THE PRESIDENT'S CONDITIONAL PARDON POWER

The President's pardon power is a near-blank check hidden among the Constitution's checks and balances.[1] Despite substantial handwringing about possible abuses of the power, scholars have almost entirely overlooked the most potent tool in the President's pardon power arsenal: the ability to attach conditions to clemency grants (the "conditional pardon power").[2] As a subset of the general pardon power, the conditional pardon power is assumed to be similarly "unfettered,"[3] "plenary,"[4] or "unlimited."[5] This cannot be correct.

If the conditional pardon power were truly "unfettered," then the President could wield it for political advantage. He or she could pardon, and thereby re-enfranchise, thousands of convicted felons in key swing states upon the condition that they vote for his or her party in the upcoming election. Pardon recipients who failed to fulfill the condition would be thrown back in jail.[6]

If the conditional pardon power were truly "plenary," then the President could use it to replace a duly enacted penal scheme with one of his or her own choosing. Imagine Congress unanimously passed, over the President's veto, a bill requiring jailtime for police officers who killed unarmed civilians with chokeholds. A President who preferred only limited civil liability could unilaterally impose a different penal scheme by pardoning all such officers upon the condition they pay the

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[1] The power is granted with only two textual limits: the President may only pardon crimes "against the United States" and may not issue pardons "in Cases of Impeachment." *See* U.S. CONST. art. II, § 2, cl. 1 (granting the President the "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment").

[2] A conditional pardon is "[a] pardon that does not become effective until the wrongdoer satisfies a prerequisite or that will be revoked upon the occurrence of some specified act." *Conditional Pardon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[3] Schick v. Reed, 419 U.S. 256, 262 (1974).

[4] *Id.* at 266; *see also* United States v. Klein, 80 U.S. 128, 147 (1871).

[5] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (noting that the pardon power is "unlimited" with the exception of textual limitations stated *supra* note 1).

[6] *See Conditional Pardon*, *supra* note 2; Lupo v. Zerbst, 92 F.2d 362, 364 (5th Cir. 1937) (describing a President's revocation of a conditional pardon). The President might also gain political advantage by granting conditional pardons to coconspirators that preserve their Fifth Amendment right to decline to testify. *Cf.* Aziz Huq, *Trump's Pardon Spree Could Actually Be Good for Democracy*, WASH. POST (Dec. 24, 2020, 2:42 PM), https://www.washingtonpost.com/outlook/2020/12/22/trump-pardons-congress-investigations-self [https://perma.cc/AS3D-DRH7] (arguing that pardoned individuals can no longer claim a Fifth Amendment privilege to avoid testifying). Imagine: "I do hereby pardon Paul Manafort upon the condition that if he should testify for the prosecution in a case in which Donald Trump or one of his children is the defendant, this pardon shall be null and void."

victim's family a sum of money not to exceed $500.[7]

And if the conditional pardon power were truly "unlimited," then the President could impose horrifying conditions. He or she could pardon a healthy prisoner upon the condition that the prisoner donate her kidney to the President's ailing cousin, or commute a death sentence upon the condition that the prisoner be strung up by his ankles and tortured in the Rose Garden for the First Family's entertainment.

Some hypotheticals seem more plausible than others, but history teaches us to take seriously the hard boundaries of executive power, especially where its exercise could be catastrophic.

Presidents have so far avoided controversial conditional pardons.[8] As a result, the boundaries of the conditional pardon power have not been clearly drawn. This Note fills that gap. It answers two questions: Are there limits[9] to the conditional pardon power? If so, what are they?

This Note's examination of the conditional pardon power is valuable for a few reasons. First, the power is ripe for abuse. It could allow a norm-breaking President to infringe upon individual rights and, as perniciously, to undermine America's separation of powers. Second, the original understanding of the conditional pardon power is sorely under-

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[7] If this example seems unrealistic, consider that Presidents have already used, or come close to using, their pardon power to circumvent bicameralism and presentment and implement their preferred criminal laws. President Jefferson pardoned everyone convicted under the Sedition Act of 1798, a law he believed unwise and possibly unconstitutional. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 530 (1977); Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URB. L.J. 1483, 1488 (2000).

Recently, President Obama controversially used his power over deportation to create quasi-permanent resident status for so-called Dreamers after Congress declined to pass comprehensive immigration reform. *See* Caitlin Dickerson, *What Is DACA? And How Did It End Up in the Supreme Court?*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/article/what-is-daca.html [https://perma.cc/P5SR-D753]. Multiple members of Congress called on the President to instead use his pardon power. Letter from Representatives Zoe Lofgren, Luis V. Gutiérrez, and Lucille Roybal-Allard to President Barack Obama (Nov. 17, 2016), https://roybal-allard.house.gov/uploadedfiles/ltr_to_president_on_daca_and_pardon_authority_-_11-2016.pdf [https://perma.cc/KC9E-6TC3]. Had President Obama acquiesced to calls for DACA-by-pardon, he would have unilaterally and unalterably rewritten United States immigration law despite a total lack of congressional authorization.

[8] *But see Notorious Presidential Pardons: Jimmy Hoffa, 1971*, TIME, http://content.time.com/time/specials/packages/article/0,28804,1862257_1862325_1862316,00.html [https://perma.cc/6DE4-FTCC].

[9] This Note defines "limit" as something that would render a pardon inoperative. A pardon issued as part of a corrupt scheme to obstruct justice might lead to impeachment or criminal prosecution. *See* Laurence Tribe, Opinion, *Donald Trump's Pardons Must Not Obstruct Justice*, FIN. TIMES (Dec. 26, 2020) https://www.ft.com/content/e73fdd69-1fee-4886-b299-959ce9647151 [https://perma.cc/3BKZ-Z95F]. But because the pardon would be valid insofar as it effectively shields its recipient from prosecution, impeachment and prosecution would not constitute "limits" on the pardon power. Limits can be internal (the power does not extend this far) or external (the power cannot overcome some other constraint on government action).

developed. Given the increasingly originalist federal judiciary, the outcome of future conditional pardon cases could turn on the power's original meaning. Finally, the conditional pardon power is underappreciated but not entirely neglected. America's history books contain scattered instances of conditional pardons, some of which received scrutiny from the Supreme Court. History provides enough data points for this Note's pardon power connect-the-dots to sketch an intelligible picture of the President's conditional pardon power.[10]

This Note concludes that the President's pardons may not include conditions that deprive an individual of rights not already deprived by that individual's conviction (or, in the case of preemptive pardons, rights that would have been deprived by a guilty plea). This internal limitation is externally reinforced by the Due Process Clause. This Note's historical and constitutional arguments should inform judges faced with conditional pardon cases. Whatever disagreements may arise over this Note's descriptive account of the conditional pardon power's limits, the examination of risks from unfettered conditional pardons commends to future administrations the wisdom of prudential limits.

Part I introduces the conditional pardon power jurisprudence. It begins by examining three cases showing that (1) English common law informs the President's pardon power and (2) American courts oscillate between two distinct theories of the President's pardon power. The first theory, which this Note dubs the "merciful-contract" theory of pardons, envisions pardons as a private act between President and pardon recipient. By contrast, the "public-welfare" theory understands pardons as an instrument of the general welfare. This Part next describes two conceptions of the conditional pardon power: a "Broad Position" that would impose no limits on the conditional pardon power and a "Narrow Position" that insists on limits but fails to precisely define them.

Part II argues that the Broad Position cannot be correct. After establishing that the conditional pardon power poses unique danger to constitutional rights, it concludes that the English common law, the Framing, and structural inference from our constitutional system all suggest a conditional pardon power that is far from plenary.

Part III identifies this limit: pardon conditions may only divest rights already forfeited by dint of conviction. It explains the limit using examples before fitting it into the theoretical framework of the pardon power. Finally, this Part compares the identified limit with other proposals and situates it within constitutional theory generally. Part IV concludes.

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[10] This Note does not explicitly consider self-pardons, unconditional pardons, pardons in cases of impeachment, or pardons from state court convictions.

I. CONCEPTIONS OF THE CONDITIONAL PARDON POWER

The Constitution grants the President the "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[11] This barebones clause received scant attention from the Framers.[12] Fleshing it out has fallen to the courts.

A. Theoretical Foundations

Pardon power jurisprudence sprang from Chief Justice John Marshall's pen. In *United States v. Wilson*,[13] he relied on English common law to hold that a court could not take notice of, and therefore could not give effect to, a pardon that a prisoner had intentionally declined to plead in court.[14] The Court upheld the prisoner's conviction for robbing the mail despite a presidential pardon from an earlier capital conviction for the same misconduct.[15]

Wilson established that English common law informs the President's pardon power. Chief Justice Marshall justified adopting England's "principles respecting the operation and effect of a pardon" because the "[pardon] power had been exercised from time immemorial by the executive of [England] . . . [,] to whose judicial institutions ours bear a close resemblance."[16] Nearly every subsequent Supreme Court decision has reaffirmed the pardon power's common law basis.[17]

Though pardon power jurisprudence consistently looks to English common law, it equivocates about both the substance of the King's common law pardon power[18] and the extent to which the King's power was modified, if at all, when adopted in the American constitutional system.[19] The disjointed jurisprudence provides no clear answers. Instead, it oscillates between two distinct conceptions of the President's pardon

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[11] U.S. CONST. art. II, § 2, cl. 1.

[12] *See Ex parte* Grossman, 267 U.S. 87, 112 (1925).

[13] 32 U.S. (7 Pet.) 150 (1833).

[14] *Id.* at 163.

[15] *Id.* at 153, 163.

[16] *Id.* at 160.

[17] *See, e.g.*, Schick v. Reed, 419 U.S. 256, 263–64 (1974); *Ex parte Grossman*, 267 U.S. at 110; *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1856) ("We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution."). *But see* Osborn v. United States, 91 U.S. 474 (1876) (failing to mention English common law).

[18] The *Wilson* Court relied on English precedent to determine only the *mechanics* of effectuating a pardon. *See Wilson*, 32 U.S. (7 Pet.) at 160–61. To the extent *Wilson* reached broad conclusions about the substance of the King's pardon power, subsequent courts have conducted their own historical analyses regarding the substance of the King's pardon power. *See, e.g.*, Hoffa v. Saxbe, 378 F. Supp. 1221, 1226–30 (D.D.C. 1974); *Ex parte Grossman*, 267 U.S. at 110–11.

[19] *Wilson* can be read to support either the broad proposition that the President's pardon power is identical to the King's, *see Ex parte Grossman*, 267 U.S. at 109–10, or only the narrow proposition that the requirement to plead a pardon does not differ from the common law requirement, *see Wilson*, 32 U.S. at 161–63.

power with divergent substantive implications.[20] Conflicting cases about pardon acceptance, *Burdick v. United States*[21] and *Biddle v. Perovich*,[22] highlight the distinct theories.

In *Burdick*, President Wilson pardoned a newspaper editor, George Burdick, who had refused to testify by invoking his Fifth Amendment right against self-incrimination.[23] President Wilson reasoned that Burdick, once pardoned, would no longer risk self-incrimination and therefore could not refuse to take the stand.[24] When Burdick rejected the pardon and still declined to testify,[25] the Supreme Court held that a pardon must be accepted for it to have legal effect.[26] The *Burdick* Court relied heavily on Chief Justice Marshall's opinion in *Wilson*, which had found a pardon ineffective when not pleaded in court.[27]

Burdick embodies what this Note calls the "merciful-contract" theory of pardons. It conceives of a pardon as "a private deed"[28] created by the President exclusively for the benefit of the individual upon whom it is bestowed.[29] *Burdick*'s acceptance condition logically follows: a pardon, like all contracts, "must be delivered and accepted to be valid."[30] The merciful-contract theory of pardons shuts the door to additional constraints beyond an acceptance requirement. If a pardon is a private contract, then a bad pardon is one from which *the parties* do not benefit. Providing a "right . . . against the exercise of executive power not solicited by [an offender] nor accepted by him"[31] fully prevents bad pardons.

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[20] Other scholars, including the former U.S. Pardon Attorney, have recognized these distinct theories. *See, e.g.*, Love, *supra* note 7, at 1500 ("Judicial precedent is not very helpful . . . : on the one hand, the courts describe pardon as a 'part of the Constitutional scheme' to be exercised for the 'public welfare;' on the other, they call it 'a matter of grace' that need not be justified or defended within the legal system." (footnote omittted) (first quoting Biddle v. Perovich, 274 U.S. 480, 486 (1927); and then citing Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 282, 285 (1998))).

[21] 236 U.S. 79 (1915).

[22] 274 U.S. 480.

[23] 236 U.S. at 85–86.

[24] *See id.*

[25] *Id.* at 86–87. The district court held Burdick in contempt of court and imprisoned him for refusing to testify. *Id.*

[26] *Id.* at 91.

[27] *See id.*; United States v. Wilson, 32 U.S. (7 Pet.) 150, 161–62 (1833); *supra* p. 2836.

[28] A semantic note: *Burdick* might suggest labeling this theory a "private-deed" theory of pardons, but this Note prefers its own original term, the "merciful-contract" theory, for two reasons. First, the term "contract," which connotes an agreement between multiple parties, better recognizes the acceptance requirement's two-way agreement than does the term "deed," which can be signed by only one party and delivered to another. *Compare Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019), *with Deed*, BLACK'S LAW DICTIONARY (11th ed. 2019). Second, the "merciful-contract" label emphasizes the singular importance of privately dispensed "mercy" under this theory.

[29] *Burdick*, 236 U.S. at 90; *see also id.* ("It is the *private*, . . . though official act of the executive magistrate." (citation omitted)).

[30] *See* Comment, *The Pardoning Power of the Chief Executive*, 6 FORDHAM L. REV. 242, 264 (1937).

[31] *Burdick*, 236 U.S. at 91.

Shortly after *Burdick*, the Supreme Court seemed to reverse course in *Biddle v. Perovich*.[32] Writing for a unanimous Court, Justice Holmes held that the President could commute a death sentence to life imprisonment without the offender's consent.[33] President Taft had reduced Vuco Perovich's death sentence to life in prison, whereby he was transferred from an Alaskan jail to a penitentiary in Kansas.[34] After unsuccessfully applying for complete pardons, he sought a writ of habeas corpus on the grounds that the commutation and subsequent transfer were without his consent.[35] The district court issued the writ and ordered him released.[36] The Supreme Court reversed, finding that substituting life in prison for a death sentence without the prisoner's consent was within the President's Article II powers.[37]

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[32] Six Justices on the *Burdick* Court — Justices McKenna (*Burdick*'s author), Day, Hughes, Lamar, Pitney, and Chief Justice White — had been replaced between 1915, when *Burdick* was decided, and 1927, when the Court unanimously decided *Biddle*. *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/85Y7-RN3L].

[33] Biddle v. Perovich, 274 U.S. 480, 486–87 (1927).

[34] *Id.* at 485.

[35] *Id.*

[36] *Id.*

[37] *Id.* at 487–88. The standard view harmonizes *Burdick* and *Biddle* by applying *Burdick*'s acceptance requirement to pardons and *Biddle*'s lack of an acceptance requirement to commutations. *See* JOSEPH G. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED § 28:5 (3d ed. 2020). On this reading, a court can constructively infer an offender's consent to avoid punishment. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1232 n.41 (D.D.C. 1974); *Biddle*, 274 U.S. at 487 ("By common understanding[,] imprisonment for life is a less penalty than death.").

The standard view cannot be correct. First, pardons and commutations are one and the same. The King did not have the power to commute sentences, only to grant conditional pardons that substituted a lesser punishment. Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 2–3, 3 n.14 (1976); Peter Brett, *Conditional Pardons and the Commutation of Death Sentences*, 20 MOD. L. REV. 131, 131 (1957); Wm. F. Craies, *Compulsion of Subjects to Leave the Realm*, 6 L.Q. REV. 388, 407 (1890). If one takes seriously the Supreme Court's repeated insistence that the President's pardon power does not exceed the King's common law power, then the President cannot commute sentences either — he or she may only achieve the effect of a commutation through a conditional pardon. One therefore cannot distinguish *Burdick* and *Biddle* by saying that one involved a pardon and the other a commutation. Whatever language might be used as a shorthand, both cases technically involved pardons.

Moreover, *Burdick* seems like an incorrect interpretation of both English sources and Supreme Court precedent. No English sources mention an acceptance requirement for pardons. *See* Recent Case, Biddle v. Perovich*, 47 Sup. Ct. 664 (U.S. 1927)*, 41 HARV. L. REV. 98, 99 (1927) (collecting English sources and showing that neither Hawkins nor Blackstone mentioned an acceptance requirement). *Wilson*, on which *Burdick* relied heavily, rested on a procedural point about a pardon's pleading mechanics, not on a deeper substantive point about the nature of a pardon and the necessity of acceptance. *See* United States v. Wilson, 32 U.S. (7 Pet.) 150, 161–62 (1833); *see also* Schick v. Reed, 419 U.S. 256, 261 (1974) ("[T]he requirement of consent was a legal fiction at best . . . ."). The English sources relied upon by *Wilson* confirm as much. *Wilson*, 32 U.S. at 162–63 (citing 2 WILLIAM HAWKINS, PLEAS OF THE CROWN § 64 (6th ed. 1787), and 4 WILLIAM BLACKSTONE, COMMENTARIES *337, *376, *401 (1769), for the pleading requirements of a pardon); Recent Case, *supra*.

Biddle forcefully articulated a "public welfare" theory of pardons incompatible with *Burdick*'s merciful-contract theory. The public welfare theory considers "bad" pardons those that do not improve "the welfare of the whole."[38] It rejects the notion that exercising the power of a public office can be a "private deed"[39] — because America has a Constitution and not a king, "[a] pardon in our days is not a private act of grace from an individual happening to possess power."[40] Mercy still matters, but only for its moral and practical benefits.[41] An offender's consent, however, matters not at all: "Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done."[42]

Advocates of a truly unfettered pardon power invariably adopt the merciful-contract theory, while those identifying limits to the pardon power correctly recognize the importance of public welfare.

B. The Broad Position

Some argue that the President may issue a pardon upon any condition he or she desires.[43] Proponents of such a plenary conditional pardon power, what this Note dubs the "Broad Position," find support in English treatises. According to William Blackstone, "the king may extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend."[44] William Hawkins found English jurists "agreed" that the King "may annex to his pardon any condition that he thinks fit, whether precedent or subsequent."[45]

The Supreme Court has often described the President's conditional

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[38] *Biddle*, 274 U.S. at 487. This public-welfare conception of the pardon power is not confined to *Biddle*. Seventy years earlier, the *Wells* Court explained that the English King's pardon power could not be exercised against "the common good." *Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1856). In 1974, the *Schick* Court justified its articulation of the conditional pardon power in part by reference to "considerations of public policy." *Schick*, 419 U.S. at 266. The most thorough attempt to define the conditional pardon power even enshrined this public-welfare ideal as part one of its two-prong test. *See Hoffa*, 378 F. Supp. at 1236; *infra* p. 2843.

[39] Burdick v. United States, 236 U.S. 79, 90 (1915).

[40] *Biddle*, 274 U.S. at 486.

[41] *See* THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (noting both the moral necessity of a mechanism to dull the sharp edge of criminal law and the practical importance of a pardon power to quell unrest).

[42] *Biddle*, 274 U.S. at 486.

[43] Proponents assert that only Article II's textual limitations, confining pardons to "Offences against the United States" and excepting impeachment, constrain the pardon power. U.S. CONST. art. II, § 2, cl. 1.

[44] 4 BLACKSTONE, *supra* note 37, at *401.

[45] 2 HAWKINS, *supra* note 37, at 547; *see* Schick v. Reed, 419 U.S. 256, 261 (1974) (citing HAWKINS, *supra* note 37, at 557).

pardon power in similarly expansive terms. Chief Justice Marshall began the trend, stating that "[a] pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment."[46] The Court's seminal conditional pardon case, *Ex parte Wells*,[47] found that the Constitution "conferred in terms" the "power to pardon conditionally."[48] The Court subsequently described "[t]he power thus conferred [as] unlimited, with the [impeachment] exception stated."[49] In its most recent pardon case, *Schick v. Reed*,[50] the Court described the pardon power as an "unfettered" power "completely independent of legislative authorization."[51]

The Broad Position puts all its eggs in the merciful-contract theory basket. If a pardon is a "private . . . act . . . delivered to the individual for whose benefit it is intended,"[52] then infinite flexibility in structuring the relationship between the pardon grantor and its recipient could make sense. Even a pardon granted on the condition of public torture could be justified if both the President and the recipient preferred torture to the original sentence.[53] And because, under the merciful-contract theory of pardons, a pardon alters only the relationship of the two parties, a torture condition would not redound to the detriment of society as a whole even if society has decided not to brook cruel and unusual punishment.

C. An Ambiguous but Persistent Narrow Position

Despite some fiercely permissive rhetoric from pardon cases generally, courts and commentators faced squarely with *conditional* pardons have formulated a narrower position. The cases follow a strange pattern: they initially pay lip service to the Broad Position before articulating limits on the President's ability to attach conditions.

The Court's first conditional pardon power case, *Ex parte Wells*, exemplifies this pattern. *Wells* confirmed the President's power to grant conditional clemency. After President Fillmore pardoned death row inmate William Wells "upon [the] condition that he be imprisoned during his natural life,"[54] Wells filed a habeas petition seeking unconditional

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46 United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

47 59 U.S. (18 How.) 307 (1856).

48 *Id.* at 315.

49 *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

50 419 U.S. 256 (1974).

51 *Id.* at 261–62.

52 United States v. Wilson, 32 U.S. (7 Pet.) 150, 160–61 (1833); *accord* Burdick v. United States, 236 U.S. 79, 90 (1915).

53 Even though an advocate of the Broad Position would probably allow an individual to reject a torture-pardon, they would not contest that *issuing* such a pardon was well within the President's Article II authority.

54 *Ex parte* Wells, 59 U.S. (18 How.) 307, 308 (1856).

release on the grounds that the President could grant only absolute pardons.[55] The Court held that the President's "power to pardon conditionally . . . [was] a part of the power to pardon."[56]

Wells was a full-throated defense of the President's power to pardon conditionally, but it took care to note limits on the conditions that may be attached. Despite citing both English and American sources implying unfettered discretion in attaching conditions,[57] the Court recounted several possible limits to that power. *Wells* implied that conditional pardons might be limited by the type of conduct pardoned,[58] statutory restrictions,[59] a lack of legislative authorization,[60] or natural law.[61] While the limits articulated were neither precise nor necessary to the holding, the Court insisted that limits do exist and implicitly rejected the Broad Position.

The Supreme Court's other direct ruling on the conditional pardon power, *Schick v. Reed*, adopted a similar position. *Schick* involved a capital pardon granted on the condition that the prisoner be permanently imprisoned without the possibility of parole.[62] Years after the pardon, the Supreme Court held the death penalty unconstitutional in *Furman v. Georgia*[63] and reduced pending death sentences to life in prison *with* the possibility of parole.[64] Mr. Schick argued that the condition attached to his pardon was unconstitutional; that his death sentence was thus still pending; and that therefore, under *Furman*, he should be eligible for parole.[65] He contended that because his crime carried either a death sentence or life *with* the possibility of parole, the President could not substitute a punishment of life *without* parole by making it a condition of clemency.[66]

The Court rejected Schick's argument and held the pardon and its

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[55] *Id.* at 309.

[56] *Id.* at 315. The Court found that Article II of the Constitution conferred the common law pardon power. *Id.* at 318. It also rejected an argument that the pardon was accepted under duress. *Id.* at 315.

[57] *Id.* at 311 (citing three English treatises, EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND, OR, A COMMENTARY UPON LITTLETON 274b (1628) [hereinafter COKE ON LITTLETON]; 2 HAWKINS, *supra* note 37, at ch. 37 § 45; 4 BLACKSTONE, *supra* note 37, at *401).

[58] *Id.* at 312 (noting that the King cannot pardon "for a common nuisance").

[59] The Court noted that the British Parliament had restricted the pardon power in cases of impeachment and in habeas cases. *Id.* at 312.

[60] *Id.* at 313 ("[C]onditional pardons by the king do not permit transportation or exile as a commutable punishment, unless the same has been provided for by legislation.").

[61] Pardons could not be issued for conduct *malum in se* or conduct that violated the common law. *Id.* at 312.

[62] Schick v. Reed, 419 U.S. 256, 258 (1974).

[63] 408 U.S. 238 (1972).

[64] *See Schick*, 419 U.S. at 259.

[65] *See id.* at 259–60.

[66] *Id.*

condition constitutional.[67] It found the President's pardon power substantially similar to the English King's.[68] Though initially describing the King's power as "unfettered"[69] and "completely independent of legislative authorization,"[70] the *Schick* Court suggested limits to the President's conditional pardon power. The Court repeatedly noted that conditions attached to a pardon may not "offend the Constitution"[71] or "aggravate punishment."[72] Justice Marshall, in dissent, went further, arguing that the separation of powers required a President to attach only penal conditions specifically authorized by statute.[73] Anything beyond that, he argued, would constitute impermissible legislation by the executive branch.[74] The majority disagreed, finding that while the statutorily authorized sentence is "relevant to a limited extent" for determining whether punishment is aggravated, because "the pardoning power is an enumerated power of the Constitution . . . its limitations, if any, must be found in the Constitution itself."[75] Because the Court *upheld* a pardon's condition, it did not specify when a condition might actually "offend the Constitution" or "aggravate punishment,"[76] but it unequivocally recognized that there exist constraints on the conditions a President may attach to pardons.

The most thorough attempt to articulate a test for pardon conditions came from the U.S. District Court for the District of Columbia in *Hoffa v. Saxbe*,[77] decided just months before *Schick*. The *Hoffa* court upheld a pardon granted to labor leader and convicted fraudster Jimmy Hoffa "upon the condition that [he] not engage in direct or indirect management of any labor organization."[78] To make sense of "admittedly imprecise" standards for determining the validity of a condition,[79] the court began by canvassing "ten centuries" of English and colonial precedent.[80] It found the King's conditional pardon power "inherently unfettered" unless "specifically limited by [an] act of Parliament."[81] Turning to the

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[67] *Id.* at 268.

[68] *See id.* at 260–64. The Court cited the Constitutional Convention and the "consistent pattern of adherence to the English common law practice." *Id.* at 262.

[69] *Id.* at 262.

[70] *Id.* at 261–62.

[71] *Id.* at 264; *accord id.* at 266.

[72] *Id.* at 267.

[73] *See id.* at 274 (Marshall, J., dissenting).

[74] *Id.*

[75] *Id.* at 267 (majority opinion).

[76] *Id.*

[77] 378 F. Supp. 1221 (D.D.C. 1974).

[78] *Id.* at 1224 (quoting Individual Warrant of Executive Clemency for James R. Hoffa (Dec. 23, 1971)).

[79] *Id.* at 1236.

[80] *Id.* at 1226; *see id.* at 1227–30.

[81] *Id.* at 1230.

Framing, the court found that although "the [F]ramers intended to repose with the President the fullest extent of that authority which the words 'reprieves and pardons' ha[d] historically encompassed," America's constitutional system necessarily constrained the conditional pardon power.[82]

The *Hoffa* court "arrive[d] at a two-pronged test" for "determining the lawfulness of a condition."[83] Any condition (1) must "directly relate[] to the public interest;"[84] and (2) may not "unreasonably infringe" on the recipient's "constitutional freedoms."[85] Applying the test to Hoffa's pardon, the court found prong one satisfied because the country relied on "the integrity of union activities inasmuch as unions exert great influence on the economic life of the nation."[86] On the second prong, the court held that the condition did not unduly infringe Hoffa's First and Fifth Amendment rights.[87]

The *Hoffa* court correctly recognized the necessity of limiting the President's conditional pardon power. Its thoughtful attempt to delineate the bounds of the power was never reviewed, however, because Jimmy Hoffa disappeared before the D.C. Circuit decided his appeal.[88] Nonetheless, *Hoffa* is the closest a court has come to defining what conditions may lawfully attach to a pardon.

II. THE BROAD POSITION IS INCORRECT

The President does not have plenary power to attach conditions to pardons. Advocates of the Broad Position overlook a unique feature of the conditional pardon power: its potential to conflict with other constitutional provisions.[89] The possibility of such conflicts strips the Broad Position of its intuitive appeal. Defending the Broad Position requires recognizing and countenancing such conflicts. It also requires defending two further propositions: First, the conditional pardon power was unlimited at common law. Second, the American system adopted, and still

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[82] *Id.* at 1231.

[83] *Id.* at 1236. The court derived its test from constitutional history and judicial precedent. *See id.*

[84] *Id.* The court found this element of the test very similar to the test for conditions that may permissibly attach to parole, namely, that parole conditions "relate to the objects of parole." *Id.* at 1237.

[85] *Id.* at 1236.

[86] *Id.* at 1238.

[87] *Id.* at 1238–40.

[88] *See Hoffa Is Reported Missing; Police Find His Car*, N.Y. TIMES (Aug. 1, 1975), https://www.nytimes.com/1975/08/01/archives/hoffa-is-reported-missing-police-find-his-car.html [https://perma.cc/DWV8-5TEV].

[89] Conditional pardons might, for example, swing an election, short-circuit constitutional processes, or shock the conscience. *See supra* pp. 2833–34.

retains, the unlimited English conditional pardon power. Neither proposition withstands scrutiny.

A. Constitutional Conflicts and Rights Deprivations

Unconditional pardons almost exclusively restore rights to their recipients. The power's ameliorative effect justifies its moniker, "[t]he benign prerogative."[90] Conditional pardons are different. They can deprive the recipient of rights, including constitutionally guaranteed ones. Some rights deprivations are permissible and have historically been upheld — for example, conditional pardons that deprive the recipient of property rights by requiring restitution payments.[91] Other deprivations would be anathema to the Constitution, like pardons made on the condition that the prisoner be publicly tortured.

The Broad Position must defend both kinds of deprivations — and it has. English jurists permitted the King to "annex to his pardon *any* condition that he thinks fit, whether precedent or subsequent."[92] The Supreme Court has parroted this picture of a plenary conditional pardon power. Chief Justice Marshall noted that "[a] pardon may be conditional, and the condition may be more objectionable than the punishment inflicted by the judgment."[93] Subsequent courts have found the power "unlimited."[94] A proponent of the Broad Position would, at the very least, find it a difficult question whether to uphold a pardon condition that violated another provision of the Constitution. The proponent would struggle to weigh a constitutional constraint like the Eighth Amendment against the exercise of a constitutionally granted plenary conditional pardon power — a power specifically designed to supersede the strictures of the criminal justice system.[95]

B. The Conditional Pardon Power Was Limited at Common Law

By 1787, both parliamentary action and natural law limited the common law conditional pardon power. English history indicates that at least some pardon conditions required parliamentary authorization. After the Glorious Revolution of 1688 cemented the separation of powers in England, banishment, or "transportation" to the colonies, became a common pardon condition only once "legalised" by an act of

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[90] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866); *see also* Hugh C. MacGill, *The Nixon Pardon: Limits on the Benign Prerogative*, 7 CONN. L. REV. 56, 75–79 (1974).

[91] *See, e.g.*, *Ex parte Garland*, 71 U.S. (4 Wall.) at 337, 381.

[92] 2 HAWKINS, *supra* note 37, at 547 (emphasis added).

[93] United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833).

[94] *Ex parte Garland*, 71 U.S. (4 Wall.) at 380.

[95] *See* Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 290 (1998) (O'Connor, J., concurring in part and concurring in the judgment) (declining to decide whether the Due Process Clause imposes any restrictions on Ohio's clemency proceedings).

Parliament.[96] When Parliament later abolished banishment as a criminal punishment, it specifically provided that the King's pardon power would remain unaffected — a provision that would have been unnecessary if the King's power to attach conditions were "independent of legislative authorization."[97] Parliament's ability to approve — and by implication, to forbid — certain pardon conditions indicates that the King's conditional power did not supersede the legal system in which it existed.[98]

English sources also recognize natural law constraints on the conditional pardon power. Certain restorations of rights, like releasing a serf from bondage, immediately became permanent and could not be made upon conditions subsequent.[99] The King also could not pardon certain offenses, conditionally or otherwise, where a pardon might remove the only means of vindicating a private right.[100]

American courts echo both legislative and natural law constraints on the conditional pardon power. The Supreme Court's best historical analyses have recognized that the King's power to impose a banishment condition required legislative authorization.[101] Other courts have emphasized English jurists' articulation of natural law constraints and added their own natural law–type limitations, for example, by disallowing "immoral" conditions.[102] As these courts have recognized, preconstitutional common law limited the conditional pardon power.

Such limits can be squared with sweeping pronouncements of English jurists like Blackstone and Hawkins because those expansive articulations may have applied only to death sentences. Both jurists rely primarily on Edward Coke's famous treatise on Littleton — Blackstone cites Hawkins, and Hawkins cites Coke. While Coke discusses conditional pardons exclusively in the context of capital punishment, both

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[96] Craies, *supra* note 37, at 401; 4 BLACKSTONE, *supra* note 37, at *401 ("[T]ransportation or banishment [are] allowable and warranted by the *habeas corpus* act."); Boudin, *supra* note 37, at 19; Patrick R. Cowlishaw, Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 159–60 (1975).

[97] Cowlishaw, *supra* note 96, at 159–60. Parliament imposed other limits, like strict linguistic requirements, on the King's pardon power. *See* 4 BLACKSTONE, *supra* note 37, at *401; MacGill, *supra* note 90, at 75–76.

[98] Conditional pardons stand in contrast to pardons granted *non obstante*, or "notwithstanding" acts of Parliament, which were abolished in 1688. MacGill, *supra* note 90, at 76.

[99] *See* COKE ON LITTLETON, *supra* note 57, at 274b ("An expresse Manumission [release from servitude] of a Villeine [serf] cannot be upon condition, for once free in that case, and ever free . . . .").

[100] 2 HAWKINS, *supra* note 37, at 543–44.

[101] *See Ex parte* Wells, 59 U.S. (18 How.) 307, 313 (1856); Schick v. Reed, 419 U.S. 256, 277 (1974) (Marshall, J., dissenting).

[102] State v. Yates, 111 S.E. 337, 338 (N.C. 1922); *see also, e.g.*, Flavell's Case, 8 Watts & Serg. 197, 199 (Pa. 1844). The prohibition on immoral conditions parallels a persistent debate in England about whether pardons could ever reach conduct that was *malum in se*, or inherently evil. *See* MacGill, *supra* note 90, at 78 n.87.

Blackstone and Hawkins curiously omit Coke's contextualization.[103] Cabining the broadest articulations of the conditional pardon power to only capital cases minimizes conflict between those broad articulations and the considerable evidence of a limited common law conditional pardon power.

C. The Constitution Adopted a Limited Conditional Pardon Power

The Constitution's grant of the power to "pardon" includes that power's common law limitations, with which the Framers were well acquainted.[104] Even if, however, the King's conditional pardon power was unlimited, the President's is not.

The prevailing wisdom at the time of the Convention maintained that the King's pardon power could not be adopted in a democracy. Blackstone gleefully called the pardon "one of the great advantages of monarchy . . . above any other form of government."[105] Blackstone's belief was rooted in the notion that "the king acts in a superior sphere"[106] and "the great operation of his scepter is mercy."[107] Because no superlegal entity exists in a democracy, "this [royal] power of pardon can never subsist."[108]

Blackstone was wrong that the pardon power cannot exist in a democracy, but he aptly identified the inherent tension between the pardon power and democratic ideals. A democracy's executive cannot be above the law, and the pardon power is inevitably superlegal.[109] The Framers knew this,[110] and from the very beginning sought a new, antimonarchical justification for the pardon power. As future-Justice James Iredell put it, the Constitution "combine[d] the acknowledged advantages of the British constitution with proper republican checks."[111] The Framers understood that the pardon power, if predicated on the English supposition that "it [is] impossible [for] the King himself [to] act unlawfully or improperly,"[112] would deform rather than bolster the

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[103] *Compare* 2 HAWKINS, *supra* note 37, at 547 ("[The king] may annex to his pardon any condition that he thinks fit, whether precedent or subsequent."), *with* COKE ON LITTLETON, *supra* note 57, at 274b ("[T]he king [may] make a Charter of pardon to a man *of his life* upon condition." (emphasis added)).

[104] MacGill, *supra* note 90, at 83; *see also Ex parte Wells*, 59 U.S. (18 How.) at 311 (1856).

[105] 4 BLACKSTONE, *supra* note 37, at *397.

[106] *Id.* at *398.

[107] *Id.* at *396.

[108] *Id.* at *398.

[109] *See id.*

[110] *See Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1856).

[111] PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 351 (Paul Leicester Ford ed., Brooklyn, N.Y. 1888) [hereinafter PAMPHLETS].

[112] JOSEPH CHITTY, A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 5 (London, Joseph Butterworth & Son 1820).

checks and balances undergirding the American experiment.[113]

The Framers instead envisioned the pardon power as a tool for public welfare.[114] Early justifications for the power were quite practical, with Hamilton arguing, for example, that well-timed pardons could help neuter nascent rebellions.[115] Even appeals to mercy employed a distinct public-welfare lens.[116] The President's power to pardon, the Framers believed, was incident to his obligation to promote the public welfare, not a derivative of his "merciful scepter."[117] And when the President granted pardons deleterious to the public good, the Framers imagined that "republican checks" would rein him in.

"Republican checks," however, can safeguard the Republic against a weaponized pardon power only if effective against two types of abuses. The first type of abuse involves the President restoring too many rights that were legitimately forfeited. George Mason made this concern explicit, worrying that a President might encourage criminality on his behalf and then pardon coconspirators.[118] The "republican check" for this type of abuse, the Federalists responded, would be swift impeachment and possible criminal prosecution.[119]

Little debate occurred about the second type of abuse: the President using his pardon power to *deprive* rights through conditional clemency. What republican check could work here? Impeachment is insufficient because it cannot remedy past wrongs. If, for example, a President commuted a death sentence upon the cruel and unusual condition that the prisoner have his fingernails pulled out one by one, the solution could not be to permit the torture and then impeach the President.[120] If

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[113] *See generally* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION (2020).

[114] *See* Duker, *supra* note 7, at 535 ("The only 'rule' governing the use of the power is that the President shall not exercise it against the public interest." (citing WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 121 (1916))); Love, *supra* note 7, at 1506–08 (describing distinct ways that pardons "help[] the President carry out his other constitutional duties," *id.* at 1506, and concluding that "[t]he President's duty to pardon does not arise from any single one of these 'public welfare' grounds for pardon, but from a combination of them all," *id.* at 1508).

[115] THE FEDERALIST NO. 74, *supra* note 41, at 447 (Alexander Hamilton) ("[T]he principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.").

[116] *See id.* at 446 ("Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.").

[117] *See* 4 BLACKSTONE, *supra* note 37, at *396.

[118] PAMPHLETS, *supra* note 111, at 330–31.

[119] *See id.* at 350–51.

[120] Under current doctrine, the prisoner could not reject this commutation. *See supra* note 37 (discussing the standard view of *Burdick* and *Biddle*). *But see id.* (critiquing the standard view).

the conditional pardon power were not limited — that is, if *all* pardon conditions were enforceable with only ex post censure available — then individual rights deprivations produced by conditional pardons would be outside of the checks and balances process. Instead, some conditions must be circumscribed. A pardon condition of torture, for example, would rightfully be voided by the Eighth Amendment.

American practice confirms a limited conditional pardon power. No President has asserted an unlimited conditional pardon power, nor has any President, save President Nixon,[121] attempted to attach a condition that might run afoul of well-established precedent.[122] Despite dicta supporting the Broad Position, every court squarely considering the conditional pardon power has explicitly said that the power is not unlimited.[123]

A close reading of historical sources and a holistic look at our Constitution's structure point to the same conclusion: the President's conditional pardon power has limits.

III. CLARIFYING THE NARROW POSITION: THE CONDITIONAL PARDON POWER'S LIMITS

The conditional pardon power's borders remain fuzzy. Only one court has attempted to precisely describe the power's limits, and even that test admitted significant ambiguity.[124] This Note identifies a single, clear limit to the conditional pardon power. This Part first explains the identified limit and provides clarifying examples. It next justifies the limit before comparing it to other proposals.

A. The Identified Limit

The President may not attach conditions that would deprive a pardon recipient of rights not already stripped by dint of conviction. Put

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[121] Even the most suspect conditional pardon in American history — the pardon of Jimmy Hoffa — was issued only after an OLC opinion laid out limits to the conditional pardon power. Memorandum from Robert G. Dixon, Jr., Off. Legal Counsel, to Lawrence M. Traylor, Pardon Att'y 6 (Aug. 2, 1973) (from the Nixon Presidential Library) (on file with the Harvard Law School library) (opining that conditions may not be "immoral, illegal [or] impossible of performance").

[122] This history is best read as confirming rather than establishing that the conditional pardon power is limited. Those unpersuaded by this Note's originalist arguments still have good reason to believe that the pardon power has evolved since the Framing. Today's justice system is "steeped in flexibility" rather than chomping at the bit to execute offenders. Duker, *supra* note 7, at 503. Clemency is less vital to ensure individualized punishment but more necessary than ever to help the President carry out his other constitutional duties. *See* Love, *supra* note 7, at 1506–08. Presidents' reticence to stretch the bounds of their conditional pardon power may reflect the power's modern boundaries.

[123] *See supra* section I.C, pp. 2840–43.

[124] *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1236 (D.D.C. 1974); *supra* pp. 2842–43.

differently, pardon conditions may not deprive the recipient of additional rights beyond those already forfeited as a result of the pardon recipient's crime. For preemptive pardons, which "carr[y] an imputation of guilt,"[125] the pardon conditions may affect only rights that would be forfeited upon conviction for the crime pardoned.[126]

Specific examples illuminate this limit's contours. Unobjectionable conditions include those that merely reemphasize a pardon recipient's existing obligations. For example, President Harding pardoned a convicted counterfeiter on the condition "that he be law-abiding and not connected with any unlawful undertaking."[127] At least one Civil War–era pardon required the recipient refrain from acquiring slaves and pay all fines and fees that he owed.[128] The Civil War amnesties conditioned upon an oath to support the U.S. Constitution and abide by the laws of Congress[129] also fall in this category. Because these conditions impose no new restrictions or obligations, they do not violate the identified limit.

In most cases, a condition's permissibility will depend on congressional action. Conditions can only deprive individuals of rights already stripped by dint of conviction. Congress, through bicameralism and presentment, determines which rights these are. Jimmy Hoffa's pardon condition, which deprived him of the ability to "engage in direct or indirect management of any labor organization,"[130] was permissible

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[125] Burdick v. United States, 236 U.S. 79, 94 (1915); *see also* Andrew Glass, *Ford Defends Nixon Pardon Before Congress, Oct. 17, 1974*, POLITICO (Oct. 16, 2016, 11:09 PM), https://www.politico.com/story/2016/10/ford-defends-nixon-pardon-before-congress-oct-17-1974-229850 [https://perma.cc/V87E-NPBN] (explaining President Ford's argument that pardoning former-President Nixon confirmed Nixon's guilt).

[126] On rare occasions, pardons have failed to specify the conduct or crimes being pardoned. *See, e.g.*, Proclamation No. 4311 — Granting Pardon to Richard Nixon, 39 Fed. Reg. 32,601 (Sept. 10, 1974). The English common law, Framing debates, and American case law indicate that such pardons are probably beyond the President's power to grant. *See* MacGill, *supra* note 90, at 74–85 (describing how specificity requirements "prevent[ed] unscrupulous applicants and courtiers from imposing upon the king's mercy; . . . relieve[d] courts from uncertainty about the applicability of a pardon to any crime charged before them; . . . [and made] the king publicly accountable for his exercise of the [pardon] prerogative," *id.* at 80); *cf. Burdick*, 236 U.S. at 86 (reciting language of a preemptive pardon that specified which conduct could have formed the basis of an indictment).

In any case, unspecified blanket pardons cannot be conditional. Such pardons provide no way to determine which rights might have been forfeited without the pardon. Depriving an individual of rights without so much as a reference to normal judicial processes would exceed the President's power.

[127] Lupo v. Zerbst, 92 F.2d 362, 363 (5th Cir. 1937); *see also* United States v. Comm'r of Immigr. Port of N.Y., 5 F.2d 162, 163 (2d Cir. 1924) (describing a pardon given to those convicted under the Espionage Act made on the condition that the recipient "be law-abiding and loyal to the government of the United States, and [] not encourage, advocate or become willfully connected with lawlessness in any form").

[128] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 337 (1860).

[129] *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 140–41 (1871).

[130] Hoffa v. Saxbe, 378 F. Supp. 1221, 1224 (D.D.C. 1974).

because Congress had explicitly forbidden individuals convicted of bribery, like Hoffa, from leading labor organizations.[131]

Under the identified limitation, Congress defines the rights deprived by a conviction but need not sanction each individual pardon condition. Imagine Congress specified that tourists who deface U.S. monuments "shall either be excluded from the United States for one year or shall be permanently excluded from the United States." A President could pardon a convicted individual on the condition that they be banned from entering the United States for *ten* years, even though the statute only contemplates one-year or permanent bans. Because Congress decreed that conviction for defacing monuments could permanently deprive an individual of the right to enter the United States, the pardon condition that *temporarily* deprived the same individual of this right would be permissible. This example parallels the majority's holding in *Schick*.[132]

Difficulty arises when a pardon condition restricts ill-defined rights. Prison sentences restrict "liberty interests," so pardon conditions should be allowed to restrict liberty as well. The specific lines, however, are fuzzy. Liberty interests might be restricted by a pardon condition prohibiting travel to certain locations. If, for example, an individual was sentenced to prison under a three-strikes law for repeatedly stealing from a mall, the President might pardon him on the condition that he not travel to the mall until the date his prison sentence would have ended.[133] Because the prison sentence would have deprived the pardon recipient of his right to go to the mall, this condition would be valid.

Liberty interests might also be restricted by compelling action. President Harding allegedly pardoned Eugene Debs on the condition that he travel to Washington, D.C., to meet the President.[134] Though a more difficult question than the permissibility of travel *restrictions*, such a compulsion to travel would probably be valid so long as the recipient was not forced to pay for the trip from his own pocket, which would abridge property rights. Even more suspect was President Ford's amnesty to draft dodgers made upon the condition that they dedicate two years to public service.[135] On the one hand, compelling only two years of public service seems a lesser restriction of liberty than the five-year

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[131] 29 U.S.C. § 504. Hoffa challenged the substantive constitutional validity of this restriction. The district court rejected his challenge. *Hoffa*, 378 F. Supp. at 1238–41.

[132] *See* Schick v. Reed, 419 U.S. 256, 267 (1974); *supra* pp. 2841–42.

[133] Enforcing this condition, however, might be difficult or impossible. *See* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1677–78 (2001) (arguing that conditional pardons are difficult to enforce).

[134] *Id.* at 1676.

[135] Andrew Glass, *Ford Issues Partial Amnesty to Vietnam Deserters, Sept. 16, 1974*, POLITICO (Sept. 16, 2018, 6:57 AM), https://www.politico.com/story/2018/09/16/ford-amnesty-vietnam-deserters-815747 [https://perma.cc/BX4M-5QRM].

sentence that could be imposed for draft dodging.[136] On the other hand, forcing an individual to perform certain tasks seems a different kind of restriction than confining someone to a prison cell. A close question, but this pardon condition would probably be impermissible.[137]

The most difficult cases will be those where the rights deprived by a condition elude classification. It may be unclear whether a certain pardon divested or restored the recipient's rights. A pardon made "on the condition that the recipient vote for the Democratic party," for example, might be defended on the ground that it restores a limited right to vote. A judge would have to decide whether the condition is best construed as a permissible restoration of the right to vote or an impermissible compulsion of political speech.[138]

A similar problem might arise when conditions seem to infringe upon multiple interests, only some of which could permissibly be abrogated by a pardon condition. Someone sentenced to prison loses their right to travel but retains their right to religious exercise. Imagine a pardon that purported to release an offender from prison on the condition that they not worship at a certain church. As the pardon condition seems like both a valid restriction on travel and also an invalid encroachment on religious freedom, its permissibility would likely depend on specific facts about the case and the conviction.[139]

The identified limit is uniquely permissive of conditions attached to capital convictions.[140] Because death sentences deprive the offender of more rights than any other punishment, Presidents have significantly more latitude to attach conditions to capital pardons.[141] Even in capital

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[136] *See* The Learning Network, *June 20, 1967 | Muhammad Ali Convicted*, N.Y. TIMES: LEARNING NETWORK (June 20, 2011, 12:05 PM), https://learning.blogs.nytimes.com/2011/06/20/june-20-1967-muhammad-ali-convicted [https://perma.cc/T9SL-3E5V].

[137] In practice, President Ford's amnesty was permissible because it was styled as an order to alter an individual's discharge from military service — thus, it was not technically an exercise of his pardon power but an exercise of his power as Commander in Chief. *See* Glass, *supra* note 135.

[138] Precisely defining the right allegedly infringed is well within the judicial ken. Judges already make similar determinations when evaluating the injury-in-fact prong of Article III's standing requirement. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 564 & n.2 (1992) (arguing that courts can draw clear lines despite plaintiffs' attempts to claim injury through clever pleading). In this case, common sense demands that this condition be voided as an impermissible restriction on political speech. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1235 n.48 (D.D.C. 1974).

[139] If the church worshipped in a way that was prohibited in prison, for example, then the condition might be permissible because the prison sentence stripped the individual of the right to worship in that particular way. If, however, the pardon recipient would have retained his right to worship at the church while in prison, the condition would be struck down.

[140] *See* Boudin, *supra* note 37, at 32 n.159 ("The commutation of death sentences has long been viewed by the courts as a special aspect of the pardoning power deserving the broadest range of executive discretion.").

[141] *See Ex parte* Wells, 59 U.S. (18 How.) 307, 315 (1856) ("[T]he [prisoner] had forfeited his life for crime, and had no liberty to part with.").

cases, however, the President's discretion is not "unfettered." The prisoner retains some rights, such as the right to be free of cruel and unusual punishment, that cannot be infringed upon by a conditional pardon. A pardon on the condition of torture would therefore exceed the President's conditional pardon power.

B. Advantages of the Identified Limit

The limit identified by this Note fits snugly into the theoretical foundation upon which the pardon power rests. Common law jurists have long recognized that the pardon power impacts only rights that the government may legitimately control. Pardons cannot infringe upon rights that have vested in others.[142] For example, if a conviction creates a private right of recovery against the offender, a pardon cannot destroy the private right. As the Supreme Court put it, "[t]he government can only release what it holds."[143] This maxim applies with special force in the American system, which guarantees the right to be free from deprivations without the "due process of law."[144]

The government "takes away" particular rights through the due process of law when it convicts an individual of a criminal offense,[145] but it has no legitimate claim to infringe upon rights and liberties untouched by the conviction. The longstanding recognition that pardons can only "release what [the government] holds"[146] prohibits the government from using the pardon power to affect rights untouched by the conviction. While pardons can restore rights legitimately "taken" by a conviction, they cannot divest the individual of retained rights.

This theoretical framework helps square this Note's identified limit on conditional pardons with unequivocal statements about the King's conditional pardon power from Blackstone and Hawkins. If pardons dealt exclusively with remission of rights, then executive attempts to deprive individuals of vested rights were beyond the scope of what can be considered a "pardon." Thus, while Blackstone and Hawkins were unequivocal that the King "may annex to his pardon any condition he [saw] fit,"[147] attempted deprivations of rights styled as pardon conditions were no pardons at all.

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142 2 HAWKINS, *supra* note 37, at 543 ("I take it to be a settled rule, that the king cannot by any dispensation, release, pardon or grant whatsoever, bar any right . . . or any legal interest, benefit or advantage whatsoever before vested in the subject . . . .").

143 Osborn v. United States, 91 U.S. 474, 477 (1876).

144 U.S. CONST. amend. V.

145 When the individual is released, paroled, or pardoned, their rights are restored.

146 *Osborn*, 91 U.S. at 477.

147 2 HAWKINS, *supra* note 37, at 547.

The theoretical framework also explains why many conditional pardons explicitly limit their conditions to the duration of a sentence.[148] The pardon recipient has only been deprived of rights for a definite period. The government will not "hold" the recipient's rights after the sentence ends and therefore cannot infringe upon those rights beyond the sentence's expiration date.

The limit identified by this Note also clarifies how the Constitution reinforced and extended existing limits to the conditional pardon power. Two presuppositions already existed at common law: (1) the King could not use the pardon power to deprive vested rights;[149] and (2) pardons, with their specific linguistic and procedural requirements, encompassed a "concept of due process."[150] Combining these propositions yields the conclusion that *individual* due process rights, if "vested," cannot be stripped through exercises of the pardon power.

The U.S. Constitution makes such a conclusion unavoidable. It explicitly guarantees an individual the right to be free of deprivations except according to "due process of law."[151] Only rights stripped by a conviction accord with due process. Conditional pardons that attempt to strip additional rights violate both the conditional pardon power's internal limit on depriving vested rights *and* the Due Process Clause, an external limit that parallels and reinforces the internal one.

Finally, the identified limit is normatively desirable. It prevents pardons that compel political expression, aggrandize executive power, or violate core constitutional tenets.[152]

C. The Identified Limit Is Preferable to Other Limits

Alternative theories have already been discussed and dismissed. Impeachment cannot be the only constraint on the conditional pardon power because impeachment is a consequence, not a limit. It does nothing to prevent the destruction of inalienable rights.[153] Nor can pardon conditions be limited exclusively to punishments that Congress explicitly authorized.[154] Such a limit finds no support in precedent[155] and would undermine the instrument's flexibility — a central justification for its

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148 The condition attached to Jimmy Hoffa's pardon, for example, expired on the day that his original sentence would have ended. Hoffa v. Saxbe, 378 F. Supp. 1221, 1223–24 (D.D.C. 1974); *see also, e.g.*, Lupo v. Zerbst, 92 F.2d 362, 363 (5th Cir. 1937) (describing a pardon condition that applied "during the period of his present sentence").

149 *See supra* p. 2845.

150 MacGill, *supra* note 90, at 80 (arguing that due process was "a characteristic of the [pardon] prerogative as exercised by the crown" rather than an external limit imposed by Parliament).

151 U.S. CONST. amend. V.

152 *See supra* pp. 2833–34 (providing examples of reprehensible conditional pardons).

153 *See supra* p. 2848.

154 *See supra* p. 2850.

155 *See* Schick v. Reed, 419 U.S. 256, 267 (1974).

inclusion in the Constitution.[156]

Professor Harold Krent proposes an interesting, if complex, limit. He first justifies using the recipient's consent as the primary limit on the pardon power,[157] then carves out several exceptions.[158] Krent admirably identifies potential pitfalls of an unlimited conditional pardon power, but his argument suffers three infirmities. First, his normative prescription lacks the historical and precedential grounding provided by this Note. Second, his arguments presuppose a merciful-contract theory of pardons — he proves bargaining yields better results for the pardon recipient, but insufficiently justifies judging pardons by their benefit to the recipient rather than to the public.[159] However, as previously discussed, the American system adopted a public-welfare basis for the pardon power,[160] so limits on the conditional pardon power should be justified by reference to public welfare. Finally, his carveouts unduly complicate the picture. This Note's identified limit prevents the worst potential abuses with a single, justiciable limit rather than an amalgamation of miscellaneous exceptions.

IV. CONCLUSION

Virtuous societies beat their swords into plowshares. The conditional pardon power threatens to reverse that trend — potentially allowing a President to wield a tool of mercy for coercive ends. Fortunately, the English common law, the American experiment, and the power's philosophical justifications all suggest a limit to the conditional pardon power: Presidents may not use their power to divest rights untouched by the initial conviction.

As a constitutional matter, the limit is clear. Practically, however, reducing the risk of abuse will require contributions from many actors. Courts seldom evaluate conditional pardons, both because pardon recipients rarely bring challenges and because conditional pardons may be underenforced.[161] This paucity of jurisprudence raises the stakes for each conditional pardon case — when courts evaluate conditional pardons, they must get it right. Scholars should more thoroughly explore the conditional pardon power before a President decides to test its limits. If the conditional pardon power were truly a blank check, it could bankrupt our Republic.

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156 *See* THE FEDERALIST NO. 74, *supra* note 41, at 446 (Alexander Hamilton).

157 Krent, *supra* note 133, at 1682.

158 Krent would prohibit conditions that (a) make the President the final arbiter of compliance, (b) waive the right to a neutral fact-finder, (c) abrogate "core constitutional rights," defined as those premised on "fundamental moral values," (d) increase punishment, or (e) circumvent restrictions on executive authority. *Id.* at 1688, 1691–95.

159 *See id.* at 1681–83.

160 *See supra* p. 2847.

161 Breaching a subsequent condition voids a conditional pardon, but the President must expend resources to reapprehend and reimprison the offender. Krent, *supra* note 133, at 1677–78.