

Constitutional Limitations Intrinsic to Exercise of the Pardon Power: Whether the President’s Pardon “Authority Is Total” and Unreviewable

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“‘When somebody is the [P]resident of the United States,’ their ‘authority is total.’”¹ The main structural elements of our democratic republic’s framework—separation of powers, checks and balances and federalism—refute this claim by former President Trump during a COVID-19 press briefing in April 2020. Had he been speaking of just the pardon power² as “total,” however, his assertion would have been at least in accord with the common view that this Article challenges.³ According to that view, the only constraints on the exercise of the pardon power are external, or *extrinsic*, to it. Limitations on the pardon power’s exercise must come from provisions elsewhere in the Constitution, rather than found inherent in, or *intrinsic* to, the power’s intention.⁴

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1. Sonam Shef, *Trump Falsely Claims that “When Somebody Is the President of the United States, the Authority Is Total,”* BUS. INSIDER (Apr. 14, 2020), <https://www.businessinsider.in/politics/news/trump-falsely-claims-that-when-somebody-is-the-president-of-the-united-states-the-authority-is-total/articleshow/75131945.cms> [<https://perma.cc/4L6W-LJ3D>].

2. See U.S. CONST. art. II, § 2 (“The President . . . shall have the Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”). As used in this Article, “pardon” refers not just to the forgiveness of a criminal conviction but also to reprieves, commutations, grants of clemency, and like terms.

3. See Albert W. Alschuler, *Limiting the Pardon Power*, 63 ARIZ. L. REV. 545, 546-47 (2021) (calling pardon power unfettered); Harv. L. Rev. Ass’n, Note, *The President’s Conditional Pardon Power*, 134 HARV. L. REV. 2833, 2833 (2021) (referring to pardon power as “near-blank check”); James N. Jorgensen, *Federal Executive Clemency Power: The President’s Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 357-58 (1993) (explaining pardon power construed broadly with only narrow limitations); Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1702-12 (2001) (listing few checks on pardon power, including judicial review, impeachment, and press); Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 117, 148 (2002) (noting a pardon is irrevocable, even if violative of due process and equal protection). The Supreme Court has contributed to this notion of a boundless pardon power by dicta in early decisions, where limitations on the exercise of the pardon power were not at issue. See *United States v. Klein*, 80 U.S. 128, 147 (1872) (stating “executive alone is [en]trusted the power of pardon; and it is granted without limit”); *Ex parte Garland*, 71 U.S. 333, 380 (1866) (stating “power thus conferred [to President] is unlimited, with the [impeachment] exception stated”).

4. See, e.g., Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Powers: Are There Limits and, if Not, Should There Be?*, 51 AZ. ST. L.J. 71, 81-86 (2019) (noting pardon power textually restricted to offenses against United States); MICHAEL A. FOSTER, CONG. RSCH. SERV., R46179, PRESIDENTIAL PARDONS: OVERVIEW

Suggested extrinsic limitations include Congress's power to impeach and try impeachments and the President's duty to faithfully execute the country's laws under the Take Care Clause.⁵ There is, however, no Supreme Court precedent holding that there are no intrinsic limitations on the pardon power's exercise. Nor has there been much consideration about whether there is basis for the view that the pardon power does have intrinsic limitations on its exercise. In the administrations of Presidents H.W. Bush, Clinton, and Trump, however, there have been abuses of the pardon power, without any alleged violation of extrinsic limitations. Moreover, today, when the adequacy of democracy's guardrails is doubtful—when abuse of the pardon power has eroded, if not busted, those guardrails—the matter transcends academic interest and merits deliberate examination. Indeed, while discouraging disclosures by those with intimate knowledge of events leading to and during the January 6 insurrection, Trump has repeatedly announced that he would pardon those involved if re-elected in 2024, prompting concerns that he would weaponize the pardon power in a second term.⁶

This Article argues in Part I that the pardon power's exercise, as with any other enumerated power under the Constitution,⁷ is subject to limitations intrinsic to the power—as opposed to only extrinsic limitations.⁸ These intrinsic limitations are inferable from the purposes and objectives for which the power was granted. Those purposes and objectives may be ascertained from the power's English common law antecedents, from the drafting history of the power's grant in the Constitution, and from statements about the power in early Supreme Court decisions. Because the pardon power's intrinsic limitations are derived through judicially construing limitations on the permissible grounds for exercising powers expressly granted in the Constitution, those limitations are entirely in keeping

AND SELECTED LEGAL ISSUES 6-7 (2020), <https://crsreports.congress.gov/product/pdf/R/R46179> [<https://perma.cc/3TL3-XB38>] (explaining external limitations exist elsewhere in Constitution beyond federal crimes and impeachment cases); Krent, *supra* note 3, at 1670 (asserting judicial review interrupts power exclusively conferred to President by Constitution). In general, “[l]imits [on a power] can be internal (the power does not extend this far) or external” (the power is limited by some other constraint on government action than within the power itself). See Harv. L. Rev. Ass’n, *supra* note 3, at 2834 n.9 (defining internal and external limitations).

5. U.S. CONST. art. I, §§ 2, 3 (granting House the impeachment power and the Senate the power to try impeachments); *id.* art. II, § 3 (stating the President “shall take Care that the Laws be faithfully executed”).

6. See, e.g., Katelyn Caralle, *Trump Promises Full Pardons and an Apology from the Government for All Capitol Rioters if He Is Elected Again*, DAILY MAIL (Sept. 1, 2022), <https://www.dailymail.co.uk/news/article-11171021/Trump-promises-pardons-APOLOGY-Capitol-rioters-elected-again.html> [<https://perma.cc/4TPC-XTU-7>]; Jonathan Rauch, *The Former President and His Allies Have Explained Their Plans Quite Clearly*, THE ATLANTIC (Aug. 29, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/trump-2024-reelection-viktor-orban-hungary/671264/> [<https://perma.cc/M8QU-U6JS>]; Amanda Terkel, *Trump Says He Would Pardon a ‘Large Portion’ of Jan. 6 Rioters*, NBC NEWS (May 10, 2023), <https://www.nbcnews.com/politics/donald-trump/trump-says-pardon-large-portion-jan-6-rioters-rcna83873> [<https://perma.cc/HB8R-LKHX>].

7. *Schick v. Reed*, 419 U.S. 256, 267 (1974) (identifying pardon power as one of Constitution's enumerated powers).

8. See *infra* Part I, for an argument that the power's intended purposes and objectives limit grounds for its valid exercise.

with the view that the pardon power's "limitations, if any, must be found in the Constitution itself."⁹

Part II considers the judicial reviewability of pardon grants and maintains that neither the separation of powers doctrine nor more prudential considerations should preclude their review.¹⁰ Part III assesses the pardon power's specific purposes and objectives and proposes a standard for reviewing the validity of pardon grants allegedly grounded in those purposes and objectives.¹¹ Finally, Part IV illustrates the application and implications of that standard through consideration of past pardons, starting with the pardon of President Nixon after Watergate.¹² Matters such as who could have standing to seek review of pardon grants and procedures for obtaining such review are briefly addressed but primarily beyond the scope of this Article.¹³

The pardon power need not and should not be unbridled in its exercise, subject to abuse, offered as a jail break guarantee, or advertised to facilitate obstruction of justice. It should not be used to leverage personal presidential favor, or effect

9. *Schick*, 419 U.S. at 267. Though correctly noting a distinction between intrinsic and extrinsic limitations on the exercise of the pardon power, one Harvard Note incorrectly argues that "[c]onditional pardons that attempt to strip [protected] rights violate both the conditional pardon power's *internal* limit on depriving vested rights and the Due Process Clause, an *external* limit that parallels and reinforces the internal one." See Harv. L. Rev. Ass'n, *supra* note 3, at 2853 (emphasis added) (discussing history of limitations on conditional pardon power). Despite the author's claim, this statement describes only *extrinsic* limitations, because limitations on conditions to the exercise of a power that are not themselves based on the purposes or objectives of a power are, analytically, all extrinsic limitations. See *id.* at 2843-48, 2853. The *conditioning* of official action, pardon grant or otherwise, on yielding some protected interest or right is the limitation, not anything inherent in the official action. The lawfulness of such conditioning simply depends on the judicial balancing of the value of the official action against the value of the interest or right to be forfeited, a regular judicial function.

The limitation that the Harvard Note discusses is not a limitation intrinsic to the pardon power but just a particular example of the doctrine of unconstitutional conditions, which even the Note attributes to external, due process limitations. See *id.* at 2835 (stating "internal limitation is externally reinforced by the Due Process Clause"). What ultimately determines the validity of an infringement on protected interests is not how the infringement is imposed—either directly or indirectly, by conditioning a pardon or some other governmental grant on yielding some protected interest—but whether the government's justification for the infringement is sufficient, as a matter of due process, to permit it. See Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine Is an Anachronism (with Particular Reference to Religion, Speech and Abortion)*, 70 B.U. L. REV. 593, 595 (1990) (advocating instead a method of judicial review that focuses on government providing "constitutionally sufficient justifications" for its infringement); see also Harv. L. Rev. Ass'n, *supra* note 3, at 2843, 2853 (noting conditional pardons border on violation of limits on due process rights). Concluding that pardons, if conditioned on forfeiting protected interests or rights, are subject to limitations internal to the pardon power reflects the same faulty analytical construct that Professor Sunstein rejects in dismissing the unconstitutional conditions doctrine. See Cass R. Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 SAN DIEGO L. REV. 337, 338, 345 (1989). "The due process clause might well, for example, forbid states from denying Medicare benefits to those who have had abortions; but . . . it is because the best interpretation of the clause leads to that result, and not because of anything . . . in the idea that some conditions are unconstitutional." *Id.* at 338.

10. See *infra* Part II, for a discussion treating pardon power like other enumerated powers in the Constitution.

11. See *infra* Part III, for a discussion of potential standards for reviewing pardons and proposing an abuse of discretion standard examining whether a pardon grant achieves a purpose or objective of the pardon power.

12. See *infra* Part IV, for a discussion of past pardons and examples applying the review standard proposed in Section III.B.2.

13. See *infra* Section III.B.3, for a limited discussion of possible judicial procedures for challenging pardons.

political or financial gains. Nor, most importantly, should would-be autocrats be allowed to fan the flames of insurrection and sedition by promising pardons to fevered supporters upon their success. Any unlimited power is inevitably a power abused. Instead, pardon power abuse requires a deterrent: judicial confirmation that the grounds for valid pardon grants, as opposed to the grounds for denials,¹⁴ are not unlimited and beyond review, even if the occasions for such review would be limited.¹⁵ The greatest temptation for the abuse of any power is leaving its holder free from a prompt and meaningful accounting of the power's exercise.

I. A POWER'S INTENDED PURPOSES AND OBJECTIVES LIMIT THE GROUNDS FOR ITS VALID EXERCISE

Unlike powers immanent in the physical universe, such as gravity, which simply exist without foreordained purpose, juridical powers are recognized in legal systems in order to achieve specified purposes and objectives.¹⁶ Juridical powers, therefore, are necessarily defined and limited by their intended purposes and objectives.¹⁷ In short, every juridical power has intrinsic limitations on the

14. As discussed in Section III.A, a pardon grant has the character of an act of grace or forgiveness, making any decision to withhold a pardon something that is, also intrinsically to the power, absolutely discretionary. See Section III.A for further discussion.

15. See *infra* Section II.B, for a discussion of the need for protections against pardon abuse.

16. For a detailed discussion of "power" and other juridical concepts, see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. REV. 710, 717, 756-57 (1917) (discussing juridical meanings of "rights," "duties," "privileges," and "powers"). A juridical power is the ability to effect a change—to create, nullify or modify—in some legal relationship, such as a "right," "duty," or "privilege," between two juridical entities or persons. See *id.* at 746. The purposes and objectives of a power are achieved through effecting changes in juridical relationships among juridical entities, that is, by the exercise of powers. See *id.* at 757. The pardon power, for example, restores rights and privileges of the individual against the federal government. Juridical powers are formally recognized, for example, through the adoption of a constitution or other organic document, through the enactment of legislation and other forms of code law, or by judicial decision in common law systems.

17. See *Gibbons v. Ogden*, 22 U.S. 1, 188-89 (1824). Chief Justice Marshall wrote in *Gibbons*:

If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule, that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connexion with the purposes for which they were conferred.

Id. (emphasis added). Only a few years later, in passing on the constitutionality under the Commerce Clause of a Maryland law requiring a license for imports, the Chief Justice similarly observed:

In performing the delicate and important duty of construing clauses in the constitution of our country, which involve conflicting powers of the government of the Union, and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connexion with other words, and of the *general objects to be accomplished* by the prohibitory clause, or by the grant of power.

Brown v. Maryland, 25 U.S. 419, 437 (1827) (emphasis added); see also *Bond v. United States*, 572 U.S. 844, 888 (2014) (Thomas, J., concurring) (arguing exercise of treaty power must follow the "object of the delegation")

grounds that permit its valid exercise. Conversely, despotic power is unlimited precisely because it does not derive from a functioning legal system.

When any juridical power's exercise is challenged, the exercise must be justified with grounds that support its exercise, and those grounds must bear an appropriate relationship to the power's intended purposes and objectives. Specifically, the exercise of a power must in some sufficient measure achieve the power's purposes or objectives in order to qualify the exercise as within the scope of the power and, therefore, valid.¹⁸ The vesting of a particular power in some person, therefore, is not and may not be the vesting of some absolute discretion in the exercise of the power.¹⁹ Indeed, early Supreme Court decisions expressly observed this, stating that the pardon power grant "conveys only the idea of an absolute power *as to the purpose or object for which it is given*."²⁰

Take, for example, the juridical power to contract. That power is recognized in common law legal systems because of a perceived need for formalizing and making accessible to all persons an ability to achieve reliability and objectivity

of the power); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) (arguing judges often confuse issue of a power's validity with cause it should promote); *Veazie v. Moor*, 55 U.S. 568, 573-74 (1852) (determining whether legislation was within the commerce power required deciding whether the law was within the "objects and purposes contemplated by the" power); Andrew Kent, *Can Congress Do Anything About Trump's Abuse of the Pardon Power?*, LAWFARE INST. (July 24, 2020), <https://www.lawfare-blog.com/can-congress-do-anything-about-trumps-abuse-pardon-power> [https://perma.cc/JN8J-BLRB] (discussing how traditional methods of constitutional construction include consideration of purposes behind adoption of Constitution and provisions at issue); cf. Alschuler, *supra* note 3, at 556 (arguing courts recognize implied limitations to enumerated constitutional powers, including the pardon power, that can be inferred from history of provisions); RANDY E. BARNETT & EVAN D. BERNICK, *THE ORIGINAL MEANING OF THE FOURTEENTH AMENDMENT 10* (2021) (noting use of not just the "letter" but also the "spirit" of the law in constitutional construction). Alschuler also observes that a President's order to murder, for example, would reveal why even facially unqualified constitutional grants of power are subject to implicit limits and that "a president's reasons for exercising his powers may be examined." Alschuler, *supra* note 3, at 565.

18. Particularly with respect to the enumerated powers of the federal government, of which the pardon power is one according to *Schick v. Reed*, 419 U.S. 256, 266-67 (1974), there is no privilege to act beyond their scope. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535 (2012). As the Court in *Sebelius* stated, "[i]f no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." *Id.*

19. See *McCray v. United States*, 195 U.S. 27, 64 (1904) (recognizing intrinsic limitation to Congress's broadly granted tax power). The Court stated in *McCray*:

Conced[ing] that if a case was presented . . . where it was plain to the judicial mind that the power had been called into play, *not for revenue*, but solely for the *purpose* of destroying rights . . . it would be the duty of the courts to say that such an arbitrary act . . . was *the exercise of an authority not conferred*.

Id. (emphasis added). Likewise, in *Youngstown*, Justice Jackson admonished that even though the President's powers as Commander in Chief have been "sometimes advanced as support for any presidential action, internal or external, involving the use of force," those powers are "not such an absolute as might be implied from that office in a militaristic system but [are] subject to limitations consistent with a constitutional Republic." *Youngstown*, 343 U.S. at 641-42 (Jackson, J., concurring); see also *id.* at 645. Additionally, Professor Martha Davis has asserted that "it is unlikely that exercise of true discretion in the sense of *no* guidelines occurs in any substantive area of tribunal decisionmaking; all such decisions must be made within boundaries." Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 58 n.50 (2000).

20. *Ex parte Wells*, 59 U.S. 307, 314 (1855) (emphasis added).

in interpersonal transactions; in other words, the power to contract is a means more certain and universal than relying on the familial or other tribal relationships of ancestral times for the enforcement of interpersonal undertakings.²¹ The requirement of sufficient mental capacity to contract is a necessary ground for and, thereby, an intrinsic limitation of the power. Minors, for example, cannot exercise the power to contract because their comprehension, statements, and actions are considered unlikely to provide the required objective meeting of the minds, including reliable intentions as to future action, and, thereby, the desired purpose and objective for which the power to contract is recognized.²²

The existence of intrinsic limitations on the exercise of juridical powers is true of all powers “We the People” granted to the federal government through the ratification of the Constitution, despite the limited constitutional text granting many of the government’s powers. An instructive paradigm is Congress’s power under the Commerce Clause in Article I. The textual guidance for construing the scope of the commerce power is merely the words: “Congress shall have the power . . . [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”²³ Nevertheless, in numerous cases challenging Congress’s exercise of the power or challenging state action as impermissibly intruding on that power, the Supreme Court has looked to the power’s purposes and objectives and engaged in a continually evolving construction of that power and its limitations.²⁴ Despite the commerce power’s limited constitutional text and the text’s broad meaning, the Court has never been reticent to construe that power’s boundaries.²⁵

21. See HENRY SUMNER MAINE, *ANCIENT LAW* 149, 150-51 (1861) (discussing progression of forms of reciprocal rights and duties originating in family and social status to common law power to contract).

22. The *action* that effects an exercise of a power should not be confused with the *grounds* that are necessary for that exercise to be valid. Those grounds exist only if the exercise achieves some purpose or objective for which the power was recognized. For example, a handshake or writing between an adult and a minor is insufficient as a valid exercise of the power to contract, regardless of whether their minds agree on the terms of their putative contract. Likewise, the President may, by order, require a variety of military actions, but any such order is valid only where its execution would achieve a purpose or objective of the powers of a Commander-in-Chief.

23. U.S. CONST. art. I, § 8.

24. See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 (1995) (ruling criminal statute about possession of guns in a school zone has no effect on interstate commerce); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (ruling Commerce Clause limited by dual system of government); *Gibbons v. Ogden*, 22 U.S. 1, 193 (1824) (holding power to regulate interstate commerce includes power to regulate interstate navigation).

25. See *Gibbons*, 22 U.S. at 194-95 (defining limitations of commerce power). Indeed, the Supreme Court has explicitly acknowledged and argued that the very language of the Commerce Clause, terse as it is, contains inherent limitations:

It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word “among” is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration [in the Constitution of Congress’s powers] presupposes something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State.

A distinction should be made between the lawful effects of a power whose exercise achieves its recognized purpose or objective, versus the unlawful effects of a power whose exercise does not achieve its recognized purpose or objective, but whose effects are unavoidable because of justiciability considerations that preclude judicial review of the exercise.²⁶ For example, the veto power does have purposes and objectives—such as effecting a president's perspective on the public interest or using the threat of a veto on one piece of legislation to leverage Congress into some other legislative action considered in the public interest.²⁷ Although the veto power has purposes and objectives to formally assess the intrinsic validity of its exercise, even assuming there were someone who has

Id. Accountings of the development of commerce power doctrine and discussion of illustrative Supreme Court cases may be found in *United States v. Lopez* and in Chief Justice Roberts's discussion of the power and federal powers generally in his opinion and in other justices' concurring and dissenting opinions in *National Federation of Independent Business v. Sebelius*. See *Lopez*, 514 U.S. at 560 (holding Congress has power to regulate guns under Commerce Clause); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 520-21 (2012) (explaining that commerce power's valid exercise must regulate "activity"). Compare *Sebelius*, 567 U.S. at 589-90 (Ginsburg, J., concurring in part) (noting Court's history of recognizing Congress's "plenary" commerce power), with *id.* at 709 (Thomas, J., dissenting) (arguing Congress's power to regulate economic activity with substantial effect on commerce is unconstitutional).

26. Justiciability encompasses a host of legal and discretionary principles constraining judicial review of official actions. For example, courts are constrained by the timing of review, ripeness, the political question doctrine, the ascertainability and manageability of decisional standards within the competence of the judiciary, the proper role of the judiciary in the constitutional scheme of separation of powers, and standing, both prudential and constitutional. See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (explaining standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction); *Flast v. Cohen*, 392 U.S. 83, 95 (1968) (stating justiciability employed to give expression to constitutional and prudential limitations courts observe in deciding whether to undertake a decision on the merits in cases presented to them).

Justiciability is itself a concept of uncertain meaning and scope. Its reach is illustrated by the various grounds upon which questions sought to be adjudicated in federal courts have been held not to be justiciable. Thus, no justiciable controversy is presented when the parties seek adjudication of a political question, when the parties request an advisory opinion, when the question sought to be adjudicated has been mooted, and when there is no standing to maintain the action. Yet it remains true that "[j]usticiability is . . . not a legal concept with a fixed content or susceptible of scientific verification."

Id.; *Ashwander v. TVA*, 297 U.S. 288, 341, 345-46 (1936) (Brandeis, J., concurring) (discussing standing requirement). See generally RICHARD H. FALLON, JR. ET AL., *Chapter II: The Nature of the Federal Judicial Function: Cases and Controversies*, in HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (7th ed. 2015) (addressing justiciability concepts as a means of achieving comity between federal and state courts); ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1962) (discussing utility of justiciability principles in limiting the need for reaching constitutional questions and preserving Judicial Branch's decisional prerogative, given its limited enforcement powers).

27. See *THE FEDERALIST NO. 73* (Alexander Hamilton) (treating veto power as check on legislature). Two basic purposes of the veto are identified in the formation history of the Constitution:

[The veto] not only serves as a shield to the executive [against legislation curtailing his powers or depriving him of resources needed for his performance], but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of that body.

Id.

standing to challenge the exercise, the challenge would not be justiciable because the determination whether legislative action is in the public interest is highly debatable and, therefore, standardless, precluding judicial review.

To be sure, if the President were to veto a piece of legislation solely because of a bribe, the veto's extrinsic invalidity would be apparent. But regardless of invalidity, the veto would likely have effect because justiciability considerations would leave the exercise unchecked.²⁸ Importantly, however, this distinction, between justiciably reviewable and unreviewable exercises of power, resolves the illusion of the pardon power as absolute. The power is no more absolute than any other constitutionally enumerated power. It has gone unnecessarily unchecked because of undue justiciability concerns.²⁹

This Article's two principal arguments are that: (1) the exercise of the pardon power is limited by that power's intended purposes and objectives and (2) judicial review of the validity of the grounds given for a particular exercise of the pardon power is available under an appropriate standard for review of executive action, instead of such review being nonjusticiable. The specific purposes and objectives intended for the pardon power are the subject of Section III.A of this Article, and a judicially ascertainable and manageable standard for review of its exercise is proposed and justified in Section III.B.2.³⁰ First, however, Part II considers basic, but not insurmountable, concerns regarding the justiciability of reviewing pardon grants, apart from those concerns regarding the proposed standard.

II. EXERCISE OF THE PARDON POWER SHOULD BE NO LESS AMENABLE TO JUDICIAL REVIEW THAN THE EXERCISE OF OTHER ENUMERATED POWERS IN THE CONSTITUTION

There is nothing about the pardon power that distinguishes it from other juridical powers, including constitutional powers, whose limitations courts regularly construe and whose exercises courts regularly review. Neither separation of powers considerations nor matters of judicial prudence or competence should warrant the largely unquestioned, but hardly unquestionable view, that the pardon power's exercise is unreviewable. For those steeped in pardon power lore—from its English antecedents that informed the Constitution's Framers, to the

28. Though it is instructive to consider the veto as a power, to distinguish between the validity of a power's exercise and the justiciability of its review, one may question whether the veto is properly characterized as a "power," in the Hohfeldian sense, as opposed to a "privilege" in that sense. See *supra* note 16 and accompanying text (discussing Hohfeld's view of power). Rather than effecting a change in legal relationships—the hallmark of the exercise of a juridical power—a veto, by preventing the adoption of legislation, avoids a change in legal relationships, preserving the status quo of legal relationships. Notably, nowhere in the constitutional text does the word "veto" appear, let alone in reference to the notion of a power.

29. See Curtis Bradley & Trevor Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1103 (2013) (noting reasons for historically few decisions constraining pardon power).

30. See *infra* Section III.A, for a discussion of the purposes and objectives intended for the pardon power and *infra* Section III.B.2, for a proposed standard of review for exercise of the pardon power.

history of its inclusion in the Executive's enumerated powers, to its treatment in early Supreme Court decisions—it may challenge credulity that the pardon power is not absolute but has intrinsic limitations that should permit courts to review whether a particular pardon unlawfully exceeded a president's power.³¹ It is necessary, therefore, initially to consider whether this early history should be treated as a dispositive affirmation of the view that the pardon power is absolute, that is, that there is no limit to the grounds sufficient for a valid pardon and that exercises of the power are judicially unreviewable in any case.

Throughout Part II's discussion, we should be mindful of Chief Justice John Marshall's prudent and time-tested judicial admonishment:

The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously perform our duty.³²

A. Historical Treatment of the Pardon Power Does Not Warrant Preclusion of Judicial Review of Pardon Grants

Although the King's pardon authority was an aspect of what was originally viewed as absolute monarchical authority to say what the law is and to control its application, monarchical authority ceased to be absolute and became increasingly constrained by the time of the American Revolution.³³ The view of law as a "pure emanation of kingship" diminished.³⁴ Pre-constitutional history of the English pardon power itself "reveals a gradual contraction to avoid its abuse and misuse. Changes were made as potential or actual abuses were perceived."³⁵ As early as the late 17th Century, in response to perceived abuse, Parliament began to limit the use of pardons to prevent impeachment.³⁶

31. See *infra* Section III.A (identifying, nevertheless, expressly acknowledged purposes and objectives of pardon power defining intrinsic limitations on its exercise).

32. *Cohens v. Virginia*, 19 U.S. 264, 404 (1821), quoted in *Ex parte Young*, 209 U.S. 123, 143 (1908). In addition, with attribution to Justice Robert H. Jackson, Justice Rehnquist stated: "We decide difficult cases presented to us by virtue of our commissions, not our competence." *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981).

33. See Frank O. Bowman, III, *Presidential Pardons and the Problem of Impunity*, 23 N.Y.U. J. LEGIS. & PUB. POL'Y 425, 434-35 (2021) (tracing decline of monarchical power).

34. See *id.* at 434 ("[T]he concept that law was a pure emanation of kingship withered by . . . the early 1700s in favor of a theory of law grounded in the shared sovereignty of king and Parliament.").

35. *Schick v. Reed*, 419 U.S. 256, 260 (1974); see *Ex parte Wells*, 59 U.S. 307, 312-14 (1855) (discussing pre- and post-revolutionary legal limitations on pardon power in England and United States).

36. See Bowman, *supra* note 33, at 442-43.

Revulsion for monarchical corruption and abuse was an overarching theme, not just in the story of the American Revolution but also in the history of the Constitution's adoption. Specifically, "many in the Founding generation disdained and feared the 'corruption' endemic to monarchy, by which they meant both corruption in the ordinary sense of venal misuse of office for pecuniary gain, but also the system by which English kings managed ministers, parliamentarians, and even judges"³⁷ The Framers feared the reemergence of a corrupt system fostered and perpetuated by the chief executive of the nation.³⁸ Consequently, concern about limiting pardon power authority was a substantial topic in the history of the Constitution's adoption.³⁹

A scholarly review of that history shows that, during the Constitutional Convention and subsequent ratification debates, consideration of protections against abuse of the pardon authority arose several times. This extended to initial drafts of the Constitution that: (1) contained no or limited pardon authority, (2) made pardon authority subject to Senate approval, and (3) excluded treason from pardon authority.⁴⁰ Ultimately, except for excluding cases of impeachment, no protections against pardon abuse were expressly adopted. Instead, congressional power to impeach for abuse of any power, together with the pardon power's exception for impeachment (including allowing subsequent criminal prosecution), was accepted as enough reason for allowing the Constitution's ratification without other *express* constraints on the pardon power.⁴¹

Given that the Framers discussed pardon abuse with great concern, it is evident that they did not abide the notion that the pardon power's purposes and objectives comprised grounds that were unlimited or absolute, including use of the power for abuse.⁴² Expressly and repeatedly, "[they] worried that a pardon authority that extended to all offenses, even treason, could be employed by a president to conceal his own misdeeds by pardoning his confederates."⁴³ Such worries, however, were mollified by the Constitution's provision for impeachment.⁴⁴

This express and extensive concern about abuse of the pardon power, despite the Framers offering only impeachment as the protection, is an important takeaway from the drafting history of the Constitution. It is critical to distinguish between what was then expressly considered and believed to be adequate

37. *Id.* at 436. Think, that is, of the King's abusive control of the legislative, executive, and judicial functions of government.

38. *See id.* at 438 (detailing Framer's recognition of need for strong, energetic executive balanced against fear of renewal of monarchical rule).

39. *See id.* at 438, 446 (calling fear of excessive pardon authority integral to American Revolution and connecting Framers' suspicion of unchecked pardon power to association with monarchy). Preceding the Constitution's adoption, several state constitutions considered control of pardon authority through the legislature by allowing the legislature to statutorily determine the scope of executive pardon authority or giving the legislature a veto over pardons of treason, murder, and other offenses. *See id.* at 446.

40. *See* Bowman, *supra* note 33, at 446-49.

41. *See id.* at 449 (explaining briefly, ratification history of pardon power).

42. *See id.* at 446-49 (highlighting Framers' concern for unchecked pardon power).

43. *Id.* at 447-48.

44. *See id.* at 447-49.

extrinsic protection against pardon power abuse—impeachment and reserving subsequent criminal prosecution—and the Framers’ overarching concern about pardon abuse, which is ameliorated by focusing on the purposes and objectives they expressed for granting the pardon power. Although there is no evidence in the debates of any consideration or appreciation of the potential for judicial review of pardon grants, or of any power’s exercise based on intrinsic limitations, neither is there any evidence that the Framers rejected such review. It is only evident that they *believed*, vainly in hindsight, that the threat of impeachment and criminal prosecution would be enough to keep abuse of the power in timely check.⁴⁵ However expeditiously impeachment proceedings could have been conducted in 1788, recent history has demonstrated the prodigious damage to democracy that is doable while such proceedings, fallible themselves, are conducted today.

It is neither logical nor reasonable to conclude—simply because impeachment was the only action *expressly* recognized in the adoption of the Constitution as a protection against pardon abuse—that the Framers necessarily rejected a limitation inherent in the very nature of every juridical power and, therefore, inherent in the constitutional grants of power themselves. Regarding the pardon power, there was neither a word about the matter in the history of the Constitution’s adoption nor any suggestion that the Constitution was intended to suspend a fundamental legal principle regarding the nature of juridical powers solely with regard to the pardon power.⁴⁶

The purposes and objectives of constitutional power grants limit the grounds for the exercise of any power granted in the Constitution, including the pardon power, and, thereby, offer protections against the abuse of any power. Since the Constitution’s early days, the Supreme Court has repeatedly referred to such powers’ purposes and objectives, in challenges to the exercise of constitutional powers, in order to construe and limit their reach.⁴⁷ Moreover, because those limitations may, according to that accepted principle of constitutional

45. That the Framers’ believed impeachment was a sufficient answer to pardon power abuse and failed to consider whether the Constitution lacked, much less necessarily precluded, other avenues of constitutionally based recourse is evident from James Madison’s remarks in response to concerns about abuse:

There is one security in this case to which gentlemen may not have adverted: if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him . . . *This is a great security.*

3 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 498 (2d ed. 1836) (emphasis added).

46. *See generally id.* (showing Framers offered no suggestion on limitation of juridical powers during constitutional debates).

47. *See supra* notes 17, 23–26 and accompanying text (highlighting Supreme Court jurisprudence limiting commerce and other federal powers).

construction, be found within the purposes and objectives of power grants, they may “be found in the Constitution itself.”⁴⁸

To be sure, there are passing statements in early Supreme Court decisions that suggest that the pardon power is unlimited. In *United States v. Klein*, the Court observed, “the executive alone is [e]ntrusted the power of pardon; and it is granted without limit.”⁴⁹ In *Ex parte Garland*, the court stated, the “power thus conferred is unlimited, with the [impeachment] exception stated.”⁵⁰ In other cases, however, there were statements that did not expressly recognize that the grounds for granting pardons were limited but suggested that the pardon power’s lawful scope was bounded.⁵¹

More recently, the Supreme Court observed in *Connecticut Board of Pardons v. Dumschat*⁵² that, “[u]nlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.”⁵³ This broad but equivocal observation still does not signify judicial recognition of keeping hands off the pardon power,

48. See *Schick v. Reed*, 419 U.S. 256, 267 (1974) (requiring that limitations on the pardon power be found expressly or impliedly in Constitution).

49. See *United States v. Klein*, 80 U.S. 128, 147 (1871).

50. See *Ex parte Garland*, 71 U.S. 333, 380 (1866). The notion that the pardon power is unbridled likely took root with Hamilton’s description of the power in *The Federalist*: “Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.” THE FEDERALIST NO. 74 (Alexander Hamilton). Hamilton’s words, however, belie absolute power because the ability to exercise the power was to “be as little as possible fettered or embarrassed,” not *entirely* unfettered or unembarrassed. See *id.* (emphasis added). Nor does the humanity Hamilton presupposed by the pardon power’s exercise mean that he intended or allowed for tolerating its abuse. Similarly, Hamilton’s position in *The Federalist*—that pardon decisions should be made by one person—does not betoken belief in the need for the decisionmaker’s, particularly the President’s, absolute autonomy. Hamilton’s reason for his position was explicit and otherwise:

As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance . . . [A]s men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these accounts, one man appears to be a more eligible dispenser of the mercy of government, than a body of men.

Id. In short, the Framer’s idea of a minimally fettered pardon power was not absolute, contrary to the way it has since been loosely described in dicta and commentary.

51. See *Knote v. United States*, 95 U.S. 149, 154 (1877) (acknowledging broad pardon power but noting presidential power still limited). The Court elaborated on its extent by stating: “*However large* . . . may be the power of pardon possessed by the President, and *however extended* may be its application,” there are constitutional limitations external to it. See *id.* at 154 (emphasis added). Further, the Court has expressly noted that the pardon power “conveys only the idea of an absolute power *as to the purpose or object for which it is given.*” *Ex parte Wells*, 59 U.S. 307, 314 (1855) (emphasis added). Moreover, in neither *Klein* nor *Garland* were the grounds necessary for a valid pardon at issue, much less the limits of those grounds. See 80 U.S. at 147; 71 U.S. at 380. Nor, until recently, have there been contemporary circumstances that have pressed for a careful consideration of what grounds were valid for the power’s exercise.

52. 452 U.S. 458 (1982).

53. See *id.* at 464 (noting differences in rights to post-conviction relief procedures).

at least where the sufficiency of the grounds for granting a pardon is called into question. That matter was not at issue in *Dumschat*, given that the case did not involve any challenge to whether valid grounds existed for the grant of a pardon.⁵⁴ Instead, the Court considered the applicability of federal due process protections to Connecticut's processing of commutation requests for state crimes.⁵⁵ The Court held that the respondents had no liberty interest in state commutation procedures that federal due process protected.⁵⁶ The case did not discuss the justiciability of a challenge to the sufficiency of the grounds for a federal pardon; rather, the question before the Court concerned whether state prisoners had any interests in seeking state pardons or commutations that federal procedural due process protected, thereby entitling them to judicial review of the procedures for the grant of state pardons and commutations.⁵⁷ It is basic that "broad, general statements in Supreme Court opinions that were unnecessary to the decision are not automatically applicable to later cases, especially those addressing different questions," and, it should be added, different and more imperative circumstances.⁵⁸

B. The Constitution's Separation of Powers Does Not Preclude Judicial Review of Pardon Grants

After considering potential but nevertheless insufficient limitations on the exercise of powers granted in the proposed Constitution, James Madison rhetorically asked in *The Federalist*, how, as a practical matter, the new republic could maintain the division of power as provided in the Constitution.⁵⁹ His answer:

The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior

54. See *id.* at 465-66 (challenging denial of post-conviction relief for want of standards to guide the decisionmaker).

55. See *id.* (explaining respondents' legal argument and analyzing due process implications).

56. See *Dumschat*, 452 U.S. at 467 (holding no liberty interest warranting due process protection).

57. See *id.* at 463-64 (explaining basis of case was due process). A plurality of the Court repeated the *Dumschat* dictum in another case involving federal due process claims and state post-conviction proceedings, but, as in *Dumschat*, the case law has no bearing on the amenability of federal pardons to judicial review. See *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 280 (1998). Because the power to grant state pardons and commutations is solely a matter of state law and the grant of pardons and commutations a matter of state privilege—never a governor's duty or a prisoner's right—a state would not violate the Constitution by explicitly providing that the grounds for exercise of those powers are within a governor's absolute and unreviewable discretion. See *Dumschat*, 452 U.S. at 467 (allowing governors freedom from explaining grants of post-conviction relief when not acting on prescribed grounds for such relief). Moreover, expressly leaving open the need for judicial review, Justice O'Connor noted in *Woodard* that "[j]udicial intervention might, for example, be warranted . . . whereby 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." See 523 U.S. at 289 (O'Connor, J., concurring).

58. See Kent, *supra* note 17; see also David Klein & Neal Devins, *Dicta, Schmicta: Theory Versus Practice in Lower Court Decision Making*, 54 WM. & MARY L. REV. 2021, 2027-32 (2013).

59. THE FEDERALIST NO. 51 (James Madison).

structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.⁶⁰

Thus, Madison admonished the necessity of a constitutional system of checks and balances to prevent a monopoly of power by one branch of government.⁶¹ Moreover, he argued the Constitution “indisputably” created such a system of checks and balances.⁶²

For over two hundred years the judiciary has remained the branch of government empowered by the Constitution to determine, with finality, the intrinsic and extrinsic limitations on any power or privilege granted under the Constitution or otherwise established.⁶³ Within this judicial review rests the prerogative of the Judicial Branch to maintain the essential balance of power among the Constitution’s three branches of government and between the states and federal government. The Supreme Court often exercises judicial review when deciding cases involving constitutional grants of power whose scope and boundaries require refinement.⁶⁴ There is nothing about the juridical nature of the pardon power that makes it any less amenable to judicial construction than other such grants of power. Recent history evidences that a pardon power not subject to the same judicial review as other constitutional powers may become a tool for dismantling the system of checks and balances so vital to the preservation of democratic government.

Determining whether an issue of constitutional power has been committed exclusively to a separate branch of government, or determining whether that

60. *Id.*

61. *Id.*

62. See *Dames & Moore v. Regan*, 453 U.S. 654, 662 (1981).

63. See *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (declaring judicial branch’s role to interpret law). Chief Justice Marshall’s decision in *Marbury* established that “[i]t is emphatically the province and duty of the Judicial Department to say what the law is.” *Id.* While other branches regularly express views on constitutional matters, for over two centuries the Supreme Court has left undisturbed the *Marbury* principle that its rulings are paramount to the views of those branches. Neither the Legislative nor the Executive Branch has ever seriously challenged the binding legal effect of a final ruling by the Judicial Branch, as distinguished from the enforceability of a ruling. For example, in response to Justice Marshall’s decision in *Worcester v. Georgia*, 31 U.S. 515 (1832), President Jackson acknowledged the Judicial Branch’s authority while highlighting its “least dangerous” character, due to its limited enforcement powers. See Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts*, THE ATLANTIC (Feb. 7, 2019), <https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144/> [https://perma.cc/DJ6N-5DG3] (discussing Jackson’s constitutional battle with Marshall); Jeffrey Rosen, *Supreme Court History: The First One Hundred Years*, THIRTEEN PBS (Dec. 2006), <https://www.thirteen.org/wnet/supremecourt/antebellum/history2.html> [https://perma.cc/6WW9-ZPXG] (explaining Jackson’s response to Marshall’s decision in *Worcester v. Georgia*); see also THE FEDERALIST NO. 78 (Alexander Hamilton) (noting liberty would be imperiled if Executive and Legislative Branches had any “power of judging” and “interpretation of the laws,” which “is the proper and peculiar province of the courts”).

64. See, e.g., *United States v. Lopez*, 514 U.S. 549, 565-66 (1995) (noting boundary between powers granted to federal government in Constitution and those it reserves to states); *Powell v. McCormack*, 395 U.S. 486, 547 (1969) (discussing congressional power to preclude seating of elected members); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (addressing executive power to appropriate private property in wartime).

branch constitutionally exceeded its exercise of power, is a “delicate” responsibility of the Supreme Court.⁶⁵ Pertaining to executive powers specifically, it has been long held that “when the President takes official action, the Court has the authority to determine whether he has acted within the law.”⁶⁶ This “long history of judicial review of executive action[] trac[es] back to England.”⁶⁷ Moreover, in determining the scope of constitutional power grants, the judiciary has engaged in and indulged its own fact finding, rather than deferring to fact finding by the Legislative or Executive Branches.⁶⁸

The text of the Constitution no more precludes entirely from judicial review issues related to the grounds sufficient for a valid exercise of the pardon power, including factual determinations whether the grounds for exercise exist, than it does for reviewing the grounds necessary for the valid exercise of any other enumerated power in the Constitution.⁶⁹ The commerce power is a paradigm. Although the Legislative Branch’s commerce power once seemed virtually

65. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

66. *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (describing presidential immunity to civil subpoena and deposition); *see, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 696 (1988) (reviewing executive role of initiating independent counsel investigations); *Train v. City of New York*, 420 U.S. 35, 41 (1975) (evaluating executive power to impound congressionally appropriated funds); *Youngstown*, 343 U.S. at 587 (1952) (assessing constitutionality of executive order authorizing seizure of steel mills during Korean War); *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944) (assessing constitutionality of executive order authorizing Japanese internment camps during World War II); *Myers v. United States*, 272 U.S. 52, 163-64 (1926) (summarizing executive appointment and removal power); *see also* John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 144 (1998) (characterizing issue of whether official action exceeds constitutional or statutory authorization the cornerstone of judicial review); Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1199-1201 (2009) (discussing core importance of ability to challenge judicially whether public official’s action exceeds their legal authorization).

67. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). Although it was Hamilton’s view that pardon decisions should be exclusively vested in the President, that view should not be taken as insulating exercises of the power pardon from judicial review. *See* THE FEDERALIST NO. 74 (Alexander Hamilton) (arguing one person “appears more eligible” to give mercy than government body); *supra* note 50 (discussing Hamilton’s argument). Hamilton was merely explaining why pardon decisions should first be made exclusively by one decisionmaker, the President being the obvious candidate. To preclude judicial review of power, including the pardon power, just because it is exercisable by only the President would insulate direct presidential exercises of all Article II powers from judicial review. Such review does not displace the President; rather, judicial review only determines whether a particular decision is within the President’s power.

68. *See, e.g.*, *Shelby County v. Holder*, 570 U.S. 529, 550-51, 557 (2013) (deciding factual basis for Voting Rights Act no longer justified congressional imposition of preclearance requirement); *see also* Neal Devins, *Congressional Fact Finding and the Scope of Judicial Review: A Preliminary Analysis*, 50 DUKE L.J. 1169, 1170 (2001) (arguing because Congress often lacks institutional incentives to take factfinding seriously, it is doubtful that Congress is better than the Supreme Court at factfinding); Allison O. Larsen, *Confronting Supreme Court Fact Finding*, 98 VA. L. REV. 1255, 1305 (2012) (discussing appellate fact finding and its propriety).

69. Notably, the Supreme Court has reviewed several cases involving pardon power issues other than the grounds sufficient for a valid exercise of the power. *See Ex parte Grossman*, 267 U.S. 87, 122 (1925) (holding criminal but not civil contempt pardonable); *Carlesi v. New York*, 233 U.S. 51, 59 (1914) (rejecting argument that pardon precludes consideration of the fact of federal conviction for the underlying crime in subsequent state charge of habitual criminal conduct); *Boyd v. United States*, 142 U.S. 450, 454 (1890) (restoring pardoned felon’s witness competency); *Ex parte Garland*, 71 U.S. 333, 380 (1866) (discussing widespread applicability of pardon power across offenses regardless of timing).

limitless, the Supreme Court has recently decided cases regularly circumscribing the scope of the power.⁷⁰

If all pardons were grantable at the President's absolute discretion, then pronouncements of the pardon power's purposes and objectives in English common law, *The Federalist*, and Supreme Court decisions would be rendered meaningless. Indeed, in an early decision construing the legal effect of a pardon, the Supreme Court was noticeably silent about any limitation on *judicial* review of the pardon power, despite stating that the pardon power "is not subject to *legislative* control" and that the power "cannot be fettered by any *legislative* restrictions."⁷¹

As with the general tenor of the law supporting judicial review of executive power, the political question doctrine does not bar judicial review of the grounds sufficient for a lawful pardon grant. The Supreme Court expressly recognized in *Baker* that "it is the *relationship* between the judiciary and the coordinate branches of the Federal Government . . . which gives rise to the 'political question.'"⁷² That some issue involves political subjects, such as voting or an elected office, is not itself reason for deeming the issue a political question. It is, therefore, the judiciary's function—as it relates to the character of its assigned constitutional role—that is the focus of the political question inquiry. Deciding whether executive or legislative action is within powers the Constitution grants or whether the Constitution prohibits such action is at the core of the judiciary's role "to say what the law is," particularly in protecting the constitutional system of checks and balances.⁷³ The Court's repeated decisions construing the scope of executive powers put to rest, in this regard, concerns involving the judiciary's relationship to the Executive and Legislative Branches. The political question

70. Compare *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (discussing Congress's broad authority to regulate interstate commerce), and *Gibbons v. Odgen*, 22 U.S. 1, 73-75 (1824) (arguing for broad exercise of commerce power), with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535-36 (2012) (recognizing boundary between commerce power and powers reserved in Constitution to states), and *United States v. Lopez*, 514 U.S. 549, 567-68 (1995) (identifying limits to Congress's commerce power).

71. *Garland*, 71 U.S. at 380 (emphasis added); cf. *United States v. Fokker Servs. B.V.*, 818 F.3d 733, 741 (D.C. Cir. 2016) (noting existing but limited nature of judicial authority when reviewing executive exercise of discretion over charging decisions).

72. 369 U.S. 186, 210 (1962) (emphasis added).

73. See *id.* at 210-11 (discussing rationale behind political question doctrine). The Court in *Baker* observed:

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 for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a courts undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217; see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494 (2019) (addressing standards for judicial review of partisan gerrymandering challenges).

determination is only properly addressed analytically, by focusing on whether judicial review of the matter implicates concerns as to Judicial Branch competence. To view any issue involving the scope of Executive Branch power regarding political matters as a political question *per se* would enervate the judiciary's own constitutional role, thereby undermining the system of checks and balances that Madison intended.

Moreover, where the concern is not just determining the scope of power or protecting the prerogative of power but also the aggrandizement of power for its own sake, the balance of power among the three branches of government is unavoidably and preeminently at stake. Concentrated power's threat to that balance is particularly great when executive actions aim to subvert criminal accountability and obstruct justice.⁷⁴ In particular, use of the pardon power to shield and, thereby, facilitate unlawful conduct or obstruct justice is the paradigm of conduct aimed at the aggrandizement of power. Accordingly, questions of whether executive exercise of the pardon power involve undue aggrandizement or entrenchment of power are certainly in the nature of those that, as Chief Justice Marshall cautioned in *Cohens*, the courts "cannot avoid."⁷⁵

The success of the "American Experiment" is in no small measure due to the Constitution's system of checks and balances—implemented through the Constitution's *separating* powers—not the *insulating* of any branch from the powers of the other two. To endure, however, that system must be dynamic with time, adjust to the *de facto* ebb and flow of power among the three branches, and avoid the aggrandizement or entrenchment of power in any one branch.⁷⁶ Though long

74. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (discussing apprehension of unlimited executive power in United States history). Justice Jackson, in his concurrence, discusses the importance of limiting executive power, stating: "The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image." See *id.*; see generally Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1810 (2019) (discussing current separation of powers jurisprudence). Manheim and Watts note that:

[P]articularly in light of the developments of the last century—which has seen a massive transfer of policymaking authority from the legislative branch to the executive branch, coupled with increasingly aggressive attempts by presidents to control that policymaking—separation-of-powers principles cut not only in the direction of *protecting* the president. . . . They also cut in the direction of *checking* the president, to help ensure that he remains within legal limits.

Manheim & Watts, *supra*, at 1810. Likewise, the Court has observed that "[w]hen judicial action is needed to serve broad public interests—as when the Court acts, not in derogation of the separation of powers, but to maintain their proper balance, or to vindicate *the public interest in an ongoing criminal prosecution*—the exercise of jurisdiction has been held warranted." *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982) (emphasis added) (citations omitted).

75. See *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (emphasizing judiciary's responsibility to decide cases properly brought before it).

76. "[T]here is fairly strong evidence that the Framers meant for the allocation of powers to be adjusted among the branches over time." Erwin Chemerinsky, *A Paradox Without Principle: A Comment on the Burger*

viewed as inconsequential to the balance of power, recent history has shown that this view should no longer be the case for the pardon power. The role of judicial review in deciding the reach and limitations of powers is vital to the system's continued success and the ultimate viability of democratic government. No less is that role with respect to the pardon power.

C. Prudential Considerations Do Not Preclude Judicial Review of Pardon Grants

Apart from the legal constraints that the Constitution's separation of powers doctrine poses for the exercise of judicial power, courts decline to act where they are empowered to do so for prudential considerations.⁷⁷ The two prudential considerations relevant to pardons that motivate courts to decline to act are: (1) institutional concerns about courts becoming embroiled in controversy and (2) lack of sufficient judicial competence as to the subject matter of a controversy, including the inability to ascertain judicially manageable standards for assessing the validity of executive or legislative action.⁷⁸ Neither of these considerations should restrain judicial review of the sufficiency of the grounds for a valid pardon grant.

First, the possibility that the judiciary may be exposed to controversy or drug into contested domestic matters should not prevent reviewing exercises of the pardon power. The Supreme Court has rendered decisions in circumstances exceedingly more fraught with significant social, legal, or economic impacts than would likely ever accompany a decision invalidating a pardon grant.⁷⁹ Indeed,

Court's Jurisprudence in Separation of Powers Cases, 60 S. CAL. L. REV. 1083, 1107-08 (1987). According to scholars:

Areas of presidential power that typically see little judicial involvement might become areas of greater involvement under certain conditions. Moreover, the likelihood of judicial review is probably affected by the extent to which courts perceive the President to be stretching traditional legal understandings. As a result, it might be more accurate to describe the constitutional law of presidential power as judicially underenforced, rather than unenforceable.

Bradley & Morrison, *supra* note 29, at 1131.

77. See Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1015-17, 1048 (1994) (discussing prudential concerns relied on by courts to avoid answering constitutional questions, even where jurisdiction proper).

78. Given the potentially high profile of many pardon grants and the difficulty of defining pardon objectives like mercy and grace, these two considerations inhere in the subject matter of pardon decisions. By contrast, other prudential justiciability considerations, such as standing, ripeness, mootness, and the bar to advisory opinions (except in some repetitive mootness scenarios) are a function of the posture of all cases subject to Article III's case and controversy requirement and do not inhere in cases of particular subject matter.

79. See, e.g., *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022) (overturning formerly constitutional privilege of abortion); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491 (2019) (analyzing justiciability of challenges to partisan gerrymandering); *Bush v. Gore*, 531 U.S. 98, 103 (2000) (finding violation of equal protection clause determining the outcome of a presidential election). "[W]ith respect to issues of presidential power, there are few situations in which the prospect of judicial review is actually zero. If the Supreme Court can decide *Bush v. Gore* and the war on terror cases, it can decide a lot." Bradley & Morrison, *supra* note 29, at 1130.

the Court's decades-long efforts to refine the reach and limitations of privileges and prohibitions under the Free Exercise and Establishment Clauses have been and promise to be fertile ground for notable controversy but are nevertheless the subjects of fulsome judicial review.⁸⁰

Surely, if any early pardon grants had the gravity of other historical exercises of executive power, prudence might well have engendered not judicial reticence but subjection of those grants to judicial review. As discussed in Part IV, however, recent history has amply demonstrated that abuse of the pardon power in certain circumstances may have untoward consequences, with much more gravity than what the Framers anticipated impeachment could be relied on to prevent or timely remediate.⁸¹ That history also shows that allowing the pardon power's abuse creates more real and palpable danger to the balance of powers than is possible from even a questionable judicial invalidation of a pardon.⁸²

Second, pardons do not involve complex concepts or other special expertise that should prevent the judiciary from reviewing the constitutional sufficiency of their grounds. Supreme Court decisions involving patentability⁸³ and antitrust principles,⁸⁴ for example, have involved issues and concepts far more complex than whether the grant of a particular pardon is within the purposes and objectives of the pardon power. In reality, when determining whether judicially discoverable and manageable standards exist for an adjudication, the Supreme Court often makes a subjective "all-things-considered assessment of whether the costs of allowing adjudication to proceed would exceed the benefits."⁸⁵ As Justice Stevens admonished in *Vieth v. Jubelirer*,⁸⁶ "it is not the unavailability of judicially manageable standards that drives today's decision [allowing partisan gerrymandering]. It is, instead, a *failure of judicial will* to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially."⁸⁷ In short, the concern about manageable standards is more a matter of

80. See generally *The Supreme Court, 2018 Term—Leading Cases*, 133 HARV. L. REV. 262 (2019) (recounting Court's most recent religious clause tribulations).

81. See *infra* Part IV, for a description of recent examples of unfettered presidential abuse of the pardon power.

82. Chief Justice Marshall's admonishment in *Cohens* against judicial reticence on questions "we would gladly avoid" should again come to mind. See *Cohens v. Virginia*, 19 U.S. 264, 404 (1821).

83. See *Alice Corp. Pty. Ltd. v. CLS Bank, Int'l*, 573 U.S. 208, 212 (2014) (analyzing patentability of computer scheme for mitigating payment risk in settlement of financial transactions); *Mayo Collaborative Servs. v. Prometheus Lab'ys, Inc.*, 566 U.S. 66, 76 (2012) (discussing patentability of process involving blood biochemistry).

84. See *Cont'l Television, Co. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977) (discussing legality of vertical trade restraints).

85. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1294-95, 1302 (2006) (examining notion of judicially ascertainable and manageable standards and realities of its application in practice).

86. 541 U.S. 267 (2004).

87. *Id.* at 341 (Stevens, J., dissenting) (emphasis added). Compare *Shaw v. Reno*, 509 U.S. 630, 658 (1993) (holding racial gerrymandering cases justiciable), with *Rucho v. Common Cause*, 139 S. Ct. 2484, 2502-07 (2019) (holding that, for want of a judicially ascertainable and manageable standard, partisan gerrymandering claims present political questions beyond the reach of the federal courts). "[I]t is a fairly common fallacy in legal and

expedience than it is lack of judicial competence to develop and apply appropriate review standards. Part III of this Article proposes, provides, and justifies a manageable standard for reviewing the validity of pardon grants.

Nor does the Framers' granting the pardon power to the President suggest their belief that no one but a president was competent to make pardon decisions. Rather, they believed that pardon decisions made by one and only one person would result in a heightened sense of responsibility and encourage prudence in the decision to grant or deny a pardon. At least in the first instance, the President, preeminently charged in the Constitution with the enforcing the laws, was the obvious choice for that one person.⁸⁸ The Framers' aim to achieve responsible and prudent pardon decisions would be thwarted were it not possible to challenge pardon decisions where the circumstances significantly suggest that a president is abusing the pardon power in aid of personal or other improper interests.

The President has the exclusive prerogative to pardon, not the unique expertise. In fact, the vast majority of pardon applications the Executive Branch receives are processed through the Office of the Pardon Attorney in the Department of Justice.⁸⁹ The Office of the Pardon Attorney is tasked with evaluating and making recommendations to the President in response to petitions seeking a pardon or commutation of sentence.⁹⁰ Notably, the Office is comprised of lawyers who, like judges that would review pardon grants, are conversant with legal principles and reasoning—the same cannot necessarily be said of every president.⁹¹

Judicially speaking, there should be nothing remarkable or exceptional about deciding a question concerning the scope of the grounds for validly exercising

moral argumentation to conclude that all is lost because there is a field of uncertainty to which our carefully formulated moral [and legal] principles cannot be applied with precision." John C. Ford, *The Morality of Obliteration Bombing*, in *WAR AND MORALITY* 19 (Richard A. Wasserstrom ed., 1970).

88. See THE FEDERALIST NO. 74 (Alexander Hamilton):

As the sense of responsibility is always strongest, in proportion as it is to undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance.

89. See *Pardon Statistics*, OFF. OF PARDON ATT'Y: U.S. DEP'T OF JUST., <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/5RAE-EHCT>] (showing total pardon petitions received in each administration starting with President Clinton numbering in the thousands). According to one analysis, the Pardon Attorney recommended only 25 of 238 total pardons and commutations that Trump granted, the lowest level among presidents since 1989, turning Pardon Attorney circumvention by presidents from an exception to the norm. See Matt Gluck & Jack Goldsmith, *Trump and the Pardon Attorney*, LAWFARE INST. (July 6, 2021), <https://www.lawfare-media.org/article/trump-and-pardon-attorney#:~:text=In%20a%20new%20essay%20in,11%20percent%2C-%20were%20so%20recommended> [<https://perma.cc/Z9QM-ATGD>]; see also Eckstein & Colby, *supra* note 4, at 106-07 (explaining DOJ pardon application review process).

90. See 28 U.S.C. §§ 509-11 (outlining Attorney General's role in pardon process); 28 C.F.R. §§ 0.35-0.36 (prescribing role of Pardon Attorney); U.S. DEPT. OF JUST., JUST. MANUAL § 9-140.110 (2018), <https://www.justice.gov/jm/jm-9-140000-pardon-attorney> [<https://perma.cc/7Z9X-T8VF>] (providing guidance on operation of Office of the Pardon Attorney).

91. See U.S. DEPT. OF JUST., *supra* note 90 § 9-140.111 (explaining DOJ solicitation of input from relevant lawyers and judges in processing pardon applications).

powers in general, including the pardon power. Rather, in both public and private contexts, courts routinely resolve disputes concerning the scope of juridical powers, including constitutional powers, and the sufficiency of foundations for their exercise.⁹² Moreover, courts themselves regularly deal with criminal justice issues, at both the trial and appellate court levels, including issues involving appropriate sentencing.⁹³ And, surely, if the Supreme Court can undertake to ascertain and apply standards for reviewing the limitations that the Establishment and Free Exercise Clauses impose on official action, determining standards for limitations on pardon grants should be well within the judiciary's reach.⁹⁴

*D. The Pardon Power's Role as a Check on the Criminal Justice System
Would Not Be Compromised by Judicial Review of the Power's Exercise*

The pardon power has been characterized as a constitutional check against the judiciary, specifically serving, as the Framers intended, to protect citizens from what in particular cases would render the law unduly harsh.⁹⁵ As Alexander Hamilton observed in *The Federalist*, without the pardon power, the law "would wear a countenance too sanguinary and cruel."⁹⁶ Even as such a check, however, the pardon power is not a check subordinating the judiciary's power to review the executive's enforcement of the law. A pardon merely succeeds the initial conviction and punishment imposed by a trial court in a particular case, sometimes by years and often for reasons having nothing to do with the validity of the conviction or propriety of the sentence imposed, both of which were also subject to initial judicial review on direct appeal from the conviction and original sentencing. Pardons, therefore, are not so much an executive check on the judiciary as they are a form of relief within the larger criminal justice system.

Invalidation of pardons upon judicial review would no more intrude on the law's administration than any other judicial invalidation of an exercise of executive power. Indeed, as argued here, were a president to justify a particular pardon as a check on the judiciary, without express or apparent justification on any grounds that a pardon may be lawfully based, the judiciary should still have the

92. See *supra* notes 16-29 and accompanying text (discussing powers as juridical concepts and judicial construction of their scopes and limitations as such).

93. See *Glossip v. Gross*, 576 U.S. 863, 867 (2015) (laying out standards for cruel or unusual methods of imposing death sentence); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (holding life imprisonment for non-homicidal juvenile offender cruel and unusual punishment); *Roper v. Simmons*, 543 U.S. 551, 578-79 (2005) (holding death penalty unconstitutional for crimes committed under age eighteen); *Enmund v. Florida*, 458 U.S. 782, 825-26 (1982) (holding imposition of death penalty only if proportional to crime); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (noting court cannot arbitrarily impose death penalty).

94. See *supra* note 80 and accompanying text (noting Court's longstanding, continuing efforts to ascertain and apply justiciable standards in religion clause context).

95. See *Bowman*, *supra* note 33, at 496-97 (describing pardon power as check on judicial excess); Eckstein & Colby, *supra* note 4, at 103-04 (noting pardon power grant was intended as a check against the judiciary).

96. THE FEDERALIST NO. 74 (Alexander Hamilton).

final word on the validity of that pardon by way of judicial review.⁹⁷ If, upon challenge, the reviewing court were to determine that there were no proper grounds or that the grounds were not adequately shown, the putative check would be in excess of the executive's power and never authorized. If, however, the reviewing court were to determine that proper grounds for a pardon were adequately shown, the reviewing court would do nothing more than recognize that the presidential check, the pardon, was within the executive's power to exercise. In the larger picture, the pardon power's beneficence remains essentially intact and effective, subject to the potential for invalidation of a particular pardon grant upon judicial review.

III. THERE ARE JUDICIALLY ASCERTAINABLE AND MANAGEABLE STANDARDS FOR REVIEWING PARDON GRANTS

Effective judicial review of Executive Branch action must satisfy two requirements. First, there must be a useful standard for assessing the validity of the official action.⁹⁸ As discussed, this requires determining whether the action claimed to be authorized by a power achieves, in some sufficient measure, an intended purpose or objective of the power. For a pardon grant to pass judicial muster, Section III.A will argue that a justified and therefore valid pardon must more than insignificantly achieve an intended purpose or objective of the pardon power.

The second requirement is determining an appropriate level of scrutiny for the justification's factual foundation. To validate executive action, a reviewing court, applying the appropriate level of scrutiny, must be able to find from the body of factual information supporting the justification, its foundation, that the justification exists, meaning that the action achieves—in the measure considered sufficient—an intended purpose or objective of the power claimed to authorize

97. Not all pardons are granted after conviction and sentencing. Where a pardon precedes conviction and sentencing, the check is not initially by the executive on the judiciary, but by the executive on itself, subject thereafter to the judicial review urged here.

98. See Davis, *supra* note 19, at 48, 58 n.50 (discussing standards of review). For example, under the APA, which generally applies to administrative action by departments and agencies, official action is unlawful where it is "contrary to law," including "contrary to constitutional . . . power" or "in excess of statutory . . . authority." 5 U.S.C. §§ 701(b)(1), 706(2)(A)-(C) (emphasis added). Validity is similarly an element of review standards in appeals from trial court rulings. The trial court will be reversed if its trial decisions on issues of law are contrary to law and—where it is empowered as the factfinder—its factual findings are "erroneous." See Davis, *supra* note 19, at 48 (explaining standards of appellate review). To be sure, the appellant must show that, based on the record, the trial court "clearly" erred, a standard of scrutiny, not validity. See *id.* (noting high level of deference given to trial court). Although there are parallels among the standards for judicial review of executive, legislative and judicial decisions and actions, there are also significant differences in nomenclature and substance between them. See generally R. Randall Kelso, *Justifying the Supreme Court's Standards of Review*, 52 SAINT MARY'S L.J. 973 (2021) (primarily discussing review standards for legislative action); Kelly Kunsch, *Standard of Review (State and Federal): A Primer*, 18 SEA. U. L. REV. 11 (1994) (distinguishing among review standards for executive, judicial and legislative action); DANIEL SOLOMON ET AL., GEO. UNIV. L. CTR., IDENTIFYING AND UNDERSTANDING STANDARDS OF REVIEW (Julia Rugg rev. 2019) (equating, for example, "rational basis" review with "substantial evidence" review).

the action.⁹⁹ Accordingly, for the level of scrutiny determined appropriate to permit a reviewing court to find that an official's action is justified, the official must provide a factual foundation for the justification sufficient to survive that scrutiny.¹⁰⁰ Section III.B.2 will argue that the foundation for a pardon fails scrutiny and the pardon should, therefore, be invalidated, where any rational adjudicator *could not* conclude from the foundation adduced that the pardon more than insignificantly achieves a valid purpose or objective of the pardon power.

A. A Valid Exercise of the Pardon Power Must Appreciably Achieve a Purpose or Objective of the Pardon Power

Regarding the validity of the justification, it is submitted that a pardon grant must more than insignificantly achieve a purpose or objective of the pardon power. In other words, for convenience of expression going forward, the pardon grant must "appreciably" achieve a purpose or objective of the pardon power. This minimal measure of the required effect aligns with the Framers' view that the pardon power "should be as little as possible fettered or embarrassed," without unduly allowing ready evasion and enervation of the justification given and thereby the pardon power's abuse.¹⁰¹ Accordingly, to determine what should be established to validate a pardon grant, it is necessary to ascertain the purposes and objectives of the pardon power.

Though there are many cases where the courts have considered pardon-related issues, such as the legal effects of a pardon or procedures applicable to granting a pardon,¹⁰² there are no cases specifying in a holding the grounds—the necessary purposes or objectives—for granting a pardon. There is, however, ample juridical guidance for determining what these grounds are and the intrinsic limitations they imply for the scope of the pardon power. For starters, the constitutional text of the pardon power's grant, as with the commerce power, provides guidance by stating: "The President . . . shall have power to grant Reprieves and Pardons for Offences."¹⁰³ Few as they are, these words instruct that "reprieves" and "pardons," not mere expungements of convictions for crimes or adjustments of their

99. Under the APA, informal administrative action may not be "arbitrary, capricious, [or] an abuse of discretion." See 5 U.S.C. § 706(2)(A). Administrative action based on a hearing record must be supported by "substantial evidence." See *id.* § 706(2)(E). See *infra* Section III.B.1, for discussion of differences in degree of scrutiny among substantial evidence review, arbitrary and capricious review, and abuse of discretion review and varying degrees of scrutiny within abuse of discretion review.

100. See *infra* Section III.B.3, for a discussion of what should constitute the foundation for justifying a pardon grant.

101. See THE FEDERALIST NO. 74 (Alexander Hamilton). Note that Hamilton's words are "as little as possible fettered or embarrassed," not "unfettered or unembarrassed." See *id.*

102. See, e.g., *Biddle v. Perovich*, 274 U.S. 480, 485 (1927) (reviewing whether convict must consent to sentence commutation); *Carlesi v. New York*, 233 U.S. 51, 59 (1914) (rejecting argument that pardon precludes consideration of the fact of federal conviction for the underlying crime in subsequent state charge of habitual criminal conduct); *Knote v. United States*, 95 U.S. 149, 153-54 (1877) (holding pardon not meant to make whole for deprivations suffered prior to pardon grant); see also Jorgensen, *supra* note 3, at 355 n.6 (1993) (summarizing cases about pardons).

103. U.S. CONST. art. II, § 2.

punishment, are what a president may grant. For that matter, the Constitution does not expressly or implicitly provide that a president may pardon without any discretion. A president may not, therefore, gratuitously void convictions or adjust punishment, contrary to what the words “pardons” and reprieves” connote in their constitutional context.

Blackstone defined pardon grants as the King’s “power to extend mercy, wherever he thinks it is deserved: holding a court of equity in his own breast, to soften the rigor of the general law, in such criminal cases as merit an exemption from punishment.”¹⁰⁴ Blackstone’s statement plainly admits a limitation on the authority described, a limitation determinable from its evident purpose: “to moderate the unjust harshness that will result in some cases from the unyielding imposition of the letter of the law.”¹⁰⁵

In addition to the purpose that Blackstone noted, Alexander Hamilton further elaborated in *The Federalist*:

*Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.*¹⁰⁶

Similarly, Chief Justice Marshall, in *United States v. Wilson*,¹⁰⁷ the Court’s first decision involving pardons, observed that a pardon was “an act of *grace*.”¹⁰⁸ Likewise, though recognizing the breadth of the pardon power, Justice Stephen Field in *Ex parte Garland* defined the power as “[t]he *benign* prerogative of *mercy*.”¹⁰⁹

In more recent constitutional history, *Biddle v. Perovich*, Justice Holmes identified a purpose and objective justifying exercise of the pardon power distinct from its generally moral and ethical purposes and objectives.¹¹⁰ In *Biddle*, Holmes stated that a pardon “[w]hen granted . . . is the determination of the ultimate authority that the *public welfare* will be better served by inflicting less than what the judgment fixed” and that a pardon is “what the law should do for the

104. WILLIAM BLACKSTONE, *Of the Rights of Persons*, in 1 COMMENTARIES ON THE LAWS OF ENGLAND 396-97 (David Lemmings ed., Oxford Eds. 2018) (1769) (defining King’s pardon power under English law).

105. Bowman, *supra* note 33, at 434-45.

106. THE FEDERALIST NO. 74 (Alexander Hamilton) (emphasis added).

107. 32 U.S. 150 (1833).

108. *Id.* at 160 (emphasis added).

109. 71 U.S. at 380 (emphasis added) (noting Congress cannot limit nor exclude effects of pardon). “Without such a power . . . [government] would be most imperfect and deficient . . . in that attribute of Deity whose judgments are always tempered with *mercy*.” *Ex parte Wells*, 59 U.S. 307, 310 (1855) (emphasis added).

110. See *Biddle v. Perovich*, 274 U.S. 480, 485 (1927) (equating Presidential pardon powers with acts of grace).

welfare of the whole.”¹¹¹ Consistent with, and earlier exemplifying this view, Hamilton wrote in *The Federalist* that in cases of “insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.”¹¹² Accordingly, a pardon that furthers the public interest would also be a pardon based on lawful grounds, but only where the putative pardonee’s (or group of pardonees’) circumstances bear a distinctive relationship to the public benefit offered in justification for a pardon.

A pardon grant adverse to the public welfare would be Hamilton’s pardon that was not a “benign” exercise of the “prerogative” or, therefore, consistent with the pardon power.¹¹³ Prior to *Biddle*, Chief Justice Taft had also noted in 1925 that the executive “shall not exercise [the pardon power] against the public interest.”¹¹⁴ The validity, however, of a pardon that is merciful to the individual or furthers the public interest in some respect while simultaneously adverse to the public interest or welfare depends on balancing these considerations. As discussed in Section III.B.2, the determination of the balance would require due deference to the President.¹¹⁵

To the Framers and early Supreme Court, a pardon was a benign act that either: (1) furthered the public interest on account of some distinctive relationship

111. *Id.* at 486-87 (emphasis added); *see also* Schick v. Reed, 419 U.S. 256, 266 (1974) (recognizing relationship between pardon powers, public policy, and humanitarian impulses); *Wells*, 59 U.S. at 310 (noting pardons avoid government from acting most imperfect and deficient in political morality); Bowman, *supra* note 33, at 428 (distinguishing individual benevolence and the public interest as separate grounds for pardons).

112. THE FEDERALIST NO. 74 (Alexander Hamilton). Pardons justifiable on public interest grounds have been granted in a few notable instances. *See* Murphy v. Ford, 390 F. Supp. 1372, 1374 (W.D. Mich. 1975) (holding President Ford’s pardon of President Nixon justifiable on public interest grounds); JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 35, 137-40 (2009) (discussing President Carter’s proclamation granting amnesty to Vietnam War draft evaders and the validity of President Ford’s pardon of President Nixon); William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 511 (1977) (discussing Lincoln’s pardon of persons who opposed the Union in the Civil War); Zeke Miller & Chris Megerian, *Biden Pardons Thousands for ‘Simple Possession’ of Marijuana*, ASSOCIATED PRESS (Oct. 7, 2022), <https://apnews.com/article/biden-marijuana-government-and-politics-2d5e3d9e2cfbbe3ee114536738894a8> [<https://perma.cc/T89P-NSGU>] (reporting President Biden’s pardon of persons federally convicted for simple possession of marijuana).

113. *See* THE FEDERALIST NO. 74 (Alexander Hamilton) (stating humanity and good policy dictate pardon); *see also Wells*, 59 U.S. at 312 (noting at common law pardons could not be contrary to “the common good”).

114. WILLIAM H. TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 121 (1925). Although furthering the public interest or welfare may be grounds for granting a pardon, whatever would be an overriding public interest concern rendering a bona fide pardon grant “against the public interest,” as opposed to justified by the public interest, would be an extrinsic limitation on the pardon power and not a subject for consideration here. Indeed, where balancing bona fide public interest concerns is at issue, some favoring a pardon grant and some not, the President’s decision that balancing those interests warrants a pardon may well be discretion entitled to complete deference, absent some other extrinsic constitutional limitation on the grant.

115. *See infra* Section III.B.2 (discussing standard appropriate for review of pardon grants). Justice Holmes also stated in *Biddle* that a pardon “is not a private act of grace.” *Biddle*, 274 U.S. at 486. It is far from clear, in fact unlikely, that Justice Holmes intended for his statement to reject “grace” particular to an individual as a ground for a pardon, as the facts in *Biddle* involved a prisoner who was seeking to reject a commutation from death to life imprisonment. *See id.* There is no indication that individual or group forgiveness, mercy, or compassion have ever, since *Biddle*, been rejected as grounds for granting a pardon. *See* CROUCH, *supra* note 112 at 112, at 31.

of the pardonee to the particular public benefit asserted or (2) relieved the putative pardonee from the continued imposition of the criminal law's prosecutorial and punitive burdens, where their continuation would be *particularly* unfortunate, inhumane, cruel, merciless or no longer justified.¹¹⁶ In a general sense, any action that relieves a person from criminal responsibility or punishment is merciful, but it is not relief whose warrant is distinct to that person's circumstances, thereby justifying a particular pardon. Otherwise, every sanction or burden criminally imposed would be constitutionally deserving of pardon relief, simply because such relief could be characterized, albeit trivially with respect to the pardon power, as merciful.¹¹⁷ Importantly, a pardon granted only as a quid pro quo with or on behalf of the pardonee, a bribe for example, is invalid—it is not an act of “grace” but merely gratitude or greed and not an act of “mercy” but merely remuneration.

As broad as the circumstances are that could warrant a charge, conviction or sentence being considered unfortunate, inhumane, cruel, merciless, or no longer justified, principles do exist for assessing when those circumstances exist. The Office of the Pardon Attorney articulates the factors to be considered when assessing whether a putative pardonee's petition warrants recommendation.¹¹⁸ Unsurprisingly, pardon power abuse occurs most often, if not exclusively, with pardons that presidents unilaterally grant¹¹⁹ without having gone through the procedures and assessment of the Pardon Attorney.¹²⁰ Still, any pardon granted outside of the pardon power's intended purposes and objectives would be in excess of the power and invalid.¹²¹ It cannot be disputed that all official action,

116. See THE FEDERALIST NO. 74 (Alexander Hamilton).

117. Likewise, while the clergy or psychotherapists would counsel individuals, including a president, to be merciful with oneself, it is doubtful that such mercy—in the form of a presidential self-pardon—is what the Framers had in mind for the pardon power. Indeed, the impeachment provisions of the Constitution suggest that a president may not self-pardon for federal crimes related to an impeachment, if not all federal crimes. Nor do the impeachment provisions suggest that a former president can claim immunity for crimes committed while in office, as former President Trump has recently claimed. The reason is that, beyond removal from office, the Constitution provides that the party convicted of impeachment remains subject to criminal prosecution. See U.S. CONST. art. I, § 3, cl. 7. Were a president empowered to self-pardon for crimes committed before leaving office, or immune from crimes committed while in office, they would never be subject to any subsequent federal criminal liability, despite the Constitution's provision that expressly and specifically states the contrary. But see Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKL. L. REV. 197 (1999) (contending Constitution permits presidential self-pardon). See generally Bowman, *supra* note 33, at 450-72 (arguing self-pardons constitutionally impermissible); FOSTER, *supra* note 4, at 13-14 (discussing self-pardoning generally); Brian C. Kalt, *Pardon Me? The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779 (1996) (contending preclusion of self-pardons implied in Constitution).

118. See U.S. DEP'T OF JUST., *supra* note 90 §§ 9-140.112-13 (listing factors).

119. See CROUCH, *supra* note 112, at 21-22, 145-49.

120. See 28 C.F.R. §§ 1.6, 1.11 (noting Attorney General recommendation, through the Pardon Attorney, does not restrict pardon authority granted President).

121. See *Myers v. United States*, 272 U.S. 52, 109-18 (1926). *Myers* is viewed as recognizing “that the federal executive, unlike the Congress, could exercise power from sources not enumerated, so long as not forbidden by the constitutional text.” I LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 633-34 (3d ed. 2000) (citing *Myers*, 272 U.S. at 118). Nevertheless, the executive pardon power is in its terms and form of

including unilateral actions by the President, must be within constitutionally granted or congressionally delegated authority.¹²²

Further, the proposed standard of validity should avoid judicial *over-invalidation* of pardons in close cases. Instead, invalidation should require adjudicators to hold, with certainty, that a pardon's circumstances fail to accomplish a purpose or objective of the power. Put differently, it should be certain that the invalidated pardon does not have the effect required to validate it. Accordingly, the invalidation standard proposed in Section III.B.2 is the inability of any rational adjudicator to conclude that a pardon has the required effect of appreciably achieving a purpose or objective of the pardon power.¹²³

To definitively articulate circumstances that would comprehend every case of mercy, injustice, or misfortune is impossible, but it is hardly difficult to be certain about what is not mercy, injustice, or misfortune. Indeed—as with deciding what is interstate commerce, pornography, establishment of religion or burdening its free exercise—it is easier to be certain when the circumstances *do not* achieve the pardon power's purpose or objective. The difficulty in defining relevant pardon concepts does not mean it is impossible to adjudicate pardons any more than difficulty defining concepts has precluded adjudication in other contexts.¹²⁴ It is not hard to judge that there is no appreciable act of mercy, only tokenism, where a president justifies pardoning only a prisoner who obstructed investigations into alleged presidential misconduct by claiming mercy to avoid that prisoner's risk of contracting an epidemic illness in prison, while all other prisoners remain incarcerated and subject to the same risk.

expression at least an enumerated power. Indeed, the Supreme Court has expressly observed “that the pardoning power is an enumerated power of the Constitution.” *Schick v. Reed*, 419 U.S. 256, 267 (1974). As such, its grant is not just explicit but necessarily made with intended purposes and objectives. Accordingly, the pardon power is amenable to judicial construction and intrinsic limitations on it, just as all other enumerated powers in the Constitution. It also bears noting that, in contrast to Congress's powers in Article I, *Myers* does not mean that the Executive's Article II powers are absolute or unlimited for lack of an enumeration. *See* *TRIBE*, *supra*, at 670-77 (discussing “silent” limits on inherent executive power, even in absence of enumerated powers). *See generally* Zachary J. Broughton, *Constitutional Law—I Beg Your Pardon: Ex parte Garland Overruled; the Presidential Pardon Is No Longer Unlimited*, 41 W. NEW ENG. L. REV. 183, 200-15 (2019) (discussing Supreme Court decisions concerning limitations respecting pardon power other than grounds necessary for lawfully justifying pardon).

122. *See* U.S. CONST. amend. X; *United States v. Darby Lumber Co.*, 312 U.S. 100, 124 (1941) (stating Tenth Amendment ratified to “allay fears that the new national government might seek to exercise powers not granted”).

123. *See infra* Section III.B.2, for a discussion proposing and justifying standard for determining validity of pardons.

124. *See Ford*, *supra* note 87, at 19 (rejecting notion that exercising moral or legal judgment is impossible just because there is uncertainty or imprecision in applying relevant concepts). The advent of aviation as a strategic battle factor in World War II brought with it ethical questions regarding the bombing of civilian populated targets for strategic advantage, such as munitions and other factories, refineries, and hospitals, all of which aided battle efforts. Whether and how lines could possibly be drawn to distinguish between ethical and unethical bombing of civilian populations drew much attention from theologians and clergy, public officials, and military commanders. Rejection of “obliteration bombing” and *in terrorem* bombing were two such lines. *See id.* at 16-19, 24, 32 (discussing the moral dilemma and rejecting obliteration and *in terrorem* bombing).

The pardon power was not intended to be a raw and unbridled grant of power, giving the executive the absolute ability to nullify a person's criminal status, end punishment, or reduce its prescribed severity without more. It is a power with articulated purposes and objectives, stated in its English antecedents, in the history of the Constitution's framing and ratification, and in Supreme Court decisions.¹²⁵ In the eyes of the Framers, its exercise was the President's prerogative, not perquisite. It is the power to grant "pardons" and "reprieves," not the "power of the pass" or the "get out of jail free power." The words of the grant itself connote beneficence, not licentiousness, limitation, not absolute power.¹²⁶

B. A Pardon Should Be Invalidated Where any Rational Adjudicator Would Be Unable to Conclude from Its Specified Foundation that the Grant Appreciably Achieves a Purpose or Objective of the Pardon Power

1. The Administrative Procedure Act Provides a Time-Tested Range of Standards as Candidates for Judicial Review of Pardon Grants

Selecting the standard of scrutiny used to review the foundational sufficiency of a pardon grant is more problematic than ascertaining the pardon power's intended purposes and objectives. The Administrative Procedure Act (APA) broadly applies to Executive Branch actions and sets forth standards of review for the actions to which it applies.¹²⁷ Mindful of the separation of powers issues that would be implicated, however, the Supreme Court has held that without specific and express statutory provisions, Executive Branch presidential actions—unlike Executive Branch administrative actions—are not directly subject to the procedural, substantive, and review provisions of the APA.¹²⁸ Until the Trump administration provoked several legal challenges to presidential actions, consideration of what law should govern review of presidential actions, like executive orders and pardon grants, was moribund and is still unsettled.¹²⁹ Thus, though

125. See *Historical Background on Pardon Power*, LIBR. OF CONG., https://constitution.congress.gov/browse/essay/artII-S2-C1-3-2/ALDE_00013317/ [<https://perma.cc/QSF4-GW98>] (detailing historical roots of pardons).

126. See *United States v. Lopez*, 514 U.S. 549, 553 (1995) (acknowledging ability to ascertain limitations on the exercise of the commerce power, despite terse language of Commerce Clause). Construing the scope of the commerce power, whose express terms are even more abbreviated than the pardon power's, the Supreme Court has likewise argued that "limitations on the commerce power are inherent in the very language of the Commerce Clause." *Id.* (quoting *Gibbons v. Ogden*, 22 U.S. 1, 194-95 (1824)) (acknowledging the terms of the clause exclude transactions "completely internal" in all respects to a state and concern only commerce that involves "more states than one").

127. See 5 U.S.C. §§ 706(2)(A), (E), (F) (detailing review standards).

128. See *Franklin v. Massachusetts*, 505 U.S. 788, 796, 800-01 (1992).

129. See *Manheim & Watts*, *supra* note 74, at 1781-84 (detailing changes after Trump elected). As Justice Jackson insightfully observed in *Youngstown*:

A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret

not directly applicable to presidential actions, the APA's review standards do encompass the range of standards of scrutiny potentially applicable to reviewing any Executive Branch actions, including presidential actions and, in particular, pardon grants.¹³⁰ Administrative law, therefore, has guided the determination of standards for judicial scrutiny of presidential actions.¹³¹

This Article will use specific gradations for the standards to be considered, because even a casual examination of legal authorities will reveal inconsistencies and overlaps in the labels used to describe positions in the range of standards for review of administrative and other government actions.¹³² Specifically, except for unreviewable or "absolute" discretion, which is hardly a standard of review, the "abuse of discretion" standard will refer to the most deferential level of judicial review of Executive Branch action, recognizing that the standard itself comprises a range of scrutiny.¹³³ Next, in ascending degree of scrutiny, comes a more probing "arbitrary and capricious" review, followed by the "substantial evidence" standard, which requires consideration of a formal record. "De novo"

for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other. And court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634-35 (Jackson, J., concurring) (noting longstanding debate and lack of clarity on scope of executive power). Direct review of presidential exercises of constitutional power is a form of nonstatutory review, meaning that the review is not statutorily authorized by legislation but is still within the judicial power of the federal courts. See Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1671 (1997) (discussing distinction between sovereign's officers and sovereign itself). In its original form, nonstatutory review rested on the fiction that a suit against an Executive Branch official carrying out some presidential action was not a suit against the true sovereign—the people of the United States. See Siegel, *supra*, at 1615 (noting "fictional conceit" of nonstatutory review); see also David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U. L. REV. 1013, 1036-40 (2018) (discussing current state of nonstatutory review of presidential actions and need for further legal development).

130. See Davis, *supra* note 19, at 80-81 (recognizing broad range of judicial review standards); Kunsch, *supra* note 98, at 31 (enumerating review standards for types of federal administrative actions).

131. See Manheim & Watts, *supra* note 74, at 1781 (noting need for coherent framework of standards for reviewing presidential orders). "[T]he judiciary's willingness to analogize to administrative law often makes sense given that both sets of challenges (to presidential orders and agency actions) involve challenges to executive-branch action." *Id.*

132. See *Dickinson v. Zurko*, 527 U.S. 150, 161-63 (1999) (discussing "substantial evidence" versus "clearly erroneous" standards of judicial scrutiny). Compare SOLOMON ET. AL., *supra* note 98, at 4 (equating "rational basis" review with "substantial evidence" review), with Manheim & Watts, *supra* note 74, at 1812 (describing contexts for judicial usage of "rational basis" review).

133. The abuse of discretion standard of review should not be confused with the rational basis standard applied in reviewing legislation. See Manheim & Watts, *supra* note 74, at 1812 (discussing misapplication of rational basis test used for judicial review of legislative action to review of administrative action). The rational basis test was originally developed in the context of judicial review of legislation. It indulges even limited legislative factfinding and arguably pretentive rationales for justifying legislation. See *id.* at 1811-12. At times, the Supreme Court has labeled review of discretionary action in the administrative context, including presidential action, as rational basis review. See *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (upholding presidential order regarding Immigration and Naturalization Act under rational basis review). Even under rational basis review, however, presidential action must be "*plausibly related* to the . . . stated objective." *Id.* at 2420 (emphasis added).

review is the least deferential and is typically applied in judicial review of agency decisions on questions of law, although, depending on the issue, an agency's legal viewpoint may be virtually controlling, such as where the issue is construction of an agency's enabling legislation or involves the agency's expertise.¹³⁴

As the phrase "standards of scrutiny" unmistakably suggests, all such standards prescribe a degree of persuasion, deemed adequate in the circumstances, regarding the relationship between the justification for an official action and the empirical foundation on which the justification rests.¹³⁵ The degree of persuasion required for discerning the justification from the foundation depends on several considerations, the most prominent of which are: the political character or status of the decisionmaker (here, the President), the source of the power (here, the Constitution), the relative degree to which issues of fact and issues of law are involved, the nature of the subject matter in terms of expertise and sophistication, and the stakes involved.¹³⁶ Accordingly, when determining the level of scrutiny applicable to pardon grants, courts should balance the President's prerogative as head of the Executive Branch against what is reasonably needed to protect against the dangers of pardon power abuse, that is, to protect against pardons that do not appreciably achieve an intended purpose or objective of the pardon power.¹³⁷

134. See Davis, *supra* note 19, at 62-63 (discussing applicability of *Chevron* deference to agency interpretation of statutes); see also *Chevron U.S.A., Inc., v. Nat'l Res. Def. Council*, 467 U.S. 837, 865-66 (1984) (indulging agency construction of its statutory authority, where matters of agency expertise are involved). But see Amy Howe, *Supreme Court Will Consider Major Case on Power of Federal Regulatory Agencies*, SCOTUSBLOG (May 1, 2023), <https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies/> [<https://perma.cc/5VUF-7GX7>] (discussing pending Supreme Court review of doctrine). Strict scrutiny, which is applied when official action is claimed impermissibly to intrude on certain protected interests—typically constitutionally protected rights and privileges—could be viewed as falling within the *de novo* range of scrutiny. It is better viewed, however, as a standard of scrutiny outside those considered here, for it is not a standard applied to determining whether official action is within the intrinsic scope of a power grant but whether the power's exercise is extrinsically limited by other legal principles. The same may be said of intermediate scrutiny, which is applied to actions claimed to intrude on "lesser" interests—such as in cases of gender discrimination. See generally Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 800-01 (1987).

135. See Davis, *supra* note 19, at 48 (noting that review standards involve different degrees of deference); Driesen, *supra* note 129, at 1015-17 (noting lack of agreement regarding proper level of scrutiny for executive action); Manheim & Watts, *supra* note 74, at 1751-52 (describing historical progression from deferential to more demanding standards of judicial review due to concerns about increasing political influence in administrative decisionmaking); DANIEL SOLOMON ET. AL., *supra* note 98 (noting review standards involve different degrees of deference).

136. See Manheim & Watts, *supra* note 74, at 1798 (noting greater deference the more politically accountable the decisionmaker); *id.* at 1814-15 (arguing for *de novo* review where questions of law are involved, as opposed to *Chevron* deference indulging agency expertise); see also R. Randall Kelso, *supra* note 98, at 989-92 (discussing, contrasting, and justifying standards of scrutiny applied in equal protection challenges involving protected classes and challenges to business regulation).

137. See Manheim & Watts, *supra* note 74, at 1814 (rejecting potentially intrusive review of presidential prerogative). Manheim and Watts assert:

[W]e do not believe that it would be advisable for the courts to blindly transfer either administrative law's many complex deference doctrines or the legislative arena's highly deferential rationality review into the presidential-order context. Instead, we believe that an intermediate approach ultimately might

Notably, there are material differences between the scrutiny that should be applied to Executive Branch *administrative* actions and that which should be applied to Executive Branch *presidential* actions.¹³⁸ In the case of administrative actions, the separation of powers concerns are less, because unlike the President's own exercise of Article II power, administrative actions taken by executive departments and regulatory agencies are made pursuant to constitutional powers delegated by the President or Congress.¹³⁹ There is also a difference in the scrutiny appropriate for presidential action based on power delegated by Congress or shared with it, such as a president's powers as Commander-in-Chief,¹⁴⁰ or powers to conduct certain aspects of foreign affairs,¹⁴¹ versus presidential action based on powers vested, as a policy or decisional matter, exclusively in the Executive Branch, such as the pardon power.¹⁴²

make the most sense—one that neither rubber-stamps presidential orders nor intrudes too severely into the president's policymaking sphere.

Id. at 1814.

138. *See id.* at 1794 (contrasting Executive Branch presidential and administrative actions).

139. *See id.* at 1793-99 (identifying three areas of difference between Executive Branch administrative action and presidential action bearing on the application of the usual standards of judicial review for administrative actions to presidential actions). The differences include procedural constraints, enforcement mechanisms and separation of powers concerns. *See id.* For judicial review of pardons, only separation of power concerns are material. In instances where a pardon is rendered before trial and conviction, invalidation of the pardon would only require a judicial declaration that a pardon exceeds presidential authority or lacks sufficient foundational support. *See id.* at 1797-98 (distinguishing between binding and nonbinding presidential orders and noting binding orders "can be legally enforced in court" or, therefore, not enforced if invalid). In situations where incarceration is about to be terminated by a pardon or a putative defendant is about to leave the country after being pardoned, provisional injunctive relief operating against prison officials or the putative defendant, in order to avoid separation of powers concerns, would be available to preserve the status quo, and even if nevertheless viewed as, in substance, an injunction against the President, the provisional relief would merely allow an opportunity for a judicial determination of the a pardon's validity. *See* Siegel, *supra* note 129, at 1682 (noting use of injunction to stop presidential action). Injunctive relief "would not have restrained the President's lawful discretion; it would simply have enjoined him from doing that which he had no right to do." *Id.* Indeed, in keeping with the concept of nonstatutory review, a judicial ruling that a particular pardon was invalid could be enforced by actions against officials other than the President. *See id.* at 1622-25. Procedural issues regarding the timing of review, such as exhaustion of remedies, ripeness, and finality, should also not be a subject of concern, as, presumably, no review action would or could be brought to challenge a pardon until it has been granted or is, at least, imminent. *See* Manheim & Watts, *supra* note 74, at 1793-95 (discussing differences in procedural constraints for presidential and other administrative orders). Congress would also have the power, through legislation, to preclude granting pardons without notice. *See infra* notes 145, 160 (discussing legislative control of the pardon power pursuant to the Necessary and Proper Clause).

140. *See* U.S. CONST. art. II, § 2, cl. 1. Congress's powers to declare war and provide for "Armies" and a "Navy" are correlative to the president's Commander-in-Chief powers. *Id.* art. I, § 8, cl. 12-13.

141. *See id.* art. II, § 2, cl. 2 (giving the President power to make treaties); *id.* art. II, § 3. Correlative to these powers are Congress's powers to regulate international commerce, punish "Offenses against the Law of Nations," and consent to "Treaties" and appointment of "Ambassadors." *See id.* art. I, § 8, cl. 10, (empowering Congress to regulate international trade and relations); *id.* art. II, § 2, cl. 2 (specifying Legislature's role in ratifying treaties).

142. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (Jackson, J., concurring) (discussing President's powers in relation to their conjunction or disjunction with those of Congress). Where the allocation of constitutional power between the Executive and Legislative Branches is unclear, care must be taken to distinguish between questions where only the scope of a power is at issue, as with the pardon power, and questions

Accordingly, when Executive Branch administrative action is based on statutorily or presidentially delegated power, Congress may prescribe the judicial standard of scrutiny courts must apply in reviewing action pursuant to such power, as it has under the APA.¹⁴³ Congress cannot, however, prescribe the standard of scrutiny to be applied in judicial review of Executive Branch presidential action that is exclusively an Article II matter not shared with Congress, like the pardon power. In that case, the standard of scrutiny is determined by the Supreme Court under its Article III judicial power, as is the case for judicial review of Legislative Branch action. Specifically, Section III.B.2 addresses what should be the standard of scrutiny for pardon grants. It should be noted, however, that under the Necessary and Proper Clause, no Article II exercise of power, including Executive Branch presidential action, is entirely free from congressional regulation.¹⁴⁴ Rather, the clause gives Congress the power to regulate actions pursuant to all executive power that the Constitution grants, though, presumably, because of the separation of powers principles, that regulation should be more deferential where Executive Branch presidential action, such as a pardon, is involved.¹⁴⁵

2. *A Valid Pardon Requires that Some Rational Adjudicator Could Find that the Pardon Appreciably Achieves a Purpose or Objective of the Pardon Power*

To engage in the considered selection of an appropriate standard for judicial review of pardon grants, starting with the most rigorous standard, *de novo* review, will be helpful. That standard can be readily passed. Unless the issue

where the issue is who has the power, regardless of its scope, and where, therefore, what Congress has said or legislated about the power may need to be considered to resolve the allocation question. *See id.*

143. *See Driesen, supra* note 129, at 1040-42 (arguing that where presidential action is pursuant to legislative authorization, judicial review is appropriate and authorized).

144. *See* U.S. CONST. art. I, § 8, cl. 18 (giving Congress power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). For example, congressional regulation of procedures for rulemaking and adjudication within Executive Branch departments through the APA is grounded in the Necessary and Proper Clause. *See* TODD GARVEY & DANIEL J. SHEFTER, CONG. RSCH. SERV., R45442, CONGRESS’S AUTHORITY TO INFLUENCE AND CONTROL EXECUTIVE BRANCH AGENCIES 1, 11-12 (2018) <https://crsreports.congress.gov/product/pdf/R/R45442/2#:~:text=Executive%20Branch%20Agencies,-The%20Constitution%20neither&text=Congress%20may%20use%20its%20Article,offices%20are%20appointed%20and%20removed> (last visited Dec. 22, 2023). Likewise, the Court has interpreted the Necessary and Proper Clause to authorize Congress to prescribe various rules of procedure for the Judicial Branch. *See* *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Despite the President’s broad powers as Commander-in-Chief, the Necessary and Proper Clause is the basis for the War Powers Act, which imposes notice and reporting requirements on the President whenever the Armed Forces are or are about to be involved in hostilities. *See* War Powers Resolution of 1973, 50 U.S.C. §§ 1541(b), 1543. Where the President and Congress share power over a subject, such as national defense or foreign affairs, is distinguished from Congress’s power to regulate Executive Branch action under the Necessary and Proper Clause. In this situation, Executive Branch action is subject to legislative influence, because the line between Congress’s and the President’s provinces in those matters is unclear and, in reality, fluctuates over time. *See* Chemerinsky, *supra* note 76, at 1107-08.

145. *See* GARVEY & SHEFTER, *supra* note 144, at 2 (noting “delicate, and at times uneasy, balance between congressional creation and control of agencies and the President’s authority to supervise executive officials”).

presented is purely legal, de novo review of pardon grants would amount to a judicial usurpation of executive power.

The substantial evidence standard falls below de novo review in rigor of scrutiny and bears discussion as a potential standard for reviewing pardons.¹⁴⁶ Of interest here, immigration law prescribes its own non-APA substantial evidence standard—a form even more deferential than the APA’s—to review judicial determinations of “refugee” status. More specifically, any alien physically present in the United States may apply for asylum but, as a prerequisite, must establish their status as a refugee.¹⁴⁷ The alien has the burden of proving refugee status in a hearing on the record.¹⁴⁸ A refugee, however, is not someone who has merely exited another country, but one shown to be fleeing a hostile or unsafe environment.¹⁴⁹ A determination of refugee status requires an administrative finding that the applicant

is unable or unwilling to return to, and is unable or unwilling to avail [themselves] of the protection of [the person’s country of nationality or prior residence] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.¹⁵⁰

Like pardon grants, therefore, although adjudication of refugee status involves mixed questions of fact and law, it is often a fact intensive determination of character particularized to a person or group of persons and involves the application of imprecisely definable concepts.¹⁵¹

If adjudicated a refugee, the alien “*may*” be granted—but is not entitled to— asylum,¹⁵² just as a president is not required to grant a pardon. Denials of asylum

146. See DANIEL SOLOMON ET AL., *supra* note 98, at 2 (noting substantial evidence standard allows “some deference”); see also Kunsch, *supra* note 98, at 31 (summarizing federal review of administrative actions). The substantial evidence standard of scrutiny for administrative action applies to rulemaking and adjudication under the APA, 5 U.S.C. § 706(2)(E), and preceded the APA in its development and application to Executive Branch decisionmaking. See Andrew Tae-Hyun Kim, *Rethinking Review Standards in Asylum*, 55 WM. & MARY L. REV. 581, 587-88 (2013); see generally E. Blythe Stason, “Substantial Evidence” Review in Administrative Law, 89 U. PA. L. REV. 1026 (1941) (discussing pre-APA development of substantial evidence standard, without reference to clearly erroneous standard).

147. See 8 U.S.C. §§ 1158(a), (b)(1)(A) (specifying procedures for seeking asylum under the Immigration and Naturalization Act (INA)).

148. See *id.* § 1158(b)(1)(B) (specifying asylum applicant’s burden of proof).

149. See *id.* § 1101(a)(42)(A) (defining “refugee”).

150. *Id.*

151. See Kim, *supra* note 146, at 584, 589 n.36 (describing requirements for finding of refugee status under the INA). In immigration law, the determination of refugee status is a mixed question of fact and law but is treated as a question of fact and, therefore, subjected to the substantial evidence standard of judicial review, which is more deferential than courts give review of mixed questions of law and fact. See *id.* at 584 (noting asylum decisions require fact-intensive review).

152. See 8 U.S.C. § 1158(b)(1)(A) (discussing Secretary of Homeland Security and Attorney General’s discretion to grant asylum).

that result in removal orders may, however, be judicially reviewed.¹⁵³ Where a challenge to removal is directly related to a discretionary asylum denial, the decision may not be reversed “unless manifestly contrary to the law and an abuse of discretion.”¹⁵⁴ Where, however, the asylum denial and challenge is based on a determination of fact denying refugee status, that determination is reviewable under a substantial evidence standard.¹⁵⁵

As substantial evidence is defined in immigration law, a finding of refugee status will be upheld, “unless *any* reasonable adjudicator would be *compelled* to conclude to the contrary,” based upon review of the administrative record.¹⁵⁶ Analogously, and the requirement of a formal record aside, a pardon grant likewise invalidated because “any reasonable adjudicator would be compelled to conclude” that the grant does not appreciably achieve a purpose or objective of the pardon power does not immediately or facially present itself as unduly intrusive on Article II powers.¹⁵⁷ Indeed, it is actually deferential to a president’s decision that a pardon is warranted. Put otherwise, applying the refugee substantial evidence standard to review of pardon grants would mean that a pardon could be invalidated only if no reasonable adjudicator could conclude that the grant appreciably achieves a purpose or objective of the pardon power. The takeaway to be made at this point, however, is not that a pardon grant should be reviewed under a standard like the immigration substantial evidence standard. Rather,

153. See *id.* § 1252(a)(2)(B)(ii) (excepting asylum relief from matters deemed unreviewable under the INA).

154. See *id.* § 1252(b)(4)(D) (setting forth abuse of discretion standard of review for asylum denials).

155. See *id.* §§ 1252(b)(4)(A)–(B) (specifying standard of review for administrative findings of fact under the INA); see also Kim, *supra* note 146, at 584–87 (discussing asylum adjudication review under standard of substantial evidence).

156. See 8 U.S.C. §§ 1252(b)(4)(A)–(B) (emphasis added) (specifying standard of review applicable to factual finding of refugee status under the INA). Because the statute focuses not just on the evidence of refugee status in the record but also how any reasonable fact finder would be required to appraise the evidence (that is, compelled to reject the evidence in order to find no refugee status), this standard of scrutiny, although considered a substantial evidence standard, is arguably different from the APA’s standard, which the Supreme Court introduced not long before the APA’s enactment. See Kim, *supra* note 146, at 587–88 (discussing history of standard). According to the Supreme Court, substantial evidence includes relevant evidence that a reasonable mind could accept as sufficient to support a conclusion. See *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938) (“Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”); accord *Dickinson v. Zurko*, 527 U.S. 150, 163 (1999). Accordingly, apart from the requirement of a record, substantial evidence review in the immigration context would appear to be significantly less stringent than APA substantial evidence review, for in the immigration context, there would need to be virtually no evidence of refugee status, for *any* reasonable adjudicators to be compelled to conclude that refugee status had not been shown. See Kim, *supra* note 146, at 588–90 (distinguishing substantial evidence standard under APA from the substantial evidence standard under INA).

157. It certainly does not reflect the level of review imposed in major decisions concerning executive power. See *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (holding separation of powers doctrine fails to shield private presidential actions from judicial review); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582, 586–87 (holding absent Congressional or Constitutional authorization, president cannot order seizure of steel mills); *Korematsu v. United States*, 322 U.S. 214, 216 (maintaining presidential action restricting civil rights of racial group subject to strict scrutiny review). Nor does it call for *de novo* judicial factfinding or even the creation and review of a formal record, let alone a careful consideration review of just some informal record. Moreover, it does not allow believing just some reasonable adjudicator could find a given pardon grant invalid but believing that no reasonable adjudicator could find the grant invalid.

given that review of refugee status decisions—which involve concepts as indefinite as “persecution,” “well-founded fear,” “nationality,” “social group membership,” and “political opinion”—is judicially manageable, review of pardon grants, involving equally indefinite concepts—mercy, misfortune, humanity, and fairness—should not be beyond judicial manageability.¹⁵⁸

A substantial evidence standard requiring review of a formal record is, however, inappropriate for judicial review of pardons, as there currently is no requirement, constitutionally or otherwise, to create a formal record supporting a pardon grant.¹⁵⁹ The same would be true for arbitrary and capricious review, which requires an explanation sufficient to withstand probing judicial inquiry.¹⁶⁰ If Congress were to legislate pardon procedures, including requiring the assembly of an informal record by the President for pardon grants, then arbitrary and capricious review and arguably even the APA substantial evidence standard would be appropriate.¹⁶¹ Rejecting, therefore, the substantial evidence and arbitrary and capricious standard of review for pardon grants, the appropriate standard of scrutiny is likely one akin to abuse of discretion.

A review of the case law on discretion reveals that “[t]here is no such thing as *one* abuse of discretion standard. . . . [‘Abuse of discretion’] more accurately describes a *range* of appellate responses.”¹⁶² Similarly to deciding among levels of

158. See, e.g., *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1062 (9th Cir. 2017) (describing immigration substantial evidence standard).

159. See 28 C.F.R. § 1.6 (specifying procedures for review of pardon applications); *Pardon Information and Instructions*, U.S. DEP’T OF JUST., <https://www.justice.gov/pardon/file/898541/download#:~:text=The%20petition%20shall%20be%20addressed,obtained%20from%20the%20Pardon%20Attorney> [<https://perma.cc/6EN5-7NBD>] (“The power to grant pardons is vested in the President alone. No hearing is held on the pardon application by either the Department of Justice or the White House.”). If, pursuant to the Necessary and Proper Clause, Congress were to legislate procedures, including requiring some sort of record for pardon grants, and if such procedures were not so intrusive on presidential power as to be unconstitutional, then the ground would be laid for some greater level of scrutiny of the foundation for pardon grants, arguably even the substantial evidence standard that is already applied to review of refugee status decisions. See *supra* note 145 and *infra* note 178 (discussing application of Necessary and Proper Clause power to pardon power procedures).

160. See *Manheim & Watts*, *supra* note 74, at 1751-52 (describing arbitrary and capricious review as “hard look” review). There has been a historical progression from deferential to more demanding review under arbitrary and capricious standard due to concerns about increasing political influence in administrative decisionmaking. See *id.* *Manheim and Watts* argue that “[i]t would be difficult for the courts to apply a robust form of arbitrary and capricious review (akin to hard look review) to presidential orders without also effectively demanding more of the presidents who are issuing those orders: perhaps technocratic justifications, detailed records, or more.” See *id.* at 1813.

161. See *infra* note 177 (noting potential for legislative resort to Necessary and Proper Clause to require some form of record for a pardon).

162. *Davis*, *supra* note 19, at 77 (emphasis in original), see also Comment, *Abuse of Discretion: Administrative Expertise vs Judicial Surveillance*, 115 U. PA. L. REV. 40, 41-42 (1966) (describing different types of abuse of discretion in the administrative context). Even though an official has discretion as to their official conduct, that does not mean it is absolute or beyond judicial control. See *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925) (“The duty may be discretionary within limits. . . . [T]hose limits . . . may be controlled by injunction or mandamus to keep within them.”). In her article, *Davis* contends that:

[Discretion] does not mean that a situation in which discretion is involved cannot be reviewed in a principled manner. Rather, it means that the source of the review principle will be found not in the

scrutiny for judicial review standards, the degree of discretion allowed when assessing the validity of an exercise of power should turn on at least the following factors: (1) the source of the power and the official level of its holder (here, the Constitution and the President), (2) the importance of what is at stake if exercise of the power were invalidated or if abuse of the power were permitted, and (3) the expertise and status of the holder of the power in relation to its subject matter.¹⁶³

A useful starting point for determining the amount of discretion that should be allowed presidential pardon grants, the most deferential, is the discretion afforded when reviewing prosecutorial decisions. That discretion has been described as one of considerable deference and presumptive propriety.¹⁶⁴ Notably, pardon decisions are analogous to prosecutorial decisions because both involve individually focused judgments as to enforcement of the criminal laws and punishment.¹⁶⁵

It would not be appropriate, however, to treat judicial review of pardon decisions as completely analogous to reviewing prosecutorial decisions for abuse of discretion. Judicial deference to prosecutorial decisions is a matter of judicial

bald abuse of discretion expression but in the particular applications made for that and similarly postured issues.

Davis, *supra* note 19, at 82; *see also* Siegel, *supra* note 129, at 1683-84 (acknowledging court involvement when executive officials engage in unlawful behavior). This Article argues that the focus should be on deriving principles for guiding discretion appropriate to the context in which the discretion is to be exercised. *See* Davis, *supra* note 19, at 59 (discussing abuse of discretion standard within context of trial judge's decisionmaking). Like the standard applied to a trial judge's decisionmaking, with respect to pardons, abuse of discretion should occur when a president "fails to properly consider the factors" relevant to a pardon grant. *See id.*

163. *See* Davis, *supra* note 19, at 77 (noting flexible nature of abuse of discretion standard). In the case of the pardon power, the Constitution is its source; the President is its holder; no entitlement, right, or protected interest is denied where a pardon is invalidated; illicit conduct harmful to the public interest may occur where abuse of the power is allowed; and, although most presidents have a general understanding of the law, government and morals, they are not always free from conflict in the exercise of the power.

164. *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (noting that, even when constitutional violations are alleged, "[i]n the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties"); *see also* United States v. Fokker Servs. B.V., 818 F.3d 733, 741 (D.C. Cir. 2016) (noting, "'judicial authority is . . . at its most limited' when reviewing the Executive's exercise of discretion over [prosecutorial] charging determinations") (emphasis added) (alteration in original). The Fokker court, however, notes that judicial review is allowed when there is "clear evidence" of irregularity. *See Fokker Servs. B.V.*, 818 F.3d at 741. *But see* United States v. Nixon, 418 U.S. 683, 693 (1974) (stating "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute") (dictum). Notably, although these cases apply a very deferential abuse of discretion standard for judicial review for prosecutorial decisions, that standard is not wholly forgiving and does not reject judicial consideration of factual circumstances calling into question prosecutorial action.

165. *See Fokker Servs. B.V.*, 818 F.3d at 737 (summarizing executive's charging authority); Henry L. Chambers, Jr., *The President, Prosecutorial Discretion, Obstruction of Justice and Congress*, 52 U. RICH. L. REV. 609, 616 (2018) (comparing pardon power to prosecutorial discretion). Similar to pardon decisions, the executive's charging authority includes decisions on "whether to initiate charges, whom to prosecute, which charges to bring, and whether to dismiss charges. . . ." *See Fokker Servs. B.V.*, 818 F.3d at 737. Moreover, the executive power, like presidential pardon decisions, includes federal prosecutorial decisions. *See* U.S. CONST. art. II, § 1, cl. 1 (vesting executive power in President); Chambers, Jr., *supra*, at 616 (recognizing executive pardon power reflects near total prosecutorial discretion).

self-restraint, grounded primarily, but not exclusively, in the separation of powers doctrine.¹⁶⁶ Further, judicial self-restraint varies with the circumstances. Prosecutorial decisions are accorded considerable deference because prosecutorial power derives from the Constitution's broad grant of executive power to "take care that the laws be faithfully executed" and is at the essence of executive power.¹⁶⁷ By contrast, the pardon power's reach, like that of other enumerated constitutional power grants, is bounded by the intended purposes and objectives of the power, which imply and ground constitutionally based and judicially discernable intrinsic limitations on its reach. Further, although historically within the powers held by an executive, pardons are not essential to executive performance as a practical or functional matter. For that matter, what is at stake in invalidating a pardon is very limited, as there is no right or entitlement to a pardon. By contrast, recent events have amply demonstrated there can be significant harm, such as the obstruction of justice, in failing to invalidate a baseless pardon.

Accordingly, the degree of discretion allowed by the standard of scrutiny for pardons should be less exacting than arbitrary and capricious review but more inquiring than the highly deferential discretion the judiciary affords prosecutorial decisions. Thus guided, selection of the deferential standard of review applicable to analogous adjudications of refugee status under immigration law—but not the formal record requirement—should be an appropriate standard for reviewing a pardon grant. Specifically, the standard would be whether no rational adjudicator could conclude from the foundation adduced for a pardon that the pardon appreciably achieves an intended purpose or objective of the pardon power.¹⁶⁸ In other words, a pardon grant should be invalidated where any rational adjudicator would only be able to conclude that the grant fails appreciably to achieve a purpose or objective of the pardon power.¹⁶⁹ Contrarily, a pardon grant would be

166. See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 4 (2009) (noting separation of powers doctrine plays role in broad prosecutorial discretion); Andrew B. Lowenstein, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 351 (2001) ("Respect by the other two branches of government for the Executive's right to determine how best to enforce the law has come to be seen as a constitutionally compelled aspect of the separation of powers.").

167. U.S. CONST. art. II, § 3. Indeed, it has been suggested that the Take Care Clause imposes an affirmative obligation on the President to enforce the law. See Alschuler, *supra* note 3, at 559-61 (suggesting Take Care Clause, to the extent it imposes an affirmative enforcement obligation, poses potential constraint for some presidential powers).

168. See *Ex parte Wells*, 59 U.S. 307, 314 (1855) (discussing pardon power language). Notably, if Congress were to enact a record requirement for pardon decisions, this standard would readily lend itself to a more searching, on the record review of pardon grants. See *supra* note 144 (discussing congressional power under Necessary and Proper Clause to arguably require recordkeeping for pardon decisions).

169. Notably, this standard is consistent with the common law view that a pardon procured by fraud was invalid. See Alschuler, *supra* note 3, at 587. A pardon procured by and only on account of fraud would not have a truthful or, therefore, any foundation. Likewise, as at common law, this standard would require invalidating a pardon based on only a bribe, because value given—which is in itself immaterial to a purpose or objective of the pardon power—may be the only factual basis for the pardon or because bribery may call into question the truth of the foundation offered in justification of a pardon. See *id.* at 590-94. Because bribery does not necessarily mean the absence of a foundation for finding that the pardon, despite the bribe, appreciably effected a purpose or

permissible where some rational adjudicator would be able to conclude that the grant appreciably achieves an intended purpose or objective of the pardon power. Whatever the formulation, what is required to invalidate a pardon is certainty that no justification, with respect to the pardon power's purposes and objectives, exists for its grant.

Under this standard, a pardon grant's predominant or only effect need not be an appreciable achievement of a purpose or objective of the pardon power, but to avoid invalidity, the pardon must at least have that effect for some rational adjudicator, even if it also has adverse effects. In this regard, the suggested standard for pardon review materially differs from APA "substantial evidence" and "arbitrary and capricious" review. Under either of those standards, an appreciable achievement of a purpose or objective of the pardon power could be vitiated by some substantially adverse consequence of the grant, rendering the grant not "benign." Notably, because the proposed standard allows validation of a pardon where some rational adjudicator would be able to conclude that the pardon achieves an appreciable purpose or objective of the pardon power, the standard affords presidential pardon actions considerable latitude.

The proposed standard also does not mean that improper presidential motives are irrelevant. As the Supreme Court recently observed in *Department of Commerce v. New York*,¹⁷⁰ although judicial review of executive action is deferential, the Court is "not required to exhibit a naiveté from which ordinary citizens are free."¹⁷¹ The Court relied on extra-record evidence to invalidate a decision personally made by the Secretary of Commerce—a cabinet level official—as "pretextual," even though, on the record, the decision was not "substantively invalid."¹⁷² The Court maintained that, "[j]udicial inquiry into 'executive motivation' . . . should normally be avoided" but is not always precluded.¹⁷³

Whether the purpose or objective a pardon grant achieves is pretextual could be information that reveals that the predominant motivation for the grant was something other than such a purpose or objective, as was the case in *Department of Commerce*. For example, when a presidential pardon clearly favors a president's personal, economic, legal, or political interests, pretext is strongly indicated. Such ill-founded and predominating motivations are not necessarily

objective of the pardon power, bribery does not necessarily invalidate a pardon. See *id.* at 593 (discussing circumstances where allegations of bribery would not result in invalidation of pardon). Because a pardon is an act of grace, however, not a quid pro quo, it may be argued that bribery, despite a sufficient foundation for a pardon, precludes the pardon.

170. 139 S. Ct. 2551 (2019).

171. *Id.* at 2575 (citing *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.) ("Judges are not required to exhibit a naivete from which ordinary citizens are free."); see also *Kassel v. Consol. Freightways Co.*, 450 U.S. 662, 691-93 (1981) (Rehnquist, J., dissenting) (reasoning if traffic safety law is not merely a pretext for discrimination, the Court should ask only whether it is rational); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 476 n.2 (1981) (Powell, J., concurring in part and dissenting in part) (noting Commerce Clause analysis empowers courts to disregard "legislature's statement of purpose if it considers it a pretext.").

172. See 139 S. Ct. at 2573-76 (explaining Court's reasoning for invalidating Secretary's decision).

173. *Id.* at 2573.

factually inconsistent with an appreciable achievement of a purpose or objective of the pardon power and, therefore, do not necessarily invalidate a pardon. The presence of such interests does, however, bear on the veracity and adequacy of the pardon's foundation, indicating that an appreciable objective or purpose of the pardon power would not be achieved by a particular pardon.¹⁷⁴ In short, judicial discretion afforded to a president need not be wholly blind to pretext or presidential self-interest.

Finally, it is notable that judicial review of a pardon would not invalidate some executive policy, program, or other action of broad impact or public importance, including where matters of national security, foreign relations, or war powers are concerned. A pardon is a limited act, one of grace, not one of received entitlement or indebtedness, and it is bestowed upon a specific individual or group of individuals. Where a pardon is invalidated, nothing is taken from the individual or group as to which there was an entitlement, debt, or favor owed. Further, where a pardon is invalidated pre-investigation, pre-trial or pre-appeal, the protection of the criminal justice system remains available to the individual or group. In nearly all cases, invalidation of a pardon would not implicate national interests. It is also unlikely that a pardon reasonably claimed to be in the public interest would ever be invalidated. Under the standard of scrutiny proposed in this Article, judicial invalidation of a pardon is likely to be a relatively occasional occurrence, having little consequence for Executive Branch performance in the national interest. Indeed, the proposed standard would protect the executive function while affording a meaningful and needed check on abuse of the pardon power.

3. The Foundation for a Valid Pardon Must Be Expressed with Factual Specificity

There are no constitutional or statutory provisions which govern procedures for granting pardons. Currently, the only regulations that exist are within the Office of the Pardon Attorney and are not binding on the President.¹⁷⁵ Hence, no record underlying a pardon is necessarily created to support a pardon grant, particularly where the pardon is not processed through the Pardon Attorney—as is typical for controversial and, therefore, potentially questionable pardons.¹⁷⁶ The Necessary and Proper Clause, however, arguably grants Congress the authority

174. See *id.* at 2573 (citing *Jagers v. Fed. Crop Ins. Corp.*, 758 F.3d 1179, 1185-86 (10th Cir. 2014)) (rejecting view that “the agency’s subjective desire to reach a particular result must necessarily invalidate result, regardless of the objective evidence supporting the agency’s conclusion”); cf. *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (“[W]here a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief . . .”).

175. See Lauren Schorr, Note, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 AM. CRIM. L.R. 1535, 1542-43 (2009) (describing Office of Pardon Attorney and its essentially administrative function).

176. See *id.* at 1545 (noting public displeasure when presidents circumvent the Pardon Attorney).

to require a record for all pardons and require that all pardons be pre-processed through the Pardon Attorney for a nonbinding recommendation, because such requirements increase transparency of executive decision making and constrain abuse of the pardon power.¹⁷⁷

Still, as discussed at the outset of Part III, the review standard proposed requires assessing the sufficiency of a pardon's foundation. Otherwise, it would be impossible to determine whether the pardon appreciably achieved a purpose or objective of the pardon power, as alleged. Accordingly, whatever information, in whatever form, that supports a pardon should be identified with specificity¹⁷⁸ and should comprise all available information relevant to determining whether the pardon's justification were valid.¹⁷⁹ The less information in the nature of a specific and substantiated factual foundation proffered for a pardon's justification the more likely the determination—under the standard of scrutiny urged here—that no rational adjudicator could find that there has been an appreciable achievement of a purpose or objective of the pardon power and that the pardon grant, therefore, is in excess of power and invalid. Although casting a broad net for information about a particular pardon has risks as to the quality of information received, in the onslaught of judicial challenges to Trump administration executive orders, as well as in past challenges to presidential actions such as *Youngstown*, that concern was primarily a relevance matter specific to the adjudication context at hand, judicially manageable, and not a barrier to review.¹⁸⁰

At a minimum, because it is not difficult to contrive a justification for a pardon that allegedly achieves a pardon power's purpose or objective, the warrant for invalidating a pardon would be clear where the pardon's foundation consists merely of conclusory assertions that the pardon achieves some purpose or objective of the power. Instead, factual specificity indicative of the appreciable achievement of the power's purpose or objective should be present to sustain a challenged pardon.¹⁸¹ Requiring the review of a pardon as proposed would not unduly intrude on a president's pardon prerogative. It would, however, pose a

177. See U.S. CONST. art. I, § 8, cl. 18 (granting Congress power to make all laws which shall be necessary and proper to implement powers granted under the Constitution). Because Congress is empowered under the Necessary and Proper Clause with carrying into execution the pardon power, it is arguable that Congress may prescribe procedures to be taken prior to pardon grants—including the creation of a record justifying the pardon or advance notice of a pardon grant. See *supra* note 145 and accompanying text (discussing scope of power generally); see also Garvey & Shefter, *supra* note 144, at 1 (discussing congressional determination of agency powers, duties, and functions); Shalev Roisman, *Presidential Factfinding*, 72 VAND. L. REV. 825, 835-37 (2019) (exploring in depth President's duty to engage in factfinding).

178. See *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019) (requiring agency disclose basis for action to enable meaningful judicial review); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) (encouraging specificity). “[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained.” *Chenery Corp.*, 318 U.S. at 94.

179. See *Manheim & Watts*, *supra* note 74, at 1795 n.263 and accompanying text (discussing debate over consideration of certain informal information in judicial review of Trump-era decisions).

180. See *id.* at 1745, 1775, 1793-96 (examining treatment of informal information in judicial review of presidential actions).

181. See *supra* Section III.B.3 (discussing specific factual information needed for foundation of a pardon to be valid).

real risk to anyone who might be concerned about the pardon eventually being invalidated, thereby diminishing a president's ability to use pardons as an illicit but guaranteed quid pro quo.

Apart from the foundation requirement, other procedural issues related to pardon challenges, including who would have standing to challenge a pardon, are beyond the scope of this Article. What is contemplated, however, is a nonstatutory review action against a prison official who has custody of a putative pardonee or, where no incarceration is involved, the President. For such action, there is substantial precedent and legal justification, including the use of injunctive relief.¹⁸² Alternatively, Congress could provide for the appointment, by the Attorney General, of a special counsel on an ad hoc or permanent basis to challenge questionable pardon grants and operate out of the Office of the Pardon Attorney.¹⁸³

IV. REPEATED HARM TO THE PUBLIC INTEREST WARRANTS EXERCISING JUDICIAL POWER TO REVIEW PARDON GRANTS FOR ABUSE OF DISCRETION

Invalidating a pardon if it does not appreciably achieve a purpose or objective of the pardon power does leave a president with considerable latitude in granting pardons, even with judicial review in place. Therefore, pardons in highly controversial circumstances will continue. President Ford's pardon of President Nixon is a paradigm for such circumstances, but it was also a situation where a rational adjudicator could conclude that the pardon achieved an appreciable purpose or objective of the pardon power. Specifically, President Nixon's pardon

182. See Siegel, *supra* note 129, at 1670-1704 (discussing justification for nonstatutory review of presidential action and means for effecting same). As to standing, it bears noting that even though abuse of the pardon power is a matter of general interest and not necessarily particular to any person, it is within Congress's constitutional power to provide for the appointment by the judiciary of a special or independent counsel tasked with reviewing and challenging pardon grants. See U.S. CONST. art. II, § 2, cl. 2 (noting Congress may vest appointment of inferior officers in President, courts, or heads of departments); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (rejecting separation-of-powers challenge to act creating independent counsel to investigate Executive Branch official). The Attorney General may also appoint a "Special Counsel" to investigate and prosecute presidential misconduct. See 28 C.F.R. §§ 600.1 *et seq.* Congress also may empower private persons to bring actions to challenge pardons as unlawful. See *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (noting "private rights of action to enforce federal law must be created by Congress"); *Assoc. Indus. of New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) (stating nothing constitutionally prohibits Congress from empowering any person to institute proceedings involving public controversy); cf. *Flast v. Cohen*, 392 U.S. 83, 101 (1968) (upholding federal income taxpayer standing to challenge allegedly unconstitutional tax statute); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1034-35 (1968) (arguing judiciary should determine when plaintiff could pursue a non-Hohfeldian claim).

183. To be sure, preserving the independence of such a special counsel from presidential interference would be a concern, but no more than the concern about the independence of special counsels appointed by the Attorney General, as the Mueller investigation completed in 2019 indicated. See Alschuler, *supra* note 3, at 550, 590 (arguing duly appointed Department of Justice lawyers would have standing to challenge fraudulent pardons). In providing for such special counsel, Congress could expressly establish causes of action to challenge pardons. Likewise, the judiciary's inherent equitable powers could support a cause of action to challenge pardons. See *Manheim & Watts*, *supra* note 74, at 1806, 1808 (discussing same).

achieved the public interest in moving forward from the turmoil and unrest caused by Watergate.¹⁸⁴

Although Part II of this Article generally rejects justiciability concerns about controversy as a per se reason for withholding review of pardons, judicial discretion to eschew review in particular cases remains. Invoking that residual discretion, without more, however, would be the abdication of judicial responsibility, against which Chief Justice Marshall inveighed in *Cohens v. Virginia*, admonishing the judiciary “to exercise our best judgment, and conscientiously to perform our duty,” even though “we would gladly avoid” doing so.¹⁸⁵ For example, despite its high profile, President George H.W. Bush’s Iran-Contra pre-trial pardon of Caspar Weinberger would have been a candidate for judicial review, because there were circumstances indicating a quid pro quo for silence, in order to protect the President’s interests.¹⁸⁶ Other candidates for review should have been President Clinton’s pardons of Roger Clinton, his half-brother, and Marc Rich, a fugitive whose wife contributed almost half a million dollars to the Clinton library.¹⁸⁷ Marc Rich’s pardon did not relieve him from any unfortunate, inhumane, merciless, or unjustified treatment or circumstance. Instead, it only consummated an alleged quid pro quo pardon for the library donation.

Another example of pardon power excess is former President Trump’s pardon of Sheriff Joe Arpaio. In July 2017, a federal district court judge found Arpaio guilty of criminal contempt for defying another judge’s order to halt racial and ethnic profiling by Arpaio’s department.¹⁸⁸ Before Arpaio’s sentencing, Trump pardoned him, citing Arpaio’s age of eighty-five and his record of “selfless public service.” Trump’s doing so before sentencing was dismissive of a co-equal branch’s prerogative.¹⁸⁹

Arpaio was the active and openly defiant head of the sheriff’s department in Maricopa County—Arizona’s most populous county—and had personally campaigned for re-election.¹⁹⁰ His age, therefore, was hardly reason for mercy or humanity. In addition, because President Trump pardoned Arpaio before sentencing, he precluded considerations of any injustice regarding age. Finally,

184. See CROUCH, *supra* note 112, at 135-36.

185. 19 U.S. (6 Wheat.) 264, 403 (1821) (explaining Court must take cases even to answer questions they prefer to avoid).

186. See CROUCH, *supra* note 112, at 139 (discussing Weinberger pardon).

187. See *id.* at 140 (discussing Clinton’s pardon of Marc Rich).

188. See *United States v. Arpaio*, No. CR-16-01012-001-PHX-SRB, 2017 U.S. Dist. LEXIS 214888, at *26 (D. Ariz. July 31, 2017); Colin Dwyer, *Ex-Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR (July 31, 2017), <https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt#:~:text=Joe%20Arpaio%2C%20the%20former%20sheriff,85%2Dyear%2Dold%20Arpaio> [<https://perma.cc/VY4U-6XYF>] (explaining Arpaio’s disregard of judge’s order).

189. See Josh Gerstein, *Court Won’t Let Trump Pardon Void Guilty Verdict Against Arpaio*, POLITICO (Feb. 27, 2020), <https://www.politico.com/news/2020/02/27/trump-pardon-arpaio-117918> [<https://perma.cc/W7EM-37TP>].

190. See Matt Pierce, *Timeline: The Rise and Fall of Arizona Sheriff Joe Arpaio*, L.A. TIMES (Aug. 2017), <https://www.latimes.com/nation/la-na-arpaio-timeline-20170801-story.html> [<https://perma.cc/K7QJ-ZVVH>] (discussing Arpaio’s position and reelection campaign during lawsuit).

awarding *past* selfless public service is hardly the achievement of an objective or purpose of the pardon power where a later criminal offense is involved. Even if such service were valid grounds, Trump offered no factual basis for determining Arpaio's presumably unique selflessness. Quite the contrary, Arpaio's current service had been racist.¹⁹¹ Even if Arpaio had been a decorated law enforcement officer, that would have hardly been amends for his later and continued racism as a law officer in contempt of a court order.

Perhaps the best examples of pardon power abuse were the Trump pardons of Roger Stone, Paul Manafort, Steve Bannon, and Michael Flynn. The Mueller investigation of Trump's 2016 campaign collusion with Russia included an inquiry into whether the President's public suggestions of pardons for Stone, Manafort, and Flynn amounted to obstruction of justice, circumstances suggested likewise for the Bannon pardon.¹⁹² The pardons did not achieve any objectives in the public interest. Instead, the Mueller investigation indicated they effected obstruction of justice.¹⁹³ Nor did the pardons achieve any pardon purpose or objective particular to each person's situation. Specifically, Stone, an advisor to the Trump campaign, was convicted of lying to Congress about his communications with Russian operatives during the campaign and witness tampering.¹⁹⁴ He was sentenced to forty months in prison.¹⁹⁵ At the time of sentence, Stone was sixty-seven years old.¹⁹⁶ He had no life-threatening health impairments and no record of public service.¹⁹⁷ He had been exclusively a political operative.¹⁹⁸

191. See *id.* (noting Arpaio found guilty of defying order to stop racially profiling Latinos).

192. See Jonathan Lemire et al., *Trump Pardons Ex-Strategist Steve Bannon, Dozens of Others*, ASSOCIATED PRESS (Jan. 20, 2021), <https://apnews.com/article/steve-bannon-trump-pardons-broidy-66c82f25134735e742b2-501c118723bb> [perma.cc/HS3R-2QBY] (describing Bannon pardon); Barbara McQuade, *Steve Bannon's Arrest and Indictment Should Worry Trump and His Associates*, NBC NEWS (Aug. 21, 2020), <https://www.nbcnews.com/think/opinion/steve-bannon-s-indictment-arrest-should-worry-trump-his-associates-ncna1237536> [https://perma.cc/774P-WPAT] (discussing implications of Bannon pardon); Andrew Prokop, *Trump's Final Pardon Spree, Explained*, VOX (Jan. 20, 2021), <https://www.vox.com/22238571/trump-pardons-bannon-broidy-corruption> [perma.cc/SHR2-BQPJ] (detailing relationship of pardons to Mueller investigation).

193. See Quinta Juresic, *Obstruction of Justice in the Mueller Report: A Heat Map*, LAWFARE INST. (Apr. 21, 2019), <https://www.lawfaremedia.org/article/obstruction-justice-mueller-report-heat-map> [https://perma.cc/7PVP-VXPR]; Will Rahn, *10 Times Trump May Have Obstructed Justice, According to Mueller*, CBS NEWS (July 22, 2019), <https://www.cbsnews.com/news/obstruction-of-justice-10-times-trump-may-have-obstructed-justice-mueller-report/> [https://perma.cc/QDN2-FHQH]; Mark Sherman, *The 10 Instances of Possible Obstruction in Mueller Report*, ASSOCIATED PRESS (Apr. 18, 2019), <https://apnews.com/article/donald-trump-ap-top-news-elections-james-comey-north-america-e0d125d737be4a21a81bec3d9f1dffd8> [https://perma.cc/6ZW3-2U-2Q].

194. See Peter Baker et al., *Trump Commutes Sentence of Roger Stone in Case He Long Denounced*, N.Y. TIMES (July 2020), <https://www.nytimes.com/2020/07/10/us/politics/trump-roger-stone-clemency.html> [https://perma.cc/JY8H-WLG4].

195. *Id.*

196. *Id.*

197. See *id.*; see also Kyle Cheney & Josh Gerstein, *Judge Explains Decision to Reject Delay in Roger Stone's Sentence*, POLITICO (June 29, 2020), <https://www.politico.com/news/2020/06/29/judge-rejects-roger-stone-request-to-delay-prison-term-345080> [https://perma.cc/XT6A-F4L6] (noting Stone's unspecified medical conditions "medically controlled").

198. See Baker et al., *supra* note 194.

Before Stone served any of his sentence, however, Trump granted Stone clemency.¹⁹⁹

As grounds for the pardon, the White House stated that there was no evidence supporting Stone's conviction.²⁰⁰ The White House, however, substituting its views for those of the trial judge and jury, offered no explanation, let alone evidence, in support of its mere assertion. Former President Trump simply rejected the conviction and the judicially adjudicated evidentiary basis for it.²⁰¹ Other than assertions of prosecutorial abuse that were also not demonstrated, there was no claim—much less substantiation—that mercy, humanity, Stone's rehabilitation or remorse, or the public interest warranted clemency.²⁰² Stone stated that he had always counted on pardon relief to protect him from lying and obstruction.²⁰³

Paul Manafort briefly served as a 2016 Trump campaign manager and had been a longstanding representative of Russian interests.²⁰⁴ He was, therefore, potentially a firsthand witness to any campaign collusion with Russia. His conviction, however, was for tax and bank fraud, activities unrelated to the campaign.²⁰⁵ Manafort's pardon resulted in his serving only months of his seven-year prison sentence and, contrary to the public interest, precluded prosecutorial pressure on Manafort to testify.²⁰⁶ As grounds for the commutation, the White

199. See Press Release, The White House Press Sec'y, Statement from the Press Secretary Regarding Executive Grant of Clemency for Roger Stone, Jr. (July 10, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grant-clemency-roger-stone-jr/> [<https://perma.cc/MJ-L5-FB5S>] [hereinafter Press Release] (announcing Stone's commutation of sentence); Baker et al., *supra* note 194.

200. See Press Release, *supra* note 199 (asserting sentence nothing more than "collusion delusion").

201. See *id.* (alleging Stone in prison because of improper investigation resulting from failed Russian probe).

202. See Robert Mueller III, *Robert Mueller: Roger Stone Remains a Convicted Felon, and Rightly So*, WASH. POST (July 11, 2020), <https://www.washingtonpost.com/opinions/2020/07/11/mueller-stone-oped/?arc4-04=true> [<https://perma.cc/M2XU-WZEF>] (claiming prosecutors acted with integrity); Press Release, The White House Press Sec'y, Statement from the Press Secretary Regarding Executive Grants of Clemency (Dec. 23, 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/statement-press-secretary-regarding-executive-grants-clemency-012021/> [<https://perma.cc/DVH5-9DMF>] [hereinafter Statement from the Press Secretary] (citing prosecutorial misconduct and unfair treatment as reasons for clemency).

203. See Peter Baker, *Roger Stone Denies Withholding "the Goods" on Trump in Exchange for Clemency*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/us/politics/roger-stone-interview-trump.html> [<https://perma.cc/ZK8F-A75Z>] (noting Stone's acknowledgment he could count on Trump). Some believed that Stone's pardon was unconstitutional on grounds other than those suggested in this Article. See Corey Brettschneider & Jeffrey K. Tulis, *The Traditional Interpretation of the Pardon Power Is Wrong*, THE ATLANTIC (July 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/traditional-interpretation-pardon-power-wrong/6140-83/> [<https://perma.cc/3BXN-H4WY>] (arguing persons charged with crimes related to matters alleged in an impeachment fall within impeachment exception to pardon power).

204. See Ilya Marritz, *Lets Recall Exactly What Paul Manafort and Rudy Giuliani Were Doing in Ukraine*, PROPUBLICA (Mar. 1, 2022), <https://www.propublica.org/article/lets-recall-what-exactly-paul-manafort-and-rudy-giuliani-were-doing-in-ukraine> [<https://perma.cc/2V85-BBYB>].

205. See Miles Parks & Ryan Lucas, *Paul Manafort, Former Trump Campaign Chairman, Sentenced to Just Under 4 Years*, NPR (Mar. 7, 2019), <https://www.npr.org/2019/03/07/701045248/paul-manafort-former-trump-campaign-chairman-sentenced-to-just-under-4-years> [<https://perma.cc/J6DC-C2VB>] (reporting Paul Manafort's arrest).

206. See Statement from the Press Secretary, *supra* note 202 (noting Manafort's two years of previously served time).

House asserted prosecutorial overreach and a political witch hunt, even though Manafort's criminal conduct preceded and had been under investigation well before the 2016 campaign.²⁰⁷ The essential "paper case" against Manafort was virtually irrefutable.²⁰⁸

Steve Bannon served as a Trump campaign strategist, although many in the intelligence community questioned suspicious contacts between Bannon, the campaign, and Russia.²⁰⁹ An indictment charging him and three others alleged that *after* leaving the campaign, defendants defrauded political donors to contribute to an organization ostensibly aimed at raising funds to "build the wall" at the southern border.²¹⁰ Trump pardoned only Bannon, whose circumstances were no different from the other three, except that he more likely was the only one who potentially had firsthand knowledge of any campaign contacts with Russia.²¹¹ A White House statement about the pardon suggested that Bannon was charged because of his political activities, which is hardly plausible, given that the Trump administration itself charged Bannon.²¹²

Finally, Michael Flynn served briefly at the start of the Trump administration as National Security Advisor.²¹³ He met with Russian officials after the 2016 election and before Trump's inauguration, and subsequently lied to FBI investigators about his conversations.²¹⁴ Flynn later plead guilty to charges of obstruction of justice.²¹⁵ Trump pardoned Flynn not only for these charges, before his sentence was even known, but also for *any* criminal conduct related to the Mueller investigation with which he might subsequently be charged.²¹⁶

207. *See id.*

208. *See* Amita Kelly et al., *Trump Pardons Roger Stone, Paul Manafort and Charles Kushner*, NPR (Dec. 23, 2020), <https://www.npr.org/2020/12/23/949820820/trump-pardons-roger-stone-paul-manafort-and-charles-kushner> [https://perma.cc/DVA4-VQ5T].

209. *See* Alana Abramson, *Donald Trump Has Burned Steve Bannon After Calling Him a Friend for Years*, TIME (Jan. 3, 2018), <https://time.com/5086254/trump-steve-bannon-book/> [https://perma.cc/8EX5-SVK9]; Mark Mazzetti, *G.O.P.-Led Senate Panel Details Ties Between 2016 Trump Campaign and Russia*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/08/18/us/politics/senate-intelligence-russian-interference-report.html?searchResultPosition=8> [https://perma.cc/SUK7-WYLT] (discussing Trump campaign's connection with Russians).

210. *See* Chelsia Rose Marcius et al., *Bannon Pleads Not Guilty to New York Charges in Wall Case*, N.Y. TIMES (Sept. 8, 2022), <https://www.nytimes.com/2022/09/08/nyregion/bannon-indictment-new-york.html> [https://perma.cc/YJ6T-RVD8].

211. *See id.* (detailing pardon and charges against other defendants).

212. *See* Pamela Brown et al., *Trump Pardons Steve Bannon as One of His Final Acts in Office*, CNN (Jan. 20, 2021), <https://www.cnn.com/2021/01/19/politics/steve-bannon-pardoned-by-trump/index.html> [https://perma.cc/C84X-3877].

213. *See* Maggie Haberman et al., *Michael Flynn Resigns as National Security Advisor*, N.Y. TIMES (Feb. 13, 2017), <https://www.nytimes.com/2017/02/13/us/politics/donald-trump-national-security-adviser-michael-flynn.html> [https://perma.cc/9P49-VVXB].

214. *See* Michael D. Shear & Adam Goldman, *Michael Flynn Pleads Guilty to Lying to the F.B.I. and Will Cooperate with Russia Inquiry*, N.Y. TIMES (Dec. 1, 2017), <https://www.nytimes.com/2017/12/01/us/politics/michael-flynn-guilty-russia-investigation.html> [https://perma.cc/898D-XKPW].

215. *See id.*

216. *See* Josh Gerstein & Kyle Cheney, "Any and All Possible Offenses": Trump Pardon Grants Flynn a Sweeping Reprieve, POLITICO (Nov. 30, 2020), <https://www.politico.com/news/2020/11/30/trump-flynn-pardon->

V. CONCLUSION

Since Watergate, presidents have quite arguably been less than scrupulous in their exercises of the pardon power.²¹⁷ Although such misuse has gone unchecked for decades, it has not been because all questionable past pardons were valid. Moreover, such disregard for the unlawful use of a constitutional power is no reason for continuing to allow the grant of pardons without *promptly* and *meaningfully* questioning their validity.

It is the Executive's primary Article II obligation to "take Care that the Laws be faithfully executed."²¹⁸ Although determining what is sufficient for faithfully executing the laws is surely nonjusticiable, it does not necessarily follow that considering whether a particular pardon grant is faithfully executing the law is nonjusticiable. Given that the judiciary has developed standards for determining the validity of other exercises of constitutional power—like deciding whether state regulations intrude on the federal commerce power's domain—surely it can discern the differences in the pardon context between compassion and corruption, public interest and personal interest, and grace and graft.²¹⁹

Despite the value of prudence, the judiciary should not be timid about its role in safeguarding the effective functioning of our democratic republic. Pre-constitutional history of the English pardon power "reveals a gradual contraction to avoid its abuse and misuse. Changes were made as potential or actual abuses were perceived"²²⁰ History does repeat itself, as with former President Trump's continuing promises to pardon participants in and witnesses to the events of January 6. Accordingly, although the questionable use of the pardon

reprieve-441527 [https://perma.cc/4E4V-95XG] (noting clemency's broad immunization Flynn); Prokop, *supra* note 192 (examining Trump using pardon power with less concern for norms of propriety).

217. See Albert W. Alschuler, *The Corruption of the Pardon Power*, 18 U. ST. THOMAS L.J. 1, 1012 (2022) (describing controversial presidential pardons); CROUCH, *supra* note 112, at 64, 101 (concluding only in recent times have presidents used pardons to serve their personal interests). Former President Trump's recent announcements that he would pardon accused or convicted January 6 law violators and persons unlawfully avoiding testimony in investigations and trials threatens to make the promise of pardons an incentive to obstruct justice, as well as a useful campaign mantra, precisely because of the widely accepted view that the pardon power is absolute and not subject to judicial review. Likewise, "[a]lthough the Constitution does not allow the president to pardon future crimes, it does not block him from encouraging crimes by announcing that he will pardon them." Alschuler, *supra* note 3, at 552. In fact, because the current public and even legal view is that the pardon power is absolute and unreviewable, a candidate's pardon promise may be the only campaign promise whose keeping a candidate may guarantee.

218. U.S. CONST. art. II, § 3.

219. See Davis, *supra* note 19, at 50:

Frequently, when an issue of law is new to a jurisdiction, the reviewing court is more focused on the developing factors and considerations than on the actual decision itself. This kind of deferential review may continue for some time in order to allow appellate or trial courts to develop the factors that should be considered when exercising the discretion, as well as the balancing of those factors. Eventually, for issues as to which rules can be developed, the appellate body, as part of its law-making function and after having further redefined the factors, will specify those factors and considerations that will thereafter be required to make the decision.

220. Schick v. Reed, 419 U.S. 256, 260 (1974).

power since President Ford's pardoning of President Nixon²²¹ does not warrant contraction of the pardon power by constitutional amendment, the need for avoiding its abuse has been demonstrated. Certainly, recent events have shown that it is no less true for the pardon power that "[p]ower tends to corrupt and absolute power corrupts absolutely."²²²

As important as other Executive Branch powers are, the pardon power is the one such power whose elimination from Article II would hardly have affected presidential prerogative since the country's founding. With that power, however, and without an effective check on it, the Executive Branch is capable of being as much a malefactor as benefactor. The availability of judicial review of questionable instances of the pardon power's exercise as proposed here is, therefore, fully warranted and in keeping with the Framers' purposes and objectives for preserving that power in an executive and not in a king. As current events have made abundantly clear, prudence in the review-limiting principles of justiciability should not foreclose the detriments and dangers of another constitutionally gratuitous act of grace.

221. See CROUCH, *supra* note 112, at 64, 101 (detailing several instances of questionable pardons since Ford's pardon of Nixon).

222. LORD ACTON, *Letter to Bishop Creighton, April 5, 1887*, in *ESSAYS ON FREEDOM AND POWER* 358, 364 (H. Finer ed. 1948).