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From the inception of this nation's history, presidents have offered pardons and commutations of sentences conditioned on a surprisingly wide array of conduct. For instance, presidents have offered clemency on the condition that offenders refrain from alcohol, provide support for family members, leave the country, join the navy, drop claims against the United States, or restrict their travel or speech. By attaching conditions, presidents may protect the public or benefit it in other ways. Although such pardons may benefit society, imposing conditions may restrict the constitutional rights of offenders. In order to escape the harsh confines of prison, offenders may have little choice but to accept restraints on their exercise of constitutionally protected freedoms. Moreover, exercise of conditional pardons may permit presidents to accomplish objectives that they could not otherwise attain. As an example, presidents can commute sentences of a particular class of offenders conditioned on supervised release or parole even if Congress has rejected such penological alternatives.

Nevertheless, this Article argues that exercise of the pardon power generally should remain vested in the president's discretion, checked only by the political process. Even though coercion is inherent in conditional

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offers, we should trust offenders to choose between complying with the conditions and staying in prison longer because they generally benefit from that choice. And, in light of the president's role under the pardon clause in making judgments about optimal punishment, presidents can alter the sentencing framework set by Congress. Oversight by Congress, the press, and subsequent presidents tempers presidential overreaching.

This Article, argues, however, that judges can play a critical role in helping check abuse of the conditional pardon power in two contexts. First, judges should negate a presidential condition in the rare case when the condition shocks society's conscience, such as requiring a prisoner to donate a kidney. Second, offenders should also be entitled to challenge any condition that violates constitutional restraints on the president's authority such as a First Amendment ban on providing support for particular religious expression. In short, although there should be no review of the process by which presidents reach the decision to pardon, the reasons for the decision, or the appropriateness of the condition selected, limited review of conditions that shock the conscience or violate constitutional restraints on presidential authority is warranted.

President Clinton's last minute flurry of pardons sparked a storm of controversy.[1] Those receiving pardons included his brother, the son of his education secretary, his former housing secretary, Susan McDougal of Whitewater fame, an old political friend from Georgia, and Marc Rich, whom the government had indicted for the largest tax scam in the nation's history.[2] Allegations of cronyism and influence peddling soon followed.[3]

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1. President Clinton is only the latest president to use the pardon power to effectuate goals that appear divorced from the traditional penological goals underlying punishment. The media and judiciary leveled similar attacks at President Ford's apparently politically motivated pardon of President Nixon for crimes he may have committed arising out of the Watergate break-in and cover-up. *See* Murphy v. Ford, 390 F. Supp. 1372 (W.D. Mich. 1975) (upholding President Ford's pardon). Likewise, the media attacked President Bush's pardon of colleagues whom the government had investigated and indicted for their activities during the Iran-Contra affair. *See Bush's Unpardonable Offense*, BOSTON GLOBE, Dec. 26, 1992, at 22; Peter M. Shane, *Presidents, Pardons and Prosecutors: Legal Accountability and the Separation of Powers*, 11 YALE L. & POL'Y REV. 361, 401-05 (1993) (excoriating Bush's pardons of former colleagues).

2. President Clinton issued 140 pardons. *See Those Pardoned by Clinton Range from the Unknown to the Famous*, ST. LOUIS POST-DISPATCH, Jan. 23, 2001, at A4; *Narrow Pardon Probe Ignores Needed Reforms*, USA TODAY, Mar. 12, 2001, at 12A; U.S. Dep't of Justice, *Pardon Grants January 2001*, *at* http://www.usdoj.gov/opa/pardonchartlst.htm (Sept. 10, 2001).

3. *See, e.g.*, Steve Chapman, *Scandalous Farewell*, WASH. TIMES, Jan. 30, 2001, at A14; Kurt Eichenwald & Michael Moss, *Did $$ and Connections Buy Last-Minute Pardons?*, DESERET NEWS, Jan. 29, 2001, at D6; Peter Slevin & George Lardner, Jr., *Pardons: It Helps to Have an Inside Connection*, INT'L HERALD TRIB., Jan. 23, 2001, at 3.

At the same time, Clinton also commuted the sentences of thirty-six individuals, most serving long sentences for drug violations,[4] who were by and large invisible to the public eye.[5] Anyone following press accounts would have assumed that the individuals were free to return to their lives. But President Clinton attached conditions to all of the commutations, including conditions that some of the offenders periodically take drug tests and some serve a period of supervised release.[6] Clinton required former Congressman Mel Reynolds to obey the "condition of compliance with rules" of the community corrections center where the government released him.[7] Failure to comply with any of the above conditions may land the individuals back in federal prison.[8]

President Clinton was no stranger to offering conditional clemency. Previously, he had offered commutations to sixteen convicted members of the FALN, the radical organization that conducted a series of bombings to publicize the Puerto Rican independence movement's goals. Although no one died in the FALN bombings, they caused substantial damage and injured several police officers seriously. Clinton imposed a number of conditions on the early release offer, requiring the leaders to "renounce violence" and prohibiting them from both associating with known felons and traveling without permission of parole authorities.[9] To many, President Clinton's offer denigrated the seriousness of the FALN's violent terrorist spree and could only be explained as a crass political move designed to enhance the electoral chances of his wife in New York's senatorial election.[10] As with the Rich pardon, congressional committees criticized the president's move and demanded all relevant paperwork,[11] while editorials manifested outrage.[12]

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4. *See* U.S. Dep't of Justice, *Commutations Granted January 20, 2001, at* http://www.usdoj/gov/opa/commutationspaocht.htm (Sept. 10, 2001).

5. The most famous person to receive a commutation was former Congressman Mel Reynolds, who had been convicted of obstructing justice and campaign fraud. *See* Deroy Murdock, *Low-Flying Jackson Sinks Lower by Hiring Sex Predator*, DESERET NEWS, Feb. 11, 2001, at A5.

6. *See* U.S. Dep't of Justice, *supra* note 4.

7. Murdock, *supra* note 5.

8. In addition, President Clinton evidently attached a condition on the Rich pardon that he remain subject to civil liability for the fraud. Shawn Tully, *Living Rich*, TIME, Feb. 19, 2001, at 130. On the other hand, given that the government and Rich had already settled the civil aspects of the suit, the condition appears to be an empty gesture.

9. Mike Dorning, *FBI Warned Clinton Clemency Was Risky, Freeing Puerto Rican Radicals Would Boost FALN, Director Said*, CHI. TRIB., Sept. 22, 1999, at 8.

10. *See, e.g.*, David Johnston, *Federal Agencies Opposed Leniency for 16 Militants*, N.Y. TIMES, Aug. 27, 1999, at A1; Katharine Q. Seelye, *Clinton Says Clemency Plan Was Unrelated to First Lady*, N.Y. TIMES, Sept. 10, 1999, at B4.

11. *See, e.g.*, James Dao, *House Panel Subpoenas Records in Clinton's Clemency Offer*, N.Y. TIMES, Sept. 2, 1999, at A25; Tom Squitieri, *Senate Rebukes Clinton on Clemency, Joins House in Criticizing Deal for FALN Members*, USA TODAY, Sept. 15, 1999, at 4A.

12. *See, e.g.*, *FALN Fumble Foils Clintons*, N.Y. DAILY NEWS, Sept. 9, 1999, at 42; *Pardoning Terrorists*, AUGUSTA CHRON., Aug. 18, 1999, at A4; *see also* George M. Kraw, *Terrorists Win a*

Lost in the political reverberations has been any concern for the wider social implications of imposing conditions on clemency. Because these conditions restrict the constitutional rights of the offenders, they may be deeply unsettling from a civil libertarian perspective. In exchange for clemency, President Clinton seemingly coerced fourteen of the sixteen FALN members into relinquishing rights to travel, association, and free expression. The conditions even preclude two sisters, who were among those offered clemency, from maintaining any contact with each other.[13] Moreover, in the recent slew of commutations, Clinton failed to specify the type of conduct that would lead to revocation of the commutation, the entity making that determination, and the applicable burden of proof. These examples highlight that, although the clemency power may be a vehicle of compassion or mercy, presidents may use conditional pardons to circumscribe the fundamental rights of offenders.

President Clinton is not the first president to attach conditions to offers of pardon or commutation of sentence.[14] From President Washington on, presidents have attached conditions to many pardons and commutations.[15] President Lincoln's offer of amnesty to Southern secessionists on the condition that they take a loyalty oath marks one controversial example.[16] Many less politically charged examples exist. For instance, presidents have required, on pain of revocation of the pardon, that offenders make restitution,[17] drop financial claims against the government,[18] or accept deportation.[19] Perhaps more surprisingly, presidents have required that offenders not drink, not associate with undesirables, and provide their families with greater financial support.[20] From Chief Justice Marshall's time onwards, the Supreme Court has upheld the president's exercise of

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Round: Clinton Pardons for Puerto Ricans Only Encourage More Killings, Bombings, FULTON COUNTY DAILY RPT., Sept. 24, 1999; *Puerto Ricans' Clemency: Helpful Friends in High Places*, DURHAM HERALD, Oct. 22, 1999, at A12.

13. Ivan Roman, *Ex-Prisoners Get Rousing Welcome in Puerto Rico, Some Will Try to Ease Their Restrictions, and All See the Struggle for Independence Continuing in Some Fashion*, ORLANDO SENTINEL, Sept. 12, 1999, at A1. Another FALN member may not be able to see his spouse because of her prior (criminal) involvement in a different pro-independence group. *Id.*

14. For the purposes of this Article, I use these terms interchangeably. The critical difference is that pardons essentially remove the fact of conviction under the law, while commutations merely reduce the punishment. Usually, presidents grant pardons after an offender serves his sentence. But, in focusing on the impact of conditional offers, there is little difference between the two types of presidential action. In each, the presidential offer is made contingent upon certain actions or omissions, and the president reserves the right to judge whether the offender has satisfied the condition. The term clemency encompasses pardons and commutations, as well as remissions of fines.

15. *See infra* text accompanying notes 64-74.

16. *See infra* text accompanying note 66.

17. *See* Bradford v. United States, 228 U.S. 446 (1913) (upholding a condition requiring restitution of public lands taken by fraud).

18. *See infra* note 71.

19. *See infra* text accompanying note 72.

20. *See infra* note 73; *infra* text accompanying note 137.

conditional pardons and commutations. As the Court observed in *Ex parte Wells*,[21] the pardon power "is frequently conditional, as [the president] may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend."[22]

Yet, empowering the president to attach conditions to offers of pardon opens a veritable Pandora's Box. Consider that a president might offer to commute the sentence of an offender on the condition that the offender donates a kidney to an ailing relative.[23] Or, a president may offer early release to an inmate sentenced to ten years in prison on the condition that, if he engages in conduct harmful to society, the government could return him to prison for the remainder of his life. Furthermore, consider that President Bush might determine, without a hearing, that the released FALN members had not renounced violence sufficiently or that Mel Reynolds had not complied sufficiently with the rules of the community corrections center and therefore could return them to jail. Prior practice suggests that the above hypothetical situations are not as fanciful as they may appear.[24] Although some believe that political process checks adequately constrain presidents from the courses of action sketched above, the examples demonstrate the potential for presidents to imperil constitutional values and augment their own power, raising the question of whether judicial review is needed as an additional check on the president's discretion.

Accordingly, this Article investigates the historical pedigree, constitutionality, and contemporary policy ramifications of conditional pardons. Part I traces the historical evolution of the exercise of the conditional pardon power. It sketches the British tradition, and then exercise of the pardon power by colonial governors. Based on documentary evidence located, in part, in the National Archives, the Article then summarizes the incidence of the conditional pardon power throughout American history. Presidents, depending upon their ideology and the political demands of the day, have offered pardons contingent upon the satisfaction of a wide variety of conditions.

Part II explores possible individual rights and separation of powers objections to the use of conditional pardons. Because of the pressures of incarceration, some would argue that offers of conditional pardons coerce the offender into relinquishing critical rights, including core individual rights such as the right to live in this country, the right to associate, or the

21. 59 U.S. (18 How.) 307 (1855).

22. *Id.* at 311.

23. In England, in 1730, one inmate was granted a pardon on the condition that he agree to experimental surgery at the hands of a famous physician. *See* 3 U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 20 (1939) [hereinafter SURVEY OF RELEASE PROCEDURES].

24. *See, e.g., infra* notes 137-143 and accompanying text.

right to judicial review. Despite the inherent potential for coercion, however, Part II.A argues that the law should empower individuals to make the tradeoffs between fulfilling the prison term and conditional release, as are made in plea bargaining. On the other hand, Part II.B recognizes that permitting an offender's waiver of certain fundamental interests may, at times, shock society's conscience. With that narrow exception, however, Part II.B concludes that society should trust individuals to choose between deferred release with no strings attached and immediate release with restrictions on freedom. Finally, Part II.C illustrates the risk that, through conditional pardons, presidents may accomplish objectives that they otherwise lack power to attain, such as lengthening punishment or compelling observance of particular religious practices. Therefore, even when offers of conditional pardons do not infringe on individual rights, they may violate structural limits[25] on the president's authority.

Part III addresses the extent to which presidential pardons should be checked externally. The Article argues that courts at different points in our history have exercised both too much and too little review. Despite some lower court precedents, courts should exercise no review over a president's reason for the pardon or the process used to reach the decision. The Constitution vests such decisions exclusively in the president, and judicial review can only disrupt that power. Similarly, in the conditional pardon context, courts should not second-guess the wisdom of conditions imposed as long as the offender consents. The president remains accountable not only to the electorate and Congress (through impeachment), but also to his successors, who need not enforce any objectionable conditions.

But, judges vigilantly should review two aspects of presidential conditional pardons. First, they should ensure that presidents have not exercised authority indirectly through the pardon power that otherwise would be prohibited constitutionally, such as favoring one type of religious observance or lengthening punishment. Second, notwithstanding prior practice, courts should oversee any presidential finding that an offender has violated a condition, thereby protecting individuals against arbitrary revocation. When liberty is at stake, presidents must conform their actions to the dictates of due process. Thus, like Congress and the court of public opinion, judges have a key role to play in the pardon process.

25. By structural limits, I refer to constitutional provisions limiting federal governmental power in general and the power of the president in particular. As I discuss, no clear line separates constitutional provisions principally protecting individual rights, such as the freedom of speech, from those limiting governmental power, such as the bicameralism and presentment requirements in Article I. *See infra* note 309.

I
HISTORICAL EXERCISE OF THE CONDITIONAL PARDON POWER

A. The British Tradition

Legal academics have traced the roots of the pardon power in Article II[26] to prior English practice.[27] By the middle of the sixteenth century, the prerogative of the pardon power became centralized in the King,[28] and the royal power to pardon covered the "authority to pardon or remit any treasons, murders, manslaughters or any kinds of felonies . . . or any outlawries for any such offenses . . . committed . . . by or against any person or persons . . . of this Realm."[29] The King enjoyed the flexibility to use pardons for any purpose advantageous to his goals. The pardon power remained open-ended until Parliament constrained the King's power in the 1700 Act of Settlement, thereby precluding the King's exercise of the pardon power to frustrate impeachments.[30]

The British sovereign also exercised the discretion to attach conditions to offers of pardon. As Blackstone summarized, "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. . . ."[31] Thus, Kings had broad latitude in offering conditional pardons. For example, they used the pardon power as an important aid to raising funds and armies. Indeed, Holdsworth asserted that the practice of conditional pardons "was used in the eighteenth century to man a navy."[32] In addition, banishment to a foreign country and later the colonies typified conditions attached to pardons.[33] Indeed, this nation's founding owes no small debt to the instrument of conditional clemency.

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26. Article II empowers the president "to grant Reprieves and Pardons for Offenses against the United States except in Cases of Impeachment." U.S. CONST. art. II, § 2.

27. *See* William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475 (1977) (describing English precedent and tracing power back to Biblical times).

28. *See* Stanley Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55-56 (1963).

29. Act for Continuing Certain Liberties of the Crown, 27 Hen. 8, c. 24, § 1 (1535-36).

30. *See* Duker, *supra* note 27, at 496-97. Under British practice, parliamentary impeachments included conventional punishment, and thus a royal pardon would directly impinge upon parliamentary prerogatives. In addition, monarchs did not have to take an oath to promise to govern according to the laws of Parliament until after the Glorious Revolution of 1688. Patrick R. Cowlishaw, Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 157 (1975).

31. 4 William Blackstone, Commentaries 394.

32. 11 W. Holdsworth, A History of English Law 573 (6th rev. ed. 1938).

33. *See also* HOLDSWORTH, *supra* note 32, at 569-72; Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 588-89 (1991). At times, those pardoned were sold as indentured servants, which created a perverse incentive to convict individuals for petty crimes only to obtain an opportunity for raising funds. 11 HOLDSWORTH at 572.

B. *Evolution of the Pardon Power in the United States*

The royally appointed colonial governors enjoyed similarly broad pardon powers. Although there was some variation from colony to colony, the governors could remit fines or exonerate convicted criminals as they saw fit.[34] For instance, the colonial charter in Maryland vested the executive with the authority "to Remit, Release, Pardon, and Abolish all Crimes and Offences whatsoever against such Laws, whether before, or after Judgment passed."[35] In some colonies such as Connecticut and Rhode Island, however, the charter vested the pardoning power in the general assemblies.[36]

Colonial governors could also offer conditional pardons to offenders. Governors of Virginia, for instance, offered pardons to individuals convicted of burglary and theft on condition that they leave the Commonwealth, work on a plantation in the West Indies as an indentured servant for a period of years, or serve in the army.[37] With Independence, however, the newly enacted legislatures began to circumscribe the pardon power. For instance, the Georgia and New Hampshire legislatures vested the power in themselves, and the Massachusetts legislature restricted the Governor's power to pardon after a criminal conviction. Most states' governments vested the power to pardon jointly in the governors and legislatures.[38] These limitations should not be surprising: Blackstone counseled that the pardon power could not exist in democracies "for there nothing higher is acknowledged than the magistrate who administers the laws: and it would be impolitic for the power of judging and pardoning to center in one and the same person."[39]

Despite Blackstone's views,[40] the Constitution restored the executive's pardon power to much of its earlier breadth. Efforts to condition the

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34. *See* Duker, *supra* note 27, at 497-500.

35. CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 5 (1922). In North Carolina, Queen Elizabeth granted to Sir Walter Raleigh a charter vesting him with the power "to convict, punish, [and] pardon" transgressions against the colony. ROMA S. CHEEK, THE PARDONING POWER OF THE GOVERNOR OF NORTH CAROLINA 59 (1932). William Penn's charter for what became Pennsylvania similarly included the power "to remitt, release, pardon and abolish, whether before Judgement or after, all Crimes and Offences whatsoever committed within the said Countrey. . . ." WILLIAM W. SMITHERS & GEORGE D. THORN, TREATISE ON EXECUTIVE CLEMENCY IN PENNSYLVANIA 15-16 (1909).

36. *See supra* note 23, at 89.

37. *See* ARTHUR P. SCOTT, CRIMINAL LAW IN VIRGINIA 119-20 (1930).

38. *See* Kobil, *supra* note 33, at 590-91 (1991); SURVEY OF RELEASE PROCEDURES, *supra* note 23.

39. 4 William Blackstone, Commentaries *390.

40. Justice Joseph Story in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES turned Blackstone's argument on its head:

> If the [pardon] power should ever be abused, it would be far less likely to occur in opposition than in obedience to the will of the people. The danger is not, that in republics the victims of the law will too often escape punishment by a pardon, but that the power will not be sufficiently exerted in cases where public feeling accompanies the prosecution, and assigns

president's pardon power on Senate consent, for instance, were defeated.[41] According to Madison's notes, George Mason commented that "[t]he Senate ha[d] already too much power."[42] The president therefore retained the exclusive power of pardons.

On its face, the Constitution's Pardon Clause permits the president to offer pardons for any reason; the president need not disclose his justifications. The Clause only restricts the president's pardon power in three respects: acts to be pardoned must constitute offenses against the United States,[43] no impeachment may be involved,[44] and the offense already must have been committed.[45] Indeed, the Clause covers civil[46] as well as criminal sanctions imposed by the federal government. The form of the presidential pardon is immaterial; the president may remit fines and forfeitures, grant broad amnesty to a group of offenders, commute sentences, and grant pardons prior to conviction.[47]

The Federalist Papers and other early writings suggest that the Framers intended the pardon power to function as a check on the coordinate branches. For instance, Alexander Hamilton defended the pardon power in *The Federalist No. 74* as a needed check on legislative power, explaining that

> [h]umanity 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

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the ultimate doom to persons who have been convicted upon slender testimony or popular suspicions.

3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1497 (5th ed. 1891).

41. *See* 5 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 480 (William S. Hein & Co. 1996) (1891) [hereinafter ELLIOT'S DEBATES] (reporting Roger Sherman's failed amendment that would have modified the presidential power to grant reprieves and pardons "until the ensuing session of the Senate, and pardons with consent of the Senate"). The amendment was defeated 8-1. *See also* J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 734-35 (1893) (recording discussion and rejection of amendment to empower Senate to approve of pardons). For the different historical evolution of the pardon power in the states, see SURVEY OF RELEASE POLICIES, *supra* note 23, at 94-113.

42. MADISON, *supra* note 41, at 735.

43. The president has no authority to pardon offenses against the states in light of our federalist system. *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 113 (1925); Carlesi v. New York, 233 U.S. 51, 59 (1914). W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 54 (1941).

44. The Article II exception for impeachment tracks British precedent, preventing the president from nullifying congressional removal of executive or judicial officials through impeachment, even though, unlike in the British system, the congressional impeachment power extends only to removal from office. *See* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 190 (rev. ed. 1984). As Justice Story commented, "the Constitution has . . . wisely interposed this check upon his power, so that he cannot, by any corrupt coalition with favourites, or dependents in high offices, screen them from punishment." 3 STORY, *supra* note 40, at § 1501.

45. *See, e.g.*, CORWIN, *supra* note 44, at 189.

46. *See id.*; HUMBERT, *supra* note 43, at 51-52.

47. *See* CORWIN, *supra* note 44, at 180-89.

> of necessary severity, that without an easy access to exceptions . . . justice would wear a countenance too sanguinary and cruel.[48]

Thus, the pardon power acts as a necessary safety valve in light of Congress's inability to foresee the particularities of every crime and the circumstances of every offender. James Iredell in the North Carolina ratifying convention stressed a similar point: "[T]here may be many instances where, though a man offends against the letter of the law, yet peculiar circumstances in his case may entitle him to mercy. It is impossible for any general law to foresee and provide for all possible cases that may arise . . . ."[49] Judges imposing punishment may lack discretion to impose appropriate punishment, or they may be insufficiently compassionate. The pardon power permitted presidents to soften the punishment meted out by Congress and the judiciary.

In addition to the checking function, the Framers also understood the pardon power to enable the president to further public welfare goals, as it had in England. Hamilton noted that

> in seasons of insurrection or rebellion there are critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth. . . . The dilatory process of convening the Legislature or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity.[50]

James Iredell noted a different strategic enforcement concern, explaining that the pardon power "is naturally vested in the president, because it is his duty to watch over the public safety; and as that may frequently require the evidence of accomplices to bring great offenders to justice, he ought to be intrusted with the most effectual means of procuring it."[51] The Framers envisaged the pardon power as a law enforcement tool as well as a critical safeguard against legislative and judicially imposed punishment.

Presidents have wielded the pardon power throughout our nation's history. From an early date, presidents have relied on the pardon power to issue general amnesties.[52] President Washington issued a Proclamation of Amnesty to the Whiskey Rebels in 1795;[53] President Adams granted an

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48. THE FEDERALIST No. 74, 482 (1938) (Alexander Hamilton). Hamilton's explanation echoes Aristotle's understanding of the need of equity to temper the inevitable imprecision of rules. ARISTOTLE, NICOMACHEAN ETHICS 5:10.

49. James Iredell, *Address in the North Carolina Ratifying Convention, reprinted in* 4 THE FOUNDERS' CONSTITUTION 17 (Philip B. Kurland & Ralph Lerner, eds. 1987).

50. THE FEDERALIST No. 74, *supra* note 48, at 449.

51. 4 ELLIOT'S DEBATES, *supra* note 41, at 111.

52. In effect, amnesties afford pardons to a group of similarly situated individuals all at once. *See* HUMBERT, *supra* note 43, at 38-40.

53. President Washington, in part, explained that the pardon was appropriate because of "assurances" made to the population of Western Pennsylvania. *See* 20 Op. Att'y Gen. 330, 339 (1892).

amnesty to the Pennsylvania insurgents in 1800;[54] and President Madison granted a general pardon to the Barataria pirates in 1815.[55] Presidents granted amnesties after the Civil War to the Southern rebels and to draft dodgers following the Vietnam War as well.[56] Further, presidents have offered pardons in politically charged cases, such as President Benjamin Harrison's pardon of Mormons convicted of polygamy in the Utah territory,[57] President Carter's commutation of Patricia Hearst's sentence,[58] President Reagan's pardon of George Steinbrenner,[59] and President Bush's pardon of the Iran-Contra defendants,[60] as well as President Clinton's pardon of Marc Rich. Most pardons, however, have been extended to individuals for reason of overcrowding or compassion.[61] Although the incidence of pardons has varied from president to president and across generations,[62] in the last ninety years, presidents have averaged roughly

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54. President Adams declared that

> [w]hereas the late wicked and treasonable insurrection against the just authority of the United States of sundry persons in the counties of Northampton, Montgomery, and Bucks, in the State of Pennsylvania . . . having been speedily suppressed, without any of the calamities usually attending rebellion . . . and the ignorant, misguided, and misinformed in the counties have returned to a proper sense of their duty . . . it is become unnecessary for the public good that any future prosecutions should be commenced . . . .

Id.

55. President Madison justified the pardon on the grounds that "the offenders have manifested a sincere penitence . . . [and] have exhibited in the defense of New Orleans unequivocal traits of courage and fidelity." *Id.* at 344.

56. Richard A. Saliterman, *Reflections on the Presidential Clemency Power*, 38 OKLA. L. REV. 257 (1985) (relating his experiences on President Ford's Clemency Board assessing applications for clemency by those committing offenses connected to the Vietnam War); Susan Fraker, *After the Pardon*, NEWSWEEK, Jan. 31, 1977, at 28 (exploring class aspects of President Carter's pardon of draft evaders).

57. *See Pardons by Our Presidents—A Remedy for Partisan "Crimes,"* ORLANDO SENTINEL TRIB., Jan. 3, 1993, at G3 (comparing Harrison's pardon of Mormon polygamists to Bush's lame duck pardon of Iran Contra defendants).

58. Charles R. Babcock, *Patricia Hearst to be Freed from Prison Thursday*, WASH. POST, Jan. 30, 1979, at A1. President Clinton recently followed up by granting her a full pardon. *See* U.S. Dep't of Justice, *supra* note 2.

59. *Reagan Pardons Steinbrenner; No Word on Shaw, Hammer*, SAN DIEGO UNION-TRIB., Jan. 20, 1989, at A6.

60. *See supra* text accompanying note 1.

61. President Washington, for instance, agreed to pardon a participant in the Whiskey rebellion because he was not "in right mind." DWIGHT F. HENDERSON, CONGRESS, COURTS & CRIMINALS: THE DEVELOPMENT OF FEDERAL CRIMINAL LAW, 1801-1829 14 (1985). Rutherford Hayes pardoned Victoria Pool in part because she was "deformed in body and imbecile in mind." President Hayes, pardon of Victoria Pool (Aug. 13, 1877) (unpublished microfiched pardon on file with Library of Congress). President Cleveland pardoned Willis Stewart in part so that he could take care of his widowed mother and Lee Roberts because he was in danger of losing his sight. 1893 ATT'Y GEN. ANN. REP. 135.

62. President Bush granted the least number of petitions for pardon and clemency in the twentieth century, seventy-seven out of the approximately 550 requested, which also is the lowest percentage within the century. President Clinton was lagging behind until the flurry two hours before his term expired. *See* Mike Dorning, *Clinton Postpones Death Penalty for Clemency Request*, CHI. TRIB. Aug. 3, 2000, at 3. President Harding, on the other hand, granted the largest percentage of clemency applications, while President Roosevelt granted 3678 applications for pardons and commutations of

two hundred acts of clemency per year.[63] There have been many more individuals affected by amnesties.

C. *Exercise of Conditional Pardons in the United States*

Presidents have utilized the conditional pardon option with differing frequency. President Hayes granted fifty-one conditional pardons, while President Grant granted five.[64] President Hoover granted eighty conditional pardons in 1932 alone.[65] Moreover, presidents have attached conditions to some amnesties: President Lincoln in 1863 called for an amnesty to all southerners who had taken up arms against the Northern States, but only upon the express condition that they thereafter swear loyalty to the Union and afford no further help to the Confederate States. Such conditions typically included a ban on traveling to the Southern States and a ban on corresponding to anyone residing there in the absence of prior approval of a military official.[66] President Ford offered clemency to numerous deserters after the Vietnam War on the condition that they perform alternate service.[67]

Like conventional pardons, conditional pardons in some cases have generated controversy. In addition to the FALN case, President Nixon pardoned James Hoffa on the condition that Hoffa not engage in union politics.[68] President Harding reportedly granted a pardon to the socialist leader Eugene V. Debs after the First World War, despite vociferous opposition, on the condition that he travel to Washington D.C. to meet him.[69]

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sentences, which remains the greatest number of applications ever granted. *See* P.S. Ruckman, Jr., *Executive Clemency in the United States: Origins, Development and Analysis (1900-1993)*, 27 PRES. STUD. Q. 251, 261 (1997).

63. P.S. Ruckman, Jr., *Releasing FALN Member Presidential Prerogative*, ROCKFORD REG. STAR, Sept. 26, 1999, *available at* http://www.rvc.cc.il.us/faclink/pruckman/VITA/new_page/htm.

64. There is some difficulty in characterization given that many of the pardons include the condition of payment of certain costs. It is not always clear whether the defendant would have had a preexisting duty to pay the costs, in which case the presidential act resembles a commutation of sentence or partial remission of fine, or whether the costs impose a new obligation as a condition to pardon.

65. 1932 Att'y Gen. Ann. Rep. 132.

66. *See* JONATHAN TRUMAN DORRIS, PARDON AND AMNESTY UNDER LINCOLN AND JOHNSON 10-17 (1952). Accepting conditions was not as easy a call as it may appear, for the pardoned offender stood to lose property in the South's control. *Id.* at 14; *see also* James N. Thurman, *Justice Revised*, CHRISTIAN SCI. MONITOR, Dec. 24, 1999, at 3.

67. Saliterman, *supra* note 56, at 261.

68. *See infra* text accompanying notes 294-299.

69. David Gray Adler, *The President's Pardon Power*, *in* INVENTING THE AMERICAN PRESIDENCY (Thomas E. Cronin ed. 1989) 209, 220. In addition, Harding commuted the sentence of IWW radicals usually on the condition that they be law abiding in the future. *See* 1921 ATT'Y GEN. ANN. REP. 398; President Harding, pardon of Nef, et al. (Oct. 14, 1922) (unpublished microfiched pardons on file with Library of Congress); President Harding, pardon of Abrams, et al. (Jan. 30, 1921) (same).

Presidents have imposed conditions on pardons in less politicized cases as well. For example, President Madison pardoned certain offenders as long as they agreed to join the Navy.[70] Early release from prison evidently was only warranted if the offender used his skills to benefit the country directly. As another example of a direct benefit, presidents have required offenders to relinquish claims against the Treasury.[71] Presidents obtained a different kind of benefit by offering pardons on the condition that offenders leave the nation.[72] Presidents also have granted conditional pardons when there is no direct benefit to the government other than a sense of justice: President Jackson pardoned a juvenile, George Patch, on the condition that his guardian pledge that he "acquir[e] some beneficial trade,"[73] and President Fillmore offered a conditional pardon and life imprisonment to the Indian See-see-sah-ma because of grave doubts about the fairness of his conviction.[74]

Although presidential use of conditional pardons has not been consistent, two factors in the early twentieth century helped precipitate a dramatic downward turn in their frequency. First, as federal crime escalated in the Prohibition Era, the pardon process became more burdensome. Presidents such as Harding and Coolidge faced a growing number of pardon requests.[75] Considering such requests consumed an increasing amount of time and, in addition, enforcement concerns escalated.[76] If conditions were attached to pardons, then presidents were duty bound to ensure that their terms were enforced.[77] If a violation occurred, then the presidents faced the responsibility of ordering the offender's arrest, and initiating some process (however cursory) to revoke the pardon and commit the offender to prison.

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70. *See* 1 Op. Atty. Gen. 341 (1820); *see also* HENDERSON, *supra* note 61, at 48.

71. *See, e.g.*, President Grant, pardon of Simon Adler & Abraham Fuerst (July 29, 1876) (unpublished microfiched pardons on file with Library of Congress); President Hayes, pardon of Daniel Reisinger (Aug. 24, 1880) (same); *see also infra* notes 262-268.

72. Many presidents have conditioned pardons upon an offender's banishment. *See* President Monroe, pardon of Lavis Hare (July 7, 1834) (unpublished microfiched pardons on file with Library of Congress); President Fillmore, pardon of Charles Bolsford (Oct. 18, 1850) (same); President Andrew Johnson, pardon of Francisco Buhagier (June 20, 1868) (same); President Cleveland, pardon of Frank White (July 6, 1887) (same). Some presidents took the lesser step of conditioning pardon on agreement to leave the D.C. area. President Jackson, pardon of George McDaniel (July 11, 1836) (unpublished microfiched pardons on file with Library of Congress); President Hayes, pardon of Victoria Pool (Aug. 13, 1877) (same); President Cleveland, pardon of Lillie Meade (May 25, 1893) (same).

73. President Jackson, pardon of George Patch (March 18, 1829) (unpublished microfiched pardon on file with Library of Congress). President Taft remitted a fine levied on Jack Howard on the condition that he spend an equal amount in keeping his three boys in school. 1912 ATT'Y GEN. ANN. REP. 350.

74. 5 Op. Att'y Gen. 368 (1851).

75. In 1908, for instance, there were 509 applications for clemency. By 1925, there were 1799. HUMBERT, *supra* note 43, at 98.

76. *See infra* text accompanying notes 136-142.

77. President Harding conditionally commuted sixty-eight sentences in 1923 alone. HUMBERT, *supra* note 43, at 98.

As early as 1820 Attorney General Wirt had warned of the "difficulty of enforcing the condition, or, in case of a breach of it, resorting to the original sentence of condemnation."[78]

Second, with passage of the federal parole and probation statutes in 1910[79] and 1925,[80] presidents found less reason to offer conditional pardons.[81] Other statutory means existed to shorten punishment and help ensure that those released would be law abiding. Moreover, parole boards could attain the same rehabilitative ends more effectively than presidential pardons. The boards could rely upon expert testimony as to each applicant's likelihood of recidivism. Presidents had neither the time nor staff to undertake that assessment. Indeed, part of the impetus for passage of the parole statute may well have been, as it was in some states, to prevent the inconsistent pardon practices of the Chief Executive.[82] Given the similar functions of conditional pardon and parole, early challenges to operation of the parole statute focused on whether Congress had unconstitutionally infringed upon the president's pardon power.[83]

More recent rejection of parole and indeterminate sentencing, however, has brought us almost full circle. The federal government and most states have abolished parole, and Congress, through the sentencing guidelines, has deprived judges of much sentencing discretion. President Clinton and Governor Pataki, at different ends of the political spectrum, have both critiqued the new sentencing schemes as overly rigid.[84] In an era of harsh and inflexible sentencing, the pleas of compassion may ring more powerfully,[85] as reflected by President Clinton's last minute offers of commutation to those suffering long prison sentences for relatively minor, nonviolent offenses.[86] Presidential offers of conditional pardon therefore may once again become critical as a means of plugging that legislatively created gap.[87]

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78. 1 Op. Att'y Gen. 341 (1820).

79. Act of June 25, 1910, 36 Stat. 819 (1910).

80. Federal Probation Act of 1925, 48 Stat. 1259 (1925).

81. In debates preceding enactment of the Parole Act, members of Congress adverted to the fact that adoption of a federal parole system would minimize the need for conditional pardons. *See* 45 CONG. REC. 6374 (1910) (statements of Reps. Crumpacker & Sterling).

82. Such was evidently the case in California. *See* Sheldon L. Messinger et al., *The Foundations of Parole in California*, 19 LAW & SOC'Y 69, 73-76 (1985).

83. *See, e.g.*, Duehay v. Thompson, 223 F. 305, 307 (9th Cir. 1915).

84. *See The War on Addiction: Abuse in America*, NEWSWEEK, Feb. 12, 2001, at 36; John Caher, *Governor Proposes Drug Law Reforms; Lower Minimum Sentences, Crackdown on Kingpins Sought*, N.Y. L.J., Jan. 18, 2001, at 1; *Proper Clemencies*, ST. PETERSBURG TIMES, Jan. 25, 2001, at 14A.

85. *See* Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 FORDHAM URBAN L.J. 1483, 1494-96 (2000).

86. *See supra* note 4.

87. *See* CHARLES L. NEWMAN, SOURCEBOOK ON PROBATION, PAROLE, AND PARDONS 64 (1968) (arguing against issuance of conditional pardons as long as parole and probation options exist).

In short, presidents extensively have used conditional pardons to accomplish various goals.[88] The president's ability to impose conditions can further goals of compassion and mercy. Conditions can also ensure protection for the citizenry at large by providing continuing oversight of the pardoned offender's life. Finally, imposition of conditions can elicit more direct benefits to the state by requiring the offender to serve the country in the armed forces upon release[89] or relinquish claims against the Treasury,[90] and in some contexts, to leave the nation.[91] No federal court has ever held any condition invalid.[92]

II
PROBLEMS POSED BY OFFERS OF CONDITIONAL PARDONS

Despite its beneficial aspects, the president's pardon power can directly threaten individual rights or encroach on the powers of coordinate branches. Through offers of conditional pardons, presidents may coerce offenders to relinquish constitutional and other fundamental rights. Moreover, aside from the offender's interests, the president's offer of conditional pardon may violate other social values. Finally, conditional pardons may allow presidents to aggrandize their own power at the expense of coordinate branches.

A. Coercion of Individual Rights

The president may grant pardons conditioned on an individual's agreement to relinquish his rights.[93] This Part advocates a bargaining model for pardons, arguing first that the offender's acceptance is an indispensable element of a conditional pardon, and then that the consent, though necessary, may be insufficient to legitimize the pardon. Although society should support an offender's right to make the tradeoffs between early conditional release and subsequent unrestricted release, the offender should not be able to waive independent assessment of whether he violated the conditions imposed.

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88. Currently, the Pardon Attorney within the Department of Justice issues a report recommending for or against a particular pardon. The report, after being reviewed and signed by the Attorney General, 28 C.F.R. § 0.35 (2001), is then forwarded to the president for action. *See generally* Love, *supra* note 85, at 1489-90. *See also* Carl M. Cannon & David Byrd, *The Power of the Pardon*, 32 NAT'L L.J. 774 (2000) (discussing procedures in place).

89. *See supra* note 70.

90. *See supra* note 71.

91. *See supra* note 72.

92. For a sampling of unsuccessful challenges, see Schick v. Reed, 419 U.S. 256 (1974); Lupo v. Zerbst, 92 F.2d 362 (5th Cir. 1937); Hoffa v. Saxbe, 378 F. Supp. 1221 (D.D.C. 1974); *Ex parte* Weathers, 33 F.2d 294 (D. Fla. 1929).

93. British monarchs enjoyed a similar power. Pardons were offered, for instance, on the condition that the individual relocate to the colonies. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *394.

1. *The Bargaining Model vs. the Legislative Model*

From a contemporary vantage-point, a conditional pardon resembles a bargained-for exchange. In exchange for the moderation of punishment, the offender accepts conditions on early release or commutation of sentence. From a rights perspective, honoring an offender's right to bargain in this manner respects his dignity and autonomy as an individual.

However, alternative perspectives exist. Indeed, one line of pardon decisions casts doubt on the validity of the bargaining model in favor of a legislative-type model, under which the president would enjoy the plenary right to attach conditions to clemency grants. The Supreme Court in *Biddle v. Perovich*[94] held that the president did not need an individual's consent to commute a death penalty to life imprisonment. Justice Holmes, for the Court, asserted that the pardon power is "not a private act of grace from an individual happening to possess power . . . . When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed . . . [t]he public welfare, not [the offender's] consent determines what shall be done."[95] The Court further explained:

> The opposite answer would permit the president to decide that justice requires the diminution of a term or a fine without consulting the convict, but would deprive him of the power in the most important cases and require him to permit an execution which he had decided ought not to take place . . . .[96]

The *Biddle* analysis seems straightforward as applied to an unconditional pardon or commutation. Presidents may lessen the duration of punishments, thereby saving the public costs of incarceration, irrespective of the offender's consent.[97] For example, President Clinton, during his last morning in office, commuted the death sentence of David Chandler to life imprisonment without parole.[98]

Although the *Biddle* analysis might be confined to the death penalty context, Attorney General Brownell read the case for much more. He advised President Eisenhower that a president unilaterally could commute a death sentence to life imprisonment without the possibility of parole, which the statute at the time did not permit.[99] Thus, unlike in the *Biddle* or

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94. 274 U.S. 480 (1927).

95. *Id.* at 486.

96. *Id.* at 487.

97. Ironically, pardons can *facilitate* an offender's execution. The court in *Chapman v. Scott*, 10 F.2d 156 (D. Conn. 1925), held that an offender must accept a pardon from a federal officer, which effectively sped up his execution on a state offense.

98. Chandler was the first person sentenced to death under the 1998 federal drug kingpin law. The government's main witness recanted his testimony and admitted firing the fatal shot. Bill Rankin, *Pardon of Alabama Man Draws Hope, Criticism*, ATLANTA CONST., Jan. 22, 2001, A5.

99. *See* 41 Op. Att'y Gen. 251, 258 (1955).

Chandler contexts, Eisenhower's offer of pardon attached a condition: waiver of the right to parole that was otherwise guaranteed under the statutory scheme. Nonetheless, the Attorney General concluded that the president "can validly attach the condition that the prisoner shall forego parole . . . without obtaining the prisoner's consent to the condition."[100] Attorney General Brownell portrayed the pardon power in legislative-type terms.[101] Under Brownell's view, presidents retroactively can change punishment, as long as the new punishment is less severe when viewed objectively. Just as legislation can criminalize previously lawful conduct (though not retroactively) or increase the tax rate for prior transactions, so a president arguably can change the duration and nature of the earlier punishment. Even if an offender would prefer a longer sentence as opposed to a shorter sentence with an obligation of restitution, a presidential condition of restitution would prevail. In Attorney General Brownell's words, "the public welfare, not [the individual's] consent" would govern.[102]

In this way, the public welfare or "legislative" justification for the conditional pardon power contrasts with the contractarian or plea bargain model. In plea bargaining, we would never permit a prosecutor to force defendants to accept an objectionable plea arrangement. Even if a prosecutor could reasonably aver that the plea would serve the public interest, the defendant's autonomy interests would prevail.[103]

A president's pardon power, however, greatly exceeds a prosecutor's authority to plea bargain. Presidents can exercise legislative-type power through delegations from Congress or directly under the Constitution.[104] As suggested in *Biddle*, the question, therefore, is whether the president can effectuate legislative or public welfare type goals through exercise of the pardon power, which trump an offender's autonomy interests.

This Article argues that the answer should be no. Consent to conditional pardons is critical for two interrelated reasons. First, the pardon power only resembles a legislative power in that it permits the president to check legislative and judicial judgments on punishment. Although presidents may serve welfare goals through exercise of the pardon power

100. *Id.* at 258.

101. *Cf. In re* Greathouse, 10 Fed. Cas. 1057, 1062 (No. 5741) (N.D. Cal. 1864) (asserting that a conditional pardon "is not a contract between equals, each receiving an equivalent for what he surrenders. It is an act of clemency, grace, and conciliation. Its condition was intended, not as a consideration, but merely to exclude from its benefits the obdurate. . . .").

102. *See also* SURVEY OF RELEASE PROCEDURES, *supra* note 23, at 202 ("It is submitted that the true rule should be that the convict has no more legal right to reject a conditional pardon than an absolute one. . . ."); G. Sidney Buchanan, *The Nature of a Pardon Under the United States Constitution*, 39 OHIO ST. L.J. 36, 49-65 (1978) (supporting Justice Holmes' position).

103. *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CALIF. L. REV. 652, 695-703 (1981).

104. For instance, the Constitution directs the president to serve also as Commander-in-Chief of the Armed Forces. U.S. CONST., art. II, § 2.

indirectly, the constitutional authorization for pardons does not represent a grant of substantive power and never did in Britain or in the colonies.[105] Second, the principal rationale for the pardon power has long been to benefit the offender caught in the grasp of the criminal justice system. Society should permit individuals subjected to punishment to determine whether to accept "a new deal" predicated on different conditions. This is particularly true when the nature of punishment, and not merely the duration, changes. Therefore, even if a proposed conditional commutation objectively appears to be more favorable, the offender's subjective evaluation of the options should prevail. Indeed, the Supreme Court long before *Biddle* had declared that an offender retains the discretion to accept or reject the offer of a conditional pardon, for "the condition may be more objectionable than the punishment inflicted by the judgment."[106]

The legal community should understand *Biddle* narrowly, reflecting a widespread, but by no means irrefutable,[107] belief that rational offenders would accept any conditional commutation that saves them from death. In Justice Holmes' view, a conditional commutation in the death penalty context may closely resemble a traditional commutation in that the commutation diminishes the offender's punishment. Commutations of sentences require no consent on the offenders' part.[108] Extrapolation of that position to conditional pardons more generally, however, is unwarranted in light of the autonomy interests at stake.[109] Thus, we should reject the legislative justification for conditional pardons: presidential ability to condition offers of pardon extends no further than an offender's willingness to accept the condition.

The contract model, on the other hand, preserves individual autonomy: offenders are permitted to decide whether fulfilling the condition is less onerous to them than serving their sentence or keeping the fact of conviction on the books. If they gauge that the value of the diminution of punishment (X) is greater than the cost to them of honoring the new condition (Y), then the exchange is beneficial from their perspective and they likely would accept the condition.

From the perspective of the chief executive, early release can save the government money, check legislative or judicial mistakes, serve a strategic law enforcement role by eliciting cooperation, facilitate international

105. *See supra* text accompanying notes 48-51.

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

107. *See generally, e.g.*, Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853 (1987) (discussing why some prisoners would elect execution over life imprisonment).

108. The related question of whether an offender needs to accept a pardon to be valid raises separate questions. *See* Burdick v. United States, 236 U.S. 79, 87-95 (1915) (holding that individual must accept a pardon before it can take effect). Suffice it to say that, if the Court in *Burdick* has recognized that offenders have the right to reject pardons (as opposed to commutations of sentence), then they should have the right to reject conditional offers.

109. *See* Alschuler, *supra* note 103, at 695-703.

relations, or manifest compassion. The condition's nature, whether deportation or restriction on the right to associate, may be necessary to protect the public from future wrongdoing. The pardon's value to society (P), in terms of compassion, justice, or savings in incarceration costs,[110] might not exceed the harm to society (H), including the probability of future wrongdoing by the released offender and the demoralization costs arising due to deprecation of the seriousness of the original offense,[111] unless a condition (C) is added. In other words, presidents should offer conditional pardons to ensure that H is less than $P + C$. Presidents may offer conditions even when P is greater than H by itself, but should insist upon C when the question is closer. Both the offender and society (represented by the president), can benefit from the exchange.

One could argue that the negotiations between the president and the offender likely will be fruitless. The parties in a sense stand in a position of a bilateral monopoly. The offender cannot shop around for different presidents to extract a better price, and presidents likely cannot benefit the public to the same extent by offering a similar conditional pardon to another inmate.[112] Thus, no market emerges on either side to constrain choice. The low likelihood of reaching a mutually satisfactory deal, however, is no reason to preclude the possibility. Even under the conditions of a bilateral monopoly, beneficial agreements can be reached. So, whenever X is greater than Y and $(P + C)$ is greater than H, conditional pardons are desirable from both the offender and society's perspective, and thus more likely to be successful.

2. *Validity of Consent*

Although we may not always trust an offender's assent to a condition, society should generally consider an offender's acceptance of a proposed bargain to be valid. This Part first presents reasons why society might not wish to leave the decision in an offender's hands and then explains why an offender's consent should, nonetheless, normally prevail.

The difficulty with a bargaining model is that it presupposes the ability to choose freely among alternatives. But, such choice may be illusory. As Justice McLean stated when dissenting in *Ex parte Wells*:[113]

> The power of [conditional] commutation . . . substitutes a new, and, it may be, an undefined punishment for that which the law

110. In addition, offenders may well contribute to the economy through their work upon release.

111. The potential harm to society is not inversely proportional to the gains of the offender.

112. An exception might arise if the president offers a conditional pardon primarily to elicit a particular reaction from the public, whether approval for his exercise of compassion, or support because of the political nature of the underlying crime. But the promise of early release on the condition of joining the Navy might be less attractive to a seventy-five-year old offender than a twenty-one-year old one.

113. *See* 59 U.S. (18 How.) 307 (1855).

> prescribes a specific penalty. It is, in fact, a suspension of the law. . . . It is true the substituted punishment must be assented to by the convict; but the exercise of his judgment, under the circumstances, may be a very inadequate protection for his rights.[114]

A paternalistic perspective therefore suggests that society at times should prevent offenders from waiving their rights through acceptance of a condition. There are a number of reasons why we might not place faith in an offender's decision to accept a condition in exchange for a pardon. For instance, offenders may be unable to gauge accurately when a pardon's benefits outweigh the costs of accepting a condition, when X is greater than Y. We may thus opt for a rule that protects pardon seekers from their own zeal to escape prison. The desire for release may be so overwhelming that the offenders would welcome any condition as long as the agreement resulted in less of a stay behind bars, even if accepting the condition is not in their long-term interest. Indeed, given the conditions in many prison facilities, few might turn down an offer of early release, irrespective of how draconian the conditions attached to the pardon.

Because the potential for coercion is so great, many courts and commentators in the probation context have argued that probationers cannot waive objections to problematic conditions. For instance, in *Commonwealth v. LaFrance*[115] the Massachusetts Supreme Court rejected the premise that individuals agreed to the conditions imposed upon them. The *LaFrance* Court stated, "[t]he coercive quality of the circumstance in which a defendant seeks to avoid incarceration by obtaining probation on certain conditions makes principles of voluntary waiver and consent generally inapplicable."[116] Or, as the Ninth Circuit stated, "a defendant's consent to a probation condition is likely to be nominal where consent is given only to avoid imprisonment."[117] Under that view, offenders presumably may overestimate the value of X or underestimate the value of Y.[118] Their consent to conditions is not binding.[119]

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114. *Id.* at 319.

115. 525 N.E.2d 379 (Mass. 1988).

116. *Id.* at 381 n.3.

117. United States v. Pierce, 561 F.2d 735, 739 (9th Cir. 1977).

118. *See, e.g.*, Cass Sunstein, *Behavioral Analysis of the Law*, 64 U. CHI. L. REV. 1175, 1182-84 (1997).

119. As discussed, *infra* text accompanying notes 284-300, such holdings may reflect more the need to impose greater constraint on decisionmakers than the lack of true consent. In other words, even when offenders consent to conditions of probation, we may wish to subject such conditions to judicial review, whether to protect third parties or restrain the power of decisionmakers. *See, e.g.*, Oregon v. Hindman, 866 P.2d 481, 482 (Or. Ct. App. 1993) ("Thus, the fact that a defendant has agreed to an improper condition of probation does not give the sentencing court the authority to do what it is otherwise unauthorized to do.").

The estimation problems in the pardon context may arise from one of four sources: ordeal of confinement, underestimation of future costs of condition, lack of information, and incommensurability. First, cognitive biases may arise due to the ordeal of confinement. Offenders may be willing to bargain away all sorts of rights for the immediate gain of release. The wide gulf between future restrictions on movement and the promise of imminent release from prison skews accurate decision-making. An offender's valuation of X may be too large.[120]

Furthermore, a presidential offer to an offender of conditional release prior to incarceration may heighten an offender's difficulty in accurately gauging the costs of incarceration. At that point, the offender must make an independent assessment of the likely magnitude of X. Although this uncertainty affects plea bargaining generally, it adds another factor to the calculation of whether the condition should be accepted.[121] And, unlike in the plea bargaining context, the president's offer of a conditional pardon may precede indictment. This situation presents an even greater number of variables that may impede effective decision-making.

Second, cognitive biases may arise instead because of an offender's underestimation of the future costs of the conditions. Because those costs are distant and uncertain, there may be a systematic undervaluing of Y.[122] Many studies have concluded that individuals improperly discount future costs in reaching long-term decisions.[123]

Third, the offender's estimation problem may arise due to a lack of information. Given that counsel may not even represent those seeking pardons, we might wish to prohibit some conditions because of a possible information gap. Offenders may be unable to appreciate the impact of the condition on their future life. For instance, they may fail to understand fully the ramifications of a permanent forfeiture of citizenship rights encompassing the rights to vote, possess firearms, and receive certain

120. In light of the atmosphere of confinement, the Federal Bureau of Prisons has adopted strict regulations that require researchers to obtain consent from inmates. *See* 28 C.F.R. § 512.16 (2001). Similarly, the Department of Health and Human Services has mandated strict consent provisions since "prisoners may be under constraints because of their incarceration which could affect their ability to make a truly voluntary and uncoerced decision...." 45 C.F.R. § 46.302 (2001). For related discussions, see generally ARTHUR L. CAPLAN, IF I WERE A RICH MAN COULD I BUY A PANCREAS?: AND OTHER ESSAYS ON THE ETHICS OF HEALTH CARE (1992) and LARRY I. PALMER, LAW, MEDICINE & SOCIAL JUSTICE (1989).

121. *See generally* Shelley and Taylor, *The Availability Bias in Social Perception and Interaction*, *in* JUDGMENT UNDER UNCERTAINTY: HEURISTICS & BIASES Ch. 13, 191-92 (Daniel Kahneman et al. eds., 1982) (addressing decisionmaking under conditions of uncertainty)

122. *See* Einer Elhauge, *Allocating Health Care Morally*, 82 CALIF. L. REV. 1449, 1529 (1994) (addressing problem of accurately evaluating long-term health care needs). People may be overoptimistic about the likelihood that they will ever be apprehended for violating a condition. *See* Sunstein, *supra* note 118.

123. Paul Slovic, Baruch Fischoff, and Sarah Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk in Judgment Under Uncertainty*, *supra* note 121, at 470-72.

benefits. Or, they might underestimate the impact of a prolonged parole period.[124] Although offenders are perhaps too familiar with *X*'s value, the problem is that they may not be familiar enough with *Y*'s cost.

To some, the estimation problem may result from the fact that options for punishment are incommensurable.[125] One may be able to consider whether to gain earlier freedom at the expense of deportation, but calculating whether to agree to give up a kidney may pose a more intractable question. The interests in freedom outside prison walls and bodily autonomy (retaining both kidneys) do not lie along the same metric. The offender may be unable, therefore, to choose meaningfully between two options.

Presidents may seize upon the cognitive biases or information gap to drive a hard bargain. After all, if an offender chooses not to accept the offer, a president only faces the costs of continued incarceration and the unrealized gains from the objectives underlying the pardon offer. Although presidents may suffer as well in the public eye if they appear to have made an unconscionable offer, a publicized offer might contribute to reputational gain whether or not the offer is accepted. The element of coercion seems immanent in offers of conditional pardons. There is a danger, in other words, that offenders will accept unconscionable terms.[126]

Precedents notwithstanding,[127] the arguments questioning the validity of the offender's consent do not make a strong case for taking the decision out of an offender's hands. The offender's great interest or need to accept the conditional offer is no reason to prohibit the offer. Rather, the background reality of confinement and the original sentence's length create the

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124. Because offenders may confuse a conditional pardon with the more familiar parole, they are particularly likely to underestimate the risks of accepting conditions. There may be three critical distinctions. Most importantly, unlike with contemporary parole policies, an offender who has violated a condition attached to the pardon must serve the full unserved time on the original sentence, irrespective of the number of years released. In other words, if a president determines that an offender, who was offered a conditional pardon after ten years of a twenty-year sentence, has failed to meet a condition nine years after release, then the offender must serve an *additional* ten years. Second, the condition may open up an offender to the risk that a greater range of noncriminal conduct, such as drinking or failure to find appropriate work, may land the individual back in jail. Third, only the president typically determines whether the condition has been satisfied—the due process protections accompanying parole revocation as in *Morrissey v. Brewer*, 408 U.S. 471 (1972), may not be applicable. *See infra* text accompanying note 144.

125. *See generally* Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994); Richard Warner, *Incommensurability as a Jurisprudential Puzzle*, 68 CHI.-KENT L. REV. 147 (1992).

126. *See also* UCC § 2-302 (2000); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (providing theoretical construct for understanding unconscionability). *See generally* Williams v. Walker-Thomas Furniture, Co., 350 F.2d 445 (D.C Cir. 1965) (addressing unconscionablity in the contracting context); Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 94-97 (N.J. 1960) (same).

127. *See supra* text accompanying notes 115-117.

pressure.[128] Coercion in a sense exists every time the government offers parole, probation, or a pardon because the offer is so very valuable.[129]

Furthermore, the cognitive biases are insufficient to justify prohibiting conditional offers.[130] Offenders grasp the tradeoff of more freedom immediately for less freedom in the future. Two of the sixteen Puerto Rican nationalists offered clemency by President Clinton rejected the offer; an offender's acceptance is not inevitable.[131] Moreover, the information deficit is not likely to be large. The vast majority of conditions are relatively easy to understand. Offenders likely can reject any condition they find unpalatable.

The incommensurability argument is not overwhelming either.[132] There is a common denominator of sorts. Much of prison existence calls for determining whether to barter one type of freedom for another, such as defending against a personal attack at the risk of forfeiting recreational privileges or speaking freely at the risk of losing visitation privileges.[133]

The unconscionability argument fares no better. As in the FALN case, the terms of the condition are unlikely to be unreasonably favorable to the president. Presidents may drive hard bargains, but as will be discussed later, there is a ceiling beyond which the president cannot go; the president lacks the constitutional power to *increase* punishment.[134] The inequality of

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128. Duress arises primarily from the situation and not from the coercive or improper conduct on part of the promisor. *See* RESTATEMENT (SECOND) OF CONTRACTS § 175 (1988); *see also* Chouinard v. Chouinard, 568 F.2d 430, 434 (5th Cir. 1978) ("[A] duress claim . . . must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim. Thus, the mere fact that a person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic necessity is not sufficient.").

129. This differs from the more typical waiver of criminal procedure rights when the benefit of waiver is not clear. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761 (1989).

130. The Supreme Court in *Ex parte* Wells, 59 U.S. 307, 315 (1855), rejected the argument "that conditional pardons cannot be considered as being voluntarily accepted by convicts so as to be binding on them, because they are made while under . . . duress." Patricia Williams, however, has commented provocatively that "[t]he vocabulary of allowance and option seems meaningless in this context of an imprisoned defendant dealing with a judge whose power is, in effect, absolute as to his fate. . . ." Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 MD. L. REV. 293, 303 (1990). In her view, the contract terminology masks that it is the state that is exacting this toll. *Id.* at 304-05. In addition, the ability to "purchase" freedom may result in vesting those more affluent in society with a better chance to bargain their way out of prison. *Id.* at 306.

131. *See* Brian Blomquist, *Reno Sounded FALN Alarm-Papers Show She Opposed Clemency Deal*, N.Y. POST, Oct. 21, 1999, at 7. Three IWW radicals rejected President Harding's offer of a conditional pardon on December 30, 1922. 1922 ATT'Y GEN. ANN. REP. 398.

132. For a general discussion of the different types of incommensurability, see JOSEPH RAZ, THE MORALITY OF FREEDOM 321-66 (1986). *See also* Symposium, *Law and Incommensurability*, 146 U. PA. L. REV. 1169 (1998).

133. *See generally* Connie S. Rosati, *A Study of Internal Punishment*, 1994 WIS. L. REV. 123 (arguing that too much is made of distinction between external and internal punishments, which include physically invasive procedures such as chemical castration, and concluding that offenders should, within limited constraints, be allowed to choose among an array of options).

134. *See infra* text accompanying notes 177-183.

bargaining power, therefore, is unlikely to result in a vastly lopsided deal, leaving an offender with a meaningful choice among the options.

As a group, therefore, offenders are likely much better off determining for themselves whether to accept particular conditions than they are if certain conditions are taken off the table completely. Mel Reynolds or members of the FALN would prefer having the option, however painful. Ex ante, therefore, they benefit from a system allowing choice even if occasional injustices flow from the option of a conditional pardon. The paternalism argument may suggest the need to allow the offender time to consider the conditions fully, and perhaps the ability to contact counsel as well. But it does not convincingly suggest that society prohibit conditional offers.[135]

3. *Exception to Validity of Consent: Condition That President Be Final Decisionmaker*

Limits exist on an offender's ability to consent to conditions. In offering pardons, presidents have reserved for themselves and their successors the power to determine compliance with the conditions imposed. If the president finds that an offender failed to satisfy a condition, the government returns the offender to prison. An offender should not be able to agree that the president has the right unilaterally to determine whether an agreed upon condition has been violated. Although the president can act in an adjudicative capacity,[136] conditioning an offender's release upon waiver of future due process rights is unacceptable.

Prior presidents have reserved the right to assess compliance. Consider a conditional pardon imposed by President Coolidge, which was later reviewed in *Ex parte Weathers*:

> he shall commit no crime punishable under the laws of the United States, or of any State or Territory of the United States; shall abstain from the possession and use of intoxicating liquor; shall not

135. One additional argument against conditional pardon offers is based on personhood theory. Under this critique, there are certain rights—like freedom of speech or procreation—fundamental to what it means to be a person and thus should be inalienable. *See* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 958-78 (1982).

Many, however, reject the notion that individuals ever lose their personhood, even if deprived of such fundamental rights. We may value fundamental aspects of personhood without concluding that a person must enjoy certain rights and still be a person. Even if an individual could sell a kidney, most would conclude that the individual retains the essence of what it means to be a person.

The personhood argument in any event cannot be taken very far. The baseline is not enjoyment of full constitutional rights, but rather only those rights that an offender possesses. After all, the state imprisons offenders, at least in the conditional commutation context. While incarcerated, they enjoy quite diminished rights to be free from searches and seizures, to speak, to practice religion, to vote, and to move freely. Many reject the notion that "personhood" ever can be compromised; and offenders may have lost some aspects of personhood by virtue of their conviction. Thus, the personhood argument should not trump the autonomy concerns of the offender.

136. *See infra* text accompanying notes 207-213.

> associate with persons of evil character; shall lead an orderly, industrious life . . . shall maintain and support his divorced wife and their children to the satisfaction of the Attorney General. . . .[137]

The president's pardon further provided that "upon the failure . . . to keep and perform the foregoing conditions, as to which fact the judgment of the President of the United States for the time being shall be conclusive, this commutation shall become void. . . ."[138] Because Coolidge reserved the power to determine whether the offender "associate[d] with persons of evil character" or led "an orderly, industrious life,"[139] he assumed the role of fact-finder.[140] The offender's failure to adhere to the condition can result in a long prison term,[141] yet no process guarantees are provided.[142] In upholding, on habeas review, the president's revocation of the commutation, the court in *Weathers* merely commented that, once the conditions were "accepted by [the offender], they are binding."[143] Courts, therefore, have permitted the president to be the sole judge of whether an offender satisfied the conditions attached to the pardon.

a. The Offender's Liberty Interest

As an initial matter, absent waiver, individuals enjoy a significant liberty interest in avoiding rescission of the pardon. Nearly fifty years later, in

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137. *Ex parte* Weathers, 33 F.2d 294, 294 (S.D. Fla. 1929).

138. *Id.* State courts upheld the same reservation of authority, holding that no judicial determination of noncompliance was necessary. *See, e.g.*, Woodward v. Murdock, 24 N.E. 1047 (Ind. 1890); Arthur v. Craig, 48 Iowa 264 (1878); Guy v. Utecht, 12 N.W.2d 753, 757 (Minn. 1943); *Ex parte* Houghton, 89 P. 801 (Or. 1907).

139. *Weathers*, 33 F.2d at 294.

140. If the president delegates the power to determine compliance to low-level officials, the accountability problem becomes even more acute. Delaware courts invalidated such a delegation from the governor to a lower level official in *In re* McKinney, 138 A. 649, 651-52 (Del. 1927).

141. *See* Lupo v. Zerbst, 92 F.2d 362, 363 (5th Cir. 1937) (upholding twenty-year term of imprisonment for offender who violated commutation condition that he not associate with persons of evil character). Similarly, in *Vitale v. Hunter*, 206 F.2d 826 (10th Cir. 1953), the offender had been offered a commutation on the condition that he leave the country. Years later, authorities stopped him at an airport in Los Angeles when he was changing planes on a flight from Mexico to Rome. Vitale, 206 F.2d at 827. The government reimprisoned him for failure to satisfy the commutation condition, and the court of appeals later rejected his habeas corpus challenge to the imprisonment. *Id.* at 829. *See also* People v. Oskroba, 111 N.E.2d 235 (N.Y. 1953) (revoking probation because offender had secured work in an establishment with a poor reputation).

142. *See* Arthur v. Craig, 48 Iowa 264 (1878); Commonwealth *ex rel.* Meredith v. Hall, 126 S.W.2d 1056 (Ky. 1939) (upholding the governor's revocation of predecessor's conditional pardon and honoring reservation of authority in the pardon for governor to determine compliance with conditions), *rev'd in part*, Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941). No hearing may be required before the government revokes the pardon. As the Attorney General's Release Manual summarized, "if it is expressly stipulated as one of the terms of the pardon that the [executive] shall have exclusive power to determine summarily whether a breach has occurred, without a hearing, this is a binding condition and no hearing need be granted." SURVEY OF RELEASE PROCEDURES, *supra* note 23, at 206.

143. *Weathers*, 33 F.2d at 295; *see also* Lupo v. Zerbst, 92 F.2d at 365 ("[A] prisoner may not accept the benefits of clemency without accepting the conditions attached thereto.").

Morrissey v. Brewer,[144] the Supreme Court held that the Due Process Clause guarantees parolees certain rights prior to revocation of parole. As with conditional pardons, "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence. . . . These conditions restrict their activities substantially beyond the ordinary restrictions imposed by law on an individual citizen."[145] The Court continued that "[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."[146]

In the Court's view, both an individual's interest in freedom and the state's interest in accuracy called for an informal hearing to assure that the parolee had, in fact, violated a condition of parole. According to the Court, due process requires that, prior to revocation, the parolee "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions. . . ."[147] In addition, law enforcement authorities must afford notice of the claimed violation, disclosure of the evidence against the offender, the opportunity to be heard in person and to present evidence, the right to cross-examine witnesses, and a written statement by the fact-finders as to the reasons for revoking parole.[148] The Court also held that due process requires "a 'neutral and detached' hearing body such as a traditional parole board. . . ."[149]

The courts have extended the requirements in *Morrissey* to the probation,[150] good-time credit,[151] and supervised release contexts.[152] Because conditional pardons are similar, *Morrissey*'s requirements should be fully applicable. As in matters of probation and parole, a sufficient liberty interest exists in a grant of conditional pardon to trigger due process concerns.[153] Offenders, therefore, should have the right to an informal hearing

144. 408 U.S. 471 (1972).

145. *Id.* at 477-78.

146. *Id.* at 480.

147. *Id.* at 488.

148. *See id.* at 489.

149. *Id.* (citation omitted); *cf.* Shepard v. Taylor, 433 F. Supp. 984 (S.D.N.Y. 1977) (adverting to danger of mixed functions); Edwardsen v. Gray, 352 F. Supp. 839, 842-43 (E.D. Wis. 1972) (same).

150. *See* Gagnon v. Scarpelli, 411 U.S. 778 (1973).

151. *See* Wolff v. McDonnell, 418 U.S. 539 (1974).

152. *See, e.g.*, United States v. Gilbert, 990 F.2d 916 (6th Cir. 1993) (holding that offender on supervised release entitled to due process protection prior to revocation); United States v. Copley, 978 F.2d 829, 831 (4th Cir. 1992) (same); *cf.* United States v. Daniel, 209 F.3d 1091 (9th Cir. 2000) (holding that oral findings suffice to determine that conditions of supervised release were violated despite *Morrissey*'s written statement requirement); United States v. Copeland, 20 F.3d 412 (11th Cir. 1994) (same).

153. *Cf.* Superintendent, Mass. Correctional Inst. v. Hill, 472 U.S. 445 (1985) (liberty interest in good time credits); Kim v. Hurston, 182 F.3d 113 (2d Cir. 1999) (finding liberty interest in participation in work release program); Indeed, the Supreme Court in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), held that at least minimal due process protections attached during *state*

prior to a final finding that they violated the presidentially imposed pardon condition,[154] and *Morrissey* entitles them to a neutral decision-maker.

b. Waiver of Right to Impartial Fact-Finder

Offenders can waive some of the Constitution's guarantees. For instance, offenders have waived the rights to a jury trial, to present particular evidence, and to representation by an attorney.[155] But individuals should not be able to waive the right to an impartial determination of whether they violated conditions attached to the pardon. Offenders are far more likely to focus on the substantive conditions attached to the pardon offer, such as abstinence from alcohol or military service, as opposed to the mechanism spelled out for determining whether those conditions have been met satisfactorily. Offenders may not have grasped the significance of the procedures mandated when they assented to a particular procedural construct.

As an analogy, in *Cleveland Board of Education v. Loudermill*,[156] the Supreme Court held that the Constitution's Due Process Clause entitles public employees, who enjoy a legitimate expectation in continuing employment under state law, to an independent federal determination of the process due. They are not bound by the explicit provision of procedures in the very same statutes that gave rise to the property interest, which is based on an expectation of continuing employment absent cause. In other words, they need not take the "bitter with the sweet."[157] The Court stated that "[w]hile the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."[158] Even though the employees were on notice of the procedural limitations and therefore arguably consented to the condition when accepting the job, the Court held that no waiver existed.[159]

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clemency proceedings, and thus the due process interest in revocation proceedings should be all the more gripping. *See also* Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941).

154. In the absence of any explicit reservation in the pardon, the default should be independent administrative resolution of compliance with condition. President Clinton evidently delegated the authority to determine compliance to federal probation and parole authorities. If the role of those two entities continues to dwindle, then new mechanisms must be established to ensure compliance with presidentially imposed conditions.

155. *See infra* text accompanying notes 163-168.

156. 470 U.S. 532 (1985).

157. *Id.* at 541 ("It is settled that the 'bitter with the sweet' approach misconceives the constitutional guarantee.").

158. *Id.* (citation omitted) (added language in the original).

159. Laurence Tribe earlier anticipated the reasoning in *Loudermill* by focusing on the difference between reliance on substantive and procedural rights. He wrote that

> It seems evident that a theory of "differential reliance" underlies the Court's distinction between the substantive content of an entitlement and the procedures provided for its protection . . . [A]n employee . . . seeking to avoid certain adverse consequences may justifiably rely, in shaping his primary conduct, on the statutes and contract provisions spelling out the events which trigger those consequences. But no parallel accommodation of

Loudermill's rationale is relevant in the pardon context as well. Individuals rely on the substantive benefits pledged by government authorities, not on the procedural mechanism for protecting such interests.[160] Once offenders enjoy the liberty bound up in a conditional pardon, they have the right to expect an independent determination that they violated the conditions attached to the pardon offer. Accordingly, offenders should be unable to precommit to waiving due process rights; the Due Process Clause entitles Mel Reynolds and others to a fair and impartial assessment of whether they complied with the conditions attached to the offers of clemency.

B. Impact on Society's Interests

Irrespective of the individual's capacity to make a reasoned choice, we might limit conditional pardons because imposition of certain conditions adversely may affect society as a whole. This Part examines three such conditions: limitation of core constitutional rights, violation of fundamental moral rights, and increases in punishment. This Part argues that only in the rare instance when a condition "shocks society's conscience" or lengthens the punishment meted out by a court should society's interest outweigh an individual's autonomy.

1. Inalienability of Core Constitutional Rights

Arguably, the rights of free speech, religious practice, and bodily autonomy are so fundamental to what we as a society deem civilized that permitting waivers may erode the fabric of society. As Kant and others have argued, certain rights should be inalienable.[161] Society may suffer if the state can take away certain core rights even if the offender is willing to accept the price. Allowing a market in such rights denigrates their importance and constitutive role in reaffirming citizenship.[162]

Despite the potentially adverse impact on society as a whole, our society allows for some waivers of constitutional rights. For instance, in the plea bargain context, offenders may bargain away their freedom to protect against a greater intrusion into their freedom that could arise should they

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behavior can realistically be expected to flow from the definition, in the same source of law, of truncated procedures for determining whether the triggering event has occurred.

Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 280 (1975); *see also* Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 922-30 (2000) (arguing that *Loudermill* can be understood instead as a means of preserving federal courts' ability to assess the adequacy of state legislative procedures).

160. *See* Tribe, 10 HARV. C.R.-C.L. L. REV. at 279-82.

161. *See* discussions in Albert W. Alschuler, *supra* note 103, at 675-80 (1981); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

162. *See* Cowlishaw, *supra* note 30, at 174-76 (arguing that, at the minimum, heightened scrutiny should be applied to conditions restricting the exercise of constitutionally protected interests).

go to trial.[163] Offenders can bargain away not only their right to a trial, but also their rights to an appeal, to the exclusion of certain evidence,[164] and certain rights at sentencing that they otherwise would enjoy.[165] In the criminal procedure context more broadly, courts have permitted waivers of the right to representation,[166] the right against self-incrimination,[167] and the right to appeal even a death sentence.[168] Judges minimally supervise such pleas to ensure voluntariness, but permit offenders to choose between them even when they think the offenders may not be selecting the option in their best interest.[169] We do not believe that society suffers by enforcing such waivers.

Given that we permit waivers of constitutional rights in so many contexts, it is difficult to explain why certain rights should be inalienable. There is no easy way to create a hierarchy of rights: to some, the Seventh Amendment may be more important than the right to religious observance, while others believe the opposite. Moreover, in the pardon context, offenders are obtaining one valuable constitutional right—liberty[170]—at another's expense. In short, offenders generally should be able to barter away constitutional rights.

2. *Fundamental Moral Values*

There may be a subset of rights, however, that society should preclude from waiver. Bartering freedom for a kidney, for instance, may cheapen the value of privacy and bodily integrity. Unlike the pretrial and trial rights that offenders may readily waive, waiver of certain other rights may erode society's core values.

Consider the outcry over the sentencing judge's initial decision in *State v. Brown*.[171] There, the judge afforded the defendants, who had been sentenced to thirty years imprisonment on a sexual misconduct offense, the option to undergo surgical castration instead. Although the defendants evidently preferred the surgical option,[172] the appellate court invalidated their

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163. *See* Mabry v. Johnson, 467 U.S. 504, 509 (1984); Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

164. United States v. Mezzanatto, 513 U.S. 196 (1995); United States v. Burch, 156 F.3d 1315, 1319-23 (D.C. Cir. 1998).

165. *See* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113 (1999).

166. *See* Faretta v. California, 422 U.S. 806 (1975).

167. Miranda v. Arizona, 384 U.S. 436 (1966).

168. Whitmore v. Arkansas, 495 U.S. 149 (1990); Gilmore v. Utah, 429 U.S. 1012 (1976).

169. *See, e.g.*, United States v. Aguilar-Muniz, 156 F.3d 974, 976 (9th Cir. 1998).

170. Liberty itself traditionally has been considered inalienable. *See* Bailey v. Alabama, 219 U.S. 219, 240-45 (1911); Clyatt v. United States, 197 U.S. 207 (1905).

171. 326 S.E.2d 410 (S.C. 1985).

172. *See also* Jamie Talan, *Castration Plan in Texas Raises Anew Questions from Science and Law Over Treatment vs. Punishment for Rapists*, NEWSDAY, Mar. 17, 1992, at 59 (describing another

choice on the ground that the Eighth Amendment's prohibition against cruel and unusual punishments barred courts from offering that alternative.[173] The court reasoned that society might suffer from permitting the castration option even if the offender would benefit.[174] As individuals become more inured to state-sanctioned violence, their own values may be compromised.

Therefore, society should limit an offender's ability to waive rights in the rare instance when waiver would threaten critical social values. Those instances are difficult to categorize easily or describe with great particularity. Perhaps we can understand that subset of rights to cover those conditions that "shock the conscience."[175] Although society generally should permit the waiver of constitutional interests, it should exempt a narrow subset of rights[176] to preserve society's ability to inculcate bedrock moral precepts.

3. *Increase in Punishment*

Offenders also should be unable to agree to conditional pardons that are harsher than the original sentence. The Supreme Court has long recognized the risk that a pardon's conditions "may be more objectionable than the punishment inflicted by the judgment."[177] No individual in our society has the right to agree to extended punishment. Punishment must be based upon acts prohibited by the legislature. Thus, one logical restraint is that offenders cannot barter for "enhanced" punishment.

Consider that several individuals accused of capital murder have pled guilty and requested the death penalty. The government has never been

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case in which the trial judge initially offered defendant a castration option). *But see* People v. Blankenship, 61 P.2d 352, 353 (Cal. Ct. App. 1936) (sustaining condition of sterilization).

173. *Brown*, 326 S.E.2d at 412. *See also* Tracy Ballard, *The Norplant Condition: One Step Forward or Two Steps Back?*, HARV. WOMEN'S L.J. 139, n.245 (1993) (discussing imposition of condition of sterilization on misdemeanant who had witnessed drug deal). For a case in which a judge offered the option of Norplant use (a birth control device that can be implanted in a woman's arm) to a defendant convicted of child abuse, see Matthew Rees, *Shot in the Arm: The Use and Abuse of Norplant; Involuntary Contraception and Public Policy*, NEW REPUBLIC, Dec. 9, 1991, at 16.

174. *Brown*, 326 S.E.2d at 411-12. *See also* Springer v. United States, 148 F.2d 411 (9th Cir. 1945) (negating probation condition that offender donate a pint of blood to the Red Cross); People v. Blankenship, 61 P.2d 352, 353 (Cal. Ct. App. 1936) (affirming sterilization as a condition on probation); Gray v. Graham, 278 P. 14 (Kan. 1929) (requiring defendant to enter hospital as condition to probation).

175. *Cf.* Rochin v. California, 342 U.S. 165, 172-73 (1982) (precluding state from pumping suspect's stomach for evidence).

176. The Eighth Amendment may be a convenient doctrinal hook at times, as in *Brown*. The notion of Due Process might be capacious enough in other contexts to justify invalidating an offensive condition. Thus, this Article suggests limited external review to ensure that no presidential offer shock the conscience. The Constitution, in other words, prohibits offers that violate the Eighth Amendment, irrespective of the offender's consent. *See infra* notes 303-311 and accompanying text.

177. United States v. Wilson, 32 U.S. (7 Pet.) 150, 161 (1833). *See also* Lee v. Superior Court, 201 P.2d 882 (Cal. Ct. App. 1949) (striking probation condition that resulted in harsher punishment than original sentence).

obligated to accept such requests, and indeed has at times rejected them.[178] Although individuals can waive rights to appeal after conviction,[179] at least at the trial stage, courts must independently determine the appropriateness of the punishment selected.[180] Courts must mete out punishments in accordance with law, not individual requests.

The protections inherent in the plea bargain context buttress this result. Prior to accepting a plea, judges must engage the defendant in a colloquy to ensure that a factual predicate exists for imposition of punishment.[181] Recently, the Supreme Court in *Mitchell v. United States*[182] stressed that a court should "make whatever inquiry it deems necessary in its sound discretion to assure itself the defendant is not being pressured to offer a plea for which there is no factual basis."[183] An individual's desire to accept punishment does not and cannot bind the state. Because society suffers if it permits punishment for those who have not committed blameworthy acts, offenders should be unable to agree to conditions that either shock the conscience or impose new punishment.

Thus, conditional pardons can potentially threaten core societal values as well as individual interests. An offender can reject any condition that appears too draconian, and even if the offender agrees, society may wish to nullify some conditions that adversely affect the community as a whole.

C. Expansion of Executive's Authority

In addition to the potential harm to the individual offender and society, a bargained-for exchange between president and offender may jeopardize the Constitution's structural safeguards limiting presidential power. Presidents should be unable to gain authority through offers of conditional pardon that they otherwise cannot exercise under Article II of the Constitution.

1. Potential Interference with Congressional Powers

Through offers of conditional pardons (as well as more traditional commutations of sentences), presidents can alter the congressionally determined range of punishments. Congress retains the power to set the parameters for punishment of federal crimes; it controls whether there should

178. *See* White, *supra* note 107, at 874.

179. *See, e.g.*, Hammett v. Texas, 448 U.S. 725, 725-26 (1980) (per curiam) (stating that defendant "made this decision voluntarily and with full knowledge of the consequences"); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 322-23 (1983).

180. *See* Jane L. McClellan, Comment, *Stopping the Rush to the Death House: Third-party Standing in Death-Row Volunteer Cases*, 26 ARIZ. ST. L.J. 201 (1994).

181. Rule 11 of the Federal Rules of Criminal Procedure requires a court to make sufficient "inquiry as shall satisfy it that there is a factual basis for the plea." FED. R. CRIM. P. 11(f).

182. 526 U.S. 314 (1999).

183. *Id.* at 324.

be a death penalty, whether to order restitution, and whether to permit parole. Each exercise of the pardon power therefore could encroach on Congress's domain.

Through conditional commutations, presidents can change the congressionally specified length and form of punishment. The Supreme Court confronted the separation of powers claim in *Schick v. Reed.*[184] While stationed in Japan, Schick committed a grisly murder. After conviction and collateral challenge, Schick petitioned the president for a pardon or commutation of the sentence. The president commuted the sentence to life imprisonment "expressly . . . on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States."[185] At that time, Congress had provided for sentences of only death and life imprisonment *with* the possibility of parole. Accordingly, Schick urged that, because the president could only commute the sentence to a congressionally approved sentence, the pardon condition failed. Otherwise, the president would invade the ambit of Congress's lawmaking province.[186]

The Court rejected Schick's argument. To reach the result, the majority relied both on historical precedents, and partly on a "greater includes the lesser" argument, namely that if the president could permit Schick to be executed, certainly he could take the lesser step of offering the choice of life imprisonment without the possibility of parole. The majority dodged the separation of powers argument, noting only that the president's Article II power included the authority to impose conditions not recognized by Congress.

In dissent, Justice Marshall addressed the separation of powers argument more directly. He argued that "[w]hile the clemency function of the Executive in the federal criminal justice system is consistent with the separation of powers, the attachment of punitive conditions is not. Prescribing punishment is a prerogative reserved for the lawmaking branch of government, the legislature."[187] In Marshall's view, President Eisenhower had fashioned a punishment that Congress rejected. Absent a delegation from Congress, Justice Marshall would have invalidated the condition as outside the president's Article II power.[188] Thus, according to Marshall, through the conditional pardon power, presidents can undermine Congress's prerogative to set the sentencing framework.

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184. 419 U.S. 256 (1974).

185. *Id.* at 258.

186. *See also* Ross v. McIntyre, 140 U.S. 453 (1891) (upholding conditional pardon to similar effect offered by President Hayes to seaman convicted of murder on ship); *Ex parte* Wells, 59 U.S. (18 How.) 307 (1855) (similar).

187. *Schick*, 419 U.S. at 274-75 (Marshall, J., dissenting).

188. *Id.* at 279.

Although Justice Marshall's reasoning has some appeal, it is difficult to quarrel with the majority's "greater includes the lesser" argument. When the president commutes a death sentence to an eight-year sentence, no separation of powers problem arises even if Congress had prescribed a minimum ten-year sentence for the crime. The elimination of parole eligibility in *Schick* should be analyzed similarly, even if Congress has explicitly rejected the option of a no parole eligibility rule. As a necessary corollary to the pardon power, presidents can reduce sentences to those unauthorized by Congress.[189] President Clinton's last minute commutation of sentences meted out to twenty-one drug offenders should be seen in a similar light, showcasing his disagreement with mandatory minimums for particular drug offenses.[190] Presidential action plainly overrides Congress's specification of a minimum length for a sentence.

A similar analysis should govern if the president imposes conditions other than reduction in sentences that Congress has neither authorized nor explicitly prohibited. For instance, consider that Congress may determine that supervised release is unavailable for a particular category of offenders. Can a president then commute the sentence of all such offenders contingent on their agreement to serve a term of supervised release? If one believes that Congress has the exclusive authority to prescribe the type of punishment, then the result, as the dissent suggested in *Schick*, is alarming. The same would be true for a presidential decision to demand restitution for the harm caused by the offender as a condition of release. But the president, through the pardon power, shares authority with Congress over the length and type of punishment imposed. The Constitution vests the president with the authority to check the legislature's judgment in creating the framework for punishment.[191] The *Schick* majority, therefore, correctly brushed aside

189. *But see* 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, 26-27 (1976) (arguing that presidents may not, as a matter of separation of powers, impose conditions that are not at least implicitly authorized by Congress).

190. *See supra* note 51. Presidents should be able to offer such commutations despite the apparent clash with congressional policy. President Clinton acted more controversially in the case of Paul Prosperi, an attorney charged and convicted for swindling clients. While Prosperi was awaiting sentencing, Clinton commuted "any total period of confinement that has already been imposed or could be imposed in the future upon Arnold Paul Prosperi as a result of his conviction." Josh Gerstein, *Unanswered Questions*, ABC NEWS, Mar. 9, 2001, *at* http://www.abcnews.go.com/sections/us/whitehousewag/wag010309.html. In essence, Clinton placed a cap on the sentence that Prosperi could receive. The cap not only departed from the applicable sentencing guidelines, but it seemingly undermined the Court's role of exercising discretion in sentencing. Although the cap may well be consistent with the separation of powers doctrine, it can be seen as an affront to the dignity of the sentencing court. Clinton could not wait for sentencing given the impending expiration of his term in office.

191. *But see* Cowlishaw, *supra* note 30, at 165 (arguing that the president should only have the authority to substitute punishments that have been "authorized by law").

the separation of powers challenge: the presidential power to pardon can trump legislative policy.

2. *Assumption of Excessive Powers*

Through use of conditional pardons, however, presidents may gain authority not recognized elsewhere in the Constitution. Exercise of the pardon power should not be a backdoor means to expanding presidential authority.

a. *Restrictions on Executive Authority*

Society should not permit presidents to evade constitutional and statutory restrictions on their authority by attaching conditions to offers of pardon. For instance, despite statutory restrictions on the sale of government benefits, presidents might sell pardons, as some intimated during President Clinton's final days, as was alleged during Andrew Johnson's administration,[192] and as practiced during Governor Walton's tenure in Oklahoma.[193] Such exercise of the pardon power should not override the congressional restrictions preventing presidents from lining their own pockets. Similarly, with respect to constitutional limitations, presidents should not be able to condition pardon on faithful attendance at Presbyterian Church services.[194] Such action would presumably violate the Establishment Clause of the First Amendment.

Whether the president can enhance punishments, however, presents a somewhat different question. Although the Constitution does not vest such authority in the president, neither does it authorize a president to deport anyone, require individuals not to associate with others, or force them to join the navy—ends attained through prior use of the conditional pardon power.[195] Nonetheless, the punishment issue is unique because it is tied so closely to the grant of authority in the Pardon Clause itself. The pardon power implicitly precludes presidents from enhancing punishment.

Consider whether the president can condition early release upon imposition of a longer sentence if the offender fails to meet certain

192. *See* Dorris, *supra* note 66.

193. Governor Walton of Oklahoma was impeached in 1923 for selling pardons for personal profit. SURVEY OF RELEASE PROCEDURES, *supra* note 23, at 150-53. Tennessee Governor Ray Blanton was removed from office three days before his term was to expire in 1979 because of suspicions that his office was selling pardons. The government later convicted two of his aides. Marck Schwed, *Pardon Scandals Figures Sentences*, UNITED PRESS INT'L., July 1, 1979.

194. A similar condition was imposed as part of probation in a Virginia case. Jones v. Commonwealth, 38 S.E.2d 444 (Va. 1946). In addition, the Ninth Circuit in *Malone v. United States*, 502 F.2d 554, 556-57 (9th Cir. 1974), upheld a condition that the offender not associate with any Irish Catholic organization.

195. *See supra* text accompanying notes 70-74.

conditions.[196] If an offender has served ten years out of a twenty-year sentence, can a president order the offender released subject to a requirement that, if he violates certain conditions within the following ten years, the government would return the offender to jail for an additional twenty years? Or, what if the president offered early release predicated on the offender's agreement that he would be subject to presidential conditions for the rest of his life?[197]

A relevant factual scenario arose in the Fifth Circuit's decision in *Lupo v. Zerbst*.[198] There, after Lupo had served ten of thirty years for counterfeiting, President Harding commuted his sentence on the conditions that he remain unconnected with any unlawful undertaking in the interim and that he be law-abiding in general. The President reserved the right to be the sole judge of any subsequent wrongdoing, and Lupo agreed to the conditions. Fifteen years later President Roosevelt revoked the pardon on the ground that Lupo failed to meet the condition, partly because he associated with unsavory characters. The president ordered authorities to return Lupo to jail and serve the time remaining on his original sentence at the time of the pardon. As a result, barring any future commutation, he would have been in jail for almost fifteen years past the date on which his sentence originally would have expired. Had he just violated a condition of parole under contemporary policies, then he would have been returned to jail until the expiration of his original sentence, not beyond.[199] Time served during parole currently is often credited towards the sentence; time served under a conditional pardon is not.[200]

We should understand the second incarceration in *Lupo*, however, as reimposition of the first sentence. The two periods of incarceration, interrupted by the lengthy period of release, do not increase the original sentence.[201] What, however, if the president offered a conditional pardon on

196. Several states have apparently released prisoners through conditional pardons so that any future wrongdoing, even beyond the expiration date of the original sentence, can result in violation of the condition and return to prison for the time that was not served. *See* SURVEY OF RELEASE PROCEDURES, *supra* note 23, at 197.

197. The hypothetical is not fanciful. Several state courts have upheld conditions that extend for the offender's natural life. *See* Crooks v. Sanders, 115 S.E. 760 (S.C. 1922); Spencer v. Kees, 91 P. 963 (Wash. 1907). President Cleveland may have imposed such a condition when he pardoned Michael Magruder, "an old, colored, wounded soldier" convicted of carrying a concealed weapon "so long as at any time hereafter he shall not be guilty of carrying a pistol or any other deadly weapon." 1894 ATT'Y GEN. ANN. REP. at 160. In the probation context, the probation term cannot exceed the maximum sentence. *See, e.g.*, Hirjee v. State, 487 S.E.2d 40 (Ga. Ct. App. 1997); State v. Watson, 535 So. 2d 1329 (La. Ct. App. 1988); Hartless v. Commonwealth, 510 S.E.2d 738 (Va. Ct. App. 1999).

198. 92 F.2d 362 (5th Cir. 1937).

199. *See generally* NEIL P. COHEN, THE LAW OF PROBATION & PAROLE § 28.2 (2d ed. 1999).

200. Many state systems operate similarly. *See* SURVEY OF RELEASE PROCEDURES, *supra* note 23, at 205.

201. Congress, however, could not have amended his original sentence to increase the consequences for violating a condition of parole without running afoul of the Ex Post Facto Clause. *See* U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. Whether a new condition imposed by the

the condition that the offender serve *additional* time in prison if the condition is violated?

From the offenders' perspective, it may be rational to agree to imposition of the condition that potentially prolongs their eventual discharge from prison. Offenders may barter for that condition as long as they value X greater than Y, even if X and Y represent the same number of years.[202] Indeed, even if Y represented a greater number of years, the value of X could still be greater because an offender could well value freedom in the short-term more than freedom down the road. Offenders might reason that life outside of custody is more valuable when they are younger, or might discount freedom later due to the risk of death or infirmity.

Nonetheless, the offender's consent to the potential increased punishment cannot remove any structural concern in the Constitution for limited governmental power.[203] The president lacks the power under the constitutional framework to enhance the punishment for crimes. The very rationale of the Pardon Clause is to empower a president to lessen, not increase, punishment. As the Supreme Court stated in *Schick v. Reed*, "[o]f course, the President may not aggravate punishment,"[204] for the Constitution only authorizes "an executive action that mitigates or sets aside punishment for a crime."[205] The offender's consent, therefore, should not permit the president to utilize the pardon power to enhance punishment.[206]

b. Exercise of Adjudicative Functions

In administering the pardon system, presidents have combined the roles of law promulgation, law execution, and judging. The president sets the conditions, enforces performance, and then decides if the conditions

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president should be understood similarly is not free from doubt. *Cf.* Scafati v. Greenfield, 390 U.S. 713 (1968) (holding that increasing punishment for violation of parole after offender commits offense violates Ex Post Facto Clause), *aff'g* 277 F. Supp. 644 (D. Mass. 1967). Given that the offer of release also was subsequent to commission of the offense, *Lupo* likely would be found to be consistent with Ex Post Facto principles.

202. X represents the value of immediate release; Y the burden of the conditions imposed. *See supra* text and note 110.

203. Neither the president nor the offender has the incentive to limit presidential power, which suggests that consent does not remove concern for the allocation of powers among the three branches. The Court has held, for instance, that consent to resolution of a dispute by a non-Article III officer does not eliminate the Article III structural concern. *See* Peretz v. United States, 501 U.S. 923, 937 (1991); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850-51 (1986) ("To the extent that the structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty."); N. Pipeline Constr. Co. v. Marathon Oil Co., 458 U.S. 50, 58 (1982). Similarly, parties by agreement cannot confer subject matter jurisdiction on an Article III court.

204. 419 U.S. 256, 267 (1974).

205. Nixon v. United States, 506 U.S. 224, 232 (1993) (citation omitted).

206. Determining when a condition extends punishment may be daunting. No clear objective benchmark exists. One might look, however, to the total time likely to be spent in prison, or time in prison plus some fraction of time in recognition of restrictions imposed by the conditional offer. One might even discount time to be spent behind bars in the future.

have been adequately satisfied. The combination of functions threatens rule-of-law norms. Some might argue that presidents should lack the power to both enforce the law by overseeing an offender's compliance with a pardon condition and adjudicate whether the offender, in fact, violated the condition attached to the pardon. Although presidents, like agencies, often discharge more than one function, the risk of bias is great.[207]

Moreover, the elastic nature of this inquiry compounds the risk of bias. Presidents afford themselves such wide discretion so as to vest themselves with the power to revoke the pardon and to reinstate the original sentence for almost any reason. For example, it would be difficult to second-guess a presidential determination that an offender associated with the wrong kind of people or failed to establish an "orderly" life.[208] Thus, instead of a vehicle for mercy or compassion, the pardon power can transform an ordinary pardon into a sword of Damocles perpetually hovering over an offender's head.[209]

Presidents under the Pardon Clause, however, must inevitably exercise this mixture of functions. *Withrow v. Larkin*[210] presents a helpful analogy. There, Wisconsin's medical licensing board received information that Dr. Larkin engaged in prohibited conduct by performing abortions. After notifying the district attorney that probable cause existed linking Dr. Larkin to criminal acts, the board set the case for a formal hearing to determine whether to revoke Dr. Larkin's license. Even though the Court recognized that "the combination of investigative and adjudicative functions necessarily created unconstitutional risk of bias,"[211] it upheld the board's dual role of investigator and adjudicator. The Court explained that "[t]he initial charge or determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same agency makes them in tandem and that they relate to the same issues does not result in a procedural due process violation."[212]

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207. Gibson v. Berryhill, 411 U.S. 564 (1973) (holding that Alabama Board of Optometry cannot both litigate against and then adjudicate lawfulness of optometrists' work for corporations); American General Ins. Co. v. FTC, 589 F.2d 462 (9th Cir. 1979) (striking down agency action due to official's inappropriate mixture of roles).

208. *Cf.* Birzon v. King, 469 F.2d 1241 (2d Cir. 1972) (addressing challenge to vagueness of parole condition proscribing association with persons who have criminal records).

209. Every imposition of a condition raises serious enforcement concerns. As Attorney General Wirt warned in 1820, there is

> difficulty of enforcing the condition, or, in case of a breach of it, resorting to the original sentence of condemnation; which difficulty arises from the limited powers of the national government. For example: you could not pardon on a condition to be enforced by the officers of a State government . . . because you have no political connexion with these officers, and, consequently, no control over them.

1 Op. Att'y Gen. 341 (1820).

210. 421 U.S. 35 (1975).

211. *Id.* at 47.

212. *Id.* at 58. *See also* Blinder, Robinson & Co. v. SEC, 837 F.2d 1099, 1104-07 (D.C. Cir. 1988) (rejecting separation of powers challenge).

As in *Withrow*, a president's assessment that an offender may not have satisfied a pardon condition does not preclude a subsequent presidential determination regarding whether the offender satisfied the condition. Indeed, parole and probation authorities routinely have exercised that very same combination of functions.[213] Such officials help set the conditions, monitor them, and then adjudicate whether a violation had taken place. *Morrissey* demands that due process principles govern revocation proceedings,[214] but nothing in the Constitution or historical practice precludes an agency, or the president, from exercising both an investigative and adjudicative function.

III
JUDICIAL REVIEW

Political checks constrain the president's exercise of the pardon power. The electorate and press scrutinize presidential actions, and Congress can impeach presidents for their misuse of the pardon power, as almost occurred during President Andrew Johnson's administration.[215] Because presidents recognize that their successors may decline to enforce the conditions imposed or may enforce them in unanticipated ways, the conditional pardon power is also subject to the unique check of limited tenure in office.

Nonetheless, judicial review can complement existing political checks on the president's pardon power to limit further the potential for abuse. Although no judicial review is needed for either the purposes or the processes by which the president reaches a pardon decision, review should be permitted to ensure that pardon conditions do not violate any structural restrictions in the Constitution on presidential authority, such as limits on extending the length of punishment or establishing an official religion.

A. Review by the Political Branches

The political process checks the president's exercise of conditional pardon authority, as it does almost every other presidential act. The public nature of the pardon offer ensures that public pressures can be brought to bear on the president. Although the Constitution does not itself mandate that the president publicize a record of all pardons, a strong tradition of publication exists. To my knowledge, every pardon has been open to public critique.

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213. *See* United States v. Farmer, 512 F.2d 160 (6th Cir. 1975) (same judge granted probation and presided over charge that offender violated probation); Armstrong v. State, 312 So. 2d 620, 623 (Ala. 1975) ("There appears to be no sound reason why the judge who granted probation could not fairly and impartially preside over the revocation of probation hearing.").

214. *See supra* notes 144-149 and accompanying text.

215. *See* DORRIS, *supra* note 66.

The role of the press can be critical. The press anticipated and publicized President Ford's consideration of whether to pardon President Nixon,[216] President Bush's decision to pardon his former colleagues involved in the Iran-Contra investigation,[217] and President Carter's choice to pardon draft dodgers of the Vietnam era.[218] The clamor that followed President Clinton's pardon of Marc Rich further illustrates the importance of press oversight.[219] Publicity raises the stakes for the pardon decision.

Congressional oversight can be potent as well.[220] In the FALN case, congressional committees demanded documentation and explanation as to why the pardon was offered. Although President Clinton blocked the release of some information on grounds of executive privilege, Congress uncovered considerable background material that informed the public's view of the pardon offer's wisdom.[221] Congress debated similar issues in the subsequent hearings over the propriety of the Marc Rich pardon.[222] Despite the discretion inherent in the exercise of the pardon power, traditional political checks of press and congressional oversight minimize the need for external review.

The president internalizes most of the costs of a conditional pardon because he stands as the only elected official accountable to the entire electorate.[223] If the pardoned offender commits another crime,[224] or if the

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216. Anthony Ripley, Editorial, *For Nixon: Indictment, Pardon or a Deal?*, N.Y.TIMES, Sept. 1, 1974, § 4, at 4.

217. *See, e.g.*, Neil A. Lewis, *Ex-Spy Chief is Convicted of Lying to Congress on Iran-Contra Affair*, N.Y.TIMES, Dec. 10, 1992, at 1.

218. *Problems Pile Up Fast for Carter*, U.S. NEWS & WORLD REP., Nov. 22, 1976, at 17. The press also vilified President Lincoln's pardon policies during the Civil War for showing leniency to the Confederates and draft dodgers. *See, e.g.*, P.S. Jr. Ruckman & David Kincaid, *Inside Lincoln's Clemency Decision Making*, 29 PRESIDENTIAL STUD. Q. 84 (1999); DORRIS, *supra* note 66.

219. *See supra* note 2.

220. *See supra* note 10.

221. Neal K. Katyal, *Executive Privilege, Confidentiality, Trust; The Road to a Compromise Between the White House and Congress*, WASH. POST., Sept. 24, 1999, at A31. In addition, Senator Hatch proposed a bill to regulate the pardon process to afford more voice to the offenders' victims and to law enforcement representatives. Cannon & Byrd, *supra* note 88.

222. *See U.S. House Panel Wants Clinton Library Fund Records*, CHANNEL NEWS ASIA, Feb. 10, 2001; Maxim Kniazkov, *U.S. Congressional Committee to Subpoena Rich's Bank Records*, AGENCE FRANCE PRESSE, Feb. 10, 2001. Congress was vocal as well during the pardon deliberations for President Nixon and the Iran Contra defendants. *See* Elizabeth Arnold, *Clinton Transition Progressing Slowly* (National Public Radio Broadcast, Nov. 8, 1992) (discussing Iran-Contra defendants). After President Ford's pardon of President Nixon, the Senate passed a resolution opposing any more pardons for Watergate defendants until their appeals had been exhausted. Adler, *supra* note 69, at 222. President Ford, indeed, testified before Congress about the pardon. Moreover, Congress in 1868 passed a resolution declaring that President Andrew Johnson's Christmas pardons, including Jefferson Davis's, were unconstitutional. *See* Scott P. Johnson & Christopher E. Smith, *White House Scandals and the Presidential Pardon Power: Persistent Risks and Prospects for Reform*, 33 NEW ENG. L. REV. 907, 926 (1999).

223. *See, e.g.*, Terry M. Moe, *Political Institutions: The Neglected Side of the Story*, 6 J. L. ECON. & ORG. 213, 235-38 (1990).

condition violates some other norm, then the president remains at least formally accountable for the pardon. Presidential motives for pardons may or may not be wise, but the president is unlikely to escape the adverse consequences from the pardon offer.[225] The Marc Rich and FALN cases amply demonstrate that presidents stand accountable to the public for their pardon decisions.

In addition, a more unique fundamental check constrains the conditional pardon power: presidents cannot bind their successors. Presidents can easily undo the conditions imposed by their predecessors, limiting the conditional pardon power's breadth.[226] Consider, for instance, President Andrew Johnson's offer of a pardon to Jacob DePuy, who had been convicted and incarcerated for violating the revenue laws. President Johnson predicated the pardon on DePuy's agreement to pay a fine.[227] When President Grant assumed the reins of power, he revoked the pardon, and the Court upheld the revocation because the paperwork had yet to reach DePuy even though the warden had the papers in his possession at the time President Grant revoked the offer.[228] Although the timing of the revocation makes the *DePuy* case unusual, it highlights that presidents cannot control how their successors enforce conditions attached to pardons.[229] Indeed, President George W. Bush's administration reportedly studied the feasibility of revoking the Marc Rich pardon, and it was not clear whether the Clinton administration had completed all of the paperwork at the time Bush took office.[230]

B. Proper Scope of Judicial Review

Judicial review may impose an additional check on the president's conditional pardon power. Some may believe that, if presidents wield the power for inappropriate ends or if the conditions imposed are immoral,

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224. The Willie Horton incident manifests the danger. Horton, who was released on furlough from Massachusetts prison, raped while on furlough. President Bush used Horton in an advertisement to paint his opponent, Michael Dukakis, as soft on crime. Anthony Lewis, *The Dirty Little Secret*, N.Y. TIMES, Oct. 20, 1988, at A27; Edward Walsh, *Clinton Charges Bush Uses Crime Issue to Divide*, WASH. POST, July 24, 1992, at A16.

225. Because President Clinton's term in office expired as he pardoned Marc Rich, Clinton did not have to worry about confronting any repercussions as president. But the hearings illustrate that the impact continued on his party as well as on President Clinton's reputation.

226. Conversely, subsequent presidents may enforce conditions far more stringently than the original president may have intended. Presidents attaching conditions to pardons must take into account that risk.

227. *See generally In re* De Puy, 7 F. Cas. 506 (S.D.N.Y. 1869) (No. 3814).

228. *Id.* Jacob DePuy later was pardoned after serving time because he was not able to pay the amount of the fine assessed.

229. *See also* Commonwealth v. Hall, 126 S.W.2d 1056 (Ky. 1939) (upholding governor's revocation of predecessor's conditional pardon), *rev'd in part*, Fleenor v. Hammond, 116 F.2d 982 (6th Cir. 1941).

230. Debra J. Saunders, *Justice for the Non-Rich*, S.F. CHRON., Jan. 31, 2001, at A23.

then judges may be able to protect the offender's interest. Similarly, if a president commits an offender to jail on the ground that he violated the condition attached to a pardon, then review may protect the individual interest in preventing unwarranted incarceration. Finally, review may protect against presidential aggrandizement of power at the expense of coordinate branches. Accordingly, this Part explores the extent to which judges should be able to review the president's clemency decision. This Part concludes that there should be no review of the process by which the president reached the decision to pardon, the reasons for the decision, or the appropriateness of the condition selected. However, courts should review constitutional challenges to the condition imposed as well as challenges to any unilateral presidential determination to revoke a pardon on the ground that an offender violated a pardon condition.

1. *Review of Reasons for Pardons and of the Process Underlying Pardon Decisions*

Despite the potential benefits from review, few presidential determinations seem as highly discretionary as the decision whether, and on what terms, to grant an offender a pardon. If judges could second-guess a president's *reasons* for granting a pardon, then judges could arrogate to themselves a substantial part of the executive's constitutionally grounded authority to exercise the pardon power. Consider the district court's decision in *Murphy v. Ford*,[231] where the district court entertained a challenge to President Ford's decision to pardon Richard Nixon. With reference to the historical context in which the Pardon Clause was enacted, the court expressed its view that the pardon was appropriate:

> Under these circumstances, President Ford concluded that the public interest required positive steps to end the divisions caused by Watergate and to shift the focus of attention from the immediate problem of Mr. Nixon to the hard social and economic problems which were of more lasting significance.[232]

No constitutional or historical principles, however, demarcate permissible from impermissible reasons.[233]

Moreover, given that there is no judicial review in other highly discretionary contexts, under either the political question doctrine or the

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231. 390 F. Supp. 1372 (W.D. Mich. 1975).

232. *Id.* at 1374. Although the court rejected the challenge on other grounds, it implicitly assumed the responsibility to review the merits of the pardon decision. *Id.*

233. In fact, no judicial review of the pardon power apparently existed at all in England. *See* A.T.H. Smith, *The Prerogative of Mercy, the Power of Pardon and Criminal Justice*, 1983 PUB. L. 398, 432. For discussion of whether review should be permitted to assess allegations of bribery, see *infra* text accompanying notes 281-283. Even though pardons obtained through bribery should not necessarily be revoked, the president's acceptance of a bribe should be subject to external inquiry. *See infra* note 307.

Administrative Procedure Act, review should be precluded to avoid second-guessing the president's reasons for granting and denying pardons.

The political question doctrine, though controversial, has long recognized that courts should not second-guess some executive branch acts. As early as *Marbury v. Madison*[234] the Court stated:

> By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . [B]eing entrusted to the executive, the decision of the executive is conclusive. . . . Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[235]

The political question doctrine also has been applied in contexts in which courts lacked institutional power to mold effective relief.[236]

The Supreme Court's decision in *Nixon v. United States*[237] illustrates the contemporary contours of the doctrine. There, the Court rejected on political question grounds an individual rights claim arising out of Judge Walter Nixon's impeachment. Judge Nixon challenged the Senate's process for trying him after his impeachment by the House for making false statements to a grand jury while serving on the bench. (Nixon previously had been convicted of criminal wrongdoing.) Nixon asserted that the Senate violated the constitutional command in Article I, § 3 that it "shall have the sole power to try all Impeachments" by delegating its authority to a special committee.[238] The Court found the claim nonjusticiable, reasoning that Article I, § 3 demonstrates a textual commitment of impeachment in the Senate.[239] Moreover, the Court explained that judicial review would

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234. 5 U.S. (1 Cranch) 137 (1803).

235. *Id.* at 165-70.

236. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 217 (1962). There the court stated:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government. . . .

Id.

237. 506 U.S. 224 (1993)

238. *Id.* at 228.

239. *Id.* at 229-30. *See also* Goldwater v. Carter, 444 U.S. 996, 1004 (1979). There, a plurality of the Court held it could not examine President Carter's decision to rescind a treaty with Taiwan. Even though the Constitution did not explicitly grant the president the power to rescind a treaty, and even though that power could undermine the Senate's textually rooted authority to consent to treaties, four justices held the claim barred by the political question doctrine. The breadth of the president's power in the foreign affairs arena is considerable, and the Court did not want to interfere with the president's strategic policy moves. Unlike repeal of laws, the treaty rescission issue was a "dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests. . . ." *Id. See also* Chicago & Southern Airlines, Inc. v. Waterman S.S. Corp., 333 U.S. 103,

undermine the importance of impeachment as a legislative check upon judicial officers. As the Court stated, "impeachment was designed to be the *only* check on the Judicial Branch by the Legislature. . . . Judicial involvement in impeachment proceedings . . . is counterintuitive because it would eviscerate" that important check.[240] Justice Souter in concurrence, however, cautioned that "[i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss or upon a summary determination that an officer of the United States was simply a 'bad guy,' judicial interference might well be appropriate."[241]

To some extent, the textual commitment of the pardon power to the president resembles the textual commitment of the power to try impeachments to the Senate. The Constitution plainly allocates authority to a particular branch in both cases, and judicial review in each might well end in judicial usurpation. Judges would decide what "trying" a case entails, and might determine the ends for which clemency can be used. Moreover, the Court in *Nixon* declined to intervene in the trial of the impeached judge, in part because of the impeachment process's role in checking judicial power. Indeed, Congress has few options other than impeachment to react to illegality or serious impropriety in the judiciary. Similarly, the pardon process allows the president to check the judiciary's power to impose punishments. Probing judicial review in general, and review of the *reasons* for pardons in particular, would intrude too sharply into the president's authority.

In addition to the political question doctrine, practice under the Administrative Procedure Act has confirmed the unreviewability of certain discretionary determinations. The APA provides that its mandate for review does not apply "to the extent that . . . agency action is committed to agency discretion by law."[242] The Supreme Court currently views that section as a "narrow exception"[243] to the review provisions in the APA applicable when the agency action is premised on some complex determination that the judiciary is ill-suited to second-guess.

The Supreme Court's decision in *Webster v. Doe* is instructive.[244] There, the relevant statute provided that "the Director of the Central Intelligence Agency may, in his discretion, terminate the employment of any officer or employee of the Agency whenever he shall deem such termination necessary or advisable in the interests of the United

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114 (1948) (declining to review presidential denial of a certificate to an airline because "the final orders embody presidential discretion as to political matters beyond the competence of the courts to adjudicate"); Commercial Trust Co. v. Miller, 262 U.S. 51 (1923) (finding that the congressional determination that the war with Germany had ended in 1921 could not be second-guessed in court).

240. *Nixon*, 506 U.S. at 235.

241. *Id.* at 253-54 (Souter, J., concurring).

242. 5 U.S.C. § 701(a)(2) (1996).

243. Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971).

244. 486 U.S. 592 (1988).

States . . . ."[245] The Court concluded that, absent a constitutional challenge, review was barred under the APA. The statutory standard "fairly exudes deference to the Director, and appears to us to foreclose the application of any meaningful judicial standard of review."[246] The Court continued that "[s]hort of permitting cross-examination of the Director concerning his views of the Nation's security and whether the discharged employee was inimical to those interests, we see no basis on which a reviewing court could properly assess an Agency termination decision."[247]

Courts have no better standard to use in determining whether a president has properly exercised the pardon authority. Indeed, presidents have not always provided reasons for their pardon decisions, making review all the more difficult. It is for the president to determine whether to use the pardon power for compassion, to save costs, to elicit the cooperation of recalcitrant witnesses,[248] or to defuse internal political strife. The constitutional grant of the pardon power suggests no limits, and judicial review would upset the constitutionally based determination that it is the president's sole prerogative to determine whether a pardon is appropriate.

Courts are even less likely to review discretionary acts when the president himself is the defendant. In *Franklin v. Massachusetts*[249] the Supreme Court held that the president is not subject to APA review. That suit challenged the way in which seats in the House of Representatives had been apportioned among the states. The Court explained that "[o]ut of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA."[250] *Franklin*, as well as the APA example, suggest that review of the pardon decision on the merits is inappropriate.[251]

The possible assertion of constitutional claims arising from pardon decisions complicates the question. In both the APA and *Franklin* contexts, the Court held that it would review constitutional claims. The *Webster* Court explained that only in the clearest case would it read statutes so as to preclude review of constitutional claims,[252] and in *Franklin* it stated that the

245. *Id.* at 594.
246. *Id.* at 600.
247. *Id.*
248. *Cf.* Burdick v. United States, 236 U.S. 79 (1915).
249. 505 U.S. 788 (1992).
250. *Id.* at 800-01. *See also* Dalton v. Specter, 511 U.S. 462 (1994) (similarly declining to review challenge to president's administrative determination as to which military bases to close).
251. In *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475 (1866), the Court refused to entertain a challenge to President Andrew Johnson's administration of the Reconstruction Acts. According to the Court, no injunction could lie against the president "in the performance of his official duties." *Id.* at 501. The Court noted that if the president disobeyed a judicial order, it would be "without power to enforce its process." *Id.*
252. 486 U.S. at 603.

"President's actions may still be reviewed for constitutionality. . . ."[253] As in *Webster* and *Franklin*, therefore, some might argue that review of pardon determinations could at least proceed if an offender raises constitutional claims. For instance, an offender might claim that a president failed to grant him a pardon because of his religion or that the denial violated his right to equal protection of the laws.[254]

Two arguments, however, strongly suggest that courts should not even consider constitutional claims based on the failure to grant a pardon. First, unlike the governmental action reviewed in *Webster* and *Franklin*, the president's pardon power is constitutionally based. The strong presumption of judicial review that attaches to exercise of delegated authority does not hold. When Congress delegates authority to the president, it can condition that exercise on certain checks, including judicial review. The president's exercise of constitutionally based powers stands on a different footing. There is no presumption that there should be review of the president's exercise of the power to command the Armed Forces,[255] to issue internal management orders within the executive branch,[256] or to appoint Ambassadors.[257] Similarly, there is no presumption of review to challenge the president's exercise of the pardon power.

Second, the risk of judicial errors from entertaining such constitutional claims is unacceptably high. As discussed before, presidents need not and have not always provided reasons for their pardon decisions, and determining after the fact why the president granted pardons in some cases and failed to act in others is notoriously difficult.[258]

To be sure, one can imagine that some judges would strain to review serious allegations that a particular president refused to pardon anyone of a different race, or pardoned every white convicted of a hate crime, but not those of other races. An equal protection violation might appear clear. But, even there, it would be impossible to assess the president's exercise of the pardon power without scrutinizing the reasons that underlie his decisions to grant or deny pardon requests. To probe the decisions any deeper risks insinuating judges into the decision-making process, and without the benefit

253. 505 U.S. at 801. *See also* Dalton, 511 U.S. at 473 (refusing to recognize a claim that the president had exceeded his statutory authority as constitutionally based).

254. President Lincoln, for instance, allegedly showed favoritism to residents of Kentucky. DORRIS, *supra* note 66. President Harrison may have granted pardons to Mormons who violated the laws but not to members of other religious sects. *See supra* note 57. Note, however, that no one is likely to have standing to challenge on constitutional grounds grants as opposed to denials of pardon.

255. *See* U.S. CONST. art. II, § 2, cl. 1.

256. *See, e.g.*, Sur Contra la Contaminacion v. EPA, 202 F.2d 443, 449 (1st Cir. 2000); Indep. Meat Packers Ass'n v. Butz, 526 F.2d 228, 236 (8th Cir. 1975); *cf.* Dept. of the Treasury v. FLRA, 494 U.S. 922, 933 (1990).

257. U.S. CONST. art. II, § 2, cl. 2.

258. *See, e.g.*, Heckler v. Chaney, 470 U.S. 821 (1985) (establishing a presumption that Congress did not intend judicial review over an agency's failure to act).

of the president's experience in handling the thousands of prior pardon applications. Courts might insist that the president create an administrative record, might demand a list of explanations from the president, and might seek the president's testimony. The costs of attempting to ascertain the president's motives for not granting pardons may be too steep.

Whether courts should be able to second-guess the process by which presidents reach the pardon decision raises somewhat of a closer question. Often courts scrutinize the process that administrators use to reach decisions without reviewing the merits themselves. Under the Administrative Procedure Act, for instance, courts at times consider whether agencies follow the correct procedures even if various administrative law doctrines preclude review of a decision on the merits.[259] In that way, courts can help agencies reach better decisions merely by insisting upon greater deliberation, access from interested parties, more notice, and the like.

In *Ohio Adult Parole Authority v. Woodard*[260] the Supreme Court considered whether judges could review challenges to the process by which the governor reached clemency decisions. Earlier, in *Connecticut Board of Pardons v. Dumschat*[261] the Court, in rejecting a claim that the governor was obligated to provide an explanation for pardon decisions, asserted that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."[262] In *Woodard*, Chief Justice Rehnquist's opinion concluded that "[t]he Due Process Clause is not violated where, as here, the procedures in question do no more than confirm that the clemency and pardon power is committed, as is our tradition, to the authority of the executive."[263] To Rehnquist, clemency remained "a matter of grace."[264] A majority of the Court, however, would have exercised limited review under the Due Process Clause if "a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."[265] The Court has left the door open to the possibility of limited judicial scrutiny of the pardon process in states to ensure that the pardon process will not be arbitrary.

But, in the presidential context, review of the president's process for issuing pardons robs the decision-maker of too much discretion. The

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259. *See, e.g., id.* at 825 n.2 (1985).

260. 523 U.S. 272 (1998).

261. 452 U.S. 458 (1981) (rejecting a claim that governors were obligated to provide explanations for pardon denials).

262. *Id.* at 464. *See also* Yelvington v. Presidential Pardon and Parole Attorneys, 211 F.2d 642 (D.C. Cir. 1954) (refusing to compel compliance with internal D.O.J. clemency regulations so as to preserve executive discretion).

263. 523 U.S. at 276.

264. *Id.* at 281.

265. *Id.* at 289 (O'Connor, J., concurring). The position is similar to that expressed by Justice Souter in *Nixon*. *See supra* text accompanying note 241.

Constitution specifies no process and, as with the Senate power to try impeachments at stake in *Nixon*, implicitly vests the power to determine the appropriate procedures in a coordinate branch. Courts cannot readily second-guess the process by which presidents grant pardons without intruding at least somewhat into the decision making itself.[266]

Consider the decision by the Court of Appeals for the District of Columbia in *Yelvington v. Presidential Pardon & Parole Attorneys*, which preceded *Woodard* by almost twenty-five years.[267] There, the presidential pardon attorneys denied an offender's application for executive clemency on the ground that it "did not warrant consideration."[268] Accordingly, the attorneys did not forward the application to the president for his consideration. The court observed that "[i]t is doubtless true that the president intended that pardon applications should reach him in every case. . . ."[269] Yet, the court concluded that the presidential pardon power, "[t]he benign prerogative of mercy," should "be free of judicial control, even to the limited extent here proposed."[270] As a consequence, the court declined to review the charges.

There are many contexts in which a prisoner may raise such process claims. President Clinton, for instance, reportedly bypassed the Office of the Pardon Attorney in making many of the last-minute pardon decisions.[271] Consider the less hypothetical claim that President Clinton failed to allow law enforcement officers or victims to present their case for why clemency should not have been granted to Marc Rich,[272] the FALN members,[273] or others. Or, assume in the *Hoffa* case that President Nixon had departed from internal guidelines by inserting the pardon condition without consultation from the Pardon Attorney.[274] As in *Yelvington*, such claims should be rejected, despite the dictum in *Woodard*.

Judges should stay their hands when confronting a challenge to either the merits of a pardon decision or the process by which a president reaches a decision. The dictum in *Murphy v. Ford*, suggesting judicial power to review pardons on their merits,[275] and to a lesser extent that in *Woodard*, err in arrogating to judges the power to second-guess presidential exercise

266. *Cf.* Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (plurality suggests that Congress cannot, consistent with the Constitution, limit the president's ability to obtain advice relevant to the appointment power in Article II).

267. 211 F.2d 642 (D.C. Cir. 1954).

268. *Id.* at 642.

269. *Id.* at 643.

270. *Id.* at 644.

271. *Noted in Passing, Pardon Us?*, FORT WORTH STAR TELEGRAM, Jan. 27, 2001, at 16; Susan Page, *Who Gets a Pardon*, USA TODAY, Mar. 20, 2001, at A7.

272. *See* Saunders, *supra* note 230, at A23; Kevin Freking, *11th Hour Pardons Belie Clinton Campaign Talk*, ARK. DEMOCRAT-GAZETTE, Feb. 1, 2001, at A1.

273. *See* Cannon & Byrd, *supra* note 88.

274. Such evidently was the case. *See* Boudin, *supra* note 189.

275. *See supra* notes 144-154.

of discretion in granting the pardons. Irrespective of whether the president is offering a pardon for reasons of compassion, international affairs, or domestic politics, no review should exist. The only checks are the disaffection of the electorate and possible impeachment by the House.

2. Review of Conditions Imposed

Although the reasons for pardon and the process by which the decision is reached should be immune from review, the questions of whether and how to review conditions in conditional pardons are more difficult. The conditions imposed may be immoral or otherwise contrary to social norms; there may be an insufficient relationship between the condition imposed and the reasons for the original incarceration; or the offer of conditional pardon may permit the president to assume power in excess of that granted under the Constitution.[276] Despite contrary precedent in the probation context, this Part argues that judges should exercise review only to ensure that the presidentially imposed condition does not shock the conscience and is consistent with structural limitations on executive power.

Consider the facts underlying the Supreme Court's decision in *Bradford v. United States*.[277] Bradford had been convicted of defrauding the United States of particular lands. The president offered him a pardon, conditioned on his willingness to make the government whole by returning the lands in question. The District Attorney had pledged that the government would reimburse him for improvements he had made on the land in the interim so that the government would not reap a windfall, and Louisiana law arguably supported the reimbursement.[278] After Bradford agreed to the pardon and returned the land, senior federal government officials refused the reimbursement request for the improvements. Accordingly, Bradford filed suit in the Court of Claims to recover those costs. The Supreme Court summarily dismissed Bradford's claim, asserting that his contention was "anomalous" given that he had been "[c]onvicted of two offenses and under sentence for them, and suspected of others . . ."[279] The

276. As discussed previously, an individual's acceptance of a presidentially imposed condition does not end the matter. Society at large may suffer if the condition, such as donation of a kidney, erodes social values. If presidents attach problematic conditions to offers that offenders accept, then review (as under the state systems or in the parole and probation context) may be critical as a means to restoring social norms.

277. 228 U.S. 446 (1913).

278. Cases had provided that "as between such individuals the one possessed even in bad faith is entitled to be compensated by the other for improvements made thereon . . . no one should be made richer at the expense of another, even though the latter has acted in bad faith." Bradford v. United States, 47 Ct. Cl. 141, 145-46 (1911), *aff'd*, 228 U.S. 446 (1913) (citations omitted). Precedent with respect to defrauding public authorities, however, did not apparently allow recovery. *Id.* at 146.

279. *Bradford*, 228 U.S. at 453.

Court continued that the District Attorney had no right to pledge reimbursement for the improvements.[280]

Bradford illustrates the risk that the president, when offering pardons, can demand payment unrelated to or in excess of the crime's costs to society.[281] No one would countenance a system under which the president auctioned off pardons to the highest bidder.[282] Although some payments might be justified on the grounds that they help defray the damage caused by the underlying crime or the ensuing incarceration, monies in excess of that amount smack of corruption.[283] That prospect, along with the possibility that the conditions attached may threaten individual rights and other social interests, suggests that external monitoring is critical.

Traditionally, most states have permitted limited judicial review of the conditions set by governors. For instance, in *Wilborn v. Saunders*[284] the offender received a pardon on the conditions that he "conduct himself in the future as a good, law-abiding citizen," that he report to the clerk of court every month for four and one-half years, and that he thereafter not commit "a violation of the penal laws of the Commonwealth."[285] The Virginia Supreme Court, as had others,[286] reviewed the conditions to ensure that they "are not immoral, illegal, or impossible of performance."[287] Even though there are no limitations in the constitutional text, a common law can develop demarcating the permissible purposes of pardon conditions, just as there has developed a law of permissible conditions in the probation context. In this way, judicial review can ensure that pardon conditions serve the public interest.

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280. *Id.* at 453-54.

281. In *Bradford* itself, it is unclear whether the cost of the improvements exceeded the damages Bradford caused the government, but certainly he was not clearly notified that he was relinquishing the right to reimbursement by accepting the pardon. British monarchs used pardons as an important source of revenue. *See supra* text accompanying notes 31-32. In addition, see President Taft's commutation of Joshua Noojin in 1909 on the condition that he pay costs in cases other than in those for which he was found liable. 1909 ATT'Y GEN. ANN. REP. 263.

282. If a president attached a condition of annual contributions to his favorite charity, that too would transcend permissible bounds because of statutory restrictions limiting the ability of public officials to benefit from their official conduct in office. *See infra* note 283. At some point, congressional restrictions on the conditions that can be attached to pardons would violate the separation of powers doctrine. *See infra* note 301. Suffice it to say that prohibiting a condition of monetary payment to the president or a favorite charity falls on the constitutional side of the line. However, influence peddling in and of itself currently violates no law.

283. Side payments that benefit the president individually would violate statutory prohibitions on what government officials may receive. *See, e.g.*, 18 U.S.C. § 201(c) (2000) (federal bribery statute).

284. 195 S.E. 723 (Va. 1938).

285. *Id.* at 724.

286. *See, e.g.*, Fuller v. State, 26 So. 146 (Ala. 1899); *Ex Parte* Hawkins, 33 S.W. 106 (Ark. 1895); State *ex rel.* Bailey v. Mayo, 65 So. 2d 721, 722 (Fla. 1953); State v. Horne, 42 So. 388 (Fla. 1906).

287. *Wilborn*, 195 S.E. at 725.

Similarly, in the probation and parole context, federal and state courts scrutinize the conditions to ensure that they serve socially beneficial purposes, usually rehabilitation or public safety.[288] The conditions must be "reasonably related" to the purposes of probation or parole, namely to protect the public and to facilitate rehabilitation.[289] Courts have upheld a wide variety of conditions, including constraints on free speech and association.[290] For instance, in *United States v. Stine*,[291] the court upheld a condition on probation that defendant undergo psychological counseling despite privacy concerns, and in *United States v. Tonry*[292] the court rejected a challenge to a condition that the offender not run for public office during the probation term. Several conditions, however, have been struck down because the superintending court abused its discretion in imposing the condition.[293]

The germaneness inquiry in unconstitutional condition cases focuses similarly on the dangers of governmental manipulation. Consider, for instance, the president's conditional pardon in *Hoffa v. Saxbe*.[294] There, President Nixon granted a pardon to Jimmy Hoffa on the condition that he refrain from any "direct or indirect management of any labor organization

288. *See, e.g.*, United States v. Schave, 186 F.3d 839, 842 (7th Cir. 1999); United States v. Albanese, 554 F.2d 543, 546 (2d Cir. 1977); Commonwealth v. Pike, 701 N.E.2d 951 (Mass. 1998); Wilborn v. Sauders, 195 S.E. 723 (Va. 1983).

289. *See* United States v. Ritter, 118 F.3d 502, 504 (6th Cir. 1997); United States v. Schiff, 876 F.2d 272 (2d Cir. 1989).

290. *See* United States v. Richey, 924 F.2d 857 (9th Cir. 1991) (reporting that condition prohibiting speaking out against the government had been imposed); United States v. Schiff, 876 F.2d 272 (2d Cir. 1989) (condition banning promotion of view of noncompliance with tax laws). Indeed, several courts imposed on violators of hazardous waste laws the probation condition that the offenders join the Sierra Club. *See* Jaimy M. Levine, Comment, *"Join the Sierra Club!": Imposition of Ideology as a Condition of Probation*, 142 U. PA. L. REV. 1841, 1841-42 (1994).

291. 675 F.2d 69 (3d Cir. 1982).

292. 605 F.2d 144 (5th Cir. 1979). *See also* United States v. Bowman, 636 F.2d 1003 (5th Cir. 1981) (same).

293. *See, e.g.*, United States v. Smith, 972 F.2d 960 (8th Cir. 1992) (striking down limitation on siring children other than with wife); Rennie v. Klein, 653 F.2d 836 (3d Cir. 1981) (stating that conditions interfering with thought processes of offender should be invalidated); Higdon v. United States, 627 F.2d 893 (9th Cir. 1980) (holding that requirements that defendant perform charitable work and forfeit all assets were harsher than necessary to achieve rehabilitation or public protection); Porth v. Templar, 453 F.2d 330 (10th Cir. 1971) (striking down condition of probation that prohibited expression of opinion as to unconstitutionality of income tax laws); Sobell v. Reed, 327 F. Supp. 1294 (S.D.N.Y. 1971) (similar); Hyland v. Procunier, 311 F. Supp. 749 (N.D. Cal. 1970) (holding that condition barring parolee from speaking on college campuses was not related to the goal of rehabilitation); People v. Hackler, 16 Cal. Rptr. 2d 681 (Cal. Ct. App. 1993) (striking down condition that offender wear a T-shirt reading "I am on felony probation for theft"); Parkerson v. State, 274 S.E.2d 799 (Ga. Ct. App. 1980) (striking down condition that spouse must move); Commonwealth v. Pike, 701 N.E.2d 951 (Mass. 1998) (holding that banishment from Massachusetts was unwarranted).

294. 378 F. Supp. 1221 (D.D.C. 1974).

for a number of years after release."[295] After accepting the pardon,[296] Hoffa contended that the presidentially imposed restriction swept too broadly, and accordingly he challenged the condition on First Amendment grounds. The district court asserted that the conditions imposed in a pardon must be "directly related to the public interest" and not "unreasonably infringe on the individual commutee's constitutional freedoms."[297] When the conditions are germane and "directly related" to the reasons for early release, there is less likelihood that the president has imposed them for improper reasons.[298] Given that the ban on involvement in union activities was so closely tied to the public interest, the court upheld the condition.[299]

The problem with the germaneness or "reasonably related" inquiry, however, is that it has no referent in the pardon context. There are no limitations as to permissible reasons for pardons. The presidentially imposed condition may seek ends completely unconnected to the traditional justifications for probation or parole, as with the former British practice of commuting sentences on the condition of banishment to the colonies or joining the Navy. Presidents presumably can pardon individuals on the condition that they continue an art career started behind bars or sing "Happy Birthday, Mr. President." Almost every condition is germane to the reasons that a president may use in granting or denying a pardon because fulfillment of the condition may be a goal of the pardon.[300]

In attaching conditions to probation or supervised release, judges and parole boards are far more constrained than presidents, and appropriately so. First, the president's pardon power flows from the Constitution, unlike probation and parole, both of which are creatures of the legislature. Accordingly, legislation may specify the manner in which parole or probation conditions are to be imposed, including a grant of judicial review. Any similar effort to cabin the president's constitutionally based pardon

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295. The Pardon Attorney and Attorney General John Mitchell both recommended that the pardon be issued unconditionally. The condition apparently was inserted at the last minute on the insistence of Presidential Counsel John Dean. *See* Boudin, *supra* note 189, at 21.

296. A dispute existed as to whether Hoffa had notice of the presidential condition. *See id.* at 22. The district court found acceptance in the fact that Hoffa did not reject the commutation, presumably after release. *Hoffa*, 378 F. Supp. at 1241-43.

297. *Hoffa*, 378 F. Supp. at 1236.

298. In unconstitutional conditions cases, courts have inquired whether the condition placed on the benefit is related to the reasons for withholding or granting the benefit. Thus, in *South Dakota v. Dole*, 483 U.S. 203 (1987), the Court asked whether the condition of raising the state's drinking age to 21 was related to the underlying purpose of why Congress might grant funds to states intent on road construction, which was presumably road safety. *Id.* at 208. *See also* Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2000) (reaffirming the importance of ensuring that a direct relationship between the condition and the federal goal exists).

299. The case was mooted on appeal by Hoffa's disappearance.

300. *But see* Cowlishaw, *supra* note 30, at 173-74 (arguing that a *Hoffa*-type germaneness test should be applied).

authority would violate Article II.[301] Second, the "reasonably related" or germaneness test responds to the need to monitor lower-level officials, such as parole boards and trial judges, who are not as politically accountable as the president.[302] In contrast, we are reluctant to interfere with presidential discretion except in the rarest of circumstances. It is for the president and not the courts to assess whether a condition serves socially beneficial ends.

As a consequence, the president's choice of conditions largely should escape judicial review. Conditions that seem overly harsh, such as banishment, that seem irrelevant, such as maintaining appropriate schooling for children, or that seem morally questionable can be imposed subject only to the offender's assent. The need for consent provides a critical check on presidential overreaching. We trust the president, in contrast to parole boards and trial judges, to exercise the pardon power judiciously.

Moreover, unlike with judges and parole boards, majoritarian forces largely should be adequate to check any president running amok. Members of Congress, and their constituents, should be able to pressure any president bent on offering problematic conditions. Congress has exerted such pressure before,[303] and members of Congress may be as well positioned as judges to assess which conditions violate social values. Presidents are also checked by their successors. A president's inability to guarantee long-term monitoring of conditions imposed may serve to limit the type of conditions they attach to offers of pardon. Thus, there should be no judicial review of either the nature or germaneness of the conditions attached to the pardons.[304]

3. *Review for Compliance with Structural Restrictions on Executive Power*

Review, however, is appropriate to ensure that the president in administering pardons does not run afoul of the Constitution's structural limitations. The offender's waiver cannot remove concern for the

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301. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) (noting that congressional limitation of presidential pardon power would be unconstitutional); Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155-56 (1871) (same); Ex parte Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (same); *cf.* Hart v. United States, 118 U.S. 62 (1886) (same).

302. Indeed, state appellate courts, in order to impose greater constraints, have held that the power to set conditions cannot be subdelegated to officials who are even less accountable. *See, e.g.*, People v. Cassidy, 250 N.Y.S.2d 743 (N.Y. Co. Ct. 1964) (invalidating delegation to caseworker); *In re* Collyar, 476 P.2d 354 (Okla. Crim. App. 1970) (invalidating sentencing court's delegation to state department of corrections).

303. *See supra* text accompanying notes 220-222.

304. *See supra* Part III.A (discussing checks by the political branches). If the condition shocks the conscience, however, then the president lacks the power under the Constitution to make the offer. *See infra* notes 305-309.

constitutional values threatened by the presidential action. Review should be exercised only when necessary to restrain executive power.

First, an offender should be able to challenge a pardon condition on the ground that the presidentially imposed condition impermissibly violates a constitutional restriction on presidential power. For instance, an offender may assert, even after accepting the condition, that the condition is more burdensome than serving out the original punishment. As discussed previously, the Pardon Clause does not permit presidents to increase punishment, and an offender's consent to increased punishment cannot be controlling. In the absence of judicial review, presidents might transform the power to lessen punishment into one that lengthens that prescribed by Congress and the courts.

Moreover, Congress and the public may not mobilize to restrain executive excesses if all that is at stake is the question of a prolonged sentence to which the offender consents. Congress is poorly situated to protect the rights of the criminally convicted, and the fact of consent makes it highly unlikely that any coalition can form to apply pressure on the president.[305] In the absence of political process checks, judicial review would be beneficial to prevent presidentially imposed conditions from increasing an offender's punishment.

Similarly, presidents lack the power under the Constitution to impose conditions that shock the conscience. The Eighth Amendment stands as a substantive restraint on government authority. Just as the offender cannot consent to increased punishment, he cannot accede to any alternative punishment, such as donating a kidney,[306] that society deems "cruel and unusual."

In addition, review is warranted to ensure that the president through pardons has not violated any other structural restraint in the Constitution on his power. A court should invalidate a condition that the offender attend Presbyterian services or make payment to the president's Reelection Committee.[307] Review may also be warranted to ensure that the condition

305. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and Theory of Public Choice: Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079 (1993); Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2167-73 (1996) (arguing from perspective of interest group theory).

306. *But see* SURVEY OF RELEASE PROCEDURES, *supra* note 23, at 20 (explaining that in England, in 1730, one inmate was granted a pardon if he agreed to experimental surgery at the hands of a famous physician).

307. Similarly, a bribery investigation would intrude somewhat into the president's prerogative by probing the motives for a pardon. But, as with review of a condition demanding campaign contributions, the investigation is needed to circumscribe executive authority. Moreover, unlike with problematic conditions, a bribery investigation may result in sanctions for the pardon giver, but not undo the pardon itself.

does not violate the Tenth Amendment.[308] Judicial scrutiny helps prevent the president from attaining prohibited ends.[309]

Second, the president should be unable to determine unilaterally whether the offender's conduct satisfies the condition imposed. To permit such determinations would inject an intolerable amount of arbitrary power into the pardoning process.[310] Even though administrative officers at times can combine investigative and adjudicative functions, presidents should not be able to use the pardon authority to vest in themselves the power to revoke the pardon and return the offender to jail on their say-so. Accordingly, the president's exercise of adjudicative powers should be subject to judicial review.[311]

In short, from both the individual rights and separation of powers perspectives, some judicial review is warranted. Although a president's reasons for pardoning an individual and the procedures used should escape judicial scrutiny, the additional external check of judicial review on the president's imposition of conditions is warranted for the limited purpose of preventing presidents from evading structural constraints on their authority.

IV
CONCLUSION

Through conditional pardons, presidents can and have forced offenders to relinquish constitutionally protected rights. To obtain earlier release from prison, individuals have forfeited citizenship and the rights of free speech, association, property, and privacy.

Despite the risk of coercion, offenders benefit by choice. They may lack the information or the ability to compare punishment options meaningfully, but for the most part individuals can make a knowing, intelligent

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308. *Cf.* United States v. Snyder, 852 F.2d 471 (9th Cir. 1988) (invalidating condition imposed as part of federal probation requiring suspension of state driver's license).

309. There is undeniably an overlap between individual rights and structural restraints in the Constitution. For instance, the First Amendment can be seen both as a protection for individuals and as a constraint on governmental authority, and the Equal Protection Clause can be viewed in similar light. This Article does not suggest any new way to demarcate one set of rights from the other. Rather, it suggests that, while offenders can waive any individual right by accepting conditional offers of pardon, their assent cannot remove any concern for structural constraints in the Constitution. *See also supra* note 203.

310. A presidential condition reserving the power to determine compliance with other conditions may not shock the conscience, but for reasons discussed earlier, individuals should not be permitted to waive impartial determination of whether they complied with a pardon's conditions. *See supra* notes 137-149 and accompanying text.

311. An administrative mechanism to determine whether the offender violated the condition could pass constitutional muster as well. Judicial review itself is not always requisite to satisfy due process. *See, e.g.*, United States v. Erika, Inc., 456 U.S. 201, 206 (1982); Schweiker v. McClure, 456 U.S. 188, 196-99 (1982).

decision whether to accept a presidential condition. Offenders often must make the difficult trade-off between one form of liberty and another.

As a question of presidential power, however, the analysis is not as clear. Traditionally, the pardon power has been viewed as an adjunct to the president's authority over criminal law enforcement. The chief executive can temper excesses of either legislators or judges through pardons, commutations of sentences, and remittances of fines. It is for the president to determine why, when, and to whom mercy should be shown. No court should sit in judgment on the reasons for the presidential decision to grant or deny applications for relief.

The president's power to attach conditions, however, subtly transforms the pardon power into a vehicle for accomplishing a wider set of governmental goals, including encouraging testimony, defusing internal dissent, and deporting undesirables. Presidents can alter the framework for punishment set by Congress and seek ends that otherwise would be constitutionally unattainable, such as increasing punishment or requiring church attendance. Such authority is far more expansive than the discrete power to determine whether a particular individual's sentence should be commuted or fine remitted.

The fact that such powers are not explicitly delineated in the Constitution is not surprising. Article II lays out sources of executive authority without listing all the means by which presidents can achieve constitutional objectives and discharge constitutional duties. Much executive authority exists in the constitutional lacunae. From the Article II appointment power flows the power to remove officials so appointed;[312] and from the power to negotiate treaties in Section 2 stems the power to enter into executive agreements with foreign states.[313] The pardon power similarly encompasses the discretion to determine the conditions under which clemency is to be granted. Executive authority has never been chained to the sparse textual authorization of power in the Constitution.

To some extent the political process safeguards against abuse of the pardon system. Exercise of the pardon power has been at the forefront of election debates, newspaper editorials, and congressional inquiries. Moreover, presidents recognize that they depend upon their successors for enforcement of any conditions they impose, which may temper the type and duration of conditions selected.

But the flexible interpretation and expansion of executive power should come with an additional price: greater external monitoring. Thus, even though the pardon power largely has been and continues to be an area committed to presidential discretion, greater scrutiny of the president's conditional pardon authority is warranted. Judicial review helps ensure that

312. Morrison v. Olson, 487 U.S. 654 (1988); Myers v. United States, 272 U.S. 52 (1926).
313. Dames & Moore v. Regan, 453 U.S. 654 (1981).

the conditions offered do not violate any structural limitation in the Constitution and that any revocation of a pardon or commutation is consistent with due process.