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Constitutional Bad Faith

David Pozen
Columbia Law School, dpozen@law.columbia.edu

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The concepts of good faith and bad faith play a central role in many areas of private law and international law. Typically associated with honesty, loyalty, and fair dealing, good faith is said to supply the fundamental principle of every legal system, if not the foundation of all law. With limited exceptions, however, good faith and bad faith go unmentioned in constitutional cases brought by or against government institutions. This doctrinal deficit is especially striking given that the U.S. Constitution twice refers to faithfulness and that insinuations of bad faith pervade constitutional discourse.

This Article investigates these points and their implications for constitutional law, theory, and politics. Good faith norms, the Article explains, are unevenly enforced throughout constitutional doctrine. Yet in spite of, and partly because of, their uneasy status within the courts, these norms perform a variety of rhetorical and regulative functions outside the courts. Moreover, different conceptions of constitutional bad faith have come to be associated with different constitutional actors; sorting out these conceptions helps to illuminate the architecture of constitutional debate. The Article further explores how sacralization of the Constitution pushes interpreters not only to insist on their own fidelity but also to see competing views as treacherous or deceitful. The overarching obligation to keep faith with the canonical text, in other words, contributes to a culture rife with suspicion of interpretive bad faith.

INTRODUCTION

The principles of good faith and bad faith are "fundamental to more or less every legal system on a world scale"[1] but not, it might seem, to American constitutional law. Thousands of cases have applied these

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[1] Markus Kotzur, *Good Faith (Bona Fides)*, *in* 4 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 508, 508 (Rüdiger Wolfrum ed., 2012). Statements to this effect are legion in the international law literature. *See, e.g.*, Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20) ("One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith."); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 105 (1953) ("[G]ood faith [is] 'the foundation of all law and all conventions.' It should, therefore, be the fundamental principle of every legal system." (footnote omitted) (quoting and translating Megalidis v. Turkey, 8 Trib. Arb. Mixtes 386, 395 (Turk.-Greece 1928))).

principles in fields ranging from contracts to bankruptcy to nuclear disarmament. Outside the criminal procedure and qualified immunity contexts, however, the language of good faith and bad faith rarely surfaces in constitutional doctrine. Nor have these ideas received focused attention in the secondary literature.[2] Constitutional law, in these ways, has been an enclave of good faith and bad faith exceptionalism.

This is not because of any shortage of bad faith in constitutional circulation. To the contrary, even a cursory review of the popular, governmental, and academic commentary reveals that insinuations of others' bad faith suffuse constitutional debates — so much so that it can be hard to make sense of the debates without an appreciation of these insinuations and the work that they do. The absence of "bad faith talk" from large sections of the *United States Reports*, then, reflects a disconnect not only between constitutional doctrine and nonconstitutional doctrine but also between constitutional doctrine and constitutional culture.[3] Relative to their role in other areas of law, charges of bad faith are both less important (within the courts) and more important (outside the courts) in the constitutional domain.

This Article excavates these features of our constitutional practice and begins to explore their causes and consequences. In so doing, the Article aims to explain why courts have been reluctant to enforce norms against constitutional bad faith as such;[4] to provide a framework for understanding the different forms that constitutional bad faith may take and the functions that bad faith talk may serve; and to

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[2] The idea of constitutional faith, understood on a religious model as belief in the Constitution, has been the subject of major studies by leading scholars. *See, e.g.*, JACK M. BALKIN, CONSTITUTIONAL REDEMPTION (2011); SANFORD LEVINSON, CONSTITUTIONAL FAITH (2d ed. 2011); H. JEFFERSON POWELL, THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM (1993); Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1 (1984); *see also infra* section IV.A, pp. 940–47 (returning to this phenomenon). The idea of constitutional good faith or bad faith, understood on a private law or international law model as a set of equitable principles guiding the performance of constitutional duties and the interpretation of constitutional language, has not to my knowledge drawn any sustained scrutiny. *See infra* p. 908 (elaborating on this point). Professor H. Jefferson Powell has eloquently defended the virtue of good faith in constitutional adjudication, but he grounds his argument in an original account of "constitutional conscience" rather than any of the approaches to good faith that have been developed elsewhere in law or philosophy. *See generally* H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE (2008).

[3] "Constitutional culture," as used here, refers to the practices and beliefs of nonjudicial actors concerning the Constitution. *See* Robert C. Post, *The Supreme Court, 2002 Term — Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) (defining constitutional culture in similar terms).

[4] The standard approach in the legal literature is to treat good faith and bad faith as a closed binary, with no middle ground between the two. *See infra* note 10. Except when considering the ambiguous case of Sartrean bad faith, I will follow this approach and assume that any norm against constitutional bad faith is coextensive with a norm in favor of constitutional good faith.

illustrate how belief in the Constitution as America's "civil religion"[5] sustains suspicion of interpretive bad faith. A rich vein of doctrinal scholarship has explored several related topics, such as judicial review for legislative pretext.[6] Investigating constitutionalism through the lens of bad faith allows us to go further. It facilitates sharper comparisons with other bodies of law, and it illuminates the dynamic relationships between judicial doctrine and extrajudicial discourse and between constitutional veneration and contestation.

One notable point suggested by this inquiry is that the occlusion of bad faith claims in the courts may be bound up with their profusion in the culture. Another is that the phenomenon of *constitutional faith* has a paradoxical affinity with — and in fact propagates — the humbler yet bleaker idea of *constitutional bad faith*. Although I cannot hope to prove any causal story here, I hope to demonstrate the plausibility of these linkages and thereby to open up new research directions. The concept of bad faith, as I will try to show throughout, supplies a valuable if unsettling tool for navigating the intersection of constitutional law and politics.

In pursuit of these goals, the Article ranges widely over constitutional doctrine, constitutional discourse, and constitutional theory. Part I provides necessary context by sketching the role played by good faith and bad faith in private law and international law. Although the concept of bad faith can be slippery, its core meanings are fairly consistent throughout the law and center on dishonesty, disloyalty, and lack of fair dealing. This Part also introduces the philosopher Jean-Paul Sartre's famous notion of bad faith, which emphasizes not deception of others (or what lawyers call subjective bad faith) but rather deception of self.[7] The line between subjective bad faith and Sartrean bad faith, this Article submits, is likely to prove especially unstable in constitutional law — which makes the turn to Sartre more fruitful and less fanciful than it might seem.

Part II takes up the question of why the principle of bad faith has been marginalized in significant swaths of constitutional doctrine, from Commerce Clause legislation to interstate compacts to traffic stops. The principle has made greater inroads in "rights" cases. Judges apply it explicitly when reviewing certain allegations of individual officer misconduct and implicitly in various other areas, as when they enter-

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[5] *See* LEVINSON, *supra* note 2, at 9–53 (exploring the historical origins and present implications of this belief); *cf.* Robert N. Bellah, *Civil Religion in America*, 96 DÆDALUS 1 (1967) (offering a more general account of American civil religion that incorporates but does not revolve around the Constitution).

[6] Important works in this vein are cited throughout Part II, *infra* pp. 896–918.

[7] Objective bad faith, in contrast, arises more generally from the unfairness or unreasonableness of a legal subject's behavior. *See infra* notes 33–37 and accompanying text.

tain claims of impermissible discriminatory motive. But these inroads are discrete and contested; even on a charitable construction, they do not place the principle in anything like the position that it occupies throughout much of private law and international law. Recent efforts by President Obama's critics to formulate a duty of good faith under the Take Care Clause — which on its face demands "faithful[]" execution of the laws[8] — only underscore the persistence of constitutional exceptionalism when it comes to confronting bad faith. Possible explanations for bad faith's relatively low profile in structural case law, this Part posits, include the unique degree to which judicial discretion is feared and constrained in constitutional decisionmaking, and the unique degree to which constitutional theory embraces institutional opportunism and methodological pluralism.

Part III moves beyond adjudication to consider how bad faith manifests itself in other sites of constitutional practice. Drawing on common understandings of bad faith as well as a range of contemporary controversies, it offers a taxonomy of constitutional bad faith meant to capture both ideal types of the phenomenon and these types' contingent connections to specific actors. The notion of constitutional bad faith as divided loyalty to the canonical document, for instance, is now associated with "living constitutionalism" and the political left, whereas the notion of constitutional bad faith as agency-denying self-deception is more associated with originalism and the political right. This taxonomy enables us to see, among other things, that insinuations of bad faith are not extraordinary but pervasive in American constitutional discourse and that the language of constitutional outrage has a coherent normative structure. Even as bad faith talk has been sidelined in constitutional doctrine, it has taken center stage in constitutional culture.

Part IV considers broader ramifications of these points in light of the Constitution's place in American civil religion. Charges of constitutional bad faith, it contends, serve important psychological, political, and hermeneutic ends. They help to police the boundary between "on-the-wall" and "off-the-wall" arguments and thus to guide the process of constitutional construction. At the same time, by moralizing disagreement, these charges undermine the deliberation and trust needed to achieve constitutional compromise. The practical unamendability of the U.S. Constitution, furthermore, both reinforces and is reinforced by a culture of interpretive bad faith. The worry arises that there is no exit from this vicious circle.

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[8] U.S. CONST. art. II, § 3. The Presidential Oath Clause similarly demands "faithful[]" execution of the office of the presidency. *Id.* art. II, § 1, cl. 8.

I. BAD FAITH BASICS

Concern with bad faith is visible everywhere in the law. Across "radically disparate contexts,"[9] the presence of bad faith or the absence of good faith may be invoked as a basis for substantive liability or special remedies, such as punitive damages or an award of attorney's fees.[10] Good faith may also be used in a "gap-filling" role to disallow conduct that otherwise would not run afoul of controlling legal texts. The duty of good faith appears in more than fifty provisions of the Uniform Commercial Code[11] (U.C.C.) and is a fixture of modern contract litigation.[12] Fiduciaries of all sorts are held to a standard of "utmost good faith."[13] Good faith and bad faith likewise play a prominent part in corporate law,[14] insurance law,[15] labor

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[9] Lawrence Ponoroff & F. Stephen Knippenberg, *The Implied Good Faith Filing Requirement: Sentinel of an Evolving Bankruptcy Policy*, 85 NW. U. L. REV. 919, 970–71 (1991) ("[The term 'good faith'] is a workhorse in the legal vocabulary . . . . Good faith has been called upon in radically disparate contexts to establish the outer boundaries of acceptable behavior.").

[10] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 689 (1978) ("[T]he settled rule [is] that a losing litigant's bad faith may justify an allowance of fees to the prevailing party."); Thomas C. Cady & Georgia Lee Gates, *Post Claim Underwriting*, W. VA. L. REV., Summer 2000, at 809, 828 (explaining that a majority of states recognize an independent tort of bad faith processing of insurance claims); Linda Curtis, Note, *Damage Measurements for Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161, 161 & n.1 (1986) (explaining that a majority of states recognize, in some form, an independent tort of bad faith breach of contract). Throughout all areas of law, to be in bad faith necessarily implies that one is not in good faith. Whether an absence of good faith necessarily implies the presence of bad faith can be less clear, although courts and commentators frequently conflate these two, and the body of law most often cited as distinguishing "bad faith" from "not in good faith" — Delaware corporate law — now appears to have rejected the distinction. *See* Joseph K. Leahy, *A Decade After* Disney*: A Primer on Good and Bad Faith*, 83 U. CIN. L. REV. 859, 863 n.30, 898–901 (2015); *cf.* Elizabeth A. Nowicki, *A Director's Good Faith*, 55 BUFF. L. REV. 457, 528–29 (2007) (criticizing the conflation of these phrases in corporate law while acknowledging that judges and academics "have consistently defined [them] . . . to mean the same thing"). Bad faith and good faith tend to be treated as not just mutually exclusive but jointly exhaustive categories in legal analysis.

[11] Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2060 (2015). Unlike in international treaty law and in some civil law systems, the duty of good faith generally is not applied to the negotiating phase in American contract law in the absence of a preliminary agreement. *See id.* at 2057 n.36.

[12] *See id.* at 2065 ("The duty of good faith and fair dealing has been invoked in several thousand [contemporary American contract] cases, often successfully. And the duty has sometimes served as the basis for strikingly liberal impositions of liability.").

[13] *See* Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. MIAMI L. REV. 425, 458 (1987) ("[A]dmonitions concerning the duty of 'utmost good faith' dominat[e] judicial analyses of fiduciary responsibilities." (footnote omitted) (quoting Couri v. Couri, 447 N.E.2d 334, 337 (Ill. 1983))).

[14] *See generally* Leahy, *supra* note 10 (reviewing the role of good faith and bad faith in Delaware corporate law).

[15] *See generally* Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74 (1994) (reviewing the role of bad faith in insurance law).

law,[16] employment law,[17] bankruptcy law,[18] and other so-called private law fields, both at home and abroad. On the global plane, good faith is an express requirement of the United Nations Charter,[19] the Vienna Convention on the Law of Treaties,[20] and numerous other agreements, resolutions, and declarations, as well as an "omnipresence" in international arbitration[21] and a "general principle" of international law.[22] Tens of thousands of lawyers worldwide must deal with the concepts of good faith and bad faith on a regular basis.

If bad faith is easy to locate in the law, its definition is more difficult to pin down. The concept's ubiquity is matched by its elasticity. "[O]f all the principles of international law," it has been claimed, "the principle of good faith is perhaps the hardest to define."[23] Judges and scholars have largely abandoned the quest for "precise calibration" of good faith or bad faith,[24] as through the specification of necessary and sufficient conditions.[25] The phrase "bad faith" connotes blameworthy

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[16] *See, e.g.*, *Employer/Union Rights and Obligations*, NAT'L LAB. REL. BOARD, http://www.nlrb.gov/rights-we-protect/employerunion-rights-and-obligations [http://perma.cc/2FRF-3B23] ("There are hundreds, perhaps thousands, of NLRB cases dealing with the issue of the duty to bargain in good faith.").

[17] *See generally* Monique C. Lillard, *Fifty Jurisdictions in Search of a Standard: The Covenant of Good Faith and Fair Dealing in the Employment Context*, 57 MO. L. REV. 1233 (1992).

[18] *See, e.g.*, Ponoroff & Knippenberg, *supra* note 9 (reviewing the role of good faith in Chapter 11 filings).

[19] U.N. Charter art. 2, ¶ 2 ("All Members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.").

[20] Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); *id.* art. 31, ¶ 1 ("A treaty shall be interpreted in good faith . . . .").

[21] Bernardo M. Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT'L L. REV. 761, 761 (2012); *see also id.* ("It is difficult to find any international arbitration award not based on, or that does not at least mention, good faith.").

[22] *See, e.g.*, Certain Norwegian Loans (Fr. v. Nor.), Judgment, 1957 I.C.J. 9, 53 (July 6) (separate opinion by Lauterpacht, J.) ("Unquestionably, the obligation to act in accordance with good faith, being a general principle of law, is also part of international law."). *See generally* J.F. O'CONNOR, GOOD FAITH IN INTERNATIONAL LAW (1991) (reviewing the role of good faith, or bona fides, in international and comparative practice).

[23] Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 344 (2006). Comparable claims are frequently made in the private law literature. *See* Clayton P. Gillette, *Limitations on the Obligation of Good Faith*, 1981 DUKE L.J. 619, 619 ("Scholarship addressed to the good faith provisions of the Uniform Commercial Code primarily discusses the intractable difficulty of defining the scope of the obligation to perform and enforce one's contract in good faith." (footnote omitted)).

[24] *Bad Faith Definition*, DUHAIME.ORG: DUHAIME'S LAW DICTIONARY, http://www.duhaime.org/LegalDictionary/B/BadFaith.aspx [http://perma.cc/D9S7-8TJA] ("[D]efining '*bad faith*' has been an elusive pursuit: 'The concept of *bad faith* is likely not capable of precise calibration . . . .'" (quoting Re Alcan Wire & Cable & United Steelworkers (1992), 26 L.A.C. 4th 93, 102)).

[25] *See, e.g.*, Steven J. Burton, *More on Good Faith Performance of a Contract: A Reply to Professor Summers*, 69 IOWA L. REV. 497, 508 (1984) ("One cannot state the necessary and sufficient factual conditions for a finding of good faith or bad faith."); Robert S. Summers, *The General Duty of Good Faith — Its Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 829 (1982)

behavior; and on many accounts, the obligation to avoid bad faith serves to secure parties' reasonable expectations against future contingency or connivance, which in turn secures values such as equity, efficiency, and trust.[26] But there is no distinct factual or moral element that is common across all varieties of legal bad faith. Rather, the varieties share a "family resemblance," or a "network of overlapping similarities," with each other.[27]

Classic formulations of legal bad faith look to the actor's state of mind and, above all, to her honesty and sincerity. "Subjective" bad faith may involve the use of deception to conceal or obscure a material fact, a malicious purpose, or an improper motive or belief, including the belief that one's own conduct is unlawful. Examples range from a seller in an arms-length transaction who misrepresents the value of her goods, to a corporate director who furtively seeks to sabotage the company, to a knowing trespasser who feigns ignorance as to the property line. Dictionary definitions of bad faith emphasize dishonesty and insincerity. The first entry for the term in *Black's Law Dictionary* equates bad faith with "[d]ishonesty of belief or purpose."[28]

In contexts where some sort of fiduciary ethic is seen to apply, bad faith is associated with disloyalty as well as dishonesty. Numerous Delaware court decisions, for instance, integrate good faith obligations into the duty of loyalty that directors owe to their corporation.[29] Contract law's duty of good faith and fiduciary law's duty of loyalty have

("Many commentators suggest that they are willing to accept that good faith cannot, as such, be usefully defined in terms of a single, general, positive meaning . . . .").

[26] *See, e.g.*, Burton, *supra* note 25, at 499 ("[T]he good faith performance doctrine is used to effectuate the intentions of the parties, or to protect their reasonable expectations, through interpretation and implication."); Kotzur, *supra* note 1, at 515 ("*[B]ona fides* is about legitimate expectations of the parties."); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195, 263 (1968) ("In most cases the party acting in bad faith frustrates the justified expectations of another.").

[27] Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 378 n.124 (1988) (citing LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §§ 66–67, at 27–28 (G.E.M. Anscombe trans., 3d ed. 2001)).

[28] *Bad Faith*, BLACK'S LAW DICTIONARY (9th ed. 2009); *see also, e.g.*, RANDOM HOUSE UNABRIDGED DICTIONARY 154 (2d ed. 1993) (defining bad faith as "lack of honesty and trust"); *Bad Faith,* n., OXFORD ENG. DICTIONARY, http://www.oed.com/view/Entry/382603 [http://perma.cc/H88P-Q9ND] (defining bad faith as "[i]ntent to deceive; insincerity, dishonesty; faithlessness, disloyalty; treachery").

[29] *See generally* Leo E. Strine, Jr., et al., *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 644 (2010) ("[G]ood faith is the defining term that Delaware courts . . . use to articulate the state of mind required of a loyal fiduciary exercising corporate powers."). While some maintain that good faith is best understood as an independent fiduciary duty, the prevailing view is that fiduciary duties generally, and the duties of loyalty and care specifically, incorporate good faith components. *Id.* Corporate fiduciaries may also be bound by good faith obligations arising from other sources, such as contractual relationships.

converged to a significant extent,[30] notwithstanding the "central conceptual difference[] that a contracting party may seek to advance his own interests in good faith while a fiduciary may not."[31] Disloyalty in a fiduciary relationship, moreover, tends to coincide with dishonesty; the director who is working against her corporation's best interests is unlikely to admit as much. In ordinary usage, too, bad faith is frequently linked with disloyalty in the form of double-mindedness or double-heartedness.[32]

American contract law distinguishes subjective bad faith from "objective" bad faith, which focuses not on the actor's state of mind but instead on the fairness or reasonableness of her conduct, tested against the norms of a legally relevant community. The U.C.C.'s general definition of good faith thus demands both "honesty in fact *and* the observance of reasonable commercial standards of fair dealing."[33] Even in the absence of deceit, a party to a contract could violate the duty of good faith if she engages in "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, [or] interference with or failure to cooperate in the other party's performance."[34] Applying the objective standard, judges and juries may find it necessary to inquire into industry customs, the purposes and values animating an agreement, or the power dynamics between the parties.

Some commentators advocate that good faith and bad faith be limited to their core, subjective formulations, lest the principles become overly broad or amorphous.[35] Most jurisdictions, however, have rejected this limitation;[36] and as a practical matter the two standards can collapse into one another when direct evidence of the defendant's state of mind is lacking.[37] Regardless of whether a jurisdiction recog-

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[30] *See* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1653–58 (1989).

[31] *Id.* at 1658; *cf.* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 438 (1993) (arguing that good faith in contract and fiduciary duties share a common gap-filling function and that the two merge into each other "with a blur and not a line").

[32] *See, e.g.*, *Bad Faith*, WIKIPEDIA, http://en.wikipedia.org/wiki/Bad_faith [http://perma.cc/8H42-XW9Q]. The Wikipedia entry on bad faith provides a broad roadmap to the term's many extralegal usages.

[33] U.C.C. § 1-201(b)(20) (AM. LAW INST. & UNIF. LAW COMM'N 2011) (emphasis added).

[34] RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. LAW INST. 1981).

[35] *See* Leahy, *supra* note 10, at 864 n.36 (stating that the "key dispute" in the scholarly literature "is whether good faith is partly objective or entirely subjective in nature" and citing competing analyses).

[36] *See* MacMahon, *supra* note 11, at 2063 & n.73 (noting that most states have adopted the U.C.C.'s broad definition of good faith).

[37] *See, e.g.*, Lawrence Ponoroff, *The Limits of Good Faith Analyses: Unraveling and Redefining Bad Faith in Involuntary Bankruptcy Proceedings*, 71 NEB. L. REV. 209, 222 n.44 (1992) ("Although many decisions speak in terms of a sharp distinction between the objective and subjective approaches for measuring bad faith [in bankruptcy], in reality the dichotomy [is] far less

nizes objective bad faith, it bears emphasis, an assertion that an actor has been "unfaithful" to her legal responsibilities need not imply that she has acted in bad faith. She may have honestly and reasonably tried to carry out her responsibilities, yet failed to do so because of a misconception or an unanticipated development, among other factors. Legal bad faith always requires something more than mere lack of legal compliance.

Spanning the subjective–objective divide, many examples of legal bad faith seem to involve opportunism. Opportunism occurs when there is "self-interest seeking with guile"[38] or, more generally, behavior "that would be contracted away if ex ante transaction costs were lower" and that "[n]ot coincidentally . . . often violates moral norms."[39] The function of legal prohibitions on bad faith, according to some law and economics scholars, is precisely (or at least principally) to suppress such behavior ex post.[40] The open-endedness of the bad faith concept is crucial on this view, as opportunism "can take an infinity of forms" that cannot all be cost-effectively anticipated.[41]

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pronounced since, as a practical matter, ordinarily the only way to prove bad motive is by inferences drawn from objective conduct." (citation omitted)); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223, 1247 (1999) (explaining that the subjective/objective debate in contract law has proven "more theoretical smoke than practical fire"). To illustrate how objectively unreasonable conduct can support a determination of subjective bad faith, my colleague Kent Greenawalt suggests the example of a husband who commits adultery the day after his wedding: it is all but inconceivable, on these facts, that the husband entered into the marriage contract sincerely intending to fulfill his marital responsibilities.

[38] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 47 (1985).

[39] Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* 14 (Harvard Pub. Law Working Paper No. 15-13, 2015), http://ssrn.com/abstract=2617413 [http://perma.cc/MUU2-M352]; *see also id.* at 15 (stating that opportunism "often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system").

[40] *See, e.g.*, *id. passim* (analyzing all of equity in these terms, with frequent reference to principles of good faith and bad faith); Hans-Bernd Schäfer & Hüseyin Can Aksoy, Good Faith 3–5 (Sept. 10, 2014) (unpublished manuscript), http://ssrn.com/abstract=2495312 [http://perma.cc/W2U6-76SL] (surveying the law and economics literature that "relates the good faith principle to the prevention of opportunism," *id.* at 3); *cf.* Mkt. St. Assocs. v. Frey, 941 F.2d 588, 595 (7th Cir. 1991) (Posner, J.) ("The office of the doctrine of good faith is to forbid the kinds of opportunistic behavior that a mutually dependent, cooperative relationship might enable in the absence of rule."); Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 616 (2011) (arguing that in many areas of law good faith doctrines supply a "mental-state inquiry designed to identify evasive actors"); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 373 (1980) (arguing that "[b]ad faith performance occurs precisely when discretion is used to recapture opportunities forgone upon contracting"). Against these potential ex post benefits, a more critical line of scholarship emphasizes the capacity of expansive bad faith prohibitions to generate destructive ex ante uncertainty. *See, e.g.*, Gillette, *supra* note 23, at 620.

[41] Ejan Mackaay, The Economics of Civil Law Contract and of Good Faith 12 (2009) (unpublished manuscript), http://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/3016/Mackaay_Trebilcock-Symposium%20_3_.pdf [http://perma.cc/926P-QRSH]. Professor Mackaay asserts that legal bad faith simply *is* opportunism and can be specified as "an asymmetry of information or coercive power between the parties exploited by one to its advantage and to the det-

Outside the law, the most famous definition of bad faith belongs to Sartre. Sartre's basic idea is straightforward to state, although his elaboration of it quickly becomes abstruse: whereas for lawyers bad faith often involves a lie to others, for Sartre "bad faith is a lie to oneself."[42] More specifically, Sartrean bad faith revolves around lies that deny either the full measure of one's freedom ("transcendence") or the concrete details of one's circumstances and constraints ("facticity").[43] Such self-deception is possible, according to Sartre, because there are multiple modes of consciousness and people may, through reflection or avoidance of reflection, distort or suppress information and beliefs of which they are prereflectively aware.[44] Sartrean bad faith is "subjective" in that it turns on one's state of mind. Yet unlike the lawyer's subjective bad faith, it posits a kind of conflict within the mind. A person in subjective bad faith necessarily understands that she is being insincere, or untruthful in her dealings. A person in Sartrean bad faith may not similarly appreciate that she is being inauthentic, or untruthful toward herself.[45] The waiter in the café who identifies completely with his role and ceases to see that he is playing at being a waiter, to

riment of the other(s) to such a degree that it might provoke significant self-protective measures amongst the latter for the future." *Id.* at 14.

[42] JEAN-PAUL SARTRE, BEING AND NOTHINGNESS 87 (Hazel E. Barnes trans., Wash. Square Press 1992) (1943); *see also id.* at 89 ("To be sure, the one who practices bad faith is hiding a displeasing truth or presenting as truth a pleasing untruth. Bad faith then has in appearance the structure of falsehood. Only what changes everything is the fact that in bad faith it is from myself that I am hiding the truth.").

[43] *See id.* at 98 ("What unity do we find in these various aspects of bad faith? . . . The basic concept which is thus engendered utilizes the double property of the human being, who is at once a *facticity* and a *transcendence*."); *see also* Thomas Flynn, *Jean-Paul Sartre*, STAN. ENCYCLOPEDIA PHIL. (Dec. 5, 2011), http://plato.stanford.edu/entries/sartre [http://perma.cc/2F4L-GZD2] ("[Sartrean] bad faith or inauthenticity can assume two principal forms: one that denies the freedom or transcendence component ('I can't do anything about it') and the other that ignores the factical dimension of every situation ('I can do anything by just wishing it').").

[44] *See* Leslie Stevenson, Discussion, *Sartre on Bad Faith*, 58 PHILOSOPHY 253, 258 (1983) ("[Sartrean bad faith] consist[s] in reflectively denying what one is pre-reflectively aware is true . . . ."); *see also* Phyllis Sutton Morris, *Sartre on the Self-Deceiver's Translucent Consciousness*, 23 J. BRIT. SOC'Y PHENOMENOLOGY 103, 113 (1992) (reviewing the "complex array of strategies" that enable Sartrean self-deception, "including distraction, misdescription, obscuring, and evasion"). A Freudian, in contrast, might appeal to the idea of the unconscious to explain self-deception, while a Marxist might invoke false consciousness. *Cf.* SARTRE, *supra* note 42, at 90–96 (challenging Freud's theory of repression). On Sartre's account, the "translucency" of consciousness makes it impossible to be wholly unaware of, or passive toward, one's bad faith. *Id.* at 96. The finer points of Sartrean phenomenology are not important for this Article's purposes; all that matters are his basic claims about the possibility and prevalence of self-deception as a type of bad faith.

[45] *Cf.* LIONEL TRILLING, SINCERITY AND AUTHENTICITY 10–12 (1972) (distinguishing similarly between sincerity and authenticity and suggesting that the latter has "a more strenuous moral experience" behind it, *id.* at 11).

take Sartre's best-known example, is in the latter sort of bad faith.[46] So is the patriot who manipulates standards of evidence or assessment to sustain a conviction that her own government is uniquely virtuous.[47]

Sartrean bad faith is marked by a flight from individual agency and responsibility, by deterministic and necessitarian logic ("that's just how things are or how they must be"), and by selective justification. A few American legal scholars have identified these features in the contemporary practice of judging.[48] But it is in the constitutional context in particular, Part IV will suggest, where Sartre's model of bad faith has legal resonance.

II. JUDICIAL TOLERATION OF CONSTITUTIONAL BAD FAITH

Against the foregoing backdrop, what do constitutional adjudicators and scholars have to say about the bad faith in their midst? Surprisingly little, on the available evidence. It is almost inconceivable that such a wide-ranging, textually grounded body of law would draw no distinction between good faith and bad faith behaviors. As already indicated, good faith is regarded by many international lawyers as a fundamental norm, if not *the* fundamental norm, that underwrites the possibility of legal order.[49] And both the aspirational statements of constitutional actors[50] and textual sources such as the Oath Clauses[51] suggest that good faith ought to be vital to American constitutionalism on an ongoing, workaday basis as well as at a foundational level. In

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[46] SARTRE, *supra* note 42, at 101–03; *cf.* TRILLING, *supra* note 45, at 102 (referring to "that notorious waiter of [Sartre's] who sees himself not as a human being but as a waiter"). Sartre's other best-known example is a woman on a date who encourages her partner's amorous advances without acknowledging to herself the choices she is making. SARTRE, *supra* note 42, at 96–98.

[47] *See* Simon Keller, *Patriotism as Bad Faith*, 115 ETHICS 563, 579–82 (2005); *see also* JOSEPH S. CATALANO, GOOD FAITH AND OTHER ESSAYS 140 (1996) ("Bad faith . . . does not really change in the face of new evidence, because it is not really about evidence. . . . What makes it 'bad' and self-deceptive is that it sees itself as of the same type as a belief that arises from evidence."); SARTRE, *supra* note 42, at 113 ("Bad faith does not hold the norms and criteria of truth as they are accepted by the critical thought of good faith.").

[48] Most notably, Professor Duncan Kennedy in DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 199–212 (1997) [hereinafter KENNEDY, CRITIQUE OF ADJUDICATION], and Duncan Kennedy, *The Hermeneutic of Suspicion in Contemporary American Legal Thought*, 25 LAW & CRITIQUE 91, 133–34 (2014) [hereinafter Kennedy, *Hermeneutic of Suspicion*]. *See infra* section III.C, pp. 934–39 (discussing Kennedy's use of Sartre).

[49] *See supra* notes 1, 19–22 and accompanying text; *see also* Kotzur, *supra* note 1, at 514 (characterizing good faith as a "fundamental and universal structure of any legal order regardless of its social, political, economic[], development-related, or cultural particularities").

[50] *See infra* Part III, pp. 918–39 (exploring how charges of bad faith are mobilized in constitutional discourse).

[51] U.S. CONST. art. II, § 1, cl. 8 (setting forth the presidential oath); *id.* art. VI, cl. 3 (providing that all federal and state legislators and executive and judicial officers "shall be bound by Oath or Affirmation, to support this Constitution").

some way, shape, or form, anti–bad faith principles must be "in" constitutional law.

Yet it takes some digging to find them. The language of bad faith, as this Part will demonstrate, plays only a modest role in constitutional adjudication involving government institutions. The underlying concept plays a substantially broader role, but still an uneasy and uneven one. If the federal courts fail to enforce certain constitutional norms to their "full conceptual limits" in discrete patches of doctrine,[52] the general norm against bad faith in the exercise of constitutional rights and duties appears to go "underenforced" throughout the greater part of the doctrine. Put more starkly, the norm against constitutional bad faith could be considered the ultimate underenforced norm in the American legal system. Why have judges tolerated so much constitutional bad faith?

A. Doctrinal Responses

Before turning to explanations, it is necessary to give a clearer sense of the courts' approach to constitutional bad faith. The most productive way to do this, I believe, is to sort through the various lines of case law that arguably enforce anti–bad faith principles, whether explicitly or implicitly, as well as those that have forgone such enforcement. This section offers a doctrinal roadmap (and reconceptualization) toward this end.[53] Its main objectives are to identify and call attention to a negative space in judicially elaborated constitutional law — the extent to which the idea of bad faith has been obscured in this legal domain as compared to its treatment in other legal domains.

This exercise is inherently imprecise. Given ongoing debate over how best to conceptualize both bad faith itself and nearly every line of doctrine, it would be impossible to render a definitive assessment of the state of bad faith in constitutional law. Nevertheless, it seems fair to conclude that: first, express judicial determinations of constitutional bad faith are relatively rare; second, in numerous areas the courts have all but abandoned the effort to regulate constitutional bad faith, especially though not exclusively on structural questions concerning the political branches' enumerated powers or the relationships among different levels or units of government; and third, concerns about infringements of constitutional rights tend to be managed through tests that functionally proscribe subjective bad faith or objective bad faith,

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[52] As famously argued in Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221, 1235 (1978). I revisit Professor Sager's underenforcement thesis in section II.B below.

[53] It does not offer a comprehensive survey of constitutional doctrine, if such a thing is possible. The focus is largely on U.S. Supreme Court cases. While the door is thereby opened to selection bias, it is unclear to me why and how this focus would distort results regarding bad faith.

but not both. Although the judicial tests that respond to constitutional bad faith do important work — and have done more or less of this work over time — they fall well short of endowing the concept of good faith with the status or salience that it enjoys in private law and international law.

1. Explicit Enforcement Zones. — Let us start with the cases that might appear to pose the sharpest challenge for this descriptive claim.

The Supreme Court's most explicit invocations of constitutional good faith and bad faith have involved law enforcement officers and, to a lesser extent, other executive branch officials. Several lines of doctrine contain "good faith" carve-outs that work to these officials' benefit when they are found to have made a reasonable mistake under the circumstances, including the good faith exception to the exclusionary rule,[54] the good faith exception to a criminal defendant's guarantee of access to evidence,[55] and, most broadly, the qualified immunity defense to civil actions brought under 42 U.S.C. § 1983[56] or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[57] These carve-outs are formulated in a manner that does not so much punish bad faith with a special sanction as reward good faith with a special reprieve, relative to the default principles that apply in the area.

Qualified immunity, however, does not apply in suits brought against government institutions[58] or the wide range of officials who are entitled to absolute immunity.[59] Where it does apply, the Court has narrowed its focus to objective reasonableness and "purged" any con-

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[54] *See, e.g.*, United States v. Leon, 468 U.S. 897, 922–25 (1984) (holding that the Fourth Amendment does not require exclusion of evidence in cases where the police acted in good faith reliance on a search warrant subsequently found to be invalid).

[55] *See, e.g.*, Arizona v. Youngblood, 488 U.S. 51, 58 (1988) ("[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.").

[56] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 557 (1967) (holding that police officers may assert "the defense of good faith and probable cause" in § 1983 suits alleging unconstitutional arrest).

[57] 403 U.S. 388 (1971) (recognizing an implied cause of action under the Fourth Amendment); *see also* Brubaker v. King, 505 F.2d 534, 537 (7th Cir. 1974) (stating "[i]t is now clear that an identical standard" of good faith is applied to *Bivens* claims against federal officials as is applied to § 1983 claims against state and local officials). Section 1983 and *Bivens* claims are frequently brought against law enforcement officers. *See* Raymond J. Farrow, Comment, *Qualifying Immunity: Protecting State Employees' Right to Protect Their Employment Rights After* Alden v. Maine, 76 WASH. L. REV. 149, 175–76 (2001) (referring to police officers and prison officials as "the most common targets of § 1983 and *Bivens* actions").

[58] *See, e.g.*, Owen v. City of Independence, 445 U.S. 622, 657 (1980) ("[M]unicipalities have no immunity from damages liability flowing from their constitutional violations . . . .").

[59] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (absolute immunity for prosecutorial acts "intimately associated with the judicial phase of the criminal process"); *Pierson*, 386 U.S. at 553–55 (absolute immunity for judicial acts); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (absolute immunity for legislative acts).

sideration of motive from the qualified immunity analysis,[60] as well as from its Fourth Amendment jurisprudence generally[61] — thus disavowing the core conception of bad faith in its efforts to police the police. In contexts such as custodial arrests and traffic stops, the Court has gone further and suggested that pretextual police action has no independent constitutional significance whatsoever.[62]

A separate set of doctrines are framed, in more subjective terms, as correctives to prosecutorial malice or deception. The federal courts have indicated that the Due Process Clause may bar prosecution if the government has delayed bringing charges in bad faith;[63] the Confrontation Clause bars use of a witness's prior testimony against a criminal defendant if the government has deported the witness in bad faith;[64] the Equal Protection Clause bars selective prosecutions brought in bad faith on account of factors such as race or religion;[65] and the Double

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[60] Crawford-El v. Britton, 523 U.S. 574, 604 (1998) (Rehnquist, C.J., dissenting) ("[W]e 'purged' qualified immunity doctrine of its subjective component and remolded it so that it turned entirely on 'objective legal reasonableness,' measured by the state of the law at the time of the challenged act." (first quoting Mitchell v. Forsyth, 472 U.S. 511, 517 (1985); then quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982))).

[61] *See, e.g.*, Kentucky v. King, 131 S. Ct. 1849, 1859 (2011) (stating that to inquire into whether police officers deliberately evaded the warrant requirement would be "fundamentally inconsistent with our Fourth Amendment jurisprudence," as the Court's "'cases have repeatedly rejected' a subjective approach, asking only whether 'the circumstances, viewed *objectively*, justify the action'" (alteration omitted) (quoting Brigham City v. Stuart, 547 U.S. 398, 404 (2006))).

[62] *See* Arkansas v. Sullivan, 532 U.S. 769, 771–72 (2001) (per curiam) (custodial arrests); Whren v. United States, 517 U.S. 806, 812–13 (1996) (traffic stops). *See generally* Ekow N. Yankah, Republicanism, Policing, and Race 11 (2015) (unpublished manuscript) (on file with author) (explaining that under the *Whren* line of cases, a police officer can "shield illicit or racist motivations by pointing to any traffic violation, no matter how trivial"). Although the Court has not foreclosed pretext analysis in noncriminal contexts, scholars have argued that "no effective limits have been established to ferret out police pretext during inventory searches" and administrative inspections. William W. Greenhalgh & Mark J. Yost, *In Defense of the "Per Se" Rule: Justice Stewart's Struggle to Preserve the Fourth Amendment's Warrant Clause*, 31 AM. CRIM. L. REV. 1013, 1087 (1994).

[63] *See, e.g.*, United States v. Marion, 404 U.S. 307, 324 (1971); *see also* Arizona v. Youngblood, 488 U.S. 51, 57 (1988) (characterizing *Marion*, among other cases, as "stress[ing] the importance for constitutional purposes of good or bad faith on the part of the Government" in certain criminal contexts).

[64] *See* John Leubsdorf, *Evidence Law as a System of Incentives*, 95 IOWA L. REV. 1621, 1650–56 (2010) (describing this rule and linking it to a suite of nonconstitutional rules that discourage the destruction and hiding of evidence). More recently, Justice Thomas has argued that the Confrontation Clause also "reaches bad-faith attempts to evade the formalized process" that he sees as dispositive for determining whether an out-of-court statement is testimonial. Williams v. Illinois, 132 S. Ct. 2221, 2261 (2012) (Thomas, J., concurring in the judgment). Other Justices, however, have rejected Justice Thomas's focus on formality and complained that he "provides scant guidance on how to conduct th[e] novel inquiry into motive" that would be entailed by his proposed bad faith backstop. *Id.* at 2276 n.7 (Kagan, J., dissenting).

[65] *See, e.g.*, Lanier v. City of Newton, 842 F.2d 253, 256 (11th Cir. 1988) ("In order to state a claim for selective prosecution, appellant must demonstrate that he was prosecuted while others similarly situated were not, and furthermore that the government prosecuted him invidiously or in bad faith.").

Jeopardy Clause "bars retrials where 'bad-faith conduct by judge or prosecutor' threatens . . . 'successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant."[66] Perhaps most famously, the Warren Court also established that federal judges may enjoin pending prosecutions undertaken by state officials, in bad faith, with the intent to harass the defendant and discourage her from exercising her federal constitutional rights.[67]

The cumulative effect of these rulings is less impressive than one might assume. Each has been criticized for defining actionable bad faith in such stringent terms that defendants have little hope of invoking it successfully.[68] If the explicit good faith defenses in constitutional doctrine have become more forgiving as they have been "objectified" over time, the explicit bad faith tests have been reduced nearly to symbolic status. The good faith/bad faith relation constructed by these cases is highly asymmetric. So far as I can tell, the doctrines listed in the paragraphs above are the only ones specific to constitutional law that look to "good faith" or "bad faith," by those labels, with any regularity.

Outside the law enforcement context, the other main locus of bad faith talk in public law doctrine has been the courts' efforts to administer remedies and supervise the adjudicatory process. Sometimes these efforts are made in support of a substantive principle of constitutional law, although often they are not — which makes it questionable whether they ought to be included in a survey of constitutional doctrine. Across a wide range of constitutional and nonconstitutional cases, federal judges have considered allegations of bad faith in the implementation of their decrees against government actors, regardless of whether bad faith was alleged in the litigation that led to the underly-

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[66] United States v. Dinitz, 424 U.S. 600, 611 (1976) (citation omitted) (first quoting United States v. Jorn, 400 U.S. 470, 485 (1971) (plurality opinion); then quoting Downum v. United States, 372 U.S. 734, 736 (1963)). The Court subsequently clarified that a defendant must show the prosecutor's or judge's bad faith conduct was "intended to 'goad' the defendant into moving for a mistrial." Oregon v. Kennedy, 456 U.S. 667, 676 (1982).

[67] *See* Dombrowski v. Pfister, 380 U.S. 479, 489–92 (1965); *cf.* Kugler v. Helfant, 421 U.S. 117, 126 n.6 (1975) (stating that "'bad faith' in this context generally means that a prosecution has been brought without a reasonable expectation of obtaining a valid conviction").

[68] *See, e.g.*, Owen M. Fiss, Dombrowski, 86 YALE L.J. 1103, 1115 (1977) ("As a practical matter . . . the universe of bad-faith-harassment claims that can be established [under *Dombrowski* and follow-on cases] is virtually empty."); Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 440 (1992) (characterizing the Court's approach to bad faith prosecutorial misconduct that triggers double jeopardy as "the strictest conceivable test" for defendants); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365, 1373 (1987) (arguing that the difficulty of proving discriminatory intent "disables most selective prosecution claims from succeeding, which they almost never do").

ing decree.[69] And while their use is said to have waned in recent years, some of the courts' most powerful equitable tools, such as the structural injunction, may be particularly well suited to curbing remedial bad faith given their continuing nature and the possibility of flexible modification in response to a defendant's attempted subversion.[70]

Although they use more anodyne language, various doctrines developed to supervise the state courts might similarly be conceptualized as devices to curb bad faith in the implementation of federal law (again, not just constitutional law). The Supreme Court, for instance, will not find an adequate and independent state ground barring review in cases where the state court's asserted ground lacks "fair support" or a "fair and substantial basis"; this rule, four Justices recently remarked, is meant "[t]o ensure that there is no 'evasion' of our authority to review federal questions."[71] As Professor Henry Monaghan has detailed, the Court has also repeatedly used "constitutional fact review" to wrest decisionmaking authority away from state courts on certain sensitive matters, like coerced confessions, in response "to perceived dangers of distorted factfinding and law application."[72]

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[69] *See, e.g.*, Hutto v. Finney, 437 U.S. 678, 689–92 (1978) (affirming a district court award of attorney's fees against the Arkansas Department of Correction for failing in bad faith to cure previously identified Eighth and Fourteenth Amendment violations); *see also* Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (holding that federal courts have "inherent power to impose attorney's fees as a sanction for bad-faith conduct").

[70] *Cf.* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965, 965 (1993) (celebrating the potential "power and scope" of the structural injunction while noting it "has suffered many defeats over the last twenty years and has been confined and enfeebled by a plethora of devices").

[71] Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 725 (2010) (plurality opinion) (quoting Broad River Power Co. v. South Carolina *ex rel.* Daniel, 281 U.S. 537, 540 (1930)). Congress, too, has at times crafted rules in a manner that reflects skepticism about the state courts' good faith, as in the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (current version at 42 U.S.C. §§ 1983, 1985–1986 (2012)) (permitting constitutional claims against state and local officials to be brought in federal court), and the Habeas Corpus Act of 1867, ch. 28, § 1, 14 Stat. 385 (current version at 28 U.S.C. § 2241 (2012)) (permitting relitigation of all federal claims by state petitioners). *See* Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 241, 252 (1988) (describing these statutes and others as the product of congressional "distrust" of the state courts and discussing cases in which the Court has "emphasized that section 1983 was based on a fundamental distrust of the state courts," *id.* at 252).

[72] Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 272 (1985); *see also* Henry P. Monaghan, *First Amendment "Due Process*," 83 HARV. L. REV. 518, 528 (1970) (discussing the Court's unwillingness to permit a remand of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), for a jury determination of the newly fashioned constitutional standard of "actual malice"). The Supreme Court's extraordinary intervention in *Bush v. Gore*, 531 U.S. 98 (2000), might similarly (and sympathetically) be understood as a response to perceived bad faith on the part of the state courts. *See id.* at 128 (Stevens, J., dissenting) ("What must underlie petitioners' entire federal assault on the Florida election procedures [and the majority's endorsement of their position] is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed.").

This discussion suggests another asymmetry in the federal courts' approach to bad faith in public law settings. The courts appear to be significantly more committed to checking bad faith when it comes to second-order institutional norms of adjudication — in particular, the expectations that parties will follow judicial orders and that state courts will follow federal law — than they do when it comes to many first-order norms concerning the substantive meaning of the Constitution.[73] That is to say, when federal courts' own power to bind litigants and declare law is directly implicated, judges seem to get more interested in the concept of bad faith.

2. Implicit Enforcement Zones. — Explicit prohibitions on bad faith in any given area of law, as the discussion above further suggests, are insufficient to assure robust enforcement of good faith in that area. They may be unnecessary as well. Across a large body of cases on individual and group rights, the Court has developed more or less direct analogues to bad faith prohibitions that avoid the bad faith label. (We already saw one such analogue in the adequate-and-independent-state-ground context.) The most prominent examples are the Court's pretext and purpose tests.[74] Applying these tests, judges may look beneath the surface of a facially neutral measure and invalidate it for being impermissibly animated by or aimed at race discrimination,[75] sex discrimination,[76] religious discrimination,[77] religious

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[73] *Cf.* Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1133–34 (2010) (explaining that, among the many constitutional issues raised by "jurisdiction-stripping," the Supreme Court has been particularly concerned about "legislation enacted with the aim of inviting state courts to defy applicable Supreme Court precedent").

[74] Professors Brannon Denning and Michael Kent define *pretext tests* as judicial inquiries that "ask whether government is, under cover of some permissible goal, actually attempting to regulate in a manner that the Constitution forbids," and *purpose tests* as inquiries that "ask whether the law has been 'developed or applied for constitutionally illegitimate reasons.'" Brannon P. Denning & Michael B. Kent, Jr., *Anti-Evasion Doctrines in Constitutional Law*, 2012 UTAH L. REV. 1773, 1780 (quoting RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 79 (2001)); *see also id.* at 1779–93 (collecting examples and lumping these tests with other "anti-evasion doctrines" that similarly seek "to prohibit indirect violations of a constitutional command by formal compliance with the decision rule," *id.* at 1780).

[75] *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977) (describing the "sensitive inquiry" courts may undertake to determine "whether invidious [racially] discriminatory purpose was a motivating factor" behind a facially neutral legislative or administrative act, *id.* at 266).

[76] *See, e.g.*, Pers. Adm'r v. Feeney, 442 U.S. 256, 279 n.24 (1979) (discussing factors a court may consider to discern "[w]hat a legislature or any official entity is 'up to'" when sex discrimination is alleged).

[77] *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 540 (1993) (opinion of Kennedy, J.) (reviewing factors that "bear on the question of discriminatory object" in Free Exercise Clause analysis). In evaluating Free Exercise claims, the courts also routinely inquire into the sincerity of the claimants. *See* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 954 (1989) (describing this religious sincerity review and suggesting it "seems akin" to a good faith analysis).

establishment,[78] or the like. Searching standards of review are thought to help operationalize these inquiries by "smoking out" hidden purposes.[79] In the sexual orientation area, the Court's recent turn toward "animus" review might also be seen as instantiating an anti–bad faith principle, focused less on uncovering concealed intentions than on repudiating malicious motives.[80]

Concerns about the bad faith of public policymakers, then, undergird the elaboration and enforcement of numerous antidiscrimination norms. Once the Court has deemed certain legislative or executive justifications to be constitutionally suspect, as it has done throughout its contemporary rights jurisprudence,[81] the hunt is on for state actions that nonetheless rely on such justifications. The language of bad faith is notably missing from the cases, but a version of the concept seems to be at work.

Just how much work these cases do in regulating constitutional bad faith, however, is unclear. In those areas where it has inquired into government "intent," the Court has privileged a narrow, subjective conception of bad faith — keyed to a specific set of forbidden motives — over alternative models that would look to disproportionate effects as well as the character of the government's decisionmaking more general-

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[78] *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987) ("While the Court is normally deferential to a State's articulation of a secular purpose [in an Establishment Clause analysis], it is required that the statement of such purpose be sincere and not a sham.").

[79] *See* Johnson v. California, 543 U.S. 499, 506 (2005) ("We . . . apply strict scrutiny to *all* racial classifications to '"smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" (alteration in original) (quoting City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion))); JOHN HART ELY, DEMOCRACY AND DISTRUST 146 (1980) ("[F]unctionally, special scrutiny, in particular its demand for an essentially perfect fit, turns out to be a way of 'flushing out' unconstitutional motivation . . . ."); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 428 (1997) (stating that strict scrutiny's critical function "has always been that of 'smoking out' invidious purposes masquerading behind putatively legitimate public policy"); *see also* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing that "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives").

[80] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675, 2693 (2013) (investigating "whether a law is motivated by an improper animus or purpose"); *cf.* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 999–1000 (N.D. Cal. 2010) (finding that proponents of California's same-sex marriage ban "failed to put forth any credible evidence" in support of their "purported interest" in the ban, *id.* at 1000). If legal prohibitions on bad faith are conceptualized as an "anti-opportunism safety valve," Smith, *supra* note 39, at 19; *see also supra* notes 38–41 and accompanying text, then substantive due process doctrine might also be seen as a functional analogue to the extent it allows judges to enforce unenumerated rights that would have been enumerated by the Framers or their successors, had ex ante transaction costs been lower.

[81] *See* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 734 (1998) (arguing that in American practice the adjudication of constitutional rights "primarily entails judicial efforts to define the *kinds of reasons* that are impermissible justifications for state action in different spheres").

ly.[82] Partly for this reason, many have questioned the adequacy of the Court's approach for responding to the full range of intrusions on constitutional rights.[83] Moreover, even where it has emphatically declared particular purposes to be impermissible, "the Court is often wary of relying on impermissible purpose alone to invalidate official action."[84] Race discrimination doctrine under the Equal Protection Clause, for example, turns on government intent;[85] yet the Court has made this intent standard "extraordinarily difficult" for plaintiffs to satisfy by, among other things, marginalizing disparate impact theories that might have proven more effective at revealing hidden or implicit bias.[86]

In keeping with their rhetorical restraint, the leading anti–bad faith principles in constitutional law thus have not been implemented to what many see as their full conceptual boundaries: they are underenforced in the Sagerian sense.[87] The Court's commitment to regulating bad faith through these functional analogues looks even less impressive when one considers that in areas of private law such as contracts, bad faith is explicitly proscribed and routinely litigated *on top of* functional analogues that target malice, fraud, oppression, inequitable

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[82] In the comparative literature on the adjudication of constitutional rights, the "United States is often viewed as an outlier" for its emphasis on the intent of government actors (and on categorical rules), rather than the effects of their actions. Vicki C. Jackson, Feature, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3096 (2015). Professor Vicki Jackson has recently pushed back on this view, explaining that various areas of constitutional doctrine remain "effects-oriented," *id.* at 3162, or otherwise contain elements of proportionality review, *see id.* at 3104–06, 3159–66. Jackson's valuable analysis demonstrates that the U.S. jurisprudence defies neat characterization but does not, as far as I can tell, undermine the claims made in this Part about the ambivalent and truncated role of bad faith concepts therein.

[83] *See, e.g.*, *id.* at 3172–83 (criticizing equal protection review as overly intent focused). Jackson has elsewhere criticized the Court's turn to an "objective" standard in Fourth Amendment qualified immunity analysis. *See, e.g.*, Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 83 (1988). In this Article's terms, Jackson suggests that equal protection doctrine pays too little attention to objective bad faith while Fourth Amendment doctrine pays too little attention to subjective bad faith.

[84] Brannon P. Denning & Michael B. Kent, Jr., *Anti-Anti-Evasion in Constitutional Law*, 41 FLA. ST. U. L. REV. 397, 420 (2014).

[85] *See, e.g.*, Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977); Washington v. Davis, 426 U.S. 229, 239–45 (1976).

[86] Reva B. Siegel, *The Supreme Court, 2012 Term — Foreword: Equality Divided*, 127 HARV. L. REV. 1, 3 (2013); *see also id.* at 15–20 (detailing restrictions on impact evidence imposed by the Burger Court). In the area of affirmative action, the Court's ambivalence toward its own subjective approach has at times yielded dissents that effectively accuse the majority of concealing, in bad faith, the fact that the government defendant is concealing, in bad faith, its race-conscious motives. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 389 (2003) (Kennedy, J., dissenting) (stating that the "majority fails to confront the reality of how the Law School's admissions policy is implemented," as the policy is "beyond question . . . used by the Law School to mask its attempt to make race an automatic factor in most instances").

[87] *See supra* note 52 and accompanying text (referencing Sager's underenforcement thesis). Sager himself uses the Fourteenth Amendment's equal protection guarantee as his principal example of an underenforced norm. *See generally* Sager, *supra* note 52.

conduct, and so forth. And as the next section will discuss, the Court's commitment to regulating constitutional bad faith, of any sort, generally has not extended to questions concerning the allocation of public power.

3. Nonenforcement Zones. — Whatever its limitations as a tool for vindicating rights, judicial scrutiny of governmental motive is now a central means of incorporating good faith norms into U.S. constitutional doctrine. It is also a fairly recent development. As Professor Caleb Nelson has documented, contemporary courts' willingness to inquire into legislative purposes marks a break from the traditions of constitutional adjudication.[88] The norm throughout most of American history has been that "courts recognized strict limits," such as extraordinarily demanding standards of proof, "on their ability to impute impermissible motivations to a legitimate legislative body."[89] In a long line of cases extending into the 1960s, the Supreme Court considered it "a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[90] Although this principle was never applied with perfect consistency and was disregarded in particular during the *Lochner* era,[91] its existence meant that subjective bad faith was not so much overlooked as excluded from ordinary constitutional analysis where legislatures were concerned — a remarkable testament to constitutional doctrine's toleration of bad faith.

While the federal courts' willingness to inquire into legislative bad faith has grown in recent decades (even if the phrase remains rare),[92] it is important to see that the historic norm Nelson calls attention to has not been fully displaced. Many critical areas of doctrine continue to ignore both legislative and executive motives in practice if not also in theory. The government actions that escape meaningful "subjective" scrutiny range from the traffic stops and custodial arrests mentioned above[93] to Commerce Clause legislation,[94] copyright term ex-

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[88] *See generally* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784 (2008).

[89] *Id.* at 1879. A strong presumption of constitutionality bolstered these limits, especially with respect to federal legislation. *See generally* Edward C. Dawson, *Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage*, 16 U. PA. J. CONST. L. 97, 107–15 (2013) (describing ways in which the presumption of constitutionality in favor of statutes has weakened over time).

[90] United States v. O'Brien, 391 U.S. 367, 383 (1968); *accord, e.g.*, Sonzinsky v. United States, 300 U.S. 506, 513–14 (1937) ("Inquiry into the hidden motives which may move Congress to exercise a power constitutionally conferred upon it is beyond the competency of courts.").

[91] *See* Nelson, *supra* note 88, at 1792, 1825–35, 1879; *see also infra* notes 167–68 and accompanying text (discussing the Warren Court's pushback against invidiously motivated Jim Crow laws in cases such as *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

[92] *See* Nelson, *supra* note 88, at 1850–59.

[93] *See supra* note 62 and accompanying text.

[94] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (affirming that Congress's use of the commerce power is "no less valid" when driven by a desire to address

tensions,[95] and partisan gerrymandering.[96] Notwithstanding Chief Justice John Marshall's well-known dictum from *McCulloch v. Maryland*,[97] federal judges have "all but forgotten" pretext analysis in their Necessary and Proper Clause decisions.[98] The Supreme Court frequently imports concepts from contract law when reviewing interstate compact cases brought under its original jurisdiction, yet it has expressly declined to import the implied covenant of good faith and fair dealing.[99] At least until its 2012 ruling in *National Federation of Independent Business v. Sebelius*[100] (*NFIB*), the Court likewise declined to enforce good faith norms in its vertical federalism jurisprudence,[101] including in the quasi-contractual setting of conditional spending grants from Congress to the states.[102]

"moral" concerns); *see also* Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1254 (2003) ("[T]he modern court has not explored the possibility of reviewing [Commerce Clause] legislation to assure that Congress has not acted pretextually."). In the dormant commerce clause area, the Court has been more willing to interrogate the motivations of (state) legislators. *See* Nelson, *supra* note 88, at 1855 & n.291 (collecting dormant commerce clause cases "where courts ask whether challenged state laws were enacted for purposes of economic protectionism," *id.* at 1855). *But cf.* Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395, 419 (1998) (noting that dormant commerce clause cases in which "the State's purpose is shown to be discriminatory" are "relatively rare").

95 *See, e.g.*, Eldred v. Ashcroft, 537 U.S. 186, 208–09 (2003) (rejecting petitioners' argument that Congress's twenty-year term extension was an impermissible "attempt to evade or override the [Copyright Clause's] 'limited Times' constraint" and suggesting that only "perpetual copyrights" would be invalidated on this basis (quoting U.S. CONST. art. I, § 8, cl. 8)); *see also* Denning & Kent, *supra* note 84, at 401–02 (discussing this point from *Eldred*).

96 *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 292–95 (2004) (plurality opinion) (declining to scrutinize the allegedly discriminatory political purpose of a gerrymander); *id.* at 308 (Kennedy, J., concurring in the judgment) (agreeing with the plurality's approach in this respect); *cf.* Denning & Kent, *supra* note 84, at 399–415 (reviewing numerous examples spanning Article I and the Bill of Rights where the Court has declined to establish an "anti-evasion" principle that would prevent subversion of a substantive constitutional principle the Court has recognized).

97 17 U.S. (4 Wheat.) 316, 423 (1819) ("[S]hould Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land.").

98 Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 448 (1995).

99 *See* Alabama v. North Carolina, 560 U.S. 330, 351 (2010) ("We have never held that an interstate compact approved by Congress includes an implied duty of good faith and fair dealing.").

100 132 S. Ct. 2566 (2012).

101 *See generally* Daniel Halberstam, *Of Power and Responsibility: The Political Morality of Federal Systems*, 90 VA. L. REV. 731, 732–34 (2004) (arguing that whereas countries such as Germany evaluate division-of-powers questions through a "fidelity" approach that holds public institutions to reciprocal duties of loyalty, the dominant approach in the United States is an "entitlements" approach that "leaves the choice between competition and cooperation to the institutional actors' self-interested political calculus," *id.* at 733).

102 *See* Samuel R. Bagenstos, *The Anti-leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861, 902 (2013) (observing that, prior to *NFIB*, "[n]ot only had the Court never *invalidated* a spending condition as coercing the states, it had not even articulated a clear basis in constitutional text or precedent for finding a spending condition coercive").

Other nonenforcement zones are even starker. Concerns about bad faith go unadjudicated in the countless separation of powers disputes that never make it to court.[103] Concerns about bad faith go unconsidered in the "rationality review" applied to the mine-run of state actions that do not target a suspect class or burden a fundamental right; rationality review, despite its name, does little to constrain unreasonable government action amounting to objective bad faith.[104] Taking all of these doctrinal observations together, one might say that the Court's basic strategy for consolidating the New Deal settlement has been to minimize the role of bad faith review in its structural jurisprudence while embedding elements of bad faith review in its rights jurisprudence.[105]

Perhaps the most striking example of bad faith's continued marginalization in structural constitutional law is the Take Care Clause (also known as the Faithful Execution Clause). Supplementing their obligation to swear by oath to "faithfully execute the Office of President of the United States,"[106] this clause instructs Presidents to "take Care that the Laws be faithfully executed."[107] It is straightforward to construe this language as imposing a duty of good faith on the President in her capacity as law implementer.[108] The Supreme Court, how-

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[103] *See* Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1109–10 (2013) (explaining that unless individual rights are directly implicated, "courts often abstain from addressing questions surrounding the allocation of authority between Congress and the President," *id.* at 1110).

[104] *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1153 (1999) ("The prevalent understanding of rationality review . . . posits that rationality review is not review at all, but rather the withholding of review . . . ."). For a rare example of the Court finding an act of legislative line-drawing to be objectively unreasonable, see *Shelby County v. Holder*, 133 S. Ct. 2612, 2630–31 (2013) (suggesting that Congress's coverage formula under the Voting Rights Act was "irrational").

Courts have also been cautious when undertaking "arbitrary and capricious" review in the administrative law context. *See* STEPHEN G. BREYER & RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 289 (1979) ("In the thousands of federal court decisions annually reviewing federal administrative action, only a comparative handful invalidate agency action [as arbitrary and capricious]."). It may be the case, though, that other conceptions of bad faith do substantially more work in administrative adjudication than in constitutional law proper, given the dominance of a fiduciary-like principal-agent paradigm in the former. *See generally* Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006) (exploring "the fiduciary norms," including good faith, "implicit in agency entrustment," *id.* at 123).

[105] For an explanation of "the New Deal settlement" and analysis of how *NFIB* could disrupt it, see Lawrence B. Solum, *How* NFIB v. Sebelius *Affects the Constitutional Gestalt*, 91 WASH. U. L. REV. 1, 2–4, 48–58 (2013).

[106] U.S. CONST. art. II, § 1, cl. 8 (Presidential Oath Clause).

[107] *Id.* art. II, § 3.

[108] *See* Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 698 (2014) ("[T]he term 'faithfully,' particularly in eighteenth-century usage, seems principally to suggest that the President must ensure execution of existing laws in good faith, a meaning consistent with the Clause's core purpose of ensuring congressional supremacy.").

ever, has declined to enforce or even recognize a duty of good faith under the Take Care Clause, and to the contrary has emphasized that the President enjoys a great deal of unreviewable discretion.[109]

Recently, critics of President Obama's approach to immigration law have challenged this understanding of the Take Care Clause and advocated that his enforcement practices be assessed under a standard of good faith.[110] From this Article's perspective, the most notable aspect of these arguments is simply that they are *reform* proposals: to restore the overall constitutional equilibrium, they aim to unsettle the doctrinal status quo. The principles of good faith and bad faith have failed to take hold in that corner of constitutional law where the plain text of the Constitution virtually cries out for their application.

As already indicated,[111] the principles of good faith and bad faith have failed to take hold in constitutional theory more broadly. The invisibility of these principles in much of the case law mirrors their invisibility in much of the literature. Many works of constitutional scholarship use the phrase "good faith" or "bad faith" in passing, without explication, or consider one arguable aspect of constitutional bad faith, such as legislative pretext, without identifying it as bad faith or drawing a connection to other forms of legal bad faith.[112] So far as I am aware, no work has offered any general analysis (beyond the Take Care Clause) of the role these concepts play, or ought to play, in constitutional law, politics, or culture. Constitutional scholars have looked to religious theory, political theory, and sociology to illuminate the celebrated phenomenon of constitutional faith.[113] They have not looked to other bodies of law to illuminate, or indeed to identify, the less exalted but no less significant phenomenon of constitutional bad faith.

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[109] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 831–35 (1985) (discussing factors that counsel against judicial review of executive decisions to refuse enforcement).

[110] *See* Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 219 (2015) (arguing that the Take Care Clause "requires an investigation [by courts] into whether the President executed the laws in good faith"); Randy Barnett, *The President's Duty of Good Faith Performance*, WASH. POST: VOLOKH CONSPIRACY (Jan. 12, 2015), http://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/12/the-presidents-duty-of-good-faith-performance [http://perma.cc/XE8Y-GAY2] (arguing that "like any other agent, the President owes his principal — the People — a duty of good faith in the exercise of [enforcement] discretion," although hedging on the question whether courts should enforce this duty).

[111] *See supra* note 2 and accompanying text.

[112] The most prolific user of the phrase "constitutional bad faith" has been Professor William Forbath, in all instances with reference to the betrayal of the Reconstruction Amendments and their egalitarian aims. *See, e.g.*, William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 6, 85 (1999); William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 208, 209, 221 (2001).

[113] *See, e.g.*, sources cited *supra* note 2.

B. Explanations

The preceding section demonstrates that the language of bad faith plays a modest role in constitutional adjudication, confined mainly to the realm of police and prosecutors, while the underlying concept plays a broader — though still limited and uneven — role. It is certainly possible that I have overlooked or underestimated elements in the case law that could be characterized as functional analogues to a bad faith prohibition; the best understandings of bad faith and many constitutional doctrines, once again, are each sufficiently contested that it would be futile to try to nail down their correlates with exactitude. Nevertheless, the discussion thus far suffices to establish, at a minimum, that the idea of bad faith has received significantly less judicial and scholarly attention in constitutional law than it has in private law and international law.[114] In comparative terms if not in absolute terms, constitutional lawyers have shown little appetite for grappling with bad faith as such.

This observation is notable in its own right, and it raises numerous questions of explanation. What accounts for constitutional law's relative lack of emphasis on bad faith? Why have certain areas within the case law been more attentive to bad faith than others? And how, if at all, does the ambivalence about confronting bad faith in constitutional doctrine relate to the exuberance of bad faith talk in constitutional culture?[115] I will consider possible answers to the first two questions in this section before broadening the lens, in Parts III and IV, to incorporate the workings of bad faith beyond the courts.

Some of the reasons why good faith and bad faith have been "underenforced" in constitutional law, it seems clear, are consistent

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[114] For a more precise statement of the main points established by the previous section, see *supra* pp. 897–98.

[115] Other questions present themselves. At a higher level of abstraction, we might ask whether different juridical forms, such as "adversarial" and "inquisitorial" systems, have fundamentally different relationships to the idea of bad faith. In a comparative vein, we might ask whether the marginal status of bad faith in numerous areas of constitutional law is an American oddity or rather inherent to constitutional adjudication generally. Both questions are well worth careful study but beyond the scope of this Article. My tentative hypothesis is that many of the factors identified in this section (for example, those relating to the difficulties of defining community standards and inquiring into governmental motives) are *not* exceptional to the United States — with the implication that the reticence to rely on bad faith in constitutional doctrine may be a global phenomenon. This hypothesis is bolstered by the observation that a wide variety of countries have "neglected" the related doctrine of abuse of rights in their domestic public law. András Sajó, *Abuse of Fundamental Rights or the Difficulties of Purposiveness*, *in* ABUSE: THE DARK SIDE OF FUNDAMENTAL RIGHTS 29, 34 (András Sajó ed., 2006). In contrast, many of the dynamics identified in the balance of the Article (for example, those relating to the unamendability and sacralization of the Constitution's text) do seem exceptional to the United States — with the implication that the profusion of bad faith talk in constitutional culture may be a distinctively, or at least an especially, American phenomenon.

with the reasons why spongy norms have been underenforced in many areas of law. The classic account of underenforcement envisions it as the product of anxiety about courts' competence "to prescribe workable standards of . . . conduct and devise measures to enforce them,"[116] along with anxiety about the "institutional propriety" of their doing so.[117] The two concerns are related in that when the technical challenges of enforcing a particular norm in a reliable manner become sufficiently acute, courts risk compromising their legitimacy if they forge ahead regardless. As Part I explains, principles of good faith and bad faith are notoriously hard for judges to define and apply.[118] It requires a great deal of information and expertise to assess with confidence whether many litigants have acted deceptively, disloyally, or unfairly — and thus to hold them to the full conceptual limits of a duty of good faith.[119] In consequence, Professor Paul MacMahon argues, this duty has been underenforced in American contract law, where its pedigree is beyond dispute.[120] To some extent, then, the underenforcement of good faith in constitutional law is likely an instance of a more general phenomenon of good faith's underenforcement in all law.[121]

The degree of constitutional underenforcement is extreme, however — which suggests that the competence and propriety concerns associated with enforcing good faith may be extreme in constitutional law as compared to private law and, perhaps to a lesser extent, international law. It is not hard to imagine why this might be the case. As a practical and conceptual matter, the task of ferreting out bad faith may be especially difficult in the constitutional context because courts are often dealing with complex decisions made by complex, in-

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116 Sager, *supra* note 52, at 1217.

117 *Id.* at 1226. Underenforcement, as indicated above, occurs when courts fail to enforce a legal norm to its "full conceptual limits" on account of institutional concerns. *Id.* at 1221, 1235; *see also supra* p. 896.

118 *See supra* notes 23–27 and accompanying text; *see also* Kotzur, *supra* note 1, at 508 (stating that the principle of good faith has "often been criticized as ambiguous if not amorphous or elusive").

119 *See* Gillette, *supra* note 23, at 665 ("Beyond moral suasion, . . . enforcement of an expansive notion of good faith appears to present overwhelming difficulties.").

120 MacMahon, *supra* note 11; *see also* Schäfer & Aksoy, *supra* note 40, at 3 ("If the good faith principle is a monster, as scholars once claimed, it has been domesticated [in European contract law] as a farm animal." (citation omitted)). *But cf.* Victor P. Goldberg, *Discretion in Long-Term Open Quantity Contracts: Reining in Good Faith*, 35 U.C. DAVIS L. REV. 319 (2002) (arguing that courts substantially *over*enforce good faith in long-term, open-quantity contract settings, relative to the parties' reasonable expectations).

121 *Cf.* Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422 (2012) (emphasizing the influence of "judicial capacity" on the shape of constitutional doctrine more generally).

ternally diverse entities such as legislatures and agencies.[122] And as a political matter, this task may be especially fraught because of the delicacy of questioning another government actor's honesty or fairness (not to mention the gravity of invalidating the work of a public body).[123] In substance, these points are familiar from scholarship analyzing the pitfalls of constitutional pretext and purpose tests.[124]

The latter point, in particular, may go a long way toward explaining why the Court has been so much more willing to apply the "bad faith" label to line-level prosecutors than to high-level policymakers.[125] Impugning the faith of Congress or the President veers dangerously close, on a pluralist or purely majoritarian account of representative democracy, to impugning the faith of the people in whose name they have been acting. Federal judges who take this step may be vulnerable not only at the level of democratic theory[126] but also at the level of retaliation.[127] If the enforcement of a norm as open-ended and morally freighted as good faith — a norm redolent of natural law — can give rise generally to fears of excessive judicial discretion and hence to the possibility of backlash, these fears take on added significance in the constitutional context.

Other candidate explanations are less familiar and, I think, more interesting. For starters, avoiding the language of constitutional bad

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[122] On the theoretical difficulties associated with inquiring into governmental motives, aside from the problems of attributing intentions to multimember bodies, see LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 38–51 (2005).

[123] In defending its objective approach to qualified immunity, the Court has opined that "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons," which "can be peculiarly disruptive of effective government." Harlow v. Fitzgerald, 457 U.S. 800, 817 (1982).

[124] At least two prior works have linked these points to bad faith specifically. *See* Denning & Kent, *supra* note 84, at 420 (speculating that the Court's "ambivalence" toward purpose tests reflects "a reluctance to accuse another branch of legislating in bad faith, the difficulty in assigning motive or intent to a multimember body, . . . and the possibility that offending legislation will simply be reenacted after somehow purging itself of the effects of the malign purpose"); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 72 (1997) (observing that questions about the influence of illegitimate considerations on government decisionmaking "may present formidable evidentiary problems" as well as "conceptual puzzles," and that "the requisite inquiries may be embarrassing for a court to make, because they involve questions about the constitutional good faith of governmental officials").

[125] *See supra* section II.A.1, pp. 898–902. Justices have shown similar rhetorical restraint in their out-of-court statements about high-level policymakers. "We have to assume," Justice Kennedy remarked in congressional testimony last year, "that we have three fully functioning branches of the government[] that are committed to proceed in good faith and with good will toward one another to resolve the problems of this republic." *Notable & Quotable: Anthony Kennedy*, WALL ST. J., Mar. 25, 2015, at A15.

[126] *Cf.* Alabama v. North Carolina, 560 U.S. 330, 351–52 (2010) (warning that "[i]f courts were authorized to add a fairness requirement to the implementation of federal statutes," as through an implied duty of good faith, "judges would be potent lawmakers indeed").

[127] *See generally* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 15–18 (2014) (reviewing Congress's and the President's "remedial options" against the federal courts).

faith may be a self-protective strategy for judges above and beyond any immediate effects on interbranch comity. The federal courts are *players* in structural constitutional law. They do not stand above and apart from the parties. Their institutional interests are far more likely to be implicated by the typical dispute concerning the scope and limits of legislative, executive, or judicial power than by the typical contract or insurance claim. Moreover, the federal courts are *repeat* players vis-à-vis the other branches, unlike any given official seeking qualified immunity, which raises the cost of explicit good faith inquiries. Insofar as courts legitimate bad faith talk as a mode of discourse about constitutional bodies performing their constitutional roles, the judges themselves risk becoming subject to that discourse and its attendant degradations. Selective inattention to constitutional bad faith — with greater attention paid to its individual rather than institutional manifestations — is a plausible strategy for maintaining judicial power and prestige.[128]

Further complicating the task of policing constitutional bad faith is the fact that constitutional law is a going concern. Many contractual relationships are effectively ended by the time bad faith is litigated. (This is less true of treaties and certain fiduciary relationships.) But American government actors can never, in an institutional sense, end their constitutional commitments. The oath binds all federal and state officers who wield power at a given time.[129] This continuity of commitment may exacerbate the awkwardness and political risk, and reduce the "stickiness," of judicial decisions based on a finding of dishonesty, disloyalty, unfair dealing, or the like. The language of bad faith is not only uncomfortably pejorative in constitutional adjudication but also unhelpfully imprecise; it vilifies specific malfeasants without in many cases providing generalizable guidance for their successors or a clear pathway back to legality.

Moreover, while the oath suggests that officeholders have a fiduciary relationship of some sort to the Constitution and the American people, the distinctive nature of this relationship complicates any attempt to import principles of good faith from fiduciary law.[130] In private

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[128] *Cf.* Josh Chafetz, *Governing and Deciding Who Governs*, 2015 U. CHI. LEGAL F. 73 (exploring the Roberts Court's rhetorical efforts to convey that "the Court stands outside of, and indeed above, the structures and processes of governance," *id.* at 75, as a strategy for preserving institutional power and prestige).

[129] The Oath Clauses in Article II and Article VI contain no temporal limitations. *See* U.S. CONST. art. II, § 1, cl. 8; *id.* art. VI, cl. 3.

[130] *See generally* Seth Davis, *The False Promise of Fiduciary Government*, 89 NOTRE DAME L. REV. 1145 (2014) (questioning the possibility of translating private fiduciary law into public law); Ethan J. Leib et al., *Translating Fiduciary Principles into Public Law*, 126 HARV. L. REV. F. 91 (2013) (accepting the characterization of politicians as fiduciaries while highlighting the difficulties of grafting private fiduciary principles onto public law settings).

contexts, courts generally expect that fiduciaries will fulfill their obligations in "utmost good faith."[131] Plaintiffs may be able to establish a violation of this duty by showing that the defendant was "interested" in a transaction or failed to exercise "independent" judgment: for instance, because she was influenced by third parties or stood to benefit from a recommended course of action.[132] These tests would be too severe in many constitutional contexts, where officeholders must cater to multiple groups and make countless decisions that bear on their personal and professional interests.[133] The whole enterprise of constitutional policymaking is shot through with mixed motives and allegiances more generally, insofar as policymakers must reconcile their ideological priors not only with their duties to the Constitution and the nation but also with discrete commitments to political parties, constituents, and institutions — all of which may be seen to supply legitimate inputs into constitutional analysis.[134] Constitutional law is so imbricated with politics and "cross-cutting relational obligations"[135] that fiduciary law's pristine conceptions of good faith, and its powerful proxies for bad faith, would wreak havoc if applied.

If the expected costs of enforcing good faith seem magnified in constitutional law, the systemic benefits may be more dubious. Ubiquitous as they are, the concepts of good faith and bad faith appear to have attained particular prominence in those private law fields where relational contracting is commonplace — most obviously, in contract law itself. Among public law fields, these concepts appear to have gained the most traction in the area of treaties, which for many purposes have been analyzed within a contract paradigm.[136] Domestic government institutions cut deals with one another too,[137] and the

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131 *See supra* note 13 and accompanying text.

132 *See* Leahy, *supra* note 10, at 893–97 (discussing corporate directors under Delaware law).

133 *See* Leib et al., *supra* note 130, at 96–99 (detailing ways in which politicians may be required to engage in various forms of structural "self-dealing" when engaged in redistricting); *see also* Jonathan R. Macey, *Public and Private Ordering and the Production of Legitimate and Illegitimate Legal Rules*, 82 CORNELL L. REV. 1123 (1997) (arguing that information and transaction costs make it impossible for judges to distinguish reliably between special-interest and public-regarding legislation).

134 *Cf.* Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 93 (1986) ("It is certainly not a sign of bad faith that one's constitutional positions reflect one's broader ideological views. Hamilton's and Jefferson's opposing positions on the national bank surely paralleled their more fundamental beliefs about the role of the central government in the federal system, and this appropriately affected their interpretations of article I of the Constitution." (internal parentheses omitted)).

135 Leib et al., *supra* note 130, at 94.

136 *See* Alex Glashausser, *What We Must Never Forget When It Is* a Treaty *We Are Expounding*, 73 U. CIN. L. REV. 1243, 1267 & n.149 (2005) (collecting scholarly sources that have "perpetuated the paradigm of treaties as contracts," *id.* at 1267).

137 *See, e.g.*, *supra* notes 99–102 and accompanying text (discussing interstate compacts and conditional spending grants). *See generally* Aziz Z. Huq, *The Negotiated Structural Constitution*,

Constitution has been analogized to a social contract.[138] Yet it is awkward at best to try to assimilate constitutional law to a contract model, given (among other things) persistent uncertainty regarding the legal enforceability of intragovernmental bargains and the precise nature of, and parties to, the original constitutional "agreement." Whatever social functions the judicial enforcement of good faith might serve in contractual or quasi-contractual settings, accordingly, would not necessarily carry over to the constitutional realm.

Some law and economics scholars, as Part I indicates, have defended judicial enforcement of vague equitable norms such as good faith as a strategy for dealing with opportunism, or technically legal yet unanticipated "self-interest seeking with guile."[139] Even though this strategy tends to increase levels of litigation and legal uncertainty, it may nonetheless be efficient because opportunism is, on the one hand, a major cause of negative externalities as well as moral concern and, on the other hand, so multifarious that it "cannot be cost-effectively captured . . . by explicit ex ante rulemaking."[140] Opportunism is widely understood to be a fundamental, and shape-shifting, problem in private law theory. Enforceable norms against bad faith offer a correspondingly supple solution.

In structural constitutional law, however, the role of opportunism is more ambiguous. On James Madison's foundational account of the separation of powers, the self-interested maneuvers of competing constitutional actors are envisioned as continuously merging together, canceling each other out, and thereby serving the greater good: to enable effective governance while minimizing the risk of tyranny, "[a]mbition must be made to counteract ambition."[141] Rather than rely on the republican virtue of officeholders, the Madisonian model seeks to "supply[], by opposite and rival interests, the defect of better motives."[142] Opportunistic presidential and congressional behaviors are not necessarily deviant or disquieting on this model. To the contrary, they are the engine of checks and balances.[143]

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114 COLUM. L. REV. 1595 (2014) (exploring ways in which government institutions negotiate over their constitutional entitlements).

138 *See* Gerald L. Neuman, *Whose Constitution?*, 100 YALE L.J. 909, 917 (1991) ("Social contract rhetoric has played a significant role in American constitutionalism.").

139 WILLIAMSON, *supra* note 38, at 47; *see supra* notes 38–41 and accompanying text.

140 Smith, *supra* note 39, at 14; *see also id.* at 15 (asserting that the benefits of opportunism "are usually smaller than the costs they impose on others" and that opportunism is "a major problem" in private law).

141 THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

142 *Id.*

143 *Cf.* Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1309 (2004) (stating that "Madison's answer" to the danger of excessive concentration of power in one institution of government "is to rely on opportunism").

Recent scholarship has poked holes in Madison's argument, which lacks a mechanism to ensure that intragovernmental competition will conduce to socially desirable outcomes[144] or that the individuals who comprise government institutions will pursue those institutions' interests instead of personal or partisan objectives.[145] Even so, "few of the Framers' ideas continue to be taken as literally or sanctified as deeply by courts and constitutional scholars."[146] The Madisonian model of separation of powers militates against seeing intragovernmental opportunism — and the bad faith it entails[147] — as a constitutional evil at all, much less one that demands a costly regulatory response.

The Madisonian model does not purport to apply to interactions between public officials and private parties, which may help explain why the courts have been so much more willing to look for bad faith in criminal contexts. Under no plausible theory of the criminal process can the continuous bad faith of prosecutors or police officers be harnessed to enhance the quality or reduce the tyranny of the criminal justice system. Criminal suspects cannot as a rule unilaterally counteract the abuses of their jailers. As MacMahon observes in his study of contract law, judicial underenforcement of good faith norms makes more "sense where other mechanisms for checking unreasonable contractual conduct — especially self-help and reputational sanctions — are available and likely to be effective."[148] Conversely, judicial enforcement of bad faith makes more sense where self-help and reputational sanctions are likely to be ineffective. These points generalize to constitutional law.

The sheer volume of constitutional litigation involving police and prosecutors may also help explain why the language of bad faith has emerged in these contexts. Because bad faith is so difficult to define and deter ex ante, courts and commentators in nonconstitutional fields have relied heavily on inductive reasoning to fashion general rules out of concrete cases.[149] Every year, the federal courts resolve thousands upon thousands of Fourth, Fifth, and Sixth Amendment claims brought by criminal defendants and § 1983 claims brought by prison

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144 *See* ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 40–43 (2011).

145 *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2323–25 (2006).

146 *Id.* at 2313. Supreme Court Justices have expressly invoked Madison's model in prominent recent cases. *See* United States v. Windsor, 133 S. Ct. 2675, 2704 (2013) (Scalia, J., dissenting); Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3157 (2010).

147 *Cf. supra* notes 38–41 and accompanying text (explaining that private law theorists see opportunism and legal bad faith as closely connected, if not identical, categories).

148 MacMahon, *supra* note 11, at 2054.

149 *See, e.g.*, Frédéric G. Sourgens, *Reconstructing International Law as Common Law*, 47 GEO. WASH. INT'L L. REV. 1, 1–2 (2015) (arguing that, throughout international law, good faith "drives" an inductive process of "establish[ing] norms on the basis of factual regularity").

inmates.[150] Other areas of constitutional law do not generate a similarly steady stream of cases through which anti–bad faith principles could be clarified and refined, over time, in a common law fashion.

Still other reasons why bad faith may be especially problematic in constitutional law concern not the players or the political dynamics involved, but rather the content of the first-order legal norms. Given the elusiveness of subjective motivations, one of the most important clues as to the existence of bad faith in private law and international law is the "objective unreasonableness" (sometimes referred to as the "baselessness") of a party's legal position.[151] This resort to reasonableness is justified as a means to promote "community standards of decency" and effectuate "agreed common purpose[s]."[152] Constitutional law, however, is characterized not only by an unusually rigid and underdeterminate operative text,[153] but also by deep and abiding disagreement over the appropriate mix of interpretive methodologies and over the substance and significance of the drafters' aspirations.[154] The boundary between constitutional arguments that are seen as "off-the-wall" and "on-the-wall" is constantly shifting, as exemplified by recent developments in Second Amendment and same-sex marriage doc-

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150 *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (lamenting that § 1983 "pours into the federal courts tens of thousands of suits each year"); Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1556 (2015) ("[T]he Supreme Court has devoted more attention to the interpretation of the Fourth Amendment than to any other constitutional provision, and the Fifth and Sixth Amendments' implications for interrogations and confessions are also frequently adjudicated.").

151 *See generally supra* notes 33–37 and accompanying text.

152 *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (AM. LAW INST. 1981) ("Good faith . . . emphasizes faithfulness to an agreed common purpose . . . ; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.").

153 *See* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 117 (2010) (noting "the fact of constitutional underdeterminacy[—]many constitutional provisions are general, abstract, and vague" — and the resulting pressure on constitutional doctrine to "change over time"). Constitutional litigation, moreover, appears to focus overwhelmingly on the document's vague provisions.

154 *See* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY § 1.01, at 3 (4th ed. 2013) ("A colleague likes to say that 'the trouble with constitutional law is that nobody knows what counts as an argument.' It may be more accurate to say that plenty of people think they know what does or should count, and that they often disagree."); Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1853 (2005) ("Among legal elites, including judges and Justices, there is widespread methodological as well as substantive disagreement about constitutional matters . . . ."); Alice Ristroph, *Is Law? Constitutional Crisis and Existential Anxiety*, 25 CONST. COMMENT. 431, 451 (2009) (explaining that scholars "doubt the existence of a single rule of recognition in American constitutional law," in part because "[t]here are too many core interpretive disputes"). Justice Scalia recently quipped that, to his "embarrassment," the Justices are not "in agreement on the basic question of what we think we're doing when we interpret the Constitution." Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK, Oct. 14, 2013, at 22, 24.

trine.[155] If anything like professional or social consensus is required, then there are hardly *any* common purposes in large portions of constitutional law.[156] More than that, the Constitution itself has been suggested as "a model instance of what the philosopher W.B. Gallie has labeled an 'essentially contested concept.'"[157] Judicial enforcement of objective bad faith, consequently, may be no less vexed than judicial enforcement of subjective bad faith. It can be hard to ascertain which legal positions are unreasonable in a field where vague standards predominate and everyone is constantly debating the proper way to do law.

Finally,[158] as the balance of the Article will suggest, it is a time-honored tradition of American constitutionalism that nearly every sect believes the other sects are operating in bad faith. Contract law, corporate law, and the like do not appear to involve comparable levels of popular engagement or mutual mistrust.[159] To adjudicate constitutional bad faith in any robust manner, accordingly, is not only to wade into an evidentiary and epistemic morass but also to invite endless finger-pointing by and at authority figures — to expose the constitutional cesspool — in the courts.

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In sum, a wide range of factors plausibly contribute to the relatively limited profile of bad faith in constitutional doctrine, as well as to the variance within the doctrine. It would be difficult to parse the in-

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[155] *See* BALKIN, *supra* note 2, at 119 (exploring these shifts and contending that the process of "attempting to move arguments from off-the-wall to on-the-wall is the process of constitutional development in America"); *see also* Lawrence Lessig, *Fidelity and Constraint*, 65 FORDHAM L. REV. 1365, 1366 (1997) ("This is the brute fact of our constitutional past. The Constitution is read at one time to mean one thing; at another, to mean something quite different. These changes track no change in constitutional text; nor do they follow confessions of earlier mistake.").

[156] *Cf.* Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 783–85 (1983) (arguing that "[c]onstitutional theory is essentially a concomitant of liberalism," *id.* at 783, and as such cannot avail itself of communitarian assumptions about shared social values and understandings without "contradict[ing] its fundamental individualism," *id.* at 785). One need not accept Professor Tushnet's further claim that "the limits of craft are so broad" in constitutional law "that in any interesting case any reasonably skilled lawyer can reach whatever result he or she wants," *id.* at 819, to accept that constitutional law features unusually high levels of textual underdeterminacy, methodological eclecticism, and creative argumentation.

[157] LEVINSON, *supra* note 2, at 124 (quoting W.B. Gallie, *Essentially Contested Concepts*, *in* THE IMPORTANCE OF LANGUAGE 121 (Max Black ed., 1962)); *see also id.* (observing that, as a practical matter, "few treat the Constitution as having an easily knowable, fixed identity").

[158] Well, almost finally. *See infra* p. 947 (suggesting one more explanation for the bad faith deficit in constitutional case law).

[159] International law seems closer to constitutional law in this respect, at least where non-allies are concerned. *Cf. infra* notes 319–21 and accompanying text (discussing the "inherent bad faith" model in international relations).

fluence of any given factor; these patterns in the case law may well be overdetermined. With that caveat, my hope is that the speculations advanced above can prompt and facilitate discussion about the distinctive treatment of good faith and bad faith in constitutional jurisprudence — thereby throwing light not only on this body of law but also on the good faith and bad faith concepts themselves, and the adjudicative conditions under which they are more or less likely to flourish.

It bears note in this regard that, whatever their causal force, the factors reviewed here supply justificatory explanations for the status quo. Many of the factors speak to the desirability, not merely the reality, of judges' stifling their suspicions of bad faith. Anyone who wished to advocate greater judicial enforcement of constitutional good faith would have to contend with them.

III. VARIETIES OF CONSTITUTIONAL BAD FAITH

The fact that judges have frequently ignored constitutional bad faith, as such, hardly means it is not there. Relative to other fields, constitutional law is distinguished not only by exceptionally low levels of bad faith talk inside the courts but also by exceptionally high levels of bad faith talk outside the courts.[160] It is hard to resist positing a connection between these two features. Having been denied a full airing in the judicial realm, accusations of bad faith have apparently migrated to, and proliferated within, the extrajudicial realm. Yet even if we bracket this unproven and perhaps unprovable hydraulic hypothesis, recognizing that constitutional bad faith goes underenforced in the doctrine only makes it more important to consider how it is conceptualized and critiqued — how it is regulated — in the culture.

To navigate this complex terrain, a taxonomy will be useful. "A complete catalogue of types of bad faith is impossible" in constitutional

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[160] *Cf.* Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 *passim* (2011) (documenting widespread cynicism about the Supreme Court's neutrality and "accusations of bad faith" directed at the Court, *id.* at 34, with particular reference to constitutional law); Louis Michael Seidman, Substitute Arguments in Constitutional Law 63–64 (July 17, 2015) (unpublished manuscript), http://ssrn.com/abstract=2631119 [http://perma.cc/GZ95-KW45] ("[A] large part of constitutional argumentation is devoted to tearing down the very justificatory ideology that the rest of it is designed to preserve. Everyone pretends to be making authentic arguments, while everyone accuses everyone else of using unprincipled substitutes."). Professor Kahan's Foreword suggests that a great deal of bad faith talk occurs in American legal discourse and that it is tied, in a deep sense, to the psychological phenomenon of motivated reasoning. *Cf. infra* notes 249–52, 298–306 and accompanying text (discussing motivated reasoning). I agree in broad outline but wish to push the empirical, conceptual, and diagnostic claims further. Kahan does not explore, among other things, the different forms that constitutional bad faith and accusations thereof may take; the ways in which *constitutional* bad faith may be distinct from other forms of bad faith, both as a legal and a cultural matter; or many of the constructive, as well as destructive, uses to which bad faith talk may be put.

law, as in other areas of law.[161] Without purporting to be exhaustive, this Part begins to map the ways in which constitutional actors accuse each other of bad faith in public settings. These accusations share a similar structure with the accusations of bad faith that one finds in other legal contexts. The generic types of bad faith that have been identified in private law and international law, that is, also recur throughout constitutional debates.

This Part focuses on the contemporary American scene to keep the scope manageable and the narrative coherent. For reasons that will soon become clear, however, I think it likely that widespread misgivings about other groups' good faith is *not* a peculiarity of contemporary practice (even if such misgivings may be especially acute in this period) but rather a hallmark of American constitutionalism.[162] This Part also brackets potentially related issues in public policy and nonconstitutional public law.[163] The behaviors surveyed here concern the interpretation and implementation of either the "big-C" written Constitution or "small-c" constitutional conventions.[164] Some readers may prefer to conceptualize the constitutional domain in narrower or more formalistic terms. Whatever the merits of such views in the abstract, I believe it is important to see how charges of bad faith continually put pressure on the line between constitutional law and political morality. For this first pass at the subject of constitutional bad faith, moreover, it seems to me particularly appropriate to err on the side of

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[161] RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (AM. LAW INST. 1981).

[162] To preview, Part IV examines ways in which bad faith talk may be fostered by "constitutional faith" as well as various psychological, political, and hermeneutic pressures. None of these variables is unique to the present period. And both the bitter tone and the narratives of betrayal that pervade contemporary constitutional debate certainly seem to have deep roots. *See, e.g.*, Alison L. LaCroix, *Continuity in Secession: The Case of the Confederate Constitution*, *in* NULLIFICATION AND SECESSION IN MODERN CONSTITUTIONAL THOUGHT (Sanford Levinson ed., forthcoming 2016), http://ssrn.com/abstract=2571358 [http://perma.cc/JJR4-F8FA] (explaining that Confederate leaders in the Civil War insisted that they alone were faithful to the Founders' Constitution, honestly construed, and copied much of its text into their own constitution). Notwithstanding my emphasis on recent examples, I thus expect that a comparably rich array of bad faith accusations could be culled from numerous periods in constitutional history, perhaps in particular the immediate pre–Civil War period, the New Deal era, the civil rights era, and the post-2002 George W. Bush presidency.

[163] I therefore do not take up, for example, the large subject of government lies, except insofar as they are used to gain a constitutional advantage or mask failures of constitutional commitment or compliance. *Cf.* Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. (forthcoming 2016) (manuscript at 20–41), http://ssrn.com/abstract=2574449 [http://perma.cc/YKH3-6ZAL] (surveying government lies and arguing that a wider subset violates the Due Process Clause or Free Speech Clause).

[164] *See* Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1081–83 (2013) (comparing "big-C" and "small-c" approaches and stating that the small-c constitution encompasses "the web of documents, practices, institutions, norms, and traditions that structure American government," *id.* at 1082); *see also* Pozen, *supra* note 127, at 29–33 (describing constitutional conventions, with reference to small-c theory).

overinclusion. Suspicions of bad faith are ubiquitous in our constitutional culture, this Part will suggest, but different sorts of suspicion are not evenly distributed across different groups. Exploring these associations can help to clarify the structure of constitutional discourse and distrust.

A. Subjective Bad Faith

1. Dishonesty. — Constitutional bad faith, like all bad faith, is strongly linked to dishonesty and insincerity. Perhaps the most straightforward type of constitutional bad faith, and the one courts have been most willing to tackle,[165] involves (1) *facially neutral government actions that are in fact based on illegitimate motives or purposes*. The framing of these actions masks their true character; additional dissimulation tends to follow. Professor Lawrence Sager asserted thirty-five years ago that "[l]egislative bad faith is a constitutionally impermissible motive."[166]

Classic examples of this type of constitutional bad faith relate to race. Throughout the Jim Crow era, Southern politicians responded to federal antidiscrimination mandates with viciously racist tactics, such as poll taxes and literacy tests, that masqueraded as neutral measures.[167] The Warren Court repudiated these tactics in a number of celebrated decisions, as when it struck down the Alabama Legislature's redistricting of Tuskegee "from a square to an uncouth twenty-eight-sided figure" in *Gomillion v. Lightfoot*.[168] Contemporary commentators invoke this history in criticizing state laws allegedly designed to combat "voter fraud" as a pretext for discriminatory disenfranchisement.[169] More broadly, accusations of invidious intent tend to be leveled against the Republican Party today when it comes to race

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[165] *See supra* section II.A.2, pp. 902–05 (suggesting that pretext and purpose tests have become the most important judicial devices for regulating constitutional bad faith).

[166] Lawrence Gene Sager, *The Supreme Court, 1980 Term — Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 77 (1981).

[167] *See* Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 889 (1998) ("[S]outhern states adopted formal measures such as poll taxes, literacy tests, and residency requirements to supplement the de facto disfranchisement of blacks already accomplished through violence and fraud by the late 1880s.").

[168] 364 U.S. 339, 340 (1960); *see also id.* at 347 (finding that an otherwise "absolute" state power was used in this instance "as an instrument for circumventing a federally protected right").

[169] *See, e.g.*, LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD 89 (2010) (describing "Republican efforts to tar the Democrats with . . . fraud allegations in order to suppress the votes of their most vulnerable voters," including "African Americans, Latinos, and other socially subordinate groups"); David Schultz, *Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 486 (2008) ("[V]oter fraud is used as a pretext for a broader agenda to disenfranchise Americans and rig elections.").

and national origin discrimination[170] and against the Democratic Party when it comes to anti-Christian discrimination,[171] to name just a few especially salient categories. Newt Gingrich's charge that President Obama has set out to impose an unconstitutional "secular-socialist machine" through his economic policies and judicial appointments,[172] notwithstanding President Obama's regular appeals to religion, is among other things a charge of subjective bad faith.

On a more abstract plane, some critics with libertarian sympathies appear to associate this brand of bad faith with judges' and scholars' ritualistic invocation of the maxim that the federal government has "limited and enumerated powers."[173] In reality, these critics suspect, many of the lawyers who mouth this phrase would be happy to give the federal government the equivalent of a general police power;[174] the function of the formula is to conceal this ambition. Professor Richard Primus has proposed that we view this maxim as a "continuity tender," or "an inherited statement that members of a community repeat in order to affirm their connection to the community's history, even though they may no longer hold the values or face the circumstances that made the statement sensible for their predecessors."[175] While Primus ultimately concludes that the maxim's expressive benefits are outweighed under current conditions by its potential for misuse,[176] he appears to ascribe its longevity to a combination of path dependence and

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[170] *See, e.g.*, sources cited *supra* note 169.

[171] *See, e.g.*, Rod Dreher, *Democrats as the Anti-Christian Party*, AM. CONSERVATIVE (Feb. 12, 2015, 12:01 PM), http://www.theamericanconservative.com/dreher/democrats-as-the-anti-christian-party [http://perma.cc/3U2E-RTFW] ("[M]any of us [Christians] simply do not trust Democrats and liberals when it comes to safeguarding our religious liberty.").

[172] *Gingrich: Democrats Want to Impose "Secular-Socialist Machine*," FOX NEWS (May 16, 2010), http://www.foxnews.com/politics/2010/05/16/gingrich-democrats-want-impose-secular-socialist-machine [http://perma.cc/NMS2-GYRZ]. Lest anyone discount Gingrich's "secular-socialist machine" charge as a stray soundbite, see NEWT GINGRICH WITH JOE DESANTIS, TO SAVE AMERICA: STOPPING OBAMA'S SECULAR-SOCIALIST MACHINE (2010).

[173] *E.g.*, United States v. Butler, 297 U.S. 1, 65 (1936); *see also* United States v. Comstock, 560 U.S. 126, 159, 180 (2010) (Thomas, J., dissenting) (reviewing textual and doctrinal support for the proposition that "[i]n our system, the Federal Government's powers are enumerated, and hence limited," *id.* at 159, and stressing that the Court has "*always* . . . rejected" the idea of a "federal police power," *id.* at 180 (quoting United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring))).

[174] *See, e.g.*, Steven G. Calabresi, *"A Government of Limited and Enumerated Powers": In Defense of* United States v. Lopez, 94 MICH. L. REV. 752, 752 (1995) (criticizing the previous "fifty years of Commerce Clause precedent" as incompatible with "the doctrine that the federal government is one of limited and enumerated powers"); Roger Pilon, Dialogue, *A Court Without a Compass*, 40 N.Y.L. SCH. L. REV. 999, 1009 (1996) ("[B]oth liberals and conservatives have essentially abandoned the idea of limited government that is at the heart of the Constitution, as reflected in the doctrine of enumerated powers.").

[175] Richard Primus, *Why Enumeration Matters*, 114 MICH. L. REV. (forthcoming 2016) (manuscript at 3), http://ssrn.com/abstract=2471924 [http://perma.cc/5DV5-UYLU].

[176] *Id.* at 33–34.

sincere longing for continuity with the past.[177] Viewed less charitably, the maxim has become an instrument of bad faith for left-leaning nationalists who wish to disguise a vision of the constitutional order that they know to be incompatible with the document's text and structure.

A second paradigmatic type of constitutional bad faith, more internal to government, involves (2) *usurpation of another actor's constitutional prerogatives by deliberately violating constitutional constraints or disregarding constitutional duties*. Just as private parties may be in bad faith for taking advantage of a contractual partner or intentionally trespassing on a neighbor's property,[178] so too may government institutions be in bad faith for taking advantage of one another or intentionally trespassing on each other's turf. In each case, "an asymmetry of information or coercive power between the parties" may be "exploited by one to its advantage and to the detriment of the other(s)."[179] The basic structure of the problem is similar, even if the remedial options are not.

This type of opportunistic, boundary-breaching bad faith is implicated by the common charge that judges are "legislating from the bench."[180] With the growth of executive power, it has become associated in an even more acute form with the President, given her ability to implement the Constitution in secrecy and, more generally, her ability to implement policy without effective congressional checks. Sometimes the President may usurp Congress's constitutional prerogatives by disguising her activities or withholding information that members need to exercise their legislative responsibilities.[181] In other instances,

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[177] *Id.* at 13–20. Primus opines at one point that those who want judges to impose stricter internal constitutional limits on congressional power "are well-served to continue repeating the enumeration principle, and surely most will do so in good faith." *Id.* at 33. Primus never engages with the possibility that others who do not believe in the maxim, even at a symbolic or nostalgic level, have been deploying it in bad faith.

[178] *See supra* notes 27–28 and accompanying text.

[179] Mackaay, *supra* note 41, at 14 (discussing opportunism).

[180] "Legislating from the bench" has become a standard trope in Supreme Court dissents, *see, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting) ("[The Court's ruling] is a naked judicial claim to legislative — indeed, *super*-legislative — power; a claim fundamentally at odds with our system of government."), and in Republican presidential rhetoric, *see, e.g.*, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 113, 117 (Feb. 2, 2005) (President George W. Bush) ("[J]udges have a duty to faithfully interpret the law, not legislate from the bench."); *Bush Seeks 'Strict Construction,'* ST. LOUIS POST-DISPATCH, July 21, 1990, at 1A (quoting President George H.W. Bush as stating, "I've always said I want somebody who will be on [the Supreme Court] not to legislate from the bench but to faithfully interpret the Constitution").

[181] *See, e.g.*, Norton, *supra* note 163, at 2–3 (collecting examples of alleged presidential lies to Congress); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257, 274–75, 292–323 (2010) (comparing presidential and congressional secret keeping and considering when the former amounts to a constitutional violation).

the President may appear to arrogate congressional power to herself in plain sight.[182]

Members of Congress, as well as state legislators, are also subject to the suspicion that they would be willing to overstep institutional boundaries (without admitting as much) if politically useful: the serial use of anonymous "holds" by certain senators[183] and bills that would ban flag burning come to mind.[184] Yet at the entity level if not the individual level, Congress is less likely than the executive branch to engage in "self-interest seeking with guile"[185] to the other's detriment, both for the functional reason that partisanship and collective action problems limit its ability to pursue self-aggrandizing strategies of any sort[186] and for the formal reason that the text of the Constitution imposes stricter obligations on the President.[187] Judicial underenforcement of the separation of powers[188] can be expected to have a systematic pro-executive skew when it comes to interbranch opportunism.

Consider, for example, the recent controversies over President Obama's legal justifications for his "deferred action" initiatives for millions of immigrants[189] and the military operations he directed in Libya.[190] An unmistakable strand in the critical commentary portrays these justifications as not simply unpersuasive but insincere — a cynical effort to take advantage of Congress's practical inability to revise

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182 *See, e.g.*, *infra* notes 189–91 and accompanying text (discussing recent examples).

183 *See* Pozen, *supra* note 127, at 39–46 (analyzing these and related tactics as breaches of constitutional convention).

184 *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990) (invalidating the Flag Protection Act of 1989). More specifically, the suspicion of subjective bad faith is that not all congresspersons who have voted for anti-flag-burning laws have done so on a sincere substantive conviction that the laws satisfy the First Amendment, combined with a sincere departmentalist conviction that Congress is constitutionally empowered to defy the Supreme Court's reasoning.

Other recurring examples of opportunistic bad faith in Congress might include the insertion into legislative history of interpretive language that would not have survived a formal vote, or undue legislative specificity amounting to a "judicial" judgment on a particular case. Open-ended delegations to administrative agencies present a more complicated case for bad faith on a private law model, given the way in which these delegations forfeit congressional power rather than (or as well as) aggrandize it. Within the judiciary, a similar complication is presented by efforts to avoid properly presented constitutional questions.

185 WILLIAMSON, *supra* note 38, at 47. This formulation, once again, is the best-known definition of opportunism from the economics literature. *See supra* notes 38–41 and accompanying text.

186 *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414–15, 440–44 (2012).

187 *See* Pozen, *supra* note 127, at 9, 38–39. Congress, accordingly, has less to gain than the executive branch from opportunistic readings of constitutional or statutory language bearing on the separation of powers.

188 *See supra* notes 103–09 and accompanying text.

189 *See, e.g.*, The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C., 2014 OLC LEXIS 2 (Nov. 19, 2014).

190 *See Libya and War Powers: Hearing Before S. Comm. on Foreign Relations*, 112th Cong. 7–17 (2011) (statement of Harold Koh, Legal Adviser, Dep't of State).

or enforce the underlying laws. The President's prior statements about the limits of his immigration enforcement discretion and press reports that he overruled the Office of Legal Counsel (OLC) on Libya are cited as evidence for this view.[191] The gravamen of the charge is not that President Obama lacks a proper understanding of the Constitution, but that he is deficient in his commitment to being bound by the Constitution. The President *knows* he has usurped congressional power and is undeterred. His lawyers' intricate arguments, on this view, are not so much faulty in their execution as they are fraudulent in their pretense to care about constitutional compliance.

Notably, some of the most zealous proponents of presidential power in the executive branch may escape this particular charge of bad faith precisely because they are seen as zealots. Even the fiercest critics of the George W. Bush Administration were often prepared to concede that key decisionmakers sincerely subscribed to the constitutional theories they were using. If Professor John Yoo was in constitutional bad faith when he drafted the "Torture Memo" and other infamous analyses while at OLC, it presumably was not because he was untrue to his beliefs about the Commander in Chief Clause.[192] Causation ran the other way. Yoo was selected to join OLC, and thrust into a leading

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191 *See, e.g.*, Blackman, *supra* note 110, at 285 (stating that "the case for 'bad faith' is palpable" with regard to deferred action, in part because "the President repeated over and over again that he could not act unilaterally"); Louis Fisher, Feature, The Law: *Military Operations in Libya: No War? No Hostilities?*, 42 PRESIDENTIAL STUD. Q. 176, 186–88 (2012) (ridiculing President Obama's legal arguments on Libya as "presidential obfuscation" and "double talk," *id.* at 186, that, along with other arguments, offer no "evidence of consistency, coherence, or commitment to fundamental constitutional principles," *id.* at 188); Charles Krauthammer, *On Immigration, Obama Prefers an Issue over a Solution*, NAT'L POST (Apr. 5, 2013, 9:24 AM), http://news.nationalpost.com/2013/04/05/charles-krauthammer-on-immigration-obama-prefers-an-issue-over-a-solution [http://perma.cc/3A7W-B9QM] (referring to President Obama's "unmistakable bad faith on [immigration] enforcement"); *cf.* Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 64 (2011) (arguing that "treat[ing] OLC's legal advice as presumptively binding enhances the credibility of a president's claims of good faith and respect for the law").

192 *See, e.g.*, JACK GOLDSMITH, THE TERROR PRESIDENCY 144–67 (2007) (explaining that Yoo's opinion on interrogation tactics was so "legally flawed, tendentious in substance and tone, and overbroad" that it had to be withdrawn, *id.* at 151, but adding that in his view Yoo's unqualified defenses of the opinion have been "in good faith," *id.* at 167). If the interrogation opinion was in constitutional bad faith, then, it was for a reason other than the author's insincerity. *See infra* notes 246–47, 268 and accompanying text.

Complicating the case of Yoo, it now appears he was given some false information by the Central Intelligence Agency (CIA) when preparing his interrogation opinion. *See* Mark Danner, *Our New Politics of Torture*, N.Y. REV. BOOKS: NYR DAILY (Dec. 30, 2014, 11:15 AM), http://www.nybooks.com/blogs/nyrblog/2014/dec/30/new-politics-torture [http://perma.cc/PQ5Y-JMTM] ("The CIA was actually misleading the Department of Justice."). It may be that the CIA, and the executive branch as a whole, was acting in subjective bad faith during this episode by deliberately and deceitfully flouting the laws against torture, even if Yoo believed at all times he was giving correct legal advice.

role within the office, because he was already known to hold expansive views on presidential power.[193]

A third paradigmatic type of subjective bad faith involves (3) *inconsistent use of interpretive methodology*. Even if constitutional law features a striking degree of methodological pluralism in its overall practice,[194] individual interpreters may publicly commit to a specific methodology as a matter of principle. These individuals then expose themselves to the charge of bad faith if they are seen to waver from their commitments in any given case. Justice Scalia, for example, has repeatedly been accused of abandoning his professed allegiance to originalism and judicial restraint on an ad hoc, results-driven basis,[195] notwithstanding his efforts to preempt such accusations with the confession that he is a "faint-hearted" originalist.[196] Inconsistency is taken as a mark of hypocrisy.

If a reputation for zealotry may allow executive branch lawyers to escape the charge of opportunistically over-reading presidential power, a reputation for methodological promiscuity, or "eclecticism,"[197] may allow judges to escape this inconsistency-as-hypocrisy charge. By declining to commit to *any* particular interpretive method or hierarchy of methods, a judge denies observers a clear baseline against which to identify deviations. And so one almost never hears the good faith of the more openly freewheeling liberal Justices impugned along these lines. That same freewheeling style is invoked, instead, as a basis for questioning their good faith at a systemic level, or their loyalty to the Constitution.

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193 *See* GOLDSMITH, *supra* note 192, at 23–24; Janet Cooper Alexander, *John Yoo's* War Powers*: The Law Review and the World*, 100 CALIF. L. REV. 331, 333 (2012).

194 *See supra* notes 154–57 and accompanying text. *See generally* Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1 (2014).

195 For a recent catalogue of such charges against Justice Scalia, see Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops* 4–5, 12–14 (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 501, 2015), http://ssrn.com/abstract=2553285 [http://perma.cc/M8RL-7CU7]. Professors Posner and Sunstein analyze such flip-flopping as the product, in many instances, of motivated reasoning and in particular "merits bias." *Id.* at 6; *see also id.* at 15–30.

196 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989). *But cf.* Senior, *supra* note 154, at 24 (quoting Justice Scalia as "repudiat[ing]" the faint-hearted characterization). Justice Scalia, it should be added, gives as good as he gets on this front and repeatedly accuses colleagues of abandoning their professed interpretive ideals. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 587 (2003) (Scalia, J., dissenting) ("I do not myself believe in rigid adherence to *stare decisis* in constitutional cases; but I do believe that we should be consistent rather than manipulative in invoking the doctrine. Today's opinions in support of reversal do not bother to distinguish — or indeed, even bother to mention — the paean to *stare decisis* coauthored by three Members of today's majority in *Planned Parenthood v. Casey*."); *cf.* Richard L. Hasen, *The Most Sarcastic Justice*, 18 GREEN BAG 2D 215 (2015) (analyzing Justice Scalia's brand of sarcasm, which frequently involves questioning the good faith of colleagues in the majority).

197 Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1787–96 (1997).

2. Disloyalty. — In light of government officials' fiduciary (or at least fiduciary-like) duties to the Constitution,[198] constitutional bad faith is linked to disloyalty as well as dishonesty. The Framers' text and Supreme Court doctrine furnish safeguards against some of the most narrowly instrumental forms of disloyalty amounting to financial self-dealing, as in the Emoluments Clauses[199] and the recently minted due process requirement that elected judges recuse themselves from cases involving major campaign donors.[200] Our constitutional history also contains more existential efforts to contain perceived disloyalty at the individual level, as through treason, and at the institutional level, as through nullification and secession.[201] These extreme examples of disloyalty, however, are somewhat hard to square with the private law and international law models of bad faith, which generally involve actors who *purport* to be acting within the system and consistent with other parties' reasonable expectations — so that disloyalty and dishonesty are inextricably intertwined.[202] Classic cases of treason and secession, in contrast, seem more openly and spectacularly defiant of established authority.

A much more general, and perpetual, anxiety in our constitutional culture is that of constitutional bad faith as (4) *double-heartedness or imperfect commitment to the Constitution*. President Obama is routinely accused of this brand of bad faith as well. In its crudest and most conspiratorial manifestation, this accusation is implied by the claim that he was born in Kenya and therefore is constitutionally ineligible to be President.[203] The more mainstream claim that President

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198 *See supra* notes 130–35 and accompanying text. *See generally* Davis, *supra* note 130, at 1147 n.4 (collecting sources applying the fiduciary model to constitutional law); D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 677 (2013) (observing that the "idea of fiduciary government has a distinguished constitutional pedigree" and recognizing a "growing body of scholarship [arguing] that the Constitution . . . should be interpreted with reference to fiduciary principles").

199 U.S. CONST. art. I, § 6, cl. 2 ("No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time . . . ."); *id.* art. I, § 9, cl. 8 (forbidding U.S. officeholders from accepting "any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State" without the consent of Congress).

200 *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

201 A long line of postbellum constitutional thought views secession as itself a form of treason. *See, e.g.*, Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1912–13 (2010) (summarizing Supreme Court doctrine on this point).

202 *See supra* notes 29–32 and accompanying text (noting connections between disloyalty and dishonesty in private law doctrine on bad faith).

203 *See* U.S. CONST. art. II, § 1, cl. 5 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President . . . ."); Kevin R. Johnson, *Immigration and Civil Rights: Is the "New" Birmingham the Same as the "Old" Birmingham?*, 21 WM. & MARY BILL RTS. J. 367, 382–83 (2012) (describing the "birther" movement, which promotes this claim).

Obama is a "secular-socialist" in disguise[204] also gains force from the insinuation of divided loyalty — from the suggestion that he is only partially committed, at best, to presumed constitutional ideals of limited government, religious devotion, and capitalist enterprise.[205] These claims about President Obama are not always presented in legal language, but they are constitutional as well as political statements insofar as they seek to delegitimize his actions on the basis of an alleged failure of fidelity to constitutional text or values.

If the charge of bad faith as deliberate usurpation of another actor's constitutional prerogatives generalizes to administrations beyond President Obama's, this charge of bad faith as divided loyalty generalizes to other left-liberals, both in and out of government. Conservative commentators routinely depict interpretive approaches associated with left-liberals, such as "living constitutionalism," as tainted by imperfect loyalty to the canonical document, to the Framers, or to the very idea of a written constitution.[206] (A parallel, though less prominent, strain of commentary on the political left accuses conservatives of refusing to accept the full scope of constitutional change wrought by the Reconstruction Amendments.[207]) Henry Monaghan's famous 1981 essay on "our perfect Constitution" was seen to cut so deeply, I believe, because in mocking liberals' tendency to find in the Constitution all of the equality and autonomy guarantees they favored, Monaghan was simultaneously questioning their commitment to the project of constitutionalism.[208]

Last generation's distinction between "interpretivism" (roughly, some form of text-based originalism) and "non-interpretivism" brought this issue to the surface.[209] Everyone who eschews the former ap-

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[204] GINGRICH WITH DESANTIS, *supra* note 172.

[205] In this vein, Rudy Giuliani's much-publicized remark that he does "not believe that the president loves America" or appreciates that "we're the most exceptional country in the world," Darren Samuelsohn, *Giuliani: Obama Doesn't Love America*, POLITICO (Feb. 18, 2015, 11:29 PM), http://www.politico.com/story/2015/02/rudy-giuliani-president-obama-doesnt-love-america-115309.html [http://perma.cc/B9CS-LL55], seems calculated to imply that President Obama does not see anything particularly admirable — anything worthy of undivided loyalty — about the United States.

[206] *See, e.g.*, David E. Bernstein, *Obama's Con Law*, COMMENTARY, Oct. 2014, at 23, 25 (maintaining that the left-leaning American Constitution Society "doesn't privilege the rule of law over other priorities like 'genuine equality' and 'access to justice,'" which reflects "liberal discomfort with fixed constitutional meaning"); Robert J. Pushaw, Jr., *Methods of Interpreting the Commerce Clause: A Comparative Analysis*, 55 ARK. L. REV. 1185, 1205 & n.98 (2003) ("borrow[ing] heavily" from prominent conservative sources in contending that the "concept of a 'living Constitution' seems to subvert the entire idea of a written Constitution").

[207] I take this to be the premise of the repeated references to "constitutional bad faith" in Forbath's scholarship. *See supra* note 112.

[208] *See generally* Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

[209] *See* William L. Reynolds, Book Review, 44 MD. L. REV. 204, 205–08 (1985) (reviewing MICHAEL J. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982)) (out-

proach, this dichotomy suggests, is not even engaged in the practice of interpretation but rather in some other, unidentified enterprise.[210] So, too, on the current Supreme Court, when Justice Scalia criticizes his colleagues' resort to foreign sources, it often reads as if he is questioning not just how they are construing the Constitution but whether they are construing the Constitution at all.[211] The Court's willingness to hunt for interpretive guidance so far beyond the document's four corners and the nation's borders, Justice Scalia implies, is not simply misguided but ill-motivated — a disloyal attempt to "impose foreign moods, fads, or fashions on Americans."[212] The insinuation of constitutional bad faith elevates an abstract methodological critique to the level of a personal moral critique.

B. Objective Bad Faith

As in American private law, bad faith in the constitutional context does not necessarily require a showing of dishonesty, disloyalty, or the like. In some instances, unreasonable or inequitable conduct may suffice. Allegations of objective bad faith often coincide with and reinforce allegations of subjective bad faith,[213] but at least in theory the categories are separable.

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lining the debate between these "two major camps" in constitutional jurisprudence, *id.* at 205); *see also* Tushnet, *supra* note 156, at 782 (defining interpretivism as the view that "judges 'should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution,' . . . with recourse when necessary to the intent of the framers" (quoting ELY, *supra* note 79, at 1)).

210 The suggestion became explicit in Professor John Hart Ely's famous claim that *Roe v. Wade* "is *not* constitutional law and gives almost no sense of an obligation to try to be." John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973). Given the connotations of "non-interpretivism," decried in H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 659 n.1 (1987), it seems remarkable in hindsight that some significant number of constitutional theorists *embraced* this characterization of their approach. It is hard to imagine the American Constitution Society (ACS) tolerating this characterization today. *See generally, e.g.*, GOODWIN LIU ET AL., KEEPING FAITH WITH THE CONSTITUTION (2010) (advocating, in one of ACS's first major publications, a "constitutional fidelity" approach to constitutional interpretation). The prevalence of the non-interpretivist label in the 1970s and 1980s suggests that the cultural association of textualism and originalism, on the one hand, with constitutional conscientiousness and commitment, on the other, was not nearly as strong then as it is now.

211 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) ("Constitutional entitlements do not spring into existence, . . . as the Court seems to believe, because *foreign nations* decriminalize conduct."); Thompson v. Oklahoma, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting) (underscoring that "it is a Constitution for the United States of America that we are expounding" and that "the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution").

212 *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (quoting Foster v. Florida, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring in denial of certiorari)).

213 *See supra* notes 33–37 and accompanying text (summarizing objective bad faith in American private law and noting its tendency to merge with subjective bad faith in judicial analyses).

Many disputes over objective bad faith in constitutional politics concern the interactions among the various institutions of government and a claim of unfair dealing.[214] One variant involves an officeholder's (5) *unwillingness to compromise or negotiate across branch or party lines*. This variant is associated in the public mind with any number of elected officials in the current era of hyperpolarization,[215] although more so with the Republican Party[216] and above all with the Tea Party at this specific moment in time.[217]

To take one prominent example, consider then–Senate Minority Leader Mitch McConnell's pronouncement that "the single most important thing we want to achieve is for President Obama to be a one-term president."[218] Such an extreme commitment to interbranch adversarialism may not be incompatible with the constitutional oath, insofar as senators have no legally binding obligation to cooperate with the President and Senator McConnell believes that displacing President Obama is itself a means to support the Constitution. Senator McConnell's state of mind may have been irreproachable. Certainly his candor was striking.

As in other fields, however, technical legality and a pure heart are not jointly sufficient to ensure a perception of good faith. Senator McConnell's approach seems hard to square with the idea held by some that leaders of the political branches have a practical obligation — implicit in the constitutional structure and explicitly enforced in analogous areas of law — to negotiate in good faith "with a view to reaching agreement" and "a genuine intention to achieve a positive result."[219] President Obama's retort that "today's pattern of obstruction"

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[214] *Cf. supra* note 33 and accompanying text (noting the emphasis on "fair dealing" in the U.C.C.'s general definition of good faith).

[215] *See generally* Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011) (documenting and diagnosing hyperpolarization).

[216] *See, e.g.*, Bruce Drake, *Public Sees GOP as Less Willing than Democrats to Reach Across the Aisle*, PEW RES. CTR. (Jan. 29, 2014), http://www.pewresearch.org/fact-tank/2014/01/29/public-sees-gop-as-less-willing-than-democrats-to-reach-across-the-aisle [http://perma.cc/Q389-Z3DF] (reporting 2014 survey results finding that the "public sees Democrats as more willing than Republicans to work with leaders from the other party by a 25-point margin").

[217] *See, e.g.*, Jared A. Goldstein, *The Tea Party Movement and the Perils of Popular Originalism*, 53 ARIZ. L. REV. 827, 862 (2011) ("By characterizing a great number of ideas and people as un-American, anti-American, or foreign, the Tea Party movement seeks to marginalize many proposals in political debate. As Tea Party supporters declare, there can be no compromise or dialogue with those who would destroy America.").

[218] Michael A. Memoli, *Mitch McConnell's Remarks on 2012 Draw White House Ire*, L.A. TIMES (Oct. 27, 2010), http://articles.latimes.com/2010/oct/27/news/la-pn-obama-mcconnell-20101027 [http://perma.cc/C9QL-QQDT] (quoting Senator McConnell).

[219] Delimitation of Maritime Boundary in Gulf of Maine Area (Can./U.S.), Judgment, 1984 I.C.J. 246, ¶ 87 (Oct. 12) (discussing the duty of good faith in public international law); *see also, e.g.*, Pozen, *supra* note 127, at 75–76 (describing the strain of separation of powers theory that in-

is "not what our Founders envisioned" and jeopardizes "the ability of any President to fulfill his or her constitutional duty"[220] is best understood, I think, as a claim that Republican representatives like Senator McConnell have been acting in objective bad faith: that no matter what their motives, they have violated a principle of fair dealing that allows the entire constitutional system to work.[221]

Objective bad faith may consist, more generally, in (6) *unwarranted deviations from constitutional convention*. Constitutional conventions are unwritten norms of government practice that are regularly followed out of a sense of obligation but are not directly enforceable in court.[222] They facilitate coordination among "the major organs and officers of government."[223] As they develop over time in a decentralized fashion, conventions come to embody and entrench shared understandings of "how things are done around here."

Allegations of convention breaches abound these days. After they accused their Republican counterparts of refusing to bargain in good faith over the Affordable Care Act[224] (ACA), for instance, congressional Democrats were accused in turn of violating convention by ramming the bill through without bipartisan support.[225] In recent decades, many debates over unwritten norms of constitutional practice have centered on the efforts of congresspersons from the opposing political party to thwart the President's agenda, and the executive countermeasures that follow. Presidents Clinton and George W. Bush railed against efforts they saw as departing from established custom.[226]

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sists on "a structural principle of workable government," *id.* at 76); Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1101 (arguing that congressional gridlock of the sort endorsed by Senator McConnell "poses such a threat to separation of powers that it places in peril the entire foundational premises of American government").

220 Remarks on Procedural Rule Changes in the Senate, 2013 DAILY COMP. PRES. DOC. 795, at 1–2 (Nov. 21, 2013).

221 Illuminating further how such a principle might be justified and operationalized, a new paper by Professor Vicki Jackson draws on political theory and comparative practice to argue that elected representatives have a "pro-constitutional" obligation to act in ways that promote working government. Vicki C. Jackson, *Constitutional Democracy and Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives*, 57 WM. & MARY L. REV. (forthcoming 2015/16).

222 *See* Pozen, *supra* note 127, at 29–33 (reviewing constitutional conventions); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–94 (2013) (reviewing conventions).

223 GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS 1 (1984).

224 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

225 *See* JOSH BLACKMAN, UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE 301 (2013); William P. Marshall, *Warning!: Self-Help and the Presidency*, 124 YALE L.J.F. 95, 113–14 (2014).

226 *See, e.g.*, Statement on the Recess Appointment of William H. Pryor, Jr., as a United States Court of Appeals Circuit Judge, 1 PUB. PAPERS 247, 247 (Feb. 20, 2004) (President Bush) (contending that "a minority of Democratic Senators has been using unprecedented obstructionist tac-

This rhetoric intensified after President Obama took office, as Republican Senators engaged in new forms of obstructionism and President Obama responded with increasingly aggressive maneuvers of his own.[227] Claims about the other side's "unprecedented"[228] tactics have ethical content in light of the theory of constitutional conventions; they imply an abuse of process or power. When a convention is seen to promote cooperation and fair play across government and thereby "the effective working of the machinery of political accountability,"[229] any claim of unjustified breach carries with it a suggestion of objective bad faith.

If minority-party legislators may be in bad faith for making it inordinately difficult to pass new laws, Presidents may be in bad faith for corrupting the laws on the books through (7) *evasion of the spirit of the bargain*.[230] Unlike in a standard bilateral contract setting, the President alone executes the legal agreements that the political system generates, in the form of statutes and joint resolutions.[231] And it therefore falls to the President alone to make good on whatever congressional–executive, House–Senate, and Democratic–Republican "bargains" they contain. While in principle this structure ensures legislative supremacy over lawmaking, in practice it gives the executive greater scope to engage in opportunism at the other branch's expense. Just as she risks being accused of bad faith on the international plane if she interprets a treaty in an unintended, self-serving manner, the President risks being

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tics to prevent . . . qualified nominees from receiving up-or-down votes"); The President's News Conference, 2 PUB. PAPERS 1676, 1676–77 (Oct. 25, 1995) (President Clinton) (contending that congressional Republicans' threat to "let the country go into default" is inconsistent with "more than two centuries" of tradition, *id.* at 1676, and "not an acceptable basis for good-faith efforts to resolve our differences," *id.* at 1677).

227 *See generally* Pozen, *supra* note 127, at 39–48 (reviewing these developments).

228 *See, e.g.*, Letter from President Barack Obama to Senators Harry Reid, Mitch McConnell, Patrick J. Leahy & Jeff Sessions 1 (Sept. 30, 2010), http://www.politico.com/static/PPM153_cc_093010.html [http://perma.cc/3VNV-68PP] (condemning "unprecedented obstruction" of judicial nominations); *It's Time to Fix This Unprecedented Obstruction*, DEMOCRATIC POL'Y & COMM. CTR. (Nov. 22, 2013), http://www.dpcc.senate.gov/?p=blog&id=276 [http://perma.cc/R4LQ-N96C] (same); Jon Perr, *The Republicans' Unprecedented Obstructionism by the Numbers*, CROOKS & LIARS (Oct. 13, 2011, 4:00 PM), http://crooksandliars.com/jon-perr/republicans-unprecedented-obstructionism-by-numbers [http://perma.cc/PN33-PK9Q] ("As it turns out, 'unprecedented' is [an] apt description for almost every boulder in the stone wall of Republican obstructionism Barack Obama has faced from the moment he took the oath of office.").

229 MARSHALL, *supra* note 223, at 210. I take this to be the standard view of constitutional conventions among theorists and politicians, although its empirical and normative validity are both open to question. For particularly pointed skepticism, see Adrian Vermeule, *Conventions in Court* 2 (Harvard Pub. Law Working Paper 13-46, 2013), http://ssrn.com/abstract=2354491 [http://perma.cc/AP9S-7487] (asserting that the decentralized manner in which conventions arise "undermines the deliberateness, responsiveness and accountability" of democratic lawmaking).

230 *Cf. supra* note 34 and accompanying text (noting that "evasion of the spirit of the bargain" is a recognized form of objective bad faith in American contract law).

231 *See* U.S. CONST. art. II, § 3 (Take Care Clause).

accused of bad faith on the domestic plane if she interprets a statute in a way that seems to defy its underlying purposes or presuppositions.

This accusation, too, has been leveled repeatedly at President Obama. Senators outraged by his position that U.S. armed forces were not engaged in "hostilities" in Libya within the meaning of the War Powers Resolution, for example, complained that this position was "just patently not the intent of Congress" when it passed the Resolution.[232] Critics have attacked his reading of the Immigration and Nationality Act[233] (INA) on similar grounds.[234] Seen through the lens of private law or international law, these criticisms imply that even if President Obama sincerely believes he has solid legal arguments in support of his actions — and therefore is not acting in subjective bad faith — he may nevertheless be guilty of bad faith for doing violence to the enacting Congress's legitimate expectations about how its laws would be implemented.

The President has no monopoly on this brand of interpretive bad faith; similar charges are periodically hurled at the judiciary as well. The recent case of *King v. Burwell*[235] provides a topical illustration.[236] Alarmed that the conservative Justices might invalidate millions of Americans' insurance tax credits under a rigid reading of one clause of the ACA, liberal commentators argued in the months leading up to the decision that such a ruling would make a mockery of the Act's aim to guarantee affordable health care for all.[237] Supporters of the lawsuit

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[232] *Libya and War Powers: Hearing Before the S. Comm. on Foreign Relations*, *supra* note 190, at 25 (statement of Sen. Bob Corker); *see also id.* (describing the Administration's legal position as a "cute argument" that "undermine[s] the integrity of the War Powers Act").

[233] Pub. Law No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of the U.S. Code).

[234] *See, e.g.*, Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1185 (2015) (contending that President Obama's Deferred Action for Parents of Americans initiative is "clearly inconsistent" with the policies and priorities animating the INA).

[235] 135 S. Ct. 2480 (2015).

[236] Although *King v. Burwell* is a statutory case, the bad faith argument summarized in this paragraph is nonetheless of constitutional dimension insofar as it calls into question the legitimacy of an anticipated act of judicial review. Allegations of interpretive opportunism are tantamount to allegations of constitutional bad faith, it seems to me, whenever they imply a deliberate distortion of the President's constitutional duty to execute the laws or the judiciary's constitutional "duty . . . to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[237] *See, e.g.*, Nicholas Bagley, *Three Words and the Future of the Affordable Care Act*, 40 J. HEALTH POL. POL'Y & L. 589, 590 (2015) (arguing that the challengers would "assign[] a meaning to the ACA that is blatantly at odds with what the statute aims to accomplish"); Rob Weiner, *Politics by Other Means*, BALKINIZATION (Aug. 16, 2014, 3:15 PM), http://balkin.blogspot.com/2014/08/politics-by-other-means.html [http://perma.cc/UU9K-U99K] ("[T]he universal assumption when the ACA was enacted was that the tax subsidies were available to low income families in *all* states. . . . [N]o principled form of textualism, nor any other legitimate mode of statutory interpretation, blinds itself to such common understanding."); *see also id.* (describing this litigation as "an

disagreed of course, and the very idea that statutes can have a coherent "spirit" or purpose is contested in American public law.[238] Indeed, if ACA supporters were worried that the Court might disrupt Congress's handiwork through an implausible literalism, a more general counterconcern in the textualism and positive-political-theory literature emphasizes that abstract appeals to a statute's spirit can have unintended disruptive effects of their own.[239] Both sides in these interpretive debates fear that judges, however good their intentions, will effectively rewrite legislative bargains and thereby subvert the constitutional lawmaking process.

Finally, and most broadly, constitutional actors of all stripes may be accused of bad faith for making (8) *interpretive arguments that are so unreasonable as to betray a furtive design or malicious state of mind*. The perceived weakness or outlandishness of someone's constitutional reasoning, that is, may furnish evidence that she is up to no good. As is common in private law and international law, objective critiques fuel suspicions of subjective impropriety.[240]

Notwithstanding the difficulties of determining what is objectively unreasonable in constitutional law,[241] these sorts of accusations seem ubiquitous in constitutional commentary (including in the debates reviewed just above). Many on the political left, for example, have analyzed the historical shortcomings of opinions like *District of Columbia v. Heller*[242] and the novel reasoning of opinions like *Bush v. Gore*[243] in these terms, while many on the political right have analyzed

effort by the losing side in a legislative battle to induce credulous or partisan judges to overturn the policy choices of our elected representatives").

238 *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 334 (1990) (noting the public-choice view that "[t]o speak of a statute's 'purpose' is incoherent, unless one means the deal between rent-seeking groups and reelection-minded legislators"); *cf. supra* note 124 and accompanying text (summarizing familiar difficulties of inferring legislative motives or purposes). I take no position in this Article on this debate. The point here, as throughout, is not that any given assertion of bad faith is well founded, but rather that we cannot hope to understand many constitutional debates without appreciating the ways in which participants call each other's good faith into question.

239 *See, e.g.*, John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2411–12 (2003) ("[T]extualists argue that if a judge curtails or extends the clear terms of a statutory text, he or she risks disturbing a carefully wrought (but perhaps unrecorded) legislative deal.").

240 *See supra* note 37 and accompanying text. Even more so than the other varieties of constitutional bad faith, this variety thus straddles the subjective/objective line.

241 *See supra* notes 151–57 and accompanying text.

242 554 U.S. 570 (2008); *see, e.g.*, Saul Cornell, Heller*, New Originalism, and Law Office History: "Meet the New Boss, Same as the Old Boss*,*"* 56 UCLA L. REV. 1095, 1098 (2009) ("[I]f one looks closely at *Heller*, . . . it seems clear that the case is . . . really just the latest incarnation of the old law office history — a results oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion." (footnote omitted)).

243 531 U.S. 98 (2000); *see, e.g.*, Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123, 182 n.200 (2006) (describing the majority's "implausible equal protection chimera barely masking an underlying political cast"); *cf.* Jamin B.

the textually cavalier method of opinions like *Roe v. Wade*[244] and the novel reasoning of opinions like *Lawrence v. Texas*[245] in these terms. Even though John Yoo's "Torture Memo" tracked his academic views on executive power,[246] its analysis was widely seen as so "riddled with error" and "plainly wrong" as to reveal an underlying mendacity.[247] Throughout constitutional discourse, charges of *bad* arguments bleed into charges of *bad faith* argumentation. Implausibility is equated with dishonesty or ill will.

C. Sartrean Bad Faith

But what of the possibility, associated with Sartre, that a person's bad faith may be turned inward, so that she hides the truth from herself?[248] A brief review of two prominent accounts of self-deception will help to frame the inquiry into Sartrean bad faith in constitutional practice specifically.

On the psychological side, a large body of research establishes the influence in diverse contexts of motivated reasoning, or "the unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs."[249]

Raskin, *What's Wrong with* Bush v. Gore *and Why We Need to Amend the Constitution to Ensure It Never Happens Again*, 61 MD. L. REV. 652, 668 (2002) ("Many critics of the *Bush v. Gore* decision have assailed the five Justices in the majority for acting in bad faith — hypocritically, with the knowledge that they were betraying their own principles for partisan purposes.").

[244] 410 U.S. 113 (1973); *see, e.g.*, Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1011–14 (2003) (ridiculing *Roe*'s reasoning as "utterly laughable," *id.* at 1011, and linking its defects in craft to "mischievous" and "manipulati[ve]" judicial designs, *id.* at 1013, 1014).

[245] 539 U.S. 558 (2003); *see, e.g.*, *id.* at 603 (Scalia, J., dissenting) (criticizing "the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change").

[246] *See supra* notes 192–93 and accompanying text (explaining that Yoo largely evaded the charge of bad faith as insincerity or hypocrisy).

[247] OFFICE OF PROF'L RESPONSIBILITY, DEP'T OF JUSTICE, INVESTIGATION INTO THE OFFICE OF LEGAL COUNSEL'S MEMORANDA CONCERNING ISSUES RELATING TO THE CENTRAL INTELLIGENCE AGENCY'S USE OF "ENHANCED INTERROGATION TECHNIQUES" ON SUSPECTED TERRORISTS 160 (2009) (quoting Professor Jack Goldsmith); *see also id.* at 11 n.10, 251–54 (finding that Yoo "committed intentional professional misconduct" by "knowingly" providing flawed legal advice, *id.* at 251–54, and indicating that Yoo would be referred for bar discipline, *id.* at 11 n.10).

[248] *See supra* notes 42–48 and accompanying text (summarizing Sartre's understanding of bad faith).

[249] Kahan, *supra* note 160, at 19; *see also* Peter H. Ditto et al., *Motivated Moral Reasoning*, *in* 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 307, 310 (Daniel M. Bartels et al. eds., 2009) (reviewing "a wealth of social psychological research suggest[ing] that in many judgment situations," people's "directional motivations serve to tip judgment processes in favor of whatever conclusion is preferred" (citation omitted)); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOL. BULL. 480, 480 (1990) (noting "considerable evidence that people are more likely to arrive at conclusions that they want to arrive at"). Motivated reasoning is closely related to, and on some accounts an umbrella term for, a cluster of psychological phenomena including cognitive dissonance, confirmation bias, myside bias, and belief perseverance.

In recent years, scholars have demonstrated how motivated reasoning and related dynamics lead people to fit their views of the law to their political preferences, moral values, and cultural worldviews — all while maintaining an "illusion of objectivity" that blinds them to their own biases.[250] The goals and needs that drive such reasoning are diverse, as are the psychological mechanisms that underlie it.[251] In macro, however, Sartre's basic insight about the prevalence of self-deception has been amply borne out by modern social science. Moreover, as Professor Dan Kahan has underscored, because people are much better at detecting the effects of motivated reasoning in others than in themselves, this same phenomenon may generate cynicism and suspicion about those who reach different legal conclusions.[252] Motivated reasoning induces both the reality of internal, Sartrean bad faith and the perception of external, subjective bad faith.

Sartre himself was particularly interested in lies that downplay or deny one's freedom of action.[253] On the critical side, Professor Duncan Kennedy has argued that this sort of self-deception is a general feature of adjudication, owing to the judge's "role conflict."[254] The role of the jurist demands that she be "above" politics and that she justify her decisions "in the language of legal necessity,"[255] while at the same time constantly requiring her "to take positions on legal questions that have no self-evident legal answers."[256] The normativity of the job does not

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[250] Ditto et al., *supra* note 249, at 311 (quoting Kunda, *supra* note 249, at 483; Tom Pyszczynski & Jeff Greenberg, *Toward an Integration of Cognitive and Motivational Perspectives on Social Inference: A Biased Hypothesis-Testing Model*, *in* 20 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 297, 317 (Leonard Berkowitz ed., 1987)). This legal literature is already vast. For a small sample of notable works, see EILEEN BRAMAN, LAW, POLITICS, & PERCEPTION (2009); Joshua Furgeson & Linda Babcock, *Legal Interpretation and Intuitions of Public Policy*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 684 (Jon Hanson ed., 2012); and Dan M. Kahan et al., *"They Saw a Protest": Cognitive Illiberalism and the Speech-Conduct Distinction*, 64 STAN. L. REV. 851 (2012).

[251] *See* Kahan, *supra* note 160, at 19–26; Kunda, *supra* note 249, at 482–92.

[252] *See* Kahan, *supra* note 160, at 7 ("[A]lthough people are poor at detecting motivated reasoning in themselves, they can readily discern its effect in others, in whom it is taken to manifest bias or bad faith."); *see also* Emily Pronin et al., *The Bias Blind Spot: Perceptions of Bias in Self Versus Others*, 28 PERSONALITY & SOC. PSYCHOL. BULL. 369, 369 (2002) (finding evidence "that individuals see the existence and operation of cognitive and motivational biases much more in others than in themselves"). Kahan never explains how he is using the term "bad faith," but in context it seems clear that he has deception of others, or subjective bad faith, in mind. *See, e.g.*, Kahan, *supra* note 160, at 57 (arguing that sanctimonious theorizing "communicates *either* self-deception *or* bad faith" (emphases added)).

[253] *See supra* notes 43–48 and accompanying text.

[254] *See* KENNEDY, CRITIQUE OF ADJUDICATION, *supra* note 48, at 202–05; Kennedy, *Hermeneutic of Suspicion*, *supra* note 48, at 125–27.

[255] Kennedy, *Hermeneutic of Suspicion*, *supra* note 48, at 134.

[256] *Id.* at 125; *cf.* Robert A. Ferguson, *The Judicial Opinion as Literary Genre*, 2 YALE J.L. & HUMAN. 201, 206–07 (1990) ("The one thing a judge never admits in the moment of decision is freedom of choice. The monologic voice of the opinion can never presume to act on its own. It

match its phenomenology. Denial of the ideological element in one's decisionmaking — coupled with a projection of those same denied ideological impulses onto *other* judges — provides a way out of this bind.[257] A trace of self-awareness remains, however. The judge senses at some level that her "effort to submerge ideology in neutral legal reasoning is phony but refuses, ostrich-like, to acknowledge this. A frank avowal would be too painful . . . ."[258]

In short, both the evidence on motivated reasoning and Kennedy's critique of adjudication imply that the (largely untold) story of Sartrean bad faith in constitutional law must be understood in the context of a larger story about Sartrean bad faith in law and society. Nothing in this literature suggests that people would be less susceptible to the forces of self-deception where the Constitution is concerned. On the contrary, I will argue in the next Part that Sartrean bad faith is likely to be especially acute in this realm — so acute, indeed, that many of the accusations reviewed above may have been focused on the wrong kind of bad faith. Kennedy's and Kahan's claims can be sharpened by attending to the distinctive characteristics of constitutional practice.

Before turning to those points, however, let me briefly sketch some of the prototypical forms that Sartrean bad faith can take in the constitutional context. As reflected in Kennedy's focus on the "transcendent" dimension of Sartre's thought, the classic indicator of Sartrean bad faith across all legal fields is (9) *necessitarian assertion about what the law "must" mean*. These claims may entail self-deception insofar as they allow advocates to hide from themselves the ineradicable contingency and ambiguity of legal meaning and the ineradicable discretion and responsibility that follow. Roughly speaking, the claims may

must instead appear as if forced to its inevitable conclusion by the logic of the situation and the duties of office . . . .").

257 Kennedy, *Hermeneutic of Suspicion*, *supra* note 48, at 124–36. "Condemnation of the other is a diverted form of self-condemnation." *Id.* at 124.

258 Richard A. Posner, *Bad Faith*, NEW REPUBLIC, June 9, 1997, at 34, 36 (reviewing KENNEDY, CRITIQUE OF ADJUDICATION, *supra* note 48). Although judges are especially drawn to legalistic self-deception on this account, Kennedy argues that law professors exhibit similar tendencies. Kennedy, *Hermeneutic of Suspicion*, *supra* note 48, at 128. The only legal actors in the system who might be able to avoid role conflict, Kennedy suggests, are "cause lawyers" who openly and unabashedly see themselves as ideological advocates. *Id.* at 128–31. We might extend Kennedy's suggestion to encompass all lawyers who work openly for a client or a cause and who are not themselves government officials with cross-cutting fiduciary obligations to the Constitution and the People. Role fidelity, for these lawyers, may not just countenance but *demand* the presentation of arguments that are not wholly subjectively believed or objectively persuasive, *see* Seidman, *supra* note 160, at 9 ("We generall[y] expect people to be honest with us when they argue about issues of importance, but [practicing] lawyers insist as a point of pride that they are exempt from this expectation."), rendering these lawyers less susceptible to the operations or accusations of bad faith of any kind. *But cf. id.* at 10 (noting that this conception of the lawyer's role morality is contested).

operate either at the level of theory-choice — for example, "the only way to interpret the Constitution is according to the theory of pragmatism" — or at the level of theory-application — for example, "the only way to resolve this particular dispute, as a pragmatist, is to find for the challengers."[259]

At the level of theory-choice, this subtype of Sartrean bad faith seems to be especially (though by no means exclusively) linked in constitutional culture with certain strains of originalism. Two of the standard arguments made on behalf of originalism — that it follows from the fact of a written constitution[260] and that it minimizes judicial discretion[261] — set off Sartrean alarm bells. The reason is not that originalism fails to supply a uniquely correct or constraining approach to constitutional interpretation. The reason is that, on the Sartrean view, there may well be *no* such approach, and yet some of originalism's defenders have declared or implied that "the original meaning of a document is its real meaning, and anything else is making it up."[262]

This claim to a prepolitical, ontologically or conceptually required methodology, Judge Richard Posner once opined, can be seen as "an example of bad faith in Sartre's sense — bad faith as the denial of freedom to choose, and so the shirking of personal responsibility."[263] While on the bench, Justice Brennan and Justice Stevens repeatedly echoed this theme in opinions that insisted Justice Scalia's methodology was no less malleable than their own reliance on principle and

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[259] I draw the terms "theory-choice" and "theory-application" from an illuminating new paper on the role of ideological reasoning in constitutional theory. *See* Gregory Brazeal, Constitutional Fundamentalism 39–44 (Jan. 8, 2015) (unpublished manuscript), http://ssrn.com/abstract=2547088 [http://perma.cc/MK7E-AQLH]. Although this subtype of Sartrean bad faith is especially associated with judges, other constitutional actors have been accused of it as well. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Crises*, 157 U. PA. L. REV. 707, 731 (2009) (suggesting that President Buchanan's ineffectual response to the crisis of the impending Civil War was attributable, at least in part, to his "unnecessarily narrow reading of the Constitution").

[260] *See, e.g.*, Larry Alexander, *Telepathic Law*, 27 CONST. COMMENT. 139, 139 (2010) ("Originalists like me . . . argue that when one is interpreting a text, . . . one is necessarily seeking its author's or authors' intended meaning."); *cf.* Lawrence B. Solum, *Semantic Originalism* 133 (Ill. Pub. Law & Legal Theory Research Papers Series, Paper No. 07-24, 2008), http://ssrn.com/abstract=1120244 [http://perma.cc/N8CS-LPJ5] (noting that a "standard argument for originalism focuses on the fact that the constitution is a written text").

[261] *See* Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 288 (2009) ("[M]any of originalism's proponents claim that their approach is uniquely capable of constraining judges' ability to impose their views under the guise of constitutional interpretation.").

[262] William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. (forthcoming 2015) (manuscript at 3) (on file with author). I stress that many originalists do not advance this claim. (Professor Baude certainly does not.) But enough have made the claim, or some cousin of it, as to foster the perception in constitutional culture of a link between originalism and Sartrean bad faith. The existence of that perceived link is all I mean to highlight here.

[263] RICHARD A. POSNER, HOW JUDGES THINK 104 (2008).

precedent.[264] If the conservative/originalist critique of living constitutionalism sees in the latter the specter of bad faith as divided loyalty,[265] the liberal/living-constitutionalist critique of originalism sees in the latter the specter of bad faith as agency-denying self-deception.[266]

For their part, those who are identified as living constitutionalists hardly escape the clutches of Sartrean bad faith. They are just associated with a different flavor, involving the (10) *minimizing of inconvenient facts about the Constitution and the judicial role*. Whereas originalists tend to be charged with Sartrean bad faith for denying their own transcendence, living constitutionalists are more likely to be charged with Sartrean bad faith for denying the facticity of their situation: the concrete constraints that come with a written Constitution and the social expectations it generates.[267] Nonoriginalists are routinely accused not of making too much of their interpretive or institutional limitations but rather of "making it up" while purporting, to themselves and others, to be law bound.[268] The alleged bad faiths of our

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[264] *See, e.g.*, McDonald v. City of Chicago, 130 S. Ct. 3020, 3117 (2010) (Stevens, J., dissenting) ("It is hardly a novel insight that history is not an objective science, and that its use can therefore 'point in any direction the judges favor.' Yet 21 years after the point was brought to his attention by Justice Brennan, Justice Scalia remains 'oblivious to th[at] fact . . . .'" (citation omitted) (first quoting *id.* at 3058 (Scalia, J., concurring); then quoting Michael H. v. Gerald D., 491 U.S. 110, 137 (1989) (Brennan, J., dissenting))).

[265] *See supra* notes 203–12 and accompanying text.

[266] A harsher version of this critique charges originalists not with Sartrean bad faith, or the complicated deception of self, but with subjective bad faith, or the calculated deception of others. *See* Adam M. Samaha, *Talk About Talking About Constitutional Law*, 2012 U. ILL. L. REV. 783, 784–85 (discussing this "darker suspicion" that "sometimes" surfaces, *id.* at 784). On my reading of the critical literature, the more common charge is of the Sartrean variety. In an essay from 2005, for example, Professor David Strauss contends that originalism fosters a lack of candor by requiring adherents to deny, implausibly, that they are "moved *at all* by the moral attractiveness of a position," yet insists that he is "not — at all — attributing bad faith to originalists." David A. Strauss, *Originalism, Precedent, and Candor*, 22 CONST. COMMENT. 299, 300, 301 (2005). If we recognize Sartrean bad faith as a form of bad faith, we can see that this disclaimer is not quite right. Strauss may be careful to avoid accusing anyone of subjective bad faith, but the argument that originalism is a candor-crushing machine plainly implies at least Sartrean bad faith among its practitioners.

[267] *Cf. supra* note 43 and accompanying text (summarizing Sartre's notion of facticity).

[268] Baude, *supra* note 262, at 3; *see also, e.g.*, Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2415 (2006) (book review) (arguing that only "the textualist-originalist approach supplies," in principle, "an objective basis for judgment that does not merely reflect the judge's own ideological stance"); Jeff Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1319–20 (1982) (explaining that Justice Rehnquist criticized living constitutionalism as a formula for undisciplined constitutional decisionmaking grounded in judges' "own notions of good policy," *id.* at 1320, and "pure emotivism," *id.* at 1319); Edward Whelan, Brown *and Originalism*, NAT'L REV. ONLINE (May 11, 2005, 7:58 AM), http://www.nationalreview.com/article/214410/brown-and-originalism-edward-whelan [http://perma.cc/8S5Q-H3L8] (describing living constitutionalism as an "Orwellian euphemism" used by the left to "promote[] and applaud[] lawless judicial decisions . . . that have no conceivable basis in the text or structure of the real Constitution"). I do not mean to suggest that "living constitutionalists" have a stranglehold on this species of Sartrean

culture's stereotypical originalist and its stereotypical living constitutionalist are mirror images of one another.[269]

At the level of theory-application, Sartrean bad faith in constitutional argumentation can take any number of discrete forms involving motivated reasoning, fatalistic logic, or the manipulation of evidentiary standards or empirical data to convince oneself of the truth of one's own views. Possible examples are endlessly varied.[270] The marginal utility of further taxonomizing falls off sharply.

Of particular interest here, I will simply note, are the canonical and anticanonical cases that many lawyers and laypersons believe to be axiomatically right or wrong.[271] As Professor Jamal Greene has shown, anticanonical cases like *Lochner v. New York*[272] "are *not* distinguished by unusually poor reasoning, by special moral failings, or because these problems exist in tandem."[273] Their status as anticanonical must be understood as the contingent product of broader historical and social forces. To be sure, our canonical and anticanonical cases may deserve to be singled out for special praise or condemnation as a normative matter. Whenever commentary on these cases lapses into a more dogmatic, deterministic register — with the contents of the (anti)canon taken to be either fixed or inevitable — the question of Sartrean bad faith arises.

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bad faith: John Yoo, to return to an earlier example, has been repeatedly accused of denying facticity to himself and to readers in his academic work. *See, e.g.*, Julian Davis Mortenson, *Executive Power and the Discipline of History*, 78 U. CHI. L. REV. 377, 381 (2011) (book review) (arguing that Yoo's work "misstates crucial facts," "misrepresents central primary sources," and "applies one set of standards to friendly evidence and another to evidence that undercuts its argument").

269 It is a separate question whether these varieties of bad faith are equally bad, as a normative matter, or indeed whether they are bad at all. There may be rule-of-law reasons, for example, to prefer that judges deny the full scope of their own "transcendence" to themselves as well as others. *Cf.* David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987) (noting support for the related idea "that judges at times may properly sacrifice openness and candor for the sake of other goals").

270 Complicating any effort to collect examples is the potential fuzziness of the distinction between theory-choice and theory-application. It is not clear to me, for instance, which category applies to the antislavery judges described by Professor Robert Cover who, in the years leading up to the Civil War, rejected legal challenges to slavery by "consistently gravitat[ing] to the formulations most conducive to a denial of personal responsibility and most persuasive as to the importance of the formalism of the institutional structure for which they had opted." ROBERT M. COVER, JUSTICE ACCUSED 229 (1975). However one characterizes this "gravitational" process, these cases collectively supply one of the most poignant examples of bad faith as the denial of transcendence in the history of American law.

271 *See generally* J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963 (1998); Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

272 198 U.S. 45 (1905).

273 Greene, *supra* note 271, at 383 (emphasis added).

IV. NEGOTIATING A (BAD) FAITH-BASED CONSTITUTIONAL CULTURE

We are now in a position to bring "constitutional faith" into the picture. I first consider, in section IV.A, how constitutional faith interacts with constitutional bad faith. My main claim is that constitutional faith and related dynamics aggravate the tendency to accuse others of duplicity and to dismiss the possibility of one's own biases, fostering both the perception of subjective bad faith and the practice of Sartrean bad faith.[274] This claim is intuitive once spelled out, I think, but it is important to identify mechanisms that underpin it. I then turn, in section IV.B, to some of the larger implications of the Article's largest claim, about the ways in which allegations of bad faith saturate and structure constitutional debate (though not constitutional doctrine) in the United States. By exploring the various functions that bad faith talk serves, we can enhance our ability to assess the overall state of American constitutionalism.

Or so I will suggest. Constitutional faith and constitutional bad faith are enormously rich subjects, and I cannot work through all of their complexities here. My hope is that this unavoidably speculative discussion can, nevertheless, help to reorient old debates about constitutional faith and to stimulate new debates about constitutional bad faith.

A. Constitutional Faith and Bad Faith

In any given area of law, ideological and institutional fissures might emerge, motivated reasoning might be triggered, and charges of dishonesty and disloyalty might circulate outside the courts. Only in the constitutional area, however, do these dynamics take place against a backdrop of civic "worship"[275] or what Professor Sanford Levinson has termed constitutional faith: the quasi-religious "'[v]eneration' of the Constitution" that has become a defining feature of the American political tradition.[276] For a variety of interconnected reasons, constitu-

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[274] Stated differently, constitutional faith subverts constitutional good faith. It pathologizes rather than reinforces the background norm of good faith that underwrites the constitutional system.

[275] Edward S. Corwin, *The Worship of the Constitution*, 4 CONST. REV. 3 (1920); Monaghan, *supra* note 208, at 356 ("The practice of 'constitution worship' has been quite solidly ingrained in our political culture from the beginning of our constitutional history.").

[276] LEVINSON, *supra* note 2, at 11; *see also* Grey, *supra* note 2, at 17 (remarking that "[v]irtually from the moment of its ratification, Americans have treated the United States Constitution . . . as a sacred symbol" and that no "other nation treat[s] its constitution in this way"); Peter J. Smith & Robert W. Tuttle, *Biblical Literalism and Constitutional Originalism*, 86 NOTRE DAME L. REV. 693, 716–17 & nn.99–100 (2011) (collecting examples of the "[m]any" works that "have compared the Constitution to a sacred text or described it as the foundation of our 'civil religion,'" *id.* at 716–17 (footnote omitted)).

tional faith and the attendant sacralization of the canonical text seem likely to exacerbate suspicion of bad faith in constitutional culture. Levels of constitutional faith, that is, seem positively correlated with — and to some extent causal of — levels of perceived constitutional bad faith.[277]

The most obvious consideration in this regard is the way in which constitutional faith infuses constitutional practice with moral, if not cosmic, significance. Disagreements about interpretive philosophy or the judicial role shade into disagreements about how to be a virtuous citizen or the meaning of America. Methodological leanings harden into solemn convictions. Efforts to persuade people in another "sect" through rational argument verge on the quixotic;[278] those who do not belong to any sect reveal themselves as apostates.

Such, at least, is the portrait that emerges from Levinson's classic account. Constitutional "faith" supervenes on a fractious religious discourse that modern law was supposed to tame and secularize. Like all faiths, it holds out the promise of "unity and integration" within communities of belief, but at the risk of fostering incomprehension and strife across communities.[279] It creates a fertile soil in which narratives of treachery and betrayal can take root.

Constitutional faith also has specific implications for the practice of politics that may invite or inflame suspicion of subjective bad faith. Most importantly, widespread veneration of the Constitution means that government officeholders and aspirants cannot, if they wish to remain politically viable, confess to a lack of faith in the Constitution or a lapse in fidelity to its commands. They cannot admit to violating the Constitution, or even to having doubts about the wisdom of following the Constitution.[280] Advocacy groups and others pushing for social change are held to a similar standard.[281] President Obama knows it

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[277] This claim is theoretically testable, at least as to correlation. It could also be investigated through a historical or comparative lens. Here, I hope only to demonstrate its plausibility by clarifying possible effects of constitutional faith on constitutional culture. To keep the scope manageable and the focus on bad faith, I largely take the phenomenon of constitutional faith as an exogenous given and do not explore its own social or cultural determinants.

[278] *See* LEVINSON, *supra* note 2, at 52 ("It is unlikely . . . that any of the participants in the debates about constitutional theory are going to have their minds changed by reading anything by a person of another sect, any more than Baptist theologians are likely to convert to Catholicism when presented with a 'refutation' of their position.").

[279] *Id.* at 17.

[280] *See, e.g.*, Brian Palmer, *Founding Fathers Fetish*, SLATE (Oct. 4, 2012, 5:46 PM), http://www.slate.com/articles/news_and_politics/explainer/2012/10/mitt_romney_constitution_worship_when_did_politicians_stop_questioning_the_constitution_.html [http://perma.cc/UC4N-EVZP] (explaining that, in the current era, to question the Constitution is to commit "political heresy").

[281] *See* Aziz Rana, Making American Constitutional Consensus 2 (2015) (unpublished manuscript) (on file with author) ("[D]espite deep disagreement about particular textual interpretations, general acceptance of the Federal Constitution has become so ingrained that, not only does it pass

would be scandalous in the prevailing constitutional culture for him to say, "I am not entirely confident that the Constitution allows me to order the use of military force in these circumstances without congressional authorization, but I will proceed because it is vital to our foreign policy interests." And so no modern President ever says any such thing.[282] A Constitution that was designed "to meet the middle distance needs"[283] of an agrarian society in the late eighteenth century and that has rarely been amended since turns out, on our politicians' readings, almost always to align with their first-order policy preferences.

All of this might sound like law and politics as usual until one considers that in other fields many believe it is morally and socially acceptable, or even preferable, to violate the law under certain circumstances. Every legal system creates incentives for subjects to downplay or deny noncompliance. Yet private parties routinely, if grudgingly, acknowledge their own legal wrongs and seek leniency, settlement, or renegotiated terms. The theory of efficient breach in contract law goes further and (on some specifications) celebrates intentional violations when they advance economic and social welfare.[284] While international law scholars may be "overwhelmingly disdainful of noncompliance,"[285] national officials not infrequently flaunt their failure to adhere to international legal obligations,[286] and numerous features of the international law of remedies arguably reflect the logic of

unnoticed, but the very idea of organized dissent seems practically unthinkable."). Professor Rana's manuscript shows that the shift in constitutional veneration from a widespread practice to a consensus practice — marked by the disappearance of any "meaningful and organized bloc that truly challenges our constitutional system's legitimacy" — is a relatively recent phenomenon, dating to the mid- to late twentieth century. *Id.*

[282] In prior periods, such statements may have been more imaginable. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb — Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 746 (2008) ("Historically, the understanding seems to have been . . . that extreme threats to the nation might sometimes dictate that the President act extraconstitutionally and thereafter publicly confess such civil disobedience and throw himself on the mercy of the legislature and the public."). *But cf.* Bradley & Morrison, *supra* note 103, at 1140 & n.149 (noting that the "executive branch almost always endeavors to argue that its actions are lawful," *id.* at 1140, and that "[e]ven President Lincoln's famous 'all the laws, but one' claim . . . was simply a backup argument" to Lincoln's principal claim that his unilateral suspension of habeas corpus during the Civil War "was fully compliant with the Constitution," *id.* at 1140 n.149).

[283] Monaghan, *supra* note 208, at 395.

[284] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 118–26 (7th ed. 2007).

[285] Monica Hakimi, *Unfriendly Unilateralism*, 55 HARV. INT'L L.J. 105, 113 n.42 (2014).

[286] *See, e.g.*, Andreas L. Paulus, *From Neglect to Defiance? The United States and International Adjudication*, 15 EUR. J. INT'L L. 783, 784, 798 (2004) (observing that U.S. courts and executive departments have "openly defied" the rulings of international tribunals on numerous occasions).

efficient breach.[287] Only in constitutional law, it seems, do legal subjects dismiss the very idea of justified noncompliance.[288]

This stance is, of course, in deep tension with the pervasive bad faith talk detailed in Part III: American officials insist on their own perfect fidelity to the Constitution even as they are endlessly accused of dishonesty, disloyalty, and unfair dealing. The submission here is that the first set of claims encourages the second. The discursive demands of constitutional faith breed an absolutist rhetoric about constitutional compliance and commitment, which in turn breeds cynicism and distrust about that same rhetoric and the practice of constitutional law. The public sphere comes to be seen as a realm of posturing and sophistry; whatever constitutional scruples a politician might have must be communicated, if at all, through "private discourse."[289] The rare constitutional "atheist" such as Professor Louis Michael Seidman can escape these constraints — and the charge of bad faith — because he has announced that he no longer has *any* faith in the Constitution, because he is openly *unfaithful*.[290] This exit option, or anything approximating it, is not available to public officials who take the formal constitutional oath and then submit to the informal strictures of constitutional faith.

Constitutional faith may have additional effects on the norms of constitutional argumentation that compound the foregoing concerns. The evidence on motivated reasoning, recall, suggests that human cognition is at a deep level results oriented: we all tend to process information and formulate judgments in ways that support the conclusions we are predisposed to favor.[291] Even more so than in other fields, however, judges and theorists seem drawn to the pursuit of "neutral principles" in constitutional law,[292] while they disparage results-oriented reasoning as illegit-

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[287] *See generally* Eric A. Posner & Alan O. Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243 (2011).

[288] To be sure, qualified immunity and other doctrines effectively ensure that a large number of constitutional violations go unremedied by courts. Yet while these doctrines may complicate the *reality* of constitutional compliance, they do not seem to have troubled the absolutist *rhetoric* about constitutional compliance that one finds in the political sphere, at least at the federal level.

[289] *See* LEVINSON, *supra* note 2, at 10 (tracing to Madison the idea that doubts about the Constitution's faultlessness are "better reserved for private discourse than the public realm").

[290] *See* Brazeal, *supra* note 259, at 53–56 (discussing Seidman's "constitutional atheism," *id.* at 53). Seidman's latest book advocates what he calls constitutional disobedience. LOUIS MICHAEL SEIDMAN, ON CONSTITUTIONAL DISOBEDIENCE (2012). As suggested above, prior periods in U.S. history appear to have featured a much larger number of politically active "constitutional atheists" and therefore, I suspect, less cultural emphasis on constitutional fidelity and less ambient suspicion of others' constitutional bad faith. *See supra* notes 280–82 and accompanying text.

[291] *See supra* notes 249–52 and accompanying text.

[292] *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); *cf.* John Denvir, *William Shakespeare and the Jurisprudence of Comedy*, 39 STAN. L.

imate and lawless.[293] The law and economics movement, with its openly consequentialist outlook, has made far less headway in constitutional law than in private law and many areas of international law.[294]

It is impossible to know why exactly results-oriented reasoning came to be so taboo in constitutional argument, but I suspect that constitutional faith plays a part here too. To instrumentalize a sacred text — to use it as a tool for achieving one's particular present goals — is to defile it. Results-oriented reasoning subordinates the Constitution's conception of the good to the interpreter's agenda. Yet on the logic of constitutional faith, as Professor Jack Balkin has observed, there can be no abandonment of the internal perspective. Fidelity to the Constitution is *itself* "the point of the practice of constitutional interpretation."[295]

Sacred texts, moreover, are inherently awkward to amend. Even to propose a revision is to admit the document's fallibility and expose one's own skepticism. Efforts to redeem the Constitution's perceived flaws are therefore pushed to the realm of interpretation (even beyond the big push already given by Article V's stringent amendment procedures[296]), which only puts more pressure on the concept of fidelity and the integrity of the interpretive enterprise.[297]

Add this all up, and we have a potent recipe for motivating motivated reasoning and fostering mutual mistrust. On the one hand, the

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REV. 825, 825 (1987) (describing constitutional theory's "ceaseless search for a 'neutral' method of articulating and applying constitutional norms").

[293] Although advocates of interpretive approaches such as "pragmatism" and "prudentialism" have made constitutional theory safe for rule-utilitarianism, the phrase "results oriented" appears in constitutional commentary almost exclusively as an insult, and one so self-evidently damning as to require no further explanation. *See, e.g.*, Edward Lazarus, *The Lingering Problems with* Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, FINDLAW (Oct. 3, 2002), http://writ.news.findlaw.com/lazarus/20021003.html [http://perma.cc/MA6P-5MJW] (describing the logic of *Roe v. Wade* as, "at best, questionable, and at worst, disingenuous and results-oriented," and linking these traits with constitutional infidelity).

[294] *See, e.g.*, Brad Snyder, *The Former Clerks Who Nearly Killed Judicial Restraint*, 89 NOTRE DAME L. REV. 2129, 2145–46 (2014) (stating that, over the past half-century or so, law and economics has been "applied more to private law than public law and [has] had little to say about constitutional theory," *id.* at 2146). In a recent book, Professor Bernard Harcourt provocatively suggests (at least as I read him) that the law and economics movement is itself a grand exercise in Sartrean bad faith, substituting market processes for legal processes as the ontological limit on choice. *See generally* BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS (2012).

[295] BALKIN, *supra* note 2, at 106.

[296] *See* U.S. CONST. art. V; Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, 88 AM. POL. SCI. REV. 355, 369 tbl.C-1 (1994) (finding that the U.S. Constitution is one of the most difficult constitutions in the world to amend). There have, of course, been periods in American history when any such reluctance to tamper with the "sacred" text has been overcome. *See* John R. Vile, *American Views of the Constitutional Amending Process: An Intellectual History of Article V*, 35 AM. J. LEGAL HIST. 44, 54–61 (1991) (discussing evolving attitudes toward constitutional amendment during the Reconstruction and Progressive eras).

[297] *Cf.* Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147, 162–73 (2012) (book review) (exploring possible tensions between faith in constitutional redemption and fidelity to the Constitution's original meaning).

U.S. Constitution is unusually venerated, textually spare, and difficult to change. No other constitution in the world compares on these combined dimensions.[298] These features generate a deep-seated resistance to the possibility that the Constitution might be irredeemably flawed and a tendency to interpret the Constitution "as standing for whatever we believe is just."[299] On the other hand, constitutional theory is unusually preoccupied with ideals of faithfulness and neutrality and contemptuous of results-oriented reasoning; constitutional practitioners, Sartre might say, are in the grip of a "spirit of seriousness."[300] Debates over how to interpret the Constitution implicate an enormous range of human goals and desires, as well as political and ideological struggles, and yet to openly pursue any end other than constitutional fidelity is to violate the rules of the interpretive game.

Sartrean bad faith offers a solution of sorts to this dilemma. Aided by motivated reasoning, it allows people to reach the constitutional conclusions they want to reach without fully coming to terms with, much less admitting, their own possible biases, blind spots, and double standards. Constitutional faith enhances the appeal of this move by casting instrumentalism in such a harsh light. Constitutional faith further facilitates (and in some permutations may itself constitute) self-deception by making it harder for members of the various constitutional sects to maintain a critical stance toward their own beliefs or toward the Constitution itself.[301] Kennedy suggests that judges turn to the agency-denying form of Sartrean bad faith to manage role conflict.[302] I am suggesting that participants in constitutional debates may be particularly drawn to Sartrean bad faith of all forms because of the distinctive stakes and constraints of constitutional argumentation — and the distinctive pressures to reduce cognitive dissonance that follow. Moreover, by debilitating political will to amend the Con-

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[298] *See* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1653, 1669 (2014) (finding that the U.S. Constitution is among the shortest and most entrenched in the world and linking these features to "an unusual degree of concern for the document's stability," *id.* at 1653, and "a pervasive veneration of the Constitution's origins," *id.* at 1669).

[299] BALKIN, *supra* note 2, at 104; *see also* SEIDMAN, *supra* note 290, at 7 ("As a practical matter, in the real world, almost no one changes her opinion about anything important just because of the Constitution. We regularly avoid this distasteful necessity by reading the Constitution so as to support the opinions we already hold."). Balkin calls this tendency "interpretive conformation." BALKIN, *supra* note 2, at 104.

[300] *See* JEAN-PAUL SARTRE, EXISTENTIALISM AND HUMAN EMOTIONS 92 (Bernard Frechtman & Hazel E. Barnes trans., Citadel Press 1987) (1957) (describing a "spirit of seriousness" that leads people to hide their own freedom from themselves and to "consider[] values as transcendent givens independent of human subjectivity").

[301] *Cf.* CATALANO, *supra* note 47, at 82 ("The project of good faith carries within it the critical awareness that the ideal of faith is in bad faith.").

[302] *See supra* notes 253–58 and accompanying text.

stitution or otherwise acknowledge its defects, the Sartrean bad faith fostered by constitutional faith perpetuates the very conditions that make it so seductive in the first place.[303]

Sartrean bad faith may, in fact, be so seductive in the constitutional context as to confound the issue of subjective bad faith. As discussed in Part III, participants in constitutional debates constantly accuse each other of calculated duplicity. No doubt these accusations are sometimes valid. Yet just as constitutional faith may increase psychological resistance to the possibility that the Constitution is defective, it may increase resistance to the possibility that one is a constitutional cheat. To accept that one has acted duplicitously in the constitutional realm is to accept that one may be not simply an opportunist or a lawbreaker but a kind of heretic. Americans want to believe they are being faithful to the Constitution, Balkin observes; "they *need* it to be so."[304]

In light of this felt need, I think we have to ask whether the greater part of deception in constitutional practice might not be self-deception.[305] Even if the critics are correct that Republican legislators' claims about voter fraud and the Obama Administration's claims about war powers are so objectively weak that they must be concealing *some* sort of bad faith, it is not necessarily the case that the officials making these claims are fully, consciously aware of the ways in which they have manipulated evidence or their reading of evidence. Or, if these officials were fully aware of such manipulations at one point, they may not be fully aware now. To be clear, this possibility does not justify or excuse misleading claims of any sort. But it suggests that the standard accusations, and the standard diagnosis, of dishonesty and insincerity are too simple. Because of constitutional faith

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[303] The concern that Constitution worship might paralyze constitutional politics, impeding efforts to make American constitutionalism more democratic, is a theme of Levinson's recent writings. *See, e.g.*, Sanford Levinson, *How I Lost My Constitutional Faith*, 71 MD. L. REV. 956, 962 (2012) ("I believe that it is basically delusionary to 'love' the Constitution . . . unless one benefits mightily from the status quo it tends to entrench and self-servingly wishes to keep it that way."); *id.* at 973 (criticizing a "totally unreflective 'constitutional faith' that ignores even the possibility that the Constitution, whatever its acknowledged benefits, might have significant costs").

[304] BALKIN, *supra* note 2, at 128 (emphasis added). Balkin writes that "there are two basic objections one could make to the idea of constitutional fidelity": that fidelity is impossible in practice, or that it stunts our moral imaginations. *Id.* at 106. I am suggesting a third possible objection to the idea (really, the idealization) of constitutional fidelity: that it increases the likelihood of Sartrean bad faith and of bad faith talk. As it turns out, Balkin's own transformation from deconstructionist to originalist supports the point. It did not take long after Balkin declared his own fidelity to the Constitution for insinuations of bad faith to follow. *See* Andrew Koppelman, *Why Jack Balkin Is Disgusting*, 27 CONST. COMMENT. 177, 185–86 (2010) (noting the "disgust" that Balkin's originalism elicited in some quarters and recurrent whispers that Balkin must be "faking it").

[305] I read Kahan's Foreword to raise the same question, although he does not frame it this way or pursue this line of inquiry. *See generally* Kahan, *supra* note 160.

and related dynamics, the slippery line between deception of others and deception of self may be especially slippery in constitutional law. Sartrean bad faith always stands ready to swallow subjective bad faith.

This analysis links back to the earlier discussion of bad faith's uneasy place in constitutional doctrine.[306] All else equal, the greater the ratio of Sartrean self-deception to subjective, self-*aware* deception of others in a given field, the harder it will be for courts to regulate the field's bad faith, as the whole question of honesty and sincerity becomes so vexed. The possibility that many constitutional actors in our system are deceiving themselves about the strength or the inevitability of their views thus provides a further basis for the underenforcement of good faith.

This underenforcement, moreover, means that most constitutional decisionmakers who act dishonestly, disloyally, or unfairly will never have their actions formally invalidated on that basis, which not only lowers the cost of opportunism but also lowers the likelihood that anyone's illusions of objectivity will be decisively punctured. Underenforcement in this way enables the phenomenon of Sartrean bad faith. That phenomenon, in turn, complicates any effort to enforce a duty of good faith, for the reason just given. The sublimation of bad faith charges in constitutional case law and the profusion of bad faith charges in constitutional culture are dialectically related. They continually feed into and fortify one another.

B. Uses and Abuses of Bad Faith Talk

Bad faith talk, I have suggested, is an important tool in constitutional debate as well as a neglected component of constitutional culture. If, as Albert Hirschman argues, allegations of perversity, futility, and jeopardy are the standard rhetorical moves used to counter new ideas in policy discourse,[307] in constitutional discourse we have the additional move (or, rather, set of moves) of alleging the other side's bad faith. What does this observation tell us about the state of constitutional self-government more broadly? In this final section, I want to sketch out some of the ways in which bad faith talk has simultaneously undermined and, more surprisingly, furthered the ends of American constitutionalism.

A natural response to widespread bad faith talk, at least among academics, is to decry it as a blight on constitutional culture.[308] And

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[306] *See supra* section II.B, pp. 909–17.

[307] *See generally* ALBERT O. HIRSCHMAN, THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY (1991).

[308] *See, e.g.*, Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 677 (2014) (arguing that the Supreme Court's opinion in *United States v. Windsor*, 133 S. Ct. 2675

while I will push back on this intuition, the practice almost certainly does impose significant costs on the constitutional system as a whole, above and beyond whatever private costs it imposes on specific targeted parties. Three harms in particular stand out.[309]

First, charges of bad faith may lower the quality, if not also the quantity, of constitutional deliberation. Just as many political theorists urge that democratic deliberation should rely on inclusive processes and public reasons that "express the value of mutual respect,"[310] many legal theorists appear to believe that extrajudicial constitutional deliberation ought to be inclusive, informed, principled, and public regarding.[311] Bad faith talk threatens these ideals of civility and republican virtue not only by coarsening but also by *personalizing* constitutional contestation. The focus shifts, and narrows, from general propositions about constitutional meaning or the common good to more specific claims about individual or institutional malfeasance, from the appropriate allocation of war powers to the bona fides of President Obama. Even when the criticisms contained in bad faith talk produce deliberative goods — the President's sincerity is a matter of public concern — they may nonetheless crowd out more elevated and productive forms of dialogue that the media are less likely to cover.[312] On account of bad faith talk, constitutional debate in the United States is often as much about the motives of the participants as it is about the substance of their positions.

Put a little differently, bad faith talk collapses some of the space between "high" constitutional politics, involving struggles over legal and political principle, and "low" constitutional politics, involving struggles over who will hold power.[313] After the Supreme Court ruled this past

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(2013), reflects and contributes to a "debased," "divisive," and "destructive" constitutional discourse in which participants refuse to credit the good faith of those who hold different positions on controversial issues).

309 There are likely other systemic costs as well. I could imagine arguments, for instance, about how bad faith talk tends to alienate members of the general public or breed disrespect for the rule of law. Although I focus here on a small set of fairly clear and direct costs, I do not mean to imply that these are the only or even the most significant harms that bad faith talk generates.

310 AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 4 (2004).

311 *See, e.g.*, Brest, *supra* note 134, at 82 (citing "informed and disinterested deliberation" as a hallmark of a "proper" constitutional decisionmaking process); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 812–13 (2002) (suggesting an ideal of "principled deliberation on constitutional values," *id.* at 813).

312 *Cf.* ROBERT F. NAGEL, JUDICIAL POWER AND AMERICAN CHARACTER 123 (1994) (arguing that "[n]ame-calling" in law and politics "defines moral disputes as settled when in fact they are still underway").

313 *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1062–63 (2001) (drawing this distinction). I do not mean to invoke Professor Bruce Ackerman's more elaborate distinction between normal politics and higher constitutional lawmaking, although bad faith talk might exert downward pressure on the "higher" side of that

summer that the Constitution requires recognition of same-sex marriage nationwide,[314] it was predictable that dissenters on and off the Court would respond by questioning the good faith of the majority Justices — and that the conversation on marriage equality would thereby be moved away, to some extent, from questions about the meaning of liberty and equal protection toward the more quotidian domain of Beltway mudslinging.[315] For those who see distinctive democratic value in debate conducted in a "higher" register, this sort of movement marks a dispiriting regression to the mean (and the mean-spirited).

Second, charges of bad faith may compromise social trust and harmony. The ideal of good faith is celebrated in fields like international law in part because it is seen to embody "mutual engagement of and mutual regard" for others,[316] which fosters "respect for and acceptance of difference."[317] Bad faith talk jeopardizes those aspirations. Although it would be enormously difficult to pin down the precise influence of bad faith talk on social trust, the likelihood that there is a negative influence seems painfully plain.

Of particular concern are vicious cycles and self-fulfilling prophecies. As the social-psychological literature reflects, when members of competing groups see each other as engaged in conscious or unconscious deception, "[a]lternating cycles of righteousness and recrimination" may arise and "infuse the debate with meanings that are of even more consequence . . . than the truth or falsity of the propositions under debate."[318] Accusations of bad faith, then, not only emerge out of but also exacerbate suspicions of bad faith. This point is reinforced by the international relations literature, where the "inherent bad faith" model has been widely used to analyze the belief systems of adversaries.[319] On this model, other states are assumed to be implacably

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dichotomy as well. *See generally* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

[314] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[315] *See, e.g.*, *id.* at 2621 (Roberts, C.J., dissenting) (intimating that parts of the Court's opinion lack "the virtue of candor"); *id.* at 2629 (Scalia, J., dissenting) (accusing the majority Justices of not "functioning as *judges*"); Bradley C.S. Watson, *Reclaiming the Rule of Law After* Obergefell, NAT'L REV. (July 9, 2015, 4:00 AM), http://www.nationalreview.com/article/420934/same-sex-marriage-and-rule-law [http://perma.cc/3L8A-YY4S] (assailing "the majority's intensely anti-religious moralism masquerading as jurisprudence"). As reflected in Professor Watson's repeated references to the *Obergefell* dissents, *see id.*, charges of bad faith leveled within the Court can have ripple effects on constitutional culture, stimulating and legitimating charges of bad faith outside the Court.

[316] Sourgens, *supra* note 149, at 51.

[317] *Id.* at 52.

[318] Kahan, *supra* note 160, at 73 (emphasis omitted); *cf.* Seidman, *supra* note 160, at 39 (suggesting that accusations of unconscious motivation may be especially harmful).

[319] *See* Ole Holsti, *Cognitive Dynamics and Images of the Enemy: Dulles and Russia*, *in* DAVID J. FINLAY ET AL., ENEMIES IN POLITICS 25 (1967) (introducing the concept of inherent bad

hostile; "contrary indicators . . . are ignored, dismissed as propaganda ploys, or interpreted as signs of weakness."[320] Such an approach, many have argued, tends to prolong conflict and weaken incentives for good faith overtures.[321] When one group signals to members of another group that it believes them to be ill-motivated or uncooperative, they are more likely to become thus. Bad faith talk pathologizes disagreement.

Third, charges of bad faith may undermine prospects for welfare-enhancing cooperation and compromise. Joint projects of all sorts are harder to carry out under conditions of mutual suspicion. Why bother to pursue a formal constitutional amendment, to take one particularly important example, if people in different constitutional sects can be expected to make unreasonable demands or to construe whatever language is codified in a duplicitous manner? Negotiating with a party whom one takes to be in bad faith is a fool's errand.

In her campaign to stop ratification of the Equal Rights Amendment (ERA) during the 1970s, Phyllis Schlafly mobilized this insight in repeatedly alleging that claims made by ERA proponents about its limited substantive scope were not to be trusted.[322] Opponents of the Federal Marriage Amendment made a similar move in the early 2000s, refusing to credit claims by the Amendment's sponsors that it would not be interpreted to prohibit same-sex civil unions, only same-sex marriages.[323] As these examples suggest, even as the difficulty of amending the Constitution helps produce bad faith talk by raising the stakes of the interpretive game,[324] the existence of bad faith talk further entrenches unamendability. We have another vicious cycle to worry about.

The perverse implication of all these points is that bad faith talk can come, over time, to cannibalize its own ostensible goal of disciplining bad faith and fostering good faith. Dishonesty, disloyalty, and unfair dealing are subject to broad limitations in private law and international law because they are thought to reduce overall levels of trust and efficiency, as well as to violate principles of equity in any given

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faith in a study of John Foster Dulles's method of processing information about the USSR); *see also* Philip E. Tetlock, *Social Psychology and World Politics*, *in* 2 THE HANDBOOK OF SOCIAL PSYCHOLOGY 868, 880 (Daniel T. Gilbert et al. eds., 4th ed. 1998) (stating that "the most widely studied" approach to foreign belief systems "is the inherent bad-faith model of one's opponent").

320 Tetlock, *supra* note 319, at 880.

321 *See, e.g.*, ROBERT S. ROBINS & JERROLD M. POST, POLITICAL PARANOIA 66 (1997).

322 *See* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323, 1394–98 (2006).

323 *See* Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 535–71 (2008).

324 *See supra* notes 295–302 and accompanying text.

case.[325] Absent judicial supervision, however, *accusations* of bad faith may be functionally interchangeable with *actual* bad faith in their capacity to destroy deliberative and cooperative values.

In sum, bad faith talk appears to do some bad things: through a number of interlocking dynamics, it threatens key public law values. We now live in an age of intense division and distrust among elites, which ramifies throughout constitutional culture and provokes bad faith talk, which in turn shapes and sustains further division and distrust, and on and on in a complex recursive loop. Although much more work would be needed to flesh out the concerns sketched above, their cumulative force strikes me as hard to deny.

At the same time, it is equally important to consider the possibility that bad faith talk serves useful social functions. Each of these functions, even if real, may well have diminishing marginal returns past a certain number of bad faith accusations. Their existence does not imply that current levels of bad faith talk are desirable, just that the normative implications are more complicated than they might seem.

First, bad faith talk may compensate to some extent for the underenforcement of good faith in constitutional doctrine. The federal courts, as explained in Part II, almost never administer "hard" remedies for acts of constitutional bad faith outside the sphere of police and prosecutors (and only rarely within that sphere). Instead of legally binding adverse judgments, punitive damages, or attorney's fees, the constitutional system produces "soft" sanctions for bad faith conduct in the form of bad faith talk. Those constitutional actors who are seen to act dishonestly, disloyally, or unfairly may face accusations that cause them professional, reputational, and psychic harm.[326]

Because bad faith talk is cheaper to pursue than litigation and often serves a political purpose, such sanctions will be overproduced. Relative to a judicially enforced model, the informal "regulatory" regime that we have generates many more Type I errors (false accusations of bad faith) and many fewer Type II errors (failures to catch true bad faith). As suggested earlier, it may also perpetuate a climate of distrust. Although there is little reason to assume this particular mix of low-level punishment and frequent enforcement is socially optimal, it may at least deter some nontrivial amount of bad faith behavior at minimal cost to the public fisc.[327]

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[325] *See supra* note 26 and accompanying text.

[326] *Cf.* Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 856–59 (2015) (discussing informal sanctions, including retaliation, ridicule, and ostracism, that may be used to curtail "uncivilly obedient" behaviors in American public law).

[327] *Cf.* Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 696 n.22 (1997) (noting evidence that, owing to risk aversion, people "are more deterred by a high probability of a relatively low sanction than

Second, bad faith talk may facilitate "harder" forms of discipline within government for conduct that is seen as especially threatening to another institution's interests. Even if the courts cannot be counted on to supply equitable remedies, bad faith talk may be used as a precursor to, and potentiator of, a wide range of self-help remedies by other public actors.[328] Through his arguments about how congressional Republicans have been dealing with him unfairly (even if not technically unlawfully),[329] President Obama has not only sparked conversation about the contours of legislative duty but also laid the groundwork for unilateral measures — such as strained statutory constructions and greater use of "nontreaty" international agreements — that would themselves constitute unfair dealing under conditions of congressional good faith.

Here, too, it is far from clear that the regulatory model for disciplining bad faith is attractive, for instance because opportunistic Presidents may have structural advantages over Congress in their capacity to use self-help.[330] If not optimal, however, intragovernmental self-help has at least proven a workable means of policing institutional boundaries and promoting responsible governance.[331] And bad faith talk helps to rationalize the practice of such self-help through the publicity and advance notice it provides.

Third, bad faith talk may be a useful device for conveying intensity of belief and stimulating political mobilization. Whatever its flaws from the perspective of ideal deliberative theory, bad faith talk is not cheap talk in the social science sense.[332] It is better seen, I think, as a form of costly signaling.[333] Accusations of bad faith will tend to be costlier to make, and hence more valuable signals, in cooperative environments. But even in relatively adversarial settings, these accusations almost always entail some amount of risk for the accuser. The Democratic official who asserts that Republican regulation of voter

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a low probability of a very high sanction"). A low-level, frequently administered sanction is also less likely to provoke cover-ups and the deadweight loss associated with efforts to avoid detection.

328 *See generally* Pozen, *supra* note 127, *passim* (exploring the phenomenon of intragovernmental self-help and explaining that "[v]irtually every self-help regime . . . insists on some form of notice of intent or demand for cessation in advance of" otherwise impermissible self-help measures, *id.* at 60).

329 *See supra* notes 218–29 and accompanying text.

330 *See supra* notes 181–88 and accompanying text; Marshall, *supra* note 225, at 105–12; Pozen, *supra* note 127, at 82–83.

331 *See* Pozen, *supra* note 127, at 62–70.

332 *See* Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 NW. U. L. REV. 1207, 1220 (2007) (defining cheap talk as "communication that is costless for the speaker to make and that is unverifiable and therefore untrustworthy"); *see also* DOUGLAS C. BAIRD ET AL., GAME THEORY AND THE LAW 303 (1994) (similar).

333 *See* Rodriguez & Weingast, *supra* note 332, at 1220 (defining costly signaling as "communication where the speaker pays a price for inaccuracies").

fraud is itself a fraudulent effort at disenfranchisement puts her credibility on the line and invites retaliation by suggesting that the other side's arguments are not merely unpersuasive but deceitful.

The same features of bad faith talk that lead it away from the deliberative ideal — its inflammatory, personalized character and its tendency to provoke recrimination — are precisely the features that can make it credible, as well as attention-grabbing.[334] In addition to being costly, bad faith talk may also be comprehensible, given the way in which it distills complex legal arguments into simple ethical themes. For multiple reasons, then, bad faith talk may be an unusually effective method, or heuristic, through which elites communicate constitutional concern to poorly informed members of the public.

Finally, bad faith talk may help to delimit the "construction zone" in which constitutional meaning is contested and the many gaps, ambiguities, and inconsistencies in the text are resolved through normative argument.[335] Bad faith talk does not assist in this process by making claims about the common good, in the way we normally associate with social movements and norm entrepreneurs seeking constitutional change. Rather, its distinctive contributions to the construction zone are claims about what we might call the common bad — about practices and positions that (it is alleged) reflect a failure of faith. Certain practices and positions, constitutional commentators endlessly imply, are so objectively unreasonable that they must be rejected as subjectively dishonest. Or else they are so dishonest that they must be rejected as unreasonable.

When former Chief Justice Warren Burger, for instance, declared in a television interview that the individual rights view of the Second Amendment is "one of the greatest pieces of fraud, I repeat the word 'fraud,' on the American public by special interest groups that I have ever seen in my lifetime,"[336] he was not so much seeking to debunk that view as to delegitimize it, to relegate it to the realm of the contemptible. Bad faith talk does not always succeed, as the Burger example reflects.[337] But it is an important device for patrolling the

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[334] *Cf.* Karl Marx, *A Contribution to the Critique of Hegel's Philosophy of Right, Introduction*, *in* KARL MARX: EARLY WRITINGS 243, 251 (Rodney Livingstone & Gregor Benton trans., 1992) ("Theory is capable of gripping the masses when it demonstrates *ad hominem* . . . .").

[335] *See* Solum, *supra* note 153, at 108, 117 (coining and explicating this phrase). I have thus far been using the term "interpretation" in its generic sense. For Professor Solum and other New Originalists, however, this term is reserved for "the process (or activity) that recognizes or discovers the linguistic meaning or semantic content of the legal text," whereas "construction" refers to "the process that gives a text legal effect (either [b]y translating the linguistic meaning into legal doctrine or by applying or implementing the text)." *Id.* at 96.

[336] *The MacNeil/Lehrer NewsHour* (PBS television broadcast Dec. 16, 1991).

[337] *See* District of Columbia v. Heller, 554 U.S. 570, 595 (2008) (holding that the Second Amendment confers "an individual right to keep and bear arms").

boundary between off-the-wall and on-the-wall understandings of the Constitution, and in particular for checking attempted departures from established practice. Even if, as Levinson suggests, "[t]here is nothing that is unsayable in the language of the Constitution,"[338] there are many constitutional arguments and maneuvers at any given time that may be seen as ethically, if not technically, out of bounds. Bad faith talk tries to tell us what they are.

CONCLUSION

The current period of American politics is 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. That distrust can be usefully understood, this Article has argued, through the lens of bad faith. Participants in constitutional debates are constantly calling into question each other's good faith, through a stock set of moves that parallel the conceptions of good faith and bad faith found in private law, international law, and (strange as it may sound) existentialist philosophy. Our constitutional institutions may or may not be awash in actual bad faith. The culture is certainly soaked in accusations thereof.

It seems natural to bemoan this state of affairs. In support of that instinct, I have tried to detail ways in which such widespread bad faith talk can degrade constitutional deliberation, cooperation, and community. And yet at the same time, I have suggested, disputes over bad faith play a significant role in the larger processes of mobilization and contestation that shape constitutional meaning and generate constitutional change. Bad faith talk may be not simply the dark side of constitutional discourse but the *regulative* side, where constitutional abuses are identified and policed, even if such policing does not itself promote any affirmative vision of the public good.

More than that, arguing about bad faith may be one of the few tools we have for policing constitutionalism itself, given the persistent underenforcement of good faith norms in large parts of constitutional doctrine. Conditions of social pluralism, political partisanship, and "Constitution worship" help drive the unamendability of the constitutional text; which forces us back on constitutional development through interpretation and construction; which generates perpetual anxiety about bad faith, subjective, objective, and Sartrean; which reinforces unamendability and ideological division. The circle is vicious but also constitutive, at least for the present stage of American democracy.

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[338] LEVINSON, *supra* note 2, at 191.

If this account is correct, then charges of constitutional bad faith deserve to be taken very seriously, and not just by people on the receiving end. Those of us who participate in constitutional debates ought to bear in mind, as Kahan has suggested, that much of what looks like constitutional duplicity or hypocrisy may involve a measure of self-deception.[339] We ought to distinguish Sartrean bad faith from subjective bad faith and modulate our responses, and deepen our self-criticism, accordingly. At the same time, it behooves us to try to cultivate more honest, substantive, and responsible argumentation when constitutional bad faith is alleged — an ethics of bad faith talk to match the inherently ethical nature of the criticisms it contains. Legal scholars are particularly well equipped to help in this effort by developing a grammar that parses the different forms of constitutional bad faith and thereby enables more meaningful discussion. This Article has tried to provide tools for that grammar.

One important task for applied constitutional theory, in short, is to grapple with constitutional bad faith as both a legal and a social practice. I take some solace in the hope that we might improve on the status quo, if in no other way, by striving for clearer understandings of the work this practice does. For as to whether constitutional culture's rampant suspicions of bad faith might themselves be soothed any time soon, I can see no basis for faith.

[339] *Cf.* Kahan, *supra* note 160, at 72–77 (proposing strategies informed by research on motivated reasoning "to fix the Supreme Court's communication problem," *id.* at 77, and improve public perceptions of the Court's neutrality).