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Pardoning Immigrants

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PARDONING IMMIGRANTS

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In the waning days of the Obama Administration, with Trump's promised immigration crackdown looming, over one hundred advocacy organizations joined forces to urge President Obama to permanently protect hundreds of thousands of immigrants from deportation by pardoning their breaches of civil immigration law. That pardon never materialized and, as expected, the Trump enforcement regime is sowing terror and devastation in immigrant communities nationwide. While it seems unfathomable that the current President would use his pardon power to mitigate even the most extreme applications of our nation's immigration laws, there is unfortunately no indication that the harshest aspects of the immigration laws are likely to be revised by the current political branches. Accordingly, future Presidents will likely once again face the questions of how they may use prosecutorial discretion generally, and the pardon power specifically, to address the human toll of such laws. Since the Founding, the pardon power has been used primarily to forgive individual criminal convictions. Thus the broad civil immigration pardon, which Obama declined to issue, would have raised novel questions regarding the appropriate boundaries of the presidential pardon power. Resolution of those previously unexplored questions is necessary to help future Presidents determine whether their pardon power can serve as a safety valve to alleviate the disproportionate penalties that our immigration laws have imposed on longtime members of our communities.

This Article explores the novel concept of a civil immigration pardon. Specifically, it closely examines the language and drafting history of the Pardon Clause, exhaustively reviews early and modern pardon practice and jurisprudence, and considers whether a President could, consistent with the Constitution, use that power to protect some of the largest categories of noncitizens currently at risk of deportation. Ultimately, it argues that the President possesses the constitutional authority to categorically pardon broad classes of immigrants for civil violations of the immigration laws and to thereby provide durable and permanent protections against deportation. As millions of noncitizens and their families face a historically unprecedented wave of deportations and as traditional mechanisms for policymaking continue to fail, the immigration pardon offers an important tool for future Presidents to forgive the civil offenses that result in some of the harshest penalties in our nation's justice system.

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INTRODUCTION

In the closing days of the Obama Administration, with the Trump presidency looming, immigrants and their advocates besieged the White House with a long list of urgent requests for final presidential actions that could help protect immigrants from the storm approaching on the horizon. One such request, delivered in a letter from over one hundred community-based and immigrant advocacy organizations, was a plea for President Obama to use his pardon power to issue a categorical pardon that would permanently protect a broad swath of immigrants from deportation.[1] While President Obama had become notorious during his presidency, labeled the "Deporter-in-Chief" for deporting more immigrants than any other

[1] Letter from Action NC et al. to President Barack Obama (Dec. 5, 2016), https://populardemocracy.typeform.com/to/tairNm; *see* Caitlin Dickerson, *A Creative Plea from Immigrants, and a Ticking Clock for Obama*, N.Y. TIMES (Dec. 20, 2016), https://www.nytimes.com/2016/12/20/us/a-creative-plea-from-immigrants-and-a-ticking-clock-for-obama.html. The authors were heavily involved in the drafting of this letter and drafted the accompanying memorandum that was prepared for the White House Counsel in support of the immigration pardon request. Much of the analysis contained in this Article is drawn from that memorandum.

President in history, in the final years of his presidency, Obama instituted a meaningful prosecutorial discretion policy, which functionally exempted many immigrants from deportation.[2] The letter from community groups asked President Obama to make permanent certain aspects of his prosecutorial discretion policy and protect hundreds of thousands of immigrants from deportation by pardoning their breaches of the immigration laws. Pardons are one of the few presidential actions that cannot be undone by future Presidents and thus, with candidate Trump's vitriolic anti-immigrant rhetoric still ringing in the ears of immigrants across the country, the idea of a wide-scale immigration pardon garnered significant media and community attention.[3]

Although immigrants and their advocates were once again disappointed by President Obama, who declined to exercise his pardon power on behalf of immigrants, the advocacy effort led to the conceptual development of a potent new legal mechanism—the immigration pardon—that could play an important role in future efforts to imbue our immigration system with some sense of proportionality and humanity. The Obama Administration's decision not to issue the

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[2] *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot., Léon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., & Alan D. Bersin, Acting Assistant Sec'y for Policy (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf (setting forth enforcement priorities that functionally exempted most immigrants living in the United States who had no, or very minor criminal records, from becoming targets of Department of Homeland Security (DHS) enforcement actions); *see also* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Léon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, & R. Gil Kerlikowske, Comm'r, U.S. Customs & Border Prot. (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf (setting forth guidelines that sought to vastly expand the group of noncitizens eligible for prosecutorial discretion, though this memorandum was eventually enjoined from taking effect and thus never went into operation); Memorandum from Janet Napolitano, Sec'y of Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs., & John Morton, Dir., U.S. Immigration & Customs Enf't (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf (setting forth guidelines for granting prosecutorial discretion to a large category of noncitizens who, inter alia, were brought to the United States as children).

[3] *See, e.g.*, Dickerson, *supra* note 1; Stephen Legomsky, *Pardoning Lawful Immigrants for Minor Offenses*, HUFFINGTON POST (Jan. 16, 2017), http://www.huffingtonpost.com/stephen-legomsky/pardoning-lawful-immigran_b_14203040.html; Laura Litvan, *Obama Should Pardon "Dreamer" Immigrants, Democrats Say*, BLOOMBERG (Nov. 17, 2016), https://www.bloomberg.com/news/articles/2016-11-17/obama-should-pardon-dreamer-immigrants-house-democrats-say; Peter L. Markowitz, *Can Obama Pardon Millions of Immigrants?*, N.Y. TIMES (July 6, 2016), https://www.nytimes.com/2016/07/06/opinion/can-obama-pardon-millions-of-immigrants.html.

immigration pardon was likely driven more by politics than by law, but the requested pardon would have been a novel exercise of the pardon power and thus various potential legal objections could also have formed the basis for the President's decision not to act. While it seems unfathomable that the current occupant of the Oval Office would consider using his pardon power to mitigate even the most brutal applications of our nation's immigration laws, there is no indication that the harshest aspects of the immigration laws are likely to be revised by the current political branches in the foreseeable future. Accordingly, we can expect that future Presidents will once again face the question of how prosecutorial discretion generally, and the pardon power specifically, may or may not be used to address the human toll of such laws. This Article seeks to address, for the first time, the legal questions necessary to evaluate a President's ability to use categorical pardons as a policymaking tool in the immigration realm.

The Pardon Clause grants the President authority to effectively forgive any individual who has committed an offense against the United States and thereby protect that person from the legal penalties she could otherwise face.[4] A pardon can protect an individual from prosecution or can functionally overturn a conviction and punishment after it has been imposed.[5] However, while the language of the clause extends to all "[o]ffences against the United States,"[6] it has been exercised almost exclusively in individual criminal cases.[7] Deportation offenses are civil—not criminal—in nature and thus a critical threshold question is whether the pardon power can extend to civil offenses generally and to deportation offenses specifically.[8] In addition, while there is significant historical precedent for widespread

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[4] U.S. CONST. art. II, § 2, cl. 1.

[5] *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

[6] U.S. CONST. art. II, § 2, cl. 1.

[7] *See* Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 661 (2016). One notable and recent exception, however, is President Trump's pardon of Maricopa County Sheriff Joe Arpaio. *See* EXEC. OFFICE OF THE PRESIDENT, EXECUTIVE GRANT OF CLEMENCY TO JOSEPH M. ARPAIO (Aug. 25, 2017), https://www.justice.gov/pardon/file/993586/download. The infamous Sheriff Arpaio was held in contempt by a federal court for failing to adhere to its order to stop making unauthorized immigration arrests. *See* Julie Hirschfeld Davis & Maggie Haberman, *Trump Pardons Joe Arpaio, Who Became Face of Crackdown on Illegal Immigration*, N.Y. TIMES (Aug. 25, 2017), https://nyti.ms/2vwUubN. Contempt, however, is not a crime. *See* discussion *infra* notes 73–82 and accompanying text. Accordingly, the Arpaio pardon is the most recent example of a noncriminal pardon.

[8] *See* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (noting that while "deportation is a particularly severe 'penalty,' . . . it is not, in a strict sense, a criminal sanction"); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (establishing the civil nature of deportation proceedings).

categorical pardons, which the Supreme Court has recognized,[9] there is no clear modern Supreme Court authority endorsing such broad use of the pardon authority. In the context of the modern administrative state, the ability to issue categorical pardons for civil offenses could represent a significant expansion of presidential pardon authority and thus would have serious implications for the Constitution's delicate balance and separation of powers between the executive, legislature, and judiciary. Accordingly, the present inquiry requires not only a full consideration of the historical precedent and origins of the pardon power, but also of the modern implications of categorical immigration pardons on our constitutional system.

Pardons are the most robust form of the executive's more general prosecutorial discretion powers. In recent years, Presidents have increasingly used systematic categorical prosecutorial discretion as a policymaking tool. Most famously, President Obama used his prosecutorial discretion power to categorically forgo the deportation of certain undocumented immigrants who came to the United States as children.[10] Before him, President George W. Bush also used robust assertions of categorical prosecutorial discretion to achieve policy goals in the environmental, civil rights, antitrust, labor, and securities enforcement arenas, to name a few.[11] President Trump has threatened to use his prosecutorial discretion power to undermine the Affordable Care Act by refusing to enforce penalties for individuals who fail to comply with the law's healthcare mandates.[12] While there is very limited relevant literature exploring civil or categorical pardons,[13] there

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9 *See infra* Section IV.A.

10 Memorandum from Janet Napolitano, *supra* note 2; *see also* Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 507–14 (2017) (cataloging these and other assertions of robust prosecutorial discretion in the immigration arena).

11 Markowitz, *supra* note 10, at 501–07 (cataloging these and other modern assertions of robust prosecutorial discretion as a policymaking tool).

12 *See, e.g.*, Danielle Kurtzleben, *Even Without Congress, the Trump Administration Can Still Redo Obamacare*, NPR (Mar. 29, 2017), http://www.npr.org/sections/health-shots/2017/03/29/521713002/even-without-congress-the-trump-administration-can-still-redo-obamacare; Ashley Parker & Amy Goldstein, *Trump Signs Executive Order That Could Effectively Gut Affordable Care Act's Individual Mandate*, WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/politics/trump-signs-executive-order-that-could-lift-affordable-care-acts-individual-mandate/2017/01/20/8c99e35e-df70-11e6-b2cf-b67fe3285cbc_story.html; *Trump May Not Enforce Individual Health Insurance Mandate: Aide*, REUTERS (Jan. 22, 2017), http://www.reuters.com/article/us-usa-obamacare-idUSKBN1560SX.

13 *See, e.g.*, Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 836–37 (2015) (discussing categorical pardons); Messing, *supra* note 7 (discussing civil pardons); Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 1021–23 (2017) (discussing categorical pardons). A few scholars have specifically explored the role of pardons in the immigration arena. *See, e.g.*, Jason A.

has been increased scholarly attention, in recent years, to this more general trend of policymaking through prosecutorial discretion in the immigration arena and beyond.[14] This Article seeks to build upon this important existing body of scholarship.

This Article proceeds in four parts. Part I sets forth the foundational nature and limits of the pardon power and draws into focus the critical, unresolved questions related to the broad use of the pardon power in the immigration realm. Part II explores the relevance of the civil-criminal divide to the pardon power. We conclude that the pardon power is not limited to the criminal realm; however, that does not mean that all civil provisions are pardonable. Rather, the constitutional text and framing history, as well as historical practice and jurisprudence, support the conclusion that the President may pardon any federal civil *penalty* but may not use his pardon power to relieve individuals of applications of civil *regulatory qualifications*. While the line between the two is not always easily drawn, this divide is well supported by historical practice and authority and preserves an appropriate balance of powers between the respective branches of the federal government. Part III applies these limits to the immigration context and concludes, for at least two sizable categories of immigrants, that immigration pardons can provide significant protections. Pardons are effective at protecting certain immigrants with legal status, such as lawful permanent residents with criminal convictions, from deportation. While pardons cannot convey status to undocumented immigrants, many of the critical barriers to status for undocumented immigrants are best conceived of as civil penalties, and thus a

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Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355 (2012); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253 (2010). But the existing scholarship does not address the power of the President to pardon immigration offenses directly. *See* Cade, *supra*, at 371–73 (discussing the immigration consequences of a gubernatorial pardon of a state crime); Morison, *supra* (discussing the immigration consequences of a presidential pardon of a federal crime).

[14] *See, e.g.*, SHOBA SIVAPRASAD WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14–32 (2015); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009) [hereinafter Cox & Rodríguez, *President and Immigration Law*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 113 (2015) [hereinafter Cox & Rodríguez, *Redux*]; 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, 783 (2013); Markowitz, *supra* note 10; Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 717 (2014); Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 411 (2014); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010).

pardon can effectively eliminate such barriers. Finally, in Part IV we explore the potential application of the immigration pardon power. Pardoning individual immigrants is a clear and important application but, perhaps more critically, we look to the history of, and authority for, categorical pardons. We conclude that categorical immigration pardons are a potentially important presidential tool for immigration policymaking that future officeholders should consider going forward.

I
The Foundational Nature and Limits of the Pardon Power

The Pardon Clause of the Constitution states that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[15] The Supreme Court has historically taken an expansive view of the President's pardon power. The Court has described the power as "unlimited, with the exception" of impeachment and explained that it "extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[16] The Court has further explained that the Pardon Clause grants the President the "ultimate authority" to determine "that the public welfare will be better served" by mercy than by full applications of the penalties proscribed by law.[17]

In addition to the textual limitation prohibiting the application of the pardon power to cases of impeachment, there are three axiomatic boundaries that constrain the President's pardon power. First, the language "offenses against *the United States*" makes clear that the

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[15] U.S. Const. art. II, § 2, cl. 1.

[16] *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866); *see, e.g.*, Proclamation No. 4311, 39 Fed. Reg. 32,601, 32,601–02 (Sept. 10, 1974) (pardoning former President Nixon in advance of any prosecution); *see also* Samuel E. Schoenburg, Note, *Clemency, War Powers, and Guantánamo*, 91 N.Y.U. L. Rev. 917, 923 (2016) ("[T]he Framers adopted a final text of Article II that allowed the President to 'single-handedly and conclusively' pardon offenses at any point after commission, even before trial."); *cf.* Power of the President to Remit Fines Against Defaulting Jurors, 4 Op. Att'y Gen. 458, 460 (1845) ("The elementary writers on the constitutional law of the United States state the President's power of pardon as follows, (Kent, vol. i, p. 284:) 'The power of pardon vested in the President is *without any limitation*, except in the single case of impeachments.'" (emphasis added)).

[17] Biddle v. Perovich, 274 U.S. 480, 486 (1927); *see also* Burdick v. United States, 236 U.S. 79, 95 (1915) (explaining that the categorical pardons are generally based on the President's assessment that "forgiveness" is "more expedient for the public welfare than prosecution and punishment").

President cannot pardon state law offenses.[18] This limit is consistent with our federal system of dual sovereigns. Second, the pardon power may not be used to interfere with privately vested rights—such as civil suits between two private parties—because only offenses "*against* the United States" may be pardoned.[19] Finally, as the Supreme Court has explained, a pardon may only be issued for an offense "*after* its commission."[20] The President may not grant anyone advance permission to violate the law. That is what distinguishes the pardon power from the repudiated dispensing and suspending powers, whereby the English King at common law was empowered to grant individuals prospective exemptions from operation of a law.[21]

These well-established principles of pardon law, however, do little alone to clarify the central questions upon which we focus. In considering whether the pardon power can reach civil immigration offenses, it is beyond question that these offenses are federal in nature, can only be pardoned, if at all, after commission, and that immigration offenses would not implicate the prohibition of disturbing privately vested rights. Thus, these principles do not foreclose the possibility of immigration pardons, but neither do they elucidate whether immigration offenses are "offenses against the United States" within the meaning of the Pardon Clause. Moreover, these foundational principles of pardon law simply do not address the appropriateness of categorical versus individual pardons.

However, critically for the current inquiry, the Supreme Court has been clear, consistent, and emphatic in its holdings regarding another foundational principle of pardon law: that the reach of the pardon power is strictly a question of constitutional law and cannot be limited in any way by Congress. As the Court explained in 1974, "the

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[18] *See* 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."); Office of the Pardon Att'y, *Pardon Information and Instructions*, U.S. DEP'T JUST., http://www.justice.gov/pardon/pardon-information-and-instructions (last updated Oct. 12, 2017) ("[T]he President cannot pardon a state criminal offense.").

[19] *See Ex parte* Grossman, 267 U.S. 87, 108 (1925); *Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1855); *see also* Messing, *supra* note 7, at 694 (demonstrating the broad reach of pardon power at common law "so long as the rights of private parties were not impaired"); discussion *infra* notes 62–63 and accompanying text (establishing that the presidential pardon power is co-extensive with the analogous power enjoyed by the King of England at the time of the framing).

[20] *Garland*, 71 U.S. at 380 (emphasis added); *see also Grossman*, 267 U.S. at 120 ("The executive can reprieve or pardon all offenses *after their commission*, either before trial, during trial or after trial . . . ." (emphasis added)).

[21] *See* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103–04 (Max Farrand ed., 1966) (explaining that the record of the Constitutional Convention demonstrates that the delegates unanimously rejected an effort to grant "suspending" powers to the President); *see also* Price, *supra* note 14, at 693.

unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."[22] One of the leading cases regarding the effect of a presidential pardon demonstrates this point.[23] In *Ex parte Garland*, Congress enacted a statute which required that any person wishing to practice in federal court take an oath asserting that he had never voluntarily borne arms against the United States.[24] The petitioner, Mr. Garland, had been a member of the Confederacy but had received a full presidential pardon for his actions.[25] Nevertheless, he was effectively barred from practicing in federal court because he could not truthfully take the required oath.[26] The Supreme Court held that the statute could not operate to limit the pardon and that Garland was therefore entitled to practice without taking the oath.[27] Specifically, the Court held that the pardon power "is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."[28]

The principle that only the Constitution, and not Congress, can limit the pardon power is critical to the inquiry at hand. Federal immigration law does have a provision that arguably purports to limit the President's pardon authority in the immigration realm.[29] Specifically, the law dictates that only a "full and unconditional pardon by the

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[22] Schick v. Reed, 419 U.S. 256, 266 (1974); *see also* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) ("[W]here the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch. . . . [W]e [have] reiterated . . . that Congress cannot interfere in any way with the President's power to pardon."); *Garland*, 71 U.S. at 380 ("This power of the President [i.e., the pardon power] is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."); Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 161 (1995) (stating that "congressional legislation cannot define or limit the effect of a presidential pardon").

[23] *Garland*, 71 U.S. at 333.

[24] *Id.* at 334.

[25] *Id*. at 336–37.

[26] *Id.* at 357.

[27] *Id.* at 381.

[28] *Id.* at 380; *see also* United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871) (holding that a different statute seeking to diminish the effect of the post-Civil War pardons was also invalid because it "impair[ed] the effect of a pardon, and thus infring[ed] the constitutional power of the Executive"); *see also* discussion *infra* notes 185–89 and accompanying text (discussing how pardons have been used throughout history as an essential check against overly harsh congressional action).

[29] 8 U.S.C. § 1227(a)(2)(A)(vi) (2012).

President of the United States" for a "criminal conviction" can protect an individual from deportation based on that criminal conviction.[30] In addition, the law expressly exempts certain criminal removal grounds, such as the removal ground triggered by controlled substance convictions, which purportedly would still operate even in the face of a full and unconditional presidential pardon of a controlled substance conviction.[31]

If this statutory term were effective to limit the President's pardon power, it would significantly constrain the President's ability to issue the contemplated immigration pardons. For example, the vast majority of individuals who are deportable for criminal convictions have state, not federal, convictions.[32] Since the President cannot pardon state crimes, under this provision of law he is purportedly impotent to pardon the federal civil removal offense that flows from state crimes—insofar as such a pardon would not be a "full and unconditional pardon" for a criminal conviction. Since only "full and unconditional pardons" are deemed effective by Congress,[33] that would mean the President could never pardon a federal deportation offense flowing from a state conviction. In addition, if Congress could limit the President's pardon power, this provision of immigration law would prevent her from pardoning anyone who is deportable because of a controlled substance conviction. However, as Samuel Morison has ably explained, the well-established principle set forth above dictates that whatever Congress's intent was with this statutory provision, the statute cannot effectively impose any limit whatsoever on the President's constitutional pardon power.[34] Accordingly, the inquiry that remains then is whether the pardon power is limited to the criminal realm and, if not, whether it can operate against civil immigration offenses.

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30 *Id.*

31 § 1227(a)(2)(B)(i) (provision for deportation based on controlled substances conviction).

32 Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 576–77 (2013) ("[T]he reality is that the vast majority of convictions within the United States arise from violations of state law. Nationwide, 99 percent of all arrests, 94 percent of felony convictions, and 93 percent of prison sentences can be traced to decisions by state and local actors.").

33 § 1227(a)(2)(A)(vi).

34 Morison, *supra* note 13, at 324–25.

II
Exploring the Boundaries of the Pardon Power Beyond the Criminal Realm

A. Pardoning Civil Offenses Against the United States

1. Text, Drafting History, and Early Exercise of the Pardon Power

As with all constitutional inquiries, we start with the text itself. It is notable, first, that the Framers used the term "offences" in the Pardon Clause and not "crimes." This is particularly true since the words "crimes," "criminal case," and "criminal prosecution" are used in many other places in the Constitution,[35] apparently indicating that, when the Framers meant to limit a provision to the criminal context, they did so clearly. Thus, well-accepted canons of statutory construction dictate that the decision to use the term "offences" rather than "crimes" in the Pardon Clause should be given effect and suggest that "offences" should be afforded a different meaning than "crimes."[36]

The leading dictionary and treatise from the Founding period demonstrate that the terms "offense" and "crime" permit of distinct meanings.[37] The leading dictionary of the Founding era, authored by Samuel Johnson, provides two relevant definitions for "Offence": (1) "Crime; act of wickedness" and (2) "[a] transgression."[38] The latter definition demonstrates, as the canons of statutory construction suggest, that at the time of the Founding, the word "offense" could carry

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[35] *See, e.g.*, U.S. Const. art. II, § 4 (subjecting the President to impeachment for "high Crimes and Misdemeanors"); *id.* art. III, § 2 (defining the jurisdiction of the judiciary to include "The Trial of all Crimes"); *id.* art. IV, § 2 (requiring that a person "charged in any State with Treason, Felony, or other Crime" who flees shall be returned to the "State having Jurisdiction of the Crime"); *id.* amend. V (establishing various rights for people accused of "capital, or otherwise infamous crime" and for people in "any criminal case"); *id.* amend. VI (establishing various rights for people in "criminal prosecutions"); *id.* amend. XIII (prohibiting involuntary servitude except as "punishment for crime"); *id.* amend. XIV, § 2 (permitting disenfranchisement for "participation in rebellion, or other crime"). The only other place the word "offences" is used is in describing "Offences against the Law of Nations" in Article I, Section 8.

[36] *See generally* Sosa v. Alvarez-Machain, 542 U.S. 692, 711 n.9 (2004) (explaining that where a statute uses "certain language in one part of the statute and different language in another" it indicates that "different meanings were intended"); Myers v. United States, 272 U.S. 52, 237 (1926) (McReynolds, J., dissenting) (explaining that the "Constitution must be interpreted by attributing to its words the meaning which they bore at the time of its adoption, and *in view of commonly-accepted canons of construction*, its history, early and long-continued practices under it, and relevant opinions of this court" (emphasis added)).

[37] *See* Messing, *supra* note 7, at 712–13 (surveying Founding-era treatises and dictionaries regarding the meaning of the words "offenses" and "pardon").

[38] 2 Samuel Johnson, A Dictionary of the English Language 220 (7th ed. 1783). The Supreme Court has relied upon this dictionary as a key source of constitutional meaning. *See, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2561 (2014) (citing Johnson's dictionary).

a broader and distinct meaning from the word "crime." This distinction is confirmed by the leading legal treatise at the time, which also used the word "offense" more broadly than crimes to include transgressions punishable only by fines.[39] Similarly, definitions of "pardon" during the period went beyond mere forgiveness for a crime and also included "[f]orgiveness of an offender" and "[r]emission of [a] penalty."[40] Thus, the common usage of the words "offense" and "pardon," as used at the time of the Founding, supports the inference from the text that "offense" was intended to have a distinct and broader meaning than the word "crime."

While the drafting history of the Pardon Clause is limited,[41] it lends some modest additional support to the contention that the pardon power was not intended to be limited to the criminal context. The first draft of the Pardon Clause was proposed by Charles Pinckney and gave the President the "power to grant pardons and reprieves, except in impeachments."[42] There is no reference to "offenses" or "crimes" in this first draft. Alexander Hamilton offered a second version and added "offenses," thereby giving the President "the power of pardoning all offences except treason."[43] The final version of the Pardon Clause provided that the President "shall have power to grant reprieves and pardons for offences against the United States."[44]

Nowhere in the drafting history was there any suggestion that the pardon power is limited to crimes. Indeed, the evidence of Pinckney and Hamilton's other proposals to the Constitutional Convention and outside writings suggest an appreciation of the distinction between crimes and offenses. Pinckney's other proposals to the Convention include language limiting the application of the draft provisions to "criminal offences" and "felonies."[45] In Hamilton's outside writings

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[39] *See* 4 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 70 (5th ed. 1786). The Supreme Court has relied upon this treatise as a key source on eighteenth-century law. *See, e.g.*, PLIVA, Inc. v. Mensing, 131 S. Ct. 2567, 2579–80 (2011).

[40] JOHNSON, *supra* note 38, at 271; *see also* THOMAS SHERIDAN, *To Pardon*, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1779) (defining "To Pardon" as "to remit a penalty").

[41] *See* Schick v. Reed, 419 U.S. 256, 260 (1974) (explaining that the Framers did not "devote extended debate to [the] meaning" of the Pardon Clause).

[42] 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILADELPHIA IN 1787, at 131 (Jonathan Elliot ed., 1845) [hereinafter DEBATES].

[43] *Id.* at 179.

[44] *Id.* at 549. The record, *see* DEBATES, *supra* note 42, does 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. *E.g.*, ALEX SIMPSON, JR., A TREATISE ON FEDERAL IMPEACHMENTS 20 (1916).

[45] *See* Messing, *supra* note 7, at 702–09 (detailing the other Pinckney provisions).

he also used the word "offences" distinctly and more broadly than "crimes."[46]

In assessing the word choice and drafting history of the Pardon Clause, it is critical to understand that the civil label, in the early years of the Union, was generally used solely in relation to suits between private parties (to which the pardon power unquestionably does not apply) and not in regard to regulatory noncriminal offenses against the United States. As Justice Frankfurter explained, the denomination of statutes as either civil or criminal in nature did not begin to take hold until the mid-nineteenth century.[47] Frankfurter listed hundreds of early statutes penalizing "petty offenses."[48] He demonstrated "the wholly capricious way in which infractions of the law were sometimes directed to be enforced by formal criminal prosecutions, and sometimes by civil penalties."[49] As Professor Beth Stephens further explained:

> Civil and criminal proceedings were so intertwined at the time of the drafting of the Constitution that distinguishing between them in the historical record presents "[p]articularly thorny" problems. "Colonial legislatures, like Parliament, made no sharp distinction between different forms directed to the same end." . . . Moreover, nominally civil proceedings could lead to imprisonment for failure to pay the fine imposed. These early legal proceedings did not distinguish between civil and criminal proceedings based on either the identity of the litigator of the action (public official or private citizen) or the form of the sanction (fine paid to the government, fine paid to a private person, or imprisonment).[50]

While the dividing line was unclear, there was an acknowledgement at the time that some public offenses were criminal in nature and others were not. However, there was no specific term of art at the time of the Founding used to describe noncriminal offenses against the state. Today we might refer to such noncriminal offenses as

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[46] *See, e.g.*, *Letter from Alexander Hamilton to Comm. of the N.Y. Convention* (Apr. 20, 1777) (describing crimes as serious actions and offenses as more trivial in comparison), *in* 6 THE WORKS OF ALEXANDER HAMILTON 574, 574–75 (John C. Hamilton ed., 1851); *see also* Messing, *supra* note 7, at 706 (discussing Hamilton's use of the two terms).

[47] *See* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 937 (1926); *see also* Messing, *supra* note 7, at 687 (explaining that, at the time of the framing, "statutes were not denominated as either criminal or civil offenses").

[48] *See* Frankfurter & Corcoran, *supra* note 47, at 938–65.

[49] *See id.* at 937 n.91.

[50] 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, 511–12 (2000) (alteration in original) (footnotes omitted) (quoting Frankfurter & Corcoran, *supra* note 47, at 937).

regulatory violations, which we understand to be civil in nature. The best reading of the history and authority at the time of the Founding is that "offenses" was a broader category than "crimes" and encompassed all public law violations by individuals, including those we would now categorize as civil regulatory violations. Against this backdrop, the Framers' decision to use the broader term "offense" and not the more limited "crimes" used elsewhere in the Constitution seems particularly instructive.[51]

While the text and drafting history strongly suggest that the Pardon Clause was intended to reach at least some noncriminal offenses, they are not alone dispositive. To supplement textual analysis, early historical practice is often relied upon by the Supreme Court as particularly probative of the Constitution's meaning.[52] Given that the civil label was not then used to describe offenses against the state, we will not find examples of pardons for offenses formally denoted as "civil" during this period. A functional review of early pardon practice, however, seems to confirm a broad conception of "offenses" that can be pardoned. A number of presidential pardons were issued following the framing of the Constitution for what we would now recognize as civil regulatory offenses. Presidents George Washington, John Adams, and Thomas Jefferson all issued early pardons for offenses punished only by fines, not imprisonment, which resemble in character and substance modern civil offenses.[53]

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[51] Whatever one thinks of the general merits of originalism as an interpretive tool, the Supreme Court has been emphatic in the pardon context that the boundaries of the pardon power are defined by the original understanding of that power as it was exercised at the time of the Founding. *See* discussion *infra* notes 62–63 and accompanying text.

[52] *See* Price, *supra* note 14, at 717; *see, e.g.*, NLRB v. Noel Canning, 134 S. Ct. 2550, 2553 (2014) ("[I]n interpreting the Clause, the Court puts significant weight upon historical practice."); Town of Greece v. Galloway, 134 S. Ct. 1811, 1819 (2014) ("[T]he Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" (quoting County of Allegheny v. ACLU, 492 U.S. 573, 670 (1989) (Kennedy, J., concurring in part, dissenting in part), *abrogated by Galloway*, 134 S. Ct. 1811)); Montana v. Egelhoff, 518 U.S. 37, 43 (1996) (evaluating a due process claim and finding "[o]ur primary guide in determining whether the principle in question is fundamental is, of course, historical practice"); Lynch v. Donnelly, 465 U.S. 668, 718 (1984) (Brennan, J., dissenting) ("Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting . . . abstract language . . . .").

[53] *See* Messing, *supra* note 7, at 719–21 (citing specific pardons by relying upon a dataset of pardons compiled by Professor P.S. Ruckman). The authors thank Professor Ruckman for generously making his database available for the research underlying this Article as well.

Early case law also provides examples of pardons for offenses that would, by contemporary standards, carry the civil label.[54] In *United States v. Yeaton*, for instance, the Circuit Court for the District of Columbia considered a presidential pardon that was issued for remission of a forfeiture order of a boat that had violated an embargo.[55] Critically, the statute under which the forfeiture was ordered did not provide for the possibility of any incarceration or other uniquely criminal punishment.[56] It was akin to a modern civil forfeiture statute.[57] Nonetheless, there was no dispute as to the power of the President to remit the portion of the forfeiture due to the government.[58] Similarly in *Ex parte Marquand*, the Circuit Court for the District of Massachusetts was also called to consider a pardon for an offense that carried no potential for incarceration or other uniquely criminal penalty.[59] The offense related to underpaid tariffs and was conducted in civil court under civil procedures.[60] Finally, in *United States v. Lancaster*, the Circuit Court for the Eastern District of Pennsylvania held that the President could cancel the government's interest in what was, in essence, a qui tam action.[61] In none of these cases did any party or court question the power of the President to pardon these types of offenses.

These examples, together with the plain language of the Constitution and drafting history, provide strong support for the Framers' understanding that pardons could reach beyond the traditional criminal realm to offenses which, under modern standards, would be considered civil.

2. The King of England's Pardon Power

The Supreme Court has been clear and emphatic that the boundaries of the President's pardon power are coextensive with the boundaries of the analogous power enjoyed by the King of England at the

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[54] *See generally* Hepner v. United States, 213 U.S. 103, 108, 115 (1909) (demonstrating how the Court later came to view the types of pardoned offenses described in this and the prior paragraph as civil).

[55] United States v. Yeaton, 2 D.C. (2 Cranch) 73 (1813).

[56] *See* Act of Feb. 28, 1806, Pub. L. 9-9, 2 Stat. 351 (1806) (expired).

[57] *Cf.* Civil Asset Forfeiture Reform Act of 2000 (CAFRA), Pub. L. No. 106-185, 114 Stat. 202 (2000).

[58] *Yeaton*, 2 D.C. (2 Cranch) at 73.

[59] *Ex parte* Marquand, 16 F. Cas. 776, 776–77 (C.C.D. Mass. 1815) (No. 9100).

[60] *See id.*; *see also* Messing, *supra* note 7, at 726.

[61] United States v. Lancaster, 26 F. Cas. 859, 860–61 (C.C.E.D. Pa. 1821) (No. 15,557); *see also* Conn. Action Now, Inc. v. Roberts Plating Co., 330 F. Supp. 695, 697 (D. Conn. 1971), *aff'd*, 457 F.2d 81 (2d Cir. 1972) ("Recognition of the *qui tam* right of action appears to have been confined to lawsuits in which the informer seeks to recover statutory fines or penalties which are *civil* in nature.").

time of the framing of the Constitution. As the Supreme Court explained in *Ex parte Wells*:

> [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. At the time of our separation from Great Britain, that power had been exercised by the king, as the chief executive. . . . [W]hen the words to grant pardons were used in the constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon. In the convention which framed the constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment. We must then give the word the same meaning as prevailed here and in England at the time it found a place in the constitution.[62]

As a result, the Supreme Court has routinely looked to English pardon practice to determine the boundaries of the President's pardon power.[63]

In evaluating the reach of the King's pardon power—known as the King's prerogative—to civil offenses, we are again faced with the fact that the civil-criminal divide was not well established, at least in the realm of public offenses, at the time of the Founding.[64] Without the aid of the formal civil and criminal labels, in order to evaluate the reach of the King's pardon power at the Founding, we look to the general principles that controlled the use of the power and to the

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[62] *Ex parte* Wells, 59 U.S. (18 How.) 307, 311 (1855); *see also* Burdick v. United States, 236 U.S. 79, 91 (1915) ("The principles declared in *Wilson v. United States* [pertaining to the adoption of England's conception of the pardon power] have endured for years; no case has reversed or modified them."); United States v. Wilson, 32 U.S. (7 Pet.) 150, 159–60 (1833) ("[W]e adopt [Britain's] principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."); *cf*. Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 162 (1995) ("The pardon clause of the Constitution was derived from the pardon power held by the King of England at the adoption of the Constitution. Accordingly, the Supreme Court has repeatedly looked to English cases for guidance in interpreting the effect of a pardon."); Power of the President to Remit Fines Against Defaulting Jurors, 4 Op. Att'y Gen. 458, 459 (1845) ("[W]e adopt, as the Supreme Court of the United States has decided we should do, the principles established by the common law respecting the operation of a pardon . . . .").

[63] *See, e.g.*, Herrera v. Collins, 506 U.S. 390, 411–13 (1993); Schick v. Reed, 419 U.S. 256, 261–64 (1974) (using the English practice of allowing conditions on grants of pardon as evidence of the Framers' incorporation of the practice to the American understanding of the pardon power); *Ex parte* Grossman, 267 U.S. 87, 109–10 (1925); *Burdick*, 236 U.S. at 89; Schick v. United States, 195 U.S. 65, 69 (1904); Boyd v. United States, 142 U.S. 450, 453–54 (1892); The Laura, 114 U.S. 411, 416–17 (1885); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 341–42 (1866); *Wells*, 59 U.S. at 310–11.

[64] *See* discussion *supra* notes 49–51 and accompanying text.

characteristics of the categories of offenses that were pardonable at common law. This is the approach that has been employed by the Supreme Court in evaluating the reach of the pardon power.[65]

English law drew a line between offenses against the Crown, which could be pardoned, and private civil matters, which could not.[66] Consistent with the broad principle that all offenses against the Crown were pardonable, there is a long history of Kings pardoning individuals for offenses against the Crown that would be considered civil by modern standards.[67] English Kings routinely issued pardons remitting fines for what we would now recognize as regulatory violations, like hunting, land use, tax, and tariff violations.[68] While fines can be used as both criminal and civil penalties, the King's pardon power reached *all* fines payable to the Crown.[69] King George III's pardon practice is, of course, particularly instructive regarding the conception of the pardon power at the time of the Founding. He too used pardons to remit fines for offenses analogous to modern civil regulatory violations, including gaming and land use violations.[70] In *Hepner v. United States*, in an era when the civil label for offenses against the state was

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[65] *See, e.g.*, *Reed*, 419 U.S. at 263–64; *Grossman*, 267 U.S. at 111; *Wells*, 59 U.S. at 310–11.

[66] *See Grossman*, 267 U.S. at 110–11; Power of the President to Remit Fines Against Defaulting Jurors, 4 Op. Att'y Gen. at 460 ("The King's right to pardon . . . is confined to cases in which the prosecution is carried on in his Majesty's name for the commission of some offence affecting the public, and which demands public satisfaction, or for the recovery of a fine or forfeiture to which his Majesty is entitled." (quoting 13 PETERDORFF's ABRIDGMENT *78)); 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 . . . for the king's benefit . . . [and] profit or safety of a third person, the king could not release the party."). This is the source of the axiomatic limitation recognized in U.S. pardon jurisprudence that pardons may not be used to interfere with private rights. *See also* discussion *supra* note 19 and accompanying text.

[67] Messing, *supra* note 7, at 689–94 (describing how an "unbroken line of kings and queens pardoned offenses that would almost undoubtedly be civil today" and exhaustively cataloging pardons for civil-type offenses by English Kings in the seventeenth and eighteenth centuries).

[68] WILLIAM G. SCROGGINS, LEAVES OF A STUNTED SHRUB 99, 347 (2009); STEPHEN SEDLEY, LIONS UNDER THE THRONE: ESSAYS ON THE HISTORY OF ENGLISH PUBLIC LAW 139 n.67 (2015); 2 ARTHUR TREVOR, THE LIFE AND TIMES OF WILLIAM THE THIRD, KING OF ENGLAND AND STADTHOLDER OF HOLLAND 176 (1836) (referring to actions taken by King William III in 1689); *see also* 1 LEONARD WOODS LABAREE, ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670–1776, at 330–31 (1935).

[69] As one English judge explained during this era, if a "fine . . . came to the king's coffers . . . the king might pardon it." 6 T.B. HOWELL, A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 775 (1811); *see also* WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 553 (6th ed. 1787) (noting that the power of pardon was so extensive as to be "dependent on the pleasure of the [king]").

[70] HAWKINS, *supra* note 69, at 541, 543.

still of relatively new vintage, the Supreme Court had occasion to grapple with the difficult task of assigning the criminal or civil label to statutes enacted before that distinction was firmly established.[71] The Court's analysis in *Hepner*, finding several statutes analogous to those pardoned by English Kings to be civil in nature,[72] further confirms that the pardon power, as exercised at the time of the Founding, extended to civil offenses against the United States.

3. The Supreme Court's Pardon Jurisprudence

While the Supreme Court has never held that the pardon power is limited to criminal offenses, in dicta, it has sometimes characterized the pardon power in ways that seem to assume such a limit.[73] At other times, however, the Court has seemed to recognize broader applications of the pardon power.[74] However, these cases are of limited utility to the current inquiry because in none of these cases was the Court actually called upon to consider whether the pardon power could be applied beyond the criminal realm. There is very limited Supreme Court precedent discussing the potential application of the pardon power to noncriminal offenses; however, the cases that do discuss the issue make clear the power is not strictly limited to the criminal realm.[75]

Ex parte Grossman is the only case where the Supreme Court was squarely confronted with the question of whether a presidential pardon could operate on a noncriminal offense. In *Grossman*, a district court had enjoined Mr. Grossman from selling alcohol, which was prohibited under federal law at the time.[76] Mr. Grossman violated that order, prompting the district court to hold him in contempt and

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[71] Hepner v. United States, 213 U.S. 103, 105 (1909).

[72] *See id.* at 105–08 (examining the nature of statutes carrying fines and penalties without criminal punishment as the dividing line between civil and criminal suits).

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

[74] *See, e.g.*, *Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1855) ("Nor can the king pardon for a common nuisance, because it would take away the means of compelling a redress of it, *unless it be in a case where the fine is to the king*, and not a forfeiture to the party grieved." (emphasis added)); *id.* at 311 ("A pardon is said by Lord Coke to be a work of mercy, whereby the king, either before attainder, sentence, or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt, or duty, temporal or ecclesiastical . . . ."); Osborn v. United States, 91 U.S. 474, 478 (1875) (finding that the President's constitutional authority to pardon offenses carries with it the power to release all penalties and forfeitures that accrue from the offenses).

[75] *See, e.g.*, *Ex parte* Grossman, 267 U.S. 87, 115 (1925); The Laura, 114 U.S. 411, 413–14 (1885).

[76] *Grossman*, 267 U.S. at 107.

sentence him to a period of incarceration.[77] Thereafter, the President issued a pardon commuting Mr. Grossman's sentence of incarceration.[78] The district court, however, refused to release Mr. Grossman and ordered instead that he serve the full period of incarceration originally imposed.[79] The district court was explicit in its ruling that it did so because it believed the President was impotent to pardon a contempt finding.[80] In the view of the district court, contempt was not an "offense" within the meaning of the Pardon Clause, because it was not a "crime[ ]."[81]

The Supreme Court ultimately disagreed. The Court held that "the term 'offen[se]'" as used in the Pardon Clause is "more comprehensive . . . than are the terms 'crimes' and 'criminal prosecutions.'"[82]

The Court's analysis was premised on the principle, discussed above, that the scope of the pardon power was identical to the scope of the "[k]ing's prerogative" at the time of the Founding.[83] The King's prerogative, the Court noted, had extended to analogous contempt orders because they were offenses against the Crown.[84] Unlike a private offense between two private parties, which could not be pardoned, contempt was an offense against the state and was thus within the King's power to pardon.[85] The Court recognized that pardons can undermine the authority of the coordinate branches of

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[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] United States v. Grossman, 1 F.2d 941, 952–53 (N.D. Ill. 1924).

[81] *Grossman*, 267 U.S. at 108.

[82] *Id.* at 117–18 (citing Schick v. United States, 195 U.S. 65, 70 (1904)). The contempt order in *Grossman* was technically classified as "criminal" rather than "civil" contempt, but the Court was clear that it was not criminal in the sense of the Fifth and Sixth Amendments because no right to jury, nor other constitutional criminal procedure protection, attached. *Id.* The civil versus criminal distinction in the contempt context rested on the question of whether the penalty imposed was intended to vindicate the rights of the state (the dignity of the court) or the rights of a private party. *Id*. at 113–15. The former were designated as criminal contempt and the latter as civil contempt. *Id.*

[83] *Id.* at 113; *see also* discussion *supra* notes 62–63 and accompanying text.

[84] *Grossman*, 267 U.S. at 111; *see also* Heckler v. Chaney, 470 U.S. 821, 849 n.6 (1985) (Marshall, J., concurring) (discussing the tradition of broad discretion given to the executive in England and America and its relation to private prosecution); Duker, *supra* note 66, at 486 (noting the only limitation to the King's pardon power was a restriction on acts interfering with the rights of third parties).

[85] *See Grossman*, 267 U.S. at 111 (noting the inefficacy of the King's pardon in a suit securing a private party's rights); *Ex parte* Wells, 59 U.S. (18 How.) 307, 312 (1855) (noting the King's inability to pardon a common nuisance where the fine is to be paid to a private party and not the Crown).

government; however, the Court appeared to view this tension as a healthy part of the larger system of checks and balances.[86]

While the *Grossman* decision was issued nearly a century ago, modern practice confirms that the holding is still understood as good law. Indeed, President Trump's very first pardon was issued in precisely the same noncriminal context discussed in *Grossman*. On August 25, 2017, President Trump issued a pardon to the infamous Maricopa County Sheriff Joe Arpaio.[87] Sheriff Arpaio had defied a federal court order to cease illegally arresting individuals for immigration violations and, as a result, had been held in contempt.[88] Before sentencing, the pardon was issued. The pardon sparked significant controversy and some even advanced various theories that it was unconstitutional.[89] But no one challenged the noncriminal nature of the pardon.

The only other instance in which the Supreme Court had occasion to consider application of the pardon power outside the criminal realm was in the case of *The Laura*.[90] *The Laura* involved a damages suit brought by a private individual under a statute that permitted either the government or a private party to sue steamboat operators if they exceeded their permissible passenger load.[91] The statutory action was unquestionably civil in nature.[92] The statute under which that action was instituted permitted the Secretary of the Treasury to, in his discretion, absolve any violating carrier of the liability imposed by statute.[93] When the Secretary granted such absolution to the operator of The Laura, the case was dismissed.[94] The original plaintiff,

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[86] *See Grossman*, 267 U.S. at 120–21 (discussing the checks and balances between the branches as foundational to the Constitution); *see also* Power of the President to Remit Fines Against Defaulting Jurors, 4 Op. Att'y Gen. 458, 461 (1845) (noting the vesting of the powers of punishment and pardon in separate branches is a deliberate function of the Constitution).

[87] Exec. Office of the President, Executive Grant of Clemency to Joseph M. Arpaio (Aug. 25, 2017), https://www.justice.gov/pardon/file/993586/download.

[88] *See* Davis & Haberman, *supra* note 7.

[89] *See* Dahlia Lithwick, *Was Trump's Pardon of Joe Arpaio Unconstitutional?*, Slate (Sept. 15, 2017), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/09/was_trump_s_pardon_of_joe_arpaio_unconstitutional.html (detailing various constitutional objections to the pardon).

[90] The Laura, 114 U.S. 411 (1885).

[91] *Id*. at 411–12.

[92] The statute at issue in *The Laura* was a qui tam statute, giving private individuals the right to stand in the shoes of the government and sue for damages. *See* Walker v. Globe Newspaper Co., 140 F. 305, 309 (1st Cir. 1905), *rev'd on other grounds*, 210 U.S. 356 (1908) (referencing the "qui tam" nature of the statute at issue in *The Laura*). Such qui tam actions are civil in nature. *See* Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 757 (5th Cir. 2001) (noting the "civil context in which qui tam suits are pursued").

[93] *The Laura*, 114 U.S. at 412–13.

[94] *Id*. at 413.

however, appealed.[95] He argued that the provision of law allowing the Secretary of the Treasury to grant absolution was unconstitutional because the Pardon Clause granted that right exclusively to the President.[96] Ultimately, the Court rejected the appeal and held that the power to forgive individuals for offenses against the United States was not exclusive to the President and, thus, Congress too could grant such relief.[97] Notably, however, the Court apparently accepted without controversy that the President's pardon power would permit the President to absolve the carrier of civil liability for the cause of action held by the United States.[98] Accordingly, the Court in *The Laura* appeared to view the Pardon Clause as empowering the President to pardon civil violations against the United States.

Thus, the Supreme Court squarely held in *Grossman* that the pardon power could be used in the context of noncriminal offenses against the federal government and that holding has been consistent with contemporary practice. Insofar as the analysis in *Grossman* turned in part on the particular history of the pardon power in the contempt context, *Grossman* does not go so far as to conclusively establish that the pardon power applies to all civil offenses against the United States. But the *Grossman* holding, which remains good law and has been cited by the Court with approval in recent decades,[99] forecloses any conception of the Pardon Clause as limited only to criminal offenses. *Grossman* does not resolve, however, whether contempt is a sui generis noncriminal application of the pardon power or whether contempt fits within a broader category of noncriminal applications of the Pardon Clause. *The Laura* did not involve the contempt context and thus supports a broader reading of the clause as generally applicable to a larger category of civil offenses against the United States, though the Court was not called upon in *The Laura* to rule directly upon this issue.

Accordingly, the plain language of the Pardon Clause, its drafting history, the lack of an established criminal-civil divide among public offenses at the Founding, and the Supreme Court's Pardon Clause jurisprudence collectively establish that the pardon power is likely not limited to the criminal context. The English pardon practice at the time of the framing, which the Supreme Court has held defines the boundaries of the presidential pardon power, goes a step further and

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95 *Id.*

96 *Id.*

97 *Id.* at 414–15.

98 *See id.* at 413–14.

99 *See, e.g.*, Schick v. Reed, 419 U.S. 256, 266 (1974).

strongly suggests that the power can be utilized in at least some civil regulatory contexts.

B. Limitations of the Civil Pardon Power

The foregoing demonstrates that the pardon power is not limited to the criminal context, but how far into the civil realm does it permit the President to reach? That question is difficult, particularly given the birth and vast expansion of the modern regulatory state, which encompasses areas of civil regulation beyond what the Framers could have envisioned and beyond the realms in which the pardon power was exercised in the Founding era. This Article does not endeavor to establish an absolute line between which civil provisions can and cannot be pardoned, but, as is explained below, modern jurisprudence and Office of Legal Counsel opinions that distinguish between civil penalties and civil regulatory qualifications suggest an important limiting principle. Put briefly, the principle is that, since contemporary pardon law makes clear that criminal pardons can protect against a civil penalty, so too should the President be able to pardon such civil penalty directly (at least insofar as the provision is federal and thus constitutes an "offence against the United States"). But, since the President's pardon power cannot protect against the application of a civil regulatory qualification or requirement, the pardon power's reach into the civil realm should be limited by the same distinction. Thus, for example, a President could not pardon normal tax liability because it is an obligation not intended as a penalty, but could pardon a civil penalty imposed for failure to make a tax payment in a timely manner. This ability to pardon a civil offense is consistent with the general principle that the greater power to issue full and unconditional pardons encompasses the lesser power to commute only some portion of the penalty that flows from an offense.[100]

Early American case law established the principle—which has endured—that consequences which flow automatically from the fact of a conviction are generally penalties and therefore eliminated by the issuance of a presidential pardon. In *Boyd v. United States*, for example, the Supreme Court found that a pardon issued by President Harrison restored the competency of the pardoned witness to testify, explaining that, because "[t]he disability to testify" was "a consequence, according to the principles of the common law, of the

[100] *See, e.g.*, Office of the Press Secretary, *President Obama Grants Commutations and Pardons*, WHITE HOUSE (Jan. 17, 2017), https://obamawhitehouse.archives.gov/the-press-office/2017/01/17/president-obama-grants-commutations-and-pardons (stating that the "[d]eath sentence [of Arboleda A. Ortiz was] commuted to life imprisonment without the possibility of parole").

judgment of conviction, the pardon obliterated that effect."[101] Similarly, in *Osborn v. United States*, the Supreme Court held that the penalty of forfeiture, which was directly triggered by conviction for the pardoned offense, "must fall with the pardon of the offence itself."[102] This understanding of a pardon's impact is consistent with English common law, in which it was well settled that a "pardon by the king removed not only the punishment that flowed from the offense, but also 'all the legal disabilities consequent on the crime.'"[103]

At points in the nineteenth century, it appeared that the Supreme Court endorsed a broader pardon power, in large part because of language in *Ex parte Garland* and *Knote v. United States*, a pair of decisions issued in the aftermath of the Civil War suggesting that a pardon could essentially erase the fact of prior misconduct from a person's history.[104] In those opinions, the Supreme Court used sweeping language to describe the effect of a pardon, stating that it "blots out the offence," releases an offender "from the consequences"[105] of his action, and makes the offender a "new man."[106] However, this language from *Garland* and *Knote* has "not been applied literally" by lower courts nor repeated by the Supreme Court.[107] Instead, courts, including the Supreme Court, have continued to consistently describe pardons as reaching "punishments, penalties, and disabilities" that are triggered by commission of the underlying offense.[108]

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101 Boyd v. United States, 142 U.S. 450, 453–54 (1892).

102 Osborn v. United States, 91 U.S. 474, 477 (1875).

103 Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 162 (1995) (quoting 7 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 416 (1852)); *see, e.g.*, Cuddington v. Wilkins (1615) 80 Eng. Rep. 231, 232 (KB) ("[T]he King's pardon doth not only clear the offence it self, but all the dependencies, penalties, and disabilities incident unto it . . . .").

104 Knote v. United States, 95 U.S. 149, 153 (1877); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866).

105 *Knote*, 95 U.S. at 153.

106 *Garland*, 71 U.S. at 380–81.

107 Whether a Presidential Pardon Expunges Judicial and Executive Branch Records of a Crime, 30 Op. O.L.C. 104, 108 (2006) (citing Memorandum from Norbert Schlei, Assistant Att'y Gen., Office of Legal Counsel, to Andrew Oehmann, Exec. Assistant to the Att'y Gen., Re: Effect of Pardon on Disability to Hold Federal Office (Aug. 12, 1963)). On the contrary, subsequent Supreme Court decisions have indicated that it may no longer subscribe to this view, *see, e.g.*, Carlesi v. New York, 233 U.S. 51, 59 (1914), and some have suggested that the language in *Garland* and *Knote* was merely dicta. *See, e.g.*, *In re* North, 62 F.3d 1434, 1436–37 (D.C. Cir. 1994) (finding that the *Garland* Court "did not rest its judgment on the theory that the pardon blotted out Garland's guilt" and noting that, since its decision rested on the fact that the disability was punitive, the expansive language on the effect of a pardon "turned out to be dictum"); *see also* Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. 34, 38 (1977) (noting that "*Ex parte Garland* may itself be viewed as a case in which the disability actually was imposed as a penalty").

108 Effects of a Presidential Pardon, 19 Op. O.L.C. at 166.

In the twentieth and twenty-first centuries, courts have sharpened the principle that presidential pardons alleviate *only* punishments, penalties, and disabilities for commission of an offense against the United States—as opposed to every consequence flowing from the underlying facts.[109] Although "the Supreme Court has never expressly adopted a distinction between penalties that a pardon can remove and qualifications that a pardon does not affect,"[110] courts and the executive branch have generally coalesced around the principle that pardons do not erase the *fact* that an individual committed an offense: As such, an individual whose past misconduct makes them unable to satisfy some type of qualification, such as meeting certain character requirements, is not helped by a pardon.[111] For example, a pardon for desertion did not eliminate the fact that a military officer previously abandoned his unit for purposes of the military's assessment of the pardoned individual's faithful service record when he sought to reenlist in the armed forces.[112] The statute imposing the faithful service requirement was, importantly, considered to impose a personal character requirement upon applicants for reenlistment rather than a penalty or disability triggered by the applicant's commission of an

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[109] In 1915, Professor Samuel Williston wrote a seminal article on the issue that was explicitly endorsed by many courts making this distinction. Samuel Williston, *Does a Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 653 (1915); *see, e.g.*, United States v. Noonan, 906 F.2d 952, 958–59 (3d Cir. 1990); Bjerkan v. United States, 529 F.2d 125, 128 n.2 (7th Cir. 1975).

[110] Effects of a Presidential Pardon, 19 Op. O.L.C. at 163.

[111] *See, e.g.*, *Noonan*, 906 F.2d at 960 (holding that the President's pardon "does not eliminate [the] conviction and does not 'create any factual fiction' that Noonan's conviction had not occurred to justify expunction of his criminal court record"); Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. at 38 (collecting Attorney General opinions); Naval Service—Desertion—Pardon, 31 Op. Att'y Gen. 225, 230 (1918) (stating that the statute in question "is properly to be regarded as a rule relating to qualification[s] for office," and "does not impose a penalty as such on individual offenders," and that "the incidental disabilities which they may suffer by reason of the statute are not removed by a pardon"); *see also* Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. at 38 (noting that *Garland* may be harmonized with extant law on the scope of the pardon power if viewed as a case in which the disability was not about a qualification, but in fact a penalty); Williston, *supra* note 109, at 647 n.1 (noting that in an opinion issued the day before *Garland* was decided, the Supreme Court used a description of the pardon power that remains accurate to this day: "A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed" (quoting United States v. Wilson, 32 U.S. (7 Pet.) 150, 160 (1833)).

[112] *See* Effects of a Presidential Pardon, 19 Op. O.L.C. at 163 (describing earlier Office of Legal Counsel (OLC) opinions holding that a pardon for desertion did not relieve a military deserter of the provisions requiring "honest and faithful" service in a prior term as a prerequisite for reenlistment).

offense.[113] Accordingly, the pardoned individual could be denied reenlistment because, notwithstanding the pardon, it remained true that his past service had not been faithful, making him unable to meet the character requirement. Instead, courts determine whether a consequence of a past prohibited act can be eliminated by a pardon by asking whether the consequences are intended to be punitive or disabling, focusing in particular on whether the consequence attaches solely because of the violation of federal law.[114] For example, pardons eliminate additional penalties that flow automatically from a conviction, like the deprivation of the right to vote,[115] serve on juries,[116] work in certain professions,[117] testify in court,[118] and own firearms,[119] but pardons do not permit a person to, for example, satisfy nonpunitive character requirements that their criminal conduct prevents them from establishing.[120] Consistent with this approach, the executive branch has concluded that a statute that made a person deportable because of a firearm-related conviction imposed a penalty that would be eliminated if the firearm offense was pardoned, and indicated that other civil penalties that the Immigration and Nationality Act (INA)

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113 *See id.*; *see also* Army—Enlistment—Pardon, 22 Op. Att'y Gen. 36, 39 (1898).

114 *See* Effects of a Presidential Pardon, 19 Op. O.L.C. at 162; Naval Service—Desertion—Pardon, 31 Op. Att'y Gen. at 229 (citing Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319 (1866)); *see also Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866).

115 *See, e.g.*, *In re* North, 62 F.3d 1434, 1439 (D.C. Cir. 1994) (Sneed, J., dissenting); Bjerkan v. United States, 529 F.2d 125, 128 (7th Cir. 1975); *In re* Exec. Comm'n, 14 Fla. 318 (1872); Cowan v. Prowse, 19 S.W. 407, 411 (Ky. 1892); Wood v. Fitzgerald, 3 Or. 568, 577 (1870); *see also* Williston, *supra* note 109, at 654 n.25 (collecting cases).

116 *See, e.g.*, *Bjerkan*, 529 F.2d at 128; *see also* United States v. Horodner, 91 F.3d 1317, 1319 n.2 (9th Cir. 1996).

117 *See, e.g.*, *Bjerkan*, 529 F.2d at 128.

118 *See, e.g.*, Thompson v. United States, 202 F. 401, 407 (9th Cir. 1913) ("The pardons were full and complete, and their effect in law was to remove penalties and disabilities and restore the witness to his full rights."); Boyd v. United States, 142 U.S. 450, 453–54 (1892).

119 *See, e.g.*, Lewis v. United States, 445 U.S. 55, 60–61 (1980).

120 *See, e.g.*, Hirschberg v. Commodities Future Trading Comm'n, 414 F.3d 679, 683–84 (7th Cir. 2005) (upholding denial of floor broker registration because the fraudulent conduct underlying a pardoned criminal conviction simply prevented the individual from fulfilling a nonpunitive qualification for the licensed position). Further, courts have recognized that even consequences that purport to be disqualifications rather than penalties will be eliminated by a pardon if they are obviously intended to inflict punishment for a past act or to add to the punishment of an offender who has been pardoned. *Compare* SEC v. Lewis, 423 F. Supp. 2d 337, 341 (S.D.N.Y. 2006) (removing the bar imposed by the SEC on a broker convicted of securities fraud against the association after the broker received a pardon because according to the court, the permanent bar functioned as a form of "continued punishment"), *with Hirschberg*, 414 F.3d at 683–84 (upholding denial of floor broker registration because the fraudulent *conduct* underlying a pardoned criminal conviction simply prevented the individual from fulfilling a nonpunitive qualification for the licensed position).

imposes for pardoned misconduct can be eliminated by a pardon as well.[121]

Through adherence to this rule, courts have circumscribed the reach of pardons to negative consequences that flow directly from the commission of an offense against the United States. While questions about the reach of pardons continue to emerge, the case law on these issues reflects the separation-of-powers concerns underlying the penalties-versus-qualifications rule.[122] For example, in the seminal case on the implications of the theory that a pardon "blots out" the existence of an offense for the other coordinate branches, the Third Circuit explained: The executive "may give what is his own, that is his protection, which the outlawed person has lost through his flight and contumacy, but that which is another's he cannot give by his own grace."[123] Thus, the distinction that has emerged through time has functioned to circumscribe the executive's powers, which makes it a particularly appealing approach for limiting civil pardons.

The fact that civil penalties may be removed as a result of a pardon for a criminal offense does not alone necessarily establish that such penalties can be directly pardoned. However, it would be odd to construe the pardon power to grant Presidents the authority to issue limited pardons, protecting an individual from civil penalties that flow from a crime (which is unquestionably within the pardon power), but to leave them impotent to pardon precisely the same civil penalty triggered by noncriminal conduct. Indeed, given the textual, historical, and jurisprudential support for civil pardons,[124] the modern distinction between civil penalties and civil regulatory qualifications offers an important limiting principle for the use of civil pardons, and one rooted in centuries of history and jurisprudence on the reach of presidential pardons. Under this logic, pardonable civil "offenses against the United States" would be limited to civil regulatory offenses that impose a penalty. Civil regulatory qualifications, which are not intended to penalize an individual but rather to ensure an individual is appropriately qualified for the benefit sought, would not be "offenses against the United States" and thus would not be pardonable. This approach serves to confine the instances in which pardons can be used

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[121] *See, e.g.*, Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 162 (1995); *see also infra* Part III.

[122] *See, e.g.*, *In re* North, 62 F.3d 1434, 1434, 1438 (D.C. Cir. 1994); United States v. Noonan, 906 F.2d 952, 956 (3d Cir. 1990).

[123] *Noonan*, 906 F.2d at 956 (quoting 2 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 371 (Travers Twiss ed. & trans. 1880) (1257)); *see also* Williston, *supra* note 109, at 649 (quoting Bracton on the same point).

[124] *See* discussion *supra* Section II.A.

and minimize any concern, discussed in greater depth in Part IV, that civil pardons would encroach upon the legislature's authority.

III
President's Pardon Power Encompasses the Power to Pardon Civil Immigration Offenses

In this Part, we consider which civil immigration violations, if any, are the type of civil penalties that pardons have traditionally protected against, and therefore fall within the scope of the pardon power as we conceive it. Immigration law is a notoriously complex maze of hypertechnical provisions including both qualifications for obtaining different forms of lawful immigration status, as well as a variety of penalties that prevent people from obtaining status or strip them of it.[125] Thus, recognizing the distinction between qualifications, which should not be pardonable, and penalties, which can be pardoned, raises the question of which provisions of the INA impose penalties and which merely set forth necessary qualifications.

This question is somewhat challenging, however, because the INA's qualification and penalty provisions are diverse and not necessarily straightforward. They include provisions that penalize noncitizens (even those with lawful immigration status) for various kinds of past acts.[126] For example, as discussed below, a conviction for certain crimes can trigger the penalty of deportation.[127] However, other provisions of the INA impose forward-looking regulatory qualifications. For example, the INA prohibits the admission of certain noncitizens on health-related grounds.[128] Presumably, these provisions are not intended to penalize immigrants for their health-related misfortune but are instead forward-looking qualifications for admission to determine the desirability, in the eyes of Congress, of their admission into the United States.

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[125] *See, e.g.*, Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (noting the "labyrinthine character of modern immigration law," which is "a maze of hyper-technical statutes and regulations"); Castro-O'Ryan v. INS, 847 F.2d 1307, 1312 (9th Cir. 1988) (describing immigration law as "second only to the Internal Revenue Code in complexity" (quoting Elizabeth Hull, Without Justice for All: The Constitutional Rights of Aliens 107 (1985))).

[126] *See generally* Immigration and Nationality Act (INA) § 237(a), 8 U.S.C. § 1227(a) (2012).

[127] *See generally id.* § 1227(a)(2). We emphasize that pardoning the violation of the INA (i.e., the offense of violating federal immigration law) need not and would not pardon the underlying conviction, which is often—but not always—the incurring of a state criminal conviction. If the President pardoned the violation of INA in such instances, the criminal conviction would remain intact; only the offense of violating our civil immigration law would be pardoned.

[128] *See generally id.* § 1182(a)(1).

While there are many provisions of the INA worth analyzing to determine if they are pardonable, we focus here on the two sets of consequences imposed by the INA that, if eliminated by operation of a pardon, would have perhaps the greatest effect on the population of noncitizens who are longtime residents of the United States: those consequences affecting lawful permanent residents, who are subject to deportation because of criminal convictions, and those affecting noncitizens, who entered the United States without authorization and lack lawful immigration status.[129]

A. Lawful Permanent Residents with Criminal Convictions

Section 237(a)(2) of the INA provides that lawful permanent residents—even those who have lived in the United States for decades—are deportable if they have been convicted of one or more of a broad range of criminal offenses. Deportation has long been considered civil in nature,[130] and its penal nature is not explicit in the text of INA § 237(a)(2), which states that, if an individual has been convicted of certain categories of offenses, the individual "is deportable."[131] Even so, the history, purpose, and effect of deportation leave no doubt that deportation is a penalty—and therefore, under the approach described in Section II.B, that the violation of INA § 237(a)(2) constitutes an "offense" within the meaning of the pardon power.

Historically, deportation—in early years, "transportation"—was not only a penalty, but also a punishment which was directly imposed as the result of criminal convictions, and which could unquestionably be eliminated by an executive pardon. At the time of the Founding, the only mechanism by which individuals were expelled from a nation was transportation, typically imposed as the result of conviction for a crime.[132] This practice evolved in England from the ancient

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[129] *See* Robert Warren, *Zero Undocumented Population Growth Is Here to Stay and Immigration Reform Would Preserve and Extend These Gains*, 5 J. ON MIGRATION & HUM. SECURITY 491, 504 (2017) (stating that the population of individuals who entered without inspection was estimated at approximately six million in 2015); Muzaffar Chishti & Michelle Mittelstadt, *Unauthorized Immigrants with Criminal Convictions: Who Might Be a Priority for Removal?*, MIGRATION POL'Y INST. (Nov. 2016), http://www.migrationpolicy.org/news/unauthorized-immigrants-criminal-convictions-who-might-be-priority-removal (describing how approximately one million noncitizens with legal status are potentially deportable as a result of a qualifying crime).

[130] *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 365 (2010); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

[131] INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012).

[132] *See* Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115, 129 (1999); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated*

punishment of banishment[133] and was a form of criminal punishment whereby people would be sentenced to indentured servitude in the colonies or merely banished thereto.[134] During the eighteenth century, as a result of the Transportation Act of 1718, transportation became the most common form of punishment in felony cases in England.[135] In fact, aside from death, it was the only significant form of punishment used at the time.[136] Between the passage of the Transportation Act in 1718 and the end of transportation to the Americas in 1775, one-quarter of all British immigrants to America, approximately 50,000 people, were sent here as a result of being sentenced to transportation as punishment for a crime.[137] Clearly, as a historical matter, the precursor to deportation was transportation, which was penal in nature.

Transportation was a well-recognized penalty, and it was pardoned with some regularity. During this period, transportation was sometimes imposed directly as a sentence for a crime, and at other times was a condition of having a death sentence commuted.[138] The historical record demonstrates that not only was the King's pardon power able to relieve people of a sentence of transportation, but in fact such pardons were regularly granted.[139] A recent comprehensive study of individuals sentenced to transportation in England during one period around the time of the framing of the Constitution

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Approach to Understanding the Nature of Immigration Removal Proceedings, 43 HARV. C.R.-C.L. L. Rev. 289, 320–27 (2008); *see also* United States v. Ju Toy, 198 U.S. 253, 269–70 (1905) (noting that both "transportation" and "deportation" refer to the banishment or "forcible removal of a citizen from his country").

133 *See* Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 459–61 (1998) (citing examples of banishment as a criminal punishment in various societies dating back to 2285 B.C.).

134 *See* W.F. Craies, *The Compulsion of Subjects to Leave the Realm*, 6 L.Q. REV. 388, 396 (1890).

135 Some scholars estimate that as many as seventy percent of felons in London were sentenced to transportation during the height of its use in the eighteenth century. Bleichmar, *supra* note 132, at 126.

136 *See id.* at 121.

137 *Id.* at 127.

138 *See* 1734, 7 Geo. 2, c. 21 (Gr. Brit.); 1768, 8 Geo. 3, c. 16 (Gr. Brit.); D.A. Thomas, *Sentencing in England*, 42 MD. L. REV. 90, 108 (1983) ("As a sentence imposed by the court itself (as opposed to a term of a conditional pardon), transportation became firmly established by the Transportation Act 1717."); *see also* Bruce Kercher, *Perish or Prosper: The Law and Convict Transportation in the British Empire, 1700–1850*, 21 LAW & HIST. REV. 527, 530–31 (2003) (describing transportation as a direct sentence for a crime and as a condition of the pardoning of a death sentence under the Transportation Act of 1718).

139 Richard Ward & Lucy Williams, *Initial Views from the* Digital Panopticon*: Reconstructing Penal Outcomes in the 1790s*, 34 LAW & HIST. REV. 893, 918–26 (2016) (surveying circumstances that gave rise to pardons, including in cases of young first-time offenders).

demonstrated that over twenty percent of all people sentenced to transportation were granted pardons protecting them from transportation.[140] Accordingly, the historical record makes clear that the historical analog of deportation, well known to the Framers, was considered a penalty and routinely eliminated by pardons.[141]

The understanding that deportation may be a penalty has carried through to modern day. Supreme Court jurisprudence has made clear that deportation, at least when imposed as the result of a criminal conviction, is a penalty. In *Padilla v. Kentucky*, the Court described deportation for a criminal conviction as "an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants."[142] Thus, while the Supreme Court views deportation as civil in nature, *Padilla* established, and similar points in the recent *Lee v. United States* decision reaffirmed, that deportation, when triggered by criminal convictions, is a form of civil penalty.[143]

The executive branch has agreed, and gone further to explicitly find, that the penalty of deportation can be alleviated by a pardon. In a 1995 opinion, the Department of Justice's Office of Legal Counsel (OLC) concluded that "a deportation order . . . is a consequence of a conviction that is precluded by a full and unconditional presidential pardon" because it is "an additional penalty."[144] In so opining, it

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[140] *Id.* at 919. This study's dataset involved individuals sentenced to transportation from England to Australia, not America; however, it nevertheless clearly demonstrates that the King's pardon power extended over sentences of transportation. *Id.* at 918–26. Other accounts confirm that pardons were exercised over transportation sentences to America. *See* Ashley T. Rubin, *The Unintended Consequences of Penal Reform: A Case Study of Penal Transportation in Eighteenth-Century London*, 46 LAW & SOC'Y REV. 815, 820 (2012) (explaining that between 1718 and 1775, the height of transportation to America, "[m]any" people were "sentenced to be transported but escaped their sentence, often by a conditional or full pardon"). There are also accounts of individual pardon processes for persons ordered transported during the period of American transportation. *See Folio 32: Petition of Thomas Love, Sentenced to Transportation for Theft, for a Pardon*, U.K. NAT'L ARCHIVES, http://discovery.nationalarchives.gov.uk/details/r/C7764898 (last visited Aug. 9, 2017); *Folio 123: Certificate of Justice T [Thomas] Denison. Recommending Mary Malin for a Free Pardon*, U.K. NAT'L ARCHIVES, http://discovery.nationalarchives.gov.uk/details/r/C16108401 (last visited Aug. 9, 2017).

[141] *See* Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. 34, 39 (1977) (opining that a pardon protects against punitive exclusion grounds, in part because "[e]xclusion from the United States . . . is analogous to the devices of banishment and exile that 'have throughout history been used as punishment'" (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.23 (1963))).

[142] Padilla v. Kentucky, 559 U.S. 356, 364 (2010).

[143] Lee v. United States, 137 S. Ct. 1958, 1967–68 (2017); *Padilla*, 559 U.S. at 364; *see also* Markowitz, *supra* note 132, at 330–41 (concluding that, under factors articulated in *Mendoza-Martinez*, 372 U.S. at 168–69, deportation proceedings are punitive in nature).

[144] Effects of a Presidential Pardon, 19 Op. O.L.C. 160, 162 (1995); *see also* Matter of Rahman, 16 I. & N. Dec. 579, 580 (B.I.A. 1978) (terminating removal proceedings based

considered the question of whether deportability due to a criminal conviction is "a penalty or disability based on an offense [or] rather only implements a decision regarding conduct Congress has deemed inconsistent with the qualifications aliens must have to remain in the country."[145] The OLC noted that deportation is not traditionally seen as punishment for purposes of other constitutional provisions, but ultimately found it clear that even under the narrower modern view of the consequences that pardons eliminate, deportability is "the type of consequence that is removed by a pardon."[146] Records from the Office of the Pardon Attorney demonstrate that it has long agreed, as it has issued a number of pardons for the explicit purpose of preventing deportation.[147] Moreover, in what appears to be the only OLC opinion to consider this issue, the OLC has suggested that the President could pardon punitive civil immigration consequences directly.[148]

Thus, considered in light of contemporary conceptions of the pardon power, it seems clear that the deportability that results when a noncitizen violates § 237(a)(2), which provides that individuals who incur certain criminal convictions are essentially "guilty" of a civil violation under the INA, is a penalty, and therefore a civil offense that may be directly absolved through a pardon. This distinction—between being able to directly pardon the provisions of § 237(a)(2) as opposed to only being able to use a criminal pardon to remove the penalties imposed by § 237(a)(2)—is critical because, as discussed above in Part I, the vast majority of individuals subject to deportation pursuant to § 237(a)(2) find themselves in deportation proceedings as the result of state criminal convictions. Because the President cannot pardon state convictions (just as a governor cannot pardon a federal offense), the only way that individuals facing deportation because of state convictions can be protected from deportation is through a pardon like the

upon a presidential pardon); Matter of M—, 3 I. & N. Dec. 310, 322 (B.I.A. 1950) (terminating deportation proceedings after the respondent was granted a presidential pardon for his violation of the Foreign Agents Registration Act); Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. at 39 n. 10 (discussing OLC's suggestion that the President could directly pardon punitive civil removal provisions).

145 Effects of a Presidential Pardon, 19 Op. O.L.C. at 163.

146 *Id.* at 164.

147 *See* W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT 131 (1941) (surveying stated reasons for each pardon issued between 1885 and 1905 and finding seventeen pardons issued to prevent deportation between 1928 and 1931).

148 Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. at 35, 39 n.10 (considering whether the provision mandating inadmissibility could be pardoned). This opinion is discussed in greater detail in Section III.B, *infra*.

one we discuss here: one that can operate directly against the federal deportation offense.

B. Undocumented Noncitizens

A more complicated question arises in the case of noncitizens who lack immigration status at all because the pardon power cannot immunize a person against prosecution for future violations of the law or affirmatively grant an individual immigration status.[149] Undocumented noncitizens,[150] like the lawful permanent residents discussed above, are removable under the INA.[151] Unlike those lawful permanent residents, who are removable because of their convictions, undocumented noncitizens are removable because they lack authorization to be in the United States.[152] As explained above, a pardon can eliminate the penalty of deportation for a past violation of the INA—such as a past conviction.[153] But this is not enough for undocumented noncitizens because, unlike lawful permanent residents who would retain their lawful status if their deportability was pardoned, undocumented noncitizens pardoned for their prior period of unlawful status will be in unlawful status again the moment after the pardon is issued.

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[149] *See* Passenger Laws.—Pardoning Power., 6 Op. Att'y Gen. 393, 403 (1854) ("[I]f a pardon could be granted in advance for offences to be committed thereafter, it would include a power to grant indulgences to commit crimes and offences, to license vice, to dispense with the sanction of the laws, without good motive, without reason, but solely by arbitrary will . . . . A pardon for an offence not yet committed would be void."); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) ("The [pardon] power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment.").

[150] Generally speaking, "undocumented" refers to noncitizens who do not have authorization to be present in the United States and therefore lack lawful immigration status. This group is largely comprised of people who have entered the country without authorization and people who had some authorization, such as a visa, but overstayed the timeline for which their presence was authorized.

[151] The INA imposes immigration law sanctions for past prohibited acts (e.g., unlawful entry to the United States or incurring criminal convictions). These sanctions include inadmissibility (INA § 212) or deportability (INA § 237(a)). If a person is "inadmissible," that means that they will generally be denied admission into the United States and are barred from certain types of immigration status for which they are otherwise eligible. If a person is "deportable," that means that the person may have had lawful status, but they can be stripped of that lawful status because they have violated the INA in some way. Both sanctions fall under the larger canopy of removability, introduced with the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, which refers to persons who can be removed from the United States.

[152] INA § 212(a)(6)(A), 8 U.S.C. § 1182(a)(6)(A) (2012) (stating that noncitizens present without being admitted or paroled into the country are removable); *id.* § 237(a)(3), 8 U.S.C. § 1227(a)(3) (stating that noncitizens who fail to register as required by INA § 265 are deportable).

[153] *See supra* Section III.A.

In other words, even if the penalty of removal for being present in the United States in violation of the INA prior to the pardon was eliminated retrospectively, undocumented individuals would become removable for this same reason as soon as the pardon was issued because a pardon cannot affirmatively grant them immigration status, nor can it immunize them from prosecution for future acts (here, being in the United States without authorization after the pardon is issued).[154] Thus, pardoning the ground of removability is of little practical value unless the noncitizen has some way to obtain lawful status prospectively.

For many undocumented individuals, there are a number of obstacles to obtaining lawful status. First, they may lack a basis for obtaining status. For example, they may not have a close familial relationship with a U.S. citizen or lawful permanent resident (a "qualifying relative") through whom they can adjust their status to that of a lawful permanent resident.[155] Second, the INA contains myriad other provisions that may bar an undocumented noncitizen from adjusting status even if he or she has a qualifying relative who could petition for them, or has some other basis for obtaining status.[156] Some of these obstacles are simple nonpunitive eligibility criteria that the undocumented individual cannot meet—which in our view cannot be pardoned—while others are penalties imposed for past misconduct, which in our view can be pardoned. Below, we focus on two common obstacles that are particularly important because, if those obstacles could be eliminated through a pardon, that would render potentially millions of noncitizens living in the United States eligible to affirmatively obtain lawful status.[157]

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154 *See supra* note 152.

155 Under INA § 245(a), 8 U.S.C. § 1255(a), certain foreign nationals who are, inter alia, physically present in the United States may obtain permanent resident status. To adjust under INA § 245(a), 8 U.S.C. § 1255(a), the statute requires that the individual has made a lawful entry into the United States, is not otherwise inadmissible, makes an application, and has an immigrant visa immediately available to him or her when they file their application. *Id*. While there are other ways that an immigrant visa may be available to a noncitizen, such a visa is immediately available to a noncitizen who is the "immediate relative" of a U.S. citizen. INA § 201(a)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i), INA § 204(a)(1)(A)(i), 8 U.S.C. § 1154(a)(1)(A)(i). Immediate relatives are spouses (twenty-one years and older) of U.S. citizens; unmarried sons and daughters (twenty-one years and older) of U.S. citizens; and the parents of a U.S. citizen who is older than twenty-one. INA § 201(a)(2)(A)(i), 8 U.S.C. § 1151(b)(2)(A)(i).

156 *See, e.g*., INA § 212(a), 8 U.S.C. § 1182(a) (setting forth grounds of inadmissibility, which, absent a waiver, bar noncitizens from adjusting status); INA § 245(c), 8 U.S.C. § 1255(c) (prohibiting adjustment of status to individuals described in the enumerated categories).

157 This is because millions of individuals within this population are nearly eligible for lawful status because they have qualifying relatives through whom they could adjust status,

First, even noncitizens who have a qualifying relative through whom they could adjust are often ineligible to adjust because the adjustment statute, INA § 245(a), requires that, to adjust status through a qualifying relative, the noncitizen must have been "inspected and admitted or paroled into the United States." This means that anyone who entered the United States without authorization is ineligible to adjust their status. Second—and relatedly—this same group is barred from adjustment because they are "inadmissible," which is a consequence that the INA imposes for a variety of past acts, including unlawful entry, and which bars individuals from obtaining different types of immigration benefits such as adjustment of status. Their entry into the United States without inspection triggers the ground of inadmissibility set forth at INA § 212(a)(6)(A)(i), which provides that, as a general matter, "[a]n alien present in the United States without being admitted or paroled, or who arrives in the United States at any time or place other than as designated by the Attorney General, is inadmissible."[158] Thus, § 245(a) and § 212(a)(6)(A)(i) both operate to prevent many otherwise eligible noncitizens from adjusting status, although in slightly different ways.

To determine whether § 245(a)—requiring that a person be admitted or paroled into the country to adjust status—and § 212(a)(6)(A)(i)—making anyone who entered without being admitted or paroled inadmissible—are "offences against the United States" that can be pardoned, we must apply the penalty-versus-qualification test described above[159] and determine whether ineligibility to adjust and inadmissibility are penalties. At first blush, § 245(a)'s requirement that any status adjustment applicant has been "inspected and admitted or paroled into the United States" certainly sounds like a qualification, a straightforward eligibility criteria not unlike the character qualifications discussed in Section II.B. And, while § 212(a)(6)(A)(i) appears to be more akin to a penalty because it structurally and functionally operates as a bar status and is triggered

but they are unable to do so because of the obstacles discussed below. At a minimum, more than three million noncitizens living in the United States would fall into this category based on the estimated number of noncitizens who would have benefitted from the Obama Administration's Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) because they are parents of minor children with U.S. citizenship. Randy Capps et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, MIGRATION POL'Y INST. (Feb. 2016), http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapas-potential-effects-families (estimating that there were 3.3 million people in this category).

158 INA § 212(a)(6)(A)(i), 8 U.S.C. § 1182(a)(6)(A)(i).

159 *See supra* Section II.B.

only by a past prohibited act, one could argue that we should not look at inadmissibility itself, but rather at the requirement that a person be affirmatively admissible in order to adjust their status, which could be simply another qualification that must be satisfied.

While this analysis may initially seem compelling, it has long been established that this analysis of whether a consequence is a penalty should not be guided by mere semantics. As early as 1866, the Supreme Court made clear that the legislature's characterization of the penalty as an eligibility requirement should not be taken at face value and we must instead look at the function and purpose of the statute creating the consequence to determine whether it imposes a penalty.[160] The OLC has similarly considered the issue to be one determined by examining the purpose and function of the consequence. In a 1977 opinion considering the impact of a pardon for evasion of military service, for instance, the OLC analyzed the statutory language, legislative history, and legislative antecedents of the INA's provision stating that all noncitizens who left the country to avoid military service were inadmissible, and concluded that the provision was in fact a penalty.[161] The OLC considered the fact that some grounds of inadmissibility "could properly be regarded as establishing qualifications for entry" but found that the provision at issue there was punitive because it imposed an affirmative restraint, had a corollary criminal provision that punished the same misconduct, was motivated by punitive intent, and "its operation promote[d] the traditional aims of punishment—retribution and deterrence."[162] The OLC ultimately concluded that the executive order and accompanying proclamation pardoning individuals who had violated criminal provisions of the Military Selective Service Act eliminated the penalty of inadmissibility that flowed from the same acts (evasion of military service).[163] Notably for present purposes, the OLC noted that the pardon would have the same effect whether it eliminated the penalty of

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[160] *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380–81 (1866) (finding that eligibility "qualifications" for admission to the state bar were in fact penalties); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319, 329 (1866); *see also* Naval Service—Desertion—Pardon, 31 Op. Att'y Gen. 225, 229 (1918) ("[W]here a statute although purporting to prescribe qualifications for office has no real relation to that end but is obviously intended to inflict punishment for a past act or to add to the punishment of an offender who has been pardoned, the disguise may be penetrated.").

[161] Effect of Presidential Pardon on Aliens Who Left the Country to Avoid Military Service, 1 Op. O.L.C. 34, 38–39 & n.10 (1977) (examining the ground of inadmissibility in the INA, 66 Stat. 166 (1952), then codified at 8 U.S.C. § 1182(a)(22), and considering the indicia of punitive intent set forth in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165–66 (1963)).

[162] *Id.* at 38–39.

[163] *Id.* at 37.

inadmissibility "derivatively" (i.e., because the underlying criminal offense was pardoned) or directly, and suggested that the President could pardon the civil offense that imposed inadmissibility itself.[164] President Truman also appeared to subscribe to this view, issuing a general proclamation that pardoned convicted deserters of the penalty imposed by provisions of the Immigration and Nationality Act of 1940: ineligibility for naturalization.[165]

Ultimately, considering their purpose, function, and effect, § 212(a)(6)(A)(i) and § 245(a) are best understood as penalties. In determining whether a consequence is a penalty or a qualification, courts look to the intent and function of the consequence, including whether it is triggered solely by the misconduct being pardoned.[166] Here, inadmissibility under § 212(a)(6)(A)(i) and ineligibility to adjust under § 245(a) are solely triggered by entry without authorization and reinforce each other to impose adverse consequences for this conduct. Preventing a person from obtaining status is an affirmative disability or restraint that has long been considered a way to punish the violator and deter others from entering the country,[167] and this

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[164] *Id.* at 35, 39 n.10.

[165] Proclamation No. 3001, 67 Stat. C24, C25 (Dec. 24, 1952) (stating, in the text of the proclamation, his intent to relieve the beneficiaries of "section 314 and section 349(a)(8) of the Immigration and Nationality Act (66 Stat. 241, 268) . . . [and] sections 306 and 401(a)(g), respectively, of the Nationality Act of 1940").

[166] *See supra* Section II.B. Even considered under the test articulated in *Mendoza-Martinez*, 372 U.S. at 168–69, a more demanding test used to determine whether legislation is punitive such that Sixth Amendment protections are required, the result would be the same. The *Mendoza-Martinez* test asks:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Id.

[167] The legislative history of INA § 245(a), 8 U.S.C. § 1255(a) (2012) evidences this intent. *See* S. REP. NO. 85-2133, at 3699 (1958) (explaining that the bill was "carefully drawn so as not to grant undeserved benefits to the unworthy or undesirable immigrant" such as "the alien who has entered the United States in violation of the law"); *see also* S. REP. NO. 103-309, at 134 (1994) (concluding that the requirement that unauthorized aliens obtain visas abroad before adjusting status was "originally designed to dissuade aliens from circumventing normal visa requirements" through an "intended deterrent effect"); Marisa S. Cianciarulo, *Seventeen Years Since the Sunset: The Expiration of 245(i) and Its Effect on U.S. Citizens Married to Undocumented Immigrants*, 18 CHAP. L. REV. 451, 465 (2015) (finding the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 was "predicated on the theory that undocumented immigrants respond to deterrence and punitive measures").

same act is also punished criminally.[168] Indeed, in contrast to, for example, § 245(a)'s nonpunitive requirement that an adjustment applicant have a qualifying relative, submit an application, or pay the application fee, the adverse consequence that flows from unauthorized entry was the very purpose of § 212(a)(6)(A)(i) and § 245(a): to penalize those who entered unlawfully and deter future violations.[169] For example, as Representative Tate bluntly stated:

> I am introducing legislation today to put an end to this madness. Under my bill, if an individual breaks our immigration laws by intentionally entering the United States illegally, he or she will never again be eligible for any kind of temporary or immigrant visa. Not 1 year later, not 20 years later, never.[170]

In sum, although the bar to adjustment set forth in § 245(a) (and to a lesser extent the inadmissibility ground set forth in § 212(a)(6)(A)(i)) may *look* like an eligibility requirement, the purpose of both provisions appears to be to penalize noncitizens who have entered the United States in violation of the INA. Thus these provisions, like INA § 237(a)(2), impose penalties for the violation of the provision and therefore, under the limiting principle described above, set forth offenses within the meaning of the Pardon Clause. As such, these offenses can be pardoned directly and, with the penalties they impose eliminated, otherwise eligible noncitizens who committed the offenses described in § 245(a) and § 212(a)(6)(A)(i) would no longer be barred from adjusting their status to that of a lawful permanent resident. Put differently, the pardon would open a pathway to status for a potentially large number of undocumented individuals who are currently barred from adjusting as a consequence of their violation of § 245(a) and § 212(a)(6)(A)(i).

We note, somewhat separately, that because the bars to entry posed by § 245(a) and § 212(a)(6)(A)(i) are penalties, it is possible that they could be eliminated derivatively through a more traditional pardon for a crime: "entry by [an] alien" at "[i]mproper time or place" under INA § 275(a), which applies to "[a]ny alien who (1) enters or

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168 This offense, unlawful entry, is a federal misdemeanor. INA § 275, 8 U.S.C. § 1325 (2012) (criminalizing "[i]mproper entry by alien").

169 *See* S. REP. NO. 85-2133, at 3699. The legislative materials that explicitly discuss § 212(a)(6)(A)(i) similarly evince an intent to create an admissibility regime that penalizes unlawful entry. *See Full Committee Markup: Immigration Overhaul: Hearing on H.R. 2202 Before the H. Comm. on the Judiciary*, 104th Cong. (1995) (statement of Rep. Lamar Smith), 1995 WL 596894; *see also* H.R. REP. NO. 104-469, pt. I, at 226 (1996) ("Under the new 'admission' doctrine, such aliens will not be considered to have been admitted, and thus, must be subject to a ground of inadmissibility, rather than a ground of deportation, based on their presence without admission.").

170 142 CONG. REC. E85-01 (daily ed. Jan. 25, 1996) (statement of Rep. Tate).

attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers."[171] If this criminal offense, which is based on entering without authorization, was pardoned, civil penalties, such as inadmissibility, that flow from the unlawful entry would be eliminated.[172] Thus, while the question of which criminal pardons might alleviate certain civil immigration penalties is not the focus of this Article, we note that it may be possible to use criminal pardons in creative ways to protect immigrants as well.

IV
Applications of the President's Immigration Pardon Power

Recognizing that the presidential pardon power extends into the civil immigration arena, but contains some significant limitations, it is worth considering the practical applications for this authority. While the current President is unlikely to use this power in ways favorable to noncitizens, future Presidents should consider the immigration pardons as a mechanism through which they can afford lasting reprieve to noncitizens who face unduly harsh penalties for certain violations of the INA. This Part describes how a President can use this type of pardon to grant individual or broad-based relief and considers the question of whether using this power to alleviate the effects of duly enacted laws conflicts with our constitutional structure.

A. Individual and Categorical Immigration Pardons

The most straightforward manner of exercising this authority is, of course, through granting individual pardons to people who apply. This method of issuing pardons is typically done after a review of an applicant's individual circumstances and the facts of the underlying offense, and consideration of the consequences that a person would face if pardoned vel non.[173] Since 1865, a formal administrative structure for considering individual applications was established, and this

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171 INA § 275, 8 U.S.C. § 1325 (2012).

172 *See supra* Section II.B and notes 163–66 (describing the OLC's conclusion that the inadmissibility that was triggered by a criminal violation of the Military Selective Service Act was eliminated derivatively when the criminal violation of the Act was pardoned).

173 *See* Samuel T. Morison, *The Politics of Grace: On the Moral Justification of Executive Clemency*, 9 Buff. Crim. L. Rev. 1, 35–42 (2005) (describing the process by which the Office of the Pardon Attorney reviews individual clemency applications); Lauren Schorr, Note, *Breaking into the Pardon Power: Congress and the Office of the Pardon Attorney*, 46 Am. Crim. L. Rev. 1535, 1544 (2009) (same).

model has historically been the primary mechanism for issuing presidential pardons.[174]

Presidents can also exercise the pardon power categorically, without individual applications or review, and, though it is less common, have done so throughout our nation's history. In fact, over one-third of past Presidents have issued collective and large-scale pardons (sometimes referred to as "amnesties"),[175] generally to restore politically unpopular subgroups to the national embrace, or otherwise advance the national interest.[176] Just seven years after the Constitution was ratified, President Washington pardoned "all persons" guilty of treasonous offenses "or otherwise concerned in the late insurrection" now known as the Whiskey Rebellion.[177] President Madison similarly issued a broad pardon to "any person or persons whomsoever, being inhabitants of New Orleans and the adjacent country, or being inhabitants of the said Island of Barataria and the places adjacent" who assisted the Navy for "all offenses committed in violation of any act or acts of the Congress of the said United States touching the revenue, trade, and navigation thereof, or touching the intercourse and commerce of the United States with foreign nations."[178]

In subsequent years, Presidents issued categorical pardons to even larger groups of people. During the Civil War, for example,

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[174] *See* Morison, *supra* note 173, at 34–35 (describing the establishment of this administrative structure); Office of the Pardon Att'y, *Clemency Statistics*, U.S. DEP'T JUST., https://www.justice.gov/pardon/clemency-statistics (last visited Aug. 6, 2017) (reporting the number of individual pardons granted since 1900).

[175] Pardons and amnesties are functionally the same for purposes of this discussion. *See* Brown v. Walker, 161 U.S. 591, 601 (1896) ("The distinction between amnesty and pardon is of no practical importance."); *see also* Knote v. United States, 95 U.S. 149, 152–53 (1877) (stating that the distinction is of no "legal importance"); Armstrong v. United States, 80 U.S. (13 Wall.) 154, 155–56 (1871) (recognizing the validity of President Johnson's "universal amnesty and pardon for participation in [the] rebellion"); Pardon—Removal of Disabilities—Pension, 27 Op. Att'y Gen. 178, 181 (1909) ("Nor is the form which this pardon may assume at all important, or the manner of its promulgation . . . . [W]hether by a formal pardon directed and delivered to the beneficiary . . . or by a proclamation of amnesty to a class of offenders, this is always and necessarily an exercise of the pardoning power . . . ."); Amnesty—Power of the President, 20 Op. Att'y Gen. 330, 337 (1892) (tracing Supreme Court approbation of general pardons and concluding that President Harrison had the power to issue a general grant of amnesty to convicted polygamists).

[176] These include Presidents Washington, Adams, Jefferson, Madison, Buchanan, Lincoln, Johnson, Harrison, Cleveland, Roosevelt, Harding, Coolidge, Truman, Kennedy, Ford, and Carter. *See* Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 139–41 (2001) (discussing the use of systematic pardons by at least one-third of all U.S. Presidents); *infra* notes 177–89 and accompanying text (discussing how several Presidents have used large-scale pardons); *see also* Office of the Pardon Att'y, *supra* note 174 (providing clemency statistics for some of these Presidents).

[177] George Washington, *Proclamation Granting Pardon to the Western Insurgents* (July 10, 1795), *reprinted in* 20 Op. Att'y Gen. 339, 339–40 (1895).

[178] Amnesty—Power of the President, 20 Op. Att'y Gen. at 344.

President Lincoln issued a broad pardon to people who had participated in the rebellion,[179] and, after the war, President Johnson issued mass pardons to those who had deserted the army as a way to foster national unity.[180] In 1893 and 1894, Presidents Cleveland and Harrison, respectively, pardoned all Mormons who had been convicted of polygamy—relieving them of the resulting disenfranchisement and other penalties—in order to quiet the long-simmering hostility between the federal government and Utah Mormons and smooth the way for Utah to become a state.[181] After World War II, President Truman issued two broad pardons to individuals who had served in the army: individuals convicted of desertion, and individuals who had prior federal criminal convictions.[182] Of particular relevance here, Truman's pardon for convicted deserters was explicitly issued, in part, to relieve pardoned offenders from the INA's penalty for desertion convictions: ineligibility for naturalization. More recently, President Carter issued a categorical pardon that covered approximately a half-million men (most of whom had not been charged) who had violated draft laws during the Vietnam War in order to "heal the war's psychic wounds."[183] This broad pardon was based on special boards through which Presidents Truman and Ford granted clemency to tens of thousands of individuals who had violated draft laws during World War II and the Vietnam War.[184]

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[179] *See* 2 ABRAHAM LINCOLN, *Proclamation of Amnesty and Reconstruction* (announcing the pardon), *in* COMPLETE WORKS OF ABRAHAM LINCOLN 442 (John G. Nicolay & John Hay eds., 1894); *see also* 2 ABRAHAM LINCOLN, *Proclamation About Amnesty* (defining who could benefit from the pardon), *in* COMPLETE WORKS OF ABRAHAM LINCOLN, *supra*, at 504.

[180] *See, e.g.*, President Johnson, Proclamation 179—Granting Full Pardon and Amnesty for the Offense of Treason Against the United States During the Late Civil War (1868); President Johnson, Proclamation 134—A Offer of Pardon to Deserters from the Regular Army Who Surrender, Gen. Order 43 (1866).

[181] *See* GRAHAM G. DODDS, TAKE UP YOUR PEN: UNILATERAL PRESIDENTIAL DIRECTIVES IN AMERICAN POLITICS 114 (2013) (noting Presidents Harrison's and Cleveland's proclamations granting amnesty to Mormon polygamists); *see also* Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1675 (2001) (highlighting "President Benjamin Harrison's pardon of Mormons convicted of polygamy in the Utah territory").

[182] *See* Proclamation No. 3000 and 3001, 17 Fed. Reg. 11,833 (Dec. 31, 1952).

[183] Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, POLITICO (Jan. 21, 2008), http://www.politico.com/story/2008/01/carter-pardons-draft-dodgers-jan-21-1977-007974; *see also* Proclamation No. 4483, Granting Pardon for Violations of the Selective Service Act, August 4, 1964 to March 28, 1973, 42 Fed. Reg. 4391 (Jan. 24, 1977).

[184] Exec. Order No. 9814, 11 Fed. Reg. 14,645 (Dec. 25, 1946); U.S. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT (1975) (containing an extensive description and analysis of the board's activities during its first year of existence, addressed to President Ford); Shanor & Miller, *supra* note 176, at 140, 142 (describing how President Ford's Clemency Board was modeled after President Truman's Amnesty Board).

Notably, disagreement with Congress was often the key reason that these pardons were issued. One of the earliest examples is President Jefferson's pardon of each and every person who had been convicted under the Alien and Sedition Acts of 1798, which criminalized the writing, printing, and publication of defamatory or inflammatory materials about the U.S. government.[185] Jefferson, who had criticized these acts even prior to his election, was explicit about his motivation: He issued pardons because, "even though [the Sedition Act] had been upheld by the courts," he "[b]eliev[ed] that the Sedition Law was unconstitutional," and therefore "used his power as President to (in his own words) 'remit the execution' of the Act by pardoning all offenders."[186] Presidents Lincoln and Johnson's proclamations of amnesty and pardons were intended to thwart punitive laws imposed by Congress.[187] In a similar fashion, President Wilson expressed his opposition to prohibition laws after Congress overrode his veto of the Volstead Act by pardoning more than 500 liquor law violators,[188] and President Kennedy commuted the sentences of hundreds of drug offenders serving mandatory minimum sentences under the Narcotics Control Act of 1956, presumably because he deemed the Act's sentencing provisions too harsh.[189]

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185 *See, e.g.*, Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H.R. REP. NO. 26-86 (1840) (refunding a fine imposed under the Sedition laws).

186 The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 133 n.8 (1993) (citing NORMAN J. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 21 (1932)); *see also* Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804) (discussing Jefferson's role as President and his views on the Sedition laws), *in* THE ADAMS-JEFFERSON LETTERS 278, 279 (Lester J. Cappon ed., 1959); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1666 (2008) (describing letters in which President Jefferson explained that he "discharged every person under punishment or prosecution under the Sedition laws, because [he] considered . . . that law to be nullity as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image").

187 The validity of these amnesties was repeatedly upheld by the Supreme Court. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 142 (1871) (upholding President Lincoln's pardon); United States v. Padelford, 76 U.S. (9 Wall.) 531, 542 (1869), *superseded by statute*, Act of July 12, 1870, ch. 251, 16 Stat. 235, *as recognized in* Bank Markazi v. Peterson, 136 S. Ct. 1310 (2016) (same); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) (upholding President Johnson's pardon).

188 *See* Barkow, *supra* note 13, at 837; P.S. Ruckman, Jr., *The Pardoning Power: The* Other *"Civics Lesson,"* 8 (Nov. 7, 2001), http://www.rvc.cc.il.us/faclink/pruckman/pardoncharts/paper5.pdf (describing President Wilson's pardons and providing clemency statistics).

189 *See* Barkow, *supra* note 13, at 837 (noting that President Kennedy "granted clemency to hundreds of first-time nonviolent drug offenders as an expression of disagreement with mandatory drug punishments in certain cases he viewed as disparate and not consistent with average sentences in comparable cases"); *see also* Shanor & Miller, *supra* note 176, at 140 (noting that President Kennedy pardoned offenders under the Narcotics Act of 1956).

The Supreme Court has upheld categorical pardons and recognized their constitutional validity.[190] The Court has explained that broad pardons, or "amnesties," are simply a permissible extension of the President's power to pardon an individual: "The Executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or *by classes*, conditionally or absolutely, and this without modification or regulation by Congress."[191] And it has explicitly rejected the argument that class-wide amnesties are different from a pardon in a way relevant here, remarking that "[t]he distinction between amnesty and pardon is of no practical"[192] or "legal importance."[193] Thus, because the President could issue a categorical pardon that would relieve classes of non-citizens of certain immigration offenses, the immigration pardon can offer far-reaching protection to members of our community who Congress has, thus far, proven unable or unwilling to protect.

B. Structural Constitutional Implications of Categorical Immigration Pardons

One need not be a constitutional scholar to wonder why the presidential pardon power—particularly when used to grant categorical relief from the penalties of duly enacted laws—does not violate the constitutional principle of separation of powers. After all, a President who could categorically absolve all violators of a particular law could effectively nullify it in many respects, thereby infringing on the legislature's constitutional authority "[t]o make all Laws."[194] This concern is not surprising, as it is generally well accepted that a President may

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[190] *See, e.g.*, Knote v. United States, 95 U.S. 149, 153 (1877) ("All the benefits which can result to the claimant from both pardon and amnesty would equally have accrued to him if the term 'pardon' alone had been used in the proclamation of the President. In Klein's case, this court said that pardon included amnesty." (citing United States v. Klein, 80 U.S. (13 Wall.) 128 (1871))); *supra* note 175. The English King's power to pardon, which is coextensive with the scope of the presidential pardon power, *see supra* notes 62–63, offers further confirmation. *See* Duker, *supra* note 66, at 517 (first citing the Charta Forestae, 9 Hen. 3, c. 15 (1225) (King's first general pardon); then citing 50 Edw. 3, c. 3 (1376) (general pardon granted to celebrate the fiftieth year of Edward III's reign and confirmed by I Rich. 2, c. 10 (1377)); then citing 6 Rich. 2, c. 13, § 1 (1382) (pardon to all subjects after the late insurrection); then citing 6 Rich. 2, c. I, § 1 (1382) (a "more large Pardon"); then citing Act of Free and General Pardon, 12 Car. 2, c. 11 (1660) (general pardon issued by Charles II); then citing Act for the King's Majesties Most Gracious, General and Free Pardon, 25 Car. 2, c. 5 (1672); then citing 2 W. & M., c. 10, § 1 (1690); then citing 6 & 7 Will. 3, c. 20 (1695); then citing 3 Geo. 1, c. 19 (1716); and then citing 20 Geo. 2, c. 52 (1747)).

[191] *Ex parte* Grossman, 267 U.S. 87, 120 (1925) (emphasis added) (citing *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866)).

[192] Brown v. Walker, 161 U.S. 591, 601 (1896).

[193] *Knote*, 95 U.S. at 153.

[194] U.S. CONST. art. I, § 8, cl. 18.

not, consistent with separation-of-powers principles enshrined in the Constitution, simply ignore or effectively override statutes because he or she disagrees with congressional policy. And yet, using a categorical pardon to absolve individuals of penalties for violating a law—as Presidents have done throughout history—seems to do exactly that. What would stop a President from using this power to gut congressional authority across any of the civil regulatory efforts prevalent in the administrative state that are contrary to presidential policy?

At the outset, it is important to recognize that, in examining the structural constitutional question here, context matters: Concerns about this issue should be least where the branch exercising the authority is effecting the goals underlying the separation-of-powers principle.[195] And that goal, the Framers made clear, was to secure and protect liberty.[196] In 1788, Madison made this very point when explaining the reason for separation of powers: "When the legislative and executive powers are united in *the same* person or body, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner."[197] Scholars and political theorists have echoed this point, emphasizing that the protection of liberty was a central goal

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[195] Although neither "separation of powers" nor any synonym is used in the Constitution itself, the constitutional structure and Framers' commentary have left little doubt that this principle was enshrined in the Constitution. *See* Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1215 (2015) (stating that "'separation of powers' and 'the constitutional system of checks and balances' [are] core principles of our constitutional design"); Stern v. Marshall, 564 U.S. 462, 483 (2011) (discussing "'the basic concept of separation of powers . . . that flow[s] from the scheme of a tripartite government' adopted in the Constitution" (alteration in original) (quoting United States v. Nixon, 418 U.S. 683, 704 (1974))); Boumediene v. Bush, 553 U.S. 723, 742 (2008) (describing the historical context and rationale for the structural protection of individual rights adopted by the Framers and noting "[t]he Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches"); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1533–40 (1991) (discussing the historical and intellectual development of the separation of powers); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (describing how checks and balances and the separation of powers were designed "to protect the citizens from the emergence of tyrannical government").

[196] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty . . . ."); *see also Boumediene*, 553 U.S. at 742; *Metro. Wash. Airports Auth.*, 501 U.S. at 272.

[197] THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added and omitted) (quoting Montesquieu).

underlying the separation of powers.[198] Moreover, they have recognized that this goal was so important that the Framers concluded that strict separation of powers did not adequately protect liberty.[199] With that in mind, they created a system of checks and balances that essentially permitted the branches to "inva[de]" and "correct[ ]" overreach so that each branch acted as a check on the other.[200]

That said, "liberty" materializes in many forms, and the Framers undoubtedly sought to protect political liberty as well as physical liberty.[201] But even so, physical liberty is unique in terms of the protections written into the Constitution. Indeed, the Constitution contains at least three separate provisions that authorize coordinate branches to review and correct unjust deprivations of physical liberty. The Due Process Clause,[202] which offers protection against deprivation of life, liberty, and property, reserves its greatest procedural protections for deprivations of physical liberty. The Supreme Court has reaffirmed the extent of its protections time and again, and recognized the fact that physical restraint is "at the core of the liberty protected by the Due Process Clause."[203] This protection, together with Article III,

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198 *See, e.g.*, Brown, *supra* note 195, at 1534 ("In general . . . separation of powers aimed at the interconnected goals of preventing tyranny and protecting liberty."); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1259–60 (1988) (describing how the constitutional system of checks and balances was designed "as a means of protecting individual liberty from arbitrary governance"); Markowitz, *supra* note 10, at 530 ("Rather than aggrandizing one branch above the others, the unilateral power of each branch to prevent liberty deprivation reflects a constitutional structural bias against liberty deprivation in general.").

199 *See* THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961) ("[U]nless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government[ ] can never in practice be duly maintained."); *see also* GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 119 (1981) ("Checks and balances do not arise from separation theory, but are at odds with it . . . [and] have to do with corrective *invasion* of the separated powers . . . ."); Brown, *supra* note 195, at 1532 (same).

200 WILLS, *supra* note 199, at 119; *see also* Brown, *supra* note 196, at 1531–32 ("The best evidence that the Framers intended to reject a strict separation of powers is that they created a system of checks and balances requiring participation by each branch in some functions that may be considered part of the power of the others . . . .").

201 Markowitz, *supra* note 10, at 528 ("While political theorists generally agree that the system of separation of powers was envisioned primarily as a 'prerequisite for civil liberty,' political liberty as well as physical liberty was surely encompassed in this vision." (footnote omitted) (quoting Brown, *supra* note 195, at 1533)); *see also* Brown, *supra* note 195, at 1533 ("On the American side of the Atlantic the primary impetus for separated powers was the establishment and maintenance of political liberty.").

202 U.S. CONST. amend. V.

203 *E.g.*, Turner v. Rogers, 564 U.S. 431, 445 (2011) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); *see also* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (describing physical liberty as "the most elemental of liberty interests"); Humphrey v. Cady, 405 U.S. 504, 509 (1972) (describing the deprivation of physical liberty as "a massive curtailment of liberty").

provides authority for the judiciary to protect against overreach by the executive and legislative branches.[204] Similarly, the Suspension Clause, which provides access to judicial review for restraints on liberty, permits the judiciary to correct unjust deprivations of liberty by the executive and/or legislative branches.[205] Finally, the Pardon Clause, as discussed, permits the executive to limit or eliminate restraints upon liberty that could be imposed or have been imposed by the legislature and/or the judiciary.[206] Moreover, underscoring the unique place of physical liberty in the Constitution, the Framers went further even than some of their exemplars who tolerated bills of attainder—legislative pronouncements of guilt—as necessary evils.[207] Instead, out of a desire to guard against the possibility of unjust deprivations of liberty, the Framers drafted a constitutional provision explicitly prohibiting them.[208] Thus, to the extent that the statements of the Framers leave any doubt that the separation-of-powers principle is animated by a concern for protecting physical liberty, the constitutional structure is clear about the primacy of liberty protection. Given that a key aim of separating powers was to protect liberty, this principle should be least offended when presidential authority—indeed any branch's authority—is effected to further that goal. Since an immigration pardon power acts as a one-way ratchet in favor of

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204 U.S. CONST. art. III; *see* Markowitz, *supra* note 10, at 529–30, 532 (describing how the Supreme Court "has not only extended a panoply of special procedural protections when physical liberty is at issue, but it has also characterized the deprivation of physical liberty as being 'at the core of the liberty protected by the Due Process Clause'" and explaining that "[m]odern jurisprudence demonstrates that creating special protections against unwarranted liberty deprivations is entirely consistent with the constitutional scheme").

205 U.S. CONST. art. I, § 9, cl. 2. More specifically, the Suspension Clause guarantees access to the writ of habeas corpus to challenge a restraint on liberty except "in Cases of Rebellion or Invasion [when] the public Safety may require it." *Id.*; *see* Boumediene v. Bush, 553 U.S. 723, 745 (2008) ("[The Suspension Clause] ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." (citing *Hamdi*, 542 U.S. at 536)); INS v. St. Cyr, 533 U.S. 289, 300–03 (2001) (surveying the history of the Suspension Clause, describing its fundamental purpose of protecting against unlawful deprivations of liberty, and finding deportation to be one such deprivation of liberty).

206 U.S. CONST. art. II, § 2, cl. 1.

207 Brown, *supra* note 195, at 1536–37 (describing Montesquieu's view of bills of attainder as "a necessary, single instance in which a branch other than the Judiciary should be permitted to make a decision affecting the liberty of an individual . . . 'in order to preserve it for the whole community'" (quoting BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 199 (Thomas Nugent trans., 1949))).

208 *See* U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

liberty protection, separation-of-powers concerns are somewhat mitigated.

In addition to these structural constraints, characteristics of the Pardon Clause itself provide powerful limits on its reach and incentives against abusing the pardon power.[209] Most importantly, even at its most expansive, the pardon power does not permit a President to, in fact or effect, actually nullify a duly enacted law because he or she cannot pardon future offenses.[210] This foundational limitation, discussed in Part I, was an essential element of the Pardon Clause from the outset, and an important way in which the Constitution differed from old English common law. In England, at common law, the King had "dispensing" and "suspending" powers which allowed the King to authorize individuals to violate laws enacted by Parliament and to abrogate parliamentary laws, respectively.[211] The pardon power, by contrast, only permits the President to relieve an individual of prosecution for, or penalties flowing from, the commission of *past* offenses.[212] In this way, the Framers ensured that the President's power to offer mercy would not be used to abrogate or suspend laws and thereby encroach on Congress's lawmaking authority.

Pardons are also limited by their nature to operate in a space that the executive has exclusive authority to create. That is, they reduce or eliminate the consequences of an enforcement proceeding, which only the executive may commence.[213] To return briefly to the tax law example, this means that a President is powerless to change what the

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[209] *See* Morison, *supra* note 13, at 278–88 (describing a range of structural constraints that the Constitution imposes on the pardon power).

[210] *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1866) ("The [pardon] power thus conferred is unlimited, with the exception stated. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."); Stauffer v. Brooks Bros. Grp., 758 F.3d 1314, 1321 (Fed. Cir. 2014) (defining pardons and finding that amendments to law "do not constitute a pardon").

[211] Edward Wavell Ridges, Constitutional Law of England 134–35 (1905) (discussing dispensing and suspending powers and legal challenges to use); Markowitz, *supra* note 10, at 500–01 (discussing the King's suspending and dispensing powers); Price, *supra* note 14, at 691 (discussing suspending and dispensing powers and their ultimate invalidation); Daniel Stepanicich, Comment, *Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion*, 18 U. Pa. J. Const. L. 1507, 1513–14 (2016) (same).

[212] *See* Passenger Laws—Pardoning Power, 6 Op. Att'y Gen. 393, 403 (1854) ("A pardon for an offence not yet committed would be void."); *see also Garland*, 71 U.S. at 380 (stating how the pardon power "extends to every offence known to the law, and may be exercised at any time *after its commission*, either before legal proceedings are taken, or during their pendency, or after conviction and judgment" (emphasis added)).

[213] *See* 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."); Office of the Pardon Att'y, *supra* note 18 ("[T]he President cannot pardon a state criminal offense.").

tax law requires individuals to report or pay, or what it prohibits individuals from writing off. The President's pardon authority is limited to a question in which the executive is constitutionally assigned a significant amount of power: whether to prosecute someone who fails to pay what they owe, what charges to file, and what penalties to seek. In this sense, pardons are, for constitutional purposes, much like prosecutorial discretion, which, with some recent exceptions, is generally accepted as consistent with the Constitution and separation of powers.[214] In short, the very definition of a pardon makes it operate primarily in the arena of decisions that the executive branch is authorized to make, such that the executive is "giv[ing] what is his own," not "that which is another's [and that] he cannot give by his own grace."[215]

Ultimately, history and the Supreme Court have made clear that, under the Constitution, "each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others," and that "[t]o the executive alone is entrusted the power of pardon," even if used in conflict with congressional policy.[216]

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[214] For example, under President Clinton, the Department of Justice (DOJ) enacted a "Corporate Leniency Policy" that, in the words of DOJ, is an "amnesty or corporate immunity policy" that grants corporations effective immunity from criminal prosecution, as well as their directors, officers, and employees, if the corporation is the first to come forward and report illegal antitrust activity and take certain other remedial steps. *See* Antitrust Div., *Corporate Leniency Policy*, U.S. DEP'T JUST., https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf [https://perma.cc/V5VS-MKZX]. Note that DOJ itself made clear that this policy was categorical and "not subject to the exercise of [individualized] prosecutorial discretion." Gary R. Spratling, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the ABA Antitrust Section 1998 Spring Meeting: The Corporate Leniency Policy: Answers to Recurring Questions (Apr. 1, 1998), http://www.usdoj.gov/atr/public/speeches/1626.htm [https://perma.cc/CNZ6-HNBK]. Presidents Truman and Carter's broad grants of amnesty after WWII and the Vietnam War are another example. Exec. Order No. 9814, 11 Fed. Reg. 14,645 (Dec. 25, 1946) (creating the President's Amnesty Board to review convictions of persons under the Selective Training and Service Act of 1940); U.S. PRESIDENTIAL CLEMENCY BD., REPORT TO THE PRESIDENT xi–xii (1975) (discussing President Ford's clemency program); Shanor & Miller, *supra* note 176, at 142 (describing examples of "systematic pardons").

[215] United States v. Noonan, 906 F.2d 952, 956 (3d Cir. 1990) (quoting 2 HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 371 (Travers Twiss ed. & trans., 1879) (1257)); *see supra* Section II.B; *supra* notes 110–11 and accompanying text. Modern pardon jurisprudence also underscores this limitation on a pardon's reach. As described above, it distinguishes between penalties for an offense, which are eliminated by a pardon, from qualifications that a person cannot satisfy due to past misconduct, which a pardon does not affect. The inability of pardons to affect a person's ability to satisfy nonpenalty requirements or qualifications is an additional mechanism that preserves legislatures' and courts' authority in areas outside those that implicate actual or potential enforcement.

[216] United States v. Klein, 80 U.S. (13 Wall.) 128, 147 (1871); *see* Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring) ("[W]here the Constitution by explicit text commits the power at issue to the exclusive control of the

Any expansive view of presidential power should be embraced cautiously and with due consideration of the potential for abuse. The reckless and unprincipled approach of the current Oval Office occupant only serves to heighten such caution. Indeed, grave concerns about the abuse of the pardon power by President Trump have been center stage in the early months of his presidency.[217] Every grant of power comes with the risk of abuse; however, on balance, the vision of the pardon power we embrace carries a greater potential for serving justice than for prompting abuse. Issuance of a broad categorical immigration pardon would be a robust assertion of presidential power, but one consistent with the Constitution's structural bias in favor of liberty protection and with the President's primary control of enforcement more generally.

Conclusion

The brutality of our nation's current immigration enforcement scheme is difficult to overstate: Hundreds of thousands of mothers, fathers, sons, and daughters each year face detention and permanent separation from their families in the United States. The ideal solution is, unquestionably, significant legislative reform to provide a path to legalization for undocumented immigrants and to eliminate the harshest aspects of the detention and removal provisions of the INA. However, congressional reform of our immigration system has long been a dead letter, and with the current presidential administration addressing the issue through vilification and shotgun-style enforcement, there is little short-term hope of meaningful legislative progress. If the congressional gridlock cannot be broken, there will come a time when future Presidents—particularly those elected by an increasingly minority electorate with more recent immigrant roots—will need to

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President, we have refused to tolerate *any* intrusion by the Legislative Branch. . . . [W]e [have] reiterated in most direct terms the principle that Congress cannot interfere in any way with the President's power to pardon."); Schick v. Reed, 419 U.S. 256, 266 (1974) ("[T]he unbroken practice since 1790 compels the conclusion that the power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."); *Garland*, 71 U.S. at 380 ("This power of the President is not subject to legislative control. . . . The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.").

[217] *See, e.g.*, John Yoo, Opinion, *Trump Can Pardon Manafort. He Shouldn't.*, N.Y. Times (Oct. 31, 2017), https://nyti.ms/2z3Rl72; *see also* Neil H. Buchanan, *Will Trump Use Arpaio Pardon as a Precedent to Pardon Russia Colluders?*, Newsweek (Aug. 30, 2017), http://www.newsweek.com/will-trump-use-arpaio-precedent-pardon-russia-colluders-657025; Philip Allen Lacovara, Opinion, *How the Pardon Power Could End Trump's Presidency*, Wash. Post (Aug. 29, 2017), http://wapo.st/2go0SAe?tid=SS_mail&utm_term=.455b1c45a98c.

find ways to ameliorate the devastating penalties that our immigration laws have imposed on longtime members of our communities.

The immigration pardon, one exercise of the executive's more general prosecutorial discretion powers, offers an important part of that solution. While direct categorical application of the pardon power to civil immigration offenses has no immediate precedent in history, it accords with the very purpose for which Presidents have, for centuries, issued categorical pardons: to use their inherent power of mercy and duty to promote the national interest to alleviate the toll of harsh laws on politically unpopular groups. It is for these reasons that the Framers bestowed the pardon power upon Presidents—as a critical check against Congress's general authority to make all laws. The pardon power serves as an essential backstop to avert unduly harsh negative consequences of legislative enactments. As the devastation caused by current immigration laws continues to grow and traditional mechanisms for policymaking continue to fail, future Presidents should consider using the pardon power to forgive the civil offenses that result in some of the most unforgiving penalties in our justice system.