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LIES, FREE SPEECH, AND THE LAW

Distrust, Negative First Amendment Theory, and the Regulation of Lies

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In April 2022, the Knight Institute hosted a symposium, titled "Lies, Free Speech, and the Law," to explore how the law regulates or should regulate false and misleading speech. The symposium was overseen by the Institute's Senior Visiting Research Scholar Genevieve Lakier and took place at Columbia University.

The essays in this series were originally presented and discussed at this event. Written by some of the country's leading scholars of law, political science, history, and technology, they focus on five themes that examine the connections between lies, freedom of speech (construed broadly), and the law: 1) the sociological and constitutional status of false or misleading speech; 2) defining the category of lies; 3) structural regulation and the problem of lies; 4) government lies; and 5) the deregulation of disclosure.

The symposium was conceptualized by Knight Institute staff, including Jameel Jaffer, executive director; Katy Glenn Bass, research director; Genevieve Lakier, senior visiting research scholar; Alex Abdo, litigation director; and Larry Siems, chief of staff. The essay series was edited by Glenn Bass and Lakier with additional support from Lorraine Kenny, communications director; A. Adam Glenn, writer/editor; Madeline Wood, research coordinator; Kushal Dev, research fellow; and Sam Subramanian, intern.

The full series is available at knightcolumbia.org/research/

INTRODUCTION

THAT WE HAVE GOVERNMENT at all is largely because we distrust each other: At its best, government establishes and enforces the rule of law to create the conditions that enable all sorts of valuable endeavors.[1] But even as we need our government to protect us from each other, we also need to protect ourselves from our government.[2] For this reason, the American constitutional tradition tells a story of simultaneous distrust of the people *and* of the government.[3]

First Amendment law exemplifies this tradition of distrust. While courts and commentators have long posited that speech deserves constitutional protection when it is affirmatively valuable in facilitating democratic self-governance, enlightenment, and individual autonomy,[4] the First Amendment tradition also relies on what many call a negative theory of the Free Speech Clause. Under this approach, the Constitution protects speech not so much because it is so valuable, but instead because the government is so dangerous in its capacity to abuse its regulatory power. Negative free speech theory thus understands the First Amendment to be more about our fears of the government than about our affirmative aspirations of the good.[5] (At

the same time, "negative" and "affirmative" First Amendment theories are not mutually exclusive, and courts and commentators commonly rely on multiple theories rather than insisting on any one free speech theory to the exclusion of all others.[6])

In short, negative First Amendment theory is about a negative value: distrust of government.[7] And because the government gives us plenty of reason to distrust it, negative theory packs substantial power.

The many examples of negative theory at work include *United States v. Alvarez*,[8] where a divided Supreme Court invalidated the federal Stolen Valor Act, a law that punished intentional falsehoods about receiving military honors. That case required the Court to consider a speaker's criminal conviction for his self-aggrandizing lie that he had received the Congressional Medal of Honor. Although all parties agreed that that law neither punished nor chilled any valuable speech,[9] the plurality relied on negative theory—that is, a focus on constraining the government rather than protecting worthy speech—to uphold the First Amendment challenge:

> 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.[10]

It's easiest to see negative theory in action when the Court strikes down the government's regulation of speech viewed as having no affirmative value, as was the case of the lies about military service in *Alvarez*. But negative theory increasingly dominates the contemporary Court's approach to a wide range of other First Amendment problems.[11]

In *Reed v. Gilbert*, for instance, the majority relied on negative theory when it announced that it would apply strict scrutiny to *all* content- and speaker-based distinctions even absent evidence of the government's malign motive.[12] *Reed* struck down, on Free Speech Clause grounds, a town's sign ordinance that prohibited some signs and permitted others in sufficiently counterintuitive ways that all of the justices found that the ordinance failed

even rational basis scrutiny.[13] Even so, the majority announced more broadly that it would apply strict scrutiny *whenever* the government distinguished between speech based on content[14]—making no effort to explain and distinguish the many instances where the government has long made content-based distinctions without triggering First Amendment attention (much less suspicion).[15] In contrast, Justices Breyer's and Kagan's concurrences doubted the wisdom of this sweeping bright-line rule, describing it as inconsistent with longstanding precedent and practice.[16]

In my view, Breyer and Kagan were right to resist. Negative theory, like any free speech theory, needs limiting principles that explain when the government's regulation of expression is constitutionally permissible—and when it is not. Without limits, negative theory always militates against the government's regulation of speech even though a completely absolutist approach is both costly and unworkable, stripping elected officials of the ability to solve pressing public problems.[17] In other words, negative theory serves as a guardrail on government, but negative theory warrants guardrails of its own to prevent the paralysis that accompanies unbounded distrust.[18] We need *both* to protect ourselves from the government *and* to empower the government to serve and protect us.

But *when* does the government deserve our distrust—or our trust? As ethicist and political scientist Russell Hardin observed, our choices to trust or distrust are largely informed by inductive reasoning—that is, by our own past experience of "the motivation of the potentially trusted person to attend to the truster's interests and his or her competence to do so."[19] Trust and distrust are necessarily both episodic[20] and comparative[21] assessments: Whether we trust (or distrust) a specific actor turns on large part on when we're asked and compared to whom. Changes over time and technology can alter our experience and thus change the subjects of our distrust.[22] And although our experience frequently leads us to distrust the government (and that there are many government actors only complicates these assessments), sometimes our experience leads us to distrust powerful private speakers even more.[23]

Adding to the complexity of these assessments, a "central problem with trust and distrust is that they are essentially cognitive assessments of the trustworthiness of the other party and may therefore be mistaken" through

both false positives and false negatives.[24] This leads political scientist Deborah Welch Larson to urge that we "assess the epistemological basis for our distrust. Where there is a possibility that distrust is based on snap judgments or automatic stereotyping, we might try to calculate the other's interests and assess the other's past behavior."[25]

Related to the question of *when* to apply negative theory is the question of *how* to use negative theory. For example, courts can use negative theory as a rule of decision itself: Under this approach, courts apply strict scrutiny to strike down the government's restriction of speech when they see evidence of the government's untrustworthy motive or incompetence—regardless of the regulated expression's lack of affirmative value.[26] Or courts can instead use negative theory as a tiebreaker when various free speech theories point in different directions: Under these circumstances, one could choose to apply negative theory as a tiebreaker such that close cases always go against the government.[27] Or courts can instead include negative theory as one of several factors in a balancing analysis where they weigh the harm threatened by the contested expression against the risk that the government will enforce the law in a partisan or clumsy manner.[28]

In this essay, I examine the relationship between negative First Amendment theory and the government's regulation of lies.[29] As a descriptive matter, I highlight the prevalence and power of negative theory when assessing the constitutionality of laws restricting lies. And as a prescriptive matter, I suggest that the principled application of negative theory—rooted, as it is, in distrust of the government's potential for regulatory overreach and abuse—requires that we attend to the inductive nature of distrust. More specifically, I propose that the principled application of negative theory requires us to ask, rather than assume, whether the government is regulating in a context where it is especially dangerous because of its malignance or clumsiness, or where its enforcement discretion is unbounded. Conversely, negative theory should pack less power in settings where the government's discretion is limited, where we don't see evidence of its self-interest or incompetence, or where listeners can't protect themselves from powerful private speakers such that we distrust nongovernmental parties even more than the government.

TRIGGERS FOR DISTRUST: SIGNS OF THE GOVERNMENT'S MALIGN MOTIVES OR INCOMPETENCE

TO SAY THAT WE DISTRUST the government to regulate in a certain area means that experience leads us to believe that the government in that setting does not have trustworthy intentions or that it is not competent. When does our experience support those conclusions? That distrust is an inductive concept based on our experience with the subject's motives and competence (and is thus both episodic and comparative) suggests the value of looking for factors (or triggers) that increase our distrust of the government, as well as factors (or contraindications) that ameliorate our distrust.

Legal scholar Ronald Cass viewed negative First Amendment theory itself as a type of inductive reasoning that requires us, first, to identify the specific historic governmental abuses that inspired distrust and thus the ratification of the First Amendment; second, to identify the key characteristics shared by those historic governmental abuses; and, finally, to apply negative First Amendment theory to curb contemporary government actions that appropriately trigger our distrust because they display those same characteristics.[30]

Characterizing the original understanding of the speech and press clauses in negative theory terms as "a modest damage-control effort; not concerned broadly with speech, but designed to place some regulation beyond government's power,"[31] Cass identified press licensing and seditious libel as the historical governmental abuses of power that particularly troubled the framers. He then identified the key characteristics shared by those abuses to be certain dangerous governmental motives: its self-interest—i.e., the government's suppression of criticism for partisan or other self-protective reasons—and its intolerance of unorthodox or uncomfortable ideas.[32]

The government's regulation of speech should thus leave us more or less distrustful depending on whether it occurs in a setting when we have more or less reason to worry about its self-interested or intolerant motive.[33] Emphasizing that the framers' negative theory concerns did not extend to all government regulation of speech,[34] Cass explained that:

> These principles do not so much mandate outcomes as allow courts to worry about the right issues: Is the speech regulation a product of personal dislike, pique, or whim on the part of government officials? Is it the product of intolerance for the message conveyed? Or is it an ordinary exercise of government's power to regulate activities so as to avoid harm? These principles do not firmly tie judges' hands in deciding speech controversies. ... Courts still must in effect balance the costs and benefits of particular speech regulations.[35]

Recall too Hardin's work, which suggests that the government's regulation of speech should trigger our distrust when we have reason to worry about its competence (as well as its motives).[36] Negative free speech theory thus appropriately attends to settings where the government might overestimate expression's danger because of its limited information or expertise, or where governmental decision-makers are especially vulnerable to cognitive and emotional biases.[37] Here too, experience can illuminate the government's competence as well as motives.[38]

Along these lines, the majority and concurring opinions in *Reed v. Gilbert* both searched for signals of the government's untrustworthy motives—but fingered very different triggers for the application of negative theory to solve Free Speech Clause problems. On one hand, the majority identified the government's content-based speech distinctions, by themselves, as triggers for distrust and the application of strict scrutiny (the doctrinal expression of courts' distrust of government's regulatory efforts). In so doing, the majority emphasized its fear that future officials would exploit content-based distinctions for self-interested purposes even if contemporary officials had no such intent:

> Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech. That is why the First Amendment expressly targets the operation of the laws—i.e., the "abridge[ment] of speech"—rather than merely the motives of those who enacted them.[39]

On the other hand, Justices Kagan's and Breyer's concurring opinions

protested that negative theory should not control the Court's doctrine absent more specific indications of the government's self-interest or intolerance. They urged very different triggers for distrust of government's regulatory efforts: the government's viewpoint-based distinctions and its restriction of an entire topic in public discourse.[40]

Rejecting the majority's reflexive reliance on negative theory, Justice Kagan suggested the value of "common sense" for identifying additional circumstances that should trigger courts' distrust of the government's regulatory efforts[41] (that is, circumstances involving any "'realistic possibility that official suppression of ideas is afoot'"[42]). Common sense, as historian Sophia Rosenfeld explains, itself reflects inductive reasoning as it stems from our "common experiences and shared faculties as humans."[43]

TRIGGERS FOR DISTRUST: THE GOVERNMENT'S UNBOUNDED DISCRETION

THE BREADTH AND MALLEABILITY of the government's interventions can enable regulatory abuse by a partisan or clumsy government. For this reason, as the *Alvarez* opinions make clear, laws that restrict lies by conferring the government with unbounded discretion trigger the Court's distrust. The *Alvarez* plurality sought to mitigate these concerns by requiring the government to tether its regulation to lies that threaten certain harms and tailor such regulation to those settings and audiences where those harms are more likely.[44] Justice Breyer's concurrence (joined by Justice Kagan) similarly emphasized the dangers of governmental regulation untethered to harm of some sort. That opinion extolled the constitutionality of laws that:

> tend to be narrower than the statute before us, in that they limit the scope of their application, sometimes by requiring proof of specific harm to identifiable victims; sometimes by specifying that the lies be made in contexts in which a tangible harm to others is especially likely to occur; and sometimes by limiting the prohibited lies to those that are particularly likely to produce harm. ...

> Statutes forbidding lying to a government official (not under oath) are typically limited to circumstances where a lie is likely to work particular and specific harm by interfering with the functioning of a government department, and those statutes also require a showing of materiality. ...
>
> Statutes prohibiting false claims of terrorist attacks, or other lies about the commission of crimes or catastrophes, require proof that substantial public harm be directly foreseeable, or, if not, involve false statements that are very likely to bring about that harm.[45]

Although far from clear in its specifics,[46] the concurrence emphasized that government officials can address negative theory concerns by tethering the regulated lie to the likelihood of harm.[47] The absence of such a tether triggers distrust, in Breyer's view, and thus justifies the application of negative theory to invalidate those laws:

> [T]hat breadth means that it creates a significant risk of First Amendment harm. As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high. ... And so the prohibition may be applied where it should not be applied, for example, to bar stool braggadocio or, in the political arena, subtly but selectively to speakers that the Government does not like. These considerations lead me to believe that the statute as written risks significant First Amendment harm.[48]

CONTRAINDICATIONS FOR DISTRUST: TETHERING REGULATED LIES TO "SOMETHING MORE"

LIES' ENORMOUS VARIETY and ubiquity mean that the government's regulation of lies, without more, enables its overreach. For this reason, the plurality described past precedent "to instruct that falsity alone may not suffice to bring the speech outside the First Amendment."[49] In

its view, "[w]ere the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court's cases or in our constitutional tradition."[50] So too did the concurrence identify the regulation of "falsity without more" as triggering its distrust.[51] When insisting on something "more," courts seek to limit the government's enforcement discretion, thus cabining its potential for abuse and overreach.

To be sure, the justices struggled to articulate the requisite something "more." The plurality insisted that the targeted lies inflict "legally cognizable harm"—illustrating, rather than defining, that phrase to include "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."[52] This tendency to focus on lies that inflict tangible and individualized harm like financial or reputational harm is not because other lies don't threaten significant harm, but instead because of concerns that the challenges of proving less tangible or collective harm will enable the government's overreaching, self-interest, bias, or incompetence to infect its enforcement decisions.

At a minimum, the requisite "more" includes lies that inflict financial and reputational harms, all of the justices agreed. But so too did all of the justices endorse the constitutionality of laws that punish lies that seek to change—or are predictably capable of changing—the target's course of conduct to the liar's advantage.[53] In this vein, all nine justices indicated their constitutional comfort with laws that prohibit speakers from falsely representing themselves to be government officials (what I've called lies to misappropriate public power[54]), as well as laws that broadly prohibit lies to the government (what I've called lies to manipulate public power[55])—even though such lies often inflict harms that do not involve financial, reputational, or other harms traditionally thought tangible or monetizable.

First, all nine justices endorsed the constitutionality of the many laws that prohibit a speaker from falsely representing herself to be a government official, like a police officer.[56] We can think about these as lies about being the government, in other words, as a type of lie about who's talking, a type of lie about the source of speech.[57]

Of course, these sorts of lies are often told to obtain a financial benefit for the liar—by, for instance, extorting money from vulnerable targets.[58] But courts have also interpreted these laws to prohibit lies to influence the listener to change her "course of conduct." For instance, the Court has held that federal law prohibits a speaker's lie that he was a law enforcement officer—told to convince his listener to divulge information that she was otherwise unwilling to disclose—because it sought to cause the target to change her course of conduct (to speak when she preferred to remain silent).[59] As the Court recognized, "[A] person may be defrauded although he parts with something of no measurable value at all."[60]

So too did all of the justices support the constitutionality of the Federal False Statements Act, which criminalizes all sorts of lies to the federal government.[61] While such lies are often told to obtain a financial benefit like a government contract, this law also prohibits lies that seek to divert enforcement officials' investigative attention or otherwise influence government's decision-making to the liar's advantage.[62] According to the Court, these lies are regulable because they seek to manipulate their listeners' conduct—that is, the government's decisions about how to allocate its time, effort, and other resources.[63]

All three of the opinions supported the constitutionality of these sorts of laws. In so doing, the justices did not view these laws as prohibiting "falsity without more." The something "more" rests in the lie's intent or capacity to change the listener's course of conduct to the liar's advantage. Here the Court appeared to rely on "common sense" (rather than demand empirical evidence) to predict such lies' capacity to affect their targets' choices. I share its sense of how the world works in this respect even as I note the difficulty of predicting when the Court will require evidence of the harms threatened by certain speech and when it will not.

Legislators can additionally tether regulated lies to something "more," and thus limit the government's enforcement discretion, by targeting those settings where harm is likely. In this vein, the *Alvarez* plurality contrasted the Stolen Valor Act (which "by its plain terms applies to a false statement made at any time, in any place, to any person"[64]) with the Federal False Statements Act and its limitations on topic and audience: "Section 1001's prohibition on false statements made [1] to Government officials, in communications

[2] concerning official matters, does not lead to the broader proposition that false statements are unprotected when made to any person, at any time, in any context."[65]

We can see related intuitions at work in other settings where the Court has signaled its comfort with the regulation of lies about the source of speech. For instance, the Court has long upheld laws that require speakers to identify themselves as the source of political contributions and campaign advertisements, recognizing that accurate information about the source of speech often influences listeners' course of conduct in important ways.[66] And precisely because listeners frequently rely on the source of speech as a proxy for that expression's credibility and quality, speakers not infrequently mislead listeners about their identities. Here's one illustration, documented by Spencer Overton: In the 2016 election, fake Facebook pages targeted Black users and falsely claimed to be authored by two Black men saying "'We don't have any other choice this time but to boycott the election. … No one represents Black people. Don't go to vote.'"[67] Other examples include the deployment of deepfake technologies that make speech look and sound like it's coming from somebody other than the actual speaker.[68]

Other lies about the source of speech are similarly, and predictably, capable of influencing their targets' conduct to the liar's advantage—and thus tethered to harm in ways that should leave courts slower to distrust laws that regulate them. Think, for instance, of a candidate's lies that she is the incumbent (a lie not terribly different from a lie that one is a law enforcement officer[69]) when voters frequently rely on incumbency as a heuristic (or cognitive shortcut) in their decision-making.[70] Think too of a speaker's lies about who has endorsed her candidacy that seek to influence listeners' course of conduct to the liar's advantage.[71]

The same is true of lies about voting requirements and procedures: They are lies about objectively verifiable facts that are predictably capable of interfering with their targets' ability to vote (thus influencing their targets' conduct to the liar's advantage). As the Court has signaled, these lies are also regulable consistent with the First Amendment.[72]

INVOKING NEGATIVE THEORY BY PRETENDING THAT HARD FIRST AMENDMENT PROBLEMS ARE EASY

So far I've examined potential triggers for (and sometimes contra-indications of) distrust of the government's regulatory interventions, and thus the application of negative theory. But sometimes courts justify the application of negative theory to invalidate the government's efforts by discounting or ignoring lies' capacity to influence their targets' course of conduct to the liar's advantage.[73] Recall, for instance, how in his *Alvarez* concurrence, Justice Breyer was quick to dismiss the capacity of lies in family settings to cause harm.[74] But as documented in detail by legal scholar Jill Elaine Hasday, lies in intimate environments can and do inflict serious physical, financial, and dignitary harms and influence their targets' course of conduct to the liar's advantage in a variety of ways.[75] As Hasday demonstrates, courts have long discounted these harms based on the assumption "that people deceived within intimate relationships do not and should not have access to remedies that are available to people deceived in other contexts."[76]

For the same reasons and with the same results, courts sometimes overstate the effectiveness of counterspeech in remedying the harms threatened by lies and other expression.[77] As G.S. Hans observes, courts often rely on the availability of counterspeech when invoking negative theory to strike down the government's regulation—not because counterspeech is demonstrably effective, but instead to justify its fear of the government's potential for regulatory overreach.[78] Negative theory presumes that the unwilling or unhappy listener can protect herself through exit or voice[79]—in other words, by simply ignoring or leaving the discussion if she doesn't like what she hears, or by rebutting and protesting. But that presumption should exert little force in settings and relationships where vulnerable listeners experience inequalities of information and power—and thus for whom exit and voice may not be available, increasing the likelihood that lies in those settings will inflict harm.[80]

These judicial choices are not inevitable. The principled application of negative theory requires comparative risk assessments, and courts can (and

sometimes do) weigh the risk of harm to comparatively vulnerable listeners more heavily than the risk of the government's regulatory abuse.[81]

CONCLUSION

NEGATIVE THEORY REQUIRES us to attend to the risk of the government's regulatory abuse and overreach when regulating lies and other potentially harmful expression.[82] To be sure, negative theory plays a valuable role in solving First Amendment problems. But its reflexive deployment has its costs. As Frederick Schauer describes this dynamic: "Fearful of the errors of mistaken judgment, the First Amendment of fear chooses to minimize the likelihood of such mistakes by largely withdrawing the power to judge altogether. Fearful of the worst, it is willing to sacrifice aspiration for the best."[83] Negative theory, when properly applied, requires courts to be transparent about the costs of this trade-off and about who bears those costs.

Our assessments of the government's motivations and competence are key to when negative theory does (or should do) more or less First Amendment work. To this end, I urge that we take care to explain when and why we fear some government actors more than others, and when and why we fear the government more than private actors (and vice versa). More specifically, the principled application of negative theory does not pretend that hard Free Speech Clause problems are easy by minimizing the harms of regulated lies nor by exaggerating the effectiveness of counterspeech in preventing those harms. And the principled application of negative theory identifies specific triggers for distrust (like evidence of the government's untrustworthy motives, its incompetence, its unfair surprise, or its unbounded discretion)—and recognizes that negative theory should carry less force when those triggers are absent.

NOTES

1 *See* Russell Hardin, Trust and Trustworthiness 109 (2002) ("Government generally protects us against the worst that might happen so that we may take risks on modest cooperative ventures. Even while we are often wary of government and its agents, we rely on them to reduce the need for trustworthiness in many realms that government regulates or otherwise oversees. We rely on contract law and court enforcement to achieve successful cooperation in contexts in which, without such protective institutions, we would not risk cooperating with others.").

2 *See* Russell Hardin, Trust 136 (2006) ("Even before Madison and his arguments for the U.S. Constitution, the recognition that governments were prone to abusing people in [self-interested] ways was a central part of the development of liberal thought, especially in the work of John Locke, David Hume, and Adam Smith. The original contributions of Madison to this long tradition were, first, to create a government that was hemmed in by itself so that it could not easily overreach its authority and, second, to give that government very little authority while also diminishing the authority of the individual states.").

3 Our constitutional tradition is arguably unique in this respect. *See* Frederick Schauer, *The Calculus of Distrust*, 77 Va. L. Rev. 653, 653 (1991) ("Although certainly heard in those countries that have far more reason to distrust their governments than we have to distrust ours, only in America does the argument against government authority from the possibility of its abuse have such knockdown force.").

4 *See* Thomas I. Emerson, *First Amendment Doctrine and the Burger Court*, 68 Calif. L. Rev. 422, 423 (1980) (discussing affirmative free speech theories); *see also* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 UCLA L. Rev. 1405, 1412-14 (1987) (observing that affirmative free speech theories "differ from other theories in two respects. First, the affirmative theories rely on deduction. Each begins with a precept, usually a conception of ideal human endeavors, rooted either in a vision of individual or communal ends, and deduces from it the value that is served by speech. Second, the positive theories are reductionist. Many reduce the focus of inquiry to a single value served by speech. And all of these theories reduce the focus of First Amendment inquiry to the ways in which the particular identified value or values can be advanced by speech.").

5 *See* Cass, *supra* note 4, at 1439 (1987) ("The framers were not intent on promoting some well-defined conception of the good, whether individual or societal. They were responding to problems that already had arisen and that they feared might recur."); Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 Harv. L. Rev. 1765, 1791 (2004) (observing that although the value of free speech "in theory definable both positively and negatively, [it] has in reality developed more negatively—understood to be at its core about protecting against danger rather than about making conditions better").

6 *See* Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. Davis L. Rev. 1631, 1658-62 (2021) (discussing pluralistic approaches to free speech theory). Note too that affirmative and negative free speech *theories* are different answers to the question of *why* the First Amendment protects speech, while positive and negative *rights* instead reflect different answers to the question of *how* the Constitution protects certain rights. *See* Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. Chi. L. Rev. 1243, 1332 (2020) (describing the tendency "to construe the guarantee of liberty (be it a substantive due process liberty, or the right to free speech) in almost purely negative terms, as a right the individual possesses against the state, rather than as a guarantee of something positive (a minimally fair bargaining process, say, or a reasonable opportunity to be heard)").

7 *See* Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 Fla. St. U. L. Rev. 1, 3 (2008) (describing "the First Amendment [as] not, in the end, primarily about protecting the individual's right to speak; rather, the First Amendment is primarily about constraining the collective authority of temporary political majorities to exercise their power by determining for everyone what is true and false, as well as what is right and wrong").

8 United States v. Alvarez, 567 U.S. 709 (2012).

9 *See* Transcript of Oral Argument, *Alvarez*, 567 U.S. at 27, 35-36, (where challenger's lawyer conceded that the Act neither punished nor chilled valuable speech). To be sure, some lies warrant First Amendment protection because they are affirmatively valuable (like lies to protect privacy or comfort the sick or frightened) or because their regulation chills valuable speech (by punishing accidental falsehoods in ways that make folks reluctant to speak at all on certain topics). *See* Helen Norton, *Lies and the Constitution*, 2012 Sup. Ct. Rev. 161, 164-70 (2012).

10 *Alvarez*, 567 U.S. at 723 (plurality opinion).

11 Note that negative theory has not always played such a large role in First Amendment doctrine. *See* Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 Harv. L. Rev. 2299, 2348 (2021) ("What these debates thus illuminate is the existence of what we might call a second strand of eighteenth and nineteenth century discourse and practice about freedom of speech—one that, in contrast to the first, constitutional strand of discourse and practice, assumed that government intervention into the marketplace of ideas was sometimes necessary to protect expressive liberty and the democratic values it facilitated. The two strands were not incompatible with one another. Both, after all, granted the government considerable power to regulate speech when necessary to promote the public good.").

12 Reed v. Town of Gilbert, 576 U.S 155 (2015).

13 *Id.* at 179 (Kagan, J., concurring).

14 *Id.* at 163-65 (majority opinion).

15 *Id.* at 578 (Breyer, J., concurring) (listing examples that include securities law, consumer protection law, professional responsibility law, and more).

16 *Id.* at 181-82 (Kagan, J., concurring) ("Although the majority insists that applying strict scrutiny to all such ordinances is 'essential' to protecting First Amendment freedoms, I find it challenging to understand why that is so. . . . We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any 'realistic possibility that official suppression of ideas is afoot.' That is always the case when the regulation facially differentiates on the basis of viewpoint. It is also the case (except in non-public or limited public forums) when a law restricts 'discussion of an entire topic' in public debate. . . . But when that is not realistically possible, we may do well to relax our guard so that 'entirely reasonable' laws imperiled by strict scrutiny can survive.").

17 *See* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2360 (2020) (Breyer, J., concurring and dissenting) ("Put simply, treating all content-based distinctions on speech as presumptively unconstitutional is unworkable and would obstruct the ordinary workings of democratic governance.").

18 *See* Hardin, *supra* note 1, at 96 ("Distrust in a world in which others are untrustworthy does, of course, protect one against losses that would follow from taking the risk of cooperating with others. But it can wreck one's own opportunities in a society or context in which others are generally trustworthy. The meaningful result of trust, when it is justified, is to enable cooperation; the result of distrust is to block even the attempt at cooperation.").

19 Russell Hardin, *Distrust: Manifestations and Management*, *in* Distrust 3, 8 (Russell Hardin ed., 2004); *see also* Hardin, *supra* note 2, at 17 ("To say we trust you means we believe that you have the right intentions toward us and that you are competent to do what we trust you to do.").

20 For an example of an episodic understanding of trust and distrust, see Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 Colum. L. Rev. 449, 449-50 (1985) ("[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment, in other words, should be targeted for the worst of times.").

21 Vincent Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 Minn. L. Rev. 11, 73-74 (1981) ("[D]istrust is a comparative notion. The allocation of authority between the state and the individual is a function not simply of how much trust should be placed in the capacity of private individuals to process communications thoughtfully and responsibly. Distrust of the state, particularly in its censorial capacity, is a fundamental value that informs the first amendment.").

22 *See* Tim Wu, *Is the First Amendment Obsolete?*, 17-01 KNIGHT FIRST AMEND. INST., Sept. 1, 2017, at 2-3, https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/9FQ7-ND7M] (describing the challenges that arise in 21st century speech environments when powerful parties, and not just the government, threaten free speech).

23 *See* HARDIN, *supra* note 1, at 89 ("[D]istrust is sometimes the only credible implication of the evidence. Indeed, distrust is sometimes not merely a rational assessment but it is also benign, in that it protects against harms rather than causing them.").

24 Hardin, *supra* note 19, at 9.

25 Deborah Welch Larson, *Distrust: Prudent, If Not Always Wise*, *in* DISTRUST 34, 54 (Russell Hardin ed., 2004).

26 The plurality opinion in *Alvarez* exemplifies this approach, invoking negative theory to strike down the government's regulation of speech even though the Court acknowledged that the regulated lie involved no valuable expression. *See supra* notes 9-10 and accompanying text.

27 *See* Blasi, *supra* note 20, at 514 ("The choice of perspective is likely to have its greatest impact at the level of methodology, rhetoric, and abstract doctrinal formulation."); Massaro & Norton, *supra* note 6, at 1657-63 (noting that other free speech theories may instead serve as tiebreakers for solving First Amendment problems).

28 Justice Breyer has long proposed such an approach, urging that we weigh the harms of the contested falsehood against the risk that the government will enforce the law in a self-interested or overreaching manner. *Alvarez*, 567 U.S. at 730-32 (Breyer, J., concurring).

29 In this essay, I use the term "lies" to mean a speaker's knowingly or recklessly false assertion of fact made with the intention that the listener understand the assertion to be true. *See* Norton, *supra* note 9, at 162 n.9.

30 Cass, *supra* note 4, at 1438-39.

31 *Id.* at 1443; *see also id.* at 1441-42 ("In each instance, the limitations on government responded to specific perceived abuses of government power. The First Amendment's concerns over the establishment of a state religion, and over interference with free religious exercise, with speech and press, with assembly and petitions for redress of grievances all spring from the same ground that gave rise to the rest of the Bill of Rights. The phrasing of the amendments in the negative—as limitations on government rather than as self-contained guarantees of liberty—is emblematic of their genesis.").

32 *See id.* at 1449-50 ("In addition to self-interest narrowly conceived, past incidents of wrongful suppression or punishment of speech had been born of officials' intolerance: distaste for the message rather than realistic concern for its practical effects. This sort of intolerance for ideas accounted for much of the censorship that governments had effected.").

33 *See* Burt Neuborne, *"Fighting Faiths," Error Deflection, and Free Speech*, 51 SETON HALL L. REV. 241, 241-56 (2020) (explaining Free Speech Clause doctrine as appropriately infused by a heavy dose of risk management, where the government's potential self-interest is a type of bias and thus a source of potential risk of error).

34 *See* Cass, *supra* note 4, at 1473 ("The common concern that informed progenitors of the speech clause was the suppression of speech based on the prejudices of the regulators; they did not intend to restrict speech regulations that avoid social harm. One possible approach to decision of speech claims is simply to take this concern as the general principle for decision of constitutional claims. The categorization effort identifies the cases in which prejudice-driven suppression is most likely and the cases in which avoidance of social harm is most likely. Strong presumptions of validity or invalidity then could attach to these speech regulations.").

35 *Id.* at 1478-79; *see also id.* at 1445 (describing the framers' generation as making a plea "for a more limited freedom: freedom from *wrongful* speech regulation. These writers, along with many who followed them and invoked their imagery, believed that government should be empowered to regulate speech, but that in some, perhaps many, instances government regulation of speech had been improper. Their effort was to illuminate the impropriety of the particular sort of speech constraint with which they were concerned.").

36 *See* HARDIN, *supra* note 2; *see also* Cass R. Sunstein, *The Ethics of Nudging*, 32 YALE J. REG. 413, 449 (2015) ("Choice architects are emphatically human, and fully subject to behavioral biases; they are often unreliable. . . . They might lack important information (the knowledge problem). They might be biased, perhaps because their own parochial interests are at stake (the public choice problem). They might themselves display behavioral biases—such as present bias, optimistic bias, or probability neglect.").

37 *See* James C. Cooper & William E. Kovacic, *Behavioral Economics: Implications for Regulatory Behavior*, 41 J. REGUL. ECON. 41, 42-43 (2012) ("[F]lawed heuristics (e.g., availability, representativeness, optimism, and hindsight) and myopia are likely to lead regulators to adopt policies closer to the preferences of political overseers than they would otherwise. . . . [T]he incentive structure for regulators is likely to reward those who adopt politically expedient policies, either intentionally (due to a desire to please the political overseer) or accidentally (due to bounded rationality)."); Eyal Zamir & Raanan Sulitzeanu-Kenan, *Explaining Self-Interested Behavior of Public-Spirited Policy Makers*, 78 PUB. ADMIN. REV. 579, 579 (2017) (describing how government decision-makers "may act in self-interested ways because of automatic and unconscious motivations rather than deliberate and conscious calculations").

38 *See* Amy Kapczynski, *The Lochnerized First Amendment and the FDA: Toward a More Democratic Political Economy*, 118 COLUM. L. REV. 179, 203 (2018) ("A more democratic First Amendment, and one still recognizable in current doctrine, would also admit that history and experience can help us distinguish between settings in which governments are likely to abuse their powers and settings in which governments are likely to be necessary to give effect to collective judgments about how we wish to live and order our values. Historical experience and empirical evidence can and should inform courts' understandings of the markets and regulators in question. Where evidence shows—as in the examples of drug detailing and evidence production about medicines and tobacco—that markets exhibit patterned forms of power and disempowerment, First Amendment analysis can and should take this into account. . . . The answers are necessarily particular and derived from experience, rather than abstract and rooted in ungrounded assertions of market neutrality.").

39 Reed v. Town of Gilbert, 576 U.S 155, 167 (2015); *see also id.* at 167-68 ("Likewise, one could easily imagine a Sign Code compliance manager who disliked the Church's substantive teachings deploying the Sign Code to make it more difficult for the Church to inform the public of the location of its services. Accordingly, we have repeatedly 'rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'").

40 *Id.* at 178-79 (Breyer, J., concurring); *id.* at 182 (Kagan, J., concurring).

41 *Id.* at 183 (Kagan, J., concurring) ("To do its intended work, of course, the category of content-based regulation triggering strict scrutiny must sweep more broadly than the actual harm; that category exists to create a buffer zone guaranteeing that the government cannot favor or disfavor certain viewpoints. But that buffer zone need not extend forever. We can administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function.").

42 *Id.* (quoting Davenport v. Washington Ed. Assn. 551 U.S. 117, 189 (2007) (quoting R.A.V. v. St. Paul, 505 U.S. 377, 388 (1992))).

43 *See* SOPHIA ROSENFELD, COMMON SENSE 227 (2011). Even so, "common sense" has its limitations. *See id.* at 256 ("[C]ommon sense, as both an informal regulatory system and a political authority, also always threatens to undermine the democratic ideal: blocking out truly new ideas, cutting off debate, convincing us that simple, kitchen-table solutions formulated by everyday people are necessarily better than complex or specialized or scientific ones. . . . Common sense ultimately works to help us talk to each other but also to limit what we can hear and from whom.").

44 United States v. Alvarez, 567 U.S. 709, 719 (2012).

45 *Id.* at 734-35.

46 Even so, Justice Breyer's discussion of the requisite harm invites a variety of questions. How, if at all, is "specific" harm distinct from "tangible" harm? What is the difference between "particular" and "specific" harm (and will either do)? How, if at all, is a lie in settings where "tangible harm" is "especially

likely to occur" distinct from a lie that is "particularly likely" to cause harm?

47 *Id.* at 736.

48 *Id.* at 736-37 ("[I]n virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies where specific harm is more likely to occur. The limitations help to make certain that the statute does not allow its threat of liability or criminal punishment to roam at large, discouraging or forbidding the telling of the lie in contexts where harm is unlikely or the need for the prohibition is small.").

49 *Id.* at 719 (plurality opinion).

50 *Id.* at 723.

51 *Id.* at 734 (Breyer, J., concurring) ("[T]he pervasiveness of false statements, made for better or for worse motives, made thoughtlessly or deliberately, made with or without accompanying harm, provides a weapon to a government broadly empowered to prosecute falsity without more. And those who are unpopular may fear that the government will use that weapon selectively, say, by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims.").

52 *Id.* at 719 (plurality opinion).

53 *See* Helen Norton, *Lies To Manipulate, Misappropriate, and Acquire Government Power*, *in* Law and Lies: Deception and Truth-Telling in the American Legal System 143, 175 (Austin D. Sarat ed., 2015) ("Although Justice Breyer did not explain more specifically what he meant by 'harm' in these contexts, we might understand 'specific harm' to mean the listener's actual reliance on the lie for decision-making purposes (where the harm of manipulation has actually occurred); we might understand 'material' harm to refer to those lies that carry an increased risk of manipulating listeners' behavioral choices; and we might understand 'lies most likely to be harmful or [i]n contexts where such lies are most likely to cause harm' as lies that have the intent to manipulate, and thus create the initial risk of manipulating, listeners' decisions."); *see also* Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 Ariz. L. Rev. 451, 467 (2020) ("[I]n some class of cases, the 'something more' need not be a showing of concrete tortious harm, but rather can include a broad range of likely or even potential systemic harms that collectively make up the category of compelling government interests.").

54 Norton, *supra* note 53, at 165.

55 *Id.* at 148.

56 *E.g.*, 18 U.S.C. § 709 (prohibiting a speaker's unauthorized use of federal agencies' names in a manner reasonably calculated to convey the impression that the speaker's message was approved or endorsed by the agency); 18 U.S.C. § 912 (prohibiting various misrepresentations that one is "an officer or employee acting under the authority of the United States"); Kan. Stat. § 21-5917 (criminalizing falsely "representing oneself" to be a law enforcement officer).

57 *See* United States v. Chappell, 691 F.3d 388, 395 (4th Cir. 2012) (describing lies about being a law enforcement officer as a type of "identity theft").

58 *E.g.*, Wilkes v. United States, 732 F.2d 1154 (3rd Cir. 1984), *cert. denied*, 469 U.S. 964 (1984) (involving lies told by someone claiming to be a Social Security employee and demanding return of alleged "overpayments"); United States v. Romero, 293 F.3d 1120 (9th Cir. 2002) (involving lies told by a person claiming to be an Immigration and Naturalization Service employee and offering to expedite immigration applications in exchange for money); United States v. Gilbert, 143 F.3d 397 (8th Cir. 1998) (involving lies told by persons claiming to be law enforcement officers told to avoid traffic tickets).

59 *See* United States v. Lepowitch, 318 U.S. 702, 704-05 (1943) (interpreting federal law to prohibit the defendant's lie about being an FBI agent that led his listener to divulge information about another person's location).

60 *Id.*

61 18 U.S.C. § 1001 (prohibiting materially false statements "in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States"). For a listing of similar laws, see United States v. Wells, 519 U.S. 482, 505-07 nn.8-10 (1997) (Stevens, J., dissenting).

62 *See* United States v. Gilliland, 312 U.S. 86, 93 (1941) (emphasizing Congress's "intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described").

63 *See* Catherine J. Ross, A Right to Lie?: Presidents, Other Liars, and the First Amendment 13 (2021) (describing laws that prohibit "deception that interferes with the administration of justice or the government's functions"); *id.* at 25 ("[L]ying to government investigators is a felony because it interferes with fact-finding, justice, and governmental efficiency.").

64 United States v. Alvarez, 567 U.S. 709, 722 (2012).

65 *Id.* at 720. Laws restricting lies also trigger distrust when they apply to settings where speakers may be unaware of the legal consequences of their lies, thus increasing concerns about the government's potential to abuse its power by unfairly or selectively trapping the unwary. *See* United States v. Brogan, 522 U.S. 398, 416 (Ginsburg, J., concurring) (noting the dangers of permitting the government to play "gotcha" by permitting "an overzealous prosecutor or investigator—aware that a person has committed some suspicious acts, but unable to make a criminal case—[to] create a crime by surprising the suspect, asking about those acts, and receiving a false denial").

66 Citizens United v. FEC, 558 U.S. 310, 371 (2010) (upholding campaign disclosure requirements and noting that this "transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages"). Because a speaker's interest in keeping her identity secret because she reasonably fears abuse by power is meaningfully distinct from her interest in keeping her identity secret to enable her to manipulate others, *Citizens United* is distinguishable from NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958) (rejecting the state's efforts to require the NAACP to disclose its members' names and addresses at a time when civil rights supporters were under siege in the South). More specifically, the disclosures' informational value to listeners was considerably greater in *Citizens United*, and the speakers' vulnerability to abuse if their identities were disclosed was considerably greater in *NAACP v. Alabama*.

67 Spencer Overton, *State Power to Regulate Social Media Companies to Prevent Voter Suppression*, 53 U.C. Davis L. Rev. 1793, 1795 (2020).

68 *See* Ross, *supra* note 63, at 69 (describing deepfakes that falsely depicted then-candidate Biden as saying "You won't be safe in Joe Biden's America").

69 *See supra* notes 56-59 and accompanying text.

70 *E.g.*, Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox, 389 N.W.2d 446, 448 (Mich. Ct. App. 1986) (describing campaign advertisements that misrepresented the candidate as the incumbent); Ohio Democratic Party v. Ohio Elections Comm'n, 07AP-876, 2008 WL 387836, *8 (Ohio Ct. App. 2008) (upholding a statute that prohibited a candidate's campaign literature from using the title of an office not currently held by the candidate); Cook v. Corbett, 446 P.2d 179, 181 (Or. 1968) (describing nonincumbent candidate's campaign advertisements urging voters to "re-elect" her).

71 *E.g.*, Linert v. MacDonald, 901 N.W.2d 664 (Minn. Ct. App. 2017) (rejecting a First Amendment challenge by a candidate fined for falsely claiming that the state Republican Party's judicial election committee had endorsed her candidacy).

72 Minnesota Voters All. v. Mansky, 138 U.S. 1876, 1889 n.4 (2018).

73 *See* Frederick Schauer, *Oliver Wendell Holmes, the Abrams Case, and the Origins of the Harmless Speech Tradition*, 51 Seton Hall L. Rev. 205, 224 (2020) ("[I]n helping to launch the harmless speech tradition, Holmes may himself have contributed to still another harm—the harm of believing that speech is harmless.").

74 United States v. Alvarez, 567 U.S. 709, 736 (2012) (Breyer, J., concurring).

75 *See* Jill Elaine Hasday, Intimate Lies and the Law 77-97 (2019).

76 *Id.* at 97-98; *see also* Elizabeth F. Emens, *On Trust, Law and Expecting the Worst*, 133 Harv. L. Rev. 1963, 1972 (2020) (reviewing Jill Elaine Hasday, Intimate Lies and the Law (2019)) ("Perhaps courts' rejection of such claims, then, stems from the ubiquity of the deceit. Its frequency may normalize it, making it almost invisible to courts."); *id.* at 1974 ("[D]ismissing suits for intimate deception is a form of regulatory influence, just as vindicating such suits

is a form of regulatory influence. In either case, the law is structuring human relationships, either by effecting a legal entitlement to be free from intimate deception or by effecting a legal entitlement to deceive an intimate without consequence.").

77 *E.g.*, *Alvarez*, 567 U.S. at 728 (plurality opinion) ("The American people do not need the assistance of a government prosecution to express their high regard for the special place that military heroes hold in our tradition. Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication.").

78 G.S. Hans, *Changing Counterspeech*, 69 Clev. St. L. Rev. 749, 753 (2021) ("[T]he contemporary preference for counterspeech is based less on a search for truth and more on the structural, political, and practical problems that government regulation of speech entails."); *id.* at 769 ("What seems to be underlying the appeal of counterspeech is not the idea that it helps us find the truth, but rather that it provides an alternative to government regulation. Even if that alternative is speculative or illusory, courts seem eager to point to counterspeech as a better method of combating speech than regulation.").

79 *See* Thomas Gibbons, *Providing a Platform for Speech: Possible Duties and Responsibilities*, *in* Positive Free Speech: Rationales, Methods and Implications 11 (Andrew T. Kenyon & Andrew Scott eds., 2021) (noting that a negative rights approach "depends on assumptions that equality exists in speech without government action, that rational debate will take place and allow truth to emerge and be identified, and that government intervention to protect speech would do more harm than non-intervention. All those assumptions have limited support.").

80 *See* Jack Balkin, *To Reform Social Media, Reform Informational Capitalism*, *in* Social Media, Freedom of Speech and the Future of Our Democracy 234 (Lee Bollinger & Geoffrey R. Stone eds., 2022) ("People who defend the freedom of speech often invoke an abstract notion of 'counter-speech' by fellow citizens that will somehow secure the promotion of knowledge or the protection of democracy. But that is not how the public sphere actually works. The counter-speech may not occur; . . . it may not occur quickly enough (for example to deal with lies and conspiracy theories). There may not be enough counter-speech, it may not be efficacious, and in some cases, it may be irrelevant, because the damage to privacy or self-worth may already have been done.").

81 *See* Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 Brook. L. Rev. 5, 50-51 (1989) ("In a hearer-centered system, a weaker skepticism about the government's ability to make the empirical assessments needed to decide whether a given communication is choice enhancing or choice impeding has led to greater deference to government attempts to censor allegedly harmful commercial speech."); Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. Colo. L. Rev. 441, 441-56 (2019) (discussing these asymmetries and how law sometimes attends to them).

82 *See* Frederick Schauer, *Constitutions of Hope and Fear*, 124 Yale L. J. 248, 528, 556 (2014) (reviewing Robert C. Post, Citizens Divided: Campaign Finance Reform and the Constitution (2014)) ("[T]he American First Amendment tradition is a tradition of risk aversion, and like all forms of risk aversion it chooses to minimize the risks of a certain kind even at the expense of increasing the number of risks of another kind.").

83 *Id.* at 558.

About the Author

Helen Norton is a university distinguished professor and Rothgerber Chair in Constitutional Law at the University of Colorado School of Law. Her scholarly and teaching interests include constitutional law and civil rights law. Before entering academia, Norton served as deputy assistant attorney general for civil rights at the U.S. Department of Justice and as director of legal and public policy at the National Partnership for Women & Families, and she currently serves as special counsel on constitutional and civil rights for Colorado's attorney general. She has been honored with the Excellence in Teaching Award on multiple occasions and appointed as a University of Colorado presidential teaching scholar. Her work has been published by Cambridge University Press, Duke Law Journal, Northwestern University Law Review, Stanford Law Review Online, and the Supreme Court Review, among others.

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