

## HARVARD LAW REVIEW FORUM

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## RESPONSES

DECUS ET TUTAMEN<sup>†</sup>

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## INTRODUCTION

In his *Numismata*, an exhaustive 1697 historical study of coins and medals, the English diarist and antiquarian John Evelyn offered a personal invective against the “injurious [p]ractice of Clippers.”<sup>1</sup> A “clipper” of the late seventeenth century would find and shave off nubs from silver English coins as a way to glean a sliver of valuable silver. At sufficient volume, the practice yielded tidy economic returns.<sup>2</sup> With the Nine Years’ War inflating silver prices in the Low Countries and France, clipping helped contribute to the British currency’s deflationary spiral.<sup>3</sup> In 1662, the Royal Mint responded to the monetary crisis by installing a new production procedure for coins: a mechanical device to turn out coins of precisely calibrated thickness and circumference, upon which the new king’s likeness was deeply impressed.<sup>4</sup> Around the edges of larger-denomination coins, the machines then imprinted a Virgilian epithet — *Decus et Tutamen* — that had been suggested to the newly

<sup>†</sup> Responding to Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019).

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<sup>1</sup> JOHN EVELYN, NUMISMATA 225 (London, Benj. Tooke 1697) (emphasis omitted). *Numismata* was “a lengthy monograph on numismatics that also, incidentally, provide[d] the first attempt at a history of England told entirely through coins and medals.” Sean Silver, *John Evelyn and Numismata: Material History and Autobiography*, 31 WORD & IMAGE 331, 335 (2015).

<sup>2</sup> In a parliamentary inquiry in 1690, three goldsmiths each collected £100 of circulating coin, which should have weighed 1200 troy ounces in the aggregate; it was found to weigh 624. See THOMAS LEVENSON, NEWTON AND THE COUNTERFEITER 626–63 (2010).

<sup>3</sup> Stephen Quinn, *Gold, Silver, and the Glorious Revolution: Arbitrage Between Bills of Exchange and Bullion*, 49 ECON. HIST. REV. 473, 473 (1996).

<sup>4</sup> Carl Wennerlind, *The Death Penalty as Monetary Policy: The Practice and Punishment of Monetary Crime, 1690–1830*, 36 HIST. POL. ECON. 131, 134–35 (2004); see also JOHN CRAIG, THE MINT: A HISTORY OF THE LONDON MINT FROM AD 287 TO 1948, at 163–65 (1953) (describing the new technology).

restored King Charles II by Evelyn the antiquarian.<sup>5</sup> *Decus et Tutamen* means “ornament and safeguard.”<sup>6</sup> Inscribed at a coin’s far rim, it supplied a “clear, firm” physical marker.<sup>7</sup> In this way, the hope was, the words could deter clipping by providing a highly salient evidentiary mark that a coin had been trimmed.<sup>8</sup>

Incantations to ward against the specters of defalcation and self-dealing are to be found again in Article II of the U.S. Constitution. The presidential oath to “faithfully execute the Office of the President”<sup>9</sup> and the obligation inherent in that office to “take Care that the Laws be faithfully executed”<sup>10</sup> are interpreted by Professors Andrew Kent, Ethan Leib, and Jed Shugerman (hereinafter “KLS”) to impose upon the nation’s executive branch officials “a restrictive duty . . . not to veer from their assigned jobs, not to self-deal, and to do their jobs with diligence and care.”<sup>11</sup> KLS’s is a two-edged gloss. On the one hand, its negative implication repudiates the imputation of supplemental Article II authority from the oath.<sup>12</sup> On the other hand, its positive connotation connotes a complex duty of fidelity.<sup>13</sup> In this latter positive aspect, KLS suggest, the two Faithful Execution Clauses are intended to work as self-executing prophylaxis against both dereliction from statutory obligation and self-dealing. The clauses, that is, act together as a self-executing “ornament and safeguard.”

But do they work? KLS’s historical exegesis of the Faithful Execution Clauses offers an opportunity to examine a more general theoretical question of constitutional design. Constitutions generally lack external enforcement mechanisms. Wanting for extrinsic props, they must generate endogenously their own “conditions of stability and adaptation.”<sup>14</sup> A

<sup>5</sup> CRAIG, *supra* note 4, at 166; Wennerlind, *supra* note 4, at 135. On Evelyn’s role in making the suggestion, see EVELYN, *supra* note 1, at 225, and Katharine Gibson, *Samuel Cooper’s Profiles of King Charles II and Thomas Simon’s Coins and Medals*, 30 MASTER DRAWINGS 314, 318 n.17 (1992).

<sup>6</sup> CRAIG, *supra* note 4, at 166.

<sup>7</sup> *Id.* at 167.

<sup>8</sup> *Id.*

<sup>9</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>10</sup> *Id.* § 3.

<sup>11</sup> Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019).

<sup>12</sup> *Id.* at 2133–34, 2191–92.

<sup>13</sup> *Id.* at 2178.

<sup>14</sup> Sonia Mittal & Barry R. Weingast, *Self-Enforcing Constitutions: With an Application to Democratic Stability in America’s First Century*, 29 J.L. ECON. & ORG. 278, 282 (2013); see also Daryl J. Levinson, *Parchment and Politics: The Positive Puzzle of Constitutional Commitment*, 124 HARV. L. REV. 657, 661 (2011) (labeling this “the puzzle of constitutional commitment,” and noting the difficulties inherent in creating a document that presumes to regulate both elites and the general public). This literature elides an important distinction between (1) how “parchment” constitutional commitments are initially gotten up and running in lieu of a superseded prior institutional regime; and (2) how those institutions, once successfully installed against prior governance models, are sustained. On the first question, see FROM PARCHMENT TO PRACTICE (Tom Ginsburg & Aziz Z. Huq eds., forthcoming 2020). See also Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV.

constitution will not long survive if it creates incentives for those in political power adverse to the persistence of its own institutional forms.<sup>15</sup> An examination of the Faithful Execution Clauses may cast light on whether the endogenous enforcement mechanisms contained in the 1787 text are effective, and if so, through what mechanisms. One strand of KLS's interpretation in particular is obviously relevant to this stabilizing function: the positive duty of faithful execution that entails the "limitation, subordination, and proscription" of executive activity contrary to statutory command.<sup>16</sup> This law-indexed constraint is the object of this Response. In contrast, obligations of fiscal probity and diligence are less useful objects of inquiry since they are reflected in other constitutional provisions.<sup>17</sup> They are also broadly uncontroversial as glosses on the office of the presidency. No one asserts a legal right to self-deal from the Oval Office (even if some flaunt their ability to do so). The material implications for constitutional practice flowing from KLS's interpretation, in my view, must stand or fall based on the plausibility of the claim that "an obligation to hew closely to [legislative] authorization and not veer outside it" can be found in Article II's Faithful Execution Clauses.<sup>18</sup>

My central aim in this Response is to extract and evaluate the causal mechanics upon which the Faithful Execution Clauses rely. In developing a functional perspective on constitutional design, I concededly go beyond the more parsimoniously exegetical, historically calibrated aims of KLS. The extension, however, is an obvious and even immanent implication of their hermeneutical inquiry. Given the context in which their article was published, KLS cannot reasonably be taken to be offering an inquiry of mere antiquarian interest. The compatibility of their account with observed institutional and individual incentives plainly merits attention.

As a way of conceptualizing the scope of the functional inquiry, consider a simpler, but analogous question: How did the imprimatur of *Decus et Tutamen* stop clipping? I think there are three points to be

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1165, 1191–222 (2014) (drawing on contract theory to identify a stabilization function of the supermajority rule in Article V in the republic's first period). My focus here is not on the distinctive problem of constitutional creation, but on the propensity of the Faithful Execution Clauses to operate as self-executing constraints on the use of official authority.

<sup>15</sup> The median age of a constitution globally at the time of its death is nineteen years. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 129 (2009).

<sup>16</sup> Kent, Leib & Shugerman, *supra* note 11, at 2182.

<sup>17</sup> *Id.* at 2179 (citing examples).

<sup>18</sup> *Id.* at 2182. This elides two complications. First, there is a question of whether the verbal difference between the oath's referent ("the Office of the Presidency") and Article II, Section 3's referent ("the Laws") is a salient one. *Id.* at 2113 (noting this difference). KLS implicitly, and quite plausibly, appear to read the two clauses in harmony: the Take Care Clause, that is, delineates the "Office" to which the oath pertains, and as such is subsumed within, and thus defines, the contour of the oath-taker's obligation. Second, KLS leave open the question of whether the phrase "the Laws" indexes "only statutes of Congress, or something more — perhaps the Constitution, treaties, common law, or the law of nations." *Id.* at 2136. For my purpose, construal of the clause to reach statutes suffices.

made to that query. To begin with, the inscription's proximity to the coin's edge created an index of illegal manipulation. That index, second, was immediately legible to potential recipients of the coin. No specialized measures or devices were needed to discern it. Finally, the Mint assumed that no other physical element of the currency, or feature of the ambient circumstances of currency usage, would undermine the inscription's indexing of defalcation. Together, these three elements were meant to render the inscription an effective constraint on clipping.

Three roughly parallel assumptions animate the Faithful Execution Clauses' law-indexed constraint. First, the clauses must have imposed some determinate constraint on officeholders at the time of their enactment. That is, it must have been clear that faithful execution entailed fidelity to *ex ante* statutory enactment. Second, in operation, an external observer would have to be able to identify transgressions of the clauses without the exercise of costly diligence. Finally, no contextual dynamics generated either by other elements of the constitutional text or by the political system more generally should in practice impinge upon the operation of the clauses' constraining force. I doubt, however, that any of these three operative conditions are satisfied. On the first point, my negative conclusion flows from an internal critique of KLS's evidence. On the latter two points, I accept KLS's interpretation in its broad contours, but then interact it with legal considerations beyond their corpus of historical evidence. In net, the arguments that follow cast doubt on the origins and incentive compatibility of a law-indexed constraint derived from the Faithful Execution Clauses.

### I. THE CONTENT OF "FAITHFUL EXECUTION": A DIACHRONIC PERSPECTIVE

Central to KLS's account is the proposition that the Faithful Execution Clauses "subordinat[ed] the President to those who authorize what he is supposed to execute,"<sup>19</sup> and thus entailed no "broad royal prerogative powers."<sup>20</sup> This proposition is premised on the idea that "historical context" is relevant to "all, or nearly all, constitutional interpreters."<sup>21</sup>

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<sup>19</sup> Kent, Leib & Shugerman, *supra* note 11, at 2182.

<sup>20</sup> *Id.* at 2184.

<sup>21</sup> *Id.* at 2117. I am not as certain as KLS that historical context in the detailed and granular sense they mean is *always* relevant to constitutional meaning in practice or in theory. As a recent Foreword in this journal noted, "we do not uniformly follow original understandings even to clarify vague provisions of the Constitution." David A. Strauss, *The Supreme Court, 2014 Term — Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 31 (2015). Important constitutional provisions, including the Free Speech Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, are presently interpreted with only intermittent regard to historical context, or in light of such general and abstract glosses on such context that history provides no constraint. With regard to the First Amendment, see *id.* at 30–31. With regard to the Fourteenth Amendment, see *id.* at 30, noting the settled understanding that the Equal Protection Clause does protect against discrimination against women, despite original understandings.

But their evidence chimes most loudly as a claim about original public meaning — that is, “the public or objective meaning that a reasonable listener would place on the words used in the constitutional provision at the time of its enactment.”<sup>22</sup> Speaking in that register, KLS assert that they have aggregated “overwhelming evidence” of how “the concept of faithful execution of office was . . . commonly used and well known.”<sup>23</sup>

As I read their evidence — and what follows is really just a gloss on their evidence rather than an effort to supplement their prodigious and admirable research effort — I am not sure that the idea of presidential constraint under statutory law emerges as pellucidly as they suggest from the historical record. Whatever the merits of the constitutional proposition that the President abides under statutory restriction, and wholly setting aside my own ultimate views on the matter,<sup>24</sup> the narrow point pertinent here is that the historical record cited in the article does not necessarily support KLS’s originalist conclusion as unequivocally as they imply.

At the threshold, KLS concede that the contemporaneous evidence of how “faithful execution” would have been understood in the late eighteenth century is quite thin. Remaining records of the Philadelphia Convention show an absence of arguments for the Take Care Clause as a positive grant of power.<sup>25</sup> This negative showing is not evidence, though, that faithful execution was understood as a source of law-indexed constraint. Beyond that, the evidence cited from the ratification debates is ambiguous and not terribly illuminating.<sup>26</sup>

<sup>22</sup> RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 92 (2004); accord Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 *CONST. COMMENT.* 47, 75–76 (2006); John O. McGinnis & Michael B. Rappaport, *Unifying Original Intent and Original Public Meaning*, 113 *NW. U. L. REV.* 1371, 1376–78 (2019).

<sup>23</sup> Kent, Leib & Shugerman, *supra* note 11, at 2117 n.30.

<sup>24</sup> My own long-held view is that the President indeed is so bound. See FREDERICK A.O. SCHWARZ JR. & AZIZ Z. HUQ, *UNCHECKED AND UNBALANCED: PRESIDENTIAL POWER IN A TIME OF TERROR* 153 (2007) (arguing the power to “ignore statutes passed by Congress . . . did not find its way into our founding documents”). The argument in the main text is an effort to evaluate fairly a scholarly argument on its own terms, not an expression of my views on the constitutional merits.

<sup>25</sup> See Kent, Leib & Shugerman, *supra* note 11, at 2128.

<sup>26</sup> KLS cite James Wilson’s “ambiguous” statement before the Pennsylvania ratifying convention that a President might “refuse to execute laws that he viewed as unconstitutional.” *Id.* at 2131 (citing and quoting Statement of James Wilson at the Pennsylvania Ratifying Convention (Dec. 1, 1787), in 2 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 451 (John P. Kaminski & Gaspare J. Saladino eds., 1988) [hereinafter Wilson Statement]). Wilson’s statement came in the context of an examination of the problem of legislative overreaching, which he characterized as “of all kinds of despotism . . . the most dreadful and the most difficult to be corrected.” Wilson Statement, *supra*, at 450. Both judicial review and some sort of presidential intercession, Wilson noted, mitigated this risk. *Id.* at 451. Two points are worth making here. First, it seems unlikely that Wilson or his audience imagined legislative “despotism” to be the modal conduct of the anticipated Congress, but rather an exceptional occurrence. Hence, it is far from clear that the presidential authority he described should be understood as anything other than an exceptional and unusual remedy. Second, Wilson’s prediction about Congress as the most likely source of “despotism,” a view he shared with James

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Accordingly, KLS look to “Anglo-American law prior to 1787” to buttress their claim.<sup>27</sup>

I see two limits to this strategy. The first is their assumption that there is a reason to treat pre-Founding era evidence of legal practice as salient to the construal of the 1787 text. KLS’s data range over a vast historical and geographical domain, starting in England during the 1200s and ending in the post-independence former colonies.<sup>28</sup> What they do not supply is evidence that an understanding of law that crystallized at a specific historical point during this heterogeneous period provided a reference point in 1787. That is, KLS supply evidence of the content of the law over time, but not evidence that such contents were available to, and relied upon by, the relevant group of constitutional drafters or their public audience. It is not safe to assume that an earlier generation — bereft of Wikipedia, digitized archives, or the modern research library — would have had access to the full gamut of materials KLS showcase. After all, we — who *do* have access to Wikipedia, digitized archives, the modern research library, and diligent law-student assistants to boot — can and have until now forgotten much of the legal and regulative history that KLS present. There is no surety that what we have forgotten was recalled by others in an earlier moment in time.

Nor can one assume that a documentary record of law, even if it was available, was understood in the 1780s in the same fashion that it is understood today. Understandings of the past molt and mutate. They experience phase shifts and unexpected transitions. The past’s past, I think, is a fragile and fickle thing. KLS take too much for granted when they assume that their (merely encyclopaedical!) efforts at historical recovery suffice to establish it.

But even setting aside such theoretical quibbles, there is a second, more mundane problem with KLS’s argument from historical context as it pertains to the President’s constraint by statutory law. As I read the evidence that KLS present of “Anglo-American law prior to 1787,”<sup>29</sup> a minority of the sources presented therein pertains to legislative constraint defined in reference to *ex ante* enactments. Many of the medieval

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Madison, see THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961), was not sustained by subsequent events. See Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1727 (1996) (“The dominance of executive power ought by now, to lift a phrase from Charles Black, to be a matter of common notoriety not so much for judicial notice as for background knowledge of educated people who live in this republic.”). How should we think about interpretive claims offered in the Founding period when they are premised on institutional predictions that subsequent history has demonstrated to be false? This is an important question, with a large attendant scholarly literature. In further work, I hope that KLS engage more with such questions.

<sup>27</sup> Kent, Leib & Shugerman, *supra* note 11, at 2141.

<sup>28</sup> See *id.* at 2141–78.

<sup>29</sup> *Id.* at 2141.

oaths that KLS describe, for example, were not backward-looking pre-commitments anchored in an earlier-written, lawlike norm. Rather, they were forward-looking promises to achieve certain goals.<sup>30</sup> Indeed, so far as I can tell, KLS's first clear example of ex ante legal commitments providing a focal point for an obligation of faithful execution comes with the remonstrations against King Charles I's ministers in the course of the monarchy's deliquescence through the English Civil War.<sup>31</sup> KLS then identify a thicket of post-Restoration statutes that referenced ex ante legal constraints. But these invoked the "[t]enor' or '[p]urport' of the act."<sup>32</sup> Such measures are equivocal evidence of KLS's thesis: they do not index official fidelity to written law, but rather to an abiding or supervening ambition behind the law. As scholars of statutory interpretation have documented, there is, between these two possible formulations, a potentially yawning gulf.<sup>33</sup>

Similarly, KLS cite a number of colonial charters, including the 1636 Pilgrim Code of Law for New Plymouth and the 1639 Fundamental Orders of Connecticut, as evidence of law as an object of faithful execution.<sup>34</sup> But consider closely the language of the latter. It is only "all wholesome lawes" made by "lawfull authority" that merit respect and obedience.<sup>35</sup> Does this not presuppose an exercise of independent discretionary choice by the executive? And isn't that discretion itself unguided by *law*? More generally, I was struck not by the continuity of conceptions of "faithful execution" displayed by KLS's impressive erudition. Rather, what endured after reading KLS's catalog was a sense of sheer variation, of subtle modulations between deontic and consequentialist registers, and of the nuance and ambiguity with which the law could be invoked. Not one straight line, but a jagged and looping arc is needed to connect these disparate and cacophonous points.

## II. THE CONTENT OF "FAITHFUL EXECUTION": A SYNCHRONIC PERSPECTIVE

Let us put to one side these objections. Let us instead focus on the idea that "Congress's laws" index the quality of faithful execution,<sup>36</sup> and consider how much traction this possibility generates today. I think

<sup>30</sup> For examples, see the sources cited in *id.* at 2143–44 nn.182–89.

<sup>31</sup> *See id.* at 2151–52.

<sup>32</sup> *Id.* at 2155 (alterations in original) (citations omitted); *see also id.* at 2156 (reading these statutes as giving an "emphasis on faithfulness of the officeholder to legislative supremacy").

<sup>33</sup> Compare WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 116–18 (1994) (developing a faithful-agent account of interpretation), with Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535–36 (1983) (discussing the distinction between statutory application and interpretation and suggesting that the latter transfers significant discretion to courts).

<sup>34</sup> Kent, Leib & Shugerman, *supra* note 11, at 2161.

<sup>35</sup> Fundamental Orders of Connecticut (Jan. 14, 1639), reprinted in COLONIAL ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 210, 215 (Donald S. Lutz ed., 1998).

<sup>36</sup> Kent, Leib & Shugerman, *supra* note 11, at 2184.

there is reason to doubt that this index provides a safe or sure contemporary footing for judgment of faithful execution. The problem is that the Faithful Execution Clauses leave open the question of how statutes should be interpreted. The absence of any meta-constraint in respect to theories of statutory interpretation leaves it open to executive branch officials to gloss statutes in a rather wide set of ways. To be sure, statutory meaning is often clear in the sense of admitting to no plurality of meanings. But I think it is likely that in a majority of interesting cases, the formulation merely suggests a framing for debates that might as well be conducted outside the argot of faithful execution. While KLS recognize this problem in passing, I think their treatment is too superficial to assuage concerns.<sup>37</sup> As a result, their claim about the constraining effect of the Faithful Execution Clauses is underwhelming as a practical matter.

The idea that statutes do not commonly admit of more than one meaning does not survive much scrutiny. As Professor Ryan Doerfler has recently reminded us, individuals often use a single phrase to communicate different things to different audiences.<sup>38</sup> Given the frequency of such polysemantic statements, Doerfler argues that it will “often make sense for Congress to enact one multi-setting provision rather than two (or three or four) provisions that are setting-specific.”<sup>39</sup> It is also reasonable to anticipate that ambiguity will be more likely identified and argued over in cases where the stakes are higher — as philosophers of language have stressed indeed occurs in everyday conversational contexts.<sup>40</sup> One does not need to look far to discover evidence that where the perceived policy or political stakes are higher, lawyers within the executive branch will strive harder to discern ambiguity that can be leveraged. Motivated reasoning is not confined to lay persons.<sup>41</sup> It is hardly news that many high-profile policy fights on national security,<sup>42</sup> immigration,<sup>43</sup> public health,<sup>44</sup> the insurance market,<sup>45</sup> and controversies of a similar ilk all turn on the construction of an ambiguous statute.

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<sup>37</sup> KLS argue that the Faithful Execution Clauses require the executive to act “*in good faith*,” and concede that “there obviously remains an area of discretion in cases where Congress does not provide adequate funding or guidance.” *Id.* at 2186.

<sup>38</sup> Ryan D. Doerfler, *Can a Statute Have More than One Meaning?*, 94 N.Y.U. L. REV. 213, 218 (2019) (“[S]peakers can and often do transparently communicate different things to different audiences with the same verbalization or written text.”).

<sup>39</sup> *Id.* at 221.

<sup>40</sup> For examples from linguistic practice, see Keith DeRose, *Contextualism and Knowledge Attributions*, 52 PHIL. & PHENOMENOLOGICAL RES. 913, 913 (1992).

<sup>41</sup> See Dan M. Kahan, *The Supreme Court, 2010 Term — Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1, 7 (2011) (describing motivated reasoning as “the tendency of people to unconsciously process information — including empirical data, oral and written arguments, and even their own brute sensory perceptions — to promote goals or interests extrinsic to the decisionmaking task at hand”).

<sup>42</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2403 (2018).

<sup>43</sup> See, e.g., *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018).

<sup>44</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 126 (2000).

<sup>45</sup> See, e.g., *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015).



In these cases, KLS's demand that the Executive act "in good faith" is unlikely to do much constraining work. When an official has a strong policy preference, and is able to construct a case for viewing a piece of statutory language as ambiguous, then it seems unlikely that either they or an outside observer will be able to discern bad faith. This is likely to be acutely so in policy domains, such as national security and foreign affairs, subject to relatively light judicial oversight and characterized by fewer secure hermeneutical anchors.

The idea that *ex ante* legislation might provide a sure and certain reference point for faithful execution, moreover, may be less suited to the current legislative landscape than it was to the legislative landscape of the late eighteenth century. Very simply, there is a difference of several orders of magnitude between how much legislative text existed in the 1790s and the legislative corpus today. This change in the volume of on-the-books legislative text increases substantially the possibility of a conflict between two textual provisions — conflicts that can create uncertainty where none had existed previously. Moreover, legal elites' beliefs about statutory interpretation have changed in ways that might make consensus over the choice of interpretive methodology more difficult to attain.<sup>46</sup> One study of the Founding period emphasizes a widespread belief in the "moderate indeterminacy" of statutory text during the 1790s, and a concomitant belief that "judicial interpretation [was] constrained in a way that political decisionmaking was not."<sup>47</sup> The same cannot be said now given the sharp battles amongst judges and between judges and theorists over the appropriate approach to statutory interpretation. Today, there are many ways in which statutory interpretation is contested along margins that the Framers did not perceive as salient. For example, a Justice recently acknowledged that the threshold of linguistic precision necessary to render a text "clear" is itself uncertain — a perception that (so far as I am aware) the Framers did not share.<sup>48</sup> The same Justice has openly disagreed with a colleague on the federal bench not just about the outcomes of specific cases, but

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<sup>46</sup> There was a debate in the Founding period about the scope of judicial discretion within Founding-era theories of interpretation. Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), with William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001). To the extent one reads this debate as suggesting some disagreements within the Founding generation, it only further undermines the expected force of the faithful execution constraint in that period.

<sup>47</sup> Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary's Structural Role*, 53 STAN. L. REV. 1, 20 (2000) (first emphasis omitted).

<sup>48</sup> Brett M. Kavanaugh, Keynote Address, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1910 (2017) ("[H]ow do courts know when a statute is clear or ambiguous? . . . Quite simply, there is no good or predictable way for judges to do this.").

also in respect to the underlying theoretical questions implicated in statutory interpretation.<sup>49</sup>

Under these conditions, it is far less likely than it was at the Founding that fixed statutory text will operate as a clear “focal point” enabling implementation of KLS’s law-indexed strand of the Faithful Execution Clauses.<sup>50</sup> This difficulty of identifying instances of infidelity to statutory text distinguishes the Faithful Execution Clauses from the *Decus et Tutamen* inscription. Whereas violations of the latter could be identified at low cost, violations of the former are in all likelihood unavoidably contestable and difficult to resolve. They therefore fail to provide a clear signal of constitutional noncompliance. Even if KLS’s account of the historical record holds, all this justifies skepticism about the prospects of effective leveraging of the Faithful Execution Clauses with an eye to presidential constraint.

### III. “FAITHFUL EXECUTION” AND CONSTITUTIONAL STRUCTURE

KLS’s inquiry into the Faithful Execution Clauses treats them in isolation. My aim in this Part is to zoom out to consider whether other elements of the constitutional design or structure impinge on those clauses’ intended operation. I suggest two reasons for doubting the constraining effect of faithful execution in light of that larger constitutional context. First, there is no obvious enforcement mechanism for violations of the faithful execution obligation. Oaths, which are central to the original understandings of those obligations, do not operate in the same fashion today that they did in 1787. Impeachment has also come to be construed in practice largely to exclude violations of the faithful execution obligation. As a result, there is a vacuum when it comes to enforcement. Second, the presidency today has a popular, democratic character that belies the original design of the office. As a consequence, the President’s claim to authority rests not only on the laws enacted by Congress, but also upon his or her “mandate” from the people.<sup>51</sup> The changing democratic pedigree of the presidency and the emergence of the “mandate” as an alternative basis for legitimation and authority diminish the force of the backward-looking Faithful Execution Clauses.

The notion that “the material consequences” of a law matter more than its internal logic or hortatory effect goes back at least to Justice

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<sup>49</sup> See, e.g., Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2119 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)).

<sup>50</sup> On the concept of focal points as conditions predicate of effective enforcement, see DAVID M. KREPS, *GAME THEORY AND ECONOMIC MODELLING* 101–02, 143–44 (1990).

<sup>51</sup> JULIA R. AZARI, *DELIVERING THE PEOPLE’S MESSAGE: THE CHANGING POLITICS OF THE PRESIDENTIAL MANDATE 2* (2014) (characterizing the late twentieth century onward as “[t]he era of mandate politics”).

Holmes's famous lecture, entitled *The Path of the Law*.<sup>52</sup> KLS expressly forego any definite judgment on how faithful execution violations would be remedied.<sup>53</sup> But their account gestures toward two possible pathways for a "material" realization of faithful execution. The first is the "solemn and momentous" act of oath-taking as a means of "binding" and "discretion-limiting."<sup>54</sup> One reading of the evidence that KLS present, indeed, is that the oath was the primary device for enforcing faithful execution.<sup>55</sup> On that view, the scope and effect of faithful execution would turn exclusively on the psychological force of an oath upon an officeholder's dispositions toward probity and legality. As KLS lucidly explain, the eighteenth-century practice of oath-taking was inseparable from broadly held views about religiosity. A background social consensus on religious norms provided a necessary predicate to the belief that oaths operated as "the safest knot of civil society, and the firmest band to tie all men to the performance of their several duties."<sup>56</sup> Today, however, the American religious landscape is considerably more fragmented.<sup>57</sup> It is far from clear that the moral force that oath-taking had in the late eighteenth century persists under present-day conditions of religious diversity. Thus, to the extent that the constitutional design rests on oath-taking as part of its self-enforcement toolkit, there is good reason to doubt its efficacy, at least if one holds its psychological predicates constant.<sup>58</sup>

Alternatively, KLS hint, the Faithful Execution Clauses might be enforced through impeachment.<sup>59</sup> The problem here is that impeachment has developed into a narrow instrument for dealing with instances of

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<sup>52</sup> O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

<sup>53</sup> Kent, Leib & Shugerman, *supra* note 11, at 2190.

<sup>54</sup> *Id.* at 2128; *see id.* at 2130 ("Oaths of office in general were discussed as real and meaningful checks on official behavior . . .").

<sup>55</sup> KLS note that an oath requirement was often conjoined with "requirements of bonds or sureties." *Id.* at 2188–89. As they rightly note, these are "probably superfluous" when it comes to the presidency. *Id.* at 2189.

<sup>56</sup> *Id.* at 2124 (quoting J.C.D. Clark, *Religion and Political Identity: Samuel Johnson as a Nonjuror*, in SAMUEL JOHNSON IN HISTORICAL CONTEXT 79, 81 (Jonathan Clark & Howard Erskine-Hill eds., 2002)).

<sup>57</sup> *Religious Landscape Study*, PEW RES. CTR., <https://www.pewforum.org/religious-landscape-study> [<https://perma.cc/9979-UUN5>] (documenting diversity of Christian, non-Christian, and non-religious dispositions).

<sup>58</sup> It is possible that executive branch officials internalize certain legal constraints. Indeed, I have argued elsewhere that internalized legal norms are not just possible but probable, at least under the modal presidential administration. Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. CHI. L. REV. 777, 802 (2012) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010)) ("Ample evidence shows executive-branch officials to have normative preferences about legality and constitutionality."). I am not sure, however, that an orientation toward legalism precludes the possibility of motivated reasoning in contestable cases. Indeed, I accept the familiar legal realism point that it does not.

<sup>59</sup> *See* Kent, Leib & Shugerman, *supra* note 11, at 2190.

outright criminality. As Professor Stephen Griffin has recently demonstrated in an impressive history of presidential impeachment debates from the early nineteenth century onward, partisan dynamics fostered by the involvement of the House and the Senate have pushed impeachment toward a Procrustean bed organized around the concept of “indictable crimes.”<sup>60</sup> Whatever the original understanding of impeachment’s scope,<sup>61</sup> and whatever the optimal interpretation,<sup>62</sup> Griffin’s analysis suggests that the incentives of elected, partisan actors on Capitol Hill have not proved consistent with a broad understanding of the impeachment power. His work indicates that the enforcement of faithful execution through impeachment will not always or often be incentive-compatible.<sup>63</sup> The fragility of both oath-taking and impeachment as remedial devices means that the Holmesian bad man, if elected, faces scant material consequence for traducing the obligation of faithful execution.

A second difficulty arises from larger constitutional structure. It stems from the shifting nature of the office of the presidency. The point here is that the idea of a legitimating presidential mandate from the people, which emerged at some point in U.S. history, has supplied an alternative basis for claims of presidential fidelity, and thus public-facing claims to legitimate authority. This alternative ground of legitimation is potentially at odds with the Faithful Execution Clauses’ backward-looking focus on already-enacted laws. A President who wants to renege on legislated commitments, that is, has the option of leaning instead on his or her popular mandate as an absolving justification.

Political scientists disagree about the origin of the presidential mandate. Professor Robert Dahl identifies President Andrew Jackson’s belief that “the President was an immediate and direct representative of the People” as an inflection point.<sup>64</sup> Elsewhere, Professor Julia Azari

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<sup>60</sup> See Stephen M. Griffin, Essay, *Presidential Impeachment in Tribal Times: The Historical Logic of Informal Constitutional Change*, 51 CONN. L. REV. 413, 419 (2019).

<sup>61</sup> See CASS R. SUNSTEIN, *IMPEACHMENT: A CITIZEN’S GUIDE* 51–53 (2017). In the English context too, impeachment was not viewed as a narrow remedy for criminality. Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 YALE L.J. 1419, 1432–34 (1975) (providing evidence for this, and also arguing that parliaments erred about the law).

<sup>62</sup> For an argument that a broad construal of impeachment is consistent with the lessons of historical and comparative constitutional law, and not likely to produce destabilizing consequences, see Tom Ginsburg, Aziz Huq & David Landau, *Designing Presidential Impeachment* (Oct. 9, 2019) (unpublished manuscript) (on file with the Harvard Law School Library).

<sup>63</sup> Cf. Aziz Z. Huq, *Legal or Political Checks on Apex Criminality: An Essay on Constitutional Design*, 65 UCLA L. REV. 1506, 1522–23 (2018) (describing the potential for institutional distortions from various mechanisms for policing high-level malfeasance).

<sup>64</sup> Robert A. Dahl, *Myth of the Presidential Mandate*, 105 POL. SCI. Q. 355, 357 (1990) (quoting LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY*, 1829–1861, at 23 (1954)).

traces a more recent post-Watergate lineage.<sup>65</sup> All agree that “the theory of the presidential mandate not only cannot be found in the Framers’ conception of the Constitution; almost certainly it violates that conception.”<sup>66</sup> And it is common ground that the “rhetorical” presidency, directed at the broad public, is a source of authority and political risk that did not exist at the time of the Founding.<sup>67</sup> This “gloss” (of a sort) on the presidency’s nature and powers, though, undermines the force of faithful execution. Mandate claims tend to arise out of the specific context of campaign promises and rhetoric.<sup>68</sup> But there is no necessary connection between campaign promises and the context of existing statutory law. To the contrary, we might expect that presidential candidates (especially nonincumbents) would campaign against the prevailing grain of policy commitments embodied in law. This means that they come to office committed to an agenda that is at odds, at least at some points, with the substantive obligation of faithful execution. At a minimum, this source of legitimating authority provides a buffer against public criticism based on violations of faithful execution. It may also mitigate the ability of Congress to employ impeachment to sanction unfaithful execution.<sup>69</sup> And obviously, the convergence between presidential mandates and partisan policy agendas renders that enervating effect even more acute.

Neither the narrowing gyre of impeachable offenses nor the rise of the presidential mandate was anticipated at the Framing. Yet ever since they emerged, these new institutional dynamics have tended to create conditions under which the force of faithful execution withers. In this fashion, the inevitable evolution of conventional understandings that go beyond the text have worked to sap faithful execution of its potency. The Constitution thus has not been working itself pure: it has been working itself, at least in one aspect, out of business.

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<sup>65</sup> AZARI, *supra* note 51, at 2–3.

<sup>66</sup> Dahl, *supra* note 64, at 358. For a careful analysis of the tension between mandate talk and the original constitutional design, see Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1262 (2006) (“By design, electoral outcomes in our system of separation of powers tend to resist being pigeonholed as mandates.”).

<sup>67</sup> JEFFREY K. TULIS, *THE RHETORICAL PRESIDENCY* 118–32 (1987) (suggesting that the plebiscitary President has changed the original constitutional conception of the presidency).

<sup>68</sup> See, e.g., Dahl, *supra* note 64, at 355.

<sup>69</sup> There is a substantial political science literature suggesting a tight connection between Congress’s ability to act against the presidency and public opinion. See, e.g., Scott J. Basinger & Brandon Rottinghaus, *Stonewalling and Suspicion During Presidential Scandals*, 65 POL. RES. Q. 290, 293 (2012) (“[C]ongressional investigations are sensitive to the media’s and the public’s initial and continuing interest in a scandal.”).

## CONCLUSION

Virgil's conjuration failed. The Mint's 1662 reforms to the coinage were not a success, let alone a "panacea," because older coins remained in circulation at full nominal value — something that struck even contemporaries as an "[a]bsurdity easily remarkable."<sup>70</sup> Thirty-four years later, Parliament would pass a Recoinage Act, withdrawing old silver coins from circulation and, under the guidance of John Locke and Isaac Newton, issuing new currency.<sup>71</sup>

A similar story might be told with presidential malfeasance. KLS's scholarly and assiduous history demonstrates one plausible story for how that problem would have been addressed at the Founding. They are to be lauded for their exhaustive work. But their contribution merely sets up a more troubling and difficult question today: Once the devices contained in the Constitution for sustaining it as a just and lawlike regime dissolve, what else, if anything, can be engraved in their place?

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<sup>70</sup> Wennerlind, *supra* note 4, at 135 (quoting JOHN WHEELER, A REVIEW OF THE UNIVERSAL REMEDY FOR ALL DISEASES INCIDENT TO COIN 12 (London, A. & J. Churchill 1696)). Machined coins were used for "illegal export or melting pit." CRAIG, *supra* note 4, at 167.

<sup>71</sup> HENRY G. ROSEVEARE, THE FINANCIAL REVOLUTION 1660–1750, at 38 (2014).