CONSTITUTIONAL GOOD FAITH

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In this essay, I argue that a constitutional scheme grounded in the Rule of Law cannot rely primarily on a self-executing, mechanistic vision of Madison's ambitious branches checking one another. Rather, "We the People" depend on self-regulation—in the form of constitutional good faith—by the vast majority of our constitutional actors. I then offer a meditation on the nature of good faith required for healthy American constitutionalism.

INTRODUCTION 41
I. GOOD FAITH IN THE CONSTITUTIONAL STRUCTURE 42
II. SOME ATTRIBUTES OF CONSTITUTIONAL GOOD FAITH 45
CONCLUSION 49

INTRODUCTION

The Rule of Law is a bundle of value concepts, but one of them is long-term stewardship of those values by constitutional officers. The heat of partisanship needs to be tempered by institutional considerations. Some view the separation of powers as a simple machine that pits unfettered ambition versus ambition. But every machine needs oil or else its gears eventually seize up and ruin the engine. Constitutional good faith[1] is an essential protectant.

Structural threats to the Rule of Law posed by the presidency transcend and predate Donald J. Trump's arrival on the American political scene. The Constitution erects structural constraints (e.g., separation of powers and judicial review) and procedural enforcement mechanisms (e.g., impeachment) to constrain the presidency. But the first line of defense in a

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* Copyright © 2018 by Andrew McCanse Wright, Associate Professor, Savannah Law School. While this Article is informed by my experiences at the White House, in Congress, and in private practice, I rely solely on factual information contained in the public domain. I would like to thank the Brennan Center for Justice at New York University and the *New York University Law Review* for the opportunity to contribute to this important dialogue on the Rule of Law. I am grateful for the outstanding research and editing support by my research assistants Katelyn Ashton and Erica Drew.

1 The title of this article is a reference to David E. Pozen's important article *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016). Among his broader points, Pozen argues that the lens of bad faith sheds light on a period of American politics at present "characterized not only by high levels of partisan rancor, congressional gridlock, and presidential adventurism but also by profound constitutional distrust across the institutions and groups that comprise the polity." *Id.* at 954. In this essay, rather than focus on the role of accusations of bad faith, I try to discern some attributes of good faith by constitutional officers.

system of self-government is the President's regulation of himself. That requires submission to the Take Care Clause and Oath of Office obligations. Personal character is an ingredient, but presidential self-regulation is also a function of the broader institutional and cultural environment.

Therefore, we need sturdy norms, workable laws, and institutional incentives that shape internal executive branch management in order to safeguard the Rule of Law. While much of a Rule of Law movement must focus on external and interbranch constraints on the Executive, it also must devote significant attention to that very sticky intrabranch problem set. Constitutional good faith is elemental to the Rule of Law and a lodestar to its movement. The topic of good faith in the constitutional scheme requires far more contemplation than possible here, but this short essay offers some catalytic provocations.

I
GOOD FAITH IN THE CONSTITUTIONAL STRUCTURE

The U.S. Constitution and the federal scheme it establishes enjoy remarkable durability. There are many contributions to its enduring success as our national charter, including democratic legitimacy, divided powers, protection and expansion of rights, preservation of judicial independence and review, and some measure of luck. Americans have also encountered many wise leaders and more than a few scoundrels as constitutional officeholders. I would posit that the constitutional good faith of countless national leaders as they have exercised their duties has tempered tyranny and impunity on a magnitude commensurate with external checks and balances fueled by others' hostile partisan or institutional ambitions. A constitutional actor's orientation to her own power is nearly as important as those structural safeguards the Framers designed to thwart abuse.[2]

Divided power is one of the Framers' central innovations. With debts to Montesquieu,[3] the Constitution divides power horizontally (separation of powers) and vertically (federalism). In the federal government, each

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[2] Daryl Levinson engages in an interesting discussion on the nature of constitutional commitments. *See* Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 658 (2011) (describing the "positive puzzle of constitutionalism" as "the willingness and ability of powerful political actors to make sustainable commitments to abide by and uphold constitutional rules even when these rules stand in the way of their immediate interests").

[3] *See* THE FEDERALIST NO. 47, at 301–03 (James Madison) (Clinton Rossiter ed., 1961) (citing reliance on Charles de Montesquieu in crafting separation of powers); *see also* MONTESQUIEU, THE SPIRIT OF THE LAWS 157 (Anne M. Cohler et al. eds. & trans., 1989) (1748) ("Nor is there liberty if the power of judging is not separate from legislative power and from executive power.").

department was assigned a core function (legislative, executive, judicial), but then those powers were limited and blended by specific provisions.

Madison set out part of his grand defense of separation of powers in Federalist No. 51, where he addresses how to maintain in practice the partition of powers as designated on parchment. First, he notes that division of power preserves liberty.[4] Madison then identifies elements of the design that will preserve the constitutional scheme, subject to some well-delineated exceptions: ensuring functional independence in personnel decisions and benefits of office and providing the constitutional officeholders the means and motive to defend the branch's structural integrity.[5] Here, Madison describes the alignment of personal and institutional incentives:

> But the great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . . [Y]ou must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.[6]

Rather than forced to rely solely on the good faith of a monarch, Americans can rely on the restraint of sovereign power divided among competing actors. In Federalist No. 10, Madison observes: "Enlightened statesmen will not always be at the helm."[7]

Some elements of modern government would be unrecognizable to the Founders,[8] but the distinct institutional identities took root and have largely

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4 THE FEDERALIST NO. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (describing "separate and distinct exercise of the different powers of government" as "essential to the preservation of liberty"); *see also* Mistretta v. United States, 488 U.S. 361, 380 (1989) (describing the "central judgment of the Framers of the Constitution" as the observation that "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty").

5 THE FEDERALIST NO. 51, *supra* note 4, at 321–23 (James Madison). For more on Madison's Framing activities and post-convention revisionism, see MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2015) (exploring the process behind Madison's creation and revision of his notes on the Constitutional Convention in part to understand why reasoning made famous in the Federalist Papers did not more prominently feature at the Convention itself).

6 THE FEDERALIST NO. 51, *supra* note 4, at 321–22 (James Madison).

7 THE FEDERALIST NO. 10, at 80 (James Madison) (Clinton Rossiter ed., 1961).

8 The rise of partisan political parties, scorned in the Federalist Papers as unholy factions, took on major significance early in the republic. *See* THE FEDERALIST NO. 51, *supra* note 4, at 323–25 (James Madison) (describing the dangers of factionalism). Similarly, a standing army would have been seen as a grave threat to representative government. And, of course, the sheer size and complexity of the country and its government would astonish the founding generation.

held their character in the intervening centuries. The Supreme Court has noted that "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[9] Human actors are shaped by institutional incentives of self-defense, stewardship, policy, and power.

The Constitution, however, also contemplates the good faith of its officers. It twice imposes express obligations of faithfulness on the President. The President must "take [c]are that the [l]aws be faithfully executed"[10] and must swear or affirm to "faithfully execute the Office of President of the United States" and "to the best of [his or her] [a]bility, preserve, protect and defend" the Constitution.[11] Therefore, the President has an explicit obligation of good faith and fair dealing with respect to the duties of the office and the execution of the laws. Similarly, legislators and judicial officers are bound by oath or affirmation to support the Constitution.[12] I would argue more broadly that all offices specified in, or contemplated by, the Constitution include an implied duty of good faith with respect to our foundational charter.[13]

The Madisonian model—i.e., separated powers defended in part by departmental ambitions in tension—is susceptible to damaging reductionism.[14] Stephen Gardbaum argues that creating a political system

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9 INS v. Chadha, 462 U.S. 919, 951 (1983).

10 U.S. CONST. art. II, § 3.

11 U.S. CONST. art. II, § 1, cl. 8.

12 *See* U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . .").

13 *See* Stephen Gardbaum, *Comparing Constitutional Bad Faith*, 129 HARV. L. REV. F. 158 (2016). Gardbaum questions a central premise of Pozen's piece with the provocative question: "Can one reason from the few specific norms of [good faith]—the Oath, Take Care, and Full Faith and Credit Clauses—to the existence of a general one?" *Id.* at 158. I would argue that the obligation of constitutional good faith is as emphatically the province of the constitutional officer as the court's province to say what the law is. The obligation of constitutional good faith does not reason *from* a few specific norms, although they are reflections of it, but rather from the purpose of the enterprise and the functionality required to preserve it. Gardbaum grounds his argument in functional contrasts between constitutional law and international law. Ironically, he argues good faith is best suited to regulate behavior among equals, whereas constitutional law "significantly (though, of course, not exclusively) regulates vertical relationships, between the state and its citizens or a federal government and constituent units." *Id.* at 159. However, he recognizes that good faith obligations may be more appropriate "among the 'coequal' branches of a national government." *Id.* He also concedes that a "liberal democracy is widely thought to require that governments treat their citizens with equal dignity and respect, which arguably gives rise to a particular duty of good faith or its near equivalent in the constitutional-rights jurisprudence of such regimes . . . ." *Id.* at 160. I agree with both final points.

14 Colleen Sheehan argues that Madison believed the censorious power of public opinion, not the separation of powers, is the primary check against tyranny. *See* Colleen A. Sheehan, *Public Opinion and the Formation of Civic Character in Madison's Republican Theory*, 67 REV. OF POL. 37 (2005); *see also* Colleen A. Sheehan, *Madison and the French Enlightenment: The*

"that looks more like Adam Smith's 'invisible hand'" is more important than David Pozen's focus on faithfulness.[15] To Gardbaum, the public political good is achieved through the aggregate effects of the pursuit of self-interest.[16] However, rational self-interest privileges short-term interest at the expense of longer term institutional or enterprise goals. It generates external costs that have a corrosive effect on the constitutional system over time.

Constitutional actors fail to fully comprehend their obligation if they relentlessly pursue ambition in reliance on the constitutional structure and other actors to serve as the external—and only—checks on self-interested assertion of power. Like our broader legal system, the Constitution may be designed to endure the Holmesian "Bad Man,"[17] but it only flourishes when the constitutional actor engages in self-restraint. Our system is not designed in naïve reliance on the "general benevolence of rulers—hereditary or elected."[18] Instead, the Founders designed safeguards in light of human frailties. Nevertheless, over the long term, the Rule of Law still relies on constitutional good faith.

Returning to the engine metaphor, combustion engines need explosive force to generate power, but they need lubricant to keep the engine parts from grinding down to ruin. Mistaking Madisonian "precautions" for affirmative mandates privileges short-term self-interest over good faith.[19] In so doing, the lubricant drains out of the constitutional engine.

II
SOME ATTRIBUTES OF CONSTITUTIONAL GOOD FAITH

So, what does good faith mean in this context? As Pozen sees it, good faith is "[t]ypically associated with honesty, loyalty, and fair dealing" and "is said to supply the fundamental principle of every legal system."[20] Good faith represents a bundle of concepts, but it is incapable of precise definition. I will start this definitional process in the negative, followed by a few attributes of constitutional good faith for consideration.

Authority of Public Opinion, 59 WM. & MARY Q. 925 (2002) (detailing Madison's critiques of Montesquieu's taxonomy of governments as dismissive of the central role of public opinion).

15 Gardbaum, *supra* note 13, at 162.

16 *Id.* For an interesting analysis of the misfits and congruencies of Adam Smith's invisible hand to norms of public-regarding actions and the separation of powers, see Adrian Vermeule, *The Invisible Hand in Legal and Political Theory*, 96 VA. L. REV. 1417 (2010).

17 *See generally* Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459–62 (1897) (emphasizing the role of legal systems in discouraging bad actors against bad acts); *see also* David Luban, *The Bad Man and the Good Lawyer: A Centennial Essay on Holmes's* The Path of the Law, 72 N.Y.U. L. REV. 1547 (1997) (dissecting the Bad Man thesis).

18 Gardbaum, *supra* note 13, at 162.

19 THE FEDERALIST NO. 51, *supra* note 4, at 322 (James Madison).

20 Pozen, *supra* note 1, at 886.

Things Good Faith is Not. For starters, bad faith is the antithesis of good faith, and courts often define good faith in terms of exclusion.[21] As I use the term, good faith is by no means an obligation to compromise on principles, although categorical refusal to compromise on ad hominem grounds would be an act of bad faith. It is not an injunction to like or admire political adversaries, but rather to respect an adversary's role, that role's democratic legitimacy, and the people's stakes in a workable relationship.

Good Faith as Honesty. At the core of the concept of good faith is honesty. Or, framed in the negative, fraudulent behavior in a commercial transaction is a classic act of bad faith.[22] In government, honesty by constitutional officers is critical to democratic legitimacy, program utility, voter information, and public safety. Political figures certainly engage in puffery and spin, but voters have a long tradition of punishing officeholders for rank dishonesty and broken promises.

Good Faith as Fair Dealing. The Universal Commercial Code imposes an implied covenant of good faith and fair dealing on parties to contracts.[23] I mention this to note that the concept of fair dealing, when applied to the constitutional scheme, connotes a concern with the conduct of political fights, both as a matter of exercise of power and rhetoric. How we fight can be as important as why we fight.[24]

Good Faith as Shared Enterprise. However, the concept of good faith often transcends honesty or sharp dealing. It can mean that there is an obligation on the part of negotiating parties to have a shared enterprise succeed. In that sense, good faith would regulate pure rational self-interests in the demise of the enterprise. This sense of good faith is an essential

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[21] Under one definitional theory of "good faith" in contract law, the term operates to exclude certain classes of undesirable conduct rather than as a concept with distinct positive meaning. *See* Robert S. Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 818–20 (1982) (addressing the "excluder" conceptualization of good faith in contract law). The Restatement (Second) of Contracts adopted this view and catalogues various forms of bad faith to include "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance." RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. LAW INST. 1981). For a survey of the concept of good faith in contract law, see E. ALLEN FARNSWORTH, CONTRACTS 488–500 (4th ed. 2004).

[22] *See* Hutchinson v. Farm Family Cas. Ins. Co., 867 A.2d 1, 7 n.4 (Conn. 2005) ("[B]ad faith is defined as the opposite of good faith, generally implying a design to mislead or to deceive another . . . ." (quoting Buckman v. People Express, Inc., 530 A.2d 596, 599 (Conn. 1987))).

[23] U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 2017). The U.C.C. defines good faith as "honesty in fact and the observance of reasonable commercial standards of fair dealing." U.C.C. § 1-201(b)(20).

[24] *See* Andy Wright, *Just Wars on the Battlefield of Ideas*, JUST SECURITY (May 23, 2016), https://www.justsecurity.org/31225/wars-battlefield-ideas/ (analogizing political rhetoric to Just War theory with focus on the ethical choices one faces when making arguments in favor of a worthy cause).

ingredient of constitutional good faith.

The Eleventh Amendment abrogation case *Seminole Tribe of Florida v. Florida*[25] presents an example of good faith as a shared enterprise. Although abrogation was a central issue in the case, the dispute arose out of the tribe's allegation that Florida had failed to negotiate a gambling compact in good faith as required by the Indian Gaming Regulatory Act (IGRA).[26] It would not make sense to interpret the good faith obligation as one of honesty. A state might honestly tell a tribe it is not interested in the tribe establishing a gaming operation. But that was precisely the concern Congress sought to remedy by imposing a duty to negotiate in good faith and providing a private right of action to enforce a state's failure to do so.[27] The good faith injunction here is to seek success in agreeing to the enterprise notwithstanding self-interested reasons to thwart negotiations. The American constitutional scheme calls for an analogous sense of good faith.

Good Faith as Discretion Exercise. In contract law, where "a contract confers on one party a discretionary power affecting the rights of the other, a duty is imposed to exercise the discretion in good faith and in accordance with fair dealing."[28] In corporate law, the business judgement rule protects the halo of discretion around a board of directors, provided that they have acted in good faith.[29] In essence, a board director acts in good faith when guided by the subjective belief that she acted in the best interests of the corporation.[30] The courts that use a good faith standard also, at times, consider the objective reasonableness of the challenged conduct.[31]

Constitutional officers certainly need an analogous halo of discretion in order to perform their duties with the boldness and vigor required by matters of state. While transparency and accountability are critical values in our constitutional system, executive privilege, immunity doctrines, and the

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25 517 U.S. 44 (1996).

26 *Id.* at 48–55. The IGRA imposed the state's obligation to negotiate with tribes in "good faith" at 25 U.S.C. § 2710(d)(3)(A) (1994).

27 S. REP. NO. 100-446, at 13–15 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083–85; *see also* Joe Laxague, Note, *Indian Gaming and Tribal-State Negotiations: Who Should Decide the Issue of Bad Faith?*, 25 J. LEGIS. 77, 81 (1999) ("When it created the IGRA's federal cause of action, Congress expressed concern that states might use the Act's compacting process as a way to exclude tribes from gaming or as a tool for protecting state-licensed gaming from free market competition.").

28 JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 413 (6th ed. 2009) (quoting Perdue v. Crocker Nat'l Bank, 702 P.2d 503, 510 (Cal. 1985)).

29 *See* FRANKLIN A. GEVURTZ, CORPORATION LAW 282–84 (2000).

30 *See id.* at 283–84 ("While courts use a variety of terms to identify the pertinent inquiry—such as the presence or absence of good faith, honesty or fraud—the heart of the matter is whether or not the directors believed what they were doing was in the best interests of the corporation.").

31 *Id.* at 284.

Speech or Debate Clause all support the truth that decision-making processes can be chilled by aggressive disclosure and reviewability.

The relation between good faith and zones of discretion also reveals something about the nature of good faith itself. Acting in good faith is largely a process of discernment among imperatives that can be in tension with one another. An actor will have to assess long- and short-term interests, self-interest, conflicts-of-interests, zero-sum consequences, opportunity costs, unintended consequences, and relative gravity of consequences. These are determinations that call for space without undue fear of micromanagement by other actors in the constitutional scheme. Such determinations are also elusive of judicially manageable standards and threaten the due respect afforded to coordinate officials by the judiciary,[32] a recognition embedded in the political question doctrine.

Good Faith as Political Culture. Constitutional good faith exists at the intersection of culture and law. One of Pozen's great contributions is his observation that debate about constitutional bad faith is largely a function of political culture.[33] While he focuses on the significance of traded accusations of bad faith in American political dialogue, the underlying premise is that culture as it relates to law, rather than law alone, shapes the constitutional actor's orientation toward her obligations in the constitutional scheme. One of Alexis de Tocqueville's key insights into the early American polity was an appreciation for the interaction between laws, mores, and nature.[34] He appreciated the ways in which the Rule of Law is dependent on a political culture committed to it along with laws that appropriately internalize the strengths and weaknesses of the human condition. Ten years before Tocqueville's tour, in his Lyceum Address, a young Abraham Lincoln urged Americans to let "reverence for the laws" become "the *political religion* of the nation."[35] The title of that speech was "The Perpetuation of Our Political Institutions."[36] While Lincoln focused his attention on vigilantism, he highlights the Rule of Law as a central

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[32] *See* Richard H. Fallon, Jr., *The Supreme Court 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 72 (1997) (noting that courts may be loath to decide cases in reliance on legal standards that call on them to pass judgment on "the constitutional good faith of governmental officials").

[33] Pozen, *supra* note 1, at 940–55.

[34] *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 287 (J.P. Mayer ed., George Lawrence trans., 1988) (defining mores as "habits of the heart" and describing mores as "one of the great general causes responsible for the maintenance of a democratic republic in the United States").

[35] Abraham Lincoln, The Perpetuation of Our Political Institutions, Address to the Young Men's Lyceum of Springfield, Illinois (Jan. 27, 1838), *in* ABRAHAM LINCOLN, THE ANNOTATED LINCOLN 42 (Harold Holzer & Thomas A. Horrocks eds., 2016).

[36] *Id.* at 36.

cultural component of the American system.[37] As such, a Rule of Law movement must have a cultural strategy. Constitutional good faith is a civic virtue that must be cultivated and inculcated with intention. It needs to be a priority to teach, a priority for officials, and—especially in a system that largely relies on political rather than judicial enforcement of such duties—a priority as a matter of voter behavior.

CONCLUSION

Constitutional good faith is a critical ingredient of a healthy American political system and an essential element of the Rule of Law. This political brand of good faith requires more than just technical compliance with legal rules. It requires respect for constitutional values, appropriate response to cautionary signals by other constitutional actors, and pursuit of substantive partisan and policy goals tempered by mindfulness of long-term institutional health. Constitutional good faith is cultural as well as legal. A Rule of Law movement must be broad enough to account for the core maxim that self-government is largely about individuals governing themselves within the American constitutional scheme.

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37 *See id.* at 37–42.