statements of fact. See *infra* text accompanying notes 125–127.

ensure that courts apply a consistent standard when evaluating similar speech regulations.¹²⁴

Furthermore, courts should set intermediate scrutiny as the default standard for content-based regulations of lies. At the most basic level, this standard best captures our general intuitions regarding lies. Again, lies already have a strike against them as compared to truthful speech—we generally presume them to be less valuable.¹²⁵ At the same time, however, there are clear dangers associated with unfettered government regulation of lies: chilling effects, government abuse, privacy concerns, and the possibility of restricting valuable speech with marginal harms.¹²⁶ There is no easy and categorical answer as to which set of considerations should trump whenever lies are regulated; rather, courts would have to evaluate each subset of lies under the various substantive factors discussed above. Intermediate scrutiny, which effectively operates as a balancing-style analysis,¹²⁷ best captures this dynamic—one that is more complex and open-ended than in the truthful speech context. Of course, courts would remain free to carve out specific categories of protected and unprotected lies from this default, and some of these categories already exist.¹²⁸ But any lies that do not fall within any of those categories should be presumed to be partially protected, such that content-based regulations are evaluated under intermediate scrutiny.

This default standard also makes practical sense because it gives courts the opportunity to work through any difficult issues posed in these cases. If courts' path of least resistance in evaluating content-based regulations of lies is intermediate scrutiny, they need not rush to classify, say, a novel set of regulated lies as either categorically protected or categorically unprotected. Rather, this default standard would afford them a valuable intermediate step—an opportunity to thoughtfully

124. Cf. Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1598 (1999) (“More parties will be covered by a rule if we make that rule a default than will be covered by that rule if we make a different rule the default. . . . This is the iron law of default inertia.”).

125. See *supra* text accompanying notes 114–117.

126. See *supra* Part II.

127. See, e.g., Sullivan, *supra* note 101, at 300 (“In either its official or de facto form, intermediate scrutiny is a balancing mode.”).

128. See, e.g., *United States v. Stevens*, 559 U.S. 460, 468 (2010) (characterizing fraud and defamation as unprotected low-value speech).

consider, on a more case-specific basis, how the various considerations on each side of the ledger stack up.¹²⁹ And over time—after courts have accrued greater experience with the novel subset of speech or regulation in question—they might find themselves better equipped to adopt a categorical rule of full protection or non-protection. A default standard of intermediate scrutiny would thus promote a greater degree of care and deliberateness in judicial analyses, limiting the risk that courts will prematurely and categorically classify a subset of lies in a manner they may later regret.¹³⁰

IV. SOME PRINCIPLES FOR CATEGORIZING LIES AND ONE VERSION OF MY PROPOSED FRAMEWORK

Having set forth a proposed doctrinal framework for categorizing lies, what might this framework look like in practice? In this Part, I set forth some broad principles that should guide courts in determining the appropriate degree of constitutional protection for a given set of lies. These principles are certainly not meant to be comprehensive, but they should, in my view, undergird any proposed taxonomy of lies, one example of which I set forth at the end of this Part.

A. *Lies Regarding the Highest-Value Speech*

First, lies regarding the highest-value speech—that is, speech that resides at the very core of First Amendment

129. Cf. David S. Han, *Terrorist Advocacy and Exceptional Circumstances*, 86 *FORDHAM L. REV.* 487, 500–01 (2017) (describing a similar dynamic in applying strict scrutiny—rather than broadly reformulating doctrinal standards—to account for changing social and technological conditions surrounding terrorist advocacy).

130. Cf. *id.* To be sure, adopting intermediate scrutiny as the default standard may produce some inconsistency, as different courts may arrive at different results in applying this open-ended standard to similar facts. But this risk simply reflects the inherent difficulty of evaluating content-based regulations of lies, which—as I discussed above—does not lend itself to easy and categorical answers. If courts were to instead adopt the highly ill-fitting and onerous strict scrutiny standard as the default, any risk of inconsistent results would likely remain given courts' demonstrated tendency to distort doctrine whenever necessary to avoid applying strict scrutiny in cases where that stringent standard doesn't fit. See Han, *supra* note 35. To evaluate these difficult cases openly and transparently under a balancing-oriented intermediate scrutiny analysis strikes me as a superior state of affairs than adopting an ill-fitting strict scrutiny standard that will likely breed doctrinal distortion, opacity, and confusion. See *id.*

protection—should carry a heavy presumption of full constitutional protection, such that any content-based restrictions of such lies are evaluated under strict scrutiny. Such regulation creates massive risks of harmful chilling effects and government abuse, and these considerations should trump all other considerations in categorizing the lies in question.

As an initial matter, I should clarify further what exactly I mean by the “highest-value” speech, or speech that falls within the central core of the First Amendment. As a matter of technical doctrine, all content-based regulations of speech—regardless of the speech’s perceived constitutional value—are evaluated under the same strict scrutiny standard, save a few narrow carve-outs of low-value speech.¹³¹ As I noted earlier, however, the Court has in other doctrinal contexts clearly distinguished certain subsets of protected speech as *particularly* valuable or central to the First Amendment—most notably, political speech and speech on matters of public concern.¹³²

This makes intuitive sense; as a purely theoretical matter, it is difficult to dispute that within the incredibly vast realm of speech covered by the First Amendment, different subsets of speech carry different degrees of constitutional value.¹³³ Most would likely agree, for example, that speeches at political rallies fall within the central core of the First Amendment and thus—at least in the abstract—carry more First Amendment value than, say, nude dancing.¹³⁴ And although the exact boundaries of this highest-value “core speech” category may be difficult to define, any such category would presumably include, at the very least, political and other ideological speech, news reporting, and any other speech regarding issues of public concern.¹³⁵

131. See, e.g., *Stevens*, 559 U.S. at 468–69.

132. See *supra* text accompanying notes 40–44.

133. Of course, whether courts should formally *recognize* these different degrees of constitutional value within First Amendment doctrine is a very different question, which must take into account the various pros and cons of different approaches to structural design. See Han, *supra* note 35.

134. This value judgment directly follows from the democratic self-governance rationale that, as I observed earlier, has been heavily relied upon by the Court in delineating the contours of the First Amendment. See *supra* text accompanying notes 37–44. Political speeches at a rally clearly shape public discourse in a far more significant and direct manner than nude dancing.

135. See Hasen, *supra* note 84, at 69 (“Although the Court’s decision in *Alvarez*

The idea that lies regarding the highest-value speech should be afforded a heavy presumption of full constitutional protection is consistent with the Court's strong and longstanding concern with chilling effects on the most valuable speech and the potential for government abuse. For example, in the defamation context, the Court made clear that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters,"¹³⁶ and it warned of "silence coerced by law" produced by "the occasional tyrannies of governing majorities."¹³⁷ As such, it instituted the most stringent constitutional standards in cases dealing with the most constitutionally valuable speech: statements regarding public figures on issues of public concern.¹³⁸ As the Court recognized—and as I discussed above—anytime the government seeks to regulate the highest-value core speech, concerns regarding chilling effects and the risk of government abuse are at their apex.¹³⁹ And if the underlying purpose of the First Amendment is primarily to preserve the sort of open public discourse necessary to sustain a robust system of democratic self-governance, these concerns should trump any other substantive considerations, including any cost-benefit considerations specific to the lies themselves.¹⁴⁰

Indeed, both the concurrence and the dissent in *Alvarez* appeared to recognize that lies regarding the most valuable core speech are entitled to the utmost protection. As Justice Alito noted in his dissent:

is badly fractured, there seems unanimous skepticism of laws targeting false speech about issues of public concern and through which the state potentially could use its sanctioning power for political ends."). The Court has stated that "[s]peech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it 'is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations omitted).

136. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

137. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

138. *Gertz*, 418 U.S. at 342–43 (stating that plaintiffs in these cases must prove actual malice by clear and convincing evidence).

139. See *supra* text accompanying notes 44–46.

140. See Geoffrey R. Stone, *The Rules of Evidence and the Rules of Public Debate*, 1993 U. CHI. LEGAL F. 127, 139–40 (arguing that although false statements in public debate "have no constitutional value" and are "destructive of public debate," prohibiting such statements would be "invalid because of the danger of putting government in the position routinely to decide the truth or falsity of all statements in public debate").

[T]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. Laws restricting false statements about philosophy, religion, history, the social sciences, the arts, and other matters of public concern would present such a threat. The point is not that there is no such thing as truth or falsity in these areas or that the truth is always impossible to ascertain, but rather that it is perilous to permit the state to be the arbiter of truth.¹⁴¹

Justice Breyer’s concurrence agreed with this portion of the dissent, and observed that regulations of these sorts of lies “in many contexts have called for strict scrutiny.”¹⁴² And although the *Alvarez* plurality did not opine on this particular issue, the Justices joining that opinion would presumably agree with the concurrence and dissent, given their judgment that even the lies covered by the Stolen Valor Act are entitled to full First Amendment protection.¹⁴³

This principle has also been embraced in post-*Alvarez* lower-court decisions evaluating regulations on campaign speech. For example, in *281 Care Committee v. Arneson*, the Eighth Circuit applied strict scrutiny in striking down a regulation prohibiting lies about proposed ballot initiatives, basing its analysis squarely on the fact that “the [political] speech at issue occupies the core of the protection afforded by the First Amendment.”¹⁴⁴ And in *Susan B. Anthony List v. Driehaus*, the Sixth Circuit applied strict scrutiny to Ohio laws criminalizing false statements about political candidates because such laws “target speech at the core of First Amendment protections—political speech.”¹⁴⁵

This principle would also presumably dictate that any content-based regulation of fake news bears a heavy

141. 567 U.S. 709, 751–52 (Alito, J., dissenting).

142. *Id.* at 732 (Breyer, J., concurring in the judgment).

143. *Id.* at 724 (plurality opinion) (applying “exacting scrutiny” to the Act); see also Hasen, *supra* note 84, at 69.

144. 766 F.3d 774, 784 (8th Cir. 2014); see also *id.* at 783 (citations omitted) (“[A]lthough *Alvarez* dealt with a regulation proscribing false speech, it did not deal with legislation regulating false *political* speech. This distinction makes all the difference and is entirely the reason why *Alvarez* is not the ground upon which we tread.”).

145. 814 F.3d 466, 473 (6th Cir. 2016).

presumption of invalidity. Fake news can potentially cause massive systemic harm, as it directly undermines the process of democratic self-governance; furthermore, it carries little to no intrinsic value. But any content-based regulation of fake news would create massive risks of chilling effects and government abuse. If the government were to sanction news reporting based solely on its falsity, then it would significantly chill the press from producing speech that is uniquely valuable to the political process: news on issues of public concern, which is necessary for ensuring a well-informed citizenry. And because such speech is so valuable, allowing the government to police it via content-based regulations would provide it with a powerful tool to manipulate and shape public discourse for its own ends. These dangers outweigh even the substantial harm associated with such speech.

To be sure, this issue ultimately comes down to a judgment as to what represents the lesser evil: a public discourse infected by purveyors of fake news, or a public discourse policed and “sanitized” by a (likely self-interested) government actor. One of the cornerstone principles of American free speech jurisprudence, however, is a strong aversion to any government management of public discourse, even if such regulation is well-intentioned and might produce some benefits.¹⁴⁶ As Geoffrey Stone has observed, it is simply too dangerous to “put[] government in the position routinely to decide the truth or falsity of all statements in public debate,” given “the possible effect of partisanship affecting the process at every level.”¹⁴⁷

146. See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (stating that the government should assume that “information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end.”); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (“[T]he Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer.”); *Alvarez*, 567 U.S. at 728 (plurality opinion) (“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.”); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 586 (2004) (“The Court had long been a guardian against letting the state assume the role of guardian over the minds of the people.”).

147. Stone, *supra* note 140, at 140.

Thus, the Court has broadly adhered to Justice Brandeis's famous pronouncement in *Whitney v. California* that "[i]f there be time to expose through discussion the falsehood and fallacies [of speech], to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."¹⁴⁸

As such, lies regarding the highest-value core speech—which might include fake news, lies made in the context of election campaigns, lies regarding scientific theories, lies regarding historical facts of public significance, or any other lies regarding issues of legitimate public concern—should generally be deemed fully protected, such that content-based regulations are evaluated under strict scrutiny. In saying this, however, I do not mean to categorically exclude *any* possibility that content-based regulation of such speech might be justified.¹⁴⁹ If lies regarding the highest-value speech are causing significant direct harms on individuals or organizations (like, for example, physical violence or targeted financial harm), or if the lies in question are very easily and objectively verifiable, the government might have some latitude to constitutionally regulate such speech.¹⁵⁰ In the context of campaign speech, for example, I agree with Eugene Volokh's suggestion that narrow bans on "knowingly false statements about when or where people should vote" or "knowingly false claims that you are the incumbent" could be constitutional.¹⁵¹ But the presumption that the government cannot regulate lies regarding the highest-value speech should be a heavy one given the massive risks of chilling effects and government abuse, and

148. 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); see *Texas v. Johnson*, 491 U.S. 397, 419 (1989); *Alvarez*, 567 U.S. at 727 (plurality opinion) ("The remedy for speech that is false is speech that is true.").

149. Cf. Norton, *supra* note 19, at 187–90 (arguing that despite the significant risks of chilling effects and government abuse, some content-based regulation of electoral lies may be permissible if narrowly tailored in scope and penalty); Hasen, *supra* note 84, at 56–57 (arguing that courts should uphold certain narrowly drawn regulations on campaign- and election-related speech).

150. This might be characterized either as a determination that this particular subset of lies is only partially protected, such that intermediate scrutiny applies, or as a determination that the regulation in question survives strict scrutiny for this subset of lies.

151. Eugene Volokh, *Freedom of Speech and Knowing Falsehoods*, VOLOKH CONSPIRACY (June 28, 2012, 5:19 PM), <http://www.volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/> [https://perma.cc/CZ35-XZZE]; see also Hasen, *supra* note 84, at 71 ("The strongest case for constitutionality is a narrow law targeted at false election speech aimed at disenfranchising voters.").

to the extent that any exceptions are recognized, they should be extremely narrow and limited in scope.

B. Cost-Benefit Considerations

Second, as I discussed above, any cost-benefit considerations regarding the lies themselves should be relegated to the sidelines whenever concerns regarding chilling effects and potential government abuse are at their apex. Cost-benefit considerations should thus carry weight only when compelling chilling effect and government abuse concerns are absent—generally, when the underlying category of regulated speech is *not* core protected speech like news reporting, political speech, or other speech of public concern.

In cases where cost-benefit considerations represent the primary basis for protecting lies, intermediate scrutiny—rather than strict scrutiny—should be the most stringent standard of review applied. That is, when compelling prophylaxis or government abuse concerns are absent, the regulated lies in question should be deemed either partially protected or unprotected, but not fully protected. This approach I think fairly reflects the broadly shared intuition regarding lies that I discussed above: lies already have a strike against them because they are categorically less valuable and more harmful than truthful speech, so the government should generally have more flexibility to regulate them in the absence of compelling prophylaxis or government abuse concerns.¹⁵²

This approach also makes sense because cost-benefit analysis is, by nature, a balancing analysis, and thus naturally fits the mold of the intermediate scrutiny standard—the only constitutional standard of review that translates to a meaningful balancing approach rather than an effectively foreordained result.¹⁵³ Of course, courts need not *always* apply intermediate scrutiny. If the social costs associated with a particular subset of lies clearly and drastically outweigh any social value, then courts would be free to categorically designate those lies as low-value speech subject to minimal

152. See *supra* text accompanying notes 114–118.

153. See Sullivan, *supra* note 101, at 300–01 (“In either its official or de facto form, intermediate scrutiny is a balancing mode. Like the poles of two-tier review, it employs the vocabulary of weights and measures as a metaphor for justification. But unlike two-tier review, it really means it.”).

constitutional protection,¹⁵⁴ as they have already done with fraud,¹⁵⁵ false commercial speech,¹⁵⁶ and perjury.¹⁵⁷ But outside of this context, intermediate scrutiny—rather than strict scrutiny—represents the best vehicle for weighing the costs and benefits of a given subset of lies.

Furthermore, in conducting the cost-benefit calculus, courts should accord minimal weight to any abstract, systemic harms to public discourse. This is not because such harms are generally less dangerous or substantial than direct harms to individuals or government institutions. Rather, this principle merely reflects the longstanding assumption within First Amendment jurisprudence that any harm to public discourse caused by false or dangerous speech is best remedied by counter-speech rather than direct regulation.¹⁵⁸

Of course, as critics have long argued, there are many reasons to doubt that the marketplace of ideas will actually work to counteract such harm.¹⁵⁹ But as Helen Norton has observed, “The more generalized and the less tangible the harms threatened by the targeted lies, . . . the greater the

154. Under the purely historical *Stevens* test for low-value speech, courts could presumably argue that lies causing substantial social harm have historically been deemed unprotected (unlike the largely “harmless” lies in *Alvarez*). As I’ve previously observed, the *Stevens* test is highly manipulable, as courts can usually dictate the result in a particular case by selecting the level of generality at which they will analogize the speech in question to historically excluded categories of speech. See Han, *supra* note 23, at 86.

155. See *Illinois ex rel. Madigan v. Telemarketing Assoc.*, 538 U.S. 600, 612 (2003) (“[T]he First Amendment does not shield fraud.”).

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

157. See *United States v. Grayson*, 438 U.S. 41, 54 (1978) (noting “the unquestioned constitutionality of perjury statutes”).

158. See, e.g., *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

159. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17 (“Due to developed legal doctrine and the inevitable effects of socialization processes, mass communication technology, and unequal allocations of resources, ideas that support an entrenched power structure or ideology are most likely to gain acceptance within our current market.”); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983) (observing that the marketplace of ideas theory “calls up the picture of a rational individual making informed choices, and downplays the extent to which the inputs in a culture influence the beliefs of the persons within that culture”); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1041 (describing the theory’s failure to account for “the different access speakers have to means for influencing truth seeking discourse”).

concerns about selective or partisan enforcement.”¹⁶⁰ When the harms in question are abstract and systemic, they are less susceptible to objective identification and measurement, thus opening the door to untethered and selective judgments by the government. Thus, even if the marketplace of ideas proves to be ineffective in counteracting falsity and uncovering truth, a laissez-faire approach to any systemic harms to the public discourse caused by falsity seems the lesser evil as compared to direct government intervention.

Finally, both the plurality and the concurrence in *Alvarez* strongly suggest a materiality threshold in identifying and measuring direct harms caused by lies. Even if the lie may have some potentially harmful effect—for example, lying about receiving the Congressional Medal of Honor might deceive someone into thinking more highly of me—that doesn’t necessarily mean that the effect rises to the level of a “legally cognizable” harm (as characterized by the *Alvarez* plurality)¹⁶¹ or a “tangible” or “material” harm (as characterized by Justice Breyer’s concurrence)¹⁶² to be weighed in the cost-benefit calculus. Although it is difficult to pin down an exact definition of materiality in this context, it ultimately reflects considerations of both concreteness and magnitude. Any substantial physical or tangible harm produced—like losing money or suffering physical injury—would clearly be material; on the other hand, de minimis harms and intangible psychological harms may not be.¹⁶³

This materiality limitation makes sense because it grounds regulation on tangible harms that may be empirically measurable rather than more abstract or de minimis harms. It therefore acts as a check on government discretion, as it limits the government’s power to simply regulate lies in the abstract without having to make any showing that the lies are

160. Norton, *supra* note 19, at 187.

161. *United States v. Alvarez*, 567 U.S. 709, 719 (2012) (plurality opinion).

162. *Id.* at 734, 738 (Breyer, J., concurring in the judgment).

163. *See id.*; Han, *supra* note 23, at 117; Norton, *supra* note 19, at 200–01 (arguing that regulations strike the appropriate constitutional balance “when they target lies that threaten second-party harms that take monetary or similarly tangible form, or lies that cause third-party harms when demonstrably material to high-stakes decisions in circumscribed settings”); *see also* *United States v. Keyser*, 704 F.3d 631, 640 (9th Cir. 2012) (distinguishing statute criminalizing lies about an act of terrorism from the Stolen Valor Act because such lies “tend[] to incite a tangible negative response” from others, such as law enforcement and emergency workers).

associated with an actual concrete harm.¹⁶⁴ That is to say, it places on the government some meaningful burden of production when it comes to justifying any regulation of purportedly harmful lies: abstract, purely psychological harm, like hurting someone's feelings or causing someone to feel betrayed, will generally not be sufficient by itself.

Of course, the boundary between material and immaterial harms is a fuzzy one. Monetary loss is certainly material—but what about lying your way into someone's bed? Or lying to give more weight to your opinion in a debate? Or causing someone severe emotional distress? These are difficult issues to untangle, and an in-depth examination of them is beyond the scope of this article.¹⁶⁵ But as I have noted elsewhere, there is no reason to doubt courts' ability to craft workable boundaries here; after all, they have long dealt with similar issues in other legal contexts, such as in tort law.¹⁶⁶

One final issue is the specific role that the materiality threshold should play in the analysis. Under one possible approach, all lies associated with material harm are automatically deemed unprotected, leaving the government free to regulate them. In the alternative, the materiality requirement would serve only to identify which harms should "count" in the cost-benefit analysis, and a finding of materiality would not necessarily mean that the lies in question are categorically unprotected.

I think that the latter approach makes more sense as it is more consistent with the underlying nature of cost-benefit analysis, and it affords courts greater analytical flexibility in dealing with difficult cases. Take, for example, lies told to gain entry onto another person's property. In my view, the associated harm in question (trespass) is clearly material as it is a concrete and tangible violation of a legal right that has long been recognized within tort law.¹⁶⁷ As such, courts may be

164. See *Alvarez*, 567 U.S. at 723 (plurality opinion) (observing that permitting the government to regulate lies on the basis of falsity alone "would endorse government authority to compile a list of subjects about which false statements are punishable").

165. For more detailed thoughts on these issues, see Norton, *supra* note 19, at 187–200.

166. See Han, *supra* note 23, at 119.

167. On this point I disagree with Chen and Marceau, who argue that "the act of accessing a place through deception does not in and of itself cause a legally cognizable harm." Chen & Marceau, *supra* note 19, at 1495. The fact that tort law does not require a showing of actual damages to recover for trespass does not

justified in deeming many of these lies unprotected.

Just because the harm is material, however, does not necessarily mean that constitutional protection is *never* warranted for these sorts of lies. Consider the undercover journalist who lies about her occupation in a job interview, and as a result is granted access to a feedlot that has long been suspected of animal abuse. A court could reasonably find that despite the clear materiality of the trespass in question, such harm is ultimately outweighed by the immense social benefits of such lies (uncovering valuable information regarding issues of public concern).¹⁶⁸ It thus seems overly rigid to say that lies are *always* unprotected if material harm exists, since at least some of these lies might still warrant constitutional protection given the substantial social value they provide.

C. *A Sample Framework*

Applying these broad principles to the three-tiered framework for categorizing lies that I outlined above, one possible taxonomy of lies might be as follows:

Protected lies: fake news, election-related lies, academic lies (e.g. lies regarding scientific theories), lies regarding historical facts, political or ideological lies, other lies on issues of public concern, lies within certain intimate/private settings¹⁶⁹

Unprotected lies: fraud, perjury, false advertising, lying to government investigators, impersonating government officials, other lies that cause significant and material

mean that some actionable trespasses are devoid of any “material” harm. Rather, I construe this longstanding tenet of tort law as a broad recognition that trespasses to land without actual damages constitute a sufficiently material violation of one’s property rights to support a valid claim (unlike, for example, brief and harmless contact with another person’s chattel). That being said, I ultimately agree with Chen and Marceau’s broad conclusion that investigative lies may be protected even if they result in physical trespass. *See infra* text accompanying note 168.

168. *See* Chen & Marceau, *supra* note 19, at 1473–75.

169. Although I did not touch on privacy considerations in the above discussion, the Court has traditionally evaluated government regulations of the most intimate and private aspects of people’s lives under strict scrutiny. *See, e.g.,* *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685–86 (1977) (applying strict scrutiny to regulations on the advertising and sale of contraceptives).

direct harms with marginal benefits

Partially protected lies: everything else, including investigative lies, lies regarding issues of private concern, and other types of “harmless” or socially beneficial lies

This preliminary taxonomy is not meant to be definitive or comprehensive. Normative disagreements will likely abound as to how exactly the different substantive factors ought to be weighed in categorizing lies, and concerns outside of the scope of this article—such as the different methods by which the government might seek to regulate the lies in question—may play a significant role in evaluating the constitutionality of any content-based regulations of lies.¹⁷⁰ But I hope that this can serve as a useful starting point for further discussion regarding the various substantive, structural, and normative considerations in regulating lies.

CONCLUSION

First Amendment jurisprudence can be conceptualized as a continuous process of categorization and doctrine-building—an attempt to impose some workable order upon a realm of human activity that is chaotic, slippery, and staggering in its variety. In *Alvarez*, the Court initiated a new stage of this process with respect to lies, rejecting its previous suggestion that “there is no constitutional value in false statements of fact”¹⁷¹ in favor of a recognition that some lies may be entitled to constitutional protection in and of themselves. This article sought to outline all of the moving parts associated with crafting this new taxonomy for lies in the hope of providing some basic structure to this nascent doctrine-building project.

In closing, it is worth emphasizing the degree of complexity involved in the project. This is not simply a matter of grafting the doctrinal framework applicable to truthful speech onto false statements of fact, and courts should be wary of taking this path of least resistance. Lies are fundamentally different from truthful speech: they are generally less valuable, they

170. See *supra* note 26 (discussing the issue of tailoring).

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

produce social harm via a mechanism that society generally recognizes as illegitimate, and they create unique issues requiring normative judgments distinct from those typically made in regulating truthful speech. The development of a coherent, workable, and sensible doctrinal framework for lies ultimately rests on courts' willingness to recognize, accept, and patiently work through these assorted complexities.