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### Faith in Elections

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## FAITH IN ELECTIONS

DEREK T. MULLER\*

Americans may be suffering a crisis of faith. But not necessarily a crisis of religious faith. Instead, it is a crisis of faith in elections. Consider a handful of examples.

Professor Nathaniel Persily and SurveyMonkey researcher Jon Cohen surveyed 3000 registered voters in October 2016. 40% of respondents said, “I have lost faith in American democracy.” Six percent indicate they’ve never had faith in the system. Overall, barely more than half—just 52 percent—say, “I have faith in American democracy.”<sup>1</sup> In a 2020 article entitled “Faith in Elections in Relatively Short Supply in U.S.,” Gallup asked Americans whether they were “confident in the honesty of elections.”<sup>2</sup> 40% were confident, 59% were not. It’s not a new phenomenon—just 30% of Americans expressed confidence in 2016, and every annual Gallup survey since 2009 has shown that a plurality of Americans lack confidence in the honesty of elections.<sup>3</sup>

Lack of faith has yielded efforts to restore it. A 2019 opinion piece in the *New York Times* entitled “Preaching Faith in Democracy” chronicled efforts after the 2016 presidential election to share “civic sermons” with people, proclaiming “American values” at small church-like gatherings and training leaders in a “seminary.”<sup>4</sup>

After the 2020 presidential election and shortly after the Electoral College convened in December 2020, President-Elect Joe Biden shared his view, “[f]aith in our institutions held.”<sup>5</sup> In a *Washington Post* article summarizing Mr. Biden’s remarks, a reporter noted Mr. Biden had critiqued politicizations in the

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1. Nathaniel Persily & Jon Cohen, *Americans are Losing Faith in Democracy—and in Each Other*, WASH. POST (Oct. 14, 2016), [https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4\\_story.html?utm\\_term=.fd9b46913b1d](https://www.washingtonpost.com/opinions/americans-are-losing-faith-in-democracy—and-in-each-other/2016/10/14/b35234ea-90c6-11e6-9c52-0b10449e33c4_story.html?utm_term=.fd9b46913b1d).

2. RJ Reinhart, *Faith in Elections in Relatively Short Supply in U.S.*, GALLUP (Feb. 13, 2020), <https://news.gallup.com/poll/285608/faith-elections-relatively-short-supply.aspx>.

3. *Id.*

4. Courtney E. Martin, *Preaching Faith in Democracy*, N.Y. TIMES (July 2, 2019), <https://www.nytimes.com/2019/07/02/opinion/preaching-faith-in-democracy.html>.

5. Matt Viser, *Joe Biden’s Speech to America: ‘It is Time to Turn the Page’*, WASH. POST (Dec. 14, 2020), [https://www.washingtonpost.com/politics/joe-biden-address/2020/12/14/80c04d02-3e35-11eb-8db8-395dedaa036\\_story.html](https://www.washingtonpost.com/politics/joe-biden-address/2020/12/14/80c04d02-3e35-11eb-8db8-395dedaa036_story.html).

Department of Justice, and that “[r]estoring faith in the department” would be a challenge after President Donald Trump announced that Attorney General Bill Barr would soon resign.<sup>6</sup> “Once lost, faith is hard to restore,” *The Economist* opined in 2020, as it examined the decline in faith that Republican voters had that votes were counted fairly.<sup>7</sup>

Many supporters of Mr. Trump, however, harbored doubt about the results of the 2020 election, led by Mr. Trump himself. In the aftermath of the election, Republicans have used the language of “restoring faith” in elections, a concession that they lacked confidence in the results. Representative Brian Fitzpatrick of Pennsylvania introduced the “Restoring Faith in Elections Act,” a proposed bill that would require photo identification to vote, require ballots to be received by the close of the polls on Election Day in order to be counted, and prohibit third-party collection of absentee ballots.<sup>8</sup> Representative Rodney Davis of Illinois, ranking member on the Committee on House Administration, led the “Faith in Elections Project” in 2021, touring states and speaking to election officials about the strength of our election system.<sup>9</sup>

States enacted new election laws in 2021. NBC News offered a gloss on such law in Georgia:

If the most charitable interpretation of the law was shoring up faith in the electoral system, Trump (after single-handedly torpedoing it) isn’t on board. And now after all of the law’s changes—including stripping authority from the secretary of state and local election officials—Democrats certainly don’t have faith in Georgia’s election system, either.<sup>10</sup>

And in Iowa, State Representative Bobby Kaufmann remarked, “[t]he ultimate voter suppression is a very large swath of the electorate not having faith in our election systems. And for whatever reason, political or not, there are thousands upon thousands of Iowans that do not have faith in our election systems.”<sup>11</sup>

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6. *Id.*

7. *Republicans’ Trust in Democracy Has Plunged Since 2016*, ECONOMIST (Oct. 19, 2021), <https://www.economist.com/graphic-detail/2021/10/19/republicans-trust-in-democracy-has-plunged-since-2016>.

8. Restoring Faith in Elections Act, H.R. 102, 117th Cong. (1st Sess. 2021).

9. *Faith in Elections Project*, COMM. ON HOUSE ADMIN. REPUBLICANS (last visited Mar. 9, 2022), <https://republicans-cha.house.gov/subcommittee-elections/faith-elections-project>.

10. Chuck Todd, Mark Murray & Carrie Dann, *Georgia’s Voting Law is Eroding Faith in Democracy—and Trump’s Making It Worse*, NBC NEWS (Apr. 8, 2021, 8:04 AM) <https://www.nbcnews.com/politics/meet-the-press/georgia-s-voting-law-eroding-faith-democracy-trump-s-making-n1263429>.

11. Maggie Astor, *‘A Perpetual Motion Machine’: How Disinformation Drives Voting Laws*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/13/us/politics/disinformation-voting-laws.html>.

Meanwhile, Matthew Yglesias wrote an opinion column in 2021 entitled “Biden’s Stealth Plan to Restore Faith in Democracy.”<sup>12</sup> The piece examined a concrete proposal to improve online user experiences in federal agencies. “Maddening inefficiency” in the federal government, Yglesias argues, “undermines public faith in democratic government.”<sup>13</sup> Just this year, a retired federal judge, John E. Jones III, penned an opinion piece reflecting on the one-year anniversary of the January 6, 2021, attack on the Capitol with the lines, “[d]emocracy is our shared faith. The rule of law is our common code.”<sup>14</sup>

This language of faith in elections—do we have faith, are we losing faith, can we restore faith—suggests religious imagery. And the religious imagery doesn’t end there. A 2021 opinion piece in *USA Today*, penned by the chief executive of a political reform organization, advised, “[t]o heal the nation’s soul, Biden’s administration needs a clear and comprehensive agenda to reform our democracy and restore faith in our elections.”<sup>15</sup> And on October 6, 2021, the Senate Judiciary Committee held a hearing entitled, “Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act.”<sup>16</sup> Assistant Attorney General Kristen Clarke testified at the hearing, stating outright, “The right to vote is sacred.”<sup>17</sup>

These examples only scratch the surface of the language of faith in elections, democracy, and the American ideal. The language is seemingly everywhere. Words, of course, take on different meanings in different contexts. But the choice to use the word “faith” does appear to invoke religious imagery. Words like “trust,” “confidence,” or “belief” could be used. “Faith,” at times, could simply be a synonym. But the religious imagery extends elsewhere, and there seems a stubborn insistence on choosing the word “faith” over these other words.

I am not a linguist. Or a theologian. Or a philosopher. So, I approach this Essay with some trepidation. Instead of popular or political comparisons of our democratic order as a type of faith, this Essay examines “faith” in elections as the term is used in the federal courts. It opens by examining how we might think of “faith,” but in a religious context (principally, the Christian faith) and a political context. It then examines four ways that courts have invoked “faith” in the context of elections, three less controversial uses and one more significant use. It concludes

12. Matthew Yglesias, *Biden’s Stealth Plan to Restore Faith in Democracy*, BLOOMBERGQUINT (Dec. 14, 2021, 7:30 AM), <https://www.bloombergquint.com/gadfly/biden-s-stealth-plan-to-restore-faith-in-democracy>.

13. *Id.*

14. John E. Jones III, *We Are All Americans, and Democracy is Our Shared Faith*, PENN LIVE (Jan. 7, 2022, 8:28 AM), <https://www.pennlive.com/opinion/2022/01/we-are-all-americans-democracy-is-our-shared-faith-opinion.html>.

15. Nick Penniman, *How Joe Biden Can Rebuild Democracy and Heal America’s Wounded Soul*, USA TODAY (Feb. 24, 2021, 6:01 AM), <https://www.usatoday.com/story/opinion/2021/02/24/how-joe-biden-can-rebuild-americas-wounded-democracy-column/4553963001/>.

16. *Protecting a Precious, Almost Sacred Right: The John R. Lewis Voting Rights Advancement Act: Hearing Before the S. Judiciary Comm.*, 117th Cong. (2021) (statement of Kristen Clarke, Assistant Att’y Gen. of the United States).

17. *Id.* at 21.

by suggesting there are reasons to be reluctant to use the phrase “faith,” both from the judicial context and the religious context, and that other, better language may be more valuable.

## THE MEANINGS OF FAITH

### *Religious Faith*

The word “faith,” even in a religious context, can take on different meanings. I’ll focus on three different ways here: sociological, epistemological to mean “belief,” and epistemological to mean “trust.”

Generically, and perhaps most simply, “faith” might take on a sociological meaning. One can be an adherent to the Jewish faith, the Muslim faith, or the Christian faith. The concept of “faith” includes some set of tenets or practices that identify someone as a member of that faith community.

Another common meaning is epistemological pertaining to “belief,” as in the belief of some proposition. C.S. Lewis, in his classic work *Mere Christianity*, describes this as one of the two ways that Christians think of faith. It is “accepting or regarding as true the doctrines of Christianity. . . because the evidence seems to him good or bad.”<sup>18</sup> It is the adherence to a belief based on good evidence. Lewis writes,

Now Faith, in the sense in which I am here using the word, is the art of holding on to things your reason has once accepted, in spite of your changing moods. . . . That is why Faith is such a necessary virtue: unless you teach your moods ‘where they get off’, you can never be either a sound Christian or even a sound atheist, but just a creature dithering to and fro, with its beliefs really dependent on the weather and the state of its digestion.<sup>19</sup>

In contrast, Professor Brian Leiter, in defining “religion,” identifies religious beliefs as those based on “faith,” which means they are “insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science.”<sup>20</sup> Professor Leiter acknowledges that some religious beliefs can and do have support in evidence.<sup>21</sup> In his view, the resurrection of Jesus Christ from the dead is classically insulated from “ordinary” evidence. Despite ancient testimonial evidence to the contrary, resurrection is “inconsistent with everything we have reason (evidence) to believe about what happens when human bodies expire.”<sup>22</sup> And the importance of evidence for the resurrection is likely a reason why Lewis dedicates a lengthy chapter in another work, *Miracles*, to explain how the miracle of the resurrection fits within the created order.<sup>23</sup> “Faith,” then,

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18. C.S. LEWIS, *MERE CHRISTIANITY* 115 (1952).

19. *Id.* at 116–17.

20. BRIAN LEITER, *WHY TOLERATE RELIGION?* 34 (Princeton Univ. Press rev. ed., 2014).

21. *Id.* at 40–42.

22. *Id.* at 42.

23. C.S. LEWIS, *MIRACLES* 233–66 (1960).

might simply mean beliefs, and the evidence (insulated or not) we have to sustain those beliefs.

Lewis in *Mere Christianity* describes another sense of the term “faith” as used in the phrase “faith *in Christ*.”<sup>24</sup> It is another epistemological claim, but this one is more like “trust” that someone will do something, or that something will happen. Here, Lewis means that Christians have an inability to achieve eternal salvation of their own power. They are acutely aware that they are incapable of living sinless lives, who discover their own “bankruptcy.”<sup>25</sup> To have “faith in Christ” means that we are “creatures related to Himself in a certain way.”<sup>26</sup>

This portrait of salvation, at the very heart of Christianity, suggests that our identity is attached to someone outside of ourselves. We are reliant on the actions that another takes on our behalf, and we recognize that we cannot act on our own. Eternal life is dependent on the actions of someone else. And we have faith *in* this being, not simply because the evidence is strongest, but because it is the only way for us to live.

### *Democratic Faith*

Using the word “faith” in the context of democracy is nothing new among political theorists and scholars. In *Democracy in America*, Alexis de Tocqueville commented on the “similar beliefs,” the “some principal ideas” that a society must share in order for a people to advance together toward common action.<sup>27</sup> He turns to the “faith” that citizens have in one another: the more equal people are, de Tocqueville argues, the less “faith” they have in each other, but they have “almost unlimited confidence in the judgment of the public.”<sup>28</sup> If the people of a society view themselves as equals with one another, it means they have much greater confidence in the judgments of the majority. He continues,

In the United States, the majority takes charge of providing individuals with a host of ready-made opinions, and thus relieves them of the obligation to form for themselves opinions that are their own. A great number of theories in matters of philosophy, morality and politics are adopted in this way by each person without examination on faith [Fr.: *foi*] in the public; and, if you look very closely, you will see that religion itself reigns there much less as revealed doctrine than as common opinion.<sup>29</sup>

In an earlier draft of this section, de Tocqueville goes farther: “Faith in common opinion is the faith of democratic nations. The majority is the prophet; you believe it without reasoning.”<sup>30</sup>

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24. LEWIS, *supra* note 18, at 148 (emphasis added).

25. *Id.* at 145.

26. *Id.*

27. 3 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 713 (Eduardo Nolla ed., James T. Schleifer trans., Bilingual French-English ed. 2010).

28. *Id.* at 719.

29. *Id.* at 719–20.

30. *Id.* at 720.

These two threads of “faith”—*confidence* in the citizenry and a *sentiment* of moral certitude of the direction of the country—hold up today.

In *Constitutional Redemption*, Professor Jack Balkin explains that “constitutional traditions have much in common with religious traditions, and especially religious traditions that feature a central organizing text that states the tradition’s core beliefs.”<sup>31</sup> Professor Sanford Levinson’s book *Constitutional Faith* explores this concept and language of faith in our Constitution and our government. Expressions of faith in the Constitution abound. Professor Levinson retells an episode from Richard Nixon’s impeachment hearings, in which Representative Barbara Jordan of Texas stated, “[m]y faith in the Constitution is whole. It is complete. It is total.”<sup>32</sup>

Likewise, Professor Richard Rorty examines the religious undertones to American pride in *Achieving Our Country*. He quotes Williams James, “Democracy is a kind of religion, and we are bound not to admit its failure.”<sup>33</sup> And Professor Balkin points to the legitimacy of the Constitution as dependent upon the people’s judgment that the regime is acceptable, including improvement in the future.<sup>34</sup> There is a sense of confidence that the Constitution and the government will move toward good results.

Drawing upon de Tocqueville, Professor Levinson describes the moral dimension of law. “So long as law is identified with will, even majority will, then any argument for the moral integrity of law must identify what it is about certain wills and their manifestations that makes them worthy of respect.”<sup>35</sup> What is it, Professor Levinson asks, that makes the American democratic system “worthy”? Elsewhere he describes it as an “attachment” to the Constitution,<sup>36</sup> something that merits our loyalty with an oath.<sup>37</sup> Professor Rorty examines the “faith” in America, the “civic religion,” as a matter of determining the country’s moral identity.<sup>38</sup> “The Left, the party of hope, sees our country’s moral identity as still to be achieved, rather than as needing to be preserved. The Right still thinks that our country already has a moral identity and hopes to keep that identity intact.”<sup>39</sup>

There is a moral underpinning to the acts of the government, a legitimacy that the people are moving toward better things. Professor Balkin frames the “legitimacy of our Constitution” as a matter that depends on “our faith in the constitutional project,” because “[f]idelity to the Constitution requires faith in the

31. JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* 7 (2011).

32. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 15 (2011).

33. RICHARD RORTY, *ACHIEVING OUR COUNTRY* 9 (1998).

34. BALKIN, *supra* note 31, at 33–72.

35. LEVINSON, *supra* note 32, at 71.

36. *Id.* at 127.

37. *Id.* at 87–89.

38. RORTY, *supra* note 33, at 14–16.

39. *Id.* at 30–31.

Constitution.”<sup>40</sup> That is, the legitimacy of the Constitution turns on the stories we the people tell ourselves about it.

“Faith” here is used in the context of a narrative. Which direction is the country going? Where are we, as a people, headed? In other words, democratic “faith” looks to the past and promises made, and it looks to the future to determine whether those promises will be fulfilled. It is similar to the Jewish and Christian religious traditions. Those traditions include an examination of the past, creation, the fall of man, and Messianic promises, with an anticipation of the future and an expectation of redemption and the things to come. “Faith” isn’t just the doctrinal tenets of religious belief and practice. It is the whole story of past and future. Political theorists here use “faith” in this narrative sense consistent with (at the very least) the Judeo-Christian tradition.

This brief review of faith in constitutional democracy only scratches the surface. The language of “faith” is not always specifically about elections. At another level of generality, these references are really about democracy. But they undoubtedly reflect some affinity that can best be described in essentially religious terms.

#### FAITH, ELECTIONS, AND DEMOCRACY

I’ve identified some ways of thinking about the language of “faith” in a religious context and some ways that scholars have used the word “faith” in American constitutionalism and democracy. This Part looks at how courts have used “faith” in the context of elections. I start with three smaller areas—political parties, electors, and redistricting—before turning to a larger claim about the public’s “faith in democracy.”

##### *Faith and Political Parties*

The Supreme Court has occasionally considered allegiance to a political party as a type of “faith.” In *Nixon v. Condon*, for example, a White Primary case from 1932, L.A. Nixon, a Black prospective voter, was denied a ballot in the Texas Democratic primary election.<sup>41</sup> Justice Benjamin Cardozo’s opinion looked at the Texas Democratic Party’s definition of who could be a member:

Whatever inherent power a State political party has to determine the content of its membership resides in the State convention . . . There platforms of principles are announced and the tests of party allegiance made known to the world. What is true in that regard of parties generally, is true more particularly in Texas, where the statute is explicit in committing to the State convention the formulation of the party faith.<sup>42</sup>

40. BALKIN, *supra* note 31, at 2.

41. *Nixon v. Condon*, 286 U.S. 73, 81 (1932).

42. *Id.* at 84–85 (internal citations omitted).



The Court routinely used the term “faith” when it scrutinized allegiance to a political party in early voting rights cases.<sup>43</sup>

Likewise, in the landmark decision *Elrod v. Burns*, the Court examined patronage in Illinois and whether public employees could be fired because of their partisan affiliation.<sup>44</sup> The Court concluded that because these were “nonpolicy-making, nonconfidential” government employee positions, the employees could not be fired solely on the basis of their political affiliation.<sup>45</sup> A plurality of the Court concluded, “[a]s such, the practice unavoidably confronts decisions by this Court either invalidating or recognizing as invalid government action that inhibits belief and association through the conditioning of public employment on political faith.”<sup>46</sup>

Another use of the word “faith” carries deeper theological significance. “Faith” used in this sense is really another word for a shared group of beliefs, the Democratic faith or the Republican faith—something like the Christian faith or the Jewish faith. Just as a religious organization might have a creed (like Christianity), we might think of the platform of a political party as a type of creed, with its adherents able to pledge support for its tenets.<sup>47</sup> It is the sociological use of “faith.”

This use of “faith” to refer to attachment to a political party appears to have fallen out of favor with the Supreme Court. The Court speaks more commonly of “association” with a political party and the party’s “ideologies” or “preferences.”<sup>48</sup> And these are, I think, better turns of phrase than “faith.”

### *Faithless Electors*

The Electoral College is a unique electoral institution in the United States. Each state receives a number of electoral votes equal to the number of House and Senate members in that state. It may “direct” the “manner” of appointing those

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43. See *Love v. Griffith*, 266 U.S. 32, 33 (1924) (“This is a bill in equity alleging that the plaintiffs are qualified electors residing in Houston, Texas, and of the Democratic political faith . . . .”); *Terry v. Adams*, 345 U.S. 461, 490 (1953) (Minton, J., dissenting) (“Surely white or colored members of any political faith or economic belief may hold caucuses.”).

44. *Elrod v. Burns*, 427 U.S. 347, 349 (1976).

45. *Id.*

46. *Id.* at 357; see *id.* at 356 (quoting *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (“[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”). See also *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) (“In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor.”).

47. See also LEVINSON, *supra* note 32, at 98 (“We can now see a bit more clearly the mixed implications of the term ‘American creed,’ with its overtones of reference to more orthodox faith communities and their test oaths and affirmations.”).

48. See *Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214 (1989); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442 (2008).

electors.<sup>49</sup> Today, every state holds a popular election to choose presidential electors. Those electors then formally vote for the president and vice president of the United States.

At the Founding, there was some sense that these electors would exercise independent judgment.<sup>50</sup> Quickly, however, political parties found loyal electors who would reliably choose the party's preferred nominee.<sup>51</sup> Voters knew that electors represented this faction or that faction. Today, Americans do not give presidential electors much thought because they have become an all but invisible part of the system. They reliably vote for the candidates they were chosen to support, even though they formally could exercise independent judgment in many states.

A 1928 editorial in the *Saint Louis Globe-Democrat* nicely encapsulates the view: "In the election of a President a good deal has to be taken on faith," the piece begins.<sup>52</sup> It is a question of "confidence" of a "trustee" who casts his vote "for the ticket he was chosen to vote for."<sup>53</sup> A new development in Nebraska meant that "the voter has to take more on faith than even in the average state."<sup>54</sup> The names of electors would not appear on the 1928 ballot, and only the names of Herbert Hoover and Al Smith would appear on the ballot.<sup>55</sup> Voters would need even greater "faith" to trust that electors would cast votes on their behalf for those named candidates.<sup>56</sup>

But presidential electors are not always reliable. Sometimes they cast votes for candidates other than those they are expected to support, but rarely.<sup>57</sup> A North Carolina elector who pledged to support Richard Nixon in 1969 but then voted for George Wallace prompted a congressional debate on the topic.<sup>58</sup> Several electors voted for some candidate other than Donald Trump or Hillary Clinton in 2016.<sup>59</sup> These electors are commonly called "faithless electors."<sup>60</sup>

"Faithless" reflects a lack of fidelity, to use another word of "faith." Electors are expected to be loyal to the desires of the people who elected them. Those desires are manifest in the names of the presidential and vice-presidential candidates on the ballot, the candidates they were chosen to support.

49. U.S. CONST. art. II, § 1, cl. 2.

50. THE FEDERALIST NO. 68 (Alexander Hamilton).

51. Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, Chialfalo, *Constitutionalizing Historical Gloss in Law and Democratic Politics*, 15 HARV. L. & POL'Y REV. 15, 40–41 (2020).

52. *Voting for President in Nebraska*, ST. LOUIS GLOBE-DEMOCRAT, Oct 4, 1928, at 18, <https://www.newspapers.com/image/572248427/?terms=%22faithless%20elector%22&match=1>.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Vasani Kesavan, *The Very Faithless Elector?*, 104 W. VA. L. REV. 123, 124 (2001).

58. Charles L. Black, Jr., *The Faithless Elector: A Contracts Problem*, 38 LA. L. REV. 31, 31 (1977).

59. Rebecca Green, *Liquidating Elector Discretion*, 15 HARV. L. & POL'Y REV. 53, 53–54 (2020).

60. Chialfalo v. Washington, 140 S. Ct. 2316, 2322 (2020).

Presidential electors took on a role resembling a trustee, but it's something more than that. A trustee holds property in trust for the benefit of another and owes a fiduciary duty to that beneficiary.<sup>61</sup> A "fiduciary" owes good faith, confidence, and candor to the beneficiary.<sup>62</sup> But we don't think the votes of presidential electors are something that electors hold and exercise in good judgment on behalf of the electorate anymore. We expect electors to act as agents bound by the instructions of the voters.

Presidential electors now lack any discretion. Sometimes, laws bind electors, and those laws strip discretion from them.<sup>63</sup> Elsewhere, electors pledge their support for a particular candidate.<sup>64</sup> Everywhere, the informal expectation is that they will dutifully cast a vote for the presidential and vice-presidential candidates who appear on the ballot. An elector breaks faith when that elector breaches that trust. The "faithless elector," then, remains a useful phrase, and not one that immediately invokes the traditional notions of religious "faith."

### *Good Faith Redistricting*

"Good faith" is a common expression in law. In collective bargaining, the National Labor Relations Act requires employers and representatives of employees to negotiate in good faith.<sup>65</sup> If police obtain evidence from a defective search warrant, the evidence can still be admitted in court under the Fourth Amendment if the police relied in good faith on the warrant.<sup>66</sup> The common law of contracts expects a duty of good faith in performing the contract.<sup>67</sup> The "faith" in "good faith" is much more about being faithful to one's duties and obligations.<sup>68</sup> Those who act in good faith do so with honesty, and they lack malicious intent.

In the context of elections, "good faith" appears most prominently in cases involving redistricting. The legislature is often the body tasked with redrawing congressional and state legislative districts after the Census.<sup>69</sup> That opens opportunities for mischief. Legislatures may be self-interested in drawing districts. They may engage in inappropriate racial or partisan gerrymandering. They may attempt to circumvent constitutional or statutory requirements in pursuit of nefarious ends. Or they may draw lines with an ostensibly appropriate purpose, but it is a pretext as the legislature actually pursues inappropriate ends.

61. *Trustee*, BLACK'S LAW DICTIONARY (11th ed. 2019).

62. *See Fiduciary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

63. Green, *supra* note 59, at 70.

64. *See, e.g., Ray v. Blair*, 343 U.S. 214 (1952).

65. 29 U.S.C. § 158(d).

66. *United States v. Leon*, 468 U.S. 897, 920–21 (1984).

67. Daniel Markovits, Good Faith as Contracts Core Value, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 272, 272 (Gregory Klass, George Letsas, and Prince Saprai eds., 2012).

68. *See Good Faith*, BLACK'S LAW DICTIONARY (11th ed. 2019) (describing one of the states of mind of "good faith" as "faithfulness in one's duty or obligation").

69. *See* Derek T. Muller, *Nonjudicial Solutions to Partisan Gerrymandering*, 62 HOWARD U. L.J. 791, 793 (2019).

In one of the Supreme Court's earliest "one person, one vote" cases, *Reynolds v. Sims*, the language of "good faith" bound the state's choices in redistricting:

By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.<sup>70</sup>

The legislature holds a responsibility to act with good intentions as it draws districts.

The Court has never required mathematical equality in districts. Instead, the requirement of districts "as nearly of equal population as is practicable" is bound with a commitment of the legislature to engage in "an honest and good faith effort" to do so.<sup>71</sup> Some deviation from absolute mathematical equality across districts is acceptable.<sup>72</sup> A few years after *Reynolds*, the Court explained that under the Constitution, "States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown."<sup>73</sup> A good-faith effort can excuse absolute equality. Good intentions—faithfulness in carrying out the duty to draw districts as nearly of equal population as practicable—are enough.

The Supreme Court requires states to justify deviations in population if there's evidence that the legislature was not acting in good faith:

First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. . . . If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.<sup>74</sup>

The same logic extends to racial gerrymandering. "[T]he good faith of a state legislature must be presumed," the Supreme Court has explained, even in the face of allegations of racial bias.<sup>75</sup> Members of the Court have recognized the challenges facing legislators in drawing districts to comply with the Voting Rights Act, which scrutinizes some redistricting decisions on the basis of race, while simultaneously avoiding racial gerrymandering, which is an impermissible basis for redistricting.

70. *Reynolds v. Sims*, 377 U.S. 533, 577 (1964); see also *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016).

71. *Reynolds*, 377 U.S. at 577.

72. *Id.* at 579.

73. *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969).

74. *Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983); see also *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 759 (2012).

75. *Miller v. Johnson*, 515 U.S. 900, 915 (1995); see also *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018); *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017) ("Redrawing this district presented a difficult task, and the result reflected the good-faith efforts of Delegate Jones and his colleagues to achieve an informed bipartisan consensus.").

As Justice David Souter once explained, "States seeking to comply in good faith with the requirements of federal civil rights laws 'now find themselves walking a tightrope: if they draw majority-black districts they face lawsuits under the equal protection clause; if they do not, they face both objections under section 5 of the Voting Rights Act and lawsuits under section 2.'"<sup>76</sup>

"Good faith" does not necessarily conjure up an epistemological sentiment of faith in elections. "Good faith" reflects the Court's belief—a form of trust and an explicit expectation—that legislators will behave appropriately. At the same time, there may be a relationship between the public's expectations of government and its confidence in elections. If the legislature is acting in "good faith" and behaving appropriately in the context of redistricting, the public is likely to trust the elections more generally. If it appears the legislature is misbehaving and drawing maps in, one would expect confidence in elections to decline. It's worth, then, turning to the final category, "faith" in democracy in its broadest sense.

### FAITH IN DEMOCRACY

These last three categories—faith in a political party, faithless electors, and good faith redistricting—are, I think, modest uses of the word "faith" in discrete contexts. One use is sociological, and two uses treat "faith" as a part of a term of art. But I now turn to one last category, a much bigger topic: "faith in democracy." It is used to identify the confidence of the public in elections and the absence of corruption in elected officials.

A popular Supreme Court expression about faith in democracy arose outside the election context, but it was later applied to campaign finance laws. In 1961, the Court issued its decision in *United States v. Mississippi Valley Generating Company*.<sup>77</sup> The Court examined a federal "conflict of interest" statute that prohibited government officials from negotiating deals that might benefit them, as it might be "inimical to the best interests of the general public."<sup>78</sup> The Court defended application of the statute to the contract in dispute:

The statute is directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption. The seriousness of this evil quite naturally led Congress to adopt a statute whose breadth would be sufficient to cope with the evil.<sup>79</sup>

"Malfeasance and corruption" can shatter the "faith" of the people in those who govern. And democracy is only "effective" with that faith.<sup>80</sup>

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76. *Bush v. Vera*, 517 U.S. 952, 1063 (1996) (Souter, J., dissenting) (quoting Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-Shaw Era*, 26 CUMBERLAND L. REV. 287, 289 (1995–1996)).

77. 364 U.S. 520 (1961).

78. *Id.* at 548.

79. *Id.* at 562.

80. *Id.*

The Supreme Court has turned to this phrase in its contemporary campaign finance cases. In *Nixon v. Shrink Missouri Government PAC*, the Supreme Court found that a state law limiting campaign contributions to political candidates passed First Amendment scrutiny.<sup>81</sup> The state relied on its interests in preventing corruption and the appearance of corruption that come from sizeable campaign contributions, even without evidence of actual bribery. The Court explained,

Leave the perception of impropriety unanswered, and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance. Democracy works “only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption.”<sup>82</sup>

Likewise, Justice Stephen Breyer, dissenting in *McCutcheon v. Federal Election Commission* and defending aggregate contribution limits for federal office, remarked, “Democracy, the Court has often said, cannot work unless ‘the people have faith in those who govern.’”<sup>83</sup>

The Supreme Court used the same language in its 2010 decision in *Citizens United v. Federal Election Commission*, which held that the First Amendment prohibited the government from placing limitations on independent corporate expenditures on political speech.<sup>84</sup> While these corporate expenditures were not coordinated with any candidate for office, the government expressed the concern that these expenditures would give rise to the appearance of corruption. That is, the government worried that the public would associate sizeable corporate spending with corruption. But the Court held, “The appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy.”<sup>85</sup> It’s a claim about the future, and a contested claim at that.<sup>86</sup> But it again reflects the Court’s concern about the people losing faith *in* something.

Members of the Court have also shown a particular concern about the public’s faith in the judiciary in the context of judicial elections. Justice Ruth Bader Ginsburg dissented in *Republican Party of Minnesota v. White*, in which a majority of the Court concluded state prohibitions on a judicial candidate’s speech failed First Amendment scrutiny.<sup>87</sup> Justice Ginsburg argued that the state’s justification for the restriction turned on a matter of “preserving public faith”:

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81. *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

82. *Id.* at 390.

83. *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185, 238 (2014) (Breyer, J., dissenting).

84. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

85. *Id.* at 360.

86. See, e.g., Rebecca L. Brown & Andrew D. Martin, *Rhetoric and Reality: Testing the Harm of Campaign Spending*, 90 N.Y.U. L. REV. 1066 (2015) (offering a theoretical and empirical basis to answer the questions, “Could there be an interest, based on the electorate’s loss of faith in our democracy, to justify restrictions on spending? If so, can the requisite social harm be shown?”); Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 NW. U. L. REV. 655, 705 (2017) (suggesting that courts should take seriously legislative findings on the empirical question about whether the electorate has lost faith in democracy).

87. *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002).

Prohibiting a judicial candidate from pledging or promising certain results if elected directly promotes the State's interest in preserving public faith in the bench. When a candidate makes such a promise during a campaign, the public will no doubt perceive that she is doing so in the hope of garnering votes. And the public will in turn likely conclude that when the candidate decides an issue in accord with that promise, she does so at least in part to discharge her undertaking to the voters in the previous election and to prevent voter abandonment in the next. The perception of that unseemly quid pro quo—a judicial candidate's promises on issues in return for the electorate's votes at the polls—inevitably diminishes the public's faith in the ability of judges to administer the law without regard to personal or political self-interest.<sup>88</sup>

Justice Ginsburg wondered how the public could have faith *in* the judiciary if political promises surrounding a candidate's election to the office of judge. In a related context, Justice David Souter lamented, "In a single 2004 judicial election in Illinois, the candidates raised a breathtaking \$9.3 million, an amount the winner called 'obscene.'"<sup>89</sup> The Justice-elect wondered, "How can people have faith in the system?"<sup>90</sup> If individuals or corporations spend significant sums of money to elect judges, there might be a loss of faith in the impartiality of the judiciary.

In a later case, *Williams-Yulee v. Florida Bar*, the Court upheld a state limitation on judicial candidates directly soliciting campaign funds.<sup>91</sup> This time, Justice Antonin Scalia dissented, insisting that public faith would not be undermined if judicial candidates could solicit campaign contributions.<sup>92</sup> He argued,

The peaceful coexistence of judicial elections and personal solicitations or most of our history calls into doubt any claim that allowing personal solicitations would imperil public faith in judges. Many States allow judicial candidates to ask for contributions even today, but nobody suggests that public confidence in judges fares worse in these jurisdictions than elsewhere.<sup>93</sup>

One more example: Justice Neil Gorsuch, in a pair of election law cases in 2020, lamented "damage to faith in the written Constitution as law" (an identical turn of phrase) if courts intervened too close in time to an election.<sup>94</sup> In his view, judicial decisions altering political judgments undermined public confidence.

88. *Id.* at 818 (Ginsburg, J., dissenting).

89. *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 506 n.2 (2007) (Souter, J., dissenting).

90. *Id.*

91. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015).

92. *Id.* at 467 (Scalia, J., dissenting).

93. *Id.*

94. *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring in denial of application to vacate stay) ("It does damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures,

This language suggests three potential understandings of “faith.” The first simply echoes the point of “trust.” The people trust their local government officials to behave appropriately. The law should encourage that behavior. But it reflects some sense of distrust. If there’s an appearance of impropriety—a conflict of interest or an exchange that looks like a bribe—we should prevent even the appearance that our elected officials are behaving inappropriately.

The second is an evidence-based claim.<sup>95</sup> The people have an expectation that their elected officials will behave appropriately. Evidence available to the public supports that view, including an expectation that officials do not receive bribes. They cannot always see officials’ conduct. The people expect their elected officials to behave appropriately, and they will sustain those expectations until evidence is introduced indicating that elected officials are engaged in malfeasance and corruption. Public displays of conduct, including campaign finance, should demonstrate appropriate conduct.

The third is a concept of faith *in* something, a proposition closer to Lewis’s second use of the term. That is, we have a special relationship with our elected officials. We elect officials to represent us. They act in our interest and in the best interests of the nation. But they often act outside of our sight. We rely on them to work out the things that benefit us. We trust in them to do the right thing for us—to abide by their promises and to act in our best interest (admitting that these can sometimes be in tension and even contract one another).

These reactions from justices on the Court are often more about “democracy,” a broader concern than just elections, but consistently arising in the context of elections. There is a persistent concern about the totality of representative government. It’s a use consistent with the narrative of the political theorists: given the promises of the Constitution, we should expect some preservation of the good things of the past and growth toward a better future. Some justices worry that decisions will undermine those promises of the future. Others are confident that the future will benefit the people consistent with the promises of the Constitution. And it might be that “faith” in democracy or

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for the more we assume their duties the less incentive they have to discharge them. Last-minute changes to longstanding election rules risk other problems too, inviting confusion and chaos and eroding public confidence in electoral outcomes.”); *Moore v. Circosta*, 141 S. Ct. 46, 48 (2020) (Gorsuch, J., dissenting from denial of application for injunctive relief) (“As they observed, efforts like these not only offend the Elections Clause’s textual commitment of responsibility for election lawmaking to state and federal legislators, they do damage to faith in the written Constitution as law, to the power of the people to oversee their own government, and to the authority of legislatures.”).

95. Justice Elena Kagan uses similar language related to evidence in another campaign finance opinion:

My guess is that this does not happen often: Most political candidates, I suspect, have enough faith in the power of their ideas to prefer speech on both sides of an issue to speech on neither. But I will take on faith that the matching funds provision may lead one or another privately funded candidate to stop spending at one or another moment in an election.

*Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 769–70 (2011) (Kagan, J., dissenting).



elections means that people assume that certain traits must exist for a democracy or an election to exist in the first place: a lack of corruption, an independent judiciary, whatever it might be. Absent these traits, there is no democracy—or, perhaps, there is nothing worth placing that faith in.

### THE LIMITATIONS OF FAITH

I conclude with three suggestions that reconsider how we should think about “faith” in elections.

First, it is not clear that the Supreme Court’s invocations of “faith,” often in lofty and generic language, are terribly helpful. The Court (and litigants before the Court) should use more precise terminology to identify concerns. Public trust in the good motives of elected officials, public assurance in the impartiality of judges, and public confidence in the outcome of election results are the more specific interests that courts really intend to examine. For one, the more specific items are better for legislatures to consider as they choose to regulate elections. It gives more precision about the kinds of corruption or weaknesses that legislatures need to address. And it provides more accurate tools for lower courts when they evaluate the choices of the legislature. Given the myriad ways that “faith” can be used in the broadest sense, it is less accurate to use the term.

For another, it risks conflating sacred terms with earthly ends. The language of “faith” is powerful, and it is undoubtedly used rhetorically to convey something significant. Consistent with this, and on a much more skeptical note, Professor Maxwell Chibundu once wrote, “‘Democracy’ has become as barren an invocation of unexamined faith as any religious dogma. There are good practical reasons for promoting democratic societies, but it is dangerous to sanctify any ideology on the basis of the potential good that it may harbor.”<sup>96</sup> It has been popular to view democratic institutions as something “sacred,” and we are inclined to use sacred language like “faith” around them. Politicians or journalists may still prefer to use that language. But it might be time to move away from that language. Courts have an important role to play in interpreting and applying public laws. But adopting religious language as a gloss on worldly laws begins to tread on holy ground, to borrow a phrase.

Second, we are witnessing a migration away from confidence in elections.<sup>97</sup> Rather than merely hope that faith will be restored, we are seeing efforts to bring better evidence to the public precisely so the public does not need to rely on a faith in things unseen.<sup>98</sup> Professor Rebecca Green has called for increasing transparency in how election observers witness the events of the canvass and the counting of

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96. Maxwell O. Chibundu, *Political Ideology as a Religion: The Idolatry of Democracy*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 117, 157 (2006).

97. See *supra* notes 1–3 & accompanying text.

98. Cf. *John* 20:29 (“Jesus said to [Thomas], ‘Have you believed because you have seen me? Blessed are those who have not seen and yet have believed.’”) (English Standard Version); *Hebrews* 11:1 (“Now faith is the assurance of things hoped for, the conviction of things not seen.”) (English Standard Version). Special thanks to Michael Morley for this discussion.

ballots,<sup>99</sup> and in transparency as redistricting authorities draw maps and explain how they achieved what they achieved.<sup>100</sup> Emily Rong Zhang has expressly called for “bolstering faith with facts,” a mechanism of shoring up popular support for independent redistricting commissions with algorithms that can provide the public with the information it needs to ensure that commissions are working well and effectively.<sup>101</sup> Professor Rick Hasen has suggested increasing transparency of election results, including paper ballot requirements and risk-limiting audits, which can increase public confidence that the process yielded the correct outcome.<sup>102</sup> It remains to be seen whether increased transparency proposals are actually implemented, and, if they are, whether public confidence is restored. But they undoubtedly reflect the notion that the status quo is inadequate for the present age.

Finally, a recommendation for people of religious faith, and here I return to an emphasis on the Christian tradition. Christians are called to respect the government and ruling authorities.<sup>103</sup> But it is worth recognizing the fallibility of these democratic institutions, as all worldly institutions.<sup>104</sup> Consider the words of the theologian Oliver O’Donovan, in *The Ways of Judgment*, who shares three ways in which human political judgment is limited: “(i) that not everything known can be publicly expressed and certified; (ii) that judgment has only certain modes of expression open to it; (iii) that it lacks final authority.”<sup>105</sup> Simply put, there are limitations to how well human institutions can work. To return to the notion of faith *in* something, that faith should be in Christ and not in the things of this world.

That is something of a gloomy note. But it’s not some sort of fatalism for people of faith, a resignation that democratic institutions are inherently fallen. There are good reasons to work to root out fear<sup>106</sup> and to live worthy lives in this world.<sup>107</sup> Reliable elections—both actually reliable and that the public perceives as reliable—can certainly redound to people of faith. Christians are called to submit to government authorities, and submissions is undoubtedly easier in a legitimate regime and calls up fewer questions about obedience than when one doubts the regime’s legitimacy. But it’s simply a reminder that democratic institutions aren’t perfect. Elections aren’t flawless. Nevertheless, we can still have confidence in elections, at least as much confidence as worldly institutions can hold. Elections

99. Rebecca Green, *Election Observation Post-2020*, 90 FORDHAM L. REV. 467 (2021).

100. Rebecca Green, *Redistricting Transparency and Litigation*, 71 SYRACUSE L. REV. 1121 (2021).

101. Emily Rong Zhang, *Bolstering Faith with Facts: Supporting Independent Redistricting Commissions with Redistricting Algorithms*, 109 CAL. L. REV. 987 (2021).

102. Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, HARV. L. REV. F. (2022).

103. See, e.g., Mark 12:13–17; Romans 13:1–7; 1 Peter 2:13–17.

104. See Psalm 146:3 (“Put not your trust in princes, in a son of man, in whom there is no salvation.”) (English Standard Version).

105. OLIVER O’DONOVAN, *THE WAYS OF JUDGMENT* 28 (2008).

106. See, e.g., Isaiah 41:10.

107. See, e.g., Ephesians 4:1; Philippians 2:14–16.

in the United States have extensive checks, robust judicial review, and increasing transparency. We simply might want to reduce reliance on the language of “faith.”