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THE DUE PROCESS *BONA FIDES* OF EXECUTIVE SELF-PARDONS AND BLANKET PARDONS

*Peter Brandon Bayer**

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* Peter Brandon Bayer, Associate Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. The author thanks the Faulkner Law Review for inviting me to participate in their interesting and dynamic symposium work and for allowing me time to delve into what for me is a relatively new subject. As always, I dedicate this work to my wonderful wife Joan, who has made my life a blessing and who has been and remains my strongest support and my most perceptive critic.

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I. INTRODUCTION

Open virtually any newspaper, news magazine or periodical, or listen to any news broadcast or news commentary program, and you likely will see or hear abundant reports and commentaries regarding something at once most remarkable and even more so, worrisome, indeed nerve-racking to those who respect the Constitution and its rule of law. The relevant matter concerns the sitting President of the United States and applicable constitutional law regarding that executive officer's singular, unilateral authority to pardon or otherwise dispense *clemency*—that is, to mitigate the punishment of convicted felons and, indeed, to pardon preemptively both individuals and classes of persons as the President sees fit.

As part of the structure of American government arising from both a specific provision of the United States Constitution and centuries-old tradition, the office of chief executives—at the federal level, the President, and at the state level, governors—includes the authority to grant various forms of clemency to convicted felons. Clemency ranges from lessening the duration or

conditions of sentences to full pardons that completely rescind any remaining punishment and essentially nullify the criminal conviction itself.¹ The theories of executive clemency in general and pardons in particular are much in the news because of various congressional and Department of Justice investigations concerning possible criminal and civil offenses involving both Donald Trump, arguably America's least qualified yet most arrogant President, and members of his equally inexperienced and maladroit inner circle of advisors including his namesake eldest son and his son-in-law.² Even as these words are being written, FBI special counsel Robert Mueller's thoroughgoing investigation has led to the arrest and plea agreement of members of the Trump campaign and administration, one of whom, retired Lt. Gen. Michael Flynn, formerly a respected member of the military, acted as a particularly ardent and effective campaign advisors of then-candidate Trump, and served thereafter, for a short but lively period, as President Trump's National Security Advisor.

As this article will underscore, settled law holds that the Constitution's Due Process Clauses contained in its Fifth³ and Fourteenth Amendments⁴ cover and constrain the entirety of

¹ "The term 'clemency' is a comprehensive term that has come to be used for all types of relief available pursuant to the pardon power, to avoid confusion with the narrower technical use of the term 'pardon[.]'" Margaret Colgate Love, *Of Pardons, Politics and Collar Buttons: Reflections on the President's Duty to Be Merciful*, 27 *FORDHAM URB. L. J.* 1483, 1484 n.4 (2000).

² The possible crimes and civil affronts include actions taken by Trump and senior members of his staff during his highly contentious presidential campaign against the Democratic Party nominee, former Secretary of State, former New York Senator, and former First Lady Hillary Rodham Clinton, and actions which, in significant measure, continued into the formative months of his presidency. See generally John Norris & Carolyn Kenney, *Donald Trump and Criminal Conspiracy Law: A RICO Explainer*, *CTR. FOR AM. PROGRESS* (Dec. 7, 2017, 9:02 AM), <https://www.americanprogress.org/issues/security/reports/2017/12/07/443833/donald-trump-criminal-conspiracy-law/>.

³ The Fifth Amendment states in part, "No person shall . . . be deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V.

⁴ The Fourteenth Amendment reads in part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. That text seemingly denotes "due process" and "equal protection" as two separate and implicitly distinct constraints on state actions; the federal courts, however, rightly explain that, in fact, "equal protection of the laws" is an offshoot or subset of "due process of law." *E.g.*, *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

American government at all levels, regarding all official conduct performed by all offices—even including executive clemency authority, which is a realm that otherwise accords the President and appropriate state officers, often governors, essentially unfettered discretion. Plausible speculation informs that, as President, Trump is considering whether to issue a series of post-conviction and preemptive pardons to both himself and to those under investigation for alleged illegal interactions,⁵ some of which are often hastily and perhaps improperly denoted as “collusion,” with Russian officials during the Trump campaign, transition, and the beginning of his administration. The serious prospect of blanket or mass pardons for his political associates makes the issue of due process constraints on the Executive’s clemency discretion of utmost urgency. The specter of Trump attempting to nullify criminal convictions and other upshots stemming from *bona fide* investigations against him and his associates, plus resulting judicial challenges, articles of impeachment, and other conceivable governmental responses to such acts of claimed clemency, loom large indeed as constitutional concerns, perhaps constitutional crises.⁶

Accordingly, the link between due process of law and executive clemency, with particular emphasis on arguably politically motivated self and blanket pardons, is the subject of this article. While any American President’s realm of discretion to pardon and otherwise grant forms of clemency is both enormous

⁵ See, e.g., Ramesh Ponnuru, *Mass Pardons Would Escalate Risks for Trump*, BLOOMBERG (Oct. 31, 2017, 12:56 PM), <https://www.bloomberg.com/view/articles/2017-10-31/mass-pardons-would-escalate-risks-for-trump>.

⁶ One commentator recently opined:

America is on its way to a full-blown constitutional crisis. Over just a few days last week, President Trump and his allies stepped up attacks on Robert Mueller, the special counsel investigating the campaign’s connections to Russia. They tried to push Attorney General Jeff Sessions out of office. They thought out loud about whether the president can pardon himself. This all points to the same conclusion: Mr. Trump is willing to deal a major blow to the rule of law—and the American Republic—in order to end an independent investigation into his Russia ties.

Yascha Mounk, *The Past Week Proves That Trump Is Destroying Our Democracy*, N.Y. TIMES: OPINION (Aug. 1, 2017), <https://www.nytimes.com/2017/08/01/opinion/trump-democracy-institutions-destroyed.html>.

and from a practical sense often unreviewable, the judiciary rightly has discerned that, for the sake of preserving the liberty vouchsafed by the Constitution, the Executive's pardoning power has constitutional limits. Consistent with the separation of powers doctrine, those limits may be determined as a matter of politics by Congress should it decide to impeach a sitting President for perceived misuse of executive clemency authority. Even more fundamentally, however, especially given the unlikelihood of presidential impeachment, the constitutional limits of executive clemency may be discerned and enforced through judicial review particularly addressing the Due Process Clauses.

Contrary to much commentary and possibly some seemingly settled law, this essay argues that an American President (or a similarly situated state officer or office) may issue individual and "blanket"—or mass—clemency benefitting classes of named or unnamed individuals, and in addition may pardon himself, *but only if* doing so comports with the principles of fundamental fairness that define due process of law under the Constitution's Fifth and Fourteenth Amendments. Accordingly, the Constitution permits acts of clemency to foster mercy, compassion, and forgiveness, or to promote the purported best interests of the nation, or even to further an executive's political advantages, *unless* such clemency is arbitrary, capricious, or otherwise contrary to justice and liberty, and thus unconstitutionally unfair.

Specifically, this article proceeds as follows: Part II presents the meaning of due process of law, accenting that, pursuant to the Due Process Clauses, all actions of whatever kind taken by any office or agent of government must be moral; meaning that official conduct may not be arbitrary, capricious or otherwise violate recognized tenets of fundamental fairness. Although not so acknowledging, the Supreme Court's definition of fundamental fairness is based on concepts of human dignity espoused by the Enlightenment moral philosopher Immanuel Kant. This article's understanding of constitutional law is controversial but based on the author's long-standing research that confirms "due process of law's" inextricable link to principles of immutable, a political morality discerned through impartial reason and applicable regardless of what outcomes may occur.

Part III briefly sets forth relevant constitutional aspects of executive clemency, including the legal requirement that acts of clemency comport with the strictures of due process of law. Part

IV then explains why governmental chief executives including the President may self-pardon, issue blanket pardons, or do both so long as those actions and similar grants of clemency comply with applicable due process standards. As is traditional, this writing ends with a brief conclusion, herein Part V.

II. THE MEANING OF DUE PROCESS OF LAW

This article begins with a very brief discussion of the true meaning of *due process of law* under the Constitution's Fifth and Fourteenth Amendments. While strictly only the Fifth Amendment is applicable to presidential pardons, as it controls the actions of federal level actors of which the President arguably is the single most important,⁷ the Supreme Court rightly has determined that the meaning of due process is identical for both amendments.⁸ Accordingly, whatever due process constraints apply to acts of presidential clemency likewise apply to those of state governors or such other offices as particular states have authorized to consider matters of clemency.

I have extrapolated the meaning of due process of law in considerable detail in an earlier work.⁹ Moreover, what I consider to be my most comprehensive explication of American due process morality and law, the forthcoming article *Deontological Originalism: Moral Truth, Liberty, and, Constitutional "Due*

⁷ See *Barron v. City of Baltimore*, 32 U.S. 243, 247-50 (1833). Even as of this writing, while essentially the entirety of its protections have been declared likewise duties of the states, technically to this day the Bill of Rights is inapplicable as law to the states. *Id.*; see, e.g., *Baribeau v. City of Minneapolis*, 596 F.3d 465, 484 (8th Cir. 2010) (citing, *inter alia*, *Barron*, "The Due Process Clause of the Fifth Amendment, however, applies only to the federal government."); *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004) (Sixth Amendment read alone applies only to federal prosecutions).

⁸ See *Great American Houseboat Co. v. U.S.*, 780 F.2d 741, 746 n.3 (9th Cir. 1986) (citing *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976); *Regan v. Tax'n With Representation of Washington*, 461 U.S. 540, 542 n.2 (1983)) ("While the due process and equal protection clauses of the fourteenth amendment are applicable only to the states, the due process clause of the fifth amendment imposes on the federal government the same obligations that the fourteenth amendment imposes on the states.").

⁹ See Peter Brandon Bayer, *Sacrifice and Sacred Honor: Why the Constitution Is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 370-403 (2011).

Process,” has been accepted for publication.¹⁰ For a thoroughgoing explication of the complex meaning of due process of law, I would be flattered if the reader consulted those publications. For the purposes of this writing, I present a shortened but essentially usable synopsis.

A. Due Process is the “Value Monism” of the Constitution

As an opening point, this writing agrees with philosophers who argue that within any conceptual system, especially those sounding in or predicated on moral theory:

[T]here must be some source of harmony; that is, all separate . . . norms [and standards] must cohere through one overarching, unifying concept that serves as the pivot for resolving any [relevant] quandary. . . . Thus, managing discrete . . . rules and their functions requires a foundational conception—a paradigmatic idea, [an] elementary particle that enables, delineates, invigorates and clarifies the entire [applicable] philosophy. Professor Wood calls this “value monism”¹¹

Consistent with this theory of moral philosophy, while other constitutional provisions such as the Ninth Amendment¹² or the Constitution’s Privileges and Immunities clauses might have attained ascendancy,¹³ the judiciary has designated “due process of law” as what may aptly be denoted the Constitution’s “value monism.” *That is, due process is the particular legal construct from which each and every other constitutional fundamental right*

¹⁰ That article is forthcoming in two parts at THUR. MARSHALL L. REV. and is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3043895.

¹¹ Bayer, *supra* note 9, at 304 (citing ALLEN W. WOOD, KANTIAN ETHICS 59 (2008)).

¹² “The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

¹³ See, e.g., Thomas Y. Davies, *Correcting Search-And-Seizure History: Now-Forgotten Common-Law Warrantless Arrest Standards and the Original Understanding of “Due Process of Law,”* 77 MISS. L. J. 1, 195 (2007) (discussing the Reconstruction Court’s emphasis on “privileges and immunities”).

derives.¹⁴ Thus, a half-century ago, surveying the panoply of discrete, individual rights set forth in the Constitution, particularly its Bill of Rights, the Supreme Court in *In re Gault* aptly explained, “Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”¹⁵ Identically, Justice Felix Frankfurter fittingly and vividly declared that due process vouchsafes, “ultimate decency in a civilized society.”¹⁶

True, this full extent of due process, as the Constitution’s value monism, arguably was not apparent from the early post-Revolution and post-Civil War debates discussing those clauses in the Fifth and Fourteenth Amendments.¹⁷ But, perhaps such specific clarifications in 1791 or 1868 were unnecessary—for, as the Supreme Court affirmed well over a century ago, “due process of law” is “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice.”¹⁸ Accordingly, while not actually so identified in the constitutional text, all fundamental rights, including those specifically listed in the Bill of Rights, emanate from and are discrete instances of the an overarching, paradigmatic idea this nation has expressed as “due process of law.” But nothing less would be expected of a concept that conveys “ultimate decency in a civilized society.”¹⁹

This article will very briefly prove the foregoing first by explaining what popularly is called “selective incorporation,” which discloses when due process of law requires States to abide

¹⁴ See *In re Gault*, 387 U.S. 1, 20 (1967).

¹⁵ *Id.*

¹⁶ *Adamson v. California*, 332 U.S. 46, 61 (1947) (Frankfurter, J., concurring).

¹⁷ “The legislative history of the Fourteenth Amendment sheds little light on how the term ‘due process of law’ was understood in 1868, because the Amendment was presented and debated largely in terms of the ‘privileges and immunities’ of citizens.” Davies, *supra* note 13, at 195. Professor Paul Finkelman likewise concluded, “Virtually all supporters of the [Fourteenth] Amendment agreed that it would protect the ‘civil rights’ of blacks and everyone else, but . . . they did not necessarily agree on the substantive content of civil rights, equal protection, or even due process.” Paul Finkelman, *Original Intent and the Fourteenth Amendment: Into the Black Hole of Constitutional Law*, 89 CHI.-KENT L. REV. 1019, 1026 (2014).

¹⁸ *Chi., B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226, 238 (1897).

¹⁹ *Adamson*, 332 U.S. at 61 (Frankfurter, J., concurring).

by the Bill of Rights specifically enumerated provisions. As I summarized a few years ago:

[I]t is axiomatic constitutional law that the Due Process Clause of the Fourteenth Amendment does not fully incorporate that is, it does not per se mandate onto the states the rights set forth in the Bill of Rights. Rather, through a right-by-right review, the judiciary has applied to the States pursuant to the Fourteenth Amendment those provisions of the Bill of Rights that derive from the American “scheme of ordered liberty and system of justice.” *In other words, due process requires states and localities to respect those rights essential to the very legitimacy of governmental conduct.*²⁰

Given that they are important enough to have been commemorated in the Bill of Rights, under “selective incorporation,” *essentially every right therein* has been deemed indispensable to civil society and thus mandatory upon the States through the Fourteenth Amendment’s Due Process Clause. Aside from a very few as yet un-litigated, the sole exceptions are: the Sixth Amendment right to a unanimous jury verdict; the Fifth Amendment requirement of indictment by a grand jury; and the right to a jury in civil litigation contained in the Seventh Amendment.²¹

Along with selective incorporation, the judicial canon recognizing *unenumerated* fundamental rights—rights not specifically set forth within the Constitution’s text—verifies the innate supremacy of due process of law. For instance, the Sixth Amendment famously includes a textual “confrontation clause” confirming that criminal defendants may confront, usually through cross-examination, witnesses that the Government calls to testify.²² Interestingly, the Constitution does not expressly contain an affirmative equivalent permitting criminal defendants to examine

²⁰ Bayer, *supra* note 9, at 395 (emphasis added) (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 763–64 (2010)).

²¹ *Id.*

²² “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. CONST. amend. VI.

witnesses and tender physical evidence in their own defense. It hardly requires deep analysis to prove that vouchsafing criminal defendants' right of confrontation while denying them the comparably pivotal right to present their own affirmative evidence would arbitrarily and capriciously prevent criminal defendants from preparing their respective defenses. Therefore, although nowhere stated within its text, the unsurprising rule is that such a right is inherent in the meaning of the Due Process Clauses.²³

As these examples demonstrate, the second Justice John Marshall Harlan accurately recognized that as "selective incorporation" coupled with the doctrine of unenumerated rights prove, "due process is a discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions" in the Bill of Rights.²⁴ Accordingly, "due process of law" is the Constitution's singular defining concept—indeed, it is the Constitution's value monism—for, all other fundamental constitutional rights, express or implied, radiate therefrom. Consequently, over a century ago, the Supreme Court rightly expressed the rudimentary nature of due process when it said, "The fundamental guaranty of due process is absolute and not merely relative. . . . [T]he constitutional safeguard

²³ See, e.g., *Bedoya v. Coughlin*, 91 F.3d 349, 352 (2d Cir. 1996) (citing *Wolff v. McDonnell*, 418 U.S. 539, 566, (1974) ("An inmate has a due process right to summon witnesses in his defense at a prison disciplinary hearing, provided facility officials do not determine that this would in any way threaten institutional safety or correctional goals.")). For an equally compelling and more historically prominent example, see *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (invalidating racial segregation under the Fifth Amendment Due Process Clause); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (invalidating racial segregation under the Fourteenth Amendment Equal Protection Clause). The most pertinent constitutional provision to proscribe racial discrimination mandated under state law arguably is the Fourteenth Amendment's Equal Protection Clause, as the *Brown* court aptly understood. However, that Amendment does not constrain the exercise of federal power. Thus, to invalidate mandatory racial segregation of public schools in the District of Columbia and other federal jurisdictions, the Court relied on the Due Process Clause of the Fifth Amendment as embracing the principles of equal protection of the law. As the *Bolling* court declared, in perhaps understated tones, due process of law and equal protection are "not mutually exclusive." *Bolling*, 347 U.S. at 499.

²⁴ *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

as to due process [is] at all times dominant and controlling where the Constitution is applicable.”²⁵

B. The Legal Meaning of “Due Process of Law”

1. *The Due Process Clauses prohibit governmental conduct that is either “arbitrary or capricious”*

The next step, then, is determining what “due process of law” actually entails. Expressing the essence of liberty, the Supreme Court confirmed at the turn of the present century that substantive and procedural due process proscribes government from “abusing [its] power, or employing it as an instrument of oppression,”²⁶ a proposition eagerly respected by the lower courts.²⁷ The Supreme Court’s 1998 *Lewis* opinion précised that standard using an accustomed legal term: “Since the time of our early explanations of due process, *we have understood the core of the concept to be protection against arbitrary action . . .* We have emphasized time and again that ‘[t]he touchstone of due process is protection of the individual against arbitrary action of government’”²⁸ *Lewis* continues the Court’s two-centuries-old tradition that, “[A]fter volumes spoken and written with a view to their exposition, the good sense of mankind has at [last] settled down to this: *that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.*”²⁹

²⁵ *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350 (1909); *see also* *United States v. Smith*, 480 F.2d 664, 668 n.9 (5th Cir. 1973).

²⁶ *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992)).

²⁷ *E.g.*, *Doe v. Rosa*, 795 F.3d 429, 437 (4th Cir. 2015); *Hatfield v. O’Neill*, 534 Fed. Appx. 838, 844 (11th Cir. 2013); *Raab v. Blakey*, 370 Fed. Appx. 303, 309 (3rd Cir. 2010).

²⁸ *Lewis*, 523 U.S. at 845 (emphasis added) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)).

²⁹ *Bank of Columbia v. Okely*, 17 U.S. 235, 244 (1819) (emphasis added). The Court’s conclusion in *Okely* has been reaffirmed and remains good law as of this writing. *See Lewis*, 523 U.S. at 845–46 (quoting *Okely* for the proposition that, “Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action.”).

Surely there can be no greater protection from official misconduct because those all-encompassing categories—"arbitrary and capricious abuses"—apparently include every possible governmental malfeasance. The next question, then, is: what comprises "arbitrary and capricious abuses"?

2. Governmental action is "arbitrary or capricious" if it is immoral, that is, lacking "fundamental fairness"

Importantly and unsurprisingly, *determining whether a challenged governmental action is arbitrary or capricious, in fact, constitutes a moral judgment.* This point cannot be overstated because, given that "arbitrary or capricious" conduct is immoral conduct, and given that the Constitution prohibits "arbitrary or capricious" governmental conduct, the *legal* meaning of "due process of law"—that is, the *legal* meaning of the constitutional provision proscribing "arbitrary or capricious" behavior—is in fact *a moral determination.* Simply put, the Constitution, through its Due Process Clauses, has made morality—moral comportment—not simply a part of the law, but rather the highest law. Accordingly, to properly define and enforce "due process of law," judges must master moral theory; there simply is no other expedient because discerning "arbitrary or capricious" conduct *vel non* is a moral inquiry.³⁰

Thus, fully appreciating the Court's formal *theoretical expression* of due process morality, Justice Felix Frankfurter fittingly employed terms that demarcate morality—"fair and right"—to boldly but accurately profess:

It is now the settled doctrine of this Court that the Due Process Clause[s] embod[y] a system of rights based on moral principles so deeply embedded in the traditions and feelings of our people as to be deemed fundamental to a civilized society as conceived by our whole history. *Due process is*

³⁰ In Bayer, *supra* note 10, at ___ (forthcoming), I explain in detail that such was understood by both the original Framers and the Reconstruction Congress, and that judges are perfectly capable of performing such intricate analysis.

*that which comports with the deepest notions of what is fair and right and just.*³¹

Consistent with the foregoing, and despite some doctrinal challenges,³² the courts have rightly and consistently held that to satisfy its *moral duty* under “due process of law,” government conduct need not be smart, nor efficient, nor wise, nor sound policy. Rather, all acts and efforts of government must be fundamentally fair³³—thus, neither arbitrary, nor capricious, nor

³¹ *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950) (Frankfurter, J., dissenting) (emphasis added), *abrogated*, *Ford v. Wainwright*, 477 U.S. 399 (1986). While no one better expressed the abstract concept of due process, review of Frankfurter’s discrete positions in due process cases evinces that nothing short of the most hideous offenses to human dignity would fit his model. *E.g.*, *Rochin v. California*, 342 U.S. 165, 172 (1952) (police conduct that “shocks the conscious” violates “due process of law”). Arguably, Frankfurter’s expression of due process theory was both profound and correct; but, his applications were unduly miserly.

³² For example, as the Court opined shortly before the turn of the twentieth century:

If the laws enacted by a state be within the legitimate sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law. . . . It is hardly necessary to say that the hardship, impolicy, or injustice of state laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from state legislatures.

Missouri Pac. Ry. Co. v. Humes, 115 U.S. 512, 520 (1885). More recently, three justices irately and inaptly asserted, “a Justice’s commission does not confer any special moral, philosophical, or social insight sufficient to justify imposing those perceptions on fellow citizens under the pretense of ‘due process.’” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2622 (2015) (Roberts, C.J., with Scalia and Thomas, JJ., dissenting).

³³ *E.g.*, *Lassiter v. Dep’t. of Soc. Servs. of Durham County*, 452 U.S. 18, 24–25 (1981) (due process “expresses the requirement of ‘fundamental fairness,’ a requirement whose meaning can be as opaque as its importance is lofty”); *Kinsella v. U.S. ex rel. Singleton*, 361 U.S. 234, 246 (1960) (quoting *Betts v. Brady*, 316 U.S. 455, 462 (1942)) (citation and footnote omitted) (“Due process cannot create or enlarge power. . . . It has to do, as taught by the Government’s own cases, with the denial of that ‘fundamental fairness, shocking to the universal sense of justice.’”); *accord* *U.S. v. Russell*, 411 U.S. 423, 432 (1973); “In construing that Amendment, we have held that it imposes minimum

otherwise inconsistent with “a principle of natural equity, recognized by all temperate and civilized governments, from a deep and universal sense of its justice.”³⁴

3. The meaning of moral bearing—of comporting with “fundamental fairness”—has been best expressed by the Enlightenment philosopher Immanuel Kant

Given that defining “due process of law’s” guarantee of “fundamental fairness” is a moral enquiry, the next matter is discerning the right moral standards to apply. Although subject to varying definitions, this article urges that the best available moral theory is popularly known as “Kantian ethics,” meaning modern treatment of the moral philosophy espoused by the noted Enlightenment philosopher Immanuel Kant.³⁵ While worthy of fuller explication,³⁶ the following provides an acceptable if rudimentary and rough overview.

The core concept Kant espoused is *human dignity*, an idea that, as we will see, the judiciary has borrowed, albeit without attribution to this singular pillar of moral philosophy. In particular, Kant maintained that all human beings possess innate, unassailable “dignity” derived from humankind’s unique, likely divinely

standards of fairness on the States.” *Danforth v. Minnesota*, 552 U.S. 264, 269 (2008); *see also, e.g., Snyder v. Com. of Mass.*, 291 U.S. 97, 117 (1934) (per Cardozo, J.) (“Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results.”); *Palko v. Connecticut*, 302 U.S. 319, 326 (1937) (per Cardozo, J.).

³⁴ *Chi., B. & Q. R.R. Co.*, 166 U.S. at 238.

³⁵ *See* Bayer, *supra* note 9, at 347–48 (explaining the difference between “Kantian ethics” and “Kant’s ethics.”); Bayer *supra* note 10, at Section II.4.c (forthcoming) (explaining Kantian morality’s relationship to the Founders’ original intent).

³⁶ As I noted earlier, inquiries into moral theory and the meaning of “due process of law” are intricate, complex and demand highly sophisticated explication. Such thoroughgoing explications, however, are not appropriate for this article. If, as I hope, the reader is interested in the more complete demonstration of the underlying propositions, I would be honored if she or he consult: Bayer, *supra* note 9, at 346–403; Peter Brandon Bayer, *The Individual Mandate’s Due Process Legality: A Kantian Explanation, and Why It Matters*, 44 *LOY. U. CHI. L. J.* 865, 896–911 (2013); and particularly, Bayer, *supra* note 10, at — (forthcoming), for substantially more complete elaborations of Kant’s theory of morality and dignity and its proper application to due process jurisprudence.

endowed ability to recognize moral truth *through neutral, impartial reason*.³⁷ Because morality is immutable, transcendent truth, the correct moral result can never come from, to use the popular and inapt term, “striking a balance” to attain some arguably best possible conclusion. Instead, as any given dilemma’s correct moral resolution is deduced from neutral, unbiased reason, that resolution must be obeyed no matter how distasteful or distressing. Thus, morality, to use the common phrasing, is not based on attaining a “good” outcome, but rather on attaining the “right” outcome. Morality is a harsh, unforgiving, and uncompassionate taskmaster, for morality demands doing what is *right* no matter the cost. In that regard, Kant was neither hyperbolic nor incorrect in his notorious assertion, “Let justice be done even if the world should perish.”³⁸

Of course, persons are imperfect; therefore, their searches for moral truth and their capacities to reason are imperfect. However, human dignity derives from the capacity, not the actuality, of achieving morally correct judgment.³⁹ Moreover and of utmost importance:

Because human dignity arises from the facility to be moral, rather than actual moral comportment itself, persons are entitled to respect, meaning they must be treated in ways that do not compromise their intrinsic dignity regardless of how they actually behave. Accordingly, every individual has an affirmative, immutable duty to treat all others in a

³⁷ Kant was a deontologist. That is, he believed that moral principles are immutable (never changing), *a priori* (thus preceding the coming of humankind), and applicable to all societies and cultures regardless of particular practices, histories, and traditions therein. Consequently, morality is not a human construct, but rather, the product of reason. *E.g.*, Bayer, *supra* note 10, at ____ (forthcoming); Bayer, *supra*, note 9, at 293–221 (defining terms and explaining why Deontology rather than Utilitarianism (also known as Consequentialism) correctly explicates morality).

³⁸ IMMANUEL KANT, TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 102 n.16 (Pauline Kleingeld ed., David L. Colclasure trans., 2006).

³⁹ See Bayer, *supra* note 9, at 348–53.

dignified fashion plus a corresponding immutable right to be so treated by all others.⁴⁰

The question becomes, of course, how does one person respect the dignity of another? In answer, Kant famously presented critical principles he called "categorical imperatives" of which this writing will discuss two. The first ("CI₁") holds, "Act only on that maxim through which you can at the same time will that it should become a universal law."⁴¹ It is not too much of an over-simplification to state that Kant's first Categorical Imperative echoes the "Golden Rule"; that is, your behavior towards others should reflect principles applicable to any and all similarly situated others. Thus, you employ a standard—a law—that is universal. "Accordingly, if in response to Smith's action 1, Jones takes [action 2], then equally Smith, or any person, should be able to take action 2 if Jones, or any similarly situated person, performs [action 1]."⁴²

Although the first categorical imperative eliminates hypocrisy, it cannot constitute a complete moral system because CI₁ cannot prove that any given "maxim" is a moral "universal law."⁴³ In other words, the particular espoused maxim may be universal, but universality alone cannot guarantee that the maxim demands right behavior rather than wrong behavior. Accordingly, more is required; and, indeed, the very core of Kantian morality is found in the celebrated second categorical imperative ("CI₂"). "Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."⁴⁴ Thus, the foregoing, perhaps arcane quote aptly counsels that it cannot be *per se* immoral to treat persons as "means." "Indeed, human

⁴⁰ Peter Brandon Bayer, *Debunking Unequal Burdens, Trivial Violations, Harmless Stereotypes, and Similar Judicial Myths: The Convergence of Title VII Literalism, Congressional Intent, and Kantian Dignity Theory*, 89 ST. JOHN'S L. REV. 401, 483–84 (symposium issue; citing Bayer, *supra* note 9, at 353–58).

⁴¹ IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 88 (Harper Torchbooks ed., H.J. Paton trans., 1964).

⁴² Bayer, *supra* note 40, at 484. "For example, if Smith hits Jones because Jones insulted Smith, then Smith can have no moral objections if Jones hits Smith should Smith comparably insult Jones." *Id.* at 484 n.276.

⁴³ *Id.* at 484.

⁴⁴ KANT *supra*, note 41, at 96.

exchanges are predicated on individuals and groups giving and receiving benefits. Rather, persons cannot treat others ‘simply’—only—as ‘means.’”⁴⁵ That is, individuals—persons, groups, organizations, corporations, even nations—may use other individuals as means to attain desired ends, but only in ways that respect the dignity of those others with whom they interact by treating them an “end[s]” in themselves.⁴⁶ “As Professor Kutz compellingly [invoked], ‘[Using] a person [solely] [for another’s gain] does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.’”⁴⁷

Possibly the best analogy is that, when interacting with others, we respect such others’ innate and incomparable dignity—treat them as ends in themselves—by not *objectifying* them. We do not transform them into inanimate objects, devoid of feelings, of personhood, and of humanity, existing only for the given user’s pleasure.⁴⁸ Classic examples of treating others “merely as means,” not as “ends in themselves,” include eliciting behavior either by lying or through duress. Regarding the former, the other party cannot make reasoned responses and decisions because she does not actually know the true state of affairs. Regarding the latter, the other party is not merely being pressured, but is being threatened and thus cannot make a truly free choice among possible options. The entire function of morality, then, is to assure that every individual respects the dignity of every other individual.

Thus, relevant herein as it anticipates how Kantian ethics inform executive clemency, the otherwise extremely perceptive Professor Harold Krent mistakenly argues that:

Irrespective of the individual’s capacity to make a reasoned choice, *we might limit conditional pardons*

⁴⁵ Bayer, *supra* note 40, at 485.

⁴⁶ Bayer, *supra* note 10, at __ (forthcoming); Bayer, *supra* note 36, at 900–03; Bayer, *supra* note 9, at 354–55.

⁴⁷ Bayer, *supra* note 9, at 355–56 (quoting Christopher Kutz, *Torture, Necessity and Existential Politics*, 95 CALIF. L. REV. 235, 256 (2007)) (quoting ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 33 (1977) (alterations in original)). Importantly, Kant included as a corollary to CI₂ the “duty of rightful honor,” which mandates that an individual has no more right to treat herself merely as a means than she has to treat others merely as means. This writing extrapolates on the *duty of rightful honor* later on as it becomes integral to assessing the constitutionality of self-pardons.

⁴⁸ See *id.* at 354–58.

because imposition of certain conditions adversely may affect society as a whole. . . . Arguably, the rights of free speech, religious practice, and bodily autonomy are so fundamental to what we as a society deem civilized that permitting waivers may erode the fabric of society. As Kant and others have argued, certain rights should be inalienable. Society may suffer if the state can take away certain core rights even if the offender is willing to accept the price. Allowing a market in such rights denigrates their importance and constitutive role in reaffirming citizenship.⁴⁹

Perhaps ironically and counter-intuitively, that “[s]ociety may suffer” is not pivotal to applicable Kantian moral theory. In Kantian theory, society is not an end in itself, but rather a means, albeit an essential and required means, to respect the innate dignity of individual persons. Persons do not work for society; rather society works for them.⁵⁰ Accordingly, constitutional and other legal standards protect individuals; thus, the reason “[s]ociety may suffer” is that the individuals comprising that society suffer if due process is violated. Societal-wide obligation to comply with moral precepts codified as law, then, safeguards the exercise of individual human dignity. *That is why no person may be compelled to sacrifice her dignity for the sake of others, even for society itself, because the entire purpose of society is respecting every individuals’ dignity, at all times, in all places, under all situations.* Such, then, is this perhaps too brief but functional synopsis of Kantian morality.

4. Discerning rights under the Due Process Clauses is an exercise in deontological moral reasoning

Fascinatingly, but not surprisingly, given that “due process of law” is an exercise in realizing whether challenged

⁴⁹ Harold J. Krent, *Conditioning the President’s Conditional Pardon Power*, 89 CAL. L. REV. 1665, 1692 (2001) (footnotes omitted, emphasis added).

⁵⁰ See Bayer, *supra* note 36, at 903–07 (discussing Kant’s argument that forming a social order through which to commemorate as law principles of moral comportment regulating individual interactions such as contractual and property transactions, is a moral imperative).

governmental behavior does or does not comport with “fundamental fairness,” the federal courts have embraced, but only partially, their duty to be experts in the gist and application of moral theory. Specifically, although it seems to violate the very structure of legal meaning, the Supreme Court enforces two incompatible yet extant paradigms to resolve due process issues. We may call them the *deeply rooted liberty principles* standard and the *dignity paradigm*. The *deeply rooted liberty principles* standard is encapsulated, albeit arguably out of context, from the noted American jurist Justice Benjamin Cardozo’s entreaty that due process protects rights, “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁵¹ Three-quarters of a century later, the Supreme Court purported to promote the *deeply rooted liberty principles* standard as the definitive meaning of due process.⁵²

The fundamental infirmity of the *deeply rooted liberty principles* approach is self-evident: it is an empirical measure. That is, it seeks to discern through historical and other empirical research what the American population, or some designated subsection thereof, believes to be principles expressing basic national values. To the fullest extent possible, proponents of that paradigm make no judgments regarding whether the discerned principles, albeit “deeply rooted,” in fact are moral and thus worthy of respect and compliance. Instead, the courts uncritically apply those “principles” regardless of the outcome, thereby rendering “fundamental fairness” into a massive tautology: the “deeply rooted principles” at issue *are* fair because they are “deeply rooted.”⁵³ Alternatively, courts disingenuously may substitute for an unsuitable set of “deeply rooted principles” another suddenly discovered set that better comports with what the reviewing court believes should be the applicable “deeply rooted principles.”⁵⁴

⁵¹ *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

⁵² *McDonald*, 561 U.S. at 760; *see, e.g., Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). I argue elsewhere that the *McDonald* Court’s attempted rationale is logically and historically infirm. Bayer, *supra* note 10, at — (forthcoming).

⁵³ Bayer, *supra* note 10, at Section 5(e)(4) (forthcoming).

⁵⁴ In such instances, while purporting to apply the *deeply rooted principles* approach, the courts, of course, are really substituting their best moral judgments in the guise of a newly discovered, newly emerging array of “deeply rooted principles.”

Arguably recognizing the inadequacy of the *deeply rooted liberties* standard, the Supreme Court has devised the *dignity paradigm*, an alternative that properly fulfills “due process of law’s” moral imperative by employing Kantian morality, although the Court has yet to acknowledge even in a cursory footnote its debt to that philosopher’s mammoth oeuvre. Pursuant to the *dignity paradigm*, because the Due Process Clauses prohibit official behavior that offends “fundamental fairness,” courts must overturn statutes, regulations, procedures, and such other governmental actions that offend individual “dignity.” Fittingly, then, “dignity” is the pivotal concept delimiting the meaning and applications of “due process of law.”

Astutely appreciating that “it is the Kantian vision of dignity that seemingly animates” the Court,⁵⁵ Professor Rex Glensey rightly avers that the *dignity paradigm* is, “steady, although inconsistent and haphazard, so that there is a partially developed body of American constitutional law that deals with some semblance of the right to dignity.”⁵⁶ Of course, while few if any standards are so fully developed that their meanings and applications are clear beyond reasonable dispute, one might properly concede that among competing constitutional exemplars, the *dignity paradigm* is particularly underdeveloped. Still, even allowing that dignity’s “importance, meaning, and function are commonly presupposed but rarely articulated,”⁵⁷ and, despite frustration with Supreme Court’s seeming aversion to clarifying its standard,⁵⁸ the perceptive investigator may easily discern that which is not really hidden with the *dignity paradigm*—Kant’s CI₁ and particularly CI₂—to determine whether, in any given instance,

⁵⁵ Rex D. Glensey, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 86 (2011).

⁵⁶ *Id.*; see, e.g., Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 202 (2011) (courts rarely consider the inherent nature of human dignity, focusing instead (as though the two were unrelated) on “what types of rights, freedoms, or entitlements may flow from ‘dignity’ as a legal concept.”).

⁵⁷ Leslie M. Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011).

⁵⁸ “It is not that the right to dignity has to be shapeless by its very nature, and thus is subject to inconsistent use, but rather, that so far there has been no coalescence (particularly in the United States) around the rational possibilities that exist for a coherent legal theory of human dignity.” Glensey, *supra* note 55, at 107–08; see, e.g., Rao, *supra* note 56, at 202–03.

government violates “due process of law” by treating regulated individuals and groups merely as means for some governmental end without concomitantly regarding such individuals and groups as ends in themselves. In fact, the revered American jurist and legal theorist Benjamin Cardozo “may have been correct to say: ‘Our jurisprudence has held fast to Kant’s categorical imperative . . . We look beyond the particular to the universal, and shape our judgment in obedience to the fundamental interest of society that contracts shall be fulfilled.’”⁵⁹

The most precise expression of the due process *dignity paradigm* was reaffirmed recently by the Supreme Court: due process liberty—the moral philosophy of fundamental fairness—prohibits governmental actions that evince, “a bare congressional desire to harm a politically unpopular group.”⁶⁰ “A bare desire to harm” clearly implicates Kantian morality, particularly CI₂ because indulging such a desire renders the maltreated persons merely means to assuage the perpetrators’ malicious motives.

The “bare desire to harm” principle evokes several interesting and important corollaries. First, even if the relevant purpose or goal is fully legitimate, Government cannot effectuate that goal through devices that treat affected individuals merely as means and not as ends in themselves. For example, certainly government can enact programs to help indigent individuals and families buy food. In so doing, for any number of valid reasons, government may design and implement such programs in ways that may alleviate—but do not completely abrogate—the problem

⁵⁹ Alexander Tsesis, *Maxim Constitutionalism: Liberal Equality for the Common Good*, 91 TEX. L. REV. 1609, 1615 (2013) (quoting BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 139–40 (1921)). Identically, Professor Wright astutely observed that while courts rarely quote, much less cite, either “Kant [or] any other philosopher[,] [p]opular versions of philosophical accounts of dignity are an element of the jurisprudential air we breathe. Inevitably, philosophical accounts inform our constitutional case law on the meanings, sources, and roles of dignity.” R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527, 537–38 (2006) (footnote omitted).

⁶⁰ U.S. v. Windsor, 540 U.S. 744, 770 (2013) (citing Dep’t of Agric. v. Moreno, 413 U.S. 528, 534–535 (1973)); see also, e.g., Romer v. Evans, 517 U.S. 620, 634–35 (1996); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446–47 (1985).

of malnutrition among the poor.⁶¹ However, "Although a State may adopt a[n] [imperfect welfare program] . . . it may not, of course, impose a regime of invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment."⁶²

Turning to a second vital corollary consistent with if not actually emanating from the first, the shorthand "bare desire to harm a politically unpopular group" does not connote that the "desire to harm" was government's sole, overarching, or dominant motivation. Rather, "bare" means a naked, plain, or revealed "desire to harm." Accordingly, that some legitimate motives might accompany the "bare desire to harm" will not salvage the challenged governmental action unless, of course, that action in fact treats the regulated individuals as ends in themselves.⁶³

⁶¹ See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 484 (1970) (Maryland's "upper limit" on AFDC (Aid to Families with Dependent Children) payments based on family size is a rational, thus constitutional means of "allocating available public funds in such a way as fully to meet the needs of the largest possible number of families" even though the system "results in some disparity in grants of welfare payments to the largest AFDC families."); *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 78 (2001) (legislative classifications may be "imperfect") (quoting *Dandridge*, 397 U.S. at 485); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (same).

⁶² *Dandridge*, 397 U.S. at 483. Thus, for instance, Government could not limit or experiment with welfare programs by aiding only indigent white families. Disallowing otherwise eligible minority families treats them not as ends in themselves (in which case they too would receive the relevant governmental largesse), but rather merely as means to promote racial bigotry by depriving them of an otherwise morally enforced governmental benefit that white persons receive.

⁶³ For example, in *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973), the Supreme Court, applying the Fifth Amendment's Due Process Clause, struck 1971 amendments to the Food Stamp Act of 1964 that reduced eligibility solely to "households" where all residents are familiarly related. *Id.* at 538. Via the 1971 amendments, Congress intended to prohibit "hippie communes" from receiving food stamps, because although lawful, legislators disapproved of the hippy lifestyle. *Id.* at 534. The Supreme Court declared the 1971 amendments unconstitutional because they were enacted to, and indeed did, cause undeserved harm to "hippies" who had done nothing immoral to deserve such treatment. *Moreno*, 413 U.S. at 537-38. *Moreno* easily fits the Kantian analysis proposed in this article because Congress treated hippies and their communes not as ends in themselves but merely as means to satisfy Congress' vindictive and otherwise immoral *animus* against them. Among legitimate purposes, the amendments reduced the government's expenditures for food stamps, thus saving taxpayer dollars. Certainly, reducing costs is a legitimate governmental goal; however, that laudable goal did not save the Food

Addressing a third corollary likewise of great importance, although its text arguably implies affirmative intent, the “bare desire to harm” standard may be understood to also cover unintentional and inadvertent failures by government to treat individuals and groups as ends in themselves. After all, the moral question always is whether given conduct is or is not moral, not whether the alleged offender intended to act immorally, although certainly that latter inquiry may be very informative.⁶⁴

With these standards firmly in mind, arguably the most notable application of the dignity paradigm’s “bare desire to harm” principle arises from the Court’s “homosexual rights” decisions. In the first instance, *Romer v. Evans* invalidated a referendum amending the Colorado Constitution to mandate that any future legal protection of homosexual individuals as a class must be enacted exclusively through a state constitutional amendment, and repealed all statutes, ordinances, and state precedents specifically prohibiting discrimination on the basis of “homosexual, lesbian or bisexual orientation, conduct, practices or relationships.”⁶⁵ The *Romer* Court reasoned those classes were not singled out for adverse treatment due to any true danger they posed to others. Rather, the amendment unconstitutionally promoted the untoward bigotry of those who consider homosexuality and related statuses offensive, abnormal or depraved.⁶⁶ Not surprisingly, *Romer* predicated its ruling on the constitutional premise that, “‘a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.’”⁶⁷

Seven years later, reversing its earlier opinion in *Bowers v. Hardwick*,⁶⁸ the Court ruled in *Lawrence v. Texas* that government may not *per se* criminalize homosexual sodomy performed in private between consenting adults.⁶⁹ Sensibly accenting *dignity*,

Stamp Act amendments because the means employed were designed to promote immoral, thus unconstitutional, purposes.

⁶⁴ See, e.g., *O’Brien v. Skinner*, 414 U.S. 524 (1974) (invalidating under the Fourteenth Amendment’s Equal Protection Clause that portion of New York state’s elections statute that unintentionally disqualified some but not all incarcerated persons from obtaining absentee ballots).

⁶⁵ *Romer*, 517 U.S. at 624.

⁶⁶ See *id.* at 635–36.

⁶⁷ *Id.* at 634 (quoting *Moreno*, 413 U.S. at 534).

⁶⁸ 478 U.S. 186 (1986).

⁶⁹ *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

the *Lawrence* Court ruled that “[i]t suffices for us to acknowledge that adults may choose to enter upon [an intimate personal] relationship in the confines of their homes and their own private lives *and still retain their dignity as free persons.*”⁷⁰ A decade after *Lawrence*, the Court in *U.S. v. Windsor*⁷¹ struck as violative of the Fifth Amendment’s Due Process Clause section 3 of the Defense of Marriage Act (“DOMA”), which banned the federal government from officially recognizing same-sex marriages lawfully performed in states then permitting such nuptials.⁷² Building on the foregoing, two years later, the Court ruled in *Obergefell v. Hodges* that state laws prohibiting same-sex civil marriages on terms equal with opposite-sex marriages contravene the Due Process and Equal Protection Clauses of the Fourteenth Amendment.⁷³

As it must, the core legal rationale for both *Obergefell* and *Windsor* holds that pursuant to the Constitution’s guarantee of “due process of law,” all acts and edicts of every office, agent, or level of American government must be morally sound. Specifically, together, the *Obergefell-Windsor* rationale reasons that discrimination against same-sex marriages unjustifiably offends the innate human dignity of individuals who wish to engage in same-sex civil marriages. Reaffirming that due process exists to protect and preserve dignity,⁷⁴ and accenting that the

⁷⁰ *Id.* at 567 (2003) (emphasis added). Moreover, like its empirical findings in *Romer*, *Lawrence* emphasized that Texas had failed to prove that treating homosexual intimacy equally with heterosexual intimacy would cause any actual societal harm other than offending the sensibilities of bigoted individuals who disapprove of homosexuals and homosexuality. In that regard, the Court unequivocally stated: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.” *Id.* at 578.

⁷¹ 570 U.S. 744 (2013).

⁷² *Windsor*, 540 U.S. at 769–70. Section 3 of DOMA amended The Dictionary Act to read, “the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” *Windsor*, 540 U.S. at 752 (quoting 1 U.S.C. § 7 (2012)).

⁷³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015). Concurrently and logically, *Obergefell* overturned state statutes barring official recognition of same-sex marriages lawfully performed in other jurisdictions. *Id.* at 2607–08.

⁷⁴ “In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.” *Id.* at 2597 (citations omitted).

institution of marriage is a most profound expression of such dignity,⁷⁵ the Court unsurprisingly concluded that, pursuant to their individual and combined dignity, persons comprising same-sex couples are entitled to the benefits of marriage equally with opposite-sex couples.⁷⁶ Integral to that proposition, of course, is the Court's reiteration that homosexuality *qua* homosexuality poses no untoward societal harms justifying discriminating against otherwise legally eligible same-sex couples who wish to marry.⁷⁷

Obergefell rightly concluded that because same-sex marriage is not immoral, government must treat such marriages as it would opposite-sex marriage. Accordingly, based on the Kantian morality implicit in the Court's dignity paradigm, governmental discrimination against same-sex marriages treats the couples seeking to marry and their offspring not as ends in themselves—human beings whose innate dignity makes them worthy of respect—but rather merely as means to perpetrate unjustified bigotry.

We now understand, not merely as an aspiration but as America's highest law, the Constitution mandates moral comportment by all governmental offices and actors, at all times, in all circumstances. Moreover, according to the judiciary, and

⁷⁵ "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices." *Id.* at 2599 (citation omitted). Indeed, "[a] first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy[, denoting an] abiding connection between marriage and liberty." *Id.* Along these lines, *Obergefell* accented that, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." *Id.* Identically, *Windsor* accented that marriage is society's imprimatur permitting couples, through the solemnization of official ceremony "to define themselves by their commitment to each other." *Windsor*, 540 U.S. at 763.

⁷⁶ *Obergefell*, 135 S. Ct. at 2604–05.

⁷⁷ *Id.* at 2596. Of equal magnitude, bans and lesser discriminatory disadvantages imposed on same-sex marriages disparage the human dignity of children raised by same-sex couples who wish to marry or whose marriages are treated by governmental offices differently—inevitably as less worthy, thereby less protected—from opposite-sex marriages. Denouncing such disparate treatment, the Court explained, "[a]s all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. . . . This provides powerful confirmation . . . that gays and lesbians can create loving, supportive families." *Id.* at 2600.

consistent with the philosophy of Immanuel Kant but not so attributed, moral comportment requires that government treat all under its jurisdiction with "fundamental fairness," meaning treating all persons as ends in themselves, not merely as means. With the foregoing as our due process basis, this writing now turns to the applicable law of clemency and its comportment with the Constitution's Due Process Clauses.

III. THE NATURE OF THE CLEMENCY AUTHORITY UNDER THE UNITED STATES CONSTITUTION

A. Clemency and Pardons in General

Given the subject matter of this writing, it is prudent to describe clemency under the Constitution before determining whether it is constrained by the Due Process Clauses and, if so, exactly how so:

The term "clemency" is a comprehensive term that has come to be used for all types of relief available pursuant to the pardon power, to avoid confusion with the narrower technical use of the term "pardon" in the Justice Department's clemency regulations which denotes the limited grant of relief after completion of sentence. Clemency includes commutation of sentence, reprieve, and remission of fine, as well as full or unconditional pardon.⁷⁸

Although commonly issued for the benefit of one or a small number of individuals, the law recognizes class-wide clemency commonly known as "amnesty,"⁷⁹ which, of necessity, often covers classes of unnamed individuals rather than denoting each

⁷⁸ Love, *supra* note 1, at 1484 n.4 (citation omitted). Similarly, Professor Kobil explained the constituency of clemency, "[w]ithin the broad ambit of 'clemency' are five specific varieties of leniency commonly recognized under American law: pardon, amnesty, commutation, remission of fines, and reprieve." Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 575 (1991).

⁷⁹ "The term 'amnesty' is usually used where a grant of clemency is extended by proclamation to a class of individuals." Love, *supra* note 1, at 1484 n.4.

benefitted person specifically.⁸⁰ Thus, acts of clemency need not identify every or indeed any given beneficiary by either name or other individualized index of identity other than belonging to the benefitted class.

Addressing the federal level, our Constitution employs the term “reprieves” to denote clemency in general. Consistent with tradition, clemency—“reprieves”—rests with the Executive Branch, as clarified by the Constitution’s Article II, Section 2, which declares in relevant part that the President enjoys the “[p]ower to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”⁸¹ The President’s grant of a pardon is “an executive action that mitigates or sets aside punishment for a crime.”⁸²

Given the depth and complexity of the numerous clemency petitions brought to their attention, modern Presidents and governors have relied on formal offices to help them determine which pleas to grant and what exact form such grants should take.⁸³ In particular regarding assistance to the President:

The pardon attorney in the U.S. Department of Justice receives and investigates all applications for pardon and commutation of sentence and makes a recommendation for or against pardon in each case. Review is on a paper record, and no hearing is held. Meritorious pardon cases are referred to the FBI for a background investigation and to the United States

⁸⁰ To cite just a few significant instances as examples, “[i]n 1795, President Washington granted an unconditional pardon to many of the participants in the Pennsylvania Whiskey Rebellion. John Adams, in order to serve ‘the public good,’ likewise issued a presidential pardon to all persons involved in an insurrection in Pennsylvania.” Kobil, *supra* note 78, at 592 (footnotes omitted). Similarly, “President Lincoln’s offer of amnesty to Southern secessionists on the condition that they take a loyalty oath.” Krent, *supra* note 49, at 1668.

⁸¹ U.S. CONST. art. II, § 2.

⁸² Nixon v. U.S., 506 U.S. 224, 232 (1993) (quoting BLACK’S LAW DICTIONARY 1113 (6th ed. 1990)).

⁸³ For example, “[i]n 1893, President [Grover] Cleveland issued an executive order authorizing the Attorney General to assume full responsibility for administering the pardon power and making him the President’s principal advisor in clemency matters. Executive Order of June 16, 1893.” RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.5(a) n.7 (2017).

Attorney and sentencing judge for a recommendation. Recommendations are referred to the White House through the deputy attorney general. The president decides all cases, including ones in which pardon is denied.⁸⁴

While the actual deliberative process may be lengthy and multifaceted, “[t]he president is not required to report the reasons for pardon decisions, and there is no appeal from a denial of relief. . . . The clemency process is conducted in utmost secrecy, and applicants themselves are not entitled to know everything that is in their clemency files.”⁸⁵

B. English Antecedents to Modern American Clemency

Consistent with much of American law and legal tradition, the derivation of Article II, Section 2, including the express textual limitation against use of clemency to impede impeachments, traces back to British standards.⁸⁶ “By the time of Henry VII’s reign in England, the common law had developed the principle that the monarch was vested, absolutely and exclusively, with the power to pardon those accused or convicted of crime.”⁸⁷ Likewise, Harold Krent explained:

By the middle of the sixteenth century, the prerogative of the pardon power became centralized in the King, and the royal power to pardon covered the “authority to pardon or remit any treasons, murders, manslaughterers or any kinds of felonies . . . or any outlawries for any such offenses . . . committed . . . by or against any person or persons .

⁸⁴ MARGARET COLGATE LOVE ET AL., *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* § 7:14 (2016) (footnote omitted).

⁸⁵ *Id.* (citing *Binion v. U.S. Dep’t. of Justice*, 695 F.2d 1189, 1194 (9th Cir. 1983) (holding that the Justice Department was not required to release confidential information compiled by the FBI for pardon investigation)).

⁸⁶ See Kobil, *supra* note 78, at 589 (“By choosing to repose the clemency power in the chief executive alone, the Framers of the Constitution aligned themselves with a vision of the power that was decidedly British in nature.”).

⁸⁷ ROTUNDA & NOWAK, *supra* note 83, at § 7.5(a) (footnote omitted).

. . of this Realm.” The King enjoyed the flexibility to use pardons for any purpose advantageous to his goals. The pardon power remained open-ended until Parliament constrained the King’s power in the 1700 Act of Settlement, thereby precluding the King’s exercise of the pardon power to frustrate impeachments.⁸⁸

Not surprising as it is consistent with the power and prerogatives of a monarch, both of England’s preeminent jurists, Lord Edward Coke and Sir William Blackstone, concurred that “the English King was given great discretion and leeway in the exercise of his power; his pardon could be ‘either absolute, or under condition, exception, or qualification.’”⁸⁹

One might suppose that the vesting of such power stemmed from the much over-stated premise that “[t]he King can do no wrong” and, thus, may grant clemency at his whim.⁹⁰ However, as the quotations above emphasize, in a nuance that was adapted by the American Constitution’s Framers, the monarch’s authority was circumscribed in 1700 by the “Act of Settlement, thereby precluding the King’s exercise of the pardon power to frustrate impeachments.”⁹¹ Such was the state of English clemency theory when the Framers of the Constitution took up the issue regarding

⁸⁸ Krent, *supra* note 49, at 1671 (quoting Act for Continuing Certain Liberties of the Crown 1535, 27 Hen. 8, c. 24, § 1 (Eng.) (other footnotes omitted)).

⁸⁹ ROTUNDA & NOWAK, *supra* note 83, at § 7.5(a) (quoting SIR EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 233 (1817)). In his famous treatise, Blackstone explained that “the king may extend his mercy upon what terms he pleases; and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend.” 4 WILLIAM BLACKSTONE, *COMMENTARIES* *394).

⁹⁰ *Cf.* Haugen v. Kitzhaber, 306 P.3d 592, 602 (Or. 2013) (footnote omitted) (“Despite . . . limitations on the king’s power, for a period of time in England, the king’s power to pardon was absolute.”)

⁹¹ Krent, *supra* note 49, at 1671. Professor Krent cites Patrick R. Cowlshaw, *The Conditional Presidential Pardon*, 28 STAN. L. REV. 149, 157 (1975), to explicate that aspect of constrained monarchial power: “Under British practice, parliamentary impeachments included conventional punishment, and thus a royal pardon would directly impinge upon parliamentary prerogatives. In addition, monarchs did not have to take an oath to promise to govern according to the laws of Parliament until after the Glorious Revolution of 1688.” Krent, *supra* note 49, at 1671 n.30.

what authority in that realm, if any, should be accorded the American President.

C. The American Model

Notwithstanding centuries of English practice to inform it, and despite the technical legal standards summarized next, commentators contend that, “[f]ew provisions in the Constitution are as misunderstood and underestimated as the President’s power to pardon.”⁹² Among the copious complex and intricate aspects of American law, it might be said that the legal meaning of the executive’s authority to issue clemency remains underdeveloped, almost in early adolescence as compared with the now centuries-old sophistication of concepts such as separation of powers, commerce, search and seizure, and due process of law. Indicatively, Alexander Hamilton referred to the “benign prerogative of pardoning,”⁹³ implying there is little practical threat to the Republic by vesting the power to nullify the work of the judiciary in the criminal context in a single decision-maker, the President. Certainly, the Framers did not expect a President to attempt appropriating federal criminal law and policy through acts of clemency such as the wholesale pardoning of large classes of criminals; and to date, none have. Rather, the power to pardon and dispense other acts of clemency, even class-wide amnesties, is to be and has been used sparingly, if seemingly unsystematically,⁹⁴ to promote such objectives as the given executive deems important.

Turning to the drafting of Article II, Section 2 itself, interestingly, “[t]he idea of executive pardoning power was so firmly established in the common law that delegates to the Constitutional Convention adopted with little debate a clause perpetuating the power of executive pardon for the President.”⁹⁵ Still, the Framers understandably gave the clemency aspect thoughtful consideration, imprinting on that doctrine the newness

⁹² Love, *supra* note 1, at 1483.

⁹³ THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clint Rossiter ed., 1961).

⁹⁴ See generally Jerry Carannante, *What to do About the Executive Clemency Power in The Wake of the Clinton Presidency*, 47 N.Y.L. SCH. L. REV. 325 (2003).

⁹⁵ ROTUNDA & NOWAK, *supra* note 83, at §7.5(a) (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 626 (Max Farrand ed., 1911)).

and boldness of the incipient nation. They arguably discarded both the British concept that clemency authority exists in great measure to enhance the legitimacy of the monarch or executive,⁹⁶ and many of the limitations on executive discretion found in British practice or theory constraining the monarch's will.⁹⁷ As Professor Krent explained: "Despite Blackstone's views, the Constitution restored the executive's pardon power to much of its earlier breadth. Efforts to condition the President's pardon power on Senate consent, for instance, were defeated. According to [James] Madison's notes, [Constitutional Convention delegate] George Mason commented that '[t]he Senate ha[d] already too much power.' The President therefore retained the exclusive power of pardons."⁹⁸ Similarly:

In a pamphlet, future Supreme Court Justice James Iredell answered concerns about the unilateral and unqualified clemency power giving the president the ability to shield himself and/or accomplices from their misdeeds. Iredell recognized this threat, but at the same time recognized the threat of imposing a change on the power as it stood. It would be impossible to foresee the negative implications of the change. Iredell saw the broad, unilateral and unqualified nature of the clemency power as being a great advantage since the president could act with a "[great] degree of secrecy and dispatch . . . on critical occasions."⁹⁹

⁹⁶ "[T]he king's use of the clemency power to enhance justice was apparently not an end in itself. Rather, the purpose of these 'repeated acts of goodness' was to consolidate the monarch's power: Blackstone observed that acts of clemency 'endear the sovereign to his subjects, and contribute more than any thing to root in their hearts that filial affection, and personal loyalty, which are the sure establishment of a prince.'" Kobil, *supra* note 78, at 586 (quoting BLACKSTONE *supra* note 89, at 398).

⁹⁷ *Id.* at 596 ("[T]he English Parliament eventually did impose limits on the pardoning power.").

⁹⁸ Krent, *supra* note 49, at 1672-73 (quoting JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 735 (E.H. Scott ed., 1893) (recording discussion and rejection of amendment to empower Senate to approve of pardons)).

⁹⁹ Carannante, *supra* note 9494, at 344 (quoting JOHN IREDELL, ANSWER TO MASON'S OBJECTION (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES 352 (Paul Leicester Ford ed., 1888)).

In sum, as the Supreme Court famously expressed a century-and-a-half ago, consistent with the breadth implied from the text of Article II, Section 2, the President's authority "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."¹⁰⁰ A full pardon erases the act and its legal consequences so that "in the eye of the law the offender is as innocent as if he had never committed the offense" and restores the offender to "all his civil rights."¹⁰¹

Equally, Professor Krent explicated regarding the *text* of Article II, Section 2, Clause 1: "The Clause only restricts the president's pardon power in three respects: acts to be pardoned must constitute offenses against the United States, no impeachment may be involved, and the offense already must have been committed."¹⁰² In fact, "the president may . . . grant broad amnesty to a group of offenders . . . and [even] grant pardons prior to conviction."¹⁰³ For example, the President may pardon or otherwise grant modes of clemency regarding, *inter alia*, criminal contempt (but not civil contempt, as Article II, Section 2 is limited to criminal matters),¹⁰⁴ and may, among other acts, remit fines and forfeitures¹⁰⁵ and commute sentences.¹⁰⁶ Indeed, "[c]ase law has now extended the power to pardon far beyond that recognized at common law."¹⁰⁷

¹⁰⁰ *Ex parte Garland*, 71 U.S. (4. Wall) 333, 334 (1866).

¹⁰¹ *Id.* at 380.

¹⁰² Krent, *supra* note 49, at 1673 (footnotes omitted).

¹⁰³ *Id.*

¹⁰⁴ See *Ex parte Grossman*, 267 U.S. 87, 121–22 (1925) (President may pardon criminal but not civil contempt); 9B BARBARA VAN ARSDALE ET AL., 9B FEDERAL PROCEDURE, LAWYER'S EDITION § 22:2123 (2017) ("the President cannot pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged."). It has also been argued that a presidential pardon might not reach a contempt of Congress. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 414 (4th rev. ed. 1957).

¹⁰⁵ *Ill. Cent. Ry. Co. v. Bosworth*, 133 U.S. 92 (1890); Krent, *supra* note 49, at 1673.

¹⁰⁶ *Biddle v. Perovich*, 274 U.S. 480, 486–88 (1927) (commutation of sentence may be imposed without prisoner's consent); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154 (1871).

¹⁰⁷ ROTUNDA & NOWAK, *supra* note 83, at §7.5(a).

Still, even discounting due process considerations, in addition to the exclusion of clemency for impeachments,¹⁰⁸ Article II, Section 2 is not without limits express and implied. Classically, “The president has no authority to pardon offenses against the states in light of our federalist system.”¹⁰⁹ Concurrently, “[a] pardon cannot restore offices forfeited, or property or interest vested in others as a consequence of a conviction and judgment.”¹¹⁰ As the Supreme Court ruled nearly 150-years-ago, “However large . . . may be the power of pardon possessed by the President, and however extended may be its application, there is this limit to it, as there is to all his powers—it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.”¹¹¹

Correspondingly, as its nature implies, the discretion to grant clemency does not entail a countervailing authority to impose new, greater, or aggravated sanctions against the convicted party.¹¹² Nor may the President via clemency interfere with “the

¹⁰⁸ Professor Krent explained:

The Article II exception for impeachment tracks British precedent, preventing the president from nullifying congressional removal of executive or judicial officials through impeachment, even though, unlike in the British system, the congressional impeachment power extends only to removal from office. As Justice Story commented, “the Constitution has . . . wisely interposed this check upon his power, so that he cannot, by any corrupt coalition with favourites, or dependents in high offices, screen them from punishment.”

Krent, *supra* note 49, at 1673 n.44 (quoting 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1501 (5th ed. 1891)) (citation omitted).

¹⁰⁹ *Id.* at 1673 n.43 (citing *Ex parte Grossman*, 267 U.S. 87, 113 (1925); *Carlesi v. New York*, 233 U.S. 51, 59 (1914)).

¹¹⁰ ARSDALE ET AL., *supra* note 104, at § 22:2123 (citing *Garland*, 71 U.S. at 334).

¹¹¹ *Knote v. United States*, 95 U.S. 149, 154 (1877) (pardon may not compensate the offender for personal injuries suffered by imprisonment, nor vacate or modify any rights that have vested in others due to the judgment against the offender).

¹¹² *E.g.*, *Schick v. Reed*, 419 U.S. 256, 267 (1974).

vested rights of third parties.”¹¹³ In addition, other offices at the federal and state levels may impose sanctions or withhold largesse even to those who have received full presidential pardons. Notably, for example, official state and federal bar associations may preserve the integrity of professional law practice by disciplining members despite their receipt of full pardons for the underlying offenses.¹¹⁴ Likewise, a respected treatise recounted generally, “a government licensing agency may consider conduct underlying a pardoned conviction where the conduct is relevant to an individual’s qualification for the license.”¹¹⁵

As yet unresolved issues include whether the President’s Article II, Section 2 authority extends to pardoning violations of international law,¹¹⁶ although two noted scholars make the compellingly logical case that:

The President should be able to pardon violations of international law insofar as American courts, whether state or federal, are concerned. However (assuming that the situation should ever arise), an international or foreign tribunal may decide not to respect such a pardon because such tribunals are not bound by United States law.¹¹⁷

Seemingly consistent with the logic of executive clemency, a sitting President may require that the benefitted individual accept conditions and limitations to receive a full pardon or lesser acts of leniency. “From President Washington on, presidents have attached conditions to many pardons and commutations. President Lincoln’s offer of amnesty to Southern secessionists on the condition that they take a loyalty oath marks one controversial example.”¹¹⁸ The examples of varying types and intensities of

¹¹³ Kobil, *supra* note 78, at 600 (citing *Knote*, 95 U.S. at 154) (In *Knote*, “the Court observed that a presidential pardon, like the king’s pardon at common law, may not affect the vested rights of third parties.”).

¹¹⁴ ROTUNDA & NOWAK, *supra* note 83, at §7.5(b) n.21.

¹¹⁵ ARSDALE ET AL., *supra* note 104, at § 22:2131 (citing *Hirschberg v. Commodities Futures Trading Comm’n*, 414 F.3d 679 (7th Cir. 2005)).

¹¹⁶ ROTUNDA & NOWAK, *supra* note 83, at §7.5(b) n.23.

¹¹⁷ *Id.*

¹¹⁸ Krent, *supra* note 49, at 1668 (footnotes omitted). Lincoln’s amnesty was conditioned on grantees affording no further help to the Confederate states.

conditions are manifold.¹¹⁹ It is equally unsurprising that courts routinely uphold such conditional acts of clemency. “As the Court observed in *Ex parte Wells*, the pardon power ‘is frequently conditional, as [the President] may extend his mercy upon what terms he pleases, and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon will depend.’”¹²⁰

In fact, a President may demand as a condition of clemency acceptance of a punishment or a penalty that is not expressly provided within the applicable federal criminal statute under which the given felon was convicted.¹²¹ As two scholars explained the judiciary’s reasoning, “[t]he majority opinion in *Schick* emphasized that the only limits which can be imposed on the presidential pardon power are those in the Constitution itself, and to require the executive to substitute a punishment already permitted by law would place unauthorized congressional restrictions on the pardoning power.”¹²² Of course as next explained, Professors Rotunda and Nowak clarified (with upmost importance for this writing) that while neither Congress nor the judiciary exercising concepts of prudence may restrict the depth and breadth of Article II, Section 2, the Constitution itself can and,

Conditions included a ban on traveling to the Southern states and a ban on corresponding to anyone residing there in the absence of prior approval of a military official. *Id.* at 1676 (footnotes omitted).

¹¹⁹ “For instance, presidents have required, on pain of revocation of the pardon, that offenders make restitution, drop financial claims against the government, or accept deportation. Perhaps more surprisingly, presidents have required that offenders not drink, not associate with undesirables, and provide their families with greater financial support.” *Id.* at 1668 (footnotes omitted). Professor Krent expounded with further examples: “President Ford offered clemency to numerous deserters after the Vietnam War on the condition that they perform alternate service. . . . President Nixon pardoned James Hoffa on the condition that Hoffa not engage in union politics. . . . President Madison pardoned certain offenders as long as they agreed to join the Navy.” *Id.* at 1676–77 (footnotes omitted).

¹²⁰ *Id.* at 1668–69 (quoting *Ex parte Wells*, 59 U.S. (18 How.) 307, 311 (1855)) (footnote omitted).

¹²¹ *E.g.*, *Schick*, 419 U.S. at 256 (upholding the presidential commutation of a death sentence to life imprisonment conditioned on permanent ineligibility for parole, even where the commuted sentence was not one which had been specifically provided for by statute).

¹²² ROTUNDA & NOWAK, *supra* note 83, at § 7.5(b) (discussing *Schick*, 419 U.S. at 266–67).

indeed, does so through the Due Process Clause of the Fifth Amendment. It is to the due process limitation that this article now turns.

D. The Due Process Meaning of Clemency

1. Clemency and suspicion of unfettered executive authority

Despite the seeming logic of according the President and state executive offices, often the governor, exceptional discretion to grant clemency, there remains a sense of unease. Specifically, we as Americans cannot be comfortable with allowing one governmental officer, even the highest-ranking executive, unfettered discretion to circumvent the formal processes of criminal law—particularly nullifying judicial review—whether for the benefit of a single convicted felon, or especially for entire classes.¹²³ Indeed, in noteworthy contrast, at the state level in early post-Revolution America, the power to grant pardons commonly did not rest with the state executive. As Professor Kobil explained:

[T]he Revolution ushered in a period of distrust of strong executive authority and temporarily brought to an end the executive's clemency monopoly. By the time the Constitution was drafted in 1787, most state governments placed the power to remit punishment for crimes in the legislative council and the governor jointly, or in the legislature alone. The pardoning power was exercised solely by the governor only in New York, Delaware, Maryland, North Carolina, and South Carolina.¹²⁴

¹²³ *E.g.*, Carannante, *supra* note 94, at 344-45 (the Framers were aware of the abuses of clemency by the English Crown).

¹²⁴ Kobil, *supra* note 78, at 590 (footnotes omitted). Kobil therefore drew the following historical conclusion:

[I]t was the British clemency model, not the model prevailing in most states, that Alexander Hamilton was following when he objected to the Virginia and New Jersey plans and proposed that a supreme executive "have the power of pardoning all offences except Treason; which he shall not pardon without the approbation or rejection of the Senate."

Id. (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 95, at 292).

Consistent with the anti-authoritarianism that, as noted above, inspired the states generally to instigate a different approach, the Constitution's adoption of the English clemency model, while rejecting much of that system's restraints, seems an uncomfortable anathema to that charter's overarching framework which otherwise emphatically disdains enforcing law through habitually un-reviewed actions of a unilateral arm of government, herein the presidency. In the American paradigm, any act of government that cannot be evaluated and checked by a different office is by definition reminiscent of, if not indeed, an act of tyranny. Even if the reviewed action is benevolent and provably legitimate, the very fact that it is not subject to enforceable constraint—that is, affirmation, modification, or nullification via separation of powers—renders that act and its underlying authority suspect as hostile to liberty. In that regard, there is some merit to Professor Daniel Kobil's description that "[t]he clemency power is something of a living fossil, a relic from the days when an all-powerful monarch possessed the power to punish and to remit punishment as an act of mercy."¹²⁵

An associated arguable infirmity renders executive clemency authority intrinsically suspicious even under the very Constitution that permits it pursuant to Article II, Section 2. Professor Kobil provides the point: "'Clemency,' as one deputy pardoning attorney puts it, is after all 'unavoidably in some ways a political act.' Over time, the politics inherent in clemency decisions have resulted in a patchwork of presidential pardoning practices that at best can be described as idiosyncratic."¹²⁶ Alarm over not simply the politicization of criminal law, but indeed the haphazard, arguably erratic politicization of criminal law, particularly as wielded through the single arm of the executive, has been accented as well by Professor Love:

[T]he intense competition for partisan advantage in matters touching on crime control has made pardoning politically problematic. This was brought home to the Clinton Administration in the

¹²⁵ Kobil, *supra* note 78, at 575.

¹²⁶ *Id.* at 601 (quoting Kevin Krajick, *The Quality of Mercy*, CORRECTIONS MAG., June 1979, at 46, 52).

summer of 1999 by the public furor that greeted the President's offer of clemency to sixteen members of a Puerto Rican nationalist group ("FALN") who were serving lengthy prison sentences for terrorist offenses. The President defended his decision in terms of "equity and fairness," but it was widely criticized as a thinly-veiled attempt to curry favor with Hispanic voters in New York on behalf of his wife's expected Senate candidacy.¹²⁷

The anti-republican, potentially patently partisan inclination of presidential pardons explains at least in part the decline of its use over the intervening decades. For instance, Professor Love does not attribute the stark drop in pardons since the Ronald Reagan presidency¹²⁸ to changes in theory, such as increased or decreased emphasis on the penology of rehabilitation contrasted with retribution, nor to any decline in applications for clemency as such applications remain numerous.¹²⁹ Nor does there appear to be an intensifying sentiment that, as Professor Kobil phrased it, emerging constitution values are rendering "[t]he clemency power [into] something of a living fossil."¹³⁰ Rather, perhaps unsurprisingly given the character of the executive branch, the notable decline in acts of executive clemency seems motivated by politics:

It appears more likely that pardon's declining incidence since 1980 is attributable to the politics of crime control, a politics that has produced some of the most potent and divisive electoral issues of the last thirty years. Since the early 1980s, Republicans and Democrats have competed for advantage in a "race to incarcerate," producing a "prison industrial complex" with a powerful institutional constituency. Politicians and bureaucrats alike have been far more interested in feeding the front end of the justice system through enacting more laws,

¹²⁷ Love, *supra* note 1, at 1484 (footnotes omitted).

¹²⁸ See *id.* at 1493-94 (culling and assessing statistical data).

¹²⁹ See *id.* at 1494-95.

¹³⁰ Kobil, *supra* note 78, at 575.

hiring more prosecutors, and building more prisons, than in helping people avoid becoming enmeshed in the system in the first place, creating opportunities for them to earn their way to freedom, or finding ways to encourage their reintegration into the community. It is hard to find a place for pardon in a system with such priorities.¹³¹

Based on the *realpolitik* involved, Professor Love's further observation is worth quoting in full:

Most people today associate pardons with politics and controversy, and do not know that for much of our nation's history the pardon power was exercised regularly and without fanfare to give relief to ordinary people convicted of garden-variety federal crimes. Once an integral part of the justice system, pardon is considered anachronistic in an age devoted to rules and wary of discretion, a vestige of a simpler time whose occasional exercise is either capricious or pointless, or both. Indeed, until quite recently the prevailing view among criminal justice practitioners and philosophers was that the time had come for pardon "silently to fade away—like collar buttons, [its] usefulness at an end."¹³²

The foregoing has inspired somewhat exaggerated criticism of the jurisprudence of pardons and clemency:

¹³¹ Love, *supra* note 1, at 1495–96 (footnotes omitted). Using the Bill Clinton Administration as an example, Professor Love explicated: "During the first years of the Clinton Administration, the determination of the White House not to cede anything to the political opposition on crime issues virtually assured prosecutors' continued influence over the pardon program in the Department. Over time, standards for recommending a case for pardon were set higher and the review process became more rigorous, resulting in a corresponding drop in the number of pardon cases sent forward to the White House for favorable action." *Id.* at 1497 (footnotes omitted).

¹³² *Id.* at 1483–84 (quoting KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 84 (1989) (other citations omitted)).

[T]he clemency power has failed to evolve with the rest of the judicial system. United States pardon attorney John Stanish's observation in 1979 that "[t]here has never really been much rhyme or reason to clemencies in the past" is still true with respect to both federal and state executive clemency decisions.¹³³

Similarly, it seems almost unnecessary and too obvious to offer that power as broad, deep, and nebulously defined as that under Article II, Section 2 could easily be subject to abuse both deliberate and unintended. In good or bad faith, any President or state's chief executive, especially one with questionable regard for justice and fairness, could manipulate her enormous clemency discretion for personal gain, to promote untoward objectives, or otherwise to attain dishonorable ends unworthy of both that President's high office and the integrity of the Constitution itself. As Professor Krent lamented, "Lost in the political reverberations has been any concern for the wider social implications of imposing conditions on clemency. Because these conditions restrict the constitutional rights of the offenders, they may be deeply unsettling from a civil libertarian perspective."¹³⁴

2. Article II, Section 2, and Exercises of State Clemency, are Constrained by the Strictures of the Due Process Clauses

Yet, even cursory research reveals the predictable answer to this battery of constitutional and policy concerns. While one may conceivably claim that "the clemency power has failed to evolve" as completely and effusively as has "the rest of the judicial system,"¹³⁵ despite initial resistance, the Supreme Court has held, and the lower courts accordingly have recognized, that while those offices' discretion is mammoth and attendant restraints are few, no

¹³³ Kobil, *supra* note 78, at 611 (quoting Krajick, *supra* note 126, at 53).

¹³⁴ Krent, *supra* note 49, at 1668. In particular, Krent noted: "In exchange for clemency, President Clinton seemingly coerced fourteen of the sixteen FALN [a radical group centered in Puerto Rico] members into relinquishing rights to travel, association, and free expression. The conditions even preclude two sisters, who were among those offered clemency, from maintaining any contact with each other." *Id.* (footnote omitted).

¹³⁵ Kobil, *supra* note 78, at 611.

less than any other office or any other lawful power, the presidency's and states' use of executive clemency must comport with "due process of law" under the Fifth and Fourteenth Amendments of the Constitution. Therefore, the Constitution does not vouchsafe this nation from unwise or impolitic grants of clemency. Indeed, no constitutional provision accords or was intended to accord such protections best left to America's political realms. However, the law of *due process*—as noted earlier, the Constitution's single greatest and most potent safeguard against tyranny, oppression, and injustice—prevents even the extraordinarily broad discretion attendant to executive clemency from jeopardizing that which the Constitution was designed to preserve: liberty. In this singular regard, the Constitution tames the realm of clemency up to and including pardons, and no more is required to forestall or to remedy misuses of clemency authority that abridge liberty except, of course, the actual national will to constrain any chief executive who would abuse her power. Professor Krent's prose, then, is hyperbolic because if the "political reverberations" have been deaf, the *constitutional* "reverberations" addressing "concern for the wider social implications of imposing conditions on clemency" are manifest and potent.

i. All underlying policies supporting a clemency system except promoting justice are irrelevant to any act of clemency's due process legitimacy

Oddly, how "due process of law" applies as a check against untoward use of the clemency authority is related to *but one* of the many concepts explaining why authority to exert clemency exists in the first place. That one relevant idea is: clemency must further the promotion of justice. While other policies might legitimately prompt pardons and similar largesse, clemency that frustrates justice is unconstitutional.

Not unpredictably, consistent with the genesis and development of many concepts in law and government, commentators confirm that there never was, nor is there now, a single dominant reason or justification for the executive's traditional authority to override the determination of the judiciary regarding convicted felons. That clemency authority is considered a privilege of high executive office certainly has its English

antecedents. Prof. Kobil recounted, for example, certain significant:

Limitations on executive clemency [mandated by Parliament in the late 1600s through the early 1700s] did not alter the established practice of exercising the power for reasons entirely unrelated to justice. . . . Kings . . . used the clemency power to win the support of key nobles and clerics during times of strife—even the outright sale of pardons was commonplace. Such questionable uses of clemency prompted widespread criticism of royal pardoning practices.¹³⁶

Given the many ignoble uses to which clemency may be put if that power's dominant validation is enhancing the Executive's personal political goals, it is understandable that the now prevailing and popular explanations for vesting such singular power in the Executive are to foster justice and mercy. As the Supreme Court expressed nearly one-hundred years ago, "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."¹³⁷ Of course, promoting justice and mercy have been policy foundations underlying executive clemency authority for centuries. "In his Commentaries, Blackstone said that the Crown's use of the pardon power to ensure that justice was administered with mercy was one of the great advantages of monarchy over any other kind of government, because it softened the rigors of the general law."¹³⁸ Identically, "Coke [like Blackstone] noted that 'mercy and truth preserve the king, and by clemency is his throne strengthened.'"¹³⁹ Granted, as the foregoing quote evinces, vouchsafing justice and mercy in substantial measure was considered instrumental—a means—to help sustain the monarchy.¹⁴⁰

¹³⁶ Kobil, *supra* note 78, at 588 (footnotes omitted).

¹³⁷ *Ex parte Grossman*, 267 U.S. 87, 120 (1925).

¹³⁸ Kobil, *supra* note 78, at 586 (citing, BLACKSTONE *supra* note 89, at 390–91).

¹³⁹ *Id.* (quoting, COKE, *supra* note 89).

¹⁴⁰ *See id.* at 586 (quoting BLACKSTONE *supra* note 89, at 398).

Still, those arguably laudable goals not only place a wise tempering force against monarchical abuse of power, but further foster a process of philosophical maturation where mercy and justice, once more means than ends, have become ends in themselves to legitimize executive clemency authority. Accordingly, Alexander Hamilton memorably offered that, “pardons are important because ‘[t]he criminal code of every country partakes so much of necessary severity that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.’”¹⁴¹ Similarly, nearly eighty years ago, a Department of Justice survey and analysis accented that clemency has “historically always been used . . . to take care of cases where the legal rules have produced a harsh, unjust, or popularly unacceptable result” and that “[s]uch cases will continue to arise under any legal system.”¹⁴²

While frequently related, justice and mercy not always are coterminous and indeed, as scholars have emphasized, may be at odds. In that regard, a debate remains whether *from a policy perspective* clemency is, or should be, considered a function exclusively or predominately of justice, or of mercy, or of both. If singularly mercy, clemency is, “separate from if not opposed to justice.” This means “clemency is dispensed to those who actually deserve punishment but that for reasons of kindness or political expediency they are given a lesser punishment.”¹⁴³

As interesting and seemingly important as this dichotomy appears, it is in fact of little constitutional moment. As explicated presently, any and all acts of official clemency must comport with “due process of law,” meaning they may not confound principles of “fundamental fairness.” As such, clemency must be just — fair. Therefore, as a matter of dominant law, while an act of clemency may have been motivated as merciful, mercy alone is inadequate; for even if well meant, mercy may be arbitrary or capricious. Consequently, to be lawful, that act of clemency must be just.

¹⁴¹ Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1360 (2008) (quoting THE FEDERALIST NO. 74, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

¹⁴² 3 U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES 298 (1939) (quoted in Barkow, *supra* note 141, at 1360 n.126).

¹⁴³ David S. Olson, *Second-Guessing the Quality of Mercy: Due Process in State Executive Clemency Proceedings*, *Ohio Adult Parole Authority v. Woodard*, 118 S.Ct. 1244 (1998), 22 HARV. J.L. & PUB. POL’Y. 1009, 1021 n.92 (1999).

Thus, justice is the *sine qua non* of constitutionally legitimate clemency.

Before addressing due process, it is prudent to mention in this review of clemency policy that in 1927, the Supreme Court announced an alternative, additional explanation underlying executive clemency authority: not to rectify particular instances of unjust excessive punishment, nor to bestow discrete acts of mercy, but rather protect the public welfare. Justice Oliver Wendell Holmes' renowned opinion for the Court in *Biddle v. Perovich* provides the overarching rationale that clemency serves, and should be dispensed, to promote the greater societal good: "A pardon in our day is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted, it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed."¹⁴⁴ To cite one illustrative instance, discussing *Murphy v. Ford*,¹⁴⁵ Prof. Kobil explained:

The district court considered whether President Ford's pardon of Richard Nixon was void because it was outside the scope of the President's pardoning power. Without questioning the appropriateness of its inquiry, the court evaluated Ford's reasons for pardoning Nixon and concluded that, because the country was "foundering in the wreckage of Watergate" and was in the grips of uncontrollable inflation and an unprecedented energy crisis, the pardon "was a prudent public policy judgment."¹⁴⁶

The *Biddle* understanding evinced what many scholars consider a most profound change in clemency theory from accenting justice or mercy for the affected felon to promoting the overall welfare of greater American society.¹⁴⁷ Nonetheless,

¹⁴⁴ 274 U.S. 480, 486 (1927) (citing *Ex parte Grossman*, 267 U.S. 87, 120, 121 (1925)).

¹⁴⁵ 390 F. Supp. 1372, 1374 (W.D. Mich. 1975).

¹⁴⁶ Kobil, *supra* note 78, at 616 (quoting *Murphy v. Ford*, 390 F. Supp. at 1374); see also, e.g., Love, *supra* note 1, at 1487 n.15 (recounting Watergate and other instances).

¹⁴⁷ See generally 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.5(b), Westlaw

because due process dominates and because no act of clemency that does not comport with justice will satisfy due process, the *Biddle* perspective is displaced if the particular forgiveness, even if promoting a good public outcome, nonetheless is arbitrary, capricious or otherwise unfair, thus comprising an immoral act of Government.

ii. *The Dominance of the Judiciary as a Check on the Executive's Clemency Prerogative*

The prolonged debate over the essential purpose or purposes of clemency has guided constitutional law addressing to what degree, if at all, executive clemency is and should be constrained by the other branches of government. Although there was some initial contrary jurisprudence,¹⁴⁸ a century-and-a-half ago, the Supreme Court's *U.S. v. Klein* explained the then-accepted general conception, "It is the intention of the Constitution that 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. *To the executive alone is [e]ntrusted the power of pardon; and it is granted without limit.*"¹⁴⁹

While its declaration that the President's Art. II, sec. 2 powers virtually are unreviewable has been repudiated by the ascendancy of the Due Process Clauses, the Constitution's ratification history bears out *Klein's* pragmatic understanding that any interference by the co-ordinate branches of government must be circumspect, indeed limited solely to the unique expertise of the particular branch. Believing that in essence Congress would enjoy no such singular expertise under the system recommended to replace the Articles of Confederation, "Proposals during the Constitutional Convention that the power be shared with Congress

(database updated Nov. 2017). Of course, while sometimes competing, the justifications of justice, mercy, and societal welfare often intersect, as indeed one hopes they would. See generally Barkow, *supra* note 141, at 1361.

¹⁴⁸ *United States v. Wilson*, 32 U.S. 150, 161 (1833) (*per* Marshall, C.J., for a unanimous Court) (stating that a pardon may be rejected by the recipient, or "controverted by the prosecutor, and [then] expounded by the court.").

¹⁴⁹ 80 U.S. 128, 147 (1871) (emphasis added). See also, e.g., *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) ("Unlike probation, pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review.").

were rejected on grounds of efficiency, and on the theory that the President's personal accountability to the electorate was a sufficient check on abuses."¹⁵⁰

Thus, the Founders believed that clemency is best vested in a single officer's ultimate decision, rather than by the vote of officers or offices spanning the executive and legislative branches.¹⁵¹ Accordingly, with regard to possible legislative oversight, the simple constitutional standard is that "Congress can neither limit the effect of [a] pardon nor exclude from its exercise any class of offenders."¹⁵² The foregoing principle, certainly accurate as a matter of practical, routine politics, is decreased in some measure by the constitutional authority of Congress to impeach and remove federal officers, including presidents, based essentially on whatever the Legislature feels is proper and sufficient cause. Thus, the Supreme Court explained nearly a century ago, "Our Constitution confers full discretion to pardon on the highest officer in the nation in confidence that he will not abuse it."¹⁵³ However, in the "improbable" instance of severe executive misuse, the Constitution's express, "resort [is] to impeachment rather than to a narrow and strained construction of the clemency power of the President."¹⁵⁴

If a hands-off standard naturally prevents Congress from legislatively checking the President's Art. II, sec. 2 prerogative, "A more difficult issue . . . concerns the authority of the judiciary to limit the President's clemency power, an issue which pits the

¹⁵⁰ Love, *supra* note 1, at 1486 n.13.

¹⁵¹ "Hamilton argued that the pardon power was vested in 'one man' rather than 'a body of men' for two reasons: first, 'the sense of responsibility is always strongest in proportion as it is undivided,' and second, 'as men generally derive confidence from their numbers, they might often encourage each other in an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency.'" *Id.* (quoting THE FEDERALIST NO. 74 at 422-23).

¹⁵² *Ex parte Garland*, 71 U.S. 333, 380 (1866).

¹⁵³ *Ex parte Grossman*, 267 U.S. 87, 121 (1925).

¹⁵⁴ *Id.* Moreover, it is worth brief note that the Constitution does not vest in the Executive exclusive authority over clemency, Congress can enact amnesty statutes so long as such acts do not constrain the President's art. II, sec. 2 authority. *E.g.*, *Brown v. Walker*, 161 U.S. 591, 601 (1896); *Pollock v. Bridgeport Steam-Boat Co. (The Laura)*, 114 U.S. 411, 414-17 (1885). Thus, while such legislative power does not limit the Executive's use of clemency, it emphasizes, consistent with separation of powers, that presidents do not enjoy a monopoly on bestowing clemency.

notion that the presidential clemency power should be unfettered against the principle that the judiciary is responsible for reviewing the constitutionality of executive actions.”¹⁵⁵ Initially, constraint identical to that against Congress inured to the Judiciary.

As Chief Justice Taft averred for the Court in *Ex parte Grossman*, the Constitution’s sole remedy for abuse of Art. II, sec. 2, is impeachment.¹⁵⁶ A quarter-century later, the District of Columbia Circuit reiterated, “The pardon power is one which the Constitution expressly vests in the President.”¹⁵⁷ Consistently, as one commentator urged, ultimately wrongly but emphatically, “A presidential pardon is an act of grace, and the pardon applicant has no due process rights in the process that can be enforced in the courts.”¹⁵⁸ Indeed, because clemency is considered a bulwark—a “check”—against occasional abuse by the Judiciary,¹⁵⁹ theorists argue that it is imprudent, if not unwise, to allow that “checked” branch to review Executives’ decisions to “check” it.¹⁶⁰ Moreover, control by the other governmental branches, including, of course, the Judiciary, arguably undermines the “unitary executive” certain theorists believe the Framers intended.¹⁶¹

¹⁵⁵ Kobil, *supra* note 78, at 597.

¹⁵⁶ “‘Our Constitution,’ wrote Taft for a unanimous Court, ‘confers full discretion to pardon on the highest officer in the nation in confidence that he will not abuse it.’ If the power were abused, the remedy . . . would be ‘resort to impeachment rather than to a narrow and strained construction of the clemency power of the President.’” *Id.* (quoting *Ex parte Grossman*, 267 U.S. at 121).

¹⁵⁷ *Yelvington v. Presidential Pardon and Parole Attorneys*, 211 F.2d 642 (D.C. Cir. 1954) (the court will not compel compliance with internal Justice Department clemency regulations so as to interfere with administration of pardon power).

¹⁵⁸ 9B FED. PROC., L. ED. § 22:2123, Westlaw (databased updated Feb. 2018) (citing *Binion v. U.S. Dep’t. of Justice*, 695 F.2d 1189 (9th Cir. 1983)).

¹⁵⁹ The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. *Ex parte Grossman*, 267 U.S. at 120–21.

¹⁶⁰ “The courts traditionally have taken the . . . position, that the clemency power is outside of the adjudicative process. . . . Some have argued that clemency operates as a check on the courts precisely because it is outside of the adjudicatory system.” Olson, *supra* note 143, at 1022 (footnotes omitted).

¹⁶¹ See Daniel T. Kobil, *Compelling Mercy: Judicial Review and the Clemency Power*, 9 U. ST. THOMAS L. J. 698, 703 (2012) “It is not for us to determine, and we have never presumed to determine, how much of the purely executive

Nonetheless, despite *Ex parte Grossman's* ardent invective against any judicial oversight of executive clemency, the Judiciary, as it must, has confronted and accepted its demanding but inalienable duty: "Since it is the province of the judiciary to say what the law is, the courts must be willing to review the executive's exercise of the clemency power to assure that it comports with the Constitution."¹⁶² Indeed, "the federal judiciary's relative independence from political pressure renders it an apt check on the far more politicized executive branch."¹⁶³

Understandably, as the Supreme Court affirmed relatively recently, the judicial check does not include assuring that even an arguably deserving person receive a reprieve; no felon has an individual right to extract clemency from the Executive:

There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. The natural desire of an individual to be released is indistinguishable from the initial resistance to being confined. But the conviction, with all its procedural safeguards, has extinguished that liberty right: "[G]iven a valid conviction, the criminal defendant has been constitutionally deprived of his liberty."¹⁶⁴

The Sixth Circuit expressed the standard succinctly, "No one has a right to a presidential pardon."¹⁶⁵ Accordingly, as one treatise précised:

There is no Fourteenth Amendment property or liberty interest *in obtaining a pardon*. In terms of

powers of government must be within the full control of the President. The Constitution prescribes that they all are." (quoting *Morrison v. Olson*, 487 U.S. 654, 697-734 (1988) (Scalia, J., dissenting)).

¹⁶² Kobil, *supra* note 78, at 616 (footnote omitted).

¹⁶³ *Id.*

¹⁶⁴ *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 7 (1979) (quoting *Meachum v. Fano*, 427 U.S. 215, 224 (1976)); *see also* *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (quoting *Greenholtz*).

¹⁶⁵ *In re Hanserd*, 123 F.3d 922, 932 (6th Cir. 1997) (citing *Binion v. U.S. Dep't of Justice*, 695 F.2d 1189, 1190 (9th Cir.1983)); *see also* *Herrera v. Collins*, 506 U.S. 390, 413 (1993) ("A pardon is an act of grace. . . .") (quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)).

the Due Process Clause, *a prisoner's expectation* that the prisoner will be pardoned is no more substantial than an inmate's expectation, for example, that an inmate will not be transferred to another prison, and it is simply a unilateral hope.¹⁶⁶

Furthermore, consistent with fundamental principles of judicial review, constitutional law properly establishes that courts may not evaluate the policy benefits *vel non* of any given exercise of executive clemency. Of course, that restraint is axiomatically inherent in constitutional separation of powers where, aside from the occasional instances when reviewing its own common law, the federal judicial role is not to create policy but rather to determine either the meaning or the constitutional *bona fides* of the particular legislation, regulation or other governmental conduct under review. Appropriately:

The judiciary is not the branch of government assigned the task of deciding what is good public policy; if a presidential pardon is not in the public interest, it is for the public to say so at the polls (as they did in the 1976 presidential election, when the Nixon pardon undoubtedly played a role in Gerald Ford's defeat).¹⁶⁷

With the foregoing principles understood, judicial review cannot and properly has not been excluded entirely from the realm of Art. II, sec. 2. After all, the Judiciary's duty—indeed, arguably its greatest duty as one jurist exclaimed—is to assure that governmental actions of every sort and regardless of office comport with the fundamental rights guaranteed by the Constitution of which the preeminent is “due process of law.”¹⁶⁸ Thus, Prof. Strasser rightly concluded:

¹⁶⁶ 16C C.J.S. Const. Law § 1783, Westlaw (database updated Feb. 2018) (emphasis added; citing *Dist. Atty's Office for Third Jud. Dist. v. Osborne*, 557 U.S. 52 (2009); *Antia-Perea v. Holder*, 768 F.3d 647 (7th Cir. 2014); *Conn. Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981)).

¹⁶⁷ Kobil, *supra* note 78, at 617.

¹⁶⁸ “I perceive it to be the highest duty of the Article III courts to guard jealously their power to adjudicate claims of due process violation.” *Strople v. Local Bd. No. 60*, 466 F.2d 601, 607 (3rd Cir. 1972) (Gibbons, J., dissenting). As this

Arguably, due process guarantees afforded by the United States Constitution apply in the pardon context as well. The Court made clear in *Evitts v. Lucey*[, 469 U.S. 387, 401 (1985),] that “when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause.”¹⁶⁹

Such indeed, is the present state of Art. II, sec. 2, law.

iii. Precedent addressing due process and clemency

The Supreme Court put to rest any lingering doubts in *Ohio Adult Parole Auth. v. Woodard*,¹⁷⁰ specifically holding that the Due Process Clause of the Fourteenth Amendment does not require states to follow their own extant clemency procedures even when the state has formally commemorated those procedures in statutes, regulations, executive orders, or judicial rulings. *Woodard* determined that while clemency procedures are constitutionally reviewable, due process considerations do not require the process the Respondent demanded. For our purposes, however, the essential lesson is that executive clemency authority is not free from due process constraints. Limited though those constraints may be, the Constitution does not accord executive clemency “free reign.” Thus, as always, it falls to the Judiciary, applying the Due Process Clauses, to discern what are the applicable limitations and how such apply in any given case.

writing emphasized from the outset, “due process of law” is the “value monism” of the Constitution; therefore, the courts’ greatest obligation is to enforce that charter’s Due Process Clauses. See *supra* Section II.A.

¹⁶⁹ Mark Strasser, *Some Reflections on the President’s Pardon Power*, 31 CAP. U. L. REV. 143, 157 (2003) (symposium). Similarly, clemency expert Daniel Kobil concluded, “a liberty interest in meaningful consideration may be found in the Due Process Clause itself, thereby triggering its procedural protections.” Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH L. REV. 201, 222 (1993).

¹⁷⁰ 523 U.S. 272 (1998).

There is no majority opinion in *Woodard*. Rather, the Court split into three groupings, one comprised of Justices Scalia, Kennedy and Thomas, with Chief Justice Rehnquist authoring for that plurality; a second with Justice O'Connor writing for herself and Justices Souter, Ginsburg and Breyer; and a sole dissenting-concurring opinion written by Justice Stevens. The Rehnquist plurality argued but fell short of a majority-generating fifth vote that judicial review for constitutional sufficiency would improperly change the very nature of the clemency process:

Procedures mandated under the Due Process Clause should be consistent with the nature of the governmental power being invoked. Here, the executive's clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges. Respondent is already under a sentence of death, determined to have been lawfully imposed. If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than he was before.¹⁷¹

Based on the very nature of clemency as, in its words, "a matter of grace" left entirely to executive discretion, the Rehnquist-four averred that, unlike criminal trials and sentencing where "due process of law" is essential, judicial review, particularly due process review, is inconsistent with traditional clemency theory and practice:

Clemency proceedings are not part of the trial—or even of the adjudicatory process. They do not determine the guilt or innocence of the defendant, and are not intended primarily to enhance the reliability of the trial process. They are conducted by the executive branch, independent of direct appeal and collateral relief proceedings. And they are usually discretionary, unlike the more structured and limited scope of judicial proceedings. While traditionally available to capital defendants as a

¹⁷¹ *Id.* at 285 (plurality opinion).

final and alternative avenue of relief, clemency has not traditionally “been the business of courts.”¹⁷²

Although those four justices apparently believed otherwise,¹⁷³ the O'Connor plurality plus Justice Stevens comprised a majority of five, setting as mandatory constitutional law that clemency in general, and presumably Art. II, sec. 2 as well, are constrained by the Due Process Clauses as interpreted by the Judiciary. Specifically, as Justice O'Connor expressed:

I do not . . . agree with the suggestion in the principal opinion that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. . . . When a person has been fairly convicted and sentenced, his liberty interest, in being free from such confinement, has been extinguished. But it is incorrect, as Justice STEVENS' dissent notes, to say that a prisoner has been deprived of all interest in his life before his execution. See *post*, at 1254–1255. Thus, although it is true that “pardon and commutation decisions have not traditionally been the business of courts,” . . . and that the decision whether to grant clemency is entrusted to the Governor under Ohio law, I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings.¹⁷⁴

Justice Stevens essentially agreed with the O'Connor plurality's due process framework, noting that, “There are valid reasons for concluding that even if due process is required in clemency proceedings, only the most basic elements of fair

¹⁷² *Id.* at 284 (plurality opinion) (citations omitted).

¹⁷³ *E.g.*, *Winfield v. Steel*, 755 F.3d 629, 630–31 (8th Cir. 2014) (en banc, per curiam) (the Rehnquist plurality apparently rejected the argument that clemency decisions may be judicially reviewed for due process sufficiency); *See also, e.g.*, *Duvall v. Keating*, 162 F.3d 1058, 1061 (10th 1998) (en banc).

¹⁷⁴ *Woodard*, 523 U.S. at 288–89 (O'Connor, J., with Souter, Ginsburg and Breyer, JJ., concurring) (quoting *Dumschat*, 452 U.S. at 464; emphasis in original).

procedure are required.”¹⁷⁵ Accordingly, subsequent courts have accepted as a constitutional proposition the gist of the O’Connor-Stevens opinions that because the offices of federal and state government must comply with, respectively, the Due Process Clauses of the Fifth and Fourteenth Amendment, and because acts of clemency by definition emanate from one or the other governmental office, such clemency must comport with whatever “due process of law” may require in that context.¹⁷⁶

While unquestionably and properly regimented by the strictures of the Fifth and Fourteenth Amendments, the general consensus among courts and commentators, supposedly suggested by the tenor, if not the text, of the Stevens-O’Connor standard, avers that the level of due process appropriate to clemency matters is “low.”¹⁷⁷ As the Fifth Circuit expressed, “The low threshold of judicial reviewability is based on the facts that pardon and commutation decisions are not traditionally the business of courts and that they are subject to the ultimate discretion of the executive power.”¹⁷⁸ Attempting to explicate what such “low” level of review entails, the Eleventh Circuit concluded that clemency procedures and decisions are constitutional unless attendant due process violations are “grave.”¹⁷⁹ Taking a slightly different tack, but essentially embracing the same idea, the Eighth and Eleventh Circuits denoted the applicable due process standard as “minimal”¹⁸⁰ (thereby implying that only a gravely erroneous clemency decision warrants constitutional reversing or vacating).

¹⁷⁵ *Id.* at 292 (Stevens, J, concurring in part and dissenting in part).

¹⁷⁶ “Justice O’Connor was the fifth and decisive vote for the plurality opinion. Thus, her concurrence set binding precedent.” *Wellons v. Comm’r, Ga. Dept. of Corr.*, 754 F.3d 1268, 1269 n.2 (11th Cir. 2014) (per curiam) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977) and *Swisher Intern., Inc. v. Schafer*, 550 F.3d 1046, 1053 (11th Cir. 2008)), cert. denied, 134 S. Ct. 2838 (2009); see also, *Schad v. Brewer*, 732 F.3d 946, 947 (9th Cir. 2013) (per curiam); *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002).

¹⁷⁷ *E.g.*, Olson, *supra* note 143, at 1029.

¹⁷⁸ *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344 (5th Cir. 1999) (per curiam).

¹⁷⁹ *Banks v. Sec’y, Fla. Dept. of Corr.*, 592 Fed. Appx. 771, 773 (11th Cir.) (per curiam), cert. denied *sub nom.*, *Banks v. Crews*, 135 S.Ct. 512 (2014).

¹⁸⁰ *Winfield v. Steel*, 755 F.3d 629, 631 (8th Cir. 2014) (en banc, per curiam); *Gilreath v. State Bd. of Pardons and Paroles*, 273 F.3d 932, 934 (11th Cir. 2001).

The foregoing consensus among the lower courts *appears* logical especially because, to illustrate what might constitute violations, Justices O'Connor and Stevens offered as examples only the most common and familiar instances. Justice Stevens urged:

Presumably a State might eliminate this aspect of capital sentencing entirely, and it unquestionably may allow the executive virtually unfettered discretion in determining the merits of appeals for mercy. Nevertheless, there are equally valid reasons for concluding that these proceedings are not entirely exempt from judicial review. I think, for example, that no one would contend that a Governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency. Our cases also support the conclusion that if a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause.¹⁸¹

Similarly, Justice O'Connor opined, "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, *or in a case where the State arbitrarily denied a prisoner any access to its clemency process.*"¹⁸² Indeed, underscoring the purportedly "low" standard of due process attendant to review of clemency matters, courts have seized upon the O'Connor plurality's use of the term "Judicial intervention might, for example, be warranted. . . ."¹⁸³ Accenting the word "might," the Fifth Circuit concluded that the examples the O'Connor *Woodard* opinion offered do not even comprise *per se* due process violations, but rather arbitrary denials of clemency that

¹⁸¹ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part).

¹⁸² *Id.* at 289 (O'Connor, J., with Souter, Ginsburg and Breyer, JJ., concurring) (emphasis added).

¹⁸³ *Id.* at 274.

may or may not be unconstitutional depending on the particular circumstances.¹⁸⁴ As that Circuit emphasized in *Epps*, “these requirements *really are* minimal”¹⁸⁵ Although in the minority, some jurists accuse the foregoing courts of reading *Woodard* too narrowly. For example, four judges from the Eighth Circuit emphatically urged, “Justice O’Connor’s hypothetical should not be read to set a firm boundary delineating the only two cognizable claims of clemency procedures which violate due process.”¹⁸⁶

It is worth briefly accenting and applying here what was shown in the general discussion of the meaning of due process. Despite frequent insistence that a gradation of standards exist, there is no actual thing in constitutional adjudication as “minimal” or “low” due process, at least insofar as those terms imply that there is an axis, hierarchy, or pole ranging from marginal to utmost due process emanating from the Constitution. Yes, at their discretion, offices of government might provide procedures and processes exceeding that which is constitutionally required. When Government accords more process than the Constitution requires, we can say that what recipients enjoy is greater than minimal process, but not greater than due process, because *constitutional* “due process” comprises exactly what is required under the given circumstances, no more and no less. If Government accords less, it violates the Constitution; if it accords more, such excess comprises largesse.

Thus, due process is neither high nor low, stern nor light, grave nor minor. Rather, as the Supreme Court famously explained in *Mathews v. Eldridge*, “The type of . . . process due . . . is a function of the context of the individual case. Due process ‘is not a technical conception with a fixed content unrelated to time, place and circumstances.’”¹⁸⁷ Likewise, the Court expressed shortly before *Matthews*, “due process is flexible and calls for such

¹⁸⁴ *Turner v. Epps*, 460 Fed. Appx. 322, 331 (5th Cir. 2012) (per curiam).

¹⁸⁵ *Id.*

¹⁸⁶ *Winfield v. Steel*, 755 F.3d 629, 633 (8th Cir. 2014) (en banc, per curiam) (Murphy, J., with Bye, Melloy and Kelly, JJ., dissenting).

¹⁸⁷ *Jones v. La. Bd. of Supervisors of Univ. of La. Sys.*, 809 F.3d 231, 236 (5th Cir. 2015) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (internal quotation marks and citation omitted)).

procedural protections as the particular situation demands.”¹⁸⁸ Thus, what process or standards actually are *due* depends on the given circumstances. Certainly, in some instances the extent and complexity of constitutionally necessary process may exceed what other situations necessitate. But, as a matter of *constitutional law*, due process is satisfied if the pertinent governmental actor simply complies with what is required. Thus, from a constitutional perspective, there is no *minimal* or *low* due process, only “due process of law.”¹⁸⁹

This more accurate understanding of due process is essential because it sets both a framework and a tone for constitutional analysis. If the basic premise courts adopt is that the applicable due process benchmark is “low” or “minimal,” those courts may well deem almost any procedures or other standards acceptable out of respect for the reviewed governmental office. The very idea of *low* or *minimal* standards invites not completely uncritical review, but certainly high deference that dissuades courts from the searching, in-depth review appropriate for the Constitution’s value monism. Indeed, in similar contexts, courts have noted that even if official action need only be “rational,” the appropriate governmental office must have chosen its arguably rational action by taking a “hard look” at the relevant situation and likely consequences of the chosen action,¹⁹⁰ an approach that fits well with constitutional law.¹⁹¹

Recognizing that due process means what is required under the circumstances reminds us that, despite any deference owed to

¹⁸⁸ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also* *Sys. Contractors Corp. v. Orleans Parish Sch. Bd.*, 148 F.3d 571, 575 (5th Cir. 1998).

¹⁸⁹ Logically, due process analysis includes assessing the “interests at stake in a given case,” *Morrissey*, 408 U.S. at 481; and, certainly some “interests” are more compelling than others. Likely, considered along with other relevant matters, the more important the interest at stake may be, the more intricate will be the process needed to vouchsafe that interest.

¹⁹⁰ *E.g.*, *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 833 F.3d 1274, 1285 (11th Cir. 2016) (interpreting the National Environmental Policy Act of 1969 § 102, 42 U.S.C. § 4332).

¹⁹¹ “In the field of administrative law, for example, courts routinely assess the procedural adequacy of policy formulation in applying the so-called ‘hard look’ doctrine. Indeed, some authorities suggest that the Constitution itself mandates inquiries of this kind.” Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1687 (2001) (citations omitted).

the relevant governmental actor, courts must use their singular knowledge and understanding regarding the meaning and purpose of the Due Process Clauses to assess with a respectful but critical and unflinching eye whether, deliberately or inadvertently, Government has violated “due process of law,” the value monism of the Constitution, thus of America itself. Therefore, although mistakenly referencing, “the minimal application of the Due Process Clause,” the Tenth Circuit came much closer to articulating the correct standard: courts must assure that, in any given instance, “the procedure followed in rendering the clemency decision will not be wholly arbitrary, capricious or based upon whim, for example, flipping a coin.”¹⁹²

Consistent with the Judiciary’s arguable mischaracterization of what due process entails, perhaps expectedly but nonetheless indecorously (at least so far as this article is concerned), the O’Connor-Stevens *Woodard* formulation has received considerable unfavorable critical attention. Indeed, one detractor seemingly castigated the O’Connor plurality for purportedly failing to provide that which the abiding principles of judicial restraint forbids, a full explication of “due process of law’s” applicability to clemency, both state and federal.¹⁹³ Moreover, commentators aver that the Court’s purportedly “low” standard, arguably generous to Government, is essentially toothless. Specifically reviewing what *Woodard* accepted as due process compliant, Prof. Olson sighed:

If this low level of procedural protection satisfied the Court in this case, it is hard to imagine what will not satisfy it. A court will be likely to step in only when a governor acts in a blatantly arbitrary or discriminatory manner and then publicizes that fact. The chances of this happening seem extremely low.¹⁹⁴

¹⁹² Duvall v. Keating, 162 F.3d 1058, 1061 (10th 1998).

¹⁹³ “Four out of five justices urging due process protections in clemency proceedings think that the actual level of protection needed is very low. In *Woodard*, Justice O’Connor found that Ohio’s clemency proceedings exceeded the minimum process required by the Due Process Clause, *without ever saying what that minimum is.*” Olson, *supra* note 143, at 1029 (emphasis added).

¹⁹⁴ *Id.*

While such critiques may meaningfully criticize as faulty how *Woodard* (and subsequent courts) actually have applied the general due process standard, complaints against the O'Connor-Stevens overarching due process framework itself are unwarranted.

First, surely it is unreasonable to expect any single judicial decision to set forth such a clear and comprehensive paradigm of due process—or presumably *any* legal idea—that its full meaning and applications are clear beyond *cavil* thus rendering applications to particular scenarios merely mechanical.¹⁹⁵ Such would require almost omniscient abstract capacity coupled with the similar competence to anticipate and to apprehend every likely, if not plausible incident. Thus, for instance, “Burkean conservatism acknowledges that no theory can be perfectly consistent, complete, or determinate. It does, nonetheless, offer a means of determining that some sorts of arguments are better than others in ways that may guide a court’s interpretation, even if they do not dictate particular results.”¹⁹⁶ Indeed, “no theory is complete—there are trap doors everywhere. . . .”¹⁹⁷

Certainly, if this were not true, the very idea of a constitutional system of government likely would be unenforceable because, human frailty coupled with political pressures render creation and adoption of a complete and explicitly comprehensible constitution essentially impossible. Similarly, as, “[m]any have argued . . . the Constitution must be vague and indeterminate in part to be relevant and useful in future unforeseen and, to the framers, unforeseeable circumstances. . . . The ambiguity, vagueness, and flux of language as well as social, cultural, moral,

¹⁹⁵ E.g., Michael H. Shapiro, *On the Possibility of “Progress” in Managing Biomedical Technologies: Markets, Lotteries, and Rational Moral Standards in Organ Transplantation*, 31 CAP. U. L. REV. 13, 37 (2003) (“no theory can be complete enough to specify all polar cases and explain just why each is considered as such.”).

¹⁹⁶ Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 687 (1994) (referring to the eighteenth-century British philosopher/politician Edmund Burke) (footnote omitted).

¹⁹⁷ Toni M. Massaro, *Gaylaw: Challenging the Apartheid of the Closet*. By William N. Eskridge, Jr. Cambridge: Harvard University Press, 98 MICH. L. REV. 1564, 1584 (2000) (book review).

and scientific changes further exacerbate the problem of judicial review.”¹⁹⁸

Furthermore, theory and experience confirm that even with astonishing comprehension, perspicacity, sentience, and foresight, the most perceptive and unbiased courts cannot devise complete definitions nor discern all applications of relevant law because, as it must be, each litigation is predicated on the given record-at-bar, comprehensive as such record may be. While expressed many times, once again Justice Felix Frankfurter provided a quotably apt synopsis:

Courts are not equipped to pursue the paths for discovering wise policy. A court is confined within the bounds of a particular record, and it cannot even shape the record. Only fragments of a social problem are seen through the narrow windows of a litigation. Had we innate or acquired understanding of a social problem in its entirety, we would not have at our disposal adequate means for constructive solution.¹⁹⁹

Therefore, this writing at least has no complaints about any lack of completeness attending to *Woodard's* due process standard, especially as a more complete, applicable, and fully compatible due process paradigm has been offered herein.²⁰⁰ In fact, the O'Connor-Stevens structure is fully sufficient for its purposes, leaving, as do essentially all constitutional law opinions, further explications and applications to future litigation premised on sufficient records to expound such subsequent determinations.²⁰¹

¹⁹⁸ Joseph Grcic, *The Supreme Court Decision: Consensus or Coercion?*, FED. LAW., June–2007, at 52, 54 (2007) (footnotes omitted).

¹⁹⁹ *Sherrer v. Sherrer*, 334 U.S. 343, 366 (1948) (Frankfurter, J., dissenting) (quoted in *MacKenzie v. Miller Brewing Co.*, 623 N.W.2d 739, 747 (Wisc. 2001)).

²⁰⁰ See *supra* Part II.

²⁰¹ See discussion *supra* Section II.B.4. This assertion must be tempered with one admonition. The proper exemplar with which to solve due process problems is the Supreme Court's "dignity" paradigm which it has used sparingly rather than, as it should, in all cases, and which unnaturally coexists with a competing and incorrect framework based on "deeply rooted" American traditions. In all due process matters, the Judiciary should denote the dignity paradigm as the correct construct.

The *Woodard* due process structure, in particular, does three very apt things. First, it rightfully explains that because executive clemency power is and ought to be broad, the presumption in any litigation is that the challenge is infirm; the challenger must prove that the given executive action confounds "due process of law."²⁰²

Second, *Woodard* reiterated something obvious but useful: that unless meeting a judicially established defense, clemency process and decisions cannot be premised on the most recognizable and apparently prevalent modes of due process violation. In particular, the Court mentioned the almost certain infirmity of "us[ing] race, religion, or political affiliation as a standard for granting or denying clemency."²⁰³

Third and most importantly, *Woodard* confirmed that any clemency process or decision must comply with due process in its broadest form, meaning, "in a case where the State *arbitrarily denied* a prisoner any access to its clemency process."²⁰⁴ As previously proved, Government acting *arbitrarily* is the very definition of a due process infraction.²⁰⁵ Because Justice O'Connor's definition, either alone or coupled with Justice Stevens' expositions, encompasses the quintessence due process, this writing discerns nothing either infirm or lacking.

Consistent not only with what one might expect, but also with sound constitutional analysis, the courts rarely have overturned state or federal clemency determinations even when such seem remarkably ungenerous and steeped in politics. It is not odd that as with legislation, regulation, and common law, in this realm of similarly spacious discretion, governmental officials'

²⁰² Of course, that initial burden may switch if the challenger demonstrates that the act of clemency was based on a clearly unconstitutional consideration. For instance, not that it would happen, if a governor announced that she would pardon only white women, simply proving that such is the stated standard would shift the argument, requiring that governor to prove, if such were possible, that basing clemency on satisfying two such seemingly irrational statuses nonetheless is reasonable.

²⁰³ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 292 (1998) (Stevens, J., concurring in part and dissenting in part). As earlier quoted, Justice O'Connor mentioned another form of apparent arbitrariness that violates due process: "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency. . . ." *Id.* at 289 (O'Connor, J., with Souter, Ginsburg and Breyer, JJ., concurring).

²⁰⁴ *Id.* (emphasis added).

²⁰⁵ See discussion *supra* Section II.B.1.

grants or denials of clemency, and the processes by which they make those decisions, may be dubious on many bases such as wisdom, politics, efficiency, and prudence, but however weak, not actually unfair in the sense of “due process of law.”

That being acknowledged, under the due process *dignity paradigm*, one could bring serious constitutional challenges to significant, longstanding, seemingly unassailable, outwardly sensible benchmarks such as the earlier discussed holdings that there is no enforceable right to a pardon or lesser clemency.²⁰⁶ Proper due process review equally might delegitimize such accepted general doctrines as, because it is an “act of grace,” executives have no duty to use clemency to rectify even undeniable abuses by courts,²⁰⁷ and, executives can “adopt[] a general policy of not granting clemency in[, for example,] capital cases.”²⁰⁸ However, because the singular point of this writing is to explain whether a president or comparable state officer may use her clemency authority to pardon herself or others to gain political advantage, I leave the other just mentioned interesting topics to another day.

IV. THE DUE PROCESS *BONA FIDES* OF EXECUTIVE SELF-PARDONS AND “BLANKET” PARDONS

As noted in the Introduction, almost immediately into the start of his term, both Congress through appropriate committees and the FBI *via* a special counsel began serious, in-depth investigations of the newly elected president, Donald Trump. These investigations concern, *inter alia*, serious claims that during his campaign and thereafter Trump and many of his advisors

²⁰⁶ “No one has a right to a presidential pardon.” *In re Hanserd*, 123 F.3d 922, 932 (6th Cir. 1997).

²⁰⁷ “[W]hile the President may not be entirely free of constitutional constraints in his exercise of the power, it seems clear that he cannot be legally compelled to grant a pardon even in case of “evident mistake.” Love, *supra* note 1, at 1501 (quoting *Ex parte Grossman*, 267 U.S. 87, 120–21 (1925)). Indeed, albeit quivering in a footnote, Love effectively concedes the error of her assertion: “This is not to say that the President may not have a legally enforceable duty to consider granting clemency. It is simply to say that his decision on the merits is not subject to judicial review, *except perhaps on Equal Protection grounds*.” *Id.* at 1501 n.63 (emphasis added).

²⁰⁸ *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002) (citing *In re Sapp*, 118 F.3d 460, 465 (6th Cir.1997)).

violated Federal law by numerous acts that alone and in tandem comprise, to use the presently popular term, “colluding” with the Russian Government. These investigations as well are inquiring into the legality of Trump’s decision to fire FBI Director James Comey who Trump claims was unfit for that high position. However, others aver that Trump abused the discretion of his presidency and engaged in unlawful “obstruction of justice” by firing Comey after he refused Trump’s express requests first to pledge specific loyalty to Trump, and, second to end immediately the FBI’s investigation into connections, if any, between Trump’s campaign and Russia.

As of this writing, the various investigations continue with the expected political ramifications such inquiries tend to engender. Indeed, as often occurs in such situations, the investigations in the Trump campaign-early presidency have, in the words of two critics have “morphed into an open-ended inquiry. It is examining issues—like Donald Trump’s private business transactions—that are far removed from the Russia question. It also has expanded its focus beyond the original question of collusion with the Russians to whether anyone involved in the Russia investigation has committed some related offense.”²⁰⁹ To date at least two individuals under investigation, including Michael Flynn, a retired, decorated general and former Trump National Security Advisor, have pled guilty to federal crimes and apparently have agreed to cooperate with the FBI’s inquiry. Claiming that the investigations essentially are frivolous, purely partisan in nature, and further claiming that a United States president cannot ever unlawfully “obstruct justice” by exercising his lawful authority to fire Federal officers such as FBI directors, many of these critics urge Mr. Trump to issue a “blanket” pardon covering both himself and anyone who in any fashion is, was or is claimed to have been “involved in” any of the subject matters of these investigations.²¹⁰

As has been mentioned herein, presidents have issued blanket or “mass” pardons and similar clemency, more commonly denoted as *amnesty*, the legality of which have not been reputed.²¹¹

²⁰⁹ David B. Rivkin, Jr. & Lee A. Casey, *Begging Your Pardon, Mr. President*, WALL STREET JOURNAL (Oct. 29, 2017 2:38 PM), <https://www.wsj.com/articles/begging-your-pardon-mr-president-1509302308>.

²¹⁰ *Id.*

²¹¹ See *supra* notes 87–88 and accompanying text.

However, such self and blanket pardons, indeed apparently no clemency matters at all have been judicially reviewed under the due process *dignity paradigm* urged by this writing. Accordingly, this article concludes by maintaining that as a matter of constitutional law, self-pardons and mass pardons are not *per se* unlawful, but under the applicable due process *dignity paradigm*, the former are unlikely ever to pass muster, and the latter, while much more likely to be lawful, must still satisfy the requirement of promoting justice—fairness—sufficiently to dispel any tainting political or other delegitimizing influences.

A. Because They Inherently Involve Self-Dealings and Self-Promotion, Self-Pardons Likely Violate the Due Process Clauses of the Constitution

The matter of self-pardons or other forms of clemency ordered by the governmental executive for the immediate and direct benefit of that governmental executive has not been addressed by the courts and has engendered perhaps understandably little scholarly comment. As Prof. Rotunda and Nowak observed:

There is no case law on this subject and there may never be. But President Nixon—who was pardoned by his successor whom he had appointed, President Ford—actually thought of this possibility. On August 1, 1974, shortly before Nixon resigned, his aides presented for him various options, one of which was that Nixon pardon himself and then resign. Nixon's lawyers “prepared a short memorandum concluding that a self-pardon would be legal.” Nixon, however, did not take that alternative.²¹²

²¹² 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.5(d), Westlaw (database updated Nov. 2017) (quoting Brian C. Kalt, Note *Pardon Me?: The Constitutional Case Against Self-Pardons*, 106 YALE L. J. 779, 779 (1996) (generally concluding that self-pardons would be unconstitutional due to the conflict of interests).

While certainly remarked upon in other articles and treatises, the two leading detailed commentaries on the matter consist of an insightful student-note, published roughly twenty years ago by the Yale Law Journal, arguing that self-pardons are unconstitutional,²¹³ and a dual-authored 1999 Oklahoma Law Review article that, while urging self-pardons are legitimate, apparently was drafted prior to the Supreme Court's ruling in *Woodard* that clemency matters are subject to "due process of law" evaluation.²¹⁴ Accordingly, the Nida-Spiro analysis is completely devoid of Due Process Clauses analysis which, this writing politely urges, renders their legal conclusions questionable not with regard to whether self-pardons are constitutionally permissible, but rather the virtual un-reviewability of such pardons those authors aver.

Both articles aptly recognize that, based solely on its text, the Constitution's Art. II, sec. 2, strongly implies that self-pardons (and for that matter, blanket pardons) are among the President's options when considering pleas for, in that provision's term, "reprieves and pardons." Indeed, Profs. Nida and Spiro correctly assert that "A textual interpretation of the Pardon Clause provides the strongest argument that a self-pardon is not prohibited by the Constitution. The concept of a textual interpretation is extremely lucid and direct, but its significance is essential."²¹⁵ In particular, Kalt explained the idea as an example of the well-known canon of interpretation, *expressio unius est exclusio alterius*, meaning "the expression of one thing excludes the other."²¹⁶

There are two limits to the President's power explicit in the Pardon Clause. First, the power applies only to "Offences against the United States." Second, "Cases of Impeachment" are excluded. The "simple" reading of the text points to these explicit restrictions and concludes that what is left, by the principle of *expressio unius*, is not restricted. *If the President did not have the power to pardon himself, the expressio unius reading says,*

²¹³ Kalt, *supra* note 212.

²¹⁴ Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197 (1999).

²¹⁵ *Id.* at 216.

²¹⁶ Kalt, *supra* note 212, at 791 n.73.

*the Framers would have added "and cases involving himself."*²¹⁷

Perhaps unkindly, Kalt calls the application of the *expressio unius* canon, "simplistic and inaccurate."²¹⁸ While this writing agrees that an appeal to Art. II, sec. 2's text alone is an insufficient basis to determine the constitutional *bona fides* of executive self-pardons, "The Supreme Court has stated that the pardon power is plenary, and when interpreting it, one should look to the text to determine its authority."²¹⁹ Concurrently, aside from Art. II, sec. 2:

The Constitution does not contain any other words regarding pardons, and it does not contain any text specifically restricting the President's ability to self-pardon.

As one commentator has stated, "[t]he Constitution provides no limitation on the pardon power, and it has been consistently interpreted to be virtually unlimited." The only limitation is the restriction on impeachment, and if the Framers had intended the text to restrict the pardon power even more, they most likely would have made this intention apparent from the plain meaning of the Constitution. For instance, to restrict self-pardoning, the Framers could have included a clause similar to the following: Power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment and against oneself.²²⁰

Given the constitutional text coupled with its British origins, and its general purposes, there is nothing direct in the Constitution forbidding self-pardons, and much emanating from the executive discretion associated with clemency to justify self-pardoning as within the realm of clemency. Still, Kalt properly

²¹⁷ *Id.* at 791 (emphasis added).

²¹⁸ *Id.*

²¹⁹ Nida & Spiro, *supra* note 214, at 216.

²²⁰ *Id.* at 217 (quoting Peter Ferrara, Commentary, *Could President Pardon Himself?*, WASH. TIMES, Oct. 22, 1996 at A-14).

instructs²²¹ that textualism does not eschew contextualism, that is, investigators must consult the full structure and context of the Constitution to understand the meaning of any given provision.²²² Indeed, with remarkable prescience as his article pre-dates *Woodard*, Kalt accented that consulting Art. II, sec. 2 alone does not take into account how other provisions, particularly the Due Process and Equal Protection Clauses might mitigate that text.²²³ By contrast, as mentioned above, the Nida-Spiro work, seemingly written and submitted during the year of, but prior to the issuance of *Woodard*, makes no mention whatsoever of the Fifth Amendment and how that Amendment's Due Process Clause, which includes an implied guarantee of equal protection,²²⁴ might affect Art. II, sec. 2.

We know from Part II that even within the generous discretion of clemency, "due process of law" requires that acts of pardon or other forgiveness must promote justice, that is must be neither arbitrary, nor capricious, nor otherwise unfair. Under the Supreme Court's *dignity paradigm*, which properly incorporates albeit without provenance Kantian moral philosophy, no clemency may treat the recipient or others "merely as means" and not as "ends in themselves." Thus, even when motivated by and actually promoting beneficent or constructive goals, clemency that demeans the dignity of any individual is, using due process parlance, unfair—arbitrary or capricious—and, thus, is unconstitutional.

As the immediate topic is executive self-pardons, it is now apt to accent a vital corollary to Kant's categorical imperatives that inform due process fairness.²²⁵ Importantly, in their social interactions, individuals owe a moral duty not only to respect the innate dignity of those with whom they interact but owe as well that very duty to themselves. One must respect one's own dignity as one must respect the dignity of others. Kant entitled this codicil

²²¹ Kalt, *supra* note 212, at 791–93.

²²² As the District of Columbia Circuit précised the familiar standard, "We agree . . . that our inquiry begins with the words of the statute. But a word's 'ordinary understanding' is not always controlling. Words draw meaning from context." *Pharmaceutical Research and Mfrs. of America v. Thompson*, 251 F.3d 219, 225 (D.C. Cir. 2001) (discussing U.S. CONST. art. III, §1, establishing the structure of the federal judiciary as an example).

²²³ Kalt, *supra* note 212, at 791–93.

²²⁴ See discussion *supra* Part II.

²²⁵ See generally *supra* Section II.B.3.

to his theory of human dignity the “duty of rightful honor,” which states, “Do not make yourself a mere means for others but be at the same time an end for them.”²²⁶ For instance, while surely one may contract one’s labor even for a relatively small fee, one may not voluntarily enslave oneself to others. One must be one’s “own master.”²²⁷ *Accordingly, if they are to be constitutional, executives cannot issue self-pardons that violate the “duty of rightful honor,”* which, in essence, is what Kalt believes any self-pardon entails.

To better understand the due process jurisprudence inherent in the duty of rightful honor, reference to the “class-of-one” theory is useful. Commonly due process (and often attendant equal protection) litigation concerns governmental actions affecting large or moderately sized classes of individuals. Nonetheless, because the protections of the Due Process Clauses inure to individuals, not exclusively groups,²²⁸ the Supreme Court reaffirmed very recently, “Laws narrow in scope, including “class of one” legislation, may violate the Equal Protection Clause *if arbitrary or inadequately justified*.”²²⁹

Thus, less than a year ago of this writing, the Judiciary reiterated unequivocally that equal protection principles, which we now understand are part of “due process of law,”²³⁰ simply but magnificently proscribe “*arbitrary or inadequately justified*” governmental conduct.

While perhaps properly informing both the design and implementation of remedies, surely it makes no difference whether Government directs such untoward, indeed unconstitutional behavior against the entire population, against one group large or small, or against an unfortunate but no less dignified individual. Thus, the Seventh Circuit equally recently and equally correctly

²²⁶ Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 811 (2003) (quoting Immanuel Kant, *The Metaphysics of Morals* (1797), in *THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY* 392 [6:236] (Mary J. Gregor ed. & trans., 1996)).

²²⁷ Bayer, *supra* note 40, at 903 n.160. Equally, suicide is immoral because the self is treating the self not as an “end,” but as a disposable object with no inherent worth. See Bharat Malkani, *Dignity and the Death Penalty in The United States Supreme Court*, 44 HASTINGS CONST. L. Q. 145, 181 (2017).

²²⁸ *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

²²⁹ *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 n.27 (2016) (emphasis added).

²³⁰ See *supra* Section II.A.

summarized the “class-of-one” doctrine: “The class-of-one label is somewhat misleading because what distinguishes these cases isn’t necessarily the fact that the plaintiff is the only one harmed. . . . *The distinguishing element in this kind of equal-protection claim is that the plaintiff claims that the law’s ‘improper execution through duly constituted agents’ is unconstitutional.*”²³¹

As the foregoing citations evince, the main instructive precedent is the remarkably short *Village of Willowbrook v. Olech*,²³² holding that the respondents stated a cognizable constitutional claim that the Village imposed arbitrary and irrational zoning requisites upon them alone.²³³ The Olechs asserted that Willowbrook’s heretofore unknown 33-foot easement demand was “irrational and wholly arbitrary”; and, “*that the Village’s demand was actually motivated by ill will* resulting from the Olechs’ previous filing of an unrelated, successful lawsuit against the Village; and that the Village acted either with the intent to deprive Olech of her rights or in reckless disregard of her rights.”²³⁴ While the allegation of discriminatory, hostile *animus* might seem vital to the Olechs’ case, the Court ruled that the bare claim of *arbitrariness* was sufficient to support their suit. “These allegations, quite apart from the Village’s subjective motivation, are sufficient to state a claim for relief under traditional equal protection analysis. We therefore affirm the judgment of the Court of Appeals, but do not reach the alternative theory of ‘subjective ill will’ relied on by that court.”²³⁵

This is not to imply that untoward intent—“ill will” and its like—is irrelevant. Indeed, Justice Breyer argued that, regarding constitutional matters in general but specifically addressing the Olech claim, governmental ill will or vindictiveness are reliable factors “to distinguish unconstitutional differences in zoning

²³¹ *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 n.2 (7th Cir. 2017) (emphasis added) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

²³² 528 U.S. 562 (2000) (per curiam).

²³³ “The Village at first conditioned the connection [of respondents’ property to municipal water supply] on the Olechs granting the Village a 33-foot easement. The Olechs objected, claiming that the Village only required a 15-foot easement from other property owners seeking access to the water supply.” *Id.* at 563.

²³⁴ *Id.* (emphasis added). Ultimately the Village relented, but finally requiring only the usual 15-foot easement did not moot the Olechs’ claim.

²³⁵ *Id.*

variances and allowing zoning variances to others that often mean taking each petitioner's unique circumstances into account."²³⁶ Rather, *Olech* underscores that, while certainly relevant evidence, bad intent is not a *sine qua non* to plead and prove due process and similar violations. The relevant question always is whether the record evinces that, regardless whether purposefully or inadvertently the governmental actor or office acted arbitrarily, capriciously, or otherwise unfairly. As the Ninth Circuit explained:

By looking for evidence of the [City of Chicago] Commissioners' personal animosity towards [Appellant] Gerhart, the district court incorrectly analyzed Gerhart's "class of one" claim, which does not require a showing of the government officials' subjective bad feelings towards him. Gerhart does not need to demonstrate that the Commissioners harbored ill will towards him in order to meet the "intent" requirement of his "class of one" claim. Instead, Gerhart must show that the Commissioners intended to treat him differently from other applicants.²³⁷

Similarly, depending on the given context, it may not even be necessary for a litigant to prove that the challenged governmental action actually treated her differently from others. All that is required, as accented above, is to prove that the judicially reviewed official conduct itself—either standing alone or when contrasted with other relevant acts—is arbitrary or otherwise unconstitutional:

In a class-of-one equal-protection case, it may not be clear that the challenged governmental action entails any classification at all. Identifying a

²³⁶ *Id.* at 565–66 (Breyer, J., concurring). Likewise, the Seventh Circuit opined, "Several of our cases have suggested that a showing of subjective ill will can be useful in distinguishing between ordinary errors and discriminatory denials of equal protection." *Geinosky v. City of Chicago*, 675 F.3d 743, 748 n.2 (7th Cir. 2012) (citation omitted).

²³⁷ *Gerhart v. Lake Cty., Montana*, 637 F.3d 1013, 1022 (9th Cir. 2011) (citations omitted).

similarly situated comparator is a way to show that disparate treatment in fact has occurred and sets “a clear standard against which departures, even for a single plaintiff, [can] be readily assessed.” In contrast, where (as here) the plaintiff challenges a statute or ordinance that by its terms imposes regulatory burdens on a specific class of persons (in this case, beer distributors), there’s no need to identify a comparator; the classification appears in the text of the statute itself.²³⁸

Granted, courts have been perhaps miserly if not wrongful, limiting in a few contexts unrelated to the subjects discussed in this article, the coverage of *Olech*.²³⁹ It is worth repeating, therefore, that mere months ago both the highest and intermediate appellate levels reconfirmed the viability of the “class-of-one” concept, emanating as it does from the inviolate due process principle that arbitrary, capricious and otherwise unfair governmental acts and actions are unconstitutional.²⁴⁰

Based essentially on these principles, although pre-dating many of the just discussed precedents, Kalt grippingly argues that self-pardons, essentially a class-of-one, constitute unconstitutional “self-dealings”:

The federal government is structured to prevent self-dealing, as evidenced by several constitutional provisions. A member of Congress, for instance, cannot simultaneously hold another federal office, and cannot resign to take a job that was created or whose pay was increased during that term of

²³⁸ *Monarch Beverage Co. v. Cook*, 861 F.3d 678, 682 (7th Cir. 2017) (citation omitted).

²³⁹ *E.g.*, *Engquist v. Oregon Dep’t of Agric.*, 553 U.S. 591, 601–09 (2008) (“class-of-one” concept not applicable to public employment litigation); *Flowers v. City of Minneapolis, Minn.*, 558 F.3d 794, 799–800 (8th Cir.2009) (“[W]e conclude that while a police officer’s investigative decisions remain subject to traditional class-based equal protection analysis, they may not be attacked in a class-of-one equal protection claim.”).

²⁴⁰ *See, e.g.*, *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1327 n.27 (2016); *Monarch Beverage Co.* 861 F.3d at 682 & n.2 (7th Cir. 2017); *Geinosky v. City of Chicago*, 675 F.3d 743, 747 (7th Cir. 2012).

Congress. [U.S. Const. art. I, § 6, cl. 2;] Congress cannot legislate a pay raise for itself that takes effect before the next congressional election, [U.S. Const. amend. XXVII.] and the presidential salary cannot be increased without an intervening presidential election. [See U.S. Const. art. II, § 1, cl. 7.] The President also cannot receive any other “emolument” from the United States besides his salary. [also in, U.S. Const. art. II, § 1, cl. 7.] In other words, federal lawmakers cannot create or enhance plush, high-paying government jobs for themselves, at least not without letting the voters review the decision.²⁴¹

In response, Nida and Spiro counter that that self-pardons may not be self-dealings entirely but may be designed for the public good.²⁴² They undoubtedly are correct; but, by not addressing in their article any due process considerations, Nida and Spiro cannot account for the fact that governmental actions, including grants of clemency, may be unconstitutional even if supported in large measure by laudable, lawful goals and effects. That presidents and governors may self-pardon not merely to protect themselves from justly deserved legal detriments, but earnestly to promote, and actually promote the “public good,” does not mean that viewed *in toto*, any given self-pardon is not unconstitutional. If the particular chief executive’s self-pardon violates the *duty of rightful honor*,²⁴³ if the executive treats herself merely as a means, not as an end in herself, then that self-pardon is unconstitutional no matter how much arguable societal good it happens to engender.

Insofar as the executive seeks benefits, rewards, and pleasure, the self-pardon is pure self-dealings—similar to those analogized by Kalt. Likely, the purposes of self-pardons are to benefit the self-pardoners by relieving her of the numerous disadvantages, impairments, and humiliation attendant in criminal investigations and trials.²⁴⁴ Likely, most self-pardons are

²⁴¹ Kalt, *supra* note 212, at 794.

²⁴² Nida & Spiro, *supra* note 214, at 219.

²⁴³ See *supra* notes 224–226 and accompanying text.

²⁴⁴ This writing accents “being a suspect” because, even with a self-pardon, the given executive still might be a target of, or at least a subject to, the criminal investigation of others. A self-pardon will not immunize the executive from her

motivated predominately, if not completely, by the given executive's desire to self-deal. As such, self-pardons should be judicially reversible under *Woodard* as due process violations.²⁴⁵ To demean oneself in that manner—to substantially shield oneself from the disapprobation of lawful investigations not through merit such as proving one's innocence, but by the fortuitous device of clemency authority—is to dodge justice. Such dodging certainly is immoral because the particular executive breaches her *duty of rightful honor* by using herself, in this case, her office, as a means to avoid justice. By contrast, had she used herself as an end in herself, her innate dignity would have required her to cooperate regardless of her predilection to gain the comfort and refuge of eluding the investigation.²⁴⁶

Based on the preceding discussion, Kalt is correct in that if self-pardons are effectively and predominately acts of self-dealing, they are unconstitutional.²⁴⁷ However, the question becomes, what if a self-pardon is justifiable as an act of justice?

B. Self-Pardons as Acts of Justice

In addition, and certainly related to the issue of self-dealings, Kalt argues that self-pardons are *per se* unconstitutional as acts of self-judging.²⁴⁸ James Madison set forth that proposition in his famous exclamation, "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment,

duty to participate in any official investigation that comports with "due process of law." In that regard, by being investigated despite the self-pardon, the executive might still experience considerable embarrassment and tangible detriments. Such detriments might be diminished respect and diminished capacity to serve in office, as well as loss of opportunities (economic and noneconomic) once out of office.

²⁴⁵ *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–89 (1998) (O'Connor, J., with Souter, Ginsburg and Breyer, JJ., concurring).

²⁴⁶ Recall that morality requires pursuing "the right," not "the good." *See supra* Section II.B.3. Any President or governor under investigation likely would think it "good" to avoid that investigation and any adverse consequences. Thus, using a convenient device such as her unique authority to grant clemency would be very attractive. However, because doing so would be immoral, it would violate the *duty of rightful honor*, the executive must attain "the right" by not self-pardoning.

²⁴⁷ Kalt, *supra* note 212.

²⁴⁸ *Id.* at 806–07.

and not improbably, corrupt his integrity.”²⁴⁹ Quoting Supreme Court precedent, Kalt fortified his argument by accenting the axiomatic constitutional principle that no person under the jurisdiction of the United States is “above the law.”²⁵⁰ “No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law and are bound to obey it.”²⁵¹

As a general matter, this writing agrees with Kalt. However, as has been accented, “due process of law” takes cases one-at-a-time, judging each on its own merits albeit in light of many overarching, highly abstract principles. Indeed, the only immutable proposition of due process analysis is that immoral governmental action is, likewise, *per se* unconstitutional.²⁵² In the improbable situation that a self-pardon truly is an act of justice, it will be constitutional despite any attendant self-dealings.

One unlikely scenario, for example, would be if a given investigation indisputably has been instituted and instigated in ways that no rational person who understands the Supreme Court’s *dignity paradigm* could deny violates the moral meaning of “due process of law.”²⁵³ Despite its manifest constitutional infirmity, neither Congress nor the courts will halt, alter, or otherwise address the particular investigation. In such a case, the marked injustice of the investigation would support a self-pardon to allow

²⁴⁹ THE FEDERALIST NO. 10, at 79 (Madison) (Clinton Rossiter ed., 1961).

²⁵⁰ Kalt, *supra* note 212, at 807 (quoting, *United States v. Lee*, 106 U.S. 196, 220–21 (1882)); *see also, e.g., U.S. v. Bartko*, 728 F.3d 327, 342 (4th Cir. 2013); *Connecticut v. Cahill*, 217 F.3d 93, 100 (2d Cir. 2000). *See also*, Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 150 (2002) (footnotes omitted) (arguing that the special status and powers of a sitting president renders self-pardons seemingly acts of someone “above the law.”).

²⁵¹ *See Lee*, 106 U.S. at 220–21.

²⁵² *See generally*, Bayer, *supra* note 9 (arguing that it is government’s immutable, non-delegable duty to comport with the moral requisites of “due process of law” no matter what the resulting outcome, even the destruction of the Nation itself).

²⁵³ For example, suppose Jane Doe is America’s first female and second African-American president. Based on racial and sexual *animus*, and nothing but, either Congress, or the FBI, or both, institute a wide-ranging but entirely sham investigation of Doe and her closest associates, predicated on deliberately fake allegations of wrongdoing supported by knowingly falsified and otherwise spurious evidence.

the duly elected executive to continue her term of office. Granted, a corrupt Congress might nonetheless impeach and even convict the wrongfully-investigated president. Moreover, even absent impeachment, the self-pardon alone would not necessarily end the corrupt investigation and its untoward impacts on the given presidency. Still, because the investigation is unjust, and because there appears to be no other pragmatically available remedy, a self-pardon would not be immoral and, therefore, not unconstitutional.²⁵⁴

C. Amnesty, Blanket Pardons, and Due Process

The discussion above on self-pardons also applies to amnesty. This writing will not quarrel with the assertion that, "Amnesties (or group pardons) are a great American tradition dating back to George Washington"²⁵⁵ Moreover, courts have recognized that, as with other forms of clemency, amnesties are judicially reviewable for constitutional adequacy.²⁵⁶ The clear and now expected answer is that large-scale pardons or other forms of class-wide clemency, even covering persons unknown and then-

²⁵⁴ Under this writing's theory, the Judiciary could review the foregoing self-pardon. Because a corrupt judiciary is involved in the relevant scenario, one might suppose that, just as it had wrongfully refused to fix the infirm investigation, the reviewing courts would declare the self-pardon unconstitutional. Until finally leaving office, this might lead to a lengthy cycle of self-pardons, judicial overturning, and more self-pardons when the affected president refuses to abide by the court orders overturning the earlier self-pardons. Such simply reaffirms that no matter how well written and well respected it may be, the Constitution ultimately is no better than the will to enforce it.

²⁵⁵ P.S. Ruckman, Jr., *Preparing the Pardoning Power for the 21st Century*, 12 U. ST. THOMAS L. J. 446, 479 (2016) (footnote omitted). To offer one prominent example, "As a means of sapping the strength of the rebellion, Washington offered blanket pardons to those who would lay down their arms." Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541, 641 n.444 (1994) (citation omitted).

²⁵⁶ See e.g., *Tate v. Dist. of Columbia*, 627 F.3d 904, 908 (D.C. Cir. 2010) (District of Columbia rationally could institute a program granting amnesty to persons who have received parking tickets but, to prevent severe loss of income and to foster other legal purposes, limit that amnesty to persons who received parking citations before January 1, 1997); *Luck v. D.C. Parole Bd.*, 996 F.2d 372, 374 (D.C. Cir.1993) (per curiam) (to alleviate prison overcrowding, government may establish parole program with reasonable requirements and limitations).

unknowable, are not per se unconstitutional under the principles set forth in Part III, particularly the Supreme Court's *dignity paradigm*. Therefore, amnesties to advance sound public policy, to benefit the nation, or to bestow *mercy* on the recipients are constitutional, but only if they promote justice. Because mercy and justice (or public policy and justice) do not always coexist, but rather can compete or even oppose each other, any act of forgiveness predicated on mercy or the "public good" must be sufficiently defensible to comport with "due process of law."

For example, suppose ten very popular politicians, duly convicted of unlawfully corrupt practices, are sentenced to lengthy prison terms. Certainly, a blanket pardon would be invalid under the *dignity paradigm* if the executive sought to curry favor with powerful individuals or the public in general who happen to like the corrupt ten. Such would be the very type of self-dealings already proven to be unconstitutional in clemency matters.²⁵⁷ Even if freeing the ten convicts assuaged violent protests and civil disobedience, such clemency would be immoral because the ten would be freed not because they deserve freedom, but to prevent unlawful violence. As we know from our study of constitutional morality,²⁵⁸ answering immoral conduct with immoral conduct is unconstitutional.²⁵⁹

Similarly, liberating them as acts of mercy would also be wrongful, unless, under principles of justice, they deserve such mercy. For instance, if felons suffering terminal illnesses who likely have but three months to live are routinely freed before fully serving their sentences, then pardons for such felons (who inexplicably are denied such sentence mitigations) would promote the due process justice of equal protection of the law and customs.

By contrast, if the convicted ten have been sentenced to unusually and undeservedly long sentences, or if subsequent fact-

²⁵⁷ See *supra* Section IV.A.

²⁵⁸ See *supra* Part III.

²⁵⁹ That is why, for instance, convicted felons are entitled to due process of law regarding, *inter alia*, their incarcerations. That they have been convicted of unlawful, thus immoral, acts does not permit the Government to treat them merely as means—like inanimate objects that may be used, even abused, and discarded at will. Convictions may morally justify loss of certain liberties, as imprisonment itself evinces. But, because prisoners do not lose their innate human dignity due to their imprisonment, their treatment while imprisoned must comport with due process morality.

finding reveals that their sentences are unduly harsh, absent other extenuating circumstances, a blanket pardon would promote justice and, thus, be constitutional. In sum, under the Due Process Clauses of the Constitution, even with the broad discretion accorded to the President under Art. II, sec. 2, no form of clemency is either *per se* constitutional or *per se* unconstitutional. Rather, as *Woodard* aptly ruled, pardons, commutations, amnesty, and other clemency is lawful under the Constitution if comporting with “due process of law.”

V. CONCLUSION

If Donald Trump decides to grant clemency regarding the extant investigations of Congress and the FBI, such amnesty must comport with Art. II, sec. 2, as informed by the Fifth Amendment. Given Mr. Trump’s apparent disinclination to understand the presidency—or at least *his* presidency—as constrained by the Constitution, it is unclear whether, should he bestow clemency on himself, on others, or on both, he will take “due process of law” into consideration. Mr. Trump has vehemently and frequently expressed his conclusion that these investigations are not only groundless, but essentially immoral (indeed, he may think unconstitutional) attempts by his political opponents to weaken or destroy his rightfully won incumbency. There are commentators who agree, and many who do not. If indeed these investigations and their fruits are constitutionally infirm, then this president may have a firm basis to grant extensive clemency. Of course, the assertions of Trump and his supporters cannot, by themselves, prove such infirmity. Thus, if Trump pardons or otherwise grants acts of forgiveness for himself or others—as many believe he might—that clemency should be deemed unconstitutional, no matter how ardently he bemoans that he and his minions are beings treated unfairly. Conversely, if, by independent and unbiased proof, he can show that his acts of clemency comport with due process morality, meaning, fairness, and justice—as explicated in this article—such clemency would be constitutional. On that, frankly, this author is, at a minimum, skeptical.