trinal sources can blunt charges of political bias today, but claims for opt-in rights unrelated to union campaigning, should they materialize, would truly test the Court's genuine loyalty to such an expansive bar on compelled subsidization.

3. Freedom of Speech — False Statements of Fact. — The Stolen Valor Act of 2005[1] makes it a federal misdemeanor for an individual to lie about having received military awards, and provides an enhanced penalty for those who misrepresent themselves as recipients of the Congressional Medal of Honor.[2] Last Term, in *United States v. Alvarez*,[3] the Supreme Court held that the Act violated the First Amendment of the U.S. Constitution. For much of its history, the Supreme Court's doctrine on the First Amendment status of content-based speech restrictions has wandered, not always elegantly, between two approaches: first, declaring some categories of speech to be wholly unprotected based on historical precedent, and second, assessing regulations in an ad hoc manner based in part on the relevant speech's affirmative social value. The plurality in *Alvarez* first determined that false statements of fact are not an unprotected category, and then found that the Act was invalid under strict scrutiny.[4] While the Court reached the correct result, a better approach would have been to assess the speech's protected status in terms of the harm it causes rather than focusing entirely on traditional categories. Such an approach would render First Amendment doctrine in this area more flexible while preserving the speech-protective benefits of the categorical method.

In 2007, at a meeting of the Three Valley Water District Board in Claremont, California, Xavier Alvarez falsely introduced himself as a "retired marine of 25 years" who had been "awarded the Congressional Medal of Honor" in 1987 after being wounded repeatedly in service.[5] Alvarez was subsequently indicted under the Stolen Valor Act.[6] He claimed that the statute was invalid under the First Amendment, but the United States District Court for the Central District of California rejected this argument.[7] Alvarez pleaded guilty to the violation and was sentenced to three years' probation, 416 hours of community service, and a $5000 fine.[8] However, he appealed his First Amendment claim to the Court of Appeals for the Ninth Circuit.[9]

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1 18 U.S.C. § 704 (2006).
2 *Id.* § 704(b)–(c).
3 132 S. Ct. 2537 (2012).
4 *Id.* at 2551 (plurality opinion).
5 *Id.* at 2542.
6 *Id.*
7 *Id.*
8 United States v. Alvarez, 617 F.3d 1198, 1201 (9th Cir. 2010).
9 *Id.*

A divided Ninth Circuit panel declared the Act unconstitutional under the First Amendment, reversing the conviction.[10] Writing for the majority, Judge Smith[11] noted that the Act "applies to pure speech," imposing criminal penalties for "the mere utterance or writing" of a "false statement of fact."[12] The court found that the speech targeted by the Act was distinguishable from existing forms of false factual speech unprotected by the First Amendment, such as defamation, fraud, or speech integral to criminal conduct, because the statute lacked any limitations beyond targeting falsehood.[13] Judge Smith also considered the argument that "maliciously stated false factual speech is historically unprotected"[14] where it "create[s] a clear and present danger [of a harm that] Congress has a right to prevent."[15] But because the speech barred by the Act did "not pose any immediate and irreparable harm," the court held that it was still protected by the First Amendment.[16] Then, applying strict scrutiny, the court found that while the government had "important" interests in "honoring and motivating our troops," the Act was not necessary to achieve those aims and thus was not narrowly tailored.[17]

The Supreme Court affirmed.[18] Writing for the plurality, Justice Kennedy[19] held that false statements of fact are not categorically exempt from First Amendment protection and that the Act failed strict scrutiny.[20] Justice Kennedy cautioned that courts must take a categorical approach and eschew a "free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits,"[21] a method the Court had previously described as "startling and dangerous."[22] Rather, content-based restrictions on speech are "presumed invalid,"[23] with exceptions only for "historic and traditional categories [of expression] long familiar to the bar" as constitutionally unprotected.[24] Among those categories are incitement, obscenity, def-

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[10] *Id.* at 1218.

[11] Judge Smith was joined by Judge Nelson. Judge Bybee dissented.

[12] *Id.* at 1200 (emphasis omitted).

[13] *Id.* at 1206–15.

[14] *Id.* at 1214.

[15] *Id.* (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).

[16] *Id.* at 1215.

[17] *Id.* at 1217.

[18] *Alvarez*, 132 S. Ct. at 2551 (plurality opinion).

[19] Justice Kennedy was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor.

[20] *Alvarez*, 132 S. Ct. at 2551 (plurality opinion).

[21] *Id.* at 2544 (alteration in original) (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)) (internal quotation marks omitted).

[22] *Id.* (quoting *Stevens*, 130 S. Ct. at 1585) (internal quotation marks omitted).

[23] *Id.* (quoting Ashcroft v. ACLU, 542 U.S. 656, 660 (2004)).

[24] *Id.* (alteration in original) (quoting *Stevens*, 130 S. Ct. at 1584) (internal quotation marks omitted).

amation, conspiracy, fighting words, child pornography, fraud, and speech presenting a "grave and imminent threat" that the government has the power to prevent.[25] False speech as such, Justice Kennedy explained, is not one of those categories: "some false statements are inevitable if there is to be an open and vigorous expression of views . . . , expression the First Amendment seeks to guarantee."[26]

Justice Kennedy then addressed several prior cases that appeared to state that false speech receives no First Amendment protection. In these cases, the Court had indicated that "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas,"[27] that "false statements 'are not protected by the First Amendment in the same manner as truthful statements,'"[28] and that there "is no constitutional value in false statements of fact."[29] However, Justice Kennedy wrote, concluding that false statements of fact are wholly unprotected "would take the quoted language far from its proper context."[30] In each of those prior cases, the Court was discussing "defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation."[31] The Stolen Valor Act, in contrast, "targets falsity and nothing more."[32]

Justice Kennedy then distinguished the Stolen Valor Act from several other examples of government regulations on false speech that courts have generally deemed valid, pointing out the additional concerns animating government regulation of each such form of speech.[33] Justice Kennedy concluded that while "there are instances in which the falsity of speech bears upon whether it is protected," existing law and tradition "reject[] the notion that false speech should be in a general category that is presumptively unprotected."[34] Further, the First Amendment stands against creating new categories of unprotected speech absent "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription."[35] Justice Kennedy noted that the government had not provided

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[25] *Id.*

[26] *Id.*

[27] *Id.* at 2545 (alterations in original) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988)) (internal quotation marks omitted).

[28] *Id.* (quoting Brown v. Hartlage, 456 U.S. 45, 60–61 (1982)).

[29] *Id.* (quoting Gertz v. Robert Welsh, Inc., 418 U.S. 323, 339–40 (1974)) (internal quotation mark omitted).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 2545–46.

[34] *Id.* at 2546–47.

[35] *Id.* at 2547 (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011)) (internal quotation marks omitted).

any such evidence. Moving on to address the Act directly, Justice Kennedy wrote that it swept too broadly in that it targeted any statement made about its subject matter in any context, whether or not it was intended to secure some material benefit for the speaker.[36]

Justice Kennedy concluded by analyzing the Act under "exacting scrutiny," which requires the government's action to be "actually necessary" to serve its interest.[37] Justice Kennedy acknowledged the "significance" of the government's objectives in passing the Act, which aimed to protect the integrity of honors that "'serve the important public function of recognizing and expressing gratitude for acts of heroism and sacrifice in military service,' and also '"foste[r] morale, mission accomplishment and esprit de corps" among service members.'"[38] However, considering the injury the Act sought to prevent, Justice Kennedy noted that while false claims might offend bona fide Medal of Honor recipients and demean the award, the government had not offered any evidence that the public's perception of award holders was diluted by false claims.[39] Further, the government failed to demonstrate that counterspeech, in the form of public refutation of false claims, could not serve the same interest as the Act.[40] Finally, the statute was not the "least restrictive means" the government could have used to achieve its objective; an online database of award holders would have allowed verification of claims and thus have served the same interest as the Act.[41]

Justice Breyer filed an opinion concurring in the judgment,[42] finding that the Stolen Valor Act violated the First Amendment not based on a categorical analysis and strict scrutiny, but rather under "intermediate scrutiny," alternatively referred to as a "proportionality" test.[43] This approach examines "whether the statute works speech-related harm that is out of proportion to its justifications."[44] Justice Breyer noted that "false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas,"[45] and that "the government often has good reasons to prohibit such false speech."[46] However, because "its regulation can nonetheless

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[36] *Id.* at 2547–48.

[37] *Id.* at 2549 (quoting *Brown*, 131 S. Ct. at 2733) (internal quotation marks omitted).

[38] *Id.* at 2548 (alteration in original) (quoting Brief for United States at 37, 38, *Alvarez*, 132 S. Ct. 2537 (No. 11-210)).

[39] *Id.* at 2549.

[40] *Id.*

[41] *Id.* at 2551.

[42] Justice Breyer was joined by Justice Kagan.

[43] *Alvarez*, 132 S. Ct. at 2551 (Breyer, J., concurring).

[44] *Id.*

[45] *Id.* at 2252.

[46] *Id.*

threaten speech-related harms," intermediate scrutiny should apply.[47] The concurrence asserted that the key question is whether the government's objective can be achieved in "less burdensome ways."[48] A more narrowly tailored statute requiring a showing of specific harm, or with coverage focused on particular contexts in which the statements were most likely to be harmful, would serve the same interests as the existing Act.[49] Justice Breyer stated that the Act thus "work[ed] disproportionate constitutional harm" and failed intermediate scrutiny.[50]

Justice Alito filed a dissent,[51] writing that the plurality's decision "[broke] sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."[52] The dissent described the Act as part of a "long tradition of efforts to protect our country's system of military honors,"[53] including an earlier statute — held facially valid by the Court — that made it a crime to wear a military uniform without authorization.[54] Justice Alito went on to describe a "proliferation" of false claims regarding receipt of military awards, including several hundred within a single state during a single year and several in online publications and in Library of Congress oral histories.[55] The dissent described the harm of such false claims as significant and often "tangible in nature," such as when people lie about the awards to receive material benefits like "lucrative contracts and government benefits."[56] However, the dissent also argued that much of the harm caused by such lies was not tangible or material, so narrowing the statute to particular circumstances would not be useful.[57]

Looking to the same precedent distinguished away by the plurality, the dissent asserted that the Court had repeatedly held that false statements have no First Amendment value even when they were not tied to a material harm — for example, in the cases of perjury or falsely representing oneself as a government representative.[58] The dissent rejected the arguments of Alvarez and some amici curiae that lying has some value of its own, stating that the notion is beyond anything

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47 *Id.*
48 *Id.* at 2555.
49 *Id.* at 2556.
50 *Id.*
51 Justice Alito was joined by Justices Scalia and Thomas.
52 *Alvarez*, 132 S. Ct. at 2557 (Alito, J., dissenting).
53 *Id.*
54 *Id.* at 2558.
55 *Id.*
56 *Id.*
57 *Id.* at 2560.
58 *Id.* at 2560–62.

supported by the Court's First Amendment precedents.[59] Rather, the Court has sometimes allowed protection for false speech in order to provide "breathing space" for protected speech that does have some intrinsic value, as in the case of defamation law regarding public officials, or the protection of false statements within politics, history, philosophy, or the social sciences.[60] In those areas, even where the truth is not "impossible to ascertain," the speech is protected because "it is perilous to permit the state to be the arbiter of truth" since the power could be abused for political ends or to dampen challenges to accepted wisdom.[61] But, the dissent stated, "the Stolen Valor Act presents no risk at all that valuable speech will be suppressed" because "[t]he speech punished by the Act is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect."[62]

The plurality in *Alvarez* reached the correct result in striking down the Act. However, the plurality's approach, with its strict focus on historically unprotected speech categories, risks rendering First Amendment doctrine insufficiently responsive to the harms of modern forms of speech. Meanwhile, the approach on display in the concurrence and dissent, while more flexible, undesirably indulges in value judgments about the worth of certain speech. The Court should have adopted a new approach that would determine whether categories are protected based on the harm caused by the targeted speech, rather than on history or on the speech's affirmative social value. Such an approach would avoid the ossification problems of the Court's existing doctrine while remaining optimally speech-protective.

The opinions in *Alvarez* highlight two different approaches to content-based restrictions on speech: a balancing test informed by judgments about the affirmative value of speech, and strict historically based categoricalism. Both the concurrence and the dissent, to varying extents, ventured into values-balancing territory. The concurrence did so most openly, freely admitting that the intermediate scrutiny it applied amounted to nothing more than a "'proportionality' review" of the harm wrought by suppressing the speech at issue and the competing justifications for doing so.[63] In its assessment of that speech-related harm, the concurrence deemed the lack of "valuable contribution to the marketplace of ideas" associated with false factual statements to be relevant enough to merit mention.[64]

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[59] *Id.* at 2563.
[60] *Id.* at 2563–64.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 2551 (Breyer, J., concurring); *see id.* at 2551–52.
[64] *Id.* at 2552.

Though the dissent appeared to undertake a category-based analysis and simply arrive at the opposite conclusion from the plurality's, its reasoning strayed into the free-floating "balancing of relative social costs and benefits"[65] derided by the plurality as "startling and dangerous."[66] Specifically, while the dissent did rest its validation of the Act on the notion that false statements of fact are an unprotected category of speech, it arrived at that conclusion largely by reasoning that such statements are bereft of any redeeming value in proportion to the harm they cause.[67] Indeed, the dissent stated that speech like Alvarez's is "entirely lacking in intrinsic value."[68] That assertion, alongside the litany of harms recited by the dissent, seems a clear instance of balancing, even if the opinion ultimately dresses up its approach as a categorical analysis by nodding toward precedents that suggest that false speech is unprotected.[69] Conversely, the plurality in *Alvarez* adopted a strictly historical-categorical approach, eschewing any assessment of the social value of lies about receipt of military honors and instead looking to history and tradition to divine whether a relevant categorical First Amendment exception existed.[70]

Both the value-laden balancing approach undertaken by the dissent and concurrence and the categorical approach adopted by the *Alvarez* plurality have problematic implications for First Amendment doctrine.[71] Balancing, through which judges predicate their decisions at least in part on determinations of whether speech has affirmative social value, risks allowing restriction of certain speech due to judges'

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[65] *Id.* at 2544 (plurality opinion) (quoting United States v. Stevens, 130 S. Ct. 1577, 1585 (2010)) (internal quotation mark omitted).

[66] *Id.* (quoting *Stevens*, 130 S. Ct. at 1585) (internal quotation marks omitted).

[67] Several of the Court's earlier decisions took the approach favored by the dissent, in which value judgments are imported into a purportedly categorical analysis. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 762 (1982) (creating a new unprotected category of speech for child pornography in part because "[t]he value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not *de minimis*").

[68] *Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting).

[69] One example of this purported categorical approach was the Court's analysis in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The Court struck down an ordinance restricting bias-motivated expressive conduct, but asserted that unprotected categories of speech were "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." *Id.* at 383 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)) (internal quotation marks omitted).

[70] Recent precedents have adhered strictly to the historical approach. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2736 (2011) (declining to recognize violent video games as an unprotected category); *Stevens*, 130 S. Ct. at 1586 (declining to create a new unprotected category of speech for depictions of animal cruelty because the Court was confined to recognition of "categories of speech that have been historically unprotected").

[71] Note that the two approaches cannot be neatly separated, as the traditional categories themselves are based largely on determinations that unprotected forms of speech — libel, obscenity, and the like — are of low value. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 388–89 (2009).

distaste for a particular type of speaker or the ideas she espouses.[72] The dissent in *Alvarez* illustrates this concern: the Stolen Valor Act impacts a kind of speaker especially likely to be unpopular — one who essentially impersonated a military hero — and the dissent betrays barely concealed contempt for the defendant, describing his brief as containing "a veritable paean to lying."[73] Given its vulnerability to the prevailing prejudices of the day, balancing may therefore insufficiently protect speech. However, the existing alternative to balancing — a strict categorical approach — carries its own dangers. An approach based entirely on history and tradition risks ossification, as it hinders the government's response to harms from uniquely modern forms of speech. Indeed, *Brown v. Entertainment Merchants Ass'n*,[74] which refused to categorize violent video games as unprotected speech,[75] is frequently criticized on just such grounds.[76] While the facts in *Alvarez* do not necessarily implicate these concerns — false statements of fact intended to self-aggrandize are hardly a modern invention — the plurality's use of tradition-based reasoning entrenches the approach, increasing the likelihood that it will arise in future cases concerned with new types of speech that do not neatly fit within any preexisting category.

A middle ground between historical categoricalism and naked value judgments of speech might offer the positive attributes of both: robust speech protectiveness and restraint of illegitimate judicial censorship, coupled with a degree of flexibility. Such an approach would create new unprotected categories of speech only when the speech works truly egregious harm,[77] but would eschew any requirement that speech have affirmative social value to merit protection, as the *Alvarez* plurality did. The Court could evaluate whether a category of speech works sufficiently substantial harm to be regulated in light of several factors: (1) whether the speech has a materially — for example, physically or financially — negative impact on an individual or group; (2) whether the speech causes or is very likely to cause psychological or emotional distress or damage to an individual or group; (3) whether the speech is intimately tied to some other form of harm that is already within the government's power to prevent; and (4) whether the group

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[72] *See* Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 939–41 (1968).

[73] *Alvarez*, 132 S. Ct. at 2563 (Alito, J., dissenting).

[74] 131 S. Ct. at 2729.

[75] *Id.* at 2736.

[76] *See, e.g.*, Laurence H. Tribe, *America's Constitutional Narrative*, DAEDALUS, Winter 2012, at 25–26.

[77] For discussion of the varying types of harms speech may cause, see generally Frederick Schauer, *Harms and the First Amendment*, 2011 SUP. CT. REV. 81, and JEREMY WALDRON, THE HARM IN HATE SPEECH (2012).

with which the speech is concerned (for example, young children) warrants special protection due to some special vulnerability.

These factors attempt to capture the various permutations of "harm" that exist within the law, and particularly within First Amendment doctrine.[78] Specifically, the concern with material harm is drawn from concepts of fighting words (physical harm), fraud (financial harm), and to a lesser extent, libel (reputational harm). Psychological, emotional, and government-preventable harm are associated with speech such as child pornography and the tort of intentional infliction of emotional distress. Finally, the issue of vulnerability echoes the distinction in libel law between public and private figures,[79] which is based in part on their unequal abilities to mitigate reputational damage without legal intervention. While no single one of these factors would be necessary or sufficient to find that a category of speech works such serious harm that the First Amendment permits its regulation, these considerations would give form and guidance to the Court's assessment. Upon determining that a category of speech is not so harmful as to remove it from First Amendment protection, the Court would apply strict scrutiny.

Such an approach to content-based restrictions would be consistent with much of the existing First Amendment doctrine in this area, leaving many of the traditionally unprotected categories undisturbed, because irrespective of their lack of social value, they work great harm. Further, a harm-focused approach would offer flexibility in the recognition of new categories but would allow the Court to avoid making judgments about the worth of particular types of speech. Assessment of harm is distinct from inquiry into speech's affirmative value because harm is observable and frequently tangible in ways that free-floating "social value" is not. Indeed, scholars have expressed skepticism that judges are equipped to accurately assess what societal "value" speech possesses.[80] Additionally, Professor Jed Rubenfeld asserts that "[t]he First Amendment . . . forbids governmental actors — judges included — from declaring an opinion to be of low value and, on that basis, applying the coercive power of law against someone because he

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[78] The Court previously adopted a harm-focused approach with its "clear and present danger" test, which held that speech may be restricted when it "create[s] a clear and present danger that [it] will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). The Court then moved away from such a harm-focused approach. *See, e.g.*, Schneider v. State, 308 U.S. 147 (1939) (balancing the limitation on free speech imposed by a law banning literature distribution in public spaces with the government's interest in preventing litter).

[79] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974).

[80] *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 787–88 (2001).

has expressed that opinion."[81] In this sense, value assessments violate the spirit of the First Amendment. The Supreme Court itself has stated that "[*m*]*ost* of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value), but it is still sheltered from government regulation."[82] Courts are far better equipped to assess harm than value, provided that harm is something greater than abstract damage to the marketplace of ideas.

In *Alvarez*, the plurality would have reached the same (correct) result had it taken a harm-focused approach. The speech targeted by the Act does not cause substantial harm: false statements of fact — concerning military awards or otherwise — do not necessarily have any financial impact, and while such lies might anger or sadden actual medal recipients, it is unlikely that they would cause severe psychological or emotional trauma. Further, such speech is not inherently tied to a particular form of crime, nor does it concern an especially vulnerable group of people. Thus, regardless of its lack of social value, the speech targeted by the Act is not so harmful that it is categorically exempt from First Amendment protection.

Deciding what measures of harm are relevant within the proposed approach would require some front-end value judgments by judges or commentators. However, these judgments would take place at a higher level of generality than those associated with specific categories or instances of speech. If the factors that enter into an assessment of harm are largely fixed within the doctrine before any individual case arises, there exists less risk that distaste for a particular "low-value" category of speech will influence the outcome. Thus, a harm-focused approach, while not completely devoid of value judgments, still offers a framework more speech-protective than the current regime.

A more significant concern about an approach that does not account for speech's affirmative value is that speech both harmful and high in value — either in its own right or because it allows "breathing room" for other valuable speech — will be vulnerable to suppression. However, given the public nature of much speech deemed to be socially valuable, such as political speech (whether true or false), in many cases the harm could and would be mitigated by public counterspeech. The notion of mitigation of harm is a familiar one elsewhere in the law, and was even raised in *Alvarez* when the plurality noted that public refutation of false claims could reduce the harmful impact of the statements targeted by the Stolen Valor Act.[83] Accordingly, including

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[81] *Id.* at 824.
[82] United States v. Stevens, 130 S. Ct. 1557, 1591 (2010).
[83] *Alvarez*, 132 S. Ct. at 2549–50 (plurality opinion).

the concept of mitigation in the calculation of harm under the proposed approach would likely be sufficient to protect valuable speech.

Ultimately, a harm-focused approach to content-based speech restrictions would require a high level of judicial discipline in restraining the natural impulse toward condemnation of that which is considered distasteful or of low value. However, such a shift in First Amendment doctrine would be well worth the risks, offering flexibility, an optimal level of protection for speech, and avoidance of value judgments that contravene the spirit of the First Amendment.

B. Fourth Amendment

1. Strip Searches of Prisoners. — Prisoners have constitutional rights, including Fourth Amendment rights protecting them from unreasonable searches.[1] Despite this fact, the Supreme Court has repeatedly deferred to corrections officials' judgments in designing prison policies that might seem to infringe on constitutional rights.[2] In the past, this deference has led the Court to uphold a policy establishing mandatory strip searches of every inmate who has a contact visit[3] and a policy banning contact visits altogether.[4] Last Term, in *Florence v. Board of Chosen Freeholders*,[5] the Supreme Court held that correctional facilities may, without reasonable suspicion, strip-search every arrestee introduced into the general jail population, even when the offender in question has committed only a minor offense.[6] The Court's 5–4 ruling in *Florence* is a significant restriction of Fourth Amendment rights for prisoners. The most remarkable aspect of the ruling was the Court's reliance on the expertise of corrections officials, without any scrutiny of their knowledge, procedure, or diligence in developing the prison's strip search policy. The Court should have critically reviewed the proffered justifications for such an invasive search, examined empirical evidence, and considered clear alternatives, rather than deferring to determinations that affect basic constitutional rights. In the future, when reviewing jail administration policies,[7] the Court should apply a standard of review akin to administrative law's "hard look review."

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[1] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 84 (1987) ("Prison walls do not form a barrier separating prison inmates from the protections of the Constitution."); Bell v. Wolfish, 441 U.S. 520, 545 (1979); Wolff v. McDonnell, 418 U.S. 539, 555–56 (1974). *But see* Hudson v. Palmer, 468 U.S. 517, 526 (1984) (noting that Fourth Amendment rights are "diminished" in correctional facilities).

[2] *See, e.g.*, Overton v. Bazzetta, 539 U.S. 126, 129–30, 132 (2003); *Turner*, 482 U.S. at 81–82, 89; *Bell*, 441 U.S. at 525–26, 547.

[3] *Bell*, 441 U.S. at 558–60.

[4] Block v. Rutherford, 468 U.S. 576, 589 (1984).

[5] 132 S. Ct. 1510 (2012).

[6] *See id.* at 1513–14.

[7] In accordance with the terminology of the Court's opinion, "jail" is used here to refer to detention facilities generally. *See id.* at 1513.