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A New Power?: Civil Offenses and Presidential Clemency

NOAH A. MESSING†

INTRODUCTION

Article II of the U.S Constitution empowers presidents to pardon "Offences against the United States." The traditional understanding of that power suggests that presidential clemency extends only to crimes. That view, however, is mistaken. This Article shows that presidents may also pardon civil offenses and opens a discussion about how this power could be used by presidents.

Federal civil offenses are laws or regulations that impose penalties on offenders—but that cannot result in the offender being sent to prison.[1] Parties who violate these laws may be

† Lecturer in the Practice of Law and Legal Writing, Yale Law School. The author received invaluable support from the Lillian Goldman Law Library at Yale Law School, including Julie Graves Krishnaswami, John Nann, Michael VanderHeijden, Drew Adan, and Michael Widener. The Article benefited from going through the wringer at Yale Law School's faculty workshop and Stetson University College of Law's faculty colloquium. Both faculties provided superb insights. Valuable advice, at various stages of the writing process, was provided by William Eskridge, Gene Fidell, Heather Gerken, Jon Michaels, Nicholas Parrillo, Judith Resnik, Cristina Rodriguez, Roberta Romano, and Louis J. Virelli, III. A number of law students provided excellent research assistance: Hillary Aidun, Ahsan Barkatullah, William Clayman, Jesse Hogin, Philipp Kotlaba, Aaron Levine, Richard Luedeman, Hava Mirell, Victoria Pasculli, Jenna Pavelec, Ben Picozzi, Marina Romani, Jessica Samuels, Allison Turbiville, Cobus van der Ven, and Theodore Wojcik. The cheery staff at the State Library of Victoria in Melbourne directed me to an extraordinary trove of records from the late 1700s that contributed to this Article's discussion of English pardons. P.S. Ruckman, Jr., Editor of the Pardon Power Blog, provided invaluable advice at the

fined,[2] and in some cases their property may be forfeited.[3] As one federal agency observed, "[c]ivil penalties are an important element of regulatory enforcement, allowing agencies to punish violators appropriately and to serve as a deterrent to future violations."[4] Thus, civil offenses resemble criminal laws: both types of offenses prohibit and punish specific misconduct. But no careful analysis has ever been undertaken of whether presidential clemency is available for civil offenses.

This Article provides a comprehensive assessment of that question. Its methodology mirrors the tools that the Supreme Court has consistently used in resolving past cases about the pardon power. Thus, this Article's analysis is based on constitutional text, constitutional structure, and history. As the Court has explained, "the arguments drawn from the common law, from the power of the King under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing" than other interpretative tools.[5] Likewise, the Court has noted that the pardon power "must be construed with reference to its meaning at the time of its

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beginning of this project and shared his incomparable data set of presidential pardons—spreadsheets that contributed immeasurably to Part III's discussion of historical U.S. pardons.

1. Some states still allow for debtors' prisons, and unpaid civil penalties are considered debt. *See* Monica Davey, *Ferguson One of 2 Missouri Suburbs Sued Over Gantlet of Traffic Fines and Jail*, N.Y. TIMES, Feb. 9, 2015, at A8. *See also* 28 U.S.C. § 2007(a) (2012) (prohibiting federal debtors' prisons in states where such prisons have been abolished).

2. *See* 28 U.S.C. § 2461(a) (2012) ("Whenever a civil fine, penalty or pecuniary forfeiture is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement thereof, it may be recovered in a civil action.").

3. *See* 28 U.S.C. § 1918(a) (2012).

4. U.S. GEN. ACCOUNTING OFFICE., GAO-03-409, CIVIL PENALTIES: AGENCIES UNABLE TO FULLY ADJUST PENALTIES FOR INFLATION UNDER CURRENT LAW, at Highlights (2003), http://www.gao.gov/products/GAO-03-409 (Mar. 14, 2003).

5. *Ex parte* Grossman, 267 U.S. 87, 118 (1925).

adoption."[6] This Article focuses on those methodologies, and those methodologies suggest that civil offenses are subject to executive clemency.

But perhaps the most compelling reason to infer that presidents may pardon civil offenses stems not from historical analysis but from a simple, intuitive example. The pardon power is, for federal criminal offenses, nearly "unlimited,"[7] and presidents may pardon murder,[8] treason,[9] and kidnapping.[10] It would therefore be bizarre if a president could pardon a farmer who murdered federal officials and committed treason[11] but was powerless to remit a $117.11 fine that the same farmer incurred for growing too much wheat—the only civil offense in the bunch.[12]

This intuition, however, conflicts with more than 180 years of dicta suggesting that the pardon power extends only to criminal offenses.[13] In 1833, Chief Justice Marshall wrote that "[a] pardon . . . exempts the individual, on whom it is

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6. *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855). *See also* Schick v. Reed, 419 U.S. 256, 262 (1974); *Ex parte* Grossman, 267 U.S. at 108-09 ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *Ex parte* Wells, 59 U.S. (18 How.) at 311-12.

7. *See, e.g.*, *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

8. *See Schick*, 419 U.S. at 257-59 (upholding clemency order for murderer of eight-year-old girl).

9. *See, e.g.*, Andrew Johnson, *President Johnson's Amnesty Proclamation*, N.Y. TIMES (May 30, 1865), http://www.nytimes.com/1865/05/30/news/president-johnson-s-amnesty-proclamation-restoration-rights-property-except.html (offering pardons to persons who had participated in a rebellion).

10. *See* Pardon of Rollie Rector (Mar. 21, 1938), *Records of the Office of the Pardon Attorney*, 46 *Pardon Warrants, 6/19/1893 – 6/30/1952*, at 211, *located in* Record Group 204, National Archives, College Park, MD [hereinafter *Pardon Warrants* RG 204].

11. *See* Debra Burlingame, *The Clintons' Terror Pardons*, WALL ST. J. (Feb. 12, 2008), http://www.wsj.com/articles/SB120277819085260827; *Pardons Granted by President George H. W. Bush (1989-1993)*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/ghwbush-pardons (last updated Jan. 26, 2015).

12. *See* Wickard v. Filburn, 317 U.S. 111, 114-15, 133 (1942) (upholding civil penalty of $117.11 for harvesting wheat in excess of 1941 marketing quota).

13. *See* Burdick v. United States, 236 U.S. 79, 94-95 (1915); United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833).

bestowed, from the punishment the law inflicts for a *crime* he has committed."[14] Likewise, the Department of Justice's website explains that the pardon power extends to "only federal *criminal* convictions."[15]

Approximately a dozen scholars have confronted whether civil offenses may be pardoned, and more than half have concluded that the president's clemency power extends only to criminal misconduct.[16] For example, John Yoo—hardly an advocate for constrained executive power—concluded that "the Pardon Clause . . . concerns crimes, not civil violations."[17] But Yoo provided no evidence for this conclusion: for this proposition, he and his coauthor cited the Pardon Clause, without *any* commentary.[18] Other commentators have made similar statements—also without delving into the available evidence.[19] In fact, no scholar—on either side of this limited debate—has carefully discussed the available evidence. This Article is the first to explore that evidence.

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14. *Wilson*, 32 U.S. (7 Pet.) at 160 (emphasis added); *see* James N. Jorgensen, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 348 n.18 (1993) ("Chief Justice Marshall supplied the classic definition of a pardon."); Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 BUFF. CRIM. L. REV. 1, 113 n.211 (2005) (referring to this quotation as "John Marshall's classic formulation of executive clemency"); *see also* Young v. United States, 97 U.S. 39, 58 (1877) (treating, without analysis, the words "crimes" and "offences" synonymously); *In re* North, 62 F.3d 1434, 1437 (D.C. Cir. 1994) (citing Chief Justice Marshall's opinion from *Wilson* about presidential pardons).

15. *Pardon Information and Instructions*, U.S. DEP'T OF JUST., https://www.justice.gov/pardon/pardon-information-and-instructions (Jan. 13, 2015) (emphasis added). When asked to justify this statement, the Office of the U.S. Pardon Attorney declined to definitively state whether the pardon power extends to federal civil violations. Letter from the Office of the Pardon Attorney, U.S. Dep't of Justice, to the Author (Feb. 4, 2014) ("[W]hen we receive an inquiry concerning clemency for a federal civil violation, we advise the questioner of our policy not to accept such applications for processing.").

16. *See infra* Part II.

17. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 842 (2013).

18. *Id.* n.390.

19. *See infra* Part II.

The relative quietude of this debate stems from underestimating the consequence of the power to pardon civil offenses; scholars have provided absolutely no discussion of what this power would mean for the executive branch. Most obviously, a president could pardon a large civil fine; these fines now routinely reach nine figures, and have exceeded five billion dollars in multiple instances in recent years.[20] A president could also influence policy directly, such as by granting amnesty each year on April 16 to cancel any civil penalties owed by citizens who failed to purchase healthcare as required under the Affordable Care Act,[21] or to issue individual pardons of any undocumented aliens detained for violating a civil offense related to immigration, or even to pardon an entire class of taxpayers who paid a lower marginal rate than Congress decreed. These approaches, of course, would be controversial—and this Article refrains from trying to draw the exact line at which, for instance, an issuance of amnesty would fall afoul of the Take Care

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20. *See* Margaret Cronin Fisk et al., *BP Pays Record $18.7 Billion to Settle Claims in Gulf Oil Spill*, BLOOMBERG (July 2, 2015), https://www.bloomberg.com/news/articles/2015-07-02/bp-said-to-settle-2010-gulf-oil-spill-claims-with-u-s-states ("A record $5.5 billion will cover federal penalties under the Clean Water Act, topping the previous high of $1 billion."); Aruna Viswanatha, *Banks to Pay $5.6 Billion in Probes*, WALL ST. J. (May 20, 2015), http://www.wsj.com/articles/global-banks-to-pay-5-6-billion-in-penalties-in-fx-libor-probe-1432130400; Press Release, U.S. Dep't of Justice, Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), http://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading; *see also* Press Release, U.S. Dep't of Justice, Justice Department Collects More Than $8 Billion in Civil and Criminal Cases in Fiscal Year 2013 (Jan. 9, 2014), http://www.justice.gov/opa/pr/justice-department-collects-more-8-billion-civil-and-criminal-cases-fiscal-year-2013; Jon Eisenberg, *Brother Can You Spare $8.9 Billion? Making Sense of SEC Civil Money Penalties*, K&L GATES LEGAL INSIGHT (Feb. 11, 2014), http://www.klgates.com/files/Publication/7b9cf03a-e90d-4bba-a373-bb494b063f9b/Presentation/PublicationAttachment/e5d51e6b-f798-4bf7-80be-ebeb853f0ad9/SEC_alert_021114.pdf ("Between 2004 and 2013, the SEC obtained orders in judicial and administrative proceedings requiring defendants and respondents to pay $8.9 billion in money penalties."); List of largest pharmaceutical settlements, WIKIPEDIA, https://en.wikipedia.org/w/index.php?title=List_of_largest_pharmaceutical_settlements&oldid=706848959 (last visited Apr. 17, 2016).

21. 26 U.S.C. § 5000A(b) (2012).

Clause.[22] This Article does not dispute that such practices would produce furor in Congress or among voters. (Criminal pardons have done so, too—such as the pardons of Richard Nixon and Marc Rich). Rather, this Article merely makes the case that the president may pardon civil offenses, but it leaves to future discussions the exact determination of where legal or political checks will impose fetters on this power.

Even so, this Article suggests a way that presidents and Congress could work together to use mass civil pardons (i.e., "amnesty") for the good of the republic. Such amnesties could provide "cloud cover" (i.e., temporary relief from problematic legislation and regulations) when these laws get too costly, when they impede important goals, or when a crisis arises. Cloud cover pardons—i.e., regularly recurring amnesty—could help in these situations without repealing or altering the underlying statutes or regulations, which might take a long time for Congress to amend, might prove hard to reenact, and might require costly ancillary legislation to appease holdouts. For instance, if the banking system seized up (as looked possible in 2008 and 2009), the president could pardon banks each night for failing to comply with various civil-offense laws that raised their costs or impeded their ability to quickly borrow or lend money. Or the president could pardon companies that traded with a country that Congress had subjected to economic sanctions if that country were facing a sudden risk of being toppled by ISIS: the amnesty could lift sanctions faster than Congress could—and without divulging classified information to numerous Hill offices.[23] Or if the United States were subjected to an oil blockade, the president and Congress could agree that the

22. U.S. CONST. art. II, § 3. The Supreme Court's 4-4 split in a recent case deprived scholars of guidance about the limits of the Take Care Clause. United States v. Texas, No. 15-674 (2016) (per curiam).

23. *Cf. PayPal to Pay $7.7 Million in U.S. Treasury Sanctions Case*, REUTERS (Mar. 25, 2015), http://www.reuters.com/article/2015/03/25/us-usa-treasury-ebay-idUSKBN0ML28620150325 (discussing civil fine imposed on PayPal for processing payments from sanctioned countries). To the extent that one administration enforced particular laws more aggressively than another—as seems to be the case with Treasury penalties during President Obama's Administration—a successor might wish to use civil-offense clemency to reduce the penalties imposed by an earlier president.

president would spur domestic oil production by granting recurring, daily pardons to violators; oil producers could then bypass many regulations in order to jumpstart production, but these laws would still be on the books as soon as the crisis passed.

This approach of using the pardon power broadly and quickly would, when combined with legislative acquiescence[24] (to prevent concerns under the Take Care Clause[25]) resemble how English monarchs and Parliament once jointly issued intermittent peacetime acts of amnesty.[26] This Article briefly reviews this tradition of executive-legislative amnesty partnership in England in the hope that it can serve as a model for lawfully and non-controversially neutralizing statutes and regulations that have fallen into desuetude or that pose problems for the nation during a crisis. (This application of the clemency power to add temporary cloud cover over statutes and regulations will likely be this Article's most controversial idea.)

But notwithstanding the above points, this Article focuses not on the possible uses of the civil clemency power but on the narrower proposition that civil offenses may be pardoned. Subsequent scholarly work will explore how and when presidents can or should deploy this untapped power. This Article simply establishes that it is very likely that the power exists.

This Article proceeds as follows. Part I reviews the conventional understanding of the scope of the president's clemency powers. Part II summarizes the existing debate about whether presidents may pardon civil offenses. Part III shows, through an array of methodological approaches, that the president may pardon civil offenses. That is, the president may negate penalties owed to the federal government for wrongdoing (but may not cancel debts or

24. A non-binding resolution could be obtained more quickly than Congress could enact or repeal legislation, and would not require permanent changes to laws that would, once the crisis passed, still be salutary. Or the president could simply ask House and Senate leaders to help develop the scope of the amnesty order.

25. U.S. CONST. art. II, § 3.

26. *See infra* Part III.A.1.

judgments owed by one private party to another). This Article concludes by briefly discussing various potential uses of the power to grant clemency for civil offenses.[27]

I. ORIGINS AND CURRENT UNDERSTANDINGS OF THE PARDON POWER

Article II, section 2, clause 1 provides: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[28] Although the Supreme Court has described the pardon prerogative as "unlimited, with the exception" of impeachment,[29] the Court was imprecise: other legal and practical restrictions curtail this power, Parts I.A and I.B describe these restrictions. Part I.C explores the power's positive dimensions.

A. *Legal Limits on the Pardon Power*

Article II imposes express and implied limits on the pardon power—four, in all.[30]

First, the president may only pardon *federal* offenses, or, "Offences *against the United States*."[31] Thus, the president is

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27. This Article does not suggest that civil penalties routinely reflect excessive legislation or regulation. But no set of laws is perfect, nor is the application of laws just in all cases. Just as newly discovered facts might warrant clemency, a civil offense might be excessive, or its consequences might be dire.

28. U.S. CONST. art. II, § 2, cl. 1.

29. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866). The Court has also described the pardon as "the determination of *the ultimate authority* that the public welfare will be better served by inflicting less than what the judgment fixed." Biddle v. Perovich, 274 U.S. 480, 486 (1927) (emphasis added).

30. Some commentators reach slightly different counts. *E.g.*, T.J. HALSTEAD, CONG. RESEARCH SERV., RS20829, AN OVERVIEW OF THE PRESIDENTIAL PARDONING POWER 1 (2006) ("First, the pardon power is limited to 'offenses against the United States' . . . . Likewise, the pardon power does not extend to 'Cases of Impeachment.'"); Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1673 (2001) (citing three limitations).

31. U.S. CONST. art. II, § 2, cl. 1 (emphasis added).

powerless to grant clemency in state criminal (or civil) cases.[32]

Second, the Constitution expressly prevents the president from granting relief "in Cases of Impeachment."[33]

Third, the president may not pardon a crime *before* it occurs.[34] Although the president may pardon an offender immediately after the crime is committed, he may not exempt anyone from the law in advance.[35]

Fourth, the president may not pardon someone held in *contempt* in a case between private parties—even if the individual is jailed for his or her contempt. The Supreme Court reached this conclusion in 1925 in *Ex parte Grossman*.[36] The Court concluded that the judicial contempt power was insulated from executive clemency if that power was being exercised to help third parties—such as by compelling witnesses to testify in private civil disputes. If, however, the criminal contempt was imposed for the court's

32. *E.g.*, Hickey v. Schomig, 240 F. Supp. 2d 793, 795 (N.D. Ill. 2002) ("[N]o federal official has the authority to commute a sentence imposed by a state court."); *Pardon Information and Instructions*, *supra* note 15 ("[T]he President cannot pardon a state criminal offense.").

33. U.S. CONST. art. II, § 2, cl. 1. The president could theoretically pardon his own crimes. *But see* Akhil Reed Amar & Brian C. Kalt, *The Presidential Privilege Against Prosecution*, 2 NEXUS 11, 11 (1997) (reaching the contrary conclusion); Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 781 (1996) (same).

34. Other than U.S. CONST. art. I, § 8, cl. 11 (which authorizes Congress to issue Letters of Marque and Reprisal to authorize someone to commit acts of piracy in advance), pre-approval to violate the law is almost completely absent from the U.S. legal system. *Cf.* Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 291 (2015) (discussing decisions to deprioritize enforcement of federal marijuana law).

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

36. 267 U.S. 87, 110-11 (1925).

benefit (e.g., to punish a misbehaving lawyer), the president may pardon the offense.[37] No other clear limits exist.[38]

B. *Practical Limits on the Pardon Power*

In addition to these formal limitations, presidential clemency is limited in numerous practical and political ways. For instance, and most obviously, the president cannot control public opinion or discourse, so if the president grants clemency to a notorious figure (such as President Ford's pardon of ex-President Nixon or President Clinton's pardon of fugitive financier, Marc Rich) the pardon cannot spare the wrongdoer from scathing comments and social consequences.[39] Likewise, someone who was convicted and then pardoned could still be referred to by private citizens as a convicted felon: law cannot trump memory.

Another major obstacle is political. Presidents—including critics of over-criminalization[40]—grant few

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37. *Id.* at 122. This holding produces some oddities. For instance, destroying documents in connection with a private case could be a statutory crime. *See, e.g.*, United States v. Lundwall, 1 F. Supp. 2d 249, 250 (S.D.N.Y. 1998) (citing 18 U.S.C. § 1503). The president could pardon that crime. But if the judge held the document-destroying witness in criminal contempt for interfering with the civil dispute, that order would be beyond presidential clemency.

38. One other possible limit exists. The Court once held unanimously that a convict must accept a pardon for it to take effect. Burdick v. United States, 236 U.S. 79, 94 (1915). But twelve years later the Court weakened this doctrine significantly, without expressly overruling it. Biddle v. Perovich, 274 U.S. 480, 486 (1927).

39. *See* JEFFREY CROUCH, THE PRESIDENTIAL PARDON POWER 3 (2009) ("President George H. W. Bush's pardons of Caspar Weinberger and other Iran-Contra figures; President Bill Clinton's conditional clemency offer to members of the FALN, along with his 'last-minute' pardons of Marc Rich and others; and President George W. Bush's commutation of Scooter Libby's prison sentence were all big stories that earned considerable media attention and general public condemnation.").

40. *See* President Barack Obama, *Remarks by the President at the NAACP Conference* (July 14, 2015) (transcript available at https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference) ("Over the last few decades, we've . . . locked up more and more nonviolent drug offenders than ever before, for longer than ever before . . . . In far too many cases, the punishment simply does not fit the crime.").

clemency petitions.[41] It was not always so. In 1896, there were 301 prisoners in federal penitentiaries,[42] and approximately 64.1% of them received presidential clemency.[43] But that was as good as things got for federal prisoners. The federal clemency rate plummeted to 10.3% by 1903.[44]

That rate would be welcome to modern federal prisoners. In 2014, the average number of daily federal prisoners was approximately 214,149,[45] but, in that same year, President Obama granted just thirteen pardons and nine petitions for commutation[46]—resulting in a clemency rate of 0.01%. Put differently, the chances of a given prisoner receiving a pardon in 1896 were over 5000 times greater than they are today. Convincing a president to invoke the pardon power has become the greatest obstacle to getting one.[47] And

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41. As of March 2016, President Obama granted 70 pardons of 2306 petitions and 187 commutations of 19,765 petitions. President George W. Bush granted 189 of 2498 pardons and 11 of 8576 commutations. By contrast, President Carter, granted 534 of 1581 pardons and 29 of 1046 commutations. *Clemency Statistics*, U.S. DEP'T OF JUST. (Mar. 10, 2016), http://www.justice.gov/pardon/clemency-statistics. As this Article was going to press, President Obama granted 214 commutations in a single day, which apparently increased his net number of commutations (as of early August 2016) to 562. Press Release, The White House, Office of the Press Secretary, President Obama Grants Commutations (Aug. 3, 2016), https://www.whitehouse.gov/the-press-office/2016/08/03/president-obama-grants-commutations; *Current Fiscal Year Clemency Statistics*, U.S. DEP'T OF JUST. (Aug. 15, 2015), https://www.justice.gov/pardon/current-fiscal-year-clemency-statistics.

42. W. H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 111 tbl.IV (1941).

43. *Id.*

44. *Id.*

45. *BOP: Population Statistics*, FED. BUREAU OF PRISONS (Apr. 21, 2016), http://www.bop.gov/about/statistics/population_statistics.jsp.

46. *Clemency Statistics*, *supra* note 41.

47. *See* Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 580-82 (2001). Additionally, the Department of Justice has adopted a regulation imposing a presumptive five-year waiting period for a federal prisoner to petition for a pardon, which reduces the number of people who may seek a pardon through that agency (although the president could, of course, issue a pardon at any time after an offense is committed, without obtaining pre-

commutations, which reduce or cancel a punishment but (unlike pardons) do not negate the underlying conviction,[48] are even scarcer.[49]

Other limits exist on the pardon power. To begin, even if the above obstacles are overcome and an offender somehow receives a pardon, once the offender has paid a fine, the pardon cannot help her recoup this payment.[50] (To be clear, no one disputes that *criminal* fines may be pardoned.)[51] Likewise, pardoned crimes are sometimes considered in sentencing a defendant in a subsequent case, at least by state courts.[52] Thus, a recidivist bank robber who is pardoned might get a longer sentence in state court when he next robs a bank. The private sector, too, could continue to ask job applicants or loan applicants about their convictions and make adverse decisions based on their responses.[53]

Similarly, a pardon cannot spare an individual from being prosecuted for an ongoing offense. For instance, if it is

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approval from the Department of Justice). 28 C.F.R. § 1.2 (2016); Hoffstadt, *supra*, at 581.

48. Jeffrey Crouch, *The President's Power to Commute: Is It Still Relevant?*, 9 U. ST. THOMAS L.J. 681, 684 (2012).

49. Brian M. Hoffstadt, *Common-Law Writs and Federal Common Lawmaking on Collateral Review*, 96 NW. U. L. REV. 1413, 1415 (2002) ("Commutation of a sentence may be of greater utility because it does not have a five-year waiting period, but *it is more difficult to obtain* . . . [because] [c]ommutation of sentence 'is an extraordinary remedy that is very rarely granted.'") (emphasis added) (quoting 28 C.F.R. § 1.3 (2001)).

50. Jorgensen, *supra* note 14, at 349 ("The president's power to remit fines and forfeitures, however, is limited to monetary penalties which have not yet been paid to the United States.") (citing Pollock v. Bridgeport Steam-Boat Co. (The Laura), 114 U.S. 411, 413 (1885); Knote v. United States, 95 U.S. 149, 154 (1877)).

51. *See infra* Part I.C.

52. For example, Massachusetts allows past crimes to be considered in determining whether a convict is a "habitual criminal," unless those crimes have been pardoned specifically on the ground that the person was innocent. MASS. GEN. LAWS ch. 279, § 25(a) (2014). This approach by state courts withstands preemption analysis under the Supremacy Clause. Carlesi v. New York, 233 U.S. 51, 57, 59 (1914).

53. *See* Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104, 105-06 (2006).

a federal offense to possess a wiretapping device,[54] a president may pardon all *past* violations of that law. But if the pardon recipient continues to possess the illegal device, a new "possession" crime occurs the moment after the president issues a pardon. This point merely extends the limitation, noted above, against pardoning future offenses. This same principle is reflected in gun amnesties: when an illegally owned gun is turned in, the one-time gun-owner ends his or her crime. (This point explains why this Article's idea of "cloud cover" would require recurring pardons.)

Theoretically, nothing bars a president from issuing recurring pardons—e.g., pardoning the owner of an illegal wiretapping device or machine gun each morning to foil any attempt to prosecute the offender. But in practice, no president has issued this sort of recurring pardon. That approach—discussed further in the Conclusion—would almost certainly infuriate Congress unless Congress assented to this approach. The limitation on this sort of pardon, however, is political, not legal. The Supreme Court has acknowledged (albeit in dicta) that various types of controversial pardons would be lawful, however distasteful their effects, and impeachment (rather than an injunction) would be the available remedy for the president's opponents.[55] Further, Congress has a variety of tools to prevent abuses. The ultimate failsafe is that Congress may impeach the president for abusing the pardon power,[56] but Congress may also, as examples, hold hearings to embarrass the president or subpoena the president's aides,[57] withhold

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54. 18 U.S.C. § 2512(1)(b) (2012).

55. *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("Exceptional cases . . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.").

56. CROUCH, *supra* note 39, at 18 (describing Hamilton's success in "attempting to quell Anti-Federalist concerns"); *see also* Jaired Stallard, *Abuse of the Pardon Power: A Legal and Economic Perspective*, 1 DEPAUL BUS. & COM. L.J. 103, 132 (2002) (noting that a president could lose his pension and entitlements for abusing the pardon power).

57. 2 U.S.C. § 1901 (2012) (describing process to subpoena witnesses); 2 U.S.C. § 192 (2012) (describing penalties); J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law*, 46 U. RICH. L. REV. 457, 480 (2012) (discussing hearings to embarrass the president); *See generally* Todd B. Tatelman,

funding from the president's favored programs,[58] or urge prosecutors to bring corruption charges against a president who issued a pardon in exchange for a payment or other quid pro quo benefit.[59]

Finally, some courts have rejected attempts to dismiss civil suits after the defendant received a pardon, suggesting that a pardon does not spare its recipient from civil liability to private parties.[60] This principle is sometimes invoked, mistakenly, to suggest that pardons cannot apply to *anything* that is "civil."[61] As Part III discusses, that proves too much. When a private party files suit against a criminal who is also a tortfeasor, the lawsuit is based on torts *against the private party*, not acts against the United States. The pardon power empowers the president to pardon "offences against the United States," not injuries to private parties.

Presidential Aides: Immunity from Congressional Process?, 39 PRESIDENTIAL STUD. Q. 385 (2009) (discussing expansion of executive privilege to exempt presidential aides from compulsory process and congressional subpoenas).

58. Steven Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1174 n.108 (1992) (recognizing "Congress's established power to refuse to fund the executive department" and "Congress's power to deny funds to the executive department").

59. Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 16 (1976).

60. In *Lettsome v. Waggoner*, a district court held that defendant's gubernatorial pardon did not bar plaintiff's civil assault proceeding and subsequent award of punitive damages. 672 F. Supp. 858, 863 (D.V.I. 1987). Similarly, there were three private lawsuits against ex-President Nixon for recording conversations. Halperin v. Kissinger, 606 F.2d 1192, 1195 (D.C. Cir. 1979); Smith v. Nixon, 606 F.2d 1183, 1185-86 (D.C. Cir. 1979); Clark v. United States, 481 F. Supp. 1086, 1090-92 (S.D.N.Y. 1979). None of the opinions mentions Nixon's pardon as a defense against these claims. And decades later, Valerie Plame sued Scooter Libby in a *Bivens* action for revealing her role in the CIA. Wilson v. Libby, 535 F.3d 697, 701 (D.C. Cir. 2008).

61. *See, e.g.*, Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 282-83 (2010) ("[T]he pardon power is limited to relieving the consequences of criminal offenses, since interference with the vested property rights of private parties is the functional equivalent of attempting to remit civil liability, which is likewise beyond the scope of the President's pardoning authority.").

C. *What Is Left? A Broad Power to Pardon*

Notwithstanding the above limitations, the pardon power is remarkably broad. The president may pardon any federal offense other than impeachment,[62] and may pardon any number of people at once.[63] Likewise, the president may pardon any number of offenses committed by a single offender.[64]

Critical to this Article, the president may undisputedly cancel criminal fines and criminal forfeitures—regardless of whether the criminal fine or criminal forfeiture[65] is attended by a prison sentence or whether the president cancels the prison sentence.[66] Notably, commentators usually observe that presidential clemency may cancel "fines" or "forfeitures" rather than specifying "*criminal* fines" or "*criminal* forfeitures,"[67] yet this power is typically treated as applying only to criminal fines and forfeitures.[68]

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62. U.S. CONST. art. II, § 2, cl. 1.

63. *See* Brown v. Walker, 161 U.S. 591, 601-02 (1896).

64. For example, President Clinton pardoned Marc Rich for "wire fraud, mail fraud, racketeering, racketeering conspiracy, criminal forfeiture, income tax evasion, and trading with Iran in violation of trade embargo." *Pardons Granted by President William J. Clinton (1993-2001)*, U.S. DEP'T OF JUST. (Jan. 23, 2015), http://www.justice.gov/pardon/clinton-pardons.

65. Terrance G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 256-57 (1994) (explaining the difference between civil and criminal forfeitures).

66. *See* Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 595 (1991) (citing HUMBERT, *supra* note 42, at 50 n.63) ("[T]here is no doubt that, in practice, the President may remit without pardoning.").

67. *See, e.g.*, Kobil, *supra* note 66, at 577 ("The clemency power also embraces remission of fines and forfeitures."); Krent, *supra* note 30, at 1673 ("[T]he president may remit fines and forfeitures"); William M. Landes & Richard A. Posner, *The Economics of Presidential Pardons and Commutations*, 38 J. LEGAL STUD. 61, 62 (2009) ("The pardon clause is understood to include . . . remissions of fines.").

68. *See infra* notes 82-95 and accompanying text.

In addition to being broad, the pardon power is flexible. The president may reduce, but not cancel, a sentence;[69] uphold a conviction while negating the punishment;[70] delay the start date of a convict's imprisonment (i.e., grant a respite);[71] temporarily release a prisoner from custody;[72] or make a pardon "conditional."[73] Conditional pardons allow the president to demand a wide array of terms in exchange for clemency that implicate other constitutional rights, such as abstaining from union politics or renouncing violence.[74]

The handful of limitations should not obscure the pardon power's stunning potential. There are more than 195,000 federal prisoners.[75] The president could release them all tomorrow. And then, as an encore, he could release all of the prisoners in Washington, D.C.[76] and use the clemency power

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69. The pardon power includes "reducing the amount of [a] fine." *Ex parte* Wells, 59 U.S. (18 How.) 307, 319 (1855).

70. Douglas A. Berman & Alyson S. White, *Looking at the* Libby *Case from a Sentencing Perspective*, 20 FED. SENT'G REP. 1, 1 (2007) ("President Bush exercised his executive clemency power to commute Scooter Libby's thirty-month prison sentence in its entirety (though he left in place Libby's convictions, the fine, and the supervised release term).").

71. Crouch, *supra* note 48, at 684 ("Other options for the chief executive include . . . to grant a reprieve or respite (which simply delays the full punishment).").

72. Kristen H. Fowler, Note, *Limiting the Federal Pardon Power*, 83 IND. L.J. 1651, 1652 (2008).

73. *See Ex Parte* Wells, 59 U.S. (18 How.) 307, 307. A condition may be precedent or subsequent, and must be accepted by the offender. Burdick v. United States, 236 U.S. 79, 90 (1915); *id.* at 311-12. Conditional pardons have required offenders to "refrain from alcohol, provide support for family members, leave the country, join the navy, drop claims against the United States, or restrict their travel or speech." Krent, *supra* note 30, at 1665. However, conditions are limited in that they may not be unconstitutional—although some conditions come close to falling afoul of this principle. *See* Schick v. Reed, 419 U.S. 256, 264 (1974).

74. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1238-40 (D.D.C. 1974) (describing President Nixon's pardon of Jimmy Hoffa conditioned on Hoffa abstaining from union politics); Krent, *supra* note 30, at 1667 (describing President Clinton's conditional pardon of FALN terrorists conditioned on renouncing violence).

75. *BOP: Population Statistics*, *supra* note 45 (noting that, as of May 16, 2016, there were 195,709 federal prisoners).

76. *See Pardon Information and Instructions*, *supra* note 15 ("[T]he President's pardon power extends to convictions adjudicated in the Superior Court of the

to restore the civil rights of all citizens who have lost those rights through felony convictions.[77] The president could thereby enable these individuals to vote, hold office, and serve on a jury or as a witness.[78] But no president, of course, has ever done this—a reality check that this Article encourages readers to remember as they assess whether civil clemency would be used irresponsibly.

Finally, the Take Care Clause, which requires the president to "take care that the laws be faithfully executed," does not ordinarily restrict the president's pardon power.[79] In fact, the very essence of a pardon is that the president has decided that an offense should not be punished as Congress intended (or as a statute is written, even if its text leads to unintended consequences). But even pardons that flaunt Congress do not usually permit a challenge under the ordinarily non-justiciable Take Care Clause,[80] and even if such a challenge *were* justiciable, the Supreme Court has indicated that impeachment and other remedies, rather than a lawsuit, are the appropriate check.[81] Still, the Take Care

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District of Columbia and military court-martial proceedings. However, the President cannot pardon a state criminal offense.").

77. CHRISTOPHER UGGEN ET AL., SENT'G PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1 (2012) ("5.85 million Americans are forbidden to vote because of 'felon disenfranchisement,' or laws restricting voting rights for those convicted of felony-level crimes.").

78. Knote v. United States, 95 U.S. 149, 153 (1877) ("A pardon . . . restores to [the offender] all his civil rights."); 3 UNITED STATES DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES: PARDON 272 (1939) ("One of the civil rights restored by pardon is the right to vote."); *id.* at 270-71 (A pardon restores "the right to hold office, to vote, to serve on a jury, to be a witness, and, in earlier times, the return of property forfeited by reason of, and punishment for, conviction of crime. But it does not restore offices forfeited, nor property or interests vested in others in consequence of conviction.").

79. U.S. CONST. art. II, § 3, cl. 5.

80. *See* David Bernstein, *Supreme Court Bombshell: Does Obama's Immigration Guidance Violate the Take Care Clause?*, WASH. POST: THE VOLOKH CONSPIRACY (Jan. 19, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/01/19/supreme-court-bombshell-does-obamas-immigration-guidance-violate-the-take-care-clause (observing that the Supreme Court has never considered a Take Care Clause case until a *sua sponte* instruction by the Court to address that issue in a pending case).

81. *Ex parte* Grossman, 267 U.S. 87, 121 (1925).

Clause creates an enormous political check on presidential excesses in the use of pardons: extreme executive use of clemency in a manner that offended Congress would spark a vicious showdown between the Executive and Legislative branches.

Taken together, the various general propositions discussed above suggest that the pardon power is enormously broad and flexible. Nevertheless, these propositions do not address whether the president may grant clemency when a person violates federal laws and regulations that impose *civil* penalties. Part II turns to that issue.

II. THE EXISTING DEBATE OVER CLEMENCY FOR CIVIL OFFENSES

This Part summarizes the debate—limited though it is—about whether presidents may pardon civil offenses.

Most jurists and scholars who have discussed this issue accept Chief Justice Marshall's dictum that "[a] pardon . . . exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a *crime* he has committed."[82] To be clear, the very concept of a "civil offense" did not come into existence until more than fifty years later.[83] And Marshall's comment (that pardons related to "crime[s]") arose in a case that had nothing to do with civil offenses: the issue was whether a bank robber had the right to reject a pardon that the president has signed.[84]

But nonbinding dicta sometimes proves durable. Marshall's position was later reiterated by Chief Justice Taft—also in dicta, also in a case that had nothing to do with civil offenses.[85] Like Marshall, Taft (a former president by

82. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) (emphasis added).

83. *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 937 n.91 (1926) (citing 1846 as marking the beginning of civil offenses in the United States).

84. *Wilson*, 32 U.S. (7 Pet.) at 160-61.

85. *See Ex parte* Grossman, 267 U.S. at 120-22 ("Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the *criminal law*.") (emphasis added).

this time) presumed without analysis that the federal pardon power applies only to criminal offenses. But civil offenses *did* exist by the time he wrote in 1925,[86] and Taft's observation proved tenacious. He made his statement without addressing whether civil offenses may *also* be pardoned. Even so, numerous leading scholars now echo his conclusion that pardons relate only to "crimes," leading them to imply that civil offenses[87] or "civil cases"[88] lie beyond the pardon power—even though they do not analyze the issue.

Where these scholars have directly addressed whether the pardon power reaches civil offenses, their conclusions do not explore fully the available evidence. For instance, Delahunty and Yoo observe that "the Pardon Clause . . . concerns crimes, not civil violations."[89] But as noted in the Introduction, they offer no evidence for their claim. Instead, they cite the bare constitutional text.[90]

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86. *See* Hepner v. United States, 213 U. S. 103, 105 (1909).

87. *See, e.g.*, David Gray Adler, *The President's Pardon Power, in* INVENTING THE AMERICAN PRESIDENCY 209, 212 (Thomas E. Cronin ed., 1989) (suggesting that the term "*offences*" was "virtually synonymous with *crimes* in English law") (emphasis added); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 31 ("The Pardons Clause also specifies that the President's pardon power does not extend to 'Cases of Impeachment.' That provision was, strictly speaking, unnecessary because impeachment is not a *criminal* proceeding and therefore could never come within the pardon power encompassed by the grant of the 'executive Power.'") (emphasis added).

88. This phrase—"civil cases"—is an ambiguous term, as it fails to clarify whether the authors are referring to civil actions between private parties or civil actions brought by the government to enforce statutory and regulatory requirements that have been violated, but it certainly does not suggest that civil offenses may be pardoned. *See, e.g.*, BRIAN C. KALT, CONSTITUTIONAL CLIFFHANGERS: A LEGAL GUIDE FOR PRESIDENTS AND THEIR ENEMIES 40-41 (2012) ("Pardons are thus limited to federal crimes; they cannot affect civil lawsuits, state criminal matters, or congressional impeachments."); James Pfiffner, *Pardon Power, in* THE HERITAGE GUIDE TO THE CONSTITUTION 261, 261 (David F. Forte & Matthew Spalding eds., 2d ed., 2014) (noting that "pardons are limited to offenses against the United States (i.e., *not civil or state cases*) and that they cannot affect an impeachment process") (emphasis added).

89. Delahunty & Yoo, *supra* note 17, at 842 (emphasis added).

90. Delahunty and Yoo support this proposition only with the following footnote: "U.S. CONST. art. II, § 2, cl. 1." *Id.* at 842 n.390.

Similarly, Samuel Morison, an attorney specializing in executive clemency, states that "the pardon power extends only to '[o]ffenses against the United States,' *as distinguished from civil penalties* or state offenses," but he, too, provides no authorities for his claim—other than the dictum of Chief Justice Marshall from before civil offenses existed.[91]

So, too, Evan Caminker reached that conclusion in his student comment, wherein he suggested that the pardon power extends only to criminal offenses.[92] Caminker based his conclusion on an overly aggressive reading of *Ex parte Grossman*, the Court's 1925 opinion.[93] But that case involved judicial *contempt*, not a civil-offense statute. The Court's rationale for concluding that the president could not pardon civil contempt was that doing so would vitiate the power of courts to enable private parties to pursue their private claims. Nothing in the case precludes the pardoning of civil offenses or the remittal of affiliated fines and forfeitures; rather, the case explained that contempt findings may not be pardoned in civil cases *between private parties*. Thus, there are good reasons for believing that civil offenses are different than the contempt orders in *Ex parte Grossman*.

Non-academic comments about the pardon power likewise presume, in most instances, that only criminal offenses may be pardoned or remitted.[94]

A few scholars, by contrast, have reached the conclusion espoused by this Article. Some of them offer little to no

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91. Morison, *supra* note 61, at 278 (emphasis added). Elsewhere, Morison cites cases repeating Chief Justice Marshall's conclusory dictum from *Wilson*. *See id.* at 296, 296-97 nn.208-09.

92. Evan Caminker, Comment, *The Constitutionality of* Qui Tam *Actions*, 99 YALE L.J. 341, 371 (1989).

93. *Id.* (citing *Ex parte* Grossman, 267 U.S. 87, 120 (1925)).

94. For example, a *Washington Post* article dismisses the theory that President Obama could use the pardon power to help illegal immigrants, because unlawful presence is "a civil violation, not a criminal one." Suzy Khimm, *No, Obama Can't Grant 'Amnesty' by Pardoning Illegal Immigrants*, WASH. POST (Dec. 6, 2011), http://www.washingtonpost.com/blogs/ezra-klein/post/no-obama-cant-grant-amnesty-by-pardoning-illegal-immigrants/2011/12/06/gIQA5S53ZO_blog.html.

support for their conclusion.[95] Others offer slightly more evidence for their position but, as shown in the following paragraphs, do not explore the array of historical materials that would support their conclusion.

Notably, W.H. Humbert—relied upon by several subsequent scholars as suggesting that civil offenses may be pardoned—offered little if any support for this view in his excellent 1941 exposition on the pardon power. First, Humbert wrote, "The Court [in *The Laura*[96]] did not question the right of the President to remit, through the exercise of his power to grant pardons, fines and forfeitures *of every description* which arise under the laws of Congress."[97] The phrase that Humbert chose—"of every description"—could be construed as applying to civil offenses as well as criminal offenses. But it is unclear that he intended as much. First, he cites almost no historical evidence for his conclusion (just a single legal encyclopedia). Second, *The Laura* involved a criminal offense, not a civil one, and did not evaluate whether civil offenses may be pardoned; if Chief Justice Marshall's dictum in *United States v. Wilson*[98] suggests (without proving the matter) that civil offenses may not be pardoned, *The Laura* plays the same role in suggesting, without proof, that civil offenses are pardonable. Third, Humbert notes that there exists a "concurrent power of remission by the President and by the Secretary of the Treasury of penalties incurred for violations of the revenue laws."[99] But that power was given by Congress to the Secretary of the Treasury on March 3, 1797. Thus, that act of "clemency" was issued

95. *See, e.g.*, 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW: GOVERNMENT STRUCTURE § 38:27 (3d ed. 2011) ("The pardoning power extends not only to felonies and misdemeanors with imprisonment but also to the remission of fines, penalties, and forfeitures. The power to pardon should not be limited by distinctions between 'civil' and 'criminal' penalties; property which has been seized by the government can be restored so long as third-party interests in the property have not vested.").

96. 114 U.S. 411, 417 (1885).

97. HUMBERT, *supra* note 42, at 51-52 (emphasis added).

98. 23 U.S. (7 Pet.) 150 (1833).

99. HUMBERT, *supra* note 42, at 52.

pursuant to a statutory authorization to cancel penalties.[100] Whether or not Congress may authorize an agency to settle specific cases does prove that the president may, under the inherent authority vested in him by Article II, pardon this sort of violation of the law.[101] Thus, Humbert offered an ambiguous hint—with no analysis—that civil offenses may be pardoned.

Subsequent scholars who share this Article's conclusion have relied on Humbert's unclear comment. For example, Harold Krent observes that "the [pardon] Clause covers *civil* as well as criminal sanctions imposed by the federal government."[102] But to support this claim, he offers no analysis. He instead cites only pages 51-52 of Humbert's book,[103] which (as just shown)[104] failed to assess this point thoroughly.

Like Krent, Brian Kalt suggested that "[a] pardon can release the offender from *civil liability* as to the federal government, provided that the claims of third parties are not impaired."[105] But he also cites only Humbert's work—which, as just noted, provides almost no evidence for its conclusion other than a citation to an ambiguous Supreme Court case.[106]

Like Krent's and Kalt's work, William Duker suggested that, while the pardon power does not apply to civil suits generally, the executive may have the power to pardon civil

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100. Remission Act of March 3, 1797, ch. 13, 1 Stat. 506 (1797); United States v. Lancaster, 26 F. Cas. 859, 860-61 (C.C.E.D. Pa. 1821) (No. 15,557) ("That the power of remission *vested in the secretary of the treasury* [by Congress, not by Article II] extends to such a case, and that, where so exercised, the interest of an individual in the penalty, not consummated by judgment, may be defeated, is unquestionable.") (emphasis added).

101. *Lancaster*, 26 F. Cas. at 860 ("But this case does not decide the question whether the president can, by his pardon, defeat the inchoate right of a private person, in a case where the remedy for the recovery of the penalty or forfeiture can be prosecuted only by and in the name of the United States.").

102. Krent, *supra* note 30, at 1673 (emphasis added) (citing HUMBERT, *supra* note 42).

103. *Id.*

104. *See supra* notes 97-101.

105. Kalt, *supra* note 33, at 780 n.10 (emphasis added).

106. *See id.* (citing HUMBERT, *supra* note 42).

penalties when doing so would not affect the rights or benefits of a third party.[107] But in substantiating this claim, Duker cites only a single source—an English case that was decided more than a century before the pardon power became a presidential power.[108] So his analysis, though correct, did not explore the state of the pardon power at the Founding. And as shown in Part III, there is a great deal of additional evidence that illuminates the constitutional validity of remitting civil penalties or pardoning civil offenders.

Only one scholar undertook more than a cursory review of whether civil offenses may be pardoned—but his analysis, too, addresses only a small fraction of the available evidence. Saikrishna Prakash's treatment provides the most detailed analysis ever undertaken (until now) of whether civil offenses may be pardoned. Prakash correctly concludes that the pardon power applies to civil offenses, but his exploration of the subject—he devotes five paragraphs to this issue in a 2015 book[109] and two more in a 2005 article[110]—falls short of true exposition. First, Prakash cites two other works to substantiate his claim.[111] The first is the work of Humbert (who, as shown above, did not address in detail whether civil offenses may be pardoned and did not build a case for that conclusion). Second, Prakash cited a 1984 book by Edward

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107. William F. Duker, *The President's Power To Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 526 (1977) ("[I]f a suit was for the king's branch of a law only and not to the particular damage of any third party, the king could pardon or dispense; if the suit was not only for the king's benefit but for the profit or safety of a third person, the king could not release the party.").

108. *Id.* at 526 n.262 (citing Thomas v. Sorrell, 89 Eng. Rep. 63, 100 (1673)). Duker also cites U.S. cases from 1875 and 1877. *Id.* at 526 n.264 (citing Knote v. United States, 95 U.S. 149 (1877); Osborn v. United States, 91 U.S. 474 (1875)). Duker's authorities do not prove the state of the law at the Founding. Additionally, the remittals that he cites arose out of criminal statutes. *See Knote*, 95 U.S. at 149; *Osborn*, 91 U.S. at 474, 477. Even though they were civil actions, they were the enforcement provisions of criminal, not civil offenses.

109. SAIKRISHNA BANGALORE PRAKASH, IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE 104-05 (2015).

110. Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 582 & n.356 (2005) (citing U.S. CONST. art. I, § 8, cl. 10; *id.* amend. V).

111. *Id.* at 582 n.355 (citing EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1984 (5th ed. 1984); HUMBERT, *supra* note 42, at 51-53).

Corwin to support his conclusions.[112] But Corwin merely stated that regardless of whether "the penalty takes the form of a fine or forfeiture, a pardon by the President restores to the offender so much of his property as has not become vested in third parties or covered into the Treasury."[113] That statement does not assert, much less prove, that the pardon power reaches civil offenses; Corwin could be discussing only criminal offenses that impose fines or permit forfeiture. (Dozens of treatises and cases from around the Founding observe that the president or an English monarch could pardon fines and forfeitures, so if Corwin's statement resolves the question posed by this Article, then far-better sources exist to support the same result). So neither Humbert nor Corwin makes Prakash's case for him.

But unlike other scholars to consider the availability of civil pardons, Prakash engaged in some original analysis on the subject.

In his 2005 article, Prakash employed a plain-text reading of the word "offences" in the pardon power. He assumed that the word "offence" means the same thing each time that it was used in the Constitution and that it means something different than "crime" (since that word appears elsewhere in the Constitution).[114] Hence, in Prakash's view "[w]hether an offense is designated criminal or civil is immaterial, for, in either case, someone has committed an offense against the laws of the United States."[115] But he assumes away the puzzle of whether "offences" and "crimes" were used in distinguishable ways; other scholars simply applied the opposite assumption.[116] As shown in Part III, the textual evidence is ambiguous, and Prakash's discussion omits any assessment of the history of pardons—what monarchs, presidents, and governors *actually* did—even though the Supreme Court regularly consults "[t]he history of our executive pardoning power," and particularly "the English

112. *Id.*

113. CORWIN, *supra* note 111, at 189.

114. *See* Prakash, *supra* note 110, at 582 n.356.

115. *Id.* at 582.

116. PRAKASH, *supra* note 109, at 104-05.

common-law practice" when determining the scope of the Pardon Clause.[117] History is the best evidence that presidents may pardon civil offenses, and this Article explores below (also in Part III) the historical evidence about civil clemency in vastly greater detail than any prior assessment.

Prakash returned to the question of civil pardons in his 2015 book, wherein he observed that the phrase "'[o]ffenses against the United States' [in Article II] should be understood as encompassing any violation of federal law in which public interests predominate," including "civil offenses prosecutable by the government."[118] He added that:

> [w]hen the government sues to collect fines and forfeitures, it prosecutes to redress offenses against the United States. In these situations, the president may pardon any such fines and forfeitures. Put another way, it does not matter whether Congress designates some penalty, fine, or forfeiture as 'civil' rather than 'criminal.'[119]

In all such situations, Prakash observed, "[t]he president can remit any fine or forfeiture due the United States; the fact that such a penalty accrues to the United States indicates that someone has committed an offense against the nation."[120]

Prakash is right. So are Krent, Kalt, Duker, and Humbert. But among the dozen or so scholars to address this issue—and Chief Justices Marshall and Taft in their dictum, and the Department of Justice in its policy—no one has yet delved below the somewhat superficial arguments revisited above. No one, in short, has yet proven the case. Thus, the academic debate of whether the president may pardon civil offenses remains open, and no robust effort has been made to disprove the Supreme Court's stray observation that pardons apply only to crimes. And the debate should be hotter than it has been: the limited number of voices in the discussion arises from an apparent oversight of the potential implications of a civil clemency power.

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117. Schick v. Reed, 419 U.S. 256, 262 (1974).

118. PRAKASH, *supra* note 109, at 105.

119. *Id.*

120. *Id.*

III. MAY CIVIL OFFENSES BE PARDONED?

This Article turns now to its central topic. Numerous interpretative tools, explored in this Part, suggest strongly that presidential clemency is available for civil offenses. Part III.A evaluates evidence from *before* the Constitutional Convention that illuminates whether civil offenses may be pardoned. It explores the history of pardons in England and in the early colonies, showing that monarchs and colonial governors pardoned what would today be civil offenses. Part III.B examines what happened at the Constitutional Convention. It explores the national debate over the pardon power, textual clues from various drafts of the pardon power about the scope of that power, and intratextual clues about the meaning of the word "offenses" in Article II. Part III.C, evaluates extrinsic evidence contemporaneous to the Convention. Part III.D discusses the structural and policy grounds supporting the conclusion that civil offenses may be pardoned. The above interpretive tools track the leading methodological approaches relied on by the Supreme Court to construe the scope of the pardon power.[121]

A. *Evidence from Before the Constitutional Convention: English Pardons and Early U.S. and Colonial Pardons*

As noted in the Introduction, the Supreme Court has repeatedly indicated that history is indispensable in assessing the pardon power's meaning and breadth.[122] Historical evidence from England further matters because Alexander Hamilton intended, as he expressed in Federalist

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121. *See Ex parte* Grossman, 267 U.S. 87, 118 (1925) ("We think the arguments drawn from the common law, from the power of the King under the British Constitution, which plainly was the prototype of this clause, from the legislative history of the clause in the Convention, and from the ordinary meaning of its words, are much more relevant and convincing.").

122. *See id.* at 109-10 ("[T]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855) ("[T]he language used in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption."). For examples of this strategy, see Schick v. Reed, 419 U.S. 256, 262 (1974); *Ex Parte* Wells, 59 U.S. (18 How.) at 311-12.

No. 69, that the pardon power would "resemble equally that of the King of Great Britain and of the governor of New York."[123]

1. Practice of English Monarchs

So does English history suggest that the U.S. pardon power encompasses the power to pardon civil offenses? Yes. But before considering this evidence, this Section considers several reasons that the evidence, though strong, is not even more overwhelming. Four problems make it difficult to achieve perfect clarity in this area.

First, statutes were not denominated as either criminal or civil offenses during this period—a practice of legislative ambiguity that, even today, has not vanished.[124] Offenses only became "civil" much later.[125] Indeed, not until 1943 did the Supreme Court definitively hold that Congress *could* supplement criminal penalties with "remedial" civil fines that exceeded the amount of the government's injury.[126] The fact that England's Parliament and early American colonies did not denominate offenses as "civil" makes it impossible to know definitively whether kings and governors could have pardoned civil offenses. But as will be shown, kings and

123. ALEXANDER HAMILTON, THE FEDERALIST NO. 69, *reprinted in* THE FEDERALIST PAPERS 396 (Am. Bar Ass'n ed., 2009). Hamilton was speaking of his draft—not the final version of Article II's pardon power. Even so, he exhaustively described the limited ways in which the president's pardon power would vary from the king's power, and made no mention of a narrower prerogative to remit fines. *Id.* at 395-98.

124. Confusion often exists about whether a statute is civil or criminal. For "civil and non-punitive" statutes, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Smith v. Doe, 538 U.S. 84, 92 (2003) (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)). But courts still conduct this inquiry, which requires them to assess whether "the intention [of the legislature] was to enact a regulatory scheme that is civil and nonpunitive" and to "further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 U.S. at 92 (quoting Kansas v. Hendricks, 521 U.S. 346, 361 (1997)).

125. *See* Frankfurter & Corcoran, *supra* note 83 (citing cases from 1846 to 1909 as marking the rise of civil offenses in the United States).

126. United States *ex rel.* Marcus v. Hess, 317 U.S. 537, 549-51 (1943).

queens had the power to pardon offenses that would, *today*, be civil offenses. And many of these English statutes are nearly identical to modern civil offenses.[127]

Second, eighteenth-century pardons (and earlier pardons) are not collected in any one searchable database, making it hard to know exactly what kings and queens pardoned. Multiple sources have been reviewed on multiple continents in writing this Article, providing a large sampling of illustrative pardons.

Third, the Crown and Parliament clashed over royal pardons.[128] Nearly all of the "general pardons" (i.e., acts of amnesty) discussed below were approved by Parliament, resembling the modern battle for power that occurs between presidents and Congress.[129] While thoughtful commentators have concluded that parliamentary approval was a courtesy designed to preserve the peace—and not a necessity[130]—no definitive statement exists regarding whether the Crown could, outside of wartime, issue general pardons cancelling fines, debts, and other non-criminal burdens without parliamentary approval. This Article attributes these joint amnesties to the king or queen who approved them—but

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127. *Compare* 6 ANTHONY HAMMOND & THOMAS COLPITTS GRANGER, A COLLECTION OF STATUTES CONNECTED WITH THE GENERAL ADMINISTRATION OF THE LAW 218 (1836) (noting that it was an offense to dump "dung and filth of the garbage and intrails as well of beasts killed, as of other corruptions" into the "rivers, and other waters"), *with* 33 U.S.C. § 1319 (2012), *and* United States v. Ward, 448 U.S. 242, 242-43 (1980) (holding that the penalty imposed for violations of the Clean Water Act is civil and therefore does not trigger the constitutional protections traditionally afforded to criminal defendants). *Compare* HAMMOND & COLPITTS, *supra*, at 2 Geo. 2 c. 24 (prohibiting, respectively, theft of saplings and theft of any "live or dead fence, or any post, pale, rail, stile, or gate" worth at least two shillings), *with* 16 U.S.C. § 4307 (2012) (providing for civil penalties for destroying or taking certain plants), 16 U.S.C. § 4306 (specifying offenses), *and* 40 U.S.C. § 9506 (civil offenses for anyone who, lacking authority to do so, "taps or opens [certain] mains or pipes laid by the federal government").

128. *See* Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1228-29 (2003) ("[O]ver the years Parliament imposed specific limitations on the pardon power in order to avoid perceived abuses.").

129. Similar battles erupted between Congress and President Johnson when he sought to declare amnesty after the Civil War. Johnson won. *See id.* at 1240-42.

130. *Id.* at 1228-29.

readers should be mindful that Parliament approved these mass pardons; in modern parlance, this would be akin to a joint act of clemency by the Congress and president.

Fourth and finally, fines were payable to the Crown. Thus, kings and queens were understandably reluctant to remit this income—it was *their* money.[131] In fact, as shown below, some monarchs pushed Parliament to over-punish certain offenses precisely so that the Crown could pull in more revenue. Thus, there are few remittals of fines because monarchs wanted the money and the parties enforcing these provisions fought fiercely to collect it because they would acquire part of any recovery.[132]

Despite these four obstacles, ample evidence shows that kings and queens commuted punishments that resemble modern civil offenses, demonstrating that they had the power to pardon any such offense (at least on a case by case basis, if not for a class of offenders).

An unbroken line of kings and queens pardoned offenses that would almost undoubtedly be civil today. This discussion reviews these pardons in the approximate order that they were issued and shows that they occurred both before and through the Constitutional Convention. This Article first considers pardons in the 200 years before George III. It then explores George III's own pardons, which are the most probative because they immediately preceded U.S. Independence.

King James I (1603-25) remitted the tariffs due on currants[133] and the fine (unaccompanied by prison time) for unlawfully attending a religious service.[134] Charles I (1625-

131. *See, e.g.*, 3 SIR EDWARD COKE, JOHN HENRY THOMAS & JOHN FARQUHAR FRASER, THE REPORTS OF SIR EDWARD COKE, KNT. [1572-1617]: IN THIRTEEN PARTS 96 (1793) [hereinafter COKE'S REPORTS].

132. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940, at 51-75 (2013) (discussing the role of various quasi-public servants in imposing, and receiving a portion of, fines).

133. STANLEY MAYES, AN ORGAN FOR THE SULTAN 247-48 (1959).

134. 2 WILLIAM G. SCROGGINS, LEAVES OF A STUNTED SHRUB 386 (2009).

49) reduced a fine, originally set at £50,000.[135] In 1631, he unilaterally "commuted" profits that he was owed under a joint venture.[136] Years later, the royal printers botched their printing of Bibles and were fined £300.[137] Charles I offered them a conditional pardon.[138] On another occasion, a lord was found liable for using "trees set aside for the navy for their iron works," and Charles I reduced the massive fine of £98,000 by more than eighty percent.[139] A biography of Charles I reports that other "[e]normous fines" for violations related to the use of royal forests "were similarly reduced . . . between 1636 and 1640."[140] Charles I's policy, one skeptic observed, appears to have been to "impose a fine which was so large that it was certain to generate the maximum resentment and then *to remit or substantially reduce it.*"[141]

Following the interregnum, Charles II remitted fines for the non-payment of fees to use government land[142] and the nonpayment of taxes for having a hearth or fireplace.[143] James II likewise pardoned what would now be civil offenses, such as when he remitted the "alien duty on all goods exported"[144] or remitted a fine (unaccompanied by prison time) for insulting a church.[145]

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135. PAULINE GREGG, KING CHARLES I 99 (1981).

136. *Id.* at 221.

137. *Id.* at 248.

138. *Id.*

139. *Id.* at 225-26. The fine was presumably commuted by Charles I or his agent. Given that the fine was reduced from £98,000 to £12,000, it is hard to imagine anyone else would have granted this remittitur. *Id.*

140. *Id.* at 226.

141. *Id.* (emphasis added).

142. THOMAS MADOX, FIRMA BURGI, OR AN HISTORICAL ESSAY CONCERNING THE CITIES TOWNS AND BURROUGHS OF ENGLAND 239-40 (1726).

143. WILLIAM O'SULLIVAN, THE ECONOMIC HISTORY OF CORK CITY FROM THE EARLIEST TIMES TO THE ACT OF UNION 113 (1937).

144. S.J.B., *A Narrative of the Sufferings Which the Jews Have Endured in England*, THE CHRISTIAN'S PENNY MAGAZINE, July 11, 1835, at 223.

145. JOHN WILLIAM WALLACE, THE REPORTERS: ARRANGED AND CHARACTERIZED WITH INCIDENTAL REMARKS 372-73 (4th ed. 1882).

William III and Mary II (1688-95 (jointly), 1695-1702 (William)), remitted fines due for killing deer in royal forests,[146] felling or stealing trees or fences from those forests,[147] and failing to pay taxes on the harvest (for "any small Rectory Vicarage or Benefice" amounting to less than £30).[148] Anne (1702-14) placed restraints on colonial governors. For instance, in 1702, she instructed Lord Cornbury, who administered New Jersey, to "not remit any fines or forfeitures whatsoever, above the sum of ten pounds"—leaving him free to remit smaller amounts.[149] Similar instructions were sent to other colonial governors by Anne and by later monarchs as discussed in Part III.A.3.[150] Such delegations suggest that she had a commensurate power to remit fines—or else delegation would have been invalid.

George I (1714-27) only pardoned offenses that would now be civil with Parliament's approval. For example, in conjunction with Parliament, he pardoned fines incurred before April 19, 1709[151] and "all fines *pro Licentia Concordandi*"[152] below £6.[153] George II (1727-60) mimicked his predecessors. Although some commentators suggest that George II exercised his pardon power narrowly, they

146. 2 W. & M. c. 10, *reprinted in* 6 STATUTES OF THE REALM 176 (1963). A subsequent pardon appears to have gone further, removing *any* deer killing violations from the pardon's exemptions. In other words, all fines and penalties for hunting royal deer were pardoned. *See id.* at 607.

147. *Id.* at 176.

148. *Id.* This fine recurred in the subsequent pardon in the mid-1690s. *See id.* at 610. The language is ambiguous as to whether the exemption applies to *harvests* worth less than £30 or to *taxes owed* on that harvest that equal less than £30.

149. 2 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF THE STATE OF NEW JERSEY 506, 516 (William A. Whitehead ed. 1881).

150. *See* 1 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, at 330-31 (Leonard Woods Labaree ed., 1935).

151. 3 Geo. 1 c. 29, *reprinted in* ANNO GEORGII REGIS, MAGNA BRITANNIA, FRANCIA, & HIBERNIA SEPTIMO 560-61 (1721).

152. *See Licentia Concordandi*, BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "licentia concordandi" as "[o]ne of the proceedings on levying a fine of lands").

153. 20 Geo. 2 c. 52, *reprinted in* ANNO GEORGII REGIS, *supra* note 151, at 561.

mistakenly rely on the number of crimes canceled (few) rather than the number of non-criminal offenses (many).[154] George II (again, with Parliament's backing) canceled fines payable to the Exchequer or sheriffs and other officials that arose prior to July 24, 1721,[155] as well as any "Fines and Amerciaments, returned, [assessed], taxed, set or entered in any Court of Record within this Realm of Great Britain" before June 15, 1745.[156] But in fairness, available records fail to support that George I or II continued their predecessors' custom of pardoning non-criminal fines unilaterally—without Parliament's blessing.

But George III (1760-1820), against whom the American colonists rebelled, resumed this tradition—and his practices are especially indicative of what sort of pardons the founders would have been aware of—since they lived through his reign. He pardoned offenses that would probably now be civil, such as the £100 fine that was imposed when William White was found to have run an unlawful cockpit (for gambling, presumably),[157] damaging a water-mill,[158] and "[c]ompounding an offense against the turnpike roads."[159] He also pardoned people for convincing a glassmaker to leave the kingdom (1784),[160] falsifying a certificate to permit the release of foreign brandy (presumably from the forfeiture of

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154. *See, e.g.*, WILLIAM CONWAY KEELE, THE PROVINCIAL JUSTICE, OR MAGISTRATE'S MANUAL, BEING A COMPLETE DIGEST OF THE CRIMINAL LAW, AND A COMPENDIOUS AND GENERAL VIEW OF THE PROVINCIAL LAW 341 (1835) (referring to the amnesty in 20 Geo. 2 c. 52 (1746), as reaching *"certain crimes*, committed before a certain period" even though the amnesty also applied to various purely monetary fines and debts) (emphasis added).

155. 20 Geo. 2 c. 52, *reprinted in* ANNO GEORGII REGIS, *supra* note 151, at 561.

156. *Id.*

157. 4 CALENDAR OF HOME OFFICE PAPERS OF THE REIGN OF GEORGE III 1773-1775, at 536 (1899).

158. *Id.* at 532.

159. *Id.* at 541 (pardon of Matthew Concanen); *see also id.* at 543 ("uttering a bad shilling," which means giving counterfeit money as change, apparently with or without intent); *id.* at 295 ("Pardon for entering the Spanish Military service.").

160. 304 LIST AND INDEX SOC'Y, PARDONS AND PUNISHMENTS: JUDGES' REPORTS ON CRIMINALS, 1783 TO 1830: HO (HOME OFFICE) 47, at 17 (2004) (discussing the 1784 pardon of Henry Gould) [hereinafter PARDONS AND PUNISHMENTS].

customs officials) (1787),[161] unionization by wheelwrights (1787),[162] buggery (1787),[163] exporting two bags of wool improperly (1787),[164] and for performing acts that were criminal at the time but could now be civil, such as solemnizing a marriage without proper licensing[165] and killing or stealing various animals[166] (which could today be both a criminal offense and a civil offense).[167] George III's use of clemency applied to acts that would now be civil offenses rather than crimes.[168]

In addition to what English monarchs actually pardoned, *many* other laws closely resemble today's civil offenses.[169] And

161. 305 *id.* at 340 (2005) (discussing the pardon of James Leslie).

162. *Id.* at ii (citing HO 47/7/95, folios 396-399).

163. *Id.* at 224 (discussing the pardon of Hugh Gribble).

164. *Id.* at 244 (discussing the pardon of John Wannberg).

165. *Id.* at 385 (discussing the pardon of this conviction of Alexander Thomson for what was then, admittedly, a felony). Such an action would now be a civil offense. *See, e.g.*, N.C. GEN. STAT. § 51-6 (2016) ("No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to that person a license for the marriage of the said persons.").

166. 305 PARDONS AND PUNISHMENTS, *supra* note 160, at 232 (discussing the pardons of Thomas Gilbert and Williams Jenkins for stealing mares); *id.* at 236 (stealing a gamecock, and noting that the "offence [was] trifling"); *id.* (stealing a lamb); *id.* at 243 (stealing "a turkey and other fowl"); *id.* at 247 (stealing a hen); *id.* at 252 (maiming a cow with an axe).

167. *See* 16 U.S.C. § 1540 (2012) (imposing both civil and criminal penalties for killing animals belonging to an endangered species).

168. This evidence, of course is not dispositive. The violations of the law that the Crown pardoned were crimes. But, as noted repeatedly, there were no civil offenses at the time.

169. *See generally supra* note 127 (juxtaposing English laws and modern U.S. laws). Many modern civil offenses are public nuisances (e.g., harming air, water, or other aspects of the environment), and the Supreme Court has acknowledged that the regal pardon power encompassed a power to remit fines for such nuisances. *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855).

The following additional examples all come from the period when George III reigned—the most relevant period for determining what offenses that would now be civil could have been pardoned by the Crown. *Compare* HAMMOND & GRANGER, *supra* note 127, at 219 (imposing fine for operating an inn without a license), *with* D.C. CODE § 47-2853.29 (2016) (permitting civil fines to be imposed for failing to acquire proper licenses in the District of Columbia); *compare* 4 SIR JOHN COMYNS

as shown in the next two Sections, English monarchs could undisputedly have pardoned any of them.

2. Common Law

As we just saw, pardons of purely monetary offenses were regularly granted by English monarchs—and they could have gone further. English common law—which, to reiterate, the Supreme Court has found vital to assessing the pardon power[170] confirms this conclusion. Multiple cases confirmed that English kings and queens could pardon nearly any monetary penalty, so long as the rights of private parties were not impaired. In England, fines were paid to the Clerk of the King's Silver[171] or to the Exchequer, and these fines and

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& STEWART KYD, A DIGEST OF THE LAWS OF ENGLAND 646 (4th ed. 1793) [hereinafter DIGEST OF THE LAWS] (imposing fines on county officials who failed to submit quarterly reports about efforts to help criminals and beggars), *with* 46 U.S.C. § 3507(h)(1)(A) (2012) (imposing civil penalties for failing to provide quarterly updates about cruise passengers under 46 U.S.C. § 3507(g)(3)(A)(ii)-(iv)); *compare* DIGEST OF THE LAWS, *supra*, at 700 (fining jurors who refused "to be sworn"), *with* 28 U.S.C. § 1866(g) (2012) (imposing a fine of up to $1000 for a person who disregards a jury summons). *See also* DIGEST OF THE LAWS, *supra*, at 350-51 (imposing a fine for failing to become a knight, if offered by the Crown, after inheriting £40 per year or more); *id.* at 648 (imposing fines on lords who collected rent from a newly erected cottage on his lands); *id.* at 559 (imposing a fine of five times the value of the sum lost or won if a gambler wagered £10 or more); *id.* at 291 (imposing a fine on anyone who married an orphan under age 21 without the license of the mayor and alderman); *id.* at 553 (fining an "innholder [if he] make horse bread, a baker being in the town, or sell not the same, and his oats, provender, hay, and victuals both for man and beast at reasonable prices"); HAMMOND & GRANGER, *supra* note 127, at 175-76 (imposing a fine for exporting equipment for "preparing, working up, or finishing" cotton or linen); *id.* at 219 (imposing a fine for advertising that a reward would be paid with "no questions asked" for the return of lost or stolen items); *id.* at 192 (fining a sheriff, mayor, or bailiff who admitted a voter to a polling place before administering a proper oath or affirmation); *id.* at 230 (imposing a fine for overcharging for wine).

170. *See supra* note 5 and accompanying text.

171. *See* 1 JOHN HARRIS, LEXICON TECHNICUM: OR, AN UNIVERSAL ENGLISH DICTIONARY OF ARTS AND SCIENCES (3d ed. 1716) (defining "Clerk of the King's Silver" as "an Officer belonging to the Common-Pleas, to whom *every Fine is brought*, after it has been with the *Cuftos Brevium*, and by whom the Effect of the Writ of Covenant is entered into a Paper-Book, and according to that Note, all the Fines of that Term are also Recorded in the Rolls of the Court") (first emphasis added). The Office of the King's Silver played the same role in the years before

payments wound up in the king's hands unless he transferred his rights to some other party.[172] Thus, intuition suggests, and case law confirms, that the king was empowered to cancel these payments.[173] In 1602, in *Tey's Case*, Lord Coke confirmed the King's absolute right to such revenues.[174]

Common law confirmed over the following century that this prerogative included the power to remit fines and monetary penalties generally. For example, a 1673 case, *Thomas v. Sorrell*, confirmed that although the king's pardon power was limited in its ability to impair third-party rights, no such limitations curtailed his power to pardon or remit monies due to the Crown.[175] Another judge during this era wrote that if a "fine . . . came to the king's coffers, . . . the king might pardon it."[176] Similarly, a case from 1686 stated "where a man ought to repair a bridge [and is fined for not doing so], the king can pardon . . . the fine due to himself."[177] The same source added that "the king may pardon, or free from a pecuniary mulct . . . [i.e., a fine for a petty offense]."[178] Yet another put the matter simply and definitively: "the king pardoned all that belonged to him, which the king may

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and after the Constitution was ratified. *See* 2 ENCYCLOPAEDIA BRITANNICA 209 (1771) (noting that "every fine is brought" to the Clerk of the King's Silver).

172. *See* 1 EDWARD WOOD, A COMPLETE BODY OF CONVEYANCING: IN THEORY AND PRACTICE 215 (1792) (noting that fines are "due to the king"); 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 553 (6th ed. 1787) (similar).

173. *See Ex parte* Rice, 162 S.W. 891, 900 (Tex. Crim. App. 1913) ("[T]he king is the prosecutor of all offenders against the criminal laws of the realm, and in his name all actions are brought. It was then perfectly consistent in theory that the king could, by means of a pardon, remit any punishment due to public justice, or any fine or forfeiture which he himself would otherwise receive.").

174. COKE'S REPORTS, *supra* note 131, at 80.

175. *See* RICHARD FREEMAN, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURTS OF KING'S BENCH & COMMON PLEAS FROM 1670 TO 1704, at 138 (2d ed, 1826).

176. T. B. HOWELL, 1 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783, at 775 (1816).

177. 11 *id.* at 1311.

178. *Id.* ("[T]hough the king may pardon, or free from a pecuniary mulct before the occasion happen, yet he cannot pardon or discharge the trespass itself: an instance is given in voluntary escapes.").

dispose of to whom he will; to the party, if he pleases."[179] And another concluded that "[i]f a Statute directs a Penalty incurred by the Commission of an Offence to be divided between the King and the Poor of the Parish, the King can only dispense with his own part of the Penalty."[180] Common law from the seventeenth-century thus shows that monarchs could dispense with *their* share of a penalty.[181]

Eighteenth-century case law confirmed this principle. In 1702, *Dr. Groenvelt's Case* addressed a dispute that involved monetary liability and possible jail time on the offender: the case involved a negligent doctor. *Dr. Groenvelt's Case* confirmed that the king's broad prerogative to pardon applied to non-criminal offenses.[182] The court held that the king could not renounce his right to pardon and that the king could use his pardon power to remit a fine even when a private third-party was the beneficiary of the fine.[183]

The court explained that any fine could be pardoned by the king because "although the fine belongs to a subject by

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179. *Id.* at 774. The Oxford English Dictionary defines "mulct" as "[a] fine imposed for an offence," or occasionally, "a compulsory payment, a tax, *esp.* an unfair or arbitrary one." *Mulct*, OXFORD ENGLISH DICTIONARY, http://www.oed.com.

180. 34 HOWELL, *supra* note 176, at 223 (1828).

181. *See also* Godden v. Hales (1696), *reprinted in* 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 1166 (T.B. Howell & R. Bagshaw eds. 1811).

182. Dr. Groenvelt's Case (1702) 91 Eng. Rep. 1038-39. Notably, the pardoned fine, for unintentional medical malpractice, did not arise from a criminal offense. *See* Jaime Staples King & Benjamin W. Moulton, *Rethinking Informed Consent: The Case for Shared Medical Decision-Making*, 32 AM. J.L. & MED. 429, 438 n.64 (2006) ("Battery in the medical malpractice context is generally considered a tort, rather than a criminal act."). The court appears to have lacked the vocabulary to describe quite what this fine *was*. To be sure, the court described the case as "*a sort of* criminal proceeding." *Dr. Groenvelt's Case*, 91 Eng. Rep. at 1039 (emphasis added). But the court explained that the case was "a great misdemeanor and offence at common law," *id.*, showing that the meaning of the word "offence" is broader than that of the word "crime." This distinction matters, of course, because the Pardon Clause lets the president pardon "offences," not merely "crimes." Thus, *Dr. Groenvelt's Case* shows that the executive can pardon a civil offense in which a failure to comply with a duty, without malice, leads to liability. This principle reaches thousands of federal civil offenses.

183. Dr. Groenvelt's Case (1702) 91 Eng. Rep. at 1038.

the King's grant, as in this case to the College of Physicians; yet the King by pardon of the offence before the fine is set, may in like manner pardon the fine."[184]

This principle remained valid as of the Constitution's ratifications—as confirmed by treatises. The king's power to pardon purely monetary offenses was confirmed in 1787 by a leading legal treatise published by William Hawkins. Hawkins concluded that it was a "settled rule" that "the king may pardon *any offence whatever*, whether against the common or statute law."[185] He cited favorably several of the cases just discussed and noted no contrary, intervening case law.[186] The Hawkins treatise was "the edition nearest to the date of the Constitution's framing" and "widely read,"[187] and has been relied on, repeatedly, by the Supreme Court.[188] Additionally, Alexander Hamilton, who was the most influential of the Founders in drafting the Pardon Clause, appears to have owned a copy.[189] It is reasonable to attribute

184. *Id.*

185. HAWKINS, *supra* note 172, at 553 (emphasis added).

186. HAWKINS, *supra* note 172, at 553 § 33 ([T]he king may pardon any offence whatever, whether against the common or statute law, . . . after it is over [and] that a pardon of such offence will save the party from any fine for the time precedent to the pardon."). *Cf.* ALEXANDER HAMILTON, THE FEDERALIST NO. 74, *supra* note 123, at 427-29 (observing that the president may need to issue immediate pardons to induce law-breakers to stop their ongoing unlawful conduct).

187. Atwater v. City of Lago Vista, 532 U.S. 318, 331 (2001); *see also* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 162 (2001) (referring to Hawkins as a "legal commentator read widely by eighteenth-century practitioners in the common law").

188. The Supreme Court has relied on Hawkins's treatise in a variety of contexts, including for its exposition about the pardon power. *See, e.g.*, S. Union Co. v. United States, 132 S. Ct. 2344, 2353 (2012) (pardons); District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (right of religious officials to possess arms in seventeenth century England); *Atwater*, 532 U.S. at 331-32 (arrest without a warrant); Washington v. Glucksberg, 521 U.S. 702, 712 n.10 (1997) (whether suicide is murder).

189. *See* Jeremy Dibbell, *Alexander Hamilton's Library*, PHILOBIBLIOS (Dec. 22, 2009), http://philobiblos.blogspot.com/2009/12/alexander-hamiltons-library.html (noting that the author reviewed records to discern which books Hamilton owned); *Alexander Hamilton*, LIBR. THING, http://www.librarything.com/catalog/AlexanderHamiltonI/yourlibrary. Even assuming that Hamilton owned a copy,

this broad view of the law—as well as the common law tradition just discussed—to the Founders' choice to use "offence" rather than "crime" in the Pardon Clause. The next Section substantiates that such attribution is supported by what colonial governors did and by the Constitutional Convention.

3. Pre-Constitution Gubernatorial Pardons

The last two sub-parts suggest that even though purely monetary offenses in England were not denominated as "civil" offenses, kings and queens could and did pardon those offenses. This Section shows that colonial governors had a similar power to pardon civil offenses and to remit the fines and that governors in five states (including New York) had this power during the early republic.

Colonial governors pardoned fines and forfeitures or had the power to do so—without that power being limited to either civil or criminal cases—long before the Constitutional Convention.[190] This power existed throughout most (if not all) of the British Empire.[191] Colonial governors in the Bahamas, Barbados, Bermuda, Grenada, Jamaica, Leeward Islands, and Nova Scotia were authorized to remit fines of up to £10, and governors in other colonies evidently had the same power.[192]

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however, it is possible that he only acquired it after he prepared his draft of the Pardon Clause.

190. Duker, *supra* note 107, at 498-99 (noting that "[t]he Lord Proprietors of North Carolina were given power 'to remit, release, pardon and abolish (whether before judgments or after) all crimes and offences whatsoever' . . . [and] [t]he constitution gave the proprietors' court the power to mitigate all fines and to suspend all executions in criminal causes before or after sentence").

191. HUMBERT, *supra* note 42, at 12 ("[E]ach colony at some time during its history enjoyed, through delegation, the benefits of the royal prerogative of pardon.").

192. *See id.* at 12-13 (citing EVARTS BOUTELL GREENE, THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA 125 (1898)). *See also*, DONALD FYSON, MAGISTRATES, POLICE AND PEOPLE: EVERYDAY CRIMINAL JUSTICE IN QUEBEC AND LOWER CANADA 266 (2006) ("[T]he governor, as the king's representative, could . . . remit corporal punishment, imprisonment, or *the king's share of fines*.") (emphasis added).

The same principle held true in the American Colonies. For example, the colonial administrator of New Jersey expressly had the power in 1676 to pardon fines for minor offenses, without limitation.[193] This power was only slightly curtailed (to fall into line with the approach in other colonies) when the administrator of New Jersey was instructed by the Crown in 1702 to "not remit any fines or forfeitures whatsoever, above the sum of ten pounds."[194] Other colonial governors in the Americas had similar powers,[195] including the power to "remit fines . . . as they saw fit."[196]

Likewise, in 1774, King George III delegated to Thomas Gage, commander-in-chief of the British forces in North America, the power "to remit fines and forfeitures, to such offenders as should appear to be fit objects of mercy."[197]

A commensurate power rested with England's colonial governor in the individual colonies: as of September 1775, as

193. THE CHARTER OR FUNDAMENTAL LAWS, OF WEST NEW JERSEY, AGREED UPON—1676, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2551 (Francis Newton Thorpe ed. 1909) (providing that the administrator "have full power to forgive and remit the person or persons offending against him or herself only, as well before as after judgment, and condemnation, and pardon and remit the sentence, fine and punishment of the person or persons offending, be it personal or other whatsoever").

194. SAMUEL SMITH, THE HISTORY OF THE COLONY OF NOVA CÆSARIA, OR NEW JERSEY 241 (1765).

195. *See, e.g.*, HUMBERT, *supra* note 42, at 13 nn.32-33 (citing examples from Massachusetts and Virginia in the 1770s).

196. *E.g.*, Krent, *supra* note 30, at 1672 ("Although there was some variation from colony to colony, the governors could remit fines or exonerate convicted criminals as they saw fit. For instance, the colonial charter in Maryland vested the executive with the authority 'to Remit, Release, Pardon, and Abolish all Crimes and Offences whatsoever against such Laws whether before, or after Judgment passed.'") (quoting CHRISTEN JENSEN, THE PARDONING POWER IN THE AMERICAN STATES 5 (1922)).

197. 1 ROBERT SCOTT, THE HISTORY OF ENGLAND; DURING THE REIGN OF GEORGE III 439 (1824) ("General Gage, commander-in-chief in America, was appointed governor of Massachuset's [sic] Bay . . . . The general was farther invested with full powers to grant pardons and to remit fines and forfeitures, to such offenders as should appear to be fit objects of mercy . . . ."). Indeed, this grant was made in 1774, *id.*, suggesting that George III viewed the need to lighten financial penalties as a valuable tool to suppress unrest in the colonies.

the Revolution drew near, one commentator noted that, for women fined in Pennsylvania, "it is a generally received Opinion, that the Governor Remits the Fine of the Woman in case of Fornication."[198] These sexual offenses did not involve prostitution; nothing occurred that would today be a crime.[199]

After the Revolution ended in 1783, distrust of executive power caused the new states to curtail executive clemency power.[200] Nevertheless, most scholars agree that governors still had a significant role in nearly half the states[201]: "six states allowed their governors to invoke clemency powers only upon the consent of an executive board, one state gave the entire power to the legislature, and five states gave their governors full control."[202] Numerous scholars have noted that "[t]he executive pardon power was thus somewhat moribund in America when it came time to write the Federal

198. G. S. Rowe, *The Role of Courthouses in the Lives of Eighteenth-Century Pennsylvania Women*, 68 W. PA. HIST. MAG. 5, 17 (1985).

199. *Id.* at 15 (noting that one particular fine was remitted, albeit in that particular case by a court rather than a governor, for a woman who invoked her "weakness for uniformed men and the lack of single men in Pittsburgh").

200. *See* Fowler, *supra* note 72, at 1654 ("[N]ew state constitutions described different approaches to the pardon power, influenced by recent experiences with . . . a too-powerful monarch."); Eric R. Johnson, Doe v. Nelson: *The Wrongful Assumption of Gubernatorial Plenary Authority over the Pardoning Process*, 50 S.D. L. REV. 156, 169 n.120 (2005).

201. *See* Johnson, *supra* note 200, at 169 n.120; *see also* Kobil, *supra* note 66, at 589-90 ("By the time the Constitution was drafted in 1787, . . . [t]he pardoning power was exercised solely by the governor only in New York, Delaware, Maryland, North Carolina, and South Carolina"). No evidence suggests that purely monetary fines ceased falling within the scope of gubernatorial pardon powers in states that continued to vest clemency powers in governors.

202. *See* Johnson, *supra* note 200.

Constitution,"[203] although opposition to executive clemency had begun to wane.[204]

The aversion to giving meaningful power to the executive soon ebbed, largely because of the fecklessness of the executive created by the Articles of Confederation. As one scholar described this backlash, "with the increasing calls for a stronger central government and a stronger chief executive after the failure of the Articles, support mounted for a strong federal clemency power much like that of England," and gubernatorial pardon powers influenced the Framers' views of the appropriate level of presidential pardon power.[205] And at one point or another, all of the states or colonies afforded their governors the power to remit fines and forfeitures.[206]

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203. Kalt, *supra* note 33, at 785; *see also* Fowler, *supra* note 72, at 1654 ("These experiences permeated the debates at the Constitutional Convention."); Kobil, *supra* note 66, at 590 ("[T]he Revolution ushered in a period of distrust of strong executive authority and temporarily brought to an end the executive's clemency monopoly."); Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 Emory L.J. 959 (1997) ("After the Revolution, though, the general distrust of executive authority which led to the adoption of the Articles of Confederation also brought an end to the executive's monopoly on the clemency power.").

204. Patrick R. Cowlishaw, Note, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 164 n.84 (1975) ("[O]pinion had shifted by the time of the Constitutional Convention, with some states already returning greater powers to their governors.").

205. Jerry Carannante, *What to Do About the Executive Clemency Power in the Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325, 330 (2003); *see also* Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 217-18 (1999) ("While the Framers were putting the constitutional framework in order, they looked at restrictions on the governors in the various colonies.").

206. Here, in reverse-chronological order, are the sources of this power for state and colonial governors: South Carolina (1790), State v. Williams, 10 S.C.L. 26, 26-27 (1 Nott & McC.) (1817); New Hampshire (1784), 4 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2464 (Francis Newton Thorpe ed. 1909); Massachusetts (1780), 3 *id.* at 1901-02; Georgia (1777), 2 *id.* at 781; New York (1777), 5 *id.* at 2632-33; Delaware (1776), 1 *id.* at 563; Maryland (1776), 3 *id.* at 1696; New Jersey (1776), 5 *id.* at 2596; North Carolina (1776), *id.* at 2791-92; Pennsylvania (1776), *id.* at 3087-88; Virginia (1776), 7 *id.* at 3817; Rhode Island (1663), 6 *id.* at 3215; Connecticut (1662), 1 *id.* at 534.

B. *Evidence from the Constitutional Convention*

This Section assesses the meaning of the Pardon Clause by analyzing records from the Constitutional Convention (and related evidence of what the Pardon Clause originally meant). This Section focuses predominantly on the Constitution's text about the pardon power, as well as the process by which this language was adopted.

For the convenience of readers, here again are the words of the Pardon Clause: "The President . . . shall have Power to grant Reprieves[207] and Pardons for Offences against the United States, except in Cases of Impeachment."[208] This Section focuses on nuanced differences between "Offences" and other words such as "crimes," but it focuses just as closely on how carefully particular Founders—including Hamilton, who drafted the final version of Article II's pardon power—differentiated among words like "crimes," "offenses," "felonies," and other related words.

This investigation begins with the first version of what would later become the Pardon Clause. It was submitted for the Founders' consideration on May 29, 1787, by Charles Pinckney of South Carolina.[209] Pinckney's draft proposed to give presidents the "*power to grant pardons and reprieves*, except in impeachments."[210] In other words, neither "offence" nor "crime" appeared in the original draft of the pardon power. The absence of either word suggests that *any* penalty could be pardoned other than impeachments—presumably including non-criminal violations of federal law (i.e., civil offenses). Or—to be more precise—the fact that presidents would, under Pinckney's proposal, have been able to "grant

207. At least some definitions of "Reprieve" might also permit civil pardons. For instance, the *Oxford English Dictionary* defines the word (in its second definition) as "a remission or a cancellation of any punishment or penalty." *Reprieve*, OXFORD ENGLISH DICTIONARY, http://www.oed.com. This definition even uses the Pardon Clause as an example of this broad meaning. *Id.*

208. U.S. CONST. art. II, § 2, cl. 1.

209. 5 JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787, at 128-32 (Jonathan Elliot ed., 1845) (emphasis added) [hereinafter ELLIOT'S DEBATES].

210. *Id.* at 131 (emphasis added).

pardons and reprieves" suggests that Pinckney would have made the pardon power coextensive with its traditional scope: in other words, whatever could be pardoned or reprieved in 1787 would have been permissible under Pinckney's plan. And, as shown in the prior Sections, pardons in England and the colonies included purely financial offenses with no possibility of prison time.

The word "Offences" was only proposed to be added to the Pardon Clause on June 18, 1787, when Hamilton offered a revised version of the clause.[211] His draft would have given the president "the power of pardoning *all offences except treason*, which he shall not pardon without the approbation of the senate."[212]

A fair reading of Hamilton's proposed Pardon Clause suggests that he selected "Offences" deliberately. The exact same document that Hamilton submitted proposed language for other provisions—and it used numerous similar but distinctive words. For instance, he proposed that judges could hold their offices "during good behavior."[213] And impeachment was available, in this draft, not for "crimes and misdemeanors" but for "mal and corrupt conduct."[214] The timing of these submissions suggests that Hamilton consciously chose "Offences" in the Pardon Clause and the phrase "mal and corrupt conduct," in his draft of the impeachment clause.

But in spite of Hamilton's proposal, Pinckney's original language for the pardon power survived until a new draft of the proposed constitution was distributed at the Convention on August 6, 1787. This document contained new language for the pardon power, stating that the president "shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of impeachment."[215] Although the language changed from Pinckney's original version, the

211. *Id.* at 198, 205.

212. *Id.* at 205 (emphasis added).

213. *Id.* This phrase was used by Pinckney earlier, *id.* at 131, but Hamilton did not alter his colleague's wording.

214. *Id.*

215. *Id.* at 380.

debates reflect no intent to narrow Pinckney's vision; in fact, the omission of "offenses" from this draft shows that the new draft mirrored what Pinckney had initially prepared.

The Pardon Clause took a large step toward its final form on August 25, 1787, when the words "but his pardon shall not be pleadable in bar of an impeachment" were removed in favor of "except in cases of impeachment."[216] But the word "offenses" still did not appear in the document.

The next attempts to change the language of the pardon power occurred on August 27, 1787. They offer little light, however, about the sort of minor offenses that could be pardoned.[217] To be sure, the Founders discussed crimes. Luther Martin of Maryland, for instance, moved to insert "after conviction," immediately after the words, "reprieves and pardons."[218] But he withdrew his own motion as soon as Wilson observed that pre-conviction pardons might help to "obtain the testimony of accomplices."[219] This exchange offers no light on whether civil offenses could be pardoned.

The Convention selected a Committee of Style on September 10, 1787, "to revise the style of, and arrange, the articles which had been agreed to,"[220] including the pardon power. Hamilton and Madison were members of the five-person committee. The committee informed the Convention two days later that it had completed its work, and the Convention began to review the various articles that day. The Convention reached the pardon power three days later (September 15, 1787).

This new language for the pardon power was identical to the ultimate version that was ratified. It provided that the president "shall have power to grant reprieves and pardons

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216. *Id.* at 475, 480.

217. For instance, Sherman proposed amending the phrase "power to grant reprieves and pardons" to read, "to grant reprieves until the ensuing session of the Senate, and pardons with consent of the Senate." *Id.* at 480. But nothing therein suggests that "pardon" or "reprieve" would be narrowed from the powers that English monarchs enjoyed.

218. *Id.* at 480.

219. *Id.*

220. *Id.* at 526, 530.

for *offences against the United States*, &c[.]"[221] Thus, it was only in the final days of the convention that the word "offences" was added to the Pardon Clause. No indication exists that the Committee on Style sought to narrow Pinckney's original language—which appears intended to have permitted any clemency that existed in England.

The Convention completed its review of the Constitution that day, approving this version of the pardon power; two days later, the Convention approved the engrossed form of the Constitution.[222] Thus, all of the precursors of the Pardon Clause used either "offences" (which, this Article suggests, had a broader meaning than "crime or [criminal] misdemeanor") or, as in Pinckney's version, refrained from imposing any limits on the types of purely monetary federal penalties that the president could pardon.

No other relevant clues exist from the debates about the Pardon Clause. But numerous other indications about the scope of the pardon power can be gleaned from the debates surrounding *other* clauses.

Perhaps most notably, the words "crime" and "felony"[223] appear elsewhere, and repeatedly, in the Constitution and drafts of it.[224] It is reasonable to infer that Hamilton and the

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221. *Id.* at 549 (emphasis added) (internal quotations omitted). The phrase "&c" indicates that text has been removed—namely the phrase that impeachments could not be foreclosed by a presidential pardon. Elliot's Debates do not show that this version included the limiting language "except in cases of impeachment," but other sources confirm that the impeachment exception had been added by this time. *See* ALEX SIMPSON JR., A TREATISE ON FEDERAL IMPEACHMENTS 20 (1916).

222. SIMPSON, *supra* note 221, at 20-21.

223. The provision protecting elected officials from their own actions in the chambers of Congress originated on May 29, 1787, when Charles Pinckney introduced the following language: "the members of both Houses shall, in all cases, except for treason, *felony*, or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it." ELLIOT'S DEBATES, *supra* note 209, at 126, 130. The Founders ultimately adopted similar language: "The Senators and Representatives . . . shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same." U.S. CONST. art. 1, § 6, cl. 1.

224. U.S. CONST. art. II, § 4 ("Treason, Bribery, or other high Crimes and Misdemeanors."); *id.* art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where

other members of the Committee on Style included "offences" consciously and carefully—and distinguishably from "crimes."[225] Prakash, in other words, was correct when he concluded that "offenses" in the Pardon Clause meant something different than "crimes."[226]

Given the close attention the Founders paid to nuances between words—including *crimes*, *felonies*, *offenses*, *high misdemeanors*, *misdemeanors*, and *criminal offences*—it is fair to conclude that the use of "offenses" in Article II was deliberate and was intended to capture the full complement of illegal activities under federal law.

Several other pieces of historical evidence support this conclusion. In particular, Hamilton used "Offences" distinctively from (and far more broadly than) "Crimes" on numerous occasions in his own writings (although not in every instance).[227]

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the said Crimes shall have been committed . . . ."); *id.* art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime."); *see also id.* art. I, § 8, cl. 10 ("To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations . . . ."); *supra* note 223 (quoting pertinent language from U.S. CONST. art. I § 6, cl. 1).

225. For instance, on August 28, 1787, just a day after debating changes to the pardon power, the Convention changed the phrase "high misdemeanor" to "other crime" in what was then Article 15 of the draft constitution; the change was made because "high misdemeanors" was believed to be unclear. ELLIOT'S DEBATES, *supra* note 209, at 483, 487.

226. *See supra* note 114 and accompanying text.

227. For instance, in an April 20, 1777, letter to the Committee of the New York Convention, Hamilton explored the distinction between crimes, misdemeanors, and private civil wrongs. *See* Letter from Alexander Hamilton to Committee of the New York Convention (April 20, 1777), *reprinted in* 6 THE WORKS OF ALEXANDER HAMILTON 574-75 (John C. Hamilton ed., 1851). He specifically juxtaposed "crimes" against "offenses [that] are of so slender a nature as to make it prudent to dismiss them." *Id.* at 574. Obviously, this letter was written a decade before the Convention, so it proves nothing definitively, but it reflects that Hamilton, at least on some occasions, used "offenses" to refer to a much broader category of wrongdoing than he used the word "crimes."

Also, Hamilton pushed for a broad pardon power that encompassed the power to pardon treason and to offer mass amnesty to put down a rebellion, writing:

> the principal argument for reposing the power of pardoning in this case in the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.[228]

Given that Hamilton wanted the president to be able to pardon thousands of traitors, it seems obvious enough that Hamilton would have wanted to afford the president flexibility if numerous fines and forfeitures had been imposed on rebels, especially if a remission of remitting these penalties—civil offenses—would convince rebels to lay down their arms. Pardoning civil offenses, in other words, would presumably be part of the suite of clemency options that Hamilton would have wanted presidents to enjoy.[229]

In sum, *none* of the proposals for the Pardon Clause contained express limitations to crimes, such as by using the word "crime" or the phrase "high crimes and misdemeanors." All of the precursors of the Pardon Clause used either "offences" (which, this Article suggests, had a broader meaning than "crime" or "crime and misdemeanor") or, as in Pinckney's version, refrained from limiting what the president could pardon.

A review of proposals that other Founders submitted to the Convention further suggests that "Offences" is a broad term that encompasses "civil offenses." For instance, Charles Pinckney of South Carolina—who, as noted above, introduced the first version of the Pardon Clause—offered the following proposal on May 29, 1787: "*All criminal offences*, except in cases of impeachment, shall be tried in the

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228. ALEXANDER HAMILTON, THE FEDERALIST NO. 74, *supra* note 123, at 428.

229. This exact scenario occurred following the Civil War; President Andrew Johnson granted amnesty to Confederate soldiers, canceling extant forfeiture orders to take their property. *See infra* notes 370-71 and accompanying text.

state where they shall be committed."[230] On the same date, Pinckney also proposed language[231] authorizing Congress "[t]o declare the law and punishment of piracies and *felonies* at sea, and of counterfeiting coin, and of all *offences against the laws of nations*."[232] While "offences against the laws of nations" was likely a term of art,[233] the differences between the proposed clauses suggest that Pinckney was careful in his use of language, distinguishing—on the same day—between "felonies," "offences," "offences against the laws of nations," and "*criminal* offences."

This last term is especially noteworthy. Pinckney's use of the phrase "*criminal* offences" implies that there existed other, *non*-criminal offenses. And John Rutledge of South Carolina (later the nation's second Chief Justice), used the same phrase, proposing that "[t]he trial of all *criminal offences* (except in cases of impeachment) shall be in the state where they shall be committed; and shall be by jury."[234]

Additional juxtapositions of constitutional proposals show that "offenses" is a broad term. William Patterson of New Jersey (who, like Rutledge, later served on the Supreme Court) proposed this clause: "*all punishments, fines, forfeitures, and penalties*, to be incurred for contravening such acts, rules, and regulations, shall be adjudged by the

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230. ELLIOT'S DEBATES, *supra* note 209, at 126, 131 (emphasis added). Pinckney's use of "criminal offenses," however, was not long-lived. On August 28, 1787, his proposed language was amended, without objection, to read, "[t]he trial of all crimes (except in cases of impeachment) shall be by jury." *Id.* at 483-84.

231. Also on May 29, 1787, Pinckney introduced the following language: "Any person, charged with *crimes* in any state, fleeing from justice to another, shall, on demand of the executive of the state from which he fled, be delivered up, and removed to the state having jurisdiction of the *offence*." *Id.* at 126, 132 (emphasis added).

232. *Id.* at 126, 130 (emphasis added). The Constitution ultimately reflected the following language: "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. 1, § 8, cl. 10.

233. *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 474 (2000). Stephens further notes that civil actions could be filed in 1790 for offenses against the law of nations by private parties. *Id.* at 490-95.

234. ELLIOT'S DEBATES, *supra* note 209, at 381 (emphasis added).

common-law judiciaries of the state *in which any offence contrary to the true intent and meaning of such acts, rules, and regulations, shall have been committed or perpetrated.*"[235] Patterson's use of "offences," like Hamilton's, Pinckney's, and Rutledge's, suggests that "offences" encompassed non-criminal conduct for which only "fines" and "forfeiture" might be available.[236]

Admittedly, a number of other Founders used "offence" synonymously with "crime" during the Constitutional Convention.[237] And the Convention did not specifically consider whether "Offences" encompassed non-criminal conduct.

But perhaps the strongest piece of counterevidence comes from the Fifth Amendment, which seemingly equates "offence" with "crime." It provides:

> No person shall be held to answer for a capital, or otherwise *infamous crime*, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same *offence* to be twice put in jeopardy of life or limb; nor shall be compelled in any *criminal case*

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235. *Id.* at 191-92 (emphasis added).

236. Elsewhere, Patterson proposed "[t]hat a citizen of one state, committing an *offence* in another state of the Union, shall be *deemed guilty* of the same *offence* as if it had been committed by a citizen of the state in which the *offence* was committed." *Id.* at 191-93 (emphasis added). Although the phrase "deemed guilty" might suggest that "offence" refers to a crime, modern civil offenses did not exist.

237. Madison similarly equated "crimes" with "offences." *Id.* at 484 ("The object of this amendment [specifying that the "trial of all *crimes* . . . shall be by jury; and such trial shall be held in the state where the said *crimes* shall have been committed"] was, to provide for trial by jury of *offences* committed out of any state.") (emphasis added). Pinckney proposed language that equated "crimes" with "offences." *Id.* at 128, 132 ("Any person, *charged with crimes in any state*, fleeing from justice to another, shall, on demand of the executive of the state from which he fled, be delivered up, and removed to the state having jurisdiction of the *offence*.") (emphasis added). And Mason, in discussing the trial of impeachments against the president for treason and bribery, said that "[t]reason, as defined in the Constitution, will not reach many great and dangerous offences." *Id.* at 528. These examples show that at least some of the available evidence suggests that at least some Founders used the terms "crime" and "offence" interchangeably at least some of the time. However, the balance of evidence suggests that "offences," as Hamilton used it, was designed to mean something broader than "crimes" or "crimes and misdemeanors."

> to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.[238]

Superficially, the Amendment might suggest that "offence" refers exclusively to criminal violations. But, as noted in Part II, all "offenses" were criminal in the United States until the 1900s. Additionally, the Fifth Amendment refers to "infamous crime," "offence" and "criminal case." This phrasing is unlikely to be coincidental. As noted earlier, Blackstone and other legal commentators viewed offenses as a lesser type of crime—the sort of legal violation that might today be civil.

Furthermore, "offence" is used in the clause that prohibits double jeopardy, but other clauses apply to *crime* (specifically an "infamous crime")[239] or *criminal case*. The best reading is that the protection against double jeopardy was intended to be broader than the protections that applied for "crime." Notably, an "offense" did not need to go to a grand jury, whereas a "crime" did.[240] Similarly, the right against self-incrimination applied in any "criminal case," not to any "offence." And the history of the Fifth Amendment shows unambiguously that actions that were once criminal have transformed into civil proceedings: the Takings Clause, which appears at the end of the Fifth Amendment, is typically enforced in *civil* proceedings.[241] And to the extent that a civil offense is alleged against a defendant, the Supreme Court has implied that it may be pardoned: "From the relevant constitutional standpoint there is no difference between a man who 'forfeits' $8,674 because he has used the money in illegal gambling activities and a man who pays a

238. U.S. CONST. amend. V (emphasis added).

239. *See* Green v. United States, 356 U.S. 165, 183 (1958) (treating "infamous crime" as a crime punishable by more than a year in prison, making it synonymous with a felony).

240. Schick v. United States, 195 U.S. 65, 68 (1904).

241. *See, e.g.*, Kelo v. City of New London, 545 U.S. 469, 475 (2005).

'criminal fine' of $8,674 as a result of the same course of conduct."[242]

In any event, the use of "offence" in the Fifth Amendment was no accident: the House[243] and Senate,[244] and the two chambers jointly,[245] approved versions of the Fifth Amendment that used "offence" in the Double Jeopardy Clause and nowhere else. Even a casual commitment to the canon of meaningful variation suggests that "offence" was broader than "crime." The House version referred to "offence" and "criminal case."[246] Even more revealing, the Senate version referred to "crime" and, separately, "offence," making it hard to infer that the words were synonymous. And the joint version approved by Congress during the constitutional amendment process referred to "crime," "criminal case," and "offence"—again raising the obvious question of why "offence" would be used rather than "crime" if those words meant the same thing. Simply put, it is hard to fathom that these words were intended to have the identical meaning given that they were used alongside one another.

Thus, the appearance of "offence" in the Fifth Amendment confirms what the overwhelming weight of historical evidence suggests: offenses are broader than crimes, and included legal violations that have today evolved into civil offenses.[247]

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242. United States v. U.S. Coin and Currency, 401 U.S. 715, 718 (1971) ("In both instances, money liability is predicated upon a finding of the owner's wrongful conduct.").

243. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 300-01 (Neil H. Cogan ed., 1997).

244. *Id.* at 302-03.

245. *Id.* at 308.

246. *Id.* at 301.

247. All of this analysis, however, assumes that juxtaposing "offenses against the United States" (in Article II) and "offenses" (in the Fifth Amendment) is a suitable method of constitutional interpretation. But the Supreme Court has, very specifically, reached the contrary conclusion:

> [I]t is clear to us that the language of the Fifth and Sixth Amendments and of other cited parts of the Constitution are not of significance in determining the scope of pardons of 'offences against the United States'

This Section has established that the word "offences" was used carefully in Article II by people who drew distinctions between "crimes," "offences," and similar words. The evidence in this Section is not dispositive of the question explored in this Article. Nevertheless, on balance, the fact that no version of the pardon power sought to limit the availability of clemency to "crimes," and the fact that the Founders did not vote to vest the president with a more limited pardon power than English monarchs had, suggests that "offences" is a broad term that includes modern civil penalties.

C. *Evidence Contemporaneous with the Constitutional Convention*

In addition to what happened at the Convention, extrinsic evidence—the leading dictionary and treatise from this era—support the conclusion that "offences" was broader than "crimes" and would include modern civil offenses (if they had existed at the time). These sources also confirm that a "pardon" can include the remission of a fine or forfeiture that is unrelated to any criminal act.

The leading dictionary of the era[248] (published in 1785)—that of the pioneering lexicographer Samuel Johnson—defines "Offence" as "[c]rime; act of wickedness."[249] If this were the only definition, we would likely infer that Hamilton

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in Article II, Section 2, clause 1, of the enumerated powers of the President.

Ex parte Grossman, 267 U.S. 87, 118 (1925). Thus, the very appearance of "offence" in the Fifth Amendment has been ruled by the Supreme Court not to be probative of what the same word meant in Article II—because the two were adopted at different times in different contexts by different people using different procedures.

248. 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785). The Supreme Court regularly cites Johnson's dictionary as an important source of constitutional meaning. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014) (citing JOHNSON, *supra* at 1602-03 (4th ed. 1773)).

249. *Offence*, JOHNSON, *supra* note 248. This broad meaning of "Offence" extended back decades. *See, e.g.*, *Offence*, GILES JACOB, A NEW LAW DICTIONARY (4th ed. 1739) (noting that "offence" covers misdemeanors, omissions where the law requires action, and acts that would result in fines or forfeitures only).

used "offences" rather than "crimes" purely for stylistic reasons. But Johnson's dictionary offers a second, broader definition of "offence": "[a] transgression."[250] This definition is consistent with other contemporary sources,[251] and the dictionary offers an even broader third meaning.[252]

Similarly, Johnson's dictionary defines the noun "Pardon" as: "1. Forgiveness of an offender. 2. Forgiveness of a crime; indulgence. 3. Remission of a penalty."[253] Other editions of Johnson's dictionary define these terms identically.[254] The second definition would be unnecessary if "crime" and "offences" were synonymous. And the third definition is even broader than the other two. Another dictionary from this era supports the conclusion that "pardon" would have encompassed modern civil offenses (if they had existed at the time).[255]

The leading legal treatise from this era also used "offence" broadly—and broader than "crime."[256] For instance, Mathew Bacon's *A New Abridgment of the Law*, published in 1786, uses the word "offences" to include wrongs punishable only by amercements (i.e., unmet monetary obligations to the state unattended by threat of prosecution). "[W]here the *Offence* is amerceable only," Bacon notes, it is "[*m*]*inima de*

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250. JOHNSON, *supra* note 248.

251. *E.g.*, *Offence*, THOMAS SHERIDAN, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE (1784). Multiple editions of Johnson's dictionary used the same definition. *See, e.g.*, JOHNSON, *supra* note 248 (1st ed. 1755); *id.* (3d ed. 1765); *id.* (4th ed. 1770).

252. *See* JOHNSON, *supra* note 248 (defining "offence" as an "[i]njury").

253. *Pardon*, JOHNSON, *supra* note 248. Both the verb "To pardon" and the noun "pardon" also contained irrelevant additional definitions, such as "*Pardon me*, is a word of civil denial, or slight apology." *Id.* (The word "civil" in this definition is not akin to the word "civil" in the term "civil offense.").

254. *See, e.g.*, *Pardon*, JOHNSON, *supra* note 248 (8th ed. 1799); *id.* (4th ed. 1773).

255. *See Pardon*, SHERIDAN, *supra* note 251 (2d ed. 1789) (defining "pardon" as "remission of penalty").

256. The Supreme Court has cited this treatise as a valuable source of eighteenth-century law. *See, e.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579-80 (2011).

quibus non curat lex," and no judge is required to impose punishment.[257]

In discussing "For What Offences the Party is to be fined or amerced," Bacon provides examples demonstrating that the word "offences" included wrongs for which non-criminal monetary penalties were proper,[258] and many of these examples of amerceable offenses would not result in criminal liability today. One example: "[i]f a dead Body in Prison, or other place, whereupon an Inquest ought to be taken, be interred, or suffered to lie so long, that it putrify before the Coroner hath viewed it, the Gaoler or Township shall be amerced."[259] In other words, the "offence" could only result in a financial penalty. (And as noted in Part III.A, monarchs were free to remit amercements.) Current federal regulations for U.S. prisons contain a similar provision, instructing that autopsies "ordinarily must be performed within 48 hours" and that if a body is to be given to a funeral home, "no preparation for burial, including embalming, should be performed until a final decision is made on the need for an autopsy."[260] The regulations impose no jail time for violating these instructions.[261] Thus, it is nearly certain that failing to perform a timely autopsy or embalming a body would expose the violator only to civil penalties—if that. But this act was cited by Bacon as an example of an eighteenth-century "offence" that could give rise to amercement and, therefore, be pardoned.

Similarly, Bacon instructs judges to amerce *the town* "[i]f any Homicide be committed, or dangerous Wound given, whether with or without Malice, or even by Misadventure, or Self-defense, in any (*b*) Town, or in the Lanes or Fields thereof, in the (*c*) Day-time, and the Offender (*d*) escape."[262] Again, the townspeople would not today be jailed if they let a felon slip out of town at night. But in 1786, the town itself—

257. 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 69 (5th ed. 1786).

258. 2 *Id.* at 504-06.

259. *Id.* at 505.

260. 28 C.F.R. § 549.80(c)(2) (2014).

261. *Id.*

262. 2 BACON, *supra* note 257, at 505.

a non-human entity—would be amerced if the felon escaped because the town had failed to comply with a statute requiring town gates to be "shut from sun-setting to sun-rising."[263] Each of these amerceable actions was described by Bacon as an "offence."[264]

Furthermore, even Bacon's examples of finable offenses include wrongs that would arguably be civil violations now. Such examples included "if a Tithing-man refuse to make a Presentment in a Leet,"[265] "if a [juror] in a Leet depart without giving his Verdict,"[266] "[i]f one is present when a Murder is done, and does not his best Endeavour to apprehend the Murderer,"[267] "if two are fighting, and others looking on, who do not endeavour to part them, [and] one [of the fighters] is killed" (which again could lead to a fine and imprisonment).[268] Bacon continued with additional examples of acts that (1) were not criminal in 1786, but (2) could have resulted in fines, and (3) could have been pardoned: "[i]f at a Justice-Seat, held within a Forest, a Man makes a false Claim of Privilege,"[269] and "[i]f, by the Forest Law, Hue and Cry is made for a Trespass in Venison" and the "Township or Village within the Forest, . . . does not follow the Hue and Cry."[270]

Bacon's discussion of the Crown's pardon power similarly supports the conclusion that the word "offences" encompassed civil and non-civil wrongs, and that the pardon power extended to both. "It is laid down in general," he wrote,

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263. *Id.*

264. Bacon gives a third example of an action subject to amercement: "[i]f the Deciners ought to pay the Rent at the Leet (e) *pro Certo letae*" but "do not pay it." *Id.* at 505. In this example, "deciners" refers to the members of a "decennary" or "tithing," a group of ten households organized for administrative and policing purposes. For a discussion of the origins of this system, see JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 27-28 (2009).

265. 2 BACON, *supra* note 257, at 505.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

"that the King may pardon any Offence whatever, whether against the Common or Statute Law."[271] Bacon implied, however, that there were moral limits on what a sovereign could pardon.[272] But notwithstanding Bacon's precatory words, a king, in practice, could have pardoned any offense.[273] Moreover, in the next passage, Bacon observed that offenses that were prohibited by law, not morality—that is, offenses akin to modern civil offenses—were wholly suitable for pardons:

> But where a Thing in its own Nature lawful, is made unlawful by Parliament, as the carrying Bell-metal, &c. out of the realm, Importing Merchandizes in foreign Ships, Selling Wines beyond a certain Price, or without a License, Multiplying Gold, &c. Coining Money of a base Allay, &c. it was formerly taken as a general Rule, that the King might dispense with it, as to a particular Time or Place, or Person, so far as the Public was concerned in it . . . .[274]

This observation is crucial. Although in practice kings and queens usually pardoned felons who caused great harm, Bacon emphasized that these crimes were *less* suitable for clemency than what we would now call civil offenses. Unless Bacon is simply wrong in his assessment of the scope of the pardon power, these passages conclusively demonstrate that the word "offenses" encompassed civil offenses—i.e., non-criminal violations that are not inherently unlawful but are, instead, "made unlawful by Parliament."[275]

Bacon added that monarchs could pardon a trespasser's duty to post a bond or obligation to forfeit that bond.[276] The burden of forfeiting such a bond is, now, a civil offense.[277]

Bacon's discussion of "Indictments" is also consistent with these conclusions. In answering "What Matters are indictable," Bacon states that indictable offenses include both

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271. 3 *id.* at 802.

272. *See id.*

273. *See supra* Part III.A.

274. 3 BACON, supra note 257, at 802-03.

275. *Id.* at 802.

276. *See id.* at 803-04.

277. *See, e.g.*, 25 C.F.R. § 163.29 (2014).

"Capital Offences, such as Treasons and Felonies," and "inferior" "Crimes being of a public Nature," as well as "all other Contempts, all Disturbances of the Peace, all Oppressions and all other . . . Misdemeanors whatsoever."[278] These lesser wrongs included "Disobedience" of a statute that "prohibits a Matter of public Grievance, or commands a Matter of public Convenience, as the Repairing the common Streets of a Town." Fines were adequate punishment for the wrongs, and the payment of such a "Fine is, it seems, a good Bar to the indictment, because by the Fine the End of the Statute is satisfied."[279] This example is revelatory. A person could have been indicted in 1786 for failing to repair the common streets of a town. Breaching this sort of affirmative duty today would rarely, if ever, lead to criminal liability; it would be a civil offense.[280] And Bacon stated unambiguously that it could be pardoned.

Bacon's list of indictable offenses that resemble civil offenses continues. He observes that if a person who had a license to use certain lands failed to repair a bridge and let it fall into "Decay, he may be indicted."[281] And, although vague, Bacon notes that a person could be indicted for "the Erecting of an Inn" (but only if the indictment "set forth some Circumstances that make it unlawful").[282] That sounds a great deal like letting out rooms without a valid certificate of occupancy or business license—which would be a civil offense now. And in another passage Bacon suggests that diverting a waterway and building cottages without disclosing them are indictable offenses.[283] These acts, like those discussed on

278. 3 BACON, *supra* note 257, at 96.

279. *Id.*

280. *See, e.g.*, People v. Russell Place Realty Co., No. 2010-824 N CR, 2012 WL 2887990 (N.Y. App. Term June 29, 2012) (citing N.Y. Property Maintenance Code § 302.7).

281. 3 BACON, *supra* note 257, at 98.

282. *Id.* at 100.

283. *Id.* at 105 (clarifying that these could not be indicted if the place where the offense occurred went unspecified but otherwise suggesting that indictment could occur).

the past few pages, would also be civil violations—such as failing to get a building permit before constructing a house.[284]

Bacon's analysis of forfeitures also supports the conclusion that offenses included civil violations. Before and after the Founding, kings could pardon forfeitures.[285] Forfeitures, however, are *civil* proceedings in the United States (so long as the forfeiture action proceeds against the property itself)—even when the property was acquired through criminal conduct.[286] Moreover, forfeitures could occur even when no wrongdoing had occurred—such as when a borrower failed to pay a debt. Accordingly, Bacon observes, "where a Statute giveth a Forfeiture, either for *Nonfeasance* or Misfeasance, the King shall have it, unless it be otherwise particularly directed by the Statute."[287] The inclusion of "Nonfeasance"—the failure to perform an act that is required by law—is telling: kings could pardon forfeitures (as noted above),[288] and forfeitures could arise even when no criminal conduct occurred. In other words, kings could pardon penalties that arose because of an *omission*, rather than an act. And that distinction is a paradigmatic difference between criminal and civil liability.[289]

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284. Bacon's conclusions are consistent with those of earlier treatises. For instance, William Nelson's *An Abridgment of the Common Law*, published in 1726, distinguishes between pardons for "Murders, Felonies, and other Crimes," and pardons for "Actions, Suits, Fines, and Forfeitures," which describe less severe wrongs punishable by fine or amercement. 2 WILLIAM NELSON, AN ABRIDGMENT OF THE COMMON LAW 1229-32 (1726).

285. 5 BACON, *supra* note 257, at 289 (1798). *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *402 (1902).

286. United States v. $27,000.00, More or Less in U.S. Currency, 865 F. Supp. 339, 340 (S.D. W. Va. 1994) (noting that forfeiture is a civil proceeding); United States v. Real Prop. Known as 311 Cleveland Ave., Hamilton, Ohio, 799 F. Supp. 824, 828 (S.D. Ohio 1992) (finding that forfeiture pursuant to civil forfeiture statute concerning real property connected with controlled substances violations is civil and not criminal in nature); United States v. Two Hundred Eighty Thousand Five Hundred and Five Dollars ($280,505.00) in U.S. Currency, 655 F. Supp. 1487, 1498 (S.D. Fla. 1986).

287. 5 BACON, *supra* note 257, at 518 (1798) (emphasis added).

288. *Id.*

289. *Compare* 26 U.S.C. § 7404 (2012) (authorizing Attorney General to direct a civil action against a person who has refused or neglected to pay taxes), *with* 26 U.S.C. § 7201 (2012) (imposing criminal liability for purposefully attempting to

In sum, the leading dictionary is consistent with the thesis of this Article—though the evidence could support either conclusion. The leading treatise provides even stronger evidence: it overwhelmingly suggests that civil offenses are pardonable.[290]

D. *Evidence from Post-Convention Pardons*

English and American pardoning behavior after the Constitutional Convention further supports the conclusions reached so far in Part III. In the months and years immediately after the United States adopted its Constitution in June 1788, King George III carried on with issuing pardons of acts that would today be civil offenses[291] or non-felony misdemeanors.[292]

Presidents soon followed this approach. George Washington pardoned the following offenses that would likely be civil today and which caused the defendants to incur fines *but not prison time*: embargo violations,[293] illegal

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"evade or defeat any tax"); *compare* 42 U.S.C. § 1320d-5(a) (2012) (imposing civil penalties for failure to comply with the requirements and standards of the Health Insurance Portability and Accountability Act), *with* 42 U.S.C. § 1320d-6 (2012) (concerning imprisonment for deliberately disclosing or obtaining health information relating to another person).

290. This Section's conclusions comport with the observation that "the Supreme Court has consistently found 'offenses' to be a broader category than 'crimes.'" Stephens, *supra* note 233, at 501.

291. These included the imprisonment of a calico printer for "leaving work unfinished," 305 PARDONS AND PUNISHMENTS, *supra* note 160, at ii (discussing the case of Samuel Dunkerly) (citing HO 47/12/121, folios 482-485) (Oct. 1790), and setting fire to corn or wheat (without, apparently, evidence of intent to commit arson) (Mar. 1789). *Id.* pt. I.B., 261. *Cf.*, 54 U.S.C. § 100722(a) (2014) (holding any person responsible for loss or destruction of national park resources "liable to the United States for response costs and damages"). He also pardoned criminal convictions for the vague offense called "negligence." 305 PARDONS AND PUNISHMENTS, *supra* note 160, at 5, 21, 124, 144.

292. These included "rioting" against a "horse tax," 305 PARDONS AND PUNISHMENTS, *supra* note 160, at 253 (discussing pardon of Samuel Horne from August 1788, just two months after the Constitution was ratified); *see also* Pardon of Sept. 18, 1788 (petty larceny), *id.* at 283, 286. *Cf.* CAL. PENAL CODE § 490.1 (2014) (imposing a fine of not more than $250 for petty theft).

293. Pardons of Munnuccheyen & Salder (Dec. 24, 1794), *microformed on* General Records of the State Department, Record Group (RG) 59, Presidential

importation[294] (including of two bags of coffee),[295] and breach of the revenue laws.[296] John Adams similarly pardoned illegal landing[297] (including with such dastardly objects as eighteen bags of coffee[298] and sugar[299]); illegal importation of sugar and various other unspecified items;[300] and—in a paradigmatic example of a civil offense—lacking proper licensing for a ship.[301] And Thomas Jefferson remitted fines for all of the following offenses that resemble civil offenses or offenses that are both criminal *and* civil: illegally landing with watches,[302] maintaining a disorderly house,[303] having an unlicensed

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Pardons & Remission, 1794-1893, roll no. 1 (Nat'l Archives Microfilm Publ'ns) [hereinafter Presidential Pardons & Remission RG 59]. The research in this Section is based on the extraordinary dataset of pardons compiled by Professor P.S. Ruckman, Jr., who generously shared this information to support the writing of this Article. Most of these pardons affected Washington, D.C. residents.

294. Pardons of David Blair (Apr. 15, 1794), James Green (June 11, 1794), and William Martin (June 11, 1794) *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

295. Pardon of Robert Gage (Sept. 17, 1796), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

296. Pardon of Stephen Neilson (Mar. 2, 1797), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

297. Pardon of John Burnett (June 10, 1800), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

298. Pardon of Robert Manton (June 1, 1798), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

299. Pardon of John Cassin (Feb. 17, 1800), *in* Presidential Pardons & Remission Records RG 59. Another convict *was* sentenced to prison for illegally landing watches. *See* Pardon of Edward Gilbert (Apr. 22, 1799), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

300. Pardon of Slocum Fowler (Feb. 1, 1800), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

301. Pardon of Joseph Billips, John Hicks, Jesse Roper and Robert Campbell (Mar. 9, 1799), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

302. Pardon of William Priestman (June 27, 1801), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

303. Pardons of Henny Day (Oct. 16, 1804), George Cunningham (June 6, 1805), Peter Colter (June 13, 1805), and James McCutchen (Feb. 8, 1809), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

billiard table,[304] operating a gambling house,[305] selling "spirituous liquor,"[306] and breaching the peace.[307] Jefferson also twice pardoned James Topham for trading slaves (including the remittance of the then-massive fine of $16,124)—an act that today is both a criminal[308] and civil[309] offense. Jefferson also remitted multiple penalties after individuals breached the revenue law.[310] Thus, the United States' first three presidencies were replete with clemency for violations of federal law and laws of the District of Columbia that would today be civil offenses.

In the modern era, Franklin Roosevelt's pardons during the rise of the New Deal reflect Roosevelt's comfort with pardoning an array of offenses that he and his allies in Congress created. During his second term, Roosevelt pardoned—in what sounds like a classic civil offense—a

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304. Pardon of James Moore (Mar. 29, 1804), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

305. Pardon of Louis LeFevre (Feb. 5, 1806), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

306. Pardons of Jane McGraw (June 18, 1805), Thomas Nevitt (Aug. 5, 1805), William Prime (June 16, 1806), George Broone (June 18, 1806), and John Staines Brasheard (Jan. 13, 1807), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

307. Pardon of Wilford Knott (Oct. 11, 1806), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293.

308. 18 U.S.C. § 1590(a) (2012); 22 U.S.C. § 7109(b)(1) (2012).

309. 18 U.S.C. § 1595(a) (2012).

310. Pardons of Adam Ganter (May 1, 1805), David Briggs (Aug. 29, 1805), John Paulson (Sept. 16, 1806), Perry Paulson (Sept. 16, 1806), Gabriel Shad (Jan. 25, 1803), Joseph Barnaby (Aug. 1806), John Adams (June 4, 1806), and Stephen Delano (Nov. 4, 1807), *in* Presidential Pardons & Remission Records RG 59, *supra* note 293. Thus, there is ample precedent for remitting tax offenses. This points to a possible use for civil-offense pardons. Consider the more-than $2 trillion held overseas by U.S. companies, which are waiting to repatriate that money until a favorable tax environment appears. *See* Richard Rubin, *U.S. Companies Are Stashing $2.1 Trillion Overseas to Avoid Taxes*, BLOOMBERG BUS., Mar. 4, 2015, http://www.bloomberg.com/news/articles/2015-03-04/u-s-companies-are-stashing-2-1-trillion-overseas-to-avoid-taxes. A president could potentially remit some portion of the taxes if these companies returned the income to the United States or agreed (as a term of the remittance) to repatriate money on a fixed schedule in the future.

person convicted of "maintenance of a common nuisance."[311] He pardoned tax evasion (related to liquor,[312] tariffs,[313] and other taxes).[314] He also pardoned a person who had entered the United States illegally,[315] raising the obvious question of whether *civil* immigration offenses could likewise be pardoned or addressed by a reprieve.

Roosevelt's third term provides additional evidence that civil penalties may be altered by presidential clemency. For example, Roosevelt remitted fines for numerous offenses (that look like modern civil offenses) after prison or probation terms had been served. His pardons included clemency for selling insurance without a license;[316] filing a false wage claim;[317] charging illegal fees for procuring loans;[318] and illegally selling cigarettes.[319] He issued numerous other pardons in response to violations of statutory offenses outside Title 18 (which contains the criminal code), including "making false entries in . . . bank records"[320] and violating the

311. Pardon of Harriet Lasson (Mar. 11, 1937), 45 *Pardon Warrants* RG 204, *supra* note 10, at 182.

312. *See, e.g.*, Pardon of Joseph Sanford Pearce (May 26, 1937), *in* 45 *Pardon Warrants* RG 204, *supra* note 10, at 227; *see also* Pardon of Helen S. Blaylock (Mar. 11, 1937), *in* 45 *Pardon Warrants* RG 204, *supra* note 10, at 179 (pardoning the failure to have "stamps" to sell liquor).

313. Pardon of Abner W. La Flair (Sept. 18, 1937), *in* 46 *Pardon Warrants* RG 204, *supra* note 10, at 82.

314. Pardon of Charles K. Biggs (Sept. 18, 1937), *in* 46 *Pardon Warrants* RG 204, *supra* note 10, at 71.

315. Pardon of Daniel Norman Munroe (Apr. 26, 1938), *in* 46 *Pardon Warrants* RG 204, *supra* note 10, at 229.

316. Pardon of Gerald F. Laughlin (June 16, 1943), *in* 51 *Pardon Warrants* RG 204, *supra* note 10, at 310.

317. Pardon of Milton C. Seelig (Mar. 12, 1943), *in* 51 *Pardon Warrants* RG 204, *supra* note 10, at 218.

318. Pardon of Edward A. Campbell (Oct. 18, 1943), *in* 52 *Pardon Warrants* RG 204, *supra* note 10, at 142.

319. Pardon of Sadie Kaplowitz (June 8, 1944), *in* 52 *Pardon Warrants* RG 204, *supra* note 10, at 378.

320. Pardon of Lawrence A. Nixon (Mar. 4, 1941), *in* 49 *Pardon Warrants* RG 204, *supra* note 10, at 142.

Air Commerce Act of 1926;[321] the Radio Act of 1927;[322] the Emergency Price Controls Act of 1942;[323] the national postal laws;[324] the Selective Service Act;[325] and the Migratory Bird Act.[326] Perhaps most illuminating, Roosevelt pardoned a violation of the securities laws (under 15 U.S.C. § 77q)[327]— an act routinely construed by modern courts as civil rather than criminal.[328] And, of course, agencies regularly settled disputes during in the New Deal and have done so ever since—raising the question of how agencies can settle their demands for civil penalties if their settlement authority is not derivative of the president's pardon power.[329]

The array of early presidential pardons and pardons from the era when civil offenses became ubiquitous (under FDR) support this Article's finding that federal clemency reaches civil offenses.

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321. Pardon of Edward Heckelbech (July 15, 1943), *in* 52 *Pardon Warrants* RG 204, *supra* note 10, at 28.

322. Pardon of George R. Butler (June 14, 1944), *in* 52 *Pardon Warrants* RG 204, *supra* note 10, at 426.

323. Pardon of Albert Yakus (Oct. 14, 1944), *in* 53 *Pardon Warrants* RG 204, *supra* note 10, at 93.

324. Pardon of Nancy L. Dickens (Sept. 26, 1942), *in* 51 *Pardon Warrants* RG 204, *supra* note 10, at 77.

325. Pardon of Horace Woodrow Hampton (May 23, 1942), *in* 50 *Pardon Warrants* RG 204, *supra* note 10, at 326.

326. Pardon of M. E. Bogle (May 1, 1942), *in* 50 *Pardon Warrants* RG 204, *supra* note 10, at 301.

327. Pardon of Alex Mengarelli (Dec. 20, 1944), *in* 53 *Pardon Warrants* RG 204, *supra* note 10, at 115.

328. *See, e.g.*, SEC v. Monterosso, 756 F.3d 1326, 1338 (11th Cir. 2014); SEC v. Leffers, 289 Fed. Appx. 449, 452 (2d Cir. 2008); SEC v. Inorganic Recycling Corp., No. 99 Civ. 10159, 2002 WL 1968341, at *4 (S.D.N.Y. Aug. 23, 2002).

329. Since the late 1700s, Congress has authorized secretaries within a given administration to remit fines and forfeitures. *See, e.g.*, Remission Act of Mar. 3, 1797, ch. 13, 1 Stat. 506; United States v. Morris, 23 U.S. (10 Wheat.) 246, 251-52 (1825). That trend continued in the years that followed. *See, e.g.*, Act of Jan. 2, 1813, ch. 7, 6 Stat. 122. But agencies, including those not expressly authorized by Congress, routinely settle cases. This suggests that the president, too, must have these powers. *See supra* note 20 (providing examples of multi-billion dollar settlements). It would be perverse if a line attorney could settle a case but the president could not remit a fine to a commensurate (or greater) degree.

E. *Post-Convention Caselaw*

And what have courts said about this issue? No court has expressly addressed whether presidents may pardon civil offenses. Two conflicting pieces of dicta, however, create ambiguity. On the one hand, the Court opined that federal clemency extends to "crimes"—suggesting that non-crimes (i.e., civil offenses) are beyond the president's power to remit.[330] But the Court did not, in that case, consider whether non-criminal activity could be pardoned. And federal civil offenses did not even exist at that time,[331] so it is hardly surprising that the Court did not extend the pardon power to still-unhatched regulatory penalties. On the other hand, the Court has stated that presidential clemency extends to "*fines, penalties, and forfeitures* of *every description* arising under the laws of [C]ongress."[332]

The historical research presented earlier in this Part of the Article would likely dictate the outcome of the case if a court considered whether presidents may pardon civil offenses; as noted several times, the Supreme Court has unambiguously stated that history is critical in assessing the scope of the pardon power.[333] But courts would, of course, look to post-Convention caselaw, and this Section reviews the most relevant authorities.

To begin, however, this Article should make clear that it does not rely on a pun to prove its thesis: the mere fact that civil violations are sometimes called "civil *offenses*" does not necessarily make them "offenses" as that term is used in Article II. By analogy, a *future* offense may not be pardoned by the president even though there is no language to that effect in the Constitution: such an act of clemency would be

330. United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833) ("A pardon . . . exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed.").

331. *See* Frankfurter & Corcoran, *supra* note 83 (noting that civil offenses first appeared around 1846).

332. *See, e.g.*, Pollock v. Bridgeport Steam-Boat Co. (The Laura), 114 U.S. 411, 413-14 (1885) (emphasis added) (excepting from this conclusion both impeachment and fines "imposed by a co-ordinate department of the government for contempt of its authority").

333. *See supra* note 5 and accompanying text.

inconsistent with the meaning of "pardon," which relates only to past offenses. This Section reviews caselaw to assess whether a *civil* offense falls within the scope of what presidential clemency may reach.

As noted in Part III.A, *all* federal offenses were crimes when Chief Justices Marshall observed in *Wilson* (in 1833) that presidential clemency applied to "crimes." But so, too, might a case from 1833 have said either that the First Amendment protected "newspapers" (without foreclosing that the Internet might later be protected) or the Second Amendment protected ownership of "rifles and muskets" (without foreclosing the right to own a shotgun, even though it did not come into use until 1850).[334] Civil offenses, like the Internet or shotguns, are an innovation that requires retrofitting a constitutional clause from the 1780s to fit a new situation.[335]

American caselaw offers a number of useful clues about how best to read the pardon power. The first probative case arose in 1806. There, in *United States v. Yeaton*,[336] the Circuit Court for the District of Columbia considered a dispute that arose after President Madison remitted a forfeiture order of a boat that had violated an embargo. A ship had crossed into prohibited waters in violation of an Act that restricted trading with Santo Domingo in what is now the Dominican Republic. The Act permitted forfeiture of any boat that was knowingly used to violate the embargo, and the offending ship was subjected to a forfeiture order. The owner, William Yeaton, petitioned for clemency and persuaded Madison to remit the forfeiture order provided that Yeaton paid

334. *See Gun Timeline*, PBS: HIST. DETECTIVES, http://www.pbs.org/opb/historydetectives/technique/gun-timeline/.

335. Even *mala prohibita* offenses, which—according to conventional wisdom are illegal but *not* immoral or evil—were crimes, not civil offenses. *See* Kempe v. United States, 151 F.2d 680, 688 (8th Cir. 1945); Michael L. Travers, *Mistake of Law in Mala Prohibita Crimes*, 62 U. CHI. L. REV. 1301, 1301 n.3 (1995).

336. 28 F. Cas. 799 (C.C.D.C. 1813) (No. 16,779); *see also* Act of Feb. 28, 1806, ch. 9, 2 Stat. 351.

whatever tariffs he would have owed had the ship done everything legally.[337]

The parties contested whether the remission order could cancel *private* claims to the vessel. But both parties accepted that Madison could remit the portion of the forfeiture due to the government. Importantly, the Act at issue did not provide any possibility of prison time: therefore, in modern parlance, it was a civil forfeiture statute—even though that term did not exist.[338] Thus, although the violation was not denominated as a civil offense, it closely resembled modern federal civil-offense statutes—and the president pardoned it, and no one disputed his power to do so.[339]

The next clue from caselaw appeared roughly a decade later in *Ex parte Marquand*.[340] In *Marquand*, the Circuit Court for the District of Massachusetts confirmed (albeit in dictum) that presidents may pardon fines for what are, in essence, civil offenses. The dispute arose when a man bribed a duty collector; he was caught by other officials (customs officers) for failing to pay sufficient duty. The only penalty for this offense was financial. The proceeding to impose this penalty on the man who had underpaid his tariffs was conducted in civil court under civil procedures. The government brought an action to enforce the legal violation through a civil "debt collection" procedure—a practice that

337. EDWARD SANGSTER, ADMINISTRATOR OF HUGH WEST, H.R. REP. NO. 36-250, at 19 (1860).

338. Act of Feb. 28, 1806, ch. 9, 2 Stat. 351 (stating that any unlawful ship, vessel or cargo found on board "shall be wholly forfeited, and may be seized and condemned in any court of the United States having competent jurisdiction").

339. *See, e.g.*, 18 U.S.C. § 1083(a) (2012) (permitting fines for the operation or use of a vessel for the carriage or transportation of passengers "between a point or place within the United States and a gambling ship"); 19 U.S.C. § 1497(a) (2012) (penalties for failure to declare are forfeiture or fine without imprisonment); 19 U.S.C. § 1681b (2012) (violators of 19 U.S.C. § 1681a, who illegally import tobacco products into the United States, are subject to fines and forfeiture but not imprisonment); 19 U.S.C. § 1683f (2012) (anyone who unlawfully imports softwood lumber into the United States is subject to fines and forfeiture); 19 U.S.C. § 1706a (2012) (penalties for trading without required certificate of documentation are forfeiture and fines without imprisonment).

340. 16 F. Cas. 776 (C.C.D. Mass. 1815) (No. 9100).

the Supreme Court eventually endorsed much later (in 1871).[341]

The statute in question expressly awarded half of the recovery to the tariff *collector*. And in this instance, the collector was the same person who had accepted the bribe.

The court, unsurprisingly, lamented the need (under the statute) to require the bribe-payer to give additional money to the bribe-taker. But it ordered that outcome, observing that only the president had the power to cancel the fine "since the constitution has committed to the president the power to grant reprieves and pardons for offences, against the United States."[342] This statement, though dicta, suggests that purely monetary penalties could be pardoned.

Then, in 1821, in *United States v. Lancaster*,[343] the Circuit Court for the Eastern District of Pennsylvania held the president could cancel the government's interest in what was, in essence, a *qui tam* action. The only issue in dispute was whether the pardon had the ancillary effect of canceling the moiety to which the private litigant (now called a *relator*) would be entitled. The court held that the pardon canceled both the government's interest and the private party's (i.e., the informer's/relator's) interest.[344] Although the court declined to consider related questions about the power of a pardon to cancel monetary penalties owed to private informers,[345] the case, like the two others just discussed,

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341. Stockwell v. United States, 80 U.S. 531 (13 Wall.) 552 (1871) (upholding the right of the federal government to obtain fines or forfeiture (or both)—that were based on a criminal statute—in a "debt collection" case in a civil proceeding).

342. *Marquand*, 16 F. Cas. at 777.

343. 26 F. Cas. 859 (C.C.E.D. Pa. 1821) (No. 15,557).

344. *Id.* at 860 ("That the power of remission vested in the secretary of the treasury extends to such a case, and that, where so exercised, the interest of an individual in the penalty, not consummated by judgment, may be defeated, is unquestionable."). *See also* Pollock v. Bridgeport Steam-Boat Co. (The Laura), 114 U.S. 411, 415-16 (1885); United States v. Morris, 23 U.S. (10 Wheat.) 246, 256 (1825).

345. *Lancaster*, 26 F. Cas. at 860 ("But this case does not decide the question whether the president can, by his pardon, defeat the inchoate right of a private person, in a case where the remedy for the recovery of the penalty or forfeiture can be prosecuted only by and in the name of the United States.").

confirms that presidents may remit fines that resemble today's civil actions—at least insofar as the president remits a penalty owed to the federal government.

A fourth early case that casts light on the central question posed by this Article is *Levy Court of Washington County v. Ringgold*,[346] decided in 1826. The case noted that a tax bill had been "pardoned," reducing the amount owed—$2,267.66, which had already been halved—to $607.49. The 73% remittal reflected both "[1] pardons and [2] fines not collected."[347] The pardon was issued by an administrator in the District of Columbia's municipal government, but no reason exists to think that the president, who may pardon offenses in Washington, D.C.,[348] had any less power to remit the defendant's tax debt.[349] This holding suggests that early understandings of the pardon power included the power to cancel *any* debt owed to the government. If the failure to pay the debt is, in itself, an offense, the act of non-payment may be pardoned. The various early presidential pardons of unpaid taxes discussed above support this conclusion.

Other relevant cases arose decades later. *United States v. Klein*,[350] decided in 1871, involved a chess-like series of moves by the different branches of government that affected the restoration of the rights of those who had supported the Confederacy during the Civil War. Congress enacted a

346. 15 F. Cas. 439 (C.C.D.C. 1826) (No. 8305), *aff'd*, 30 U.S. (5 Pet.) 451 (1831).

347. *Id.* at 439.

348. Letter from Roger C. Adams, Pardon Att'y, DEP'T OF JUSTICE , to David A. Guard, CRIMINAL JUSTICE POLICY FOUND., http://static1.squarespace.com/static/53ce893fe4b076d747fd326e/t/53d6b7f9e4b0d47dc085ba57/1406580729050/DClet ter2.pdf ("[T]he President handles clemency in cases involving criminal violations of the D.C. Code."); *see also* 1 ENCYCLOPEDIA OF PRISONS AND CORRECTIONAL FACILITIES 136 (Mary Bosworth ed., 2005) ("However, presidential clemency power does extend to convicted offenders in Washington, D.C., federal territories, and the U.S. military."); ANDREW NOVAK, COMPARATIVE EXECUTIVE CLEMENCY: THE CONSTITUTIONAL PARDON POWER AND THE PREROGATIVE OF MERCY IN GLOBAL PERSPECTIVE 117 (2016) ("[O]nly the president of the United States (and not the executive mayor) has the ability to pardon offenses under the federal district law of Washington, DC.").

349. *See Ringgold*, 15 F. Cas. at 440.

350. 80 U.S. (8 Wall.) 128 (1871).

statute that purported to prevent any Southerners from relying on a pardon by President Lincoln to recover the proceeds of property that had been forfeited to the Union and sold during or after the war. The administration claimed that the legislation was unconstitutional because it impinged on the judiciary's power to establish rules of decision and because it impinged on the president's prerogative to grant pardons and reprieves. The Supreme Court agreed with the executive branch on both points, thus letting pardons cancel a wide array of forfeitures.[351]

Klein is relevant to the present discussion because it confirmed that a presidential pardon was valid in restoring property rights and interests, even when Congress sought to strip those rights. If Congress could not nullify a pardon's efficacy in canceling the punishment imposed by forfeiture—by enacting a statute that specifically sought to achieve that result—it would be strange if it could strip the president of this power merely by reclassifying punishments as civil offenses.[352]

Perhaps the strongest doctrinal support for civil pardons appeared in 1885. As noted in the opening of this section, the Supreme Court stated in *The Laura* that:

> except in cases of impeachment and where fines are imposed by a co-ordinate department of the government for contempt of its authority, *the President, under the general, unqualified grant of power to pardon offenses against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress.*[353]

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351. *Id.* at 145-48.

352. *Armstrong v. United States*, 80 U.S. (8 Wall.) 154, 155-56 (1871), decided later that same year, reached the same conclusion. The forfeiture order in that case occurred because a female slave owner traveled south with several dozen slaves to avoid emancipation. The Court held that a presidential pardon entitled her to avoid the Court of Claims' forfeiture order.

353. Pollock v. Bridgeport Steam-Boat Co. (The Laura), 114 U.S. 411, 413-14 (1885) (emphasis added); *see also* HUMBERT, *supra* note 42, at 51-52 ("The [*Laura*] Court did not question the right of the President to remit, through the exercise of his power to grant pardons, fines and forfeitures of every description which arise under the laws of Congress.").

The phrase "every description"—in the specific context of fines and forfeitures—suggests that the pardon power reaches civil offenses.

Forty years later, the Supreme Court tested *The Laura* Court's conclusion that "fines . . . imposed by a co-ordinate department of the government for contempt of its authority"[354] could not be pardoned. In *Ex parte Grossman*,[355] the Court considered whether presidents could pardon a court's criminal-contempt order. In the underlying case, the trial court held Grossman in criminal contempt for violating an injunction against selling liquor and sentenced him to one year's imprisonment and a $1,000 fine. President Coolidge conditionally pardoned Grossman, permitting him to avoid imprisonment if he paid the fine. Grossman paid the fine and was released. The trial judge (whose order was vitiated by the pardon) arranged for Grossman to be arrested and imprisoned, notwithstanding the pardon. The Supreme Court unanimously vacated the order, holding that criminal penalties were pardonable.

Although this holding has little to do with the availability of pardons for civil offenses, the Court's discussion provided some relevant, though non-binding, comments. The Court distinguished between pardons of contempt orders designed to "punish the contemnor for violating the dignity of the court and the King, *in the public interest*" and contempt orders "necessary to secure the rights of the injured [private] suitor," such as by forcing an evasive witness to testify.[356] The Court held that pardons of public-interest contempts were lawful; pardons of contempt orders that affected private litigation exceeded the pardon power. But contrary to the overly broad reading offered by at least one prominent scholar,[357] the case tells us nothing about what the president may pardon if the

354. *The Laura*, 114 U.S. at 413.

355. 267 U.S. 87 (1925).

356. *Id.* at 111 (emphasis added) (citations omitted).

357. *Id.* Caminker relies on *Grossman* to dispute the existence of a civil pardon power. *See* Caminker, *supra* note 92, at 371, 371 n.153 (citing *Ex parte Grossman*, 267 U.S at 120). However, Caminker overreads *Grossman*'s civil-criminal distinction by suggesting that *Grossman* forecloses pardons in *any* civil context. *Id.* at 371 n.153.

government is seeking damages in a *civil* proceeding. The best reading of *Grossman* is, as noted above, that the president may cancel contempts enforcing the government's rights, but cannot cancel those enforcing a private party's rights. Under this reading, the contempts that most resemble civil offenses—monetary penalties without a criminal trial that arise as part of the government's enforcement of a non-criminal law—could be pardoned.[358]

On balance, the pardons of early presidents and cases from the last 210 years, suggest that the pardon power is best read as reaching civil offenses.[359] In fact, it was only at the launch of the New Deal that the Court began to uphold civil offenses that lacked any *mens rea* requirement.[360] As discussed in the next Part (which explores whether the policy considerations that underlie the pardon power justify letting clemency reach civil offenses as well as how presidents might use the power to grant clemency for civil offenses), the justifications of clemency for civil offenses are often stronger than for crimes.

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358. There is some evidence that *all* contempts should be viewed as, at their essence, civil offenses. The Supreme Court observed just one year before *Grossman* that "[w]hile contempt may be an offense against the law and subject to appropriate punishment, . . . such offenses have been regarded as *sui generis* and not 'criminal prosecutions' within the Sixth Amendment or common understanding." Myers v. United States, 264 U.S. 95, 104-05 (1924).

359. In addition to the cases cited above, an 1852 Opinion of the Attorney General concluded that the president could pardon a fine where a fine was the only available penalty. *See* Pardoning Power of the President, 5 Op. Att'y Gen. 579, 590-91 (1852). Two abolitionists were fined a massive sum—more than $20,000 between them, or nearly $600,000 in present-day dollars—for helping to "transport" seventy-four slaves out of the South. The statute resembled modern civil offenses insofar as no possibility of incarceration existed—unless the fine went unpaid. The opinion concluded that the two offenders could be pardoned fully and that the amount owed to the slaveowners could be remitted. *Id.* at 582.

360. United States v. Dotterweich, 320 U.S. 277 (1943) (upholding strict liability and vicarious liability for a company president who was convicted of a "public welfare" offense).

IV. STRUCTURAL AND POLICY CONSIDERATIONS—AND POTENTIAL USES OF CLEMENCY FOR CIVIL OFFENSES

Commentators have offered numerous rationales for pardons, but the strongest structural and policy considerations fall into seven categories. Most support the premise that civil offenses should be pardonable. In the course of discussing these rationales, this Article discusses a number of possible uses of the power to grant clemency for civil offenses. This discussion seeks merely to open a dialogue and to explore possibilities for how the power would be used. Subsequent work—and, perhaps, subsequent presidential acts—will reveal the exact contours of this new (but 229-year-old) power.

1. Justice. The leading *modern* account for pardons focuses on justice—correcting excessive or improper punishments. Countless commentators agree, observing that "clemency can be used to achieve justice, by individualizing sentences and remitting undeserved punishment."[361] Civil pardons can advance this goal. Imagine, for instance, that a man smoked a small amount of marijuana on his boat and lost his entire boat to a civil forfeiture.[362] Or imagine that the boat's owner lost his boat even though he did not commit *any* crime. In 1974, the Supreme Court upheld the forfeiture of a yacht under these conditions.[363] Other citizens have lost their life savings when they carried cash across a border

361. Kobil, *supra* note 66, at 571 (noting that this use of the clemency power "rests on a vision of human nature that is fundamentally less pessimistic" than other explanations and "can properly be said to be a fundamental part of any system of justice").

362. John Enders, *Forfeiture Law Casts a Shadow on Presumption of Innocence*, L.A. TIMES (Apr. 18, 1993), http://articles.latimes.com/1993-04-18/local/me-24209_1_forfeiture-law ("[A]lleged abuses make big headlines. A small-town Southern sheriff seizes a Rolls Royce from a drug dealer and uses it as his personal car. Local police in Little Compton, R.I., net $3.8 million in a drug bust and outfit their cars with $1,700 video cameras and heat detection devices for a police force of seven. The owner of a sailboat loses the craft after a crew member is caught with a small amount of marijuana.").

363. Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974).

without declaring that they were doing so—even when there was no evidence that the money would be used for an illegal purpose.[364] The outcome of these cases likely offends (for most readers) two separate instincts related to justice: proportionality and culpability. Punishing the owner harshly for someone else's misconduct may be legal—but its harshness makes clemency an appealing option in such civil-forfeiture cases.

Concerns about justice are particularly acute in the context of civil offenses. Federal criminal convictions usually require a unanimous jury; liability for a civil offense, by contrast, is typically issued by a judge. A criminal conviction requires the evidence to prove guilt beyond a reasonable doubt; civil liability can attach based on preponderance of the evidence. Further, civil offenses (i) are not attended by a right against self-incrimination, (ii) can produce liability based on inferences drawn by the invocation of the right against self-incrimination in a criminal case, (iii) nullify the right to confront adverse witnesses, and (iv) lack habeas review. In other words, the risk of error or injustice is *greater* in a civil-offense case than in a criminal case because it is so easy to penalize an alleged offender.

2. Mercy. Traditionally, pardons have been justified in terms of "mercy and caprice."[365] These rationales were ubiquitous among English pardons when the Constitution was ratified.[366] Mercy might support a

364. *See, e.g.*, German Lopez, *Why Police Could Seize a College Student's Life Savings Without Charging Him for a Crime*, VOX (Oct. 8, 2015), http://www.vox.com/2015/6/17/8792623/civil-forfeiture-charles-clarke ("The government is mainly basing its forfeiture of Clarke's $11,000 on one claim: His checked bag and money smelled like marijuana, so, according to law enforcement, the money was very likely obtained or meant for illegal drug activity.").

365. HUMBERT, *supra* note 42, at 5.

366. *See* 305 PARDONS AND PUNISHMENTS, *supra* note 160, para. 107, at 240 (noting that the prisoner was "seduced by bad company"); *id.* para. 109 (noting that the prisoner is "poor" and "has a wife and 5 small children"); *id.* para. 116, at 241 (noting the prisoner's poor health); *id.* para. 127, at 244 (alleging that "the

pardon when a convict is sick or old, or when he has small children. Or it might result in a pardon if the convict's family would have no other means of support or if the convict is a first-time offender. But this does not mean that the punishment was unjust; in fact, a pardon could be issued even if the applicant received a lenient sentence. A similar principle applies to civil offenses. For instance, if a teenage boy is fined $100,000 for plucking a flower from wetlands, or if a new doctor would be fined millions of dollars for an accidental HIPAA violation, or if the government moved to seize a single mother's home because her daughter is selling illegal drugs from the house, civil-offense clemency advances the interests of mercy.

3. Caprice. Unlike considerations of justice and mercy, caprice poses problems for civil pardons. Kings and presidents have often pardoned their loyalists and the wealthy.[367] Self-serving (or *seemingly* self-serving) pardons, such as George W. Bush's grant of a reprieve to his Vice President's chief of staff, or Bill Clinton's pardon of donor Marc Rich, or Ronald Reagan's pardon of Caspar Weinberger[368] are troubling. But they are legal. Even so, it is all too easy and all too distasteful to imagine major donors (or the companies

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prosecutors had not intended such a harsh punishment"); *id.* para. 9, at 247 (coming "from an honest and respectable family in the 'middle rank of life' some of whom being Quakers were precluded from giving evidence on oath" (no citation for quotation provided)); *id.* para. 53, at 258 (noting that the prisoner was one of the "oldest prisoners" on the hulk).

367. Kobil, *supra* note 66, at 571 ("The clemency power traditionally has been used to entrench regimes by endear[ing] the sovereign to his subjects, rewarding political supporters, and even lining the executive's coffers.") (internal quotation marks and footnotes omitted).

368. *See* BILL CLINTON, MY LIFE 940-41 (2004) (justifying the Rich pardon and noting that most people in Rich's position had been charged with a "civil offense"). Controversial pardons are nothing new. *See* Krent, *supra* note 30, at 1675-76 ("Further, presidents have offered pardons in politically charged cases, such as President Benjamin Harrison's pardon of Mormons convicted of polygamy in the Utah territory, President Carter's commutation of Patricia Hearst's sentence, President Reagan's pardon of George Steinbrenner, and President Bush's pardon of the Iran-Contra defendants, as well as President Clinton's pardon of Mark Rich.") (citations omitted).

that employ them) receiving remittals of fines from beholden presidents. But this debate was already resolved when the Constitution gave the president the pardon power. For even the most shocking of crimes, the Founders vested the presidency with the prerogative to grant clemency based on the assumption that the power would generally be used in good faith.[369] So, too, with civil offenses.

4. Military strategy. The fourth rationale for pardons, which is perhaps the most important structural reason, is to arm presidents with an extra tool to win and end military conflicts. This theory, often forgotten in the popular discourse about pardons, was central to Hamilton's thinking.[370] History has revealed Hamilton's prescience: amnesties have repeatedly been used to resolve wars, quell uprisings, and solve other violent conflicts. Amnesty has, in fact, been used in U.S. history *only* to resolve violent conflicts.[371] Civil forfeitures were a part of this package of imposing pressure against adversaries, including during the Civil War.[372]

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369. *See* ALEXANDER HAMILTON, THE FEDERALIST NO. 74, *supra* note 123, at 427-29.

370. As the American Revolution and the Civil War demonstrate, criminal punishment, fines, and forfeitures are weapons during conflict. This concern motivated Hamilton to push for a strong pardon power; in Federalist No. 74, he explicitly linked military action and executive clemency, titling that work "[T]he Command of the National Forces, and the Power of Pardoning." *Id.* Hamilton advocated a broad pardon power largely because of this concern. *Id.* ("In seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents and rebels may restore the tranquillity [sic] of the commonwealth.").

371. *See* Krent, *supra* note 30, at 1674-75 ("From an early date, presidents have relied on the pardon power to issue general amnesties. President Washington issued a Proclamation of Amnesty to the Whiskey Rebels in 1795; President Adams granted an amnesty to the Pennsylvania insurgents in 1800; and President Madison granted a general pardon to the Barataria pirates in 1815. Presidents granted amnesties after the Civil War to the Southern rebels and to draft dodgers following the Vietnam War as well.") (internal citations omitted).

372. *See* Act of July 17, 1862, ch. 195, 12 Stat. 589, 590-91 ("Confiscation Acts," authorizing the confiscation of rebels' property); George C. Pratt & William B. Petersen, *Civil Forfeiture in the Second Circuit*, 65 ST. JOHN'S L. REV. 653, 657-60 (1991) (discussing the expansive use of civil forfeiture during the Civil War).

But consider what would happen if civil offenses were imposed on one's *own* citizens to support a military effort. One's own citizens could be subjected to civil fines for failing to recycle metal, for violating curfews, for consuming too much food or water or electricity, for leaving lights on at night, and so on. But the president would likely want to be able to pardon these offenses: they would exist to increase compliance—not to actually punish one's own citizenry. Similarly, if the United States entered a war with a foreign country, assets of that country or its nationals located in the United States could conceivably be forfeited—and, again, the prospects for an armistice would be strengthened if the president could remit these civil-offense penalties in exchange for peace.

5. Countering illegal or immoral legislation. A fifth basis to permit pardons is that they can act as a safeguard against overreaching by the legislature, thus serving as a critical check when the legislature decides to punish activities that are either constitutionally protected or perfectly moral, such as criticizing the president,[373] engaging in same-sex relationships,[374] marrying a person of a different race,[375] or protesting for women's suffrage.[376] This use of the pardon power is controversial—especially if it occurs on a mass basis rather than in a single case. After all, in such scenarios the president is, in essence, negating the will of the legislature—precisely because a law operated as the legislature intended. That use of a pardon raises the specter of King James II and his

373. *See* Sedition Act of 1798, ch. 74, 1 Stat. 596 (making it a crime, punishable by both a fine and prison, to publish "false, scandalous and malicious" criticism of the government, Congress, or the President, "with intent to defame" them or "to bring them . . . into contempt or disrepute").

374. *See* Bowers v. Hardwick, 478 U.S. 186 (1986).

375. *See* Loving v. Virginia, 388 U.S. 1 (1967).

376. *See* U.S. DEP'T OF JUSTICE, ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE U.S. FOR THE YEAR 1918, at 509. Had the women been fined civilly for the net cost to economic productivity of any traffic jams they caused—let us assume $1,000,000 in present-day dollars—only a civil pardon, not a criminal pardon, could have remitted that penalty.

claim to have a "suspending" power;[377] this approach raises concerns that the Take Care Clause[378] will be breached and mirrors recent claims that Presidents Bush and Obama are exceeding their constitutional powers.

But such amnesties are no different structurally than what happens during a conflict: during a wartime or post-conflict amnesty, many of the laws enacted by the legislature are summarily negated by the president in order to achieve peace or to gain a strategic advantage. Nevertheless, absent a crisis, such maneuvers will spark great practical and constitutional concerns.

Such a power, however, is still a useful check and balance. Imagine if Congress imposed an apartheid-like curfew or registration requirements on a particular minority group, enforced by civil penalties. (E.g., imagine if a president had issued a daily amnesty to all Japanese Americans during World War II who disregarded a federal statute requiring them to go to internment camps.) To be sure, a president might conclude that the harm to the Take Care Clause of enforcing any such statute was greater than the harm of pardoning people who failed to comply with it. And, of course, the president could be impeached if he abused the pardon power intolerably.[379] The availability of clemency for civil-offenses is a check against extreme legislation.

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377. *See generally* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 VA. L. REV. 575 (2008); *see also* Note, *Executive Revision of Judicial Decisions*, 109 HARV. L. REV. 2020, 2033 (1996) ("When used to remit fines, penalties, and forfeitures, the pardon power can restore property as well as liberty; at the extreme, it can nullify the operation of a criminal statute or provide a means by which the executive may escape accountability for its actions.") (internal citations omitted).

378. U.S. CONST. art. II, § 3, cl. 5.

379. *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("Exceptional cases . . . would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.").

6. Inter-Administration lenity. Some presidential administrations are harsher than others. And when a more-lenient president enters the White House, he may wish to lessen the punishments that were meted out during a prior administration (or during a time when a different view prevailed about the appropriate punishment for an offense). Every monarch in England from Elizabeth to George III granted, with Parliament's blessing, amnesty for a wide array of offenses, coinciding with their coronation;[380] the acts cast the monarchs as moderate and just. So, too, do perceptions about culpability change over time in the modern era. For example, Congress passed tough drug laws in the 1980s—and those laws punished crimes involving "crack" cocaine far more harshly than crimes involving powder cocaine.[381] Over time, most policy makers concluded that the Draconian sentencing rules for crack-cocaine offenses were too harsh.[382] President Obama signed legislation amending these laws,[383] but he also indicated that he would grant pardons to non-violent offenders who violated these laws—citing the excessive harshness of those penalties.[384] The same principle can apply to civil offenses: one administration may enforce a particular penalty far more strictly or frequently than a prior administration,[385] and a subsequent

380. *See supra* Part III.

381. Sari Horwitz, *From a First Arrest to a Life Sentence*, WASH. POST (July 15, 2015), http://www.washingtonpost.com/sf/national/2015/07/15/from-a-first-arrest-to-a-life-sentence.

382. *Id.*

383. Fair Sentencing Act of 2010, Pub. L. 111-220.

384. Sari Horwitz, *President Obama Commutes Sentences of 95 Federal Drug Offenders*, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/world/national-security/president-obama-commutes-sentences-of-about-100-drug-offenders/2015/12/18/9b62c91c-a5a3-11e5-9c4e-be37f66848bb_story.html (describing Obama's 95 commutations for cocaine-related convictions as "an effort to give relief to drug offenders who were harshly sentenced in the nation's war on drugs").

385. *See, e.g.*, Sonia A. Steinway, Comment, *SEC "Monetary Penalties Speak Very Loudly," But What Do They Say? A Critical Analysis of the SEC's New*

administration should be able to remit fines that have not yet been paid.

7. Economic efficiency. Finally, a rationale rarely explored—but that should be considered carefully by future presidents—is to offer relief from laws that harm economic growth.[386] This final approach is likely to be the most controversial of the rationales discussed herein,[387] but it is a place where pardoning civil offenses can be especially useful. Pardoning civil offenses is a potential way for presidents to temporarily alleviate the effects of harsh laws or inefficient regulation.[388]

For instance, imagine that the president concluded that Congress's intransigence in reforming the visa system for immigrants whose labor the United States urgently wanted—such as those seeking visas through the H-1B or H-2B programs—was harming the economy. By issuing civil pardons, the president could issue daily amnesties to pardon both (i) foreigners who entered the United States on a tourist visa and then sought a job and (ii) companies or farms that

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Enforcement Approach, 124 YALE L.J. 209, 209-210 (2014) (noting that the largest SEC penalty ever was $10 million in 2002; from 2000 to 2013, the average penalty has been $57.9 million).

386. An eighth major basis has disappeared. Pardons, when they were common, provided a reason for prisoners to behave well. *See, e.g.*, *supra* text accompanying note 43 (noting that in the late 1800s as many as 64.1% of federal prisoners received clemency). But now that parole has become common and pardons have become scarce, few prisoners would behave well solely in the hope of executive clemency. Similarly, another major basis for pardons is inapplicable for civil offenses: to solve prison overcrowding. *See* Krent, *supra* note 30, at 1675 ("Most pardons, however, have been extended to individuals for reason of overcrowding or compassion.").

387. *See, e.g.*, 3 BACON, *supra* note 257, at 802 (1786) ("The Power of pardoning Offences is inseparably incident to the Crown; and this high Prerogative the King is intrusted with upon a special Confidence, that he will spare those only whose Case, could it have been foreseen, the Law itself may be presumed willing to have excepted out of its general Rules, which the Wisdom of Man cannot possibly make so perfect as to suit every particular Case.").

388. This approach could, of course, be used for mischief, such as if a president pardoned a monopolist daily for willfully crushing its puny competitors or bilking customers.

hired them.[389] While each sunrise might usher in a new offense, the president could reissue a daily pardon to cancel any penalties for as long as his or her administration lasted. This process of using recurring amnesties to temporarily block the "heat" of legislation and regulation is referred to herein—in a hat tip to the phrase "sunset legislation"—as "cloud cover."

That approach would certainly be controversial.[390] But it would play an important structural role to check a legislature that was too active or to bypass a legislature that had become inert. And even the threat of this tactic could likely pressure Congress to act.

Ideally, any such amnesty would be issued with congressional acquiescence, such as if the president acquired a non-binding "sense of the Senate [or House]" or received the blessing of congressional leaders to use this tactic. Although no majority might acquiesce around a particular bill, Congress might *want* to empower the president to issue interim relief, which could be achieved through recurring pardons. This approach would be helpful during a recession, war, or crisis. The president could throw cloud cover over legislation that slowed economic growth, reduced the country's ability to adapt to a crisis, or inflicted military harm. For instance, if the country needed rare elements for

389. There is precedent for pardoning immigration violations. Multiple examples were cited above. *See supra* Part III.D (noting that President Roosevelt pardoned a person who had entered the United States illegally). The Supreme Court recently affirmed, by a 4-4 vote, a lower court opinion invalidating President Obama's attempt to use administrative inaction to defer deportations. United States v. Texas, No. 15-674 (2016) (upholding by inaction the trial court's preliminary injunction and the Fifth Circuit's decision not to stay that preliminary injunction from taking effect). To achieve similar goals without running into problems under the Take Care Clause, presidents may, in the coming years, decide to use executive clemency to grant relief for immigration violations. U.S. CONST. art. II, § 3 (requiring presidents to "take care that the laws be faithfully executed").

390. *Ex parte* Grossman, 267 U.S. 87, 121 (1925) ("If it be said that the President, by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases . . . would suggest a resort to impeachment . . . .").

military hardware, the president could promise to pardon people or companies who mined for these elements in violation of civil statutes or regulations; the instant that the offense occurred, he could pardon it.[391] Congress could, of course, lift these restrictions—but doing so would be slower, and would permanently rescind the legislation. If Congress disliked the president's actions, it could call congressional hearings, cut off funding, enact other legislative rules, or even impeach the president. But the pardon power could, in the interim, become a way to help the war effort (or the economy, or the national response to some other crisis).

Ideally, Congress would pre-approve such pardons, which would resemble the partnership between monarchs and Parliament that led to the issuance of many acts of amnesty.[392]

The regulatory pardon, used in this way, is a potentially enormous presidential tool, the limits—and merits—of which warrant far greater exploration than can be provided herein. In short, however, this Article posits that this power can sensibly be used during emergencies since the president is able to grant amnesties faster than Congress can amend legislation—and the effects would be temporary, since the legislation remains in place. One wonders, for instance, if amnesties from various regulations could, during the onset of a financial crisis or a terror attack, provide helpful interim, emergency legislative adaptation while Congress and agencies debate more comprehensive reforms.

Congress would not acquiesce to this practice being used unilaterally by presidents. A lively set of checks and balances would ensue if the president sought to bypass Congress completely, such as when Congress threatened to cut funding to the Carter Administration after President Carter granted

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391. *Compare* HAWKINS, *supra* note 172, Principle 61 ("The king could never dispense with a statute before it was made."), *with id.* Principle 62 ("The king may pardon *any* offence after it is committed, so far as the public are concerned.") (emphasis in original).

392. Every monarch from Elizabeth I through George II issued amnesties of what would now be civil offenses with Parliamentary approval, and George III did the same thing—but without Parliament's blessing. *See supra* Part III.

amnesty to draft avoiders.[393] As noted above, the president and Congress would, ideally, partner together, just as kings and queens worked with Parliament to issue general pardons. For instance, a non-binding congressional resolution during a crisis could authorize the president to use the pardon power broadly for thirty days to advance important national goals; the president could then return to Congress at the end of this period to seek additional approval to use civil amnesties to achieve policy effects.

Assessing how an amnesty toward civil offenses would interact with the Take Care Clause and other separation of powers concerns is beyond this Article's ambition, but the sheer complexity of the modern federal regulatory scheme and the threat that excessive regulation can impair economic growth warrants exploring this issue further.

CONCLUSION

The president may pardon civil offenses. English monarchs and U.S. presidents pardoned and remitted penalties for violations of the law that closely resemble today's civil offenses—both in the decades before and after the Constitutional Convention. Although civil offenses evolved from crimes, they did not exist at the birth of the United States; even so, they resemble misdemeanors, nuisances, civil forfeitures, "mulcts," and "amercements"—all of which English monarchs and U.S. presidents could pardon. The debates and drafts from the Constitutional Convention support the legality of clemency for civil offenses conclusion. And case law has not resolved this issue, but it leans toward permitting pardons of civil offenses. The policy rationales behind pardons likewise suggest that clemency for civil offenses comports with the original reasons that the Founders gave presidents broad clemency powers.

To be sure, risks exist (as with criminal pardons) that presidents might abuse the power that this Article suggests

393. *See* Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 962-63 (1994) (describing how Congress attached a rider to the Fiscal Year 1978 appropriation bill, barring the Justice Department from using any funds to carry out President Carter's pardons of Vietnam-era draft resisters).

they wield. But that risk has always existed with pardons. It is more likely that the Executive Branch would grant relief in cases in which the law was applied too harshly—just as with pardons of crimes. This Article has hinted at several other possible uses of the untapped power to grant clemency for civil offenses. The republic can weather all these scenarios. And given that the Constitution was designed to protect citizens against the risk that the "Federal Government should overpass the just bounds of its authority and make a tyrannical use of its powers"[394]—and that literally tens of thousands of federal civil offenses exist—it hardly seems surprising to think that the Founders would want the president to be able to remit civil penalties that impose too great of a burden.

But this Article is not, ultimately, making a normative case that clemency should exist for civil offenses. Rather, it is suggesting that this power, though neglected, has existed since 1787. We cannot yet know how presidents will use the power to grant clemency for civil offenses. But—as with pardons for crimes—the choice is theirs.

394. ALEXANDER HAMILTON, THE FEDERALIST NO. 33, *supra* note 123, at 173-76.