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Constitutional Law -- Presidential Pardons and the Common Law

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fect of such a per se rule as possibly leading to the elimination of many small independent competitors.[48] The situation in *Sylvania* corresponds with that concern. By 1962 Sylvania's share of the television market had declined to one or two percent. The new distribution policy had helped it increase its share to five percent in 1965.[49] Even though it is controlled by General Telephone and Electronics Corporation, Sylvania has never been a giant in the television industry.

The antitrust laws were initially enacted to prevent monopolies by a few large companies. It is certain that the underlying purpose of the antitrust laws is not being served when interbrand competition is sacrificed to encourage intrabrand competition.[50] The *Schwinn* rule should only be applied to territorial resale restraints and other restraints that have a similar effect of dividing markets and limiting intrabrand competition. Dealer-location clauses are not such restraints.

JOHN GALE

Constitutional Law—Presidential Pardons and the Common Law

The Constitution states that "[t]he President shall . . . have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[1] In *Schick v. Reed*[2] the United States Supreme Court was called upon to determine whether the commutation of a death sentence to a sentence of life imprisonment without the possibility of parole was a valid exercise of the President's pardoning power.[3] A divided Court[4] upheld the validity of this commutation, concluding that the power granted the President under article II, section 2, includes the power to substitute for the sentence imposed by the trial court another type of sentence not specifically provided for by statute.[5] In so holding, the Court extended the scope of the Presi-

48. 388 U.S. at 394.
49. 1974 Trade Cas. at 96,793.
50. *See* note 35 *supra.*

1. U.S. CONST. art. II, § 2.
2. 95 S. Ct. 379 (1974).
3. *Id.* at 382.
4. Chief Justice Burger wrote the majority opinion. Justices Marshall, Douglas, and Brennan dissented in an opinion written by Justice Marshall. *Id.* at 386.
5. *Id.* at 384.

dent's pardoning power beyond its previous judicially recognized boundaries and beyond the scope of its English common-law counterpart.

Petitioner Maurice L. Schick was tried for murder in 1954 while serving in the United States Army.[6] In the face of conflicting psychiatric testimony, the court-martial rejected his defense of insanity and sentenced him to death.[7] After an Army Board of Review and the Court of Military Appeals affirmed his conviction and sentence,[8] his case was forwarded for final review to President Eisenhower.[9] On March 25, 1960, the President commuted his sentence to life imprisonment, on the express condition that he never be eligible for parole.[10] Schick received a dishonorable discharge from the Army and was transferred to the federal penitentiary at Lewisberg, Pennsylvania, to serve his life sentence.[11]

In 1971 Schick brought suit in the federal District Court for the District of Columbia to require the United States Board of Parole to consider him for parole.[12] He argued that the annexation of the no-parole condition to his commutation was an invalid exercise of the presidential pardoning power. The court rejected his claim and granted the Government's motion for summary judgment.[13] Before the court

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6. *Id.* at 381.

7. Schick was sentenced pursuant to Uniform Code of Military Justice art. 118, Act of May 5, 1950, ch. 169, § 1, 64 Stat. 140 (codified at 10 U.S.C. § 918 (1970)), which prescribed death and life imprisonment (with the possibility of parole) as the alternative punishments for premeditated murder, the choice being left up to the court-martial.

8. *See* United States v. Schick, 7 U.S.C.M.A. 419, 22 C.M.R. 209 (1956).

9. Uniform Code of Military Justice art. 71(a), Act of May 5, 1950, ch. 169, § 1, 64 Stat. 131 (codified at 10 U.S.C. § 871(a) (1970)), required the President to review all military sentences and authorized him to "approve the sentence or such part, amount, or commuted form of the sentence as he sees fit . . . ."

10. The President's order stated:

> "[P]ursuant to the authority vested in me as President of the United States by Article II, Section 2, Clause 1, of the Constitution, the sentence to be put to death is thereby commuted to dishonorable discharge . . . and confinement at hard labor for the term of his . . . natural life. This commutation of sentence is expressly made on the condition that the said Maurice L. Schick shall never have any rights, privileges, claims or benefits arising under the parole and suspension or remission of sentence laws of the United States . . . ."

95 S. Ct. at 381. As the dissent noted, "Confinement without opportunity for parole is unknown to military law." *Id.* at 389 n.11. The establishment of a parole system for offenders in military correctional facilities is authorized by 10 U.S.C. § 952 (1970).

11. 95 S. Ct. at 381.

12. *Id.* Under the federal parole statute, 18 U.S.C. § 4202 (1970), which was applicable to Schick because he was imprisoned in a federal institution, a prisoner may be released on parole after serving one-third of a definite-term sentence or fifteen years of a life sentence.

13. 95 S. Ct. at 381.

of appeals heard the case, the Supreme Court decided in *Furman v. Georgia*[14] that death sentences imposed at the discretion of a jury are unconstitutional.[15] Because the imposition of the death penalty had been within the discretion of the court-martial,[16] Schick argued that *Furman* should be applied retroactively to his case, thus requiring the imposition of the only legal alternative punishment, life imprisonment, with attendant eligibility for parole consideration.[17] Schick also argued that the President had exceeded his authority in granting the conditional commutation.[18] The court of appeals rejected both arguments and affirmed the decision of the district court.[19]

The Supreme Court likewise affirmed.[20] The majority was unpersuaded by Schick's argument concerning the retroactivity of *Furman*. It reasoned that since his death sentence had been commuted in 1960, he was not under a death penalty at the time *Furman* was decided and thus that decision could provide him no relief.[21]

The Court devoted most of its opinion to an examination of the constitutional validity of Schick's conditional commutation. In interpreting the meaning of the pardon power under the Constitution, the Court relied heavily on the history of the pardoning power in England prior to the drafting of the Constitution[22] and on the Court's previous interpretations of its scope in this country. It concluded that the pardoning power granted the President was meant to be unfettered by any legislative enactments[23] and held that this power inescapably included the right to commute a death sentence to life imprisonment without

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14. 408 U.S. 238 (1972).
15. *Id.* at 240.
16. *See* note 7 *supra.*
17. Schick v. Reed, 483 F.2d 1266, 1270 (D.C. Cir. 1973).
18. *Id.* at 1268.
19. *Id.* at 1270. Judge Skelly Wright dissented on the ground that *Furman* should be retroactively applied here, thereby invalidating the death sentence and its later commutation. *Id.* at 1271.
20. 95 S. Ct. at 386.
21. *Id.* at 382. The dissenters, however, believed that *Furman* required the eradication of *all* adverse consequences of an unconstitutionally imposed death sentence. Since the punishment substituted by the commutation was more severe than the statute's only alternative, the dissent considered the conditional commutation to be an adverse consequence that *Furman* required to be voided. *Id.* at 387.
22. The Court observed that "[t]he history of our executive pardoning power reveals a consistent pattern of adherence to the English common law practice." *Id.* at 383. The similarity in the English and American prerogatives was intended by the constitutional draftsmen, who "were well acquainted with the English crown authority to alter and reduce punishments as it existed in 1787." *Id.* at 382.
23. *Id.* at 385.

eligibility for parole,[24] even though the latter was not authorized by statute.[25]

The power of the Crown to pardon is deeply rooted in English history, some say tracing back to the Teutonic tribes.[26] By the time of Henry VIII, the pardoning power was absolutely and exclusively vested in the King.[27] He had great latitude in exercising this power; Coke reported that his pardon could be "either absolute, or under condition, exception, or qualification . . . ."[28] This flexibility ensured the King an unrestricted ability to bestow mercy. According to Coke, "A pardon is a work of mercy, whereby the king either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporall or ecclesiasticall . . . ."[29] Its exercise was seen as being noble, for, as Coke stated, "[m]ercy and truth preserve the king, and by clemency is his throne strengthened."[30]

With little modification the constitutional draftsmen brought the pardoning power of the executive to this country. Because there was not much debate at the Constitutional Convention over the inclusion of the pardoning clause,[31] it appears that the delegates intended this power of the President to be similar to that power of the English Crown with which they were familiar.[32] Writing in *The Federalist No. 74* shortly after the Convention, Hamilton justified the granting of this power on the grounds that "one man appears to be a more eligible dispenser of the mercy of the government than a body of men."[33] Clearly he and the other framers shared the English view of the pardon as being an act of mercy. Terming the pardoning power a "benign prerogative," Hamilton wrote, "The criminal code of every country partakes

24. *Id.* at 384.

25. *See* note 7 *supra.*

26. C. JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 1 (1922).

27. In 1535, Parliament enacted the following law: " 'That no person or persons, of what estate or degree soever they be . . . shall have any power or authority to pardon or remit any treasons, murders, manslaughters or any felonies whatsoever they be . . . but that the king's highness, his heirs and successors, kings of the realm, shall have the whole and sole power and authority thereof . . . .' " Grupp, *Some Historical Aspects of the Pardon in England*, 7 AM. J. LEGAL HIST. 51, 55 (1963), *quoting* An Act for Recontinuing Liberties in the Crown, 27 Hen. 8, c.24 (1535).

28. E. COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 233 (1817).

29. *Id.*

30. *Id.*

31. *See, e.g.*, 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 626 (1911).

32. Schick v. Reed, 95 S. Ct. 379, 382 (1974).

33. THE FEDERALIST No. 74, at 500 (J. Cooke ed. 1961) (A. Hamilton).

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."[34]

Chief Justice Marshall gave judicial recognition to the view that a pardon was an act of mercy. Writing for the Court in *United States v. Wilson*,[35] he defined pardon as "an act of grace proceeding from the power intrusted with the execution of the laws . . . ."[36] Marshall also stressed the similarity between the English and the American forms of pardoning power and asserted the need to look to the common law for guidance:

> As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt the principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it.[37]

After *Wilson* the trend of the courts in this country was to view the granting of a pardon as a personal act of mercy bestowed upon an individual by the President.[38] When questions arose concerning the nature of this power, courts turned to principles developed at common law.

The Supreme Court abandoned this historical approach in 1927 with *Biddle v. Perovich*.[39] In an opinion by Mr. Justice Holmes, the Court stated that a pardon was an act for the public welfare, "not a private act of grace from an individual happening to possess power."[40] It rested its conclusion concerning the nature of a pardon on logic rather than on common-law principles or on concepts existing at the time the Constitution was drafted.[41]

One manifestation of this non-historical approach in *Biddle* was the Court's use of the terms "commutation" and "pardon" without drawing any distinction between them. Traditionally, the concepts have

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34. *Id.*
35. 32 U.S. (7 Pet.) 150 (1833).
36. *Id.* at 160.
37. *Id.*
38. *See, e.g., Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).
39. 274 U.S. 480 (1927). In this case the petitioner argued that the presidential commutation of his sentence from death to life imprisonment was invalid because it was imposed without his consent. The Court upheld the commutation.
40. *Id.* at 486.
41. The Court announced this departure from the historical approach by stating, "We will not go into history . . . ." *Id.*

been viewed as completely different forms of clemency.[42] A pardon is a reduction of punishment that requires acceptance by the prisoner to be effective.[43] A commutation, on the other hand, is a "substitution of a punishment of a different character for that which has been awarded by the court."[44] Unlike a pardon, it does not require acceptance by the prisoner and can be imposed upon him against his will.[45]

Biddle disregarded the technical meaning of these terms. It reasoned that as long as the substituted sentence was one commonly recognized as being less severe, the prisoner "on no sound principle ought to have any voice in what the law should do for the welfare of the whole."[46] With this statement the Court discarded the long-standing requirement of prisoner consent.[47]

The Court's statement in *Schick* that "the requirement of consent was a legal fiction at best"[48] shows that the majority shared the views expressed in *Biddle*. However, the Court did not rely on *Biddle* in reaching its conclusion. Rather, it stated that this conclusion was "inescapable" "[i]n light of the English common law."[49] In fact, the decision misconstrued the common law.

The distinction between these two forms of clemency was important at common law. According to Maitland, although the King possessed the power to pardon, he could not commute sentences.[50] He was able to avoid this disability, however, by granting conditional pardons.[51] The English law officers Alexander Cockburn and Sir Richard Bethell explained this limitation on the King's powers in an 1854 opinion as follows:

> "The Crown has no power, except when such a power is expressly given by Act of Parliament, to commute a sentence passed by a court of justice. Practically, indeed, commutation of punishment has long taken place under the form of conditional pardons.

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42. *See, e.g.*, Lee v. Murphy, 63 Va. (22 Gratt.) 789 (1872).
43. *Id.* at 798.
44. Brett, *Conditional Pardons and the Commutation of Death Sentences*, 20 MOD. L. REV. 131 (1957).
45. Lee v. Murphy, 63 Va. (22 Gratt.) 789, 798 (1872).
46. 274 U.S. at 487.
47. Learned Hand did not share Holmes' view on this matter. Dissenting in United States *ex rel.* Brazier v. Commissioner of Immigration, 5 F.2d 162 (2d Cir. 1924), Hand said, "[A] pardon, like a deed, must be accepted to be valid at all." *Id.* at 166. He thought that a commutation was necessarily invalid because "the President . . . may not change the lawful sentence of a court except by reducing it." *Id.*
48. 95 S. Ct. at 383.
49. *Id.* at 384.
50. F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 480 (1955).
51. *Id.*

> For the Crown, having by the prerogative the power of pardon, may annex to a pardon such conditions as it pleases. Thus for offenses for which the punishment was death, where it was not deemed advisable to carry the sentence of death into execution, the course, from an early period, was to grant a pardon on condition of the convict being transported to some settlement or plantation.
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> "*But this could only be done with the consent of the felon.* The Crown cannot compel a man, against his will, to submit to a different punishment from that which has been awarded against him in due course of law."[52]

Based on this statement of the law, Cockburn and Bethell ruled that the commutation of a sentence by the Governor of Barbados was invalid.[53]

Early American courts also recognized the distinction between the two forms of clemency and the necessity for consent. For example, in *Ex parte Wells*[54] the Supreme Court relied on the consent requirement to uphold the validity of conditional pardons. The Court reasoned that, since the prisoner was required to accept a pardon for it to be effective, he, rather than the President, was imposing the new punishment.[55] *Schick*'s citation of that case to support its conclusion that "the pardoning power was intended to include the power to commute sentences"[56] illustrates its misinterpretation of the traditional views of the pardoning power.

Schick also went beyond *Biddle* in holding that a President may impose on a prisoner a punishment not already authorized by law.[57] *Biddle*, although expanding the scope of the pardoning power to include commutations, did not go so far as to hold that the President had unlimited freedom in substituting punishments.[58] In fact, commentators have viewed that case as "indicat[ing] that by substituting a commutation order for a deed of pardon, a President can always have his way in such matters, *provided the substituted penalty is authorized by law* and does not 'in common understanding exceed the original penalty.' "[59]

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52. Brett, *supra* note 44, at 136-37 (emphasis added).

53. *Id.* at 137. "The legal reputations of Cockburn and Bethell are such that their opinions must command the greatest respect. And this is the more so when, as in the present instance, the opinion conforms to the accepted principles of English constitutional law." *Id.*

54. 59 U.S. (18 How.) 307 (1855).

55. *Id.* at 315.

56. 95 S. Ct. at 384.

57. *Id.*

58. *See* Biddle v. Perovich, 274 U.S. 480 (1927).

59. CONGRESSIONAL RESEARCH SERVICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA—ANALYSIS AND INTERPRETATION 475 (1973) (emphasis added).

Schick, however, concluded that only the Constitution limited the President and that to require him to substitute a punishment already authorized by law would place congressional restrictions on his pardoning power.[60] While the draftsmen of the Constitution clearly expressed the view that the pardoning power should not be " 'fettered or embarrassed,' "[61] the context in which they made the statement suggests that they were referring to the President's freedom to *exercise* his power, rather than his freedom to impose new punishments.[62] Hamilton said that the "benign prerogative of pardoning should be as little as possible fettered or embarrassed" because he believed that there should be "an easy *access* to exceptions in favor of unfortunate guilt."[63] In other words, he felt that the kinds of cases over which the President could exercise his pardon should not be unduly restricted. He did not, however, express a view as to the types of punishments the President might impose.

There is little authority either at common law or in the American courts concerning the nature of the conditions that can be attached to a pardon. The most frequent statement of the courts is that the condition can not be illegal, immoral, or impossible to perform.[64] One American court elaborated on this limitation by saying: "[The condition] must not be impossible, immoral or illegal. It is clear that [the governor] is authorized to substitute, with the consent of the prisoner, any punishment *recognized by statute or the common law as enforced in this state*."[65] One of the few decisions concerning the Executive's freedom to select a punishment not authorized by law was the case of the commutation by the Governor of Barbados, referred to above.[66] In that case the law officers Cockburn and Bethell not only ruled that the order was invalid because it was a commutation, but they also ruled that even had it been a conditional pardon, it would have been invalid.[67] The ground for this latter assertion of invalidity was that the Governor had substituted a prison sentence of nine years, whereas the law under which the prisoner was convicted authorized a

60. 95 S. Ct. at 385.
61. *Id.* at 384, *quoting* THE FEDERALIST No. 74, at 500 (J. Cooke ed. 1961) (A. Hamilton).
62. THE FEDERALIST No. 74, *supra* note 33, at 500.
63. *Id.*
64. C. JENSEN, *supra* note 26, at 127.
65. Lee v. Murphy, 63 Va. (22 Gratt.) 789, 802 (1872) (emphasis added).
66. *See* text accompanying notes 52-53 *supra.*
67. Brett, *supra* note 44, at 137.

maximum prison term of four years.[68]

Schick wanted to avoid the restriction of the President's pardoning power by Congress. However, in doing so, the Court allowed the executive branch to exercise powers that were vested in Congress. The Court had previously stated that "the authority to define and fix the punishment for crime is legislative . . . and . . . the right to relieve from punishment, fixed by law and ascertained according to methods by it provided, belongs to the executive department."[69] More recently the Court stated that "[t]he punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress . . . ."[70] The Court could have permitted both branches to exercise their given functions, had it recognized the right of Congress to define the outer boundaries of the President's pardoning power.

In light of this intrusion of the executive branch into the legislative domain, it is unfortunate that *Schick* did not clarify the actual basis for its holding. The Court announced that its decision was grounded in the "history of the English pardoning power."[71] Nevertheless, an examination of the decision shows that the Court's conclusions deviated from the common-law principles significantly. Rather than attempting to invoke the common law, the Court could have openly announced that it was abandoning an historical approach and was basing its decision on currently existing conditions. The Court then could have proceeded to enumerate the considerations upon which it based its conclusion that the President has the right to prescribe and impose punishments on individuals without either the prisoners' consent or the Congress' authorization. Such an approach would have illuminated both the scope of the President's pardoning power and the nature of his relation to Congress.

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Constitutional Law—Procedural Due Process in Prison Disciplinary Proceedings—The Supreme Court Responds

Most correctional systems reduce an inmate's sentence as a reward for serving periods of his confinement without incurring dis-

68. *Id.*
69. *Ex parte* United States, 242 U.S. 27, 42 (1916).
70. Bell v. United States, 349 U.S. 81, 82 (1955).
71. 95 S. Ct. at 385.