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## Forward

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## FOREWORD

The second Issue of Volume 89 includes the Sixth Annual John Paul Stevens Lecture, as well as essays and articles from the Twenty-Fifth Annual Ira C. Rothgerber Jr. Conference on Constitutional Law.

The University of Colorado Law School's Byron White Center for the Study of American Constitutional Law invited the Honorable Jonathan Lippman, the former Chief Judge of New York and former Chief Judge of the New York Court of Appeals, to deliver this year's Stevens Lecture on September 26, 2017. Chief Judge Lippman spoke about access to justice, an issue of critical importance for all of us. Addressing a public audience at the Ralph L. Carr Colorado Judicial Center in Denver, Chief Judge Lippman spoke of his own work in New York to expand equal access to justice and legal aid. He commented on Colorado's progress and growth in promoting access to justice, and he left the audience with a simple admonition: always strive for equal access to justice for all. We are fortunate to publish his remarks as the first piece in this Issue.

The Twenty-Fifth Annual Rothgerber Constitutional Law Conference explored the relationship between "Truth, Lies, and the Constitution." The universe of lies uttered by human beings is remarkable for its numerosity and diversity. Some of our lies are devastating; others are benign or even valuable. The law sometimes permits and even encourages deliberate falsehoods, while at other times it punishes them. At a time when charges and counter-charges of allegedly "fake news" dominate our public discourse, the Supreme Court has held that the First Amendment protects many, if not most, lies—but not all of them.

The papers in this symposium seek to illuminate these and related puzzles. How, if at all, can law help us distinguish dangerous from valuable lies? When does the Constitution protect lies from government regulation and when, on the other hand, does it permit the government to punish lies? Under what circumstances, if ever, does the Constitution prohibit our government from lying to us?

In *Climate Change Disinformation, Citizen Competence, and the First Amendment*, Professor James Weinstein considers the oil industry's alleged lies denying a connection

between fossil fuels and climate change, and wonders whether the First Amendment would permit the government to prohibit knowingly false factual statements intended to mislead the public about matters of public concern. Professor Weinstein argues that punishing such statements would violate a “fundamental yet underexplored precept of American popular sovereignty” that entrusts the people, rather than the government, with determining the truth of factual assertions in public debate.

In *Incredible Lies*, Professor Catherine J. Ross explores the narrow universe of what she calls “incredible lies”—i.e., lies “too preposterous to be believed”—such as fortune-tellers’ and other hucksters’ claims. Professor Ross concludes that some lies are so literally unbelievable that they lose their power to harm their listeners or their subjects, and thus may become immune from government regulation as a First Amendment matter.

Professor B. Jessie Hill examines governmental lies about reproductive rights in *Sex, Lies, and Ultrasound*. Professor Hill concludes that governmental falsehoods in the abortion context primarily inflict a form of expressive injury. She urges that these expressive harms can, and should, be recognized as imposing an unconstitutional undue burden on the right to abortion.

In *Government Lies and the Press Clause*, Professor Helen Norton considers the ways in which the government’s press-related lies and misrepresentations can frustrate the values most commonly identified as underlying the First Amendment’s Press Clause: exposing (and thus checking) government misconduct, and informing public opinion about a wide range of matters. Possibilities for addressing the harms of such governmental lies include a more muscular Press Clause doctrine, as well as engaged counterspeech and oversight by other government actors, the press, and the public more generally.

Professor Carla F. Fredericks and Jesse D. Heibel address the government’s lies and misrepresentations to Native Americans in a variety of treaty and related contexts in *Standing Rock, the Sioux Treaties, and the Limits of the Supremacy Clause*. The authors situate the Standing Rock and other Sioux Tribes’ legal battle against the Dakota Access Pipeline in historical context, and explain how this struggle offers a modern example of the government’s continuing failure to respect Indian treaties and treaty rights as the “supreme Law of the Land.”

In *Free Speech Hypocrisy: Campus Free Speech Conflicts and the Sub-Legal First Amendment*, Professor Christina E. Wells discusses the ways in which some speakers invoke the First Amendment to silence others, as can be the case when critics characterize—and seek to shut down—campus protestors’ speech as censorship. Professor Wells draws upon conflict resolution literature as well as the Supreme Court’s First Amendment jurisprudence to illuminate how some critiques of student protests are themselves antagonistic to the Court’s concept of public discourse.

In *Truth, Lies, and the Confrontation Clause*, Professor Mark Spottswood urges that the Confrontation Clause is best understood as a tool for reducing the likelihood of wrongful convictions by limiting prosecutors’ and witnesses’ ability to concoct false stories without fear of discovery. Professor Spottswood finds, however, that modern Confrontation Clause doctrine has departed from this theoretical foundation and suggests doctrinal reforms in response.

Two articles—*Categorizing Lies* by Professor David S. Han, and *Developing a Taxonomy of Lies Under the First Amendment* by Professors Alan K. Chen and Justin Marceau—consider the First Amendment rules that should apply to government regulation of a wide variety of lies that threaten very different harms and promise very different benefits. Each article proposes a three-tiered framework for categorizing and organizing lies in a post-*Alvarez* world, and outlines how its framework might promote doctrinal clarity while remaining appropriately attentive to nuance.

Finally, in *The Law of Deception: A Research Agenda*, Gregory Klass urges scholars, judges, and lawyers to think about the law of deception as a distinct body of law. More specifically, Professor Klass suggests that a commitment to individual freedom undergirds and helps explain the law of deception in at least three ways: the law of deception recognizes that deception interferes with deceived listeners’ individual autonomy; constitutional protections for lies in some contexts privilege speakers’ individual autonomy; and contract law sometimes protects parties’ individual autonomy by permitting them to contract out of laws that would otherwise prohibit their deception.

We hope that you enjoy these essays and articles as much as we have.

THE EDITORS

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