Afterword

For Whose Benefit Is the Freedom of Speech?

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United States v. *Alvarez*, oral argument of Jonathan D. Libby on behalf of the respondent, 22 February 2012:

CHIEF JUSTICE ROBERTS:	What is – what is the First Amendment value in a lie, a pure lie?
MR. LIBBY:	Just a pure lie? There can be a number of values. There's the value of personal autonomy.
CHIEF JUSTICE ROBERTS:	The value of what?
MR. LIBBY:	Personal autonomy.
CHIEF JUSTICE ROBERTS:	What does that mean?
MR. LIBBY:	Well, that we get to – we get to exaggerate and create.
CHIEF JUSTICE ROBERTS:	No, not exaggerate – lie.

In *United States* v. *Alvarez*,[1] the US Supreme Court ruled that an official of a water district who introduced himself to his constituents by falsely stating in a public meeting that he had earned the Congressional Medal of Honor had a First Amendment right to make that demonstrably untrue claim. Audience members misled by the statement might well be considered to have a First Amendment interest in not being directly and knowingly lied to in that way. Other members of the community might be thought to have a First Amendment interest in public officials such as Xavier Alvarez telling the truth about their credentials and experiences. Nevertheless, as both the plurality and the concurring justices who together formed the majority in *Alvarez* viewed the case, it was the liar's interest in saying what he wished that carried the day. Why is that? Crucial to answering this question is whether 'the freedom of speech' that the First Amendment tolerates 'no law abridging' is understood to be primarily speaker-centered, audience-centered, or society-centered.

[1] *United States* v. *Alvarez*, 567 US 709 (2012).

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I maintain that up until the last fifty years the freedom of speech that is the subject of First Amendment protection had been understood to be primarily for the benefit of audiences and the society beyond. Only as a result of modern Supreme Court interpretations has a speaker-centered understanding of that freedom become dominant. One of the consequences of this shift has been that today liars are more able than ever before to cause harm, and not only because of the way that digital technology amplifies their misbegotten communicative power. Constitutional interpretation is also part of the problem. At least that is so in the USA.

Other societies that have maintained a less speaker-centered approach to the freedom of speech have more capability on that account to punish lying. That capability might become more and more important as digital technology vastly increases the means, the incidence and the reach of lying. For that reason, as well as many others, it is important to realize that the current speaker-centered understanding of the freedom of speech that makes the USA an outlier is something of an aberration – not only by comparison to how other countries view the matter but also by comparison to how the First Amendment itself was conceived in earlier eras.

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The principal author of the provision that eventually became the First Amendment was James Madison. He also was probably the most influential advocate in securing its passage by Congress and ratification by the states. Earlier, in a fascinating exchange of letters with Thomas Jefferson,[2] Madison had wondered how efficacious 'parchment barriers' protecting the freedoms of speech and press can be in a government that takes the form of a republic. He conceded that declaring rights in a charter can serve as a rallying standard for arousing popular resistance to corrupt or oppressive *monarchical* rule – Jefferson was receiving Madison's ruminations while residing in Paris on the eve of the French Revolution – but surmised that the situation must be different in a *republic*, where the chief danger lies in the wrongful exercise of majority will itself. Nevertheless, Madison concluded that such a declaration could conceivably have a constructive role to play in a republic by means of influencing public opinion: 'The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion.'[3] Moreover,

> although it be generally true, as above stated, that the danger of oppression lies in the interested majorities of the people rather than usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source, and

[2] James Madison, 'Letter to Thomas Jefferson', 17 October 1788, in James Madison, *Writings* (Ed. by Jack N. Rakove, New York: Library of America, 1999) pp. 420–21.

[3] Ibid. pp 421–22.

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> on such, a bill of rights will be a good ground for an appeal to the sense of the community.[4]

This exchange with Jefferson was echoed on 8 June 1789, when as a member of the House of Representatives Madison spoke in favor adopting a bill of rights which he had drafted, including what became the First Amendment.[5] He addressed head-on the objection that declaring such rights might be ineffectual:

> It may be thought all paper barriers against the power of the community are too weak to be worthy of attention … [Y]et, as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might be otherwise inclined.[6]

Ten years later, in response to the passage by his political opponents of the Sedition Act of 1798 prohibiting 'any false, scandalous, and malicious writing or writings against the government of the United States',[7] Madison published his most detailed account of the meaning of the First Amendment, and once again he made public opinion the touchstone. The *Report on the Virginia Resolutions*,[8] written by Madison on behalf of the Virginia Legislature, argued that the federal Sedition Act was unconstitutional under the First Amendment for violating 'that right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed, the only effectual guardian of every other right'.[9] Madison noted that the Constitution supposes that 'the President, the Congress, and each of its houses, may not discharge their trusts'.[10] Whenever that happens, he reasoned, 'it is the duty as well as right of intelligent and faithful citizens' to control such abuses by means of 'the censorship [i.e., censure] of the public opinion'.[11] He made no mention of an individual right of self-expression. His focus was entirely on the role that an informed public opinion must play as a check on official conduct.

In 1964, the *Virginia Report* was made the centerpiece of the Supreme Court's landmark opinion in *New York Times* v. *Sullivan*,[12] which ruled invalid under the First Amendment a state court defamation judgment against a national newspaper for some factual errors in a story about abusive treatment of civil rights protesters by

[4] Ibid. p. 422.
[5] James Madison, 'Speech in Congress Proposing Constitutional Amendments', 8 June 1789, in Madison, *Writings* (n 2) pp. 446–47.
[6] Ibid. pp. 446–47.
[7] Sedition Act, ch. 74, § 2, 1 Stat. 596 (1798).
[8] James Madison, 'Report on the Alien and Sedition Acts' (The Virginia Report), 7 January 1800, in Madison, *Writings* (n 2) pp. 651–52.
[9] Ibid. p. 651.
[10] Ibid. p. 652.
[11] Ibid.
[12] *The New York Times* v. *Sullivan*, 376 US 254, 270–76 and n 19 (1964).

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local officials in Montgomery, Alabama. Justice Brennan's opinion for the Court invoked Madison for the proposition that 'breathing space' for unintentional factual error is requisite under the First Amendment because of 'a profound national commitment that debate on public issues should be uninhibited, robust and wide-open'.[13] It was 'the great controversy over the Sedition Act of 1798', said Justice Brennan, 'which first crystallized a national awareness of the central meaning of the First Amendment'.[14] Not only Madison's writing on the subject but also that of John Milton (*Areopagitica*),[15] John Stuart Mill (*On Liberty*)[16] and Oliver Wendell Holmes (dissenting opinion in *Abrams* v. *United States*)[17] were invoked by Justice Brennan in his opinion for the Court majority in *Sullivan*. Like Madison, each of these thinkers had developed a well-known and distinctly audience-centered account of the freedom of speech.

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In the early 1930s, when the US Supreme Court first began to rule in favor of First Amendment claimants, the majority opinions, usually written by Chief Justice Charles Evans Hughes, emphasized the interests of audiences and the society beyond rather than the interests of speakers. In *Stromberg* v. *California*,[18] vindicating the right to display a red flag as a symbol of opposition to government, Chief Justice Hughes said: 'The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.'[19] In *Near* v. *Minnesota*,[20] holding that judicial enjoining of a publication is as problematic under the First Amendment as requiring a license for the privilege of printing, Hughes quoted Madison's *Virginia Report* for the proposition that 'to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression'.[21] Hughes also invoked the following passage about the freedom of the press contained in a letter written in 1774 by the Continental Congress to the inhabitants of Quebec urging them to join in resisting British colonial rule:

> The importance of [freedom of the press] consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on

[13] Ibid. at 270–72.
[14] Ibid. at 273.
[15] John Milton, *Areopagitica* (London, 1644).
[16] John Stuart Mill, *On Liberty* (London: John W. Parker and Son, 1859).
[17] *Abrams* v. *United States*, 250 US 616 (1919) (Holmes J, dissenting).
[18] *Stromberg* v. *California*, 283 US 359, 369 (1931).
[19] Ibid.
[20] *Near* v. *Minnesota*, 283 US 697, 717–20 (1931).
[21] Ibid. at 718.

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> the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs.[22]

Not only founding-era history but also twentieth-century developments informed the Chief Justice's understanding in *Near* of the audience- and society-centered justification for freedom of the press:

> [T]he administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities.[23]

Further evidence of how the First Amendment was viewed by the Court that first gave it life is the opinion Hughes wrote for a unanimous Court in *Semler* v. *Oregon State Board of Dental Examiners*,[24] a case about the constitutionality of a state law that prohibited dentists from 'advertising to guarantee any dental service, or to perform any dental operation painlessly'.[25] His explanation for upholding the law focused on audience well-being:

> It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner', that he is telling the truth. In framing its policy, the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners. The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule even though, in particular instances, there might be no actual deception or misstatement.[26]

Hughes treated the case as raising only an unpersuasive liberty-of-contract objection. No Justice, and not even the dentists asserting a right to advertise, even considered the possibility that a speaker-centered First Amendment had anything to do with the dispute.

Two landmark cases decided in the early 1940s, after Chief Justice Hughes had retired, continued the emphasis on audience and societal interests. In *Chaplinsky* v. *New Hampshire*,[27] the Court ruled that the First Amendment does not protect a speaker's right to utter face-to-face epithets, even to assert a political point. One day

[22] Ibid. at 717.
[23] Ibid. at 719–20.
[24] *Semler* v. *Oregon State Board of Dental Examiners*, 294 US 608, 609, 612–13 (1935).
[25] Ibid. at 609.
[26] Ibid. at 612–13.
[27] *Chaplinsky* v. *New Hampshire*, 315 US 568, 572 (1942).

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in Rochester, New Hampshire, a Jehovah's Witness named Walter Chaplinsky offended local citizens in front of the town hall by denouncing all religion as a 'racket'. The City Marshall, one Bowering, came upon the scene, only to be derided by Chaplinsky in the following terms: 'You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.'[28] The US Supreme Court unanimously agreed that Chaplinsky's outburst directed to a government official was not protected under the First Amendment: '[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'[29] Chaplinsky's personal interest in having his say in his own biting way was given short shrift. What determined the outcome of the case was the lack of value to any audience of the speech at issue.

In *West Virginia State Board of Education* v. *Barnette*,[30] the Court held that a schoolchild cannot be required to recite the Pledge of Allegiance in a classroom ceremony. Although the case was largely argued in terms of an asserted individual right to abstain grounded in religious freedom, the majority opinion by Justice Robert Jackson based the holding on a broader freedom derived from the political principle of popular sovereignty: 'We set up government by the consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.'[31] Although the hardships of the expelled young Witnesses and their parents made for appealing individual claims, the Court's interpretation of the First Amendment focused on the various ways that the pledge requirement corrupted public opinion: "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing".[32]

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Since the 1930s and 1940s, the Court's understanding of the freedom of speech has become much more speaker-centered. This is not the place to trace the complicated history of that evolution, but a few representative cases decided within the last fifty years well illustrate the contrast. In *Miami Herald Publishing Co.* v. *Tornillo*,[33] the Court interpreted the Press Clause of the First Amendment to disallow 'a state statute granting a political candidate a right to equal space to reply to criticism and

[28] Ibid. at 569 (internal quotation marks omitted).
[29] Ibid. at 572.
[30] *West Virginia State Board of Education* v. *Barnette*, 319 US 624, 641 (1943).
[31] Ibid.
[32] Ibid.
[33] *Miami Herald Publishing Co.* v. *Tornillo*, 418 US 241, 248–49, 258 (1974).

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attacks on his record by a newspaper'.[34] The Court's analysis began by focusing on audience interests:

> It is urged that at the time the First Amendment to the Constitution was ratified in 1791 as part of our Bill of Rights the press was broadly representative of the people it was serving. While many of the newspapers were intensely partisan and narrow in their views, the press collectively presented a broad range of opinions to readers.[35]

In contrast, by the latter part of the twentieth century, 'chains of newspapers, national newspapers, national wire and news services, and one-newspaper towns, are the dominant features of a press that has become noncompetitive and enormously powerful and influential in its capacity to manipulate popular opinion and change the course of events'.[36] Despite this asserted and never disputed development, the Court ruled that:

> the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors … The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.[37]

In terms of classifying the various First Amendment interests in play in *Tornillo*, the candidate's claim to have access to the newspaper's readers can be viewed as either speaker-centered for the benefit of the candidate, or audience-centered in that granting him such access might give the newspaper's readers additional information and advocacy that would help them decide how to vote in the forthcoming election. By the same token, the newspaper's claim of a right to exercise maximum control over the content of its pages might be seen as benefiting the newspaper qua speaker or as benefiting its readers who might wish to defer to the judgment of professional journalists regarding what content would best serve their interests.

An additional understanding of the *Tornillo* ruling at the time might have been that audiences and the society beyond have a strong interest in media entities controlling their published content because of the role such powerful actors can play in holding government accountable due to their local knowledge, expertise, resources and professional credibility. Recall the way that Madison placed such accountability at the center of his argument in the *Virginia Report*. Such a notion of instrumental journalistic autonomy would resonate with the Court's talk in *Tornillo* of the distinctive 'function of editors'. In sum, *Tornillo* was a case of apparently rich but uncertain import regarding how the First Amendment would be understood going forward regarding its intended beneficiaries.

[34] Ibid. at 243.
[35] Ibid. at 248.
[36] Ibid. at 249.
[37] Ibid. at 258.

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Just three years later, the Court invoked the *Tornillo* holding in support of its ruling that a New Hampshire driver had a First Amendment right to cover up the state's motto 'Live Free or Die' on his license plate.[38] Whatever else that case was about, it had nothing to do with journalistic autonomy and very little to do with audience interests. Similarly, a decade later the Court relied heavily upon *Tornillo* to strike down a law requiring solicitors of charitable donations to disclose to their addressees what percentage of their donations would be passed along to needy recipients rather than used by the solicitors to cover operating expenses or for other purposes.[39] Once again, speaker interests dictated the result, on this occasion in the face of a significant audience interest in disclosure. Since then, *Tornillo* has become a favored precedent for a robust speaker-centered right against 'compelled speech', a right enjoyed by almost all targets of regulation, not just journalists, and one that is seldom derived from a comparison of speaker and audience interests.

Arizona Free Enterprise Club's Freedom Club PAC v. *Bennett* (2011)[40] involved a challenge to a public financing scheme for elections which had been adopted by referendum. A candidate for office agreeing to cap her spending from private contributions was granted an initial public subsidy, which would then be supplemented by a second-stage subsidy if her privately financed opponent spent over a specified amount. The law was challenged by a group of privately financed candidates who claimed that the scheme punished them by making their spending for speaking a trigger for extra public funding being directed to their opponents' campaigns. The law was defended on the ground that it enabled more and different candidates to run competitive campaigns, thereby giving voters more choices and more information while still not prohibiting privately financed candidates from spending as much as they wished.

In an opinion by Chief Justice Roberts, the Court majority ruled, citing *Tornillo*, that making a privately financed candidate an instrument for triggering public subsidization of his opponent's campaign was an encroachment on that candidate's liberty under the First Amendment even if the overall result was more total speech available to the electorate, and indeed even if the privately financed candidate was still able to outspend the two-stage-subsidized publicly financed candidate.[41] This logic left the four dissenters aghast. As Justice Kagan put it: 'Except in a world gone topsy-turvy, additional campaign speech and electoral competition is not a First Amendment injury.'[42]

It is possible, of course, that in certain campaigns the mechanism of the triggered subsidy might cause a privately financed candidate to conclude that his best tactic would be to spend less than he could in order to prevent his opponent from getting

[38] *Wooley* v. *Maynard*, 430 US 705 (1977).
[39] *Riley* v. *National Federation of the Blind*, 487 US 781 (1988).
[40] *Arizona Free Enterprise Club's Freedom Club PAC* v. *Bennett*, 564 US 721 (2011).
[41] Ibid. at 740–43, 755.
[42] Ibid. at 763 (Kagan J, dissenting).

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the second-stage supplemental subsidy. If so, voters would receive less speech overall. But the majority opinion made no claim that this scenario would ensue more often than the more-spending-by-both-sides scenario. Its ruling was focused exclusively on the burden the law placed on the privately financed candidate. *Arizona Free Enterprise Club's Freedom Club PAC* is a speaker-centered, not an audience-centered or system-centered opinion.

A different kind of speaker-centered understanding of the First Amendment drove the Court's ruling in *National Institute of Family and Life Advocates* v. *Becerra* (2018).[43] California required clinics that primarily serve pregnant women to inform their potential patients that the state 'has public programs that provide immediate free or low-cost access to comprehensive family planning services including … contraception, prenatal care, and abortion for eligible women', and to give them a phone number to call to learn more about such programs.[44] Private clinics that offered pregnancy testing, prenatal care and moral counseling opposed to abortion argued that it violated their freedom of speech to be required to post the mandated message informing patients of their alternatives.

A closely divided Supreme Court held that the state's disclosure requirement violated the First Amendment because of its potential adverse effect on the messaging of the private clinics that considered abortion to be immoral. The Court majority treated a service provider's responsibility to disclose accurate information regarding the availability of alternative services to be as problematic under the First Amendment as would be a requirement that the service provider convey an opinion contrary to its own about the morality of services it declined to provide. In that respect, the *National Institute of Family and Life Advocates* (*NIFLA*) holding went well beyond *Tornillo*, which it cited. Furthermore, the fact that the speech of the clinics was integrated with the act of providing medical services did not reduce the speaker's claim to exercise full control over what patients heard and read within its walls. The Court never considered any possible First Amendment interest of the patients of the private clinic in learning about the full range of alternatives available to them or in understanding at the outset what services were and were not being made available to them at the private clinic.

The problem with the *NIFLA* decision lies not with its premise that a speaker, even one taking on the responsibilities of a service provider, has a First Amendment interest of a sort in exercising full control over what accurate information it conveys or chooses not to convey to the persons it seeks to serve. At least when the choice of what to convey might be perceived by an audience as carrying normative implications, a speaker's interest in not participating in the transmission of certain information might well have First Amendment valence. The problem is that such a conceivable interest was not the only one related to the freedom of speech in play in

[43] *National Institute of Family and Life Advocates* v. *Becerra*, 138 S.Ct. 2361 (2018).
[44] Ibid. at 2369.

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the case, and the Court majority reasoned as if it was. Regarding the relative importance of speaker interests and listener or societal interests, *NIFLA* reads nothing like the opinion of Justice Jackson in the foundational compelled speech case, *Barnette*, involving the compulsory flag salute. Rather, *NIFLA* represents the modern triumph of the speaker-centered understanding of the freedom of speech.

All of which brings us back to where we began: the Court's decision in *Alvarez*, recognizing a speaker's First Amendment right to claim in a formal public setting that he had earned the Congressional Medal of Honor when he knew that he had not. This was not a case about punishing falsity in the realm of opinion or delusional assertion. All the Justices read the statute to cover only situations in which there could be no doubt that the speaker knew perfectly well that his statements about specific facts were false. Moreover, although the plurality opinion noted that the statute read literally would apply to 'personal, whispered conversations within a home', such an application was all but inconceivable. The reasoning of both the plurality and the concurring opinions made it clear that the First Amendment concerns that led to overturning Alvarez's conviction would have prevailed even if the statute had been confined to lying in a public setting, or even more narrowly in a formal public meeting.

What exactly was the speaker's legal interest, grounded in the freedom of speech, in being able to tell a deliberate, self-aggrandizing lie to his constituents? It could not have been simply in saying whatever he wished. Had Alvarez issued a 'true' threat or directed a face-to-face epithet to a member of his audience, Supreme Court precedent makes clear that he would have had no First Amendment claim whatsoever.[45] Such communications are not considered to be part of the freedom of speech. So if there is no comprehensive First Amendment right to say what you wish, what was Alvarez's claim to lie the way he did? How does protecting his lying advance the objectives of the freedom of speech? There would be a First Amendment concern if a speaker's being vulnerable to prosecution for lying created a risk of being convicted for telling the truth. Some would-be spreaders of truth surely would opt for silence in the face of that risk. But so long as the prohibition is limited, as was the Stolen Valor Act, to knowingly spreading a falsehood about a hard fact concerning oneself, the chilling effect on, or risk of wrongful conviction of, truthful speakers is bound to be minimal.

The plurality and concurring opinions in the case appeared to find it relevant that many persons knowingly lie, not only to burnish their credentials but also to embellish a story or exaggerate a point, and often are indulged in doing so. In that respect, it might seem to be more problematic for a representative government to criminalize the activity than it is to punish threats or face-to-face epithets, which are forms of speech that may or may not be as common as lying but are more universally

[45] See *Chaplinsky* v. *New Hampshire*, at 571–72; *Watts* v. *United States*, 394 US 705, 708 (1969); *Virginia* v. *Black*, 538 US 343, 359 (2003).

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condemned. A different speaker-based interest was thought by the plurality and concurring opinions to be a reason not to uphold the criminalization of deliberate lying. Precisely because the activity is common, prosecutorial discretion not to press charges is bound to play a large role in enforcement practices.

Justice Kennedy for the plurality, and Justice Breyer for himself and Justice Kagan, worried that prosecutorial discretion could be improperly based on disapproval of a speaker's ideas. Such selectivity would violate a speaker-based interest not to be discriminated against on the basis of one's beliefs. However, that risk is not limited to the selective prosecution of communicative crimes. A regime inclined to punish beliefs could do so by selectively enforcing housing codes, tax filing requirements or speed limits. Were that to occur, the objects of such selective prosecutions would be punished for their beliefs just as much as when the underlying crime is lying. The Stolen Valor Act presented no unusual risk of being selectively enforced.

The receptivity of the plurality and concurring Justices in *Alvarez* to these less-than-compelling speaker-centered interests was noteworthy. Equally noteworthy was the lack of receptivity exhibited by the prevailing Justices to the audience- and society-centered interests grounded in the freedom of speech that might support regulating the type of lying at issue in the case. Those could include autonomy interests of listeners not to be manipulated, as well as audience and societal interests in fact-based political accountability and productive public discourse. Justice Kennedy said nothing at all about the wrong done to individual audience members by their being lied to. He said a lot about public discourse, however. He discovered in the Stolen Valor Act the seeds of the most notorious regime of comprehensive thought control ever devised by the human imagination:

> 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. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth. See G. Orwell, *Nineteen Eighty-Four* (1949).[46]

This analogy is dramatic but its drama is of the fictional sort. Oceania's infamous 'Ministry of Truth' existed to decree official truth and punish deviants from that 'truth'. It was about policing heresy. The Stolen Valor Act punished dishonesty not heresy. The only 'truth' it enforced was the understanding the speaker himself had developed before venturing out to mislead others regarding what he believed. A government that punishes deliberate lying regarding hard facts is not thereby enforcing its own truth.

Later in his opinion, Justice Kennedy continued to operate at a very high level of generality: '[S]uppression of speech by the government can make exposure of falsity

[46] *United States* v. *Alvarez*, at 723 (plurality opinion).

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more difficult, not less so. Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.'[47] It is a stretch to characterize what was done to Alvarez as 'suppression of speech' by a government seeking to 'orchestrate public discussion through content-based mandates'. He was convicted of making a deliberate lie about a hard fact concerning an important matter singled out by statute and on the basis of proof beyond a reasonable doubt that he understood the falsity of his statement. His conviction was a discrete event, not part of a wide-ranging, 'list'-driven effort by government to control the thought of its citizens.

There is a place in legal analysis for slippery slope arguments, but they lose credibility when they are employed indiscriminately. Flat-out lying about one's receipt of a specific award falls into a category of communicative activity that is notable for its boundedness. No questions of characterization, intention or degree complicate the classification. Any doctrine devised to address the dangers and transgressions of that activity can be contained. To equate the punishment of deliberate lying about a hard fact concerning the speaker's own experience with comprehensive, dogmatic Orwellian thought control is not to take seriously the distinctive audience and societal interests that are jeopardized by such lying.

That said, some observers who understand the freedom of speech to be at least partly about audience and societal truth-seeking might believe, with Justice Kennedy, that those objectives would be better served if liars were regulated exclusively by refutation. In fact, a preference for private refutation had an honored place in the free speech tradition of yore that gave considerable weight to audience and societal interests. Justice Brandeis memorably argued in *Whitney* v. *California* that, when time permits, 'falsehood and fallacies' are corrected better by 'more speech' than by 'enforced silence', and that 'the fitting remedy for evil counsels is good ones'.[48] Justice Brandeis's favoring of private correction was prompted by what he took to be the benefit of giving audience members informal civic responsibilities. '[T]he greatest menace to freedom', he said in *Whitney*, 'is an inert people'.[49] Justice Kennedy's concern that authoritative legal correction might be obtuse or sought for ulterior purposes was not mentioned by Justice Brandeis in *Whitney*. As a legendary reformer, he did not share Justice Kennedy's comprehensive distrust of government regulation. Indeed, it is not at all clear from the case context whether the 'falsehood and fallacies' and 'evil counsels' that Justice Brandeis believed were better corrected by 'more speech' than by regulation included knowing lies about hard facts

[47] Ibid. at 728.

[48] *Whitney* v. *California*, 274 US 357, 375, 377 (1927), quoted by Justice Kennedy in *United States* v. *Alvarez*, 727–28.

[49] *Whitney* v. *California*, at 375.

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concerning the speaker's own personal experience. The defendant in *Whitney* was not prosecuted for lying.

The older free speech tradition also counseled that the circulation of false ideas can have heuristic value for audiences. In his concurring opinion in *Alvarez*, Justice Breyer invoked Mill's famous observation that one good reason to protect 'the liberty of thought and discussion' is that when audiences confront falsity they can develop a deeper understanding of truth and a better capacity to apply and defend it.[50] Mill made that point in a chapter of *On Liberty* in which he discussed how false opinions about values and objectives and matters such as historical causation and political efficacy should be fairly considered and turned to constructive heuristic use. He did not take up the subject of deliberate lies in that chapter. Perhaps Mill thought that discrediting a knowing lie about a hard fact such as whether a specific person had actually been awarded a particular medal does not require or lead to the depth of understanding he took to be the benefit to audiences of engaging with false moral or interpretative opinions.

It is a serious question whether the regulation of specific lies should be governed by the same principles that govern the regulation of unorthodox opinions relating to objectives, or best means, or norms, or predicted effects. The motives of liars are fundamentally different from the motives of ideological provocateurs and other kinds of contrarians. The value to audiences of being exposed to untrue factual assertions regarding the speaker's personal experiences is of a lesser order than the value to audiences of being exposed to aspirational, explanatory and critical ideas that lack current public acceptance. The difficulty of defining and proving violations is much greater when the legally consequential behavior consists of assertions of value or efficacy rather than assertions of specific hard facts. The reasons to distrust regulators are better validated by history when they assert control over heresy, extremism or foolishness than when they assert control over dishonesty. These are differences that the prevailing opinions in *Alvarez* might have addressed directly. Instead, the possible distinctiveness of disputes over deliberate lies regarding hard facts concerning the speaker's personal experience was glossed over.

The current Court's speaker-centered approach to interpreting the First Amendment is in consonance with its conflating of deliberate lies with provocative opinions. When the interests of speakers is the primary concern and when distrust of regulators is a large part of the constitutional tradition, courts might understandably be in search of formal, relatively mechanistic, not overly refined or subdivided criteria of categorization. Reading the First Amendment to protect 'the freedom of speech' rather than 'the freedom of sincere speech' or 'the freedom of speech that is

[50] *United States* v. *Alvarez*, at 733 (Breyer J, concurring). For Mill's discussion in *On Liberty* of the value of engaging with falsehood, see Mill, *On Liberty* (n 16) 64–82.

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useful to audiences' is tempting. (An audience-centered approach might protect something more akin to Mill's 'freedom of thought and discussion'.)

A textualist might think it is self-evident that the proper unit of reference is 'the freedom of speech' simpliciter, but that only raises the interpretative question of what 'the' freedom specified in the text of the First Amendment refers to. Is it a nearly all-inclusive freedom of speaking, as the current Court would have it? Or is the reference instead to a less encompassing, more determinate set consisting of the modern analogs of certain historical claims to communicative liberty that were thought at the time of the Amendment's ratification to serve especially important functions?

The recent Court's practice of interpreting the First Amendment expansively in the spirit of conflation with small regard for function has not been confined to the question of how to think about lying. Commercial speech, for example, has been brought within the coverage of the First Amendment in an increasingly indiscriminate manner, with the justification no longer limited to the protection of audience interests.[51] Chief Justice Hughes' assumption in 1935 that dental advertising had nothing to do with the freedom of speech now seems doctrinally anachronistic, even as he certainly qualifies as the better 'originalist' on this point.[52]

The contemporary turn in First Amendment doctrine toward privileging speaker interests is ahistorical and theoretically problematic, but it might be defensible on practical grounds. It could be the case that speaker interests can be turned into operational legal rights in a more disciplined, less politicized, way than is true for audience and societal interests, which are harder to evaluate because the frame of reference is necessarily broader and more drawn out chronologically. That is a plausible theory, but whether experience confirms it is open to question. The Court's recent performance in finding case-dispositive speaker interests in the *Arizona Free Enterprise Club's Freedom Club PAC* and *NIFLA* decisions discussed above hardly inspires confidence on this point.

The Justices who made up the majority in *Alvarez* declined to disable government entirely from the punishing of lies. Longstanding laws against perjury and either impersonating a government official or lying to one are not imperiled by the Court's ruling, they specified.[53] More generally, both Justice Kennedy's plurality opinion and that of the concurring Justices appeared to signal a willingness to uphold public regulatory authority over knowing lies that cause material harm to specific individuals.[54] Thus, *some* interests other than those of speakers were recognized, but those were not the regulatory interests that carry First Amendment valence. To permit

[51] See, e.g., *Sorrell* v. *IMS Health, Inc.*, 564 US 552 (2011) (extending 'the freedom of speech' to include private sales pitches to doctors by representatives of drug companies).

[52] See text at n. 25.

[53] *United States* v. *Alvarez*, 720–21 (plurality opinion).

[54] Ibid. at 723 and 734 (Breyer J, concurring).

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individuated material interests to justify the punishment of lying but not the regulatory interest in preventing the general public from being deceived about a matter of common concern is perverse from a First Amendment standpoint. It means that the liars who have the most freedom to practice their craft are those whose principal victim is public understanding.

One argument for limiting the power to punish lying to cases of individuated material harm might be the supposition that those kinds of harms are the most serious. Both the plurality and the concurring Justices in *Alvarez* appear to have embraced that view. But such an evaluation would certainly have surprised the generation that gave us the First Amendment. To conclude that it is a lower-level harm to cause the public at large to be misinformed about such a matter as the credentials and truthfulness of a public official is, to put it mildly, in some tension with the founding generation's preoccupation with public opinion as the single most important object of institutional design. As Madison observed in an essay published four days after the ratification of the First Amendment: 'Public opinion sets bounds to every government, and is the real sovereign in every free one.'[55]

Over a century ago, Judge Learned Hand identified a procedural incongruity that helps to explain why audience and societal interests in the freedom of speech tend to be undervalued in the United States. In a letter to the great First Amendment scholar Zechariah Chafee, Jr., Judge Hand said: 'while the justification for freedom of speech is public enlightenment, historically the "right" – though I join you in hating the word – is vested in the speaker constitutionally'.[56] Usually, the First Amendment interests of speakers and their audiences are aligned, so it does not matter greatly that audience and societal interests in public enlightenment find their expression through speakers who are resisting being regulated. But there is no such alignment when lies are at issue. In that situation, the First Amendment interests of audiences and the broader public typically are served rather than threatened by laws punishing lying. When that is the dynamic, it is important that those interests not lose their special First Amendment salience simply because they are being asserted to justify rather than invalidate a regulation. That, I claim, is what happened in *Alvarez*, at least in the plurality and concurring opinions. As a result, the way that liars not only exercise the freedom of speech but also undercut it did not influence the outcome of the case as much as it should have.

In the United States courts have played an outsized role in giving meaning and efficacy to the freedom of speech. In other countries, that responsibility has been divided more widely among various government actors. As digital technology increases the incidence, extends the range, and magnifies the consequences of

[55] James Madison, 'Public Opinion', *National Gazette*, 19 December, 1791, in Madison, *Writings* (n 2) pp. 446–47.

[56] Letter from Learned Hand to Zechariah Chafee, Jr., 2 January 1921, reprinted in (1975) 27 *Stanford Law Review* 769, at 771.

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deliberate lying, governments and citizens worldwide can be expected to look beyond their own borders for assistance in trying to fashion a regulatory response that addresses the problem but still does justice to the freedom of speech. In doing so, they should keep in mind that the juriscentric way that constitutional rights have been elaborated in the USA has led to an unfortunate understanding of the freedom of speech that privileges speaker interests over audience and societal interests relating to the acquisition of knowledge, thereby giving liars more than their due.

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