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ARTICLE

COMPELLING MERCY: JUDICIAL REVIEW
AND THE CLEMENCY POWER

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When I first began writing about pardons and commutations in 1991, I looked to the judiciary to improve the clemency process: “[the courts] can and should use judicial review to ensure that the executive is using the clemency power constitutionally.”¹ I believed that judicial review of clemency was necessary for two reasons. First, federal statistics showed an alarming decline in the number of pardons and commutations granted by presidents, suggesting that there was a need to look to the courts to help “reinvigorate” the power.² Second, clemency decisions can potentially violate Equal Protection or Due Process principles, but without judicial review there is little to prevent even blatant constitutional violations by executives.³

Today, the need for reform of the federal clemency process is even more apparent. The miserly clemency practices of Presidents George W. Bush and Barack Obama make clemency advocates long for the relative generosity of Presidents Carter and Reagan.⁴ There is also a compelling case to be made that the Justice Department’s advisory function has been captured—and ultimately undermined—by federal prosecutors who are primarily interested in ensuring that sentences be carried out, and rarely mitigated.⁵ And suggestions that racial discrimination could infect the clemency

* Professor of Law, Capital University Law School. I would like to thank the University of St. Thomas Law Journal and Professor Mark Osler for organizing this timely, stimulating symposium on the clemency power. I would also especially like to thank Esther Barrett for her invaluable assistance with the researching and writing of this article.

1. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 620 (1991).

2. *Id.* at 603.

3. *Id.* at 617.

4. President Carter received 1581 pardon and 1046 commutation requests during his presidency. He granted 534 pardons and 32 commutations. President Reagan received 2099 pardon and 1305 commutation requests. He granted 393 pardons and 13 commutations. *Id.* at 640.

5. Evan P. Schultz, *Does the Fox Control Pardons in the Henhouse?*, 13 FED. SENT’G REP. 177, 178 (2001); Daniel T. Kobil, *Reviving Presidential Clemency in Cases of “Unfortunate Guilt,”* 21 FED. SENT’G REP. 160, 163 (2009).

process are no longer hypothetical. A U.S. pardon attorney has left his post and retired after making racially-biased remarks about a clemency applicant.⁶ Even more troubling is a study of presidential pardons demonstrating that in recent years racial disparity mars the clemency process, with whites being more than four times more likely to receive pardons than minorities.⁷ At the state level, concerns about whether clemency procedures comport with due process of law are pervasive.⁸

Given such ongoing problems, it is time to revisit whether the courts should be asked to intervene in clemency matters. Judges, both state and federal, are understandably reluctant to interfere with the decisions of other branches about whether to grant or deny clemency. There are also serious questions about whether judicial review would, in the end, improve the quality of clemency decision making. In this essay, I examine the arguments commonly advanced against judicial review of clemency issues, and conclude that they are unpersuasive. I also explore the circumstances under which the courts should intervene to invalidate grants of clemency or declare specific procedures unconstitutional. Although there are legitimate concerns that judicial review could contribute to further atrophy of the power, I believe that where due process and equal protection guarantees are being eroded by arbitrary or discriminatory clemency practices, or fundamental rights are infringed by unconstitutional conditions, there is a role for the courts to play. However, there is little that the courts can do to promote more robust exercise of the clemency power by governors or presidents who are reluctant to use their authority.

I. CONSTITUTIONALLY DERIVED SEPARATION OF POWERS CONCERNS

The argument that judicial intervention violates separation of powers principles is a significant hurdle that must be overcome in any effort to involve the courts in overseeing grants or denials of clemency. This constitutionally derived separation of powers assertion (i.e., “the judiciary can never consider the propriety of a clemency decision or process”) is distinct from a prudential refusal to consider specific clemency issues based on policy considerations (“it is unwise for the courts to decide this particular issue, although it is within their constitutional authority”).⁹

The Mississippi Supreme Court in *In re Hooker* recently held that it was bound by constitutional separation of powers principles to reject a chal-

6. Dafna Linzer & Jennifer LaFleur, *A Racial Gap for Criminals Seeking Mercy*, WASH. POST, Dec. 4, 2011, at A01.

7. *Id.*

8. See discussion and cases cited *infra* Part III.D.

9. See *infra* text accompanying notes 31–33 (discussing some of the policy considerations that could impel courts to choose not to review clemency matters as a prudential matter).

lenge to controversial grants of clemency made by outgoing Governor Haley Barbour.¹⁰ In *Hooker*, a majority of the court held that:

a facially valid pardon, issued by the governor—in whom our [c]onstitution vests the chief-executive power of this state, and who is the head of the coequal executive branch of government—may not be set aside or voided by the judicial branch, based solely on a claim that the procedural publication requirement of [the state constitution] was not met¹¹

Despite plausible assertions that Governor Barbour had failed to comply with mandatory constitutional language regarding the publication of pardon applications, the *Hooker* majority ruled that it simply could not review such executive action owing to constitutionally derived separation of powers principles.¹²

Those who ask courts to apply federal constitutional principles to the clemency process could well be required to address a similar separation of powers argument. Indeed, the U.S. Supreme Court has at times hinted that the federal judiciary lacks the constitutional authority to interfere in any way with the exercise of the clemency power. In *United States v. Klein*, the Supreme Court held that Congress, and implicitly the judiciary as well, could not interfere with the president's power to pardon: "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 intrusted the power of pardon; and it is granted without limit."¹³ More recently, some members of the Court have suggested that the judiciary should never be involved with clemency, employing broad language reminiscent of *Hooker* that could be read as immunizing federal and state clemency processes from any type of judicial intervention. Chief Justice Burger, rejecting an attempt to compel a grant of state clemency on due process grounds, observed in dicta that "pardon and commutation decisions have not traditionally been the business of courts; as such, *they are rarely, if ever, appropriate subjects for judicial review.*"¹⁴ Chief Justice Rehnquist, writing for four Justices in *Ohio Adult Parole Authority v. Woodard*, would have ruled that clemency, as a matter of "grace" rather than a legitimate claim of entitlement, is not subject to judicial review for alleged violations of due process.¹⁵ As Justice Stevens characterized Chief Justice Rehnquist's approach, even clemency proceedings "infected by bribery, personal or political animosity, or the de-

10. *In re Hooker*, 87 So. 3d 401, 414 (Miss. 2012).

11. *Id.*

12. *Id.* at 401–14.

13. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871).

14. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981) (emphasis added).

15. 523 U.S. 272, 284–85 (1998).

liberate fabrication of false evidence would be constitutionally acceptable.”¹⁶

However, a majority of the Supreme Court has not embraced such a “hands off” approach to judicial involvement in clemency matters. In *Woodard*, Justice O’Connor, joined by four other Justices, acknowledged that the clemency process could sometimes trigger due process review by the courts:

I do not, however, agree . . . that, because clemency is committed to the discretion of the executive, the Due Process Clause provides no constitutional safeguards. . . . [A]lthough it is true that “pardon and commutation decisions have not traditionally been the business of courts,” . . . some *minimal* procedural safeguards apply to clemency proceedings. *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.*¹⁷

In *Schick v. Reed*,¹⁸ the Court likewise had no difficulty reaching the merits of the petitioner’s argument that his commutation exceeded the president’s power to pardon. Although the majority upheld the validity of President Eisenhower’s conditional commutation, none of the Justices suggested that the very act of reviewing the validity of an act of clemency violates constitutionally derived separation of powers principles. Indeed, the Court stated repeatedly that the president could attach to a grant of clemency a condition “which does not otherwise offend the Constitution.”¹⁹ The most direct means of enforcing such a limitation on the clemency power is, of course, judicial review.²⁰

Perhaps the clearest support for the proposition that the judiciary possesses the authority to review the validity of clemency grants comes from several early decisions of the Supreme Court. In *United States v. Wilson*, Chief Justice Marshall wrote for a unanimous Court that a pardon could be rejected by a recipient, or even “controverted by the prosecutor, and [then] expounded by the court.”²¹ Likewise, in *Ex parte Grossman*,²² the Court reviewed, without questioning its authority to do so, the validity of a presidential pardon issued to one imprisoned for criminal contempt of court.

Although *Grossman* ultimately upheld the pardon being challenged, the Court actually invalidated a presidential pardon in *Burdick v. United*

16. *Id.* at 290–91.

17. *Id.* at 288–89 (O’Connor, J., concurring) (second emphasis added) (citation omitted).

18. 419 U.S. 256 (1974).

19. *Id.* at 264, 266–67.

20. Impeachment or other sorts of political checks are alternative means of deterring unconstitutional clemency grants.

21. 32 U.S. (7 Pet.) 150, 161 (1833) (emphasis added).

22. 267 U.S. 87 (1925).

States.²³ In *Burdick*, a newspaper editor, relying on his Fifth Amendment privilege against self-incrimination, refused to reveal to a federal grand jury his sources for a story exposing corruption in the U.S. Customs Office. In order to eliminate the possibility of prosecution and thus frustrate the editor's claim of Fifth Amendment privilege, President Wilson issued a pardon covering any federal crimes Burdick may have committed in connection with the article.²⁴ The Court, however, saw this as an instance of the pardon power infringing on Burdick's Fifth Amendment right, and held that the Court's responsibility was "to preserve both,—to leave to each its proper place."²⁵ In order to protect Burdick's Fifth Amendment privilege, the Court held that the pardon, because it had been refused by Burdick, did not "becom[e] effective," and declared Wilson's grant of clemency invalid.²⁶

This unbroken practice of the Court deciding matters pertaining to exercise of the clemency power suggests that it is unlikely that separation of powers principles would be deemed to place clemency issues categorically beyond the reach of the federal judiciary.²⁷ There is no insurmountable constitutional barrier to asking the courts to intervene regarding clemency.²⁸ However, those who would reform the clemency process using judicial review must also consider whether it is desirable to ask courts to oversee clemency, and if so, what sorts of requests for judicial involvement would most likely succeed?

23. 236 U.S. 79 (1915).

24. *Id.* at 85–87.

25. *Id.* at 93–94.

26. *Id.* at 94. Interestingly, the Court refused to follow the reasoning of *Burdick* in a later case, *Biddle v. Perovich*, 274 U.S. 480 (1927). In *Biddle*, Justice Holmes, writing for the Court, held that a grant of commutation was effective even if the recipient of the commutation had not consented to the imposition of a lesser punishment (life imprisonment instead of hanging). *Id.* at 487–88. In such a case, Holmes reasoned that the grant of clemency, like punishment itself, could be imposed regardless of the will of the prisoner, and that the reasoning of *Burdick* was not "to be extended to the present case." *Id.* at 488. However, Justice Holmes did not question the *Burdick* Court's authority to review grants of presidential clemency, and implicitly affirmed that power by reviewing Perovich's claim that his commutation was invalid. Thus, *Biddle* actually is consistent with *Burdick* insofar as judicial review is concerned.

27. This is not to say the separation of powers issues could never arise in a clemency case. For example, if the courts were asked to order the issuance of a pardon to a particular person, it is quite possible that this would be deemed to violate constitutionally derived separation of powers principles. Indeed, it was a claim that certain prisoners had a constitutionally protected interest in obtaining commutations that brought the Court closest to washing its hands of clemency matters entirely in *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981). However, short of a litigant seeking a comparably extraordinary intrusion on the clemency authority, it seems that courts would consider constitutional issues that arise in the context of clemency.

28. *But see* *Graham v. Angelone*, 73 F. Supp. 2d 629 (E.D. Va. 1999) (stating that a clemency petition directed to the governor of Virginia is not subject to judicial review based on separation of powers and Tenth Amendment principles).

II. IS JUDICIAL REVIEW OF CLEMENCY ISSUES DESIRABLE?

From the perspective of those who wish to see clemency function effectively as a release and restoration of rights mechanism, it might seem obvious that judicial review of flawed clemency processes is desirable. After all, executives are not inclined to fix clemency mechanisms even when they appear to be broken. Despite widespread criticism of the Office of the Pardon Attorney, President Obama abandoned initial efforts to reform federal clemency practices.²⁹ Likewise, state executives seldom devote much attention to the clemency process until the end of their term, by which time it is impractical to implement measures to improve the administration of clemency.³⁰ Courts potentially offer an attractive alternative to the inattention of chief executives.

Nevertheless, there are plausible reasons why, for matters of policy, one might object to judicial review of clemency matters. A number of these objections are related less to clemency per se than to normative assumptions about the proper role of the courts in our government. For example, some observers might object to judicial review of presidential clemency acts because of an underlying commitment to the theory of a unitary executive akin to that voiced by Justice Scalia in his separation of powers jurisprudence.³¹ Under such a view, the President alone should have complete and final say over all matters of executive authority, including clemency. Likewise, a strong belief in the importance of federalism may cause others to conclude that federal courts, at least, should decline to review any state clemency issues out of respect for state sovereignty. Judge Posner expressed this philosophical reluctance to review state clemency procedures in *Bowens v. Quinn*, a case in which the court refused to order the Governor of Illinois to issue clemency decisions in a timely manner:

We therefore balk at the idea of federal judges' setting timetables for action on clemency petitions by state governors.

29. Linzer & LaFleur, *supra* note 6.

30. The experience of Ohio Governor Richard F. Celeste is typical. Celeste, by his own admission, thought little about clemency until shortly before he was leaving office in 1991, at which time he lacked key advisors to help him administer clemency in a coherent fashion. Richard F. Celeste, *Executive Clemency: One Executive's Real Life Decisions*, 31 CAP. U. L. REV. 139, 139 (2003) (“[T]he clemency power is in many respects the most unencumbered power enjoyed by a Governor. It is also the one for which there is the least training or preparation. When I was first elected and went to the new Governors course . . . there was no hour devoted to this responsibility and no required reading. Nor did anyone take me aside to offer good advice on this as they did on everything from relations with legislative leadership to handling the Federal reforms of CETA.”).

31. *Morrison v. Olson*, 487 U.S. 654, 697–734 (1988) (Scalia, J., dissenting) (“It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President. The Constitution prescribes that they *all* are.”); *see also* *Printz v. United States*, 521 U.S. 898, 922 (1997) (“The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known.”).

. . . Federal courts have run prisons, school systems, police and fire departments, and other state and local agencies found to have engaged in unconstitutional conduct. But for a federal court to run a governor's pardon system would be a step too far.³²

It might also be argued that reviewing an act of clemency presents a non-justiciable political question that should not be decided by the courts.³³

These arguments are surely important, but their resolution hinges on fundamental jurisprudential principles that have long been debated and are not unique to clemency.³⁴ Thus, a detailed assessment of federalism principles or considerations of judicial restraint would take us far afield from clemency. Instead, I would like to consider why those who care about the proper functioning of clemency should think carefully before involving the courts.

First, judicial review of clemency could undermine one of the key advantages of the federal clemency model: the undivided responsibility placed in the hands of the executive encourages a sense of care and scrupulousness in making clemency decisions that might be lost if the responsibility were shared with the courts. The federal constitutional approach, which is also commonly employed by the states,³⁵ vests the chief executive with plenary responsibility to make clemency decisions. Thus, it is the president or governor alone who is given the responsibility of deciding whether clemency is deserved in a particular case. Alexander Hamilton saw this vesting of the clemency power in the president as one of the strengths of the Constitution:

32. 561 F.3d 671, 676 (7th Cir. 2009).

33. See *Nixon v. United States*, 506 U.S. 224, 224 (1993) (refusing to review constitutionality of Senate impeachment procedure for prudential reasons); *Baker v. Carr*, 369 U.S. 186, 287 (1962) (determining that the Constitution has assigned certain provisions to be enforced by the other branches of government, and that when such a constitutional provision is at issue, the Court will refuse to hear the case on the grounds that it is a non-justiciable political question). For an insightful discussion of the political question issues that could arise in the context of clemency, see Mark Strasser, *The Limits of the Clemency Power on Pardons, Retributivists, and the United States Constitution*, 41 BRANDEIS L.J. 85, 138–43 (2002).

34. See generally Larry D. Kramer, *The Supreme Court 2000 Term: Foreword: We The Court*, 115 HARV. L. REV. 4 (2001) (arguing that the Supreme Court has overstepped its bounds from judicial review to judicial sovereignty); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (arguing against judicial review from a standpoint that the practice is “democratically illegitimate”). See also Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069 (2006) (asserting that rhetoric regarding “discretion-free” judicial review does not fit with reality).

35. MARGARET COLGATE LOVE, *RELIEF FROM COLLATERAL CONSEQUENCES OF A CRIMINAL CONVICTION: A STATE-BY-STATE RESOURCE GUIDE* 22–36 (2006). There are three basic models for dispensing clemency. States most commonly give the governor the ultimate authority to make clemency decisions, often with the assistance of an administrative agency. *Id.* at 23. Some states have a “hybrid” system where the governor exercises the clemency power only after prior approval by an administrative board. *Id.* at 28–29. A handful of states give the clemency authority to an independent board of gubernatorial appointees. *Id.* at 23–26.

As the sense of responsibility is always strongest, in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. *The reflection that the fate of a fellow-creature depended on his sole fiat, would naturally inspire scrupulousness and caution*; the dread of being accused of weakness or connivance, would beget equal circumspection, though of a different kind. On the other hand, 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. On these accounts, one man appears to be a more eligible dispenser of the mercy of the government, than a body of men.³⁶

The considerations expressed in Federalist No. 74 have special force when clemency is sought in a death penalty case, where the defendant often wants a governor or president to wrestle with his or her conscience as to the “fate of a fellow-creature.”³⁷ The prospect of judicial review might cause executives to be less inclined to make a difficult, politically charged decision to commute a questionable death sentence or to pardon a criminal convicted of a heinous crime, instead hoping to pass these responsibilities on to the courts. It is also plausible that the prospect of judicial review could cause an executive to be less careful in dispensing clemency, confident that the courts will “clean up” any mistakes.

However, I am not convinced that the division of responsibility argument should cause clemency advocates to forego completely the option of seeking judicial review. There certainly would seem to be no reason for such restraint in the federal system where judicial review is already established.³⁸ Moreover, Hamilton’s vision of the president wrestling in solitary fashion with each clemency decision is now a pipe dream: everyday clemency decisions are made by the Office of the Pardon Attorney, which can (and does) reject most clemency applications before anyone in the White House sees them.³⁹ Thus, responsibility for making clemency decisions is already effectively divided, at least within the executive branch. Occasional

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

37. It is my personal recollection that the possible loss of this sense of undivided responsibility by the governor was one of the factors that prompted the section 1983 challenge of the state’s proposed clemency procedures in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998). Having been consulted by attorneys who challenged the new procedure prior to the filing of the case, one concern that was expressed was that if the Adult Parole Authority made recommendations to the governor early on, before execution was imminent, the governor might be more inclined to deny clemency summarily and wash his hands of the matter, hoping to pass the final “life or death” decision on to the judiciary.

38. See *supra* text accompanying notes 17–27.

39. Linzer & LaFleur, *supra* note 6.

judicial review of the clemency process would be unlikely to lead to a greater degree of atrophy than currently exists.

At the state level, nothing suggests that the absence of judicial review in a particular jurisdiction means that governors are more likely to grant clemency. For example, California law does not allow the courts to review the Governor's clemency decisions.⁴⁰ Yet no California governor has commuted a death sentence since 1976.⁴¹ Ohio, on the other hand, does allow the courts to review and actually invalidate grants of clemency.⁴² However, this prospect does not seem to have deterred governors from granting clemency in controversial cases involving capital punishment. Overall, Ohio's governors have granted eight commutations of death sentences since 2008, the most of any state apart from Illinois, which abolished the death penalty in 2011.⁴³ Moreover, since the death penalty was reinstated in 1976, Ohio's governors have granted about one commutation for every three people executed, the highest ratio of clemency in an active death penalty state.⁴⁴ If the prospect of judicial review actually decreased the willingness of governors to grant clemency in controversial cases, one would expect to find few grants of clemency from Ohio's governors.

The second reason advanced for rejecting judicial review is more compelling: it will inevitably result in the invalidation of some pardons and commutations. This is a legitimate concern with regard to a power that is in danger of atrophying in many jurisdictions, including the federal system. In *Hooker*,⁴⁵ the refusal of the court to review any of Governor Barbour's grants of clemency meant that all 215 grants of clemency remained intact.⁴⁶ However, if the dissenters' approach had prevailed, there is a significant likelihood that Mississippi courts would have invalidated some or all of the

40. *People v. Ansell*, 24 P.3d 1174, 1189 (Cal. 2001) (stating that pardon decisions are discretionary and rest ultimately with the governor); *Jenkins v. Knight*, 293 P.2d 6, 8 (Cal. 1956) (holding that the judiciary will not interfere with the governor's performance of political or executive acts that involve "the exercise of judgment or discretion" such as pardons).

41. *Clemency*, DEATH PENALTY INFORMATION CENTER, <http://www.deathpenaltyinfo.org/clemency> (last visited Oct. 28, 2012) (listing grants of clemency in capital cases).

42. *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 379 (Ohio 1994) (invalidating pardon of Governor Richard F. Celeste).

43. *See Clemency*, *supra* note 41.

44. *See State by State Database*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/state_by_state (last visited Oct. 28, 2012). The Death Penalty Information website shows that Ohio has had 48 executions and 16 commutations since 1976. *Id.* By contrast, during the same period, California has had 13 executions and 0 commutations, Virginia has had 109 executions and 8 commutations, Florida has had 73 executions and 6 grants of clemency, while Texas has had 488 executions and a meager 2 commutations. *Id.*

45. 87 So. 3d 401 (Miss. 2012).

46. *Id.* at 403, 414. According to news reports, Barbour pardoned 198 people on Jan. 10, 2012, shortly before ending his second term as governor. Emily Wagster Pettus, *16 Pardoned by Barbour After Parole Board Said No*, HUNTSVILLE TIMES, Feb. 17, 2012, at 06C. "He also granted 13 medical releases; one suspension of sentence; one conditional, indefinite suspension of sentence; and one conditional clemency." *Id.*

pardons and commutations that the Governor had granted without complying with the publication requirements of the Mississippi Constitution.⁴⁷

Certainly, if courts have the power to review grants of clemency, they will sometimes declare pardons and commutations invalid. As the previous discussion of *Burdick*⁴⁸ demonstrates, the U.S. Supreme Court nullified a presidential grant of clemency. Likewise, in *State ex rel. Maurer v. Sheward*,⁴⁹ the Ohio Supreme Court declared void a pardon granted by Governor Richard F. Celeste because the Governor had not followed the procedure set forth in the Ohio Constitution. The court stated that “[a]n attempted pardon that is granted without adherence to constitutionally authorized requirements is invalid and is not immune to challenge.”⁵⁰ Other courts have also been willing to invalidate grants of clemency.⁵¹

Thus, by urging judicial review of clemency matters, I cannot deny that I am also opening the door to the rejection of desirable grants of clemency. For those who, like Professor Doug Berman, believe there is “no such thing as a bad grant of clemency,”⁵² judicial review is undoubtedly dangerous: it will result in the overturning of some commutations and pardons, and could be employed to set aside politically unpopular decisions like the *Hooker* grants, nearly twenty percent of which went to murderers and sex offenders.⁵³

However, this concern does not justify rejecting judicial review categorically. I do not agree with Professor Berman that every grant of clemency is necessarily “good.” Though I am troubled, like Professor Berman,

47. *In re Hooker*, 87 So. 3d at 439 (Randolph, J., dissenting) (stating that “the circuit court would determine whether the State has overcome the presumption of validity” and presumably invalidate grants of clemency that did not satisfy the publication requirement).

48. 236 U.S. 79 (1915).

49. 644 N.E.2d 369, 379 (Ohio 1994).

50. *Id.* at 373.

51. *See, e.g.*, *Horton v. Gillespie*, 279 S.W. 1020, 1025 (Ark. 1926) (invalidating a pardon issued by the acting governor for failing to follow the correct procedure for granting pardons); *Dover v. Bickle*, 285 S.W. 386, 388 (Ark. 1926) (same); *People ex rel. Garrison v. Lamm*, 622 P.2d 87, 90 (Colo. App. 1980) (invalidating a pardon issued by the lieutenant governor of Colorado while the governor was absent for failing to follow the proper procedure); *State v. Dunning*, 9 Ind. 20, 23 (Ind. 1857) (invalidating the remittance of a fine for failing to follow a statute that required the application for remission to be accompanied by statements of opinion by state officers on the propriety of remitting the fine); *Jamison v. Flanner*, 228 P. 82, 99 (Kan. 1924) (invalidating Kansas governor’s pardon for failing to follow notice procedure required for pardons under the state constitution); *State ex rel. Maurer*, 644 N.E. 2d at 379 (invalidating Ohio governor Richard F. Celeste’s pardon for failure to follow state constitutionally mandated procedure); *see also* *Gulley v. Budd*, 189 S.W.2d 385, 389–90 (Ark. 1945) (holding that the court has the power to invalidate a pardon obtained from the governor under fraudulent pretenses since there is no procedure for the governor to do so); *Rathbun v. Baumel*, 191 N.W. 297, 299 (Iowa 1922) (same).

52. Professor Douglas Berman, Address at the University of St. Thomas Law Journal Spring Symposium: Sentence Commutations and the Executive Pardon Power (Apr. 20, 2012).

53. Jay Newton-Small, *Haley Barbour’s Pardons: Why No One in Mississippi Is in a Forgiving Mood*, TIME, Jan. 13, 2012, available at <http://swampland.time.com/2012/01/13/haley-barbours-pardons-why-no-one-in-mississippi-is-in-a-forgiving-mood/>.

by the general unwillingness of executives to use the clemency power, I believe that it may occasionally be appropriate for the courts to overturn pardons or commutations. Certainly it is possible to identify some clemency grants that have been predicated on bad information or that might, in rare circumstances, have been deemed dangerous. Judicial invalidation of such grants, if done with care, could actually strengthen the clemency power by increasing public confidence in its exercise.

For instance, a pardon issued by Governor Barbour to Harry R. Bostick is extremely troubling. While Bostick's pardon application was pending for his third DUI, a felony, Bostick committed a fourth DUI and in the process killed an eighteen-year-old woman. Nonetheless, Governor Barbour inexplicably granted Bostick's pardon just three months later:

Of all the pardons issued by Mr. Barbour, the case involving Harry R. Bostick, first disclosed by a blogger in Oxford, Miss., Tom Freeland, may be the most confounding.

Mr. Bostick, a former criminal investigator for the I.R.S., was sentenced in May 2010 for his third drunken driving offense—a felony—and ordered into treatment.

. . . .

In October [2011], Mr. Bostick, 55, was arrested again for drunken driving, this time in an accident that left an 18-year-old waitress dead. The waitress, Charity Smith, was working at Cracker Barrel to save money for college. On a Friday night, her Buick collided with Mr. Bostick's truck.

Mr. Bostick was charged with his fourth D.U.I. On Jan. 10, [2012,] he was pardoned for his prior felony D.U.I. by Mr. Barbour.⁵⁴

Judicial invalidation of Bostick's pardon, if it had been accomplished in a manner consistent with the rule of law, would have likely improved public confidence in clemency and may have prompted future governors to be more careful than Barbour, whose sloppy clemency practices prompted Mississippians to consider abolishing the clemency power altogether.⁵⁵

Similarly, in my view, it was not a mistake for the U.S. Supreme Court in *Burdick*⁵⁶ to invalidate the pardon tendered by President Wilson in order to get around the First Amendment and Fifth Amendment protections invoked by a member of the press. As I will discuss more fully below, the pardon power cannot be exercised in a manner that violates fundamental constitutional rights. Few would defend a presidential pardon issued on condition that the recipient agree to vote for the president's party in all

54. Campbell Robertson & Stephanie Saul, *List of Pardons Included Many Tied to Power*, N.Y. TIMES, Jan. 27, 2012, at A1.

55. Sid Salter, *Pardon Me?*, HUNTSVILLE TIMES, Jan. 15, 2012, at 17A.

56. 236 U.S. 79 (1915).

future elections, or donate one million dollars to the president's reelection campaign.

Thus, it is not the invalidation of clemency per se that is problematical. The principal danger presented by judicial invalidation is that the courts will overreach, aggressively infringing on use of the clemency power and thereby constricting an already atrophied appendage of executive authority. For example, if the Mississippi Supreme Court had thrown out Bostick's pardon, would they also have rejected well-deserved pardons that were not marred by inadequate information?⁵⁷

It is impossible to say how the Mississippi pardons and commutations would have fared if all 214 had been reviewed by the courts for compliance with the publication requirements of the Mississippi Constitution. However, based on what has occurred in other jurisdictions, fears that judicial review will result in the wholesale invalidation of clemency grants appear to be more theoretical than real.

Thus far, courts have simply not been eager to invalidate clemency grants of any kind, either at the state or federal level. The Supreme Court has only once overturned a presidential pardon.⁵⁸ With respect to judicial review of state clemency processes on federal constitutional grounds, the Court has left the door open for possible intervention, but just a tiny crack. Justice O'Connor's controlling concurrence in *Woodard* emphasized that clemency decisions "have not traditionally been the business of courts."⁵⁹ Although she recognized that "some *minimal* procedural safeguards apply to clemency proceedings," she suggested that this would only warrant judicial intervention in the face of wholly arbitrary clemency practices such as decisions made by the toss of a coin.⁶⁰ Given this demanding standard, it is not surprising that the Court has never invalidated a state grant of clemency.⁶¹ Indeed, the Court in *Woodard* upheld Ohio's clemency practice

57. Indeed, the majority of Barbour's grants went to persons who had been released from jail and whose applications had been approved by the Mississippi Parole Board. Yet if the Mississippi courts had chosen to review challenges to all of Barbour's grants of clemency based on the lack of compliance with the Constitution's publication requirement, it seems likely that some legitimate grants of clemency would have been thrown out too. See Patrik Jonsson, *Did Haley Barbour Overlook Mississippi Constitution Before Mass Pardon*, CHRISTIAN SCI. MONITOR, Jan. 12, 2012, at 16 (noting that Barbour had defended the grants because "the state parole board had already approved release of ninety percent of those pardoned, that the majority of them had already been released, and that his main goal was to restore voting and even hunting rights for Mississippians who had paid their price to society").

58. *Burdick*, 236 U.S. at 95.

59. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (citation omitted).

60. *Id.* (suggesting that judicial intervention might be warranted by a scheme where a State official flipped a coin to determine whether to grant clemency, or if the State arbitrarily denied a prisoner "any access" to its clemency process).

61. However, the Court summarily reversed a ruling by the U.S. Court of Appeals for the Sixth Circuit invalidating two commutations issued by the Governor of Tennessee. See *Rose v. Hodges*, 423 U.S. 19, 21–22 (1975).

without even a remand to apply Justice O'Connor's "minimal procedural safeguards" standard.⁶²

State courts have also been reticent about using their power to undo or limit executive clemency. For example, in *State ex rel. Maurer v. Sheward*, the Ohio Supreme Court did reject one of Governor Celeste's pardons, but it still declined to invalidate the controversial death penalty commutations that had originally spawned the challenge to the governor's authority.⁶³ Thus, *Maurer* overall was a significant vindication of the governor's clemency authority. Similarly, in *Gulley v. Budd*, a case sometimes cited as showing that the clemency power can be limited by the courts,⁶⁴ the Arkansas Supreme Court asserted its authority to review "the Governor's power to act" with regard to clemency, but held that the pardon challenged by the prosecuting attorney was valid.⁶⁵ In Colorado, although the court invalidated a pardon, it did so at the request of sitting Governor Richard Lamm, who sought to rescind the grant of clemency made by his lieutenant governor while Lamm had been absent from the state.⁶⁶ Thus, judicial invalidation of the pardon was actually a means of reinforcing the broad clemency authority of Colorado's governor.

62. *Woodard*, 523 U.S. at 289–90.

Post-*Woodard*, Chief Justice Roberts, in an opinion joined by four other justices, stated that non-capital defendants "cannot challenge the constitutionality of any procedures available to vindicate an interest in state clemency." *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). Thus it is possible to argue that a majority of the Court no longer accepts Justice O'Connor's view that "minimal" procedural protections apply to state clemency processes, at least in non-capital cases. However, because Justice Robert's opinion does not overrule or even refer to *Woodard* and disposes of the clemency issue in two sentences, it is likely that Justice O'Connor's approach in *Woodard* is still good law, as one lower court has assumed. *Link v. Nixon*, No. 2:11-CV-4040, 2011 WL 529577, at *3 (W.D. Mo. Feb. 7, 2011) (citation omitted) (stating that "some minimal due process protections apply to a State clemency proceeding").

63. 644 N.E.2d 369 (Ohio 1994). As Chief Justice Moyer explained in the concurring opinion, this was not because the justices in the majority agreed with the Governor's unpopular death penalty commutations, but because they felt constrained not to interfere with the broad constitutional authority of the Governor to grant clemency:

We are not required or even requested to review the wisdom or the judgment of the acts of Governor Celeste when he pardoned and commuted the sentences of the defendants two business days before he left office. If that were the issue, my vote would be to invalidate all of the Governor's actions. That, however, is not the issue we are required to decide. Nor is there any dispute that even if the Governor were required by the [c]onstitution and the statutes to receive a report from the Ohio Adult Parole Authority before granting a pardon or commutation, he could disregard the recommendation contained in the report and grant the pardon or commutation. Indeed, the manner in which Governor Celeste granted the commutations and pardon in the cases before us suggests that even if he had followed the statutory procedure, it is unlikely he would have followed a recommendation of the Adult Parole Authority that any of the defendants not be granted a commutation or pardon. It appears that that is precisely the reason the dissent advocates an amendment to the [c]onstitution that would limit the power of the Governor to grant pardons, commutations, and reprieves.

Id. at 380.

64. *In re Hooker*, 87 So. 3d 401, 421 n.77 (Miss. 2012) (Randolph, J., dissenting).

65. 189 S.W.2d 385, 388 (Ark. 1945).

66. *People ex rel. Garrison v. Lamm*, 622 P.2d 87 (Colo. App. 1980).

What these decisions show is that if anything, judicial review has rarely resulted in courts placing limits on the executive clemency power. Rather, judicial review is an exceptional remedy, the contours of which must be carefully delineated in order to be successfully invoked. This, then, is the crux of the question regarding judicial review: What sorts of claims regarding clemency are properly reviewable by the courts?

III. WHAT TYPES OF CLAIMS WILL BE REVIEWED BY THE JUDICIARY?

If we are to take them at their word, courts are willing to review grants of executive clemency that violate or undermine another provision of the Constitution. The Court in *Schick v. Reed*⁶⁷ repeatedly stated that the president may issue commutations in a manner “which does not otherwise offend the Constitution.”⁶⁸ *Burdick*⁶⁹ saw the Court invalidating a presidential pardon in order to “preserve” the Fifth Amendment’s guarantee against self-incrimination.⁷⁰ Five Justices in *Woodard* concluded that state clemency processes must provide at least minimal due process protections.⁷¹ However, in practice, it seems likely that the judiciary will only countenance claims of constitutional violation when the remedy sought is one that the courts are comfortable providing, such as invalidation of clemency grants, or perhaps enjoining a particular manner of exercising the power.⁷² As Samuel Morison has observed regarding the federal authority, “the Achilles’ heel in subjecting clemency decisions to judicial review is in fashioning an adequate remedy, since a court can neither enjoin the president to issue a pardon or grant ‘equitable’ relief on its own authority.”⁷³

Under the U.S. Constitution, there are four possible types of challenges that provide a plausible basis for judicial review of the clemency power. First, a presidential grant of clemency could be set aside for violating the only express limitation set forth in the Constitution, that a pardon cannot be issued “in Cases of Impeachment.”⁷⁴ Second, clemency grants by presidents or governors might be declared invalid because they infringe on fun-

67. 419 U.S. 256 (1974).

68. *Id.* at 264, 266–67.

69. 236 U.S. 79 (1915).

70. *Id.* at 93–94.

71. *Woodard v. Ohio Adult Parole Auth.*, 523 U.S. 272, 289 (1998).

72. The Supreme Court has not imposed any restrictions on state or federal clemency practices. However, the lower federal courts have sometimes found egregious state clemency practices to violate the Constitution. *See, e.g.*, *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000) (enjoining an execution based on a claim that the state had violated due process by preventing the governor from obtaining truthful information that was relevant to commutation request).

73. Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 *STAN. J. C.R. & C.L.* 253, 288 (2010); *see also Ex parte United States*, 242 U.S. 27, 42 (1916) (arguing that federal courts do not have inherent authority to relieve prisoners from the imposition of punishment because that right “belongs to the executive department”).

74. U.S. CONST. art. II, § 2 (giving the president the power to grant pardons and reprieves, for “Offenses against the United States, except in cases of Impeachment”).

damental rights, such as free speech or reproductive freedom. Third, the courts could provide relief if clemency were granted or denied in violation of equal protection principles by discriminating on the basis of race or gender. Finally, clemency practices could be modified or enjoined by the courts for failing to provide minimal due process protections. These issues are discussed below.

A. Clemency Granted in Cases of Impeachment

The drafters of the Constitution, following the model of the British Act of Settlement of 1700, sought to prevent the president from using the clemency power to interfere with the process of impeachment.⁷⁵ Alexander Hamilton originally 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.”⁷⁶ The Report of the Committee of Detail gave the president the power to grant reprieves and pardons, but instead of excepting treason, provided that presidential pardon “shall not be pleadable in Bar of an Impeachment.”⁷⁷ This language was shortened to its present form—authorizing clemency “except in cases of impeachment”—without reported debate.⁷⁸

There are two ways in which a pardon, granted in a case of impeachment, might come before a court. First, a person who had been impeached and removed from office could seek a pardon in order to preclude prosecution for whatever crime had precipitated his impeachment and removal from office.⁷⁹ President Nixon reportedly considered pardoning himself prior to his resignation from office, presumably to prevent his subsequent prosecution for any violations of federal law that he may have committed.⁸⁰ The U.S. Constitution permits pardons prior to conviction and if Nixon had pardoned himself, and had thereafter been removed from office via impeachment, he may have sought to invoke his pardon as a bar to his subse-

75. See generally Kobil, *supra* note 1, at 588–90 (discussing the history of the clemency power).

76. Neither the Virginia Plan, proposed by Edmund Randolph on May 29, 1787, nor the New Jersey Plan, proposed by William Paterson on June 15, 1787, provided for the granting of clemency. The first reference to pardoning was made by Alexander Hamilton. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 292. (Max Farrand ed., 1911) [hereinafter M. FARRAND].

77. *Id.* at 171–72.

78. See *id.* at 411, 419–20.

79. Article II, § 4, of the U.S. Constitution states that all officers of the United States can be removed from office upon impeachment for and conviction of “Treason, Bribery, or other high Crimes and Misdemeanors.” Article I of the Constitution also provides that a successful impeachment can only result in removal and disqualification from holding future federal office, but that the convicted party “shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.” U.S. CONST. art. I, § 3.

80. It is unclear whether this would have been constitutional. See Brian C. Kalt, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 779 (1996); Strasser, *supra* note 33.

quent indictment and prosecution. In such a situation, the court presiding over the subsequent prosecution would likely have had to decide whether the pardon prevented Nixon's prosecution.

Given that the exception for "cases of impeachment" is the only textual limitation on the president's clemency power, a court could well have refused to give effect to a pardon pleaded as a bar to prosecution in such a situation. It could be argued that the intent of the Framers was to prevent presidents from using pardons as a bar to impeachment and removal, not as a bar to subsequent prosecution. However, the fact that the drafters of Article II specifically rejected the Committee of Detail's language that a pardon "shall not be pleadable in Bar of an Impeachment," and replaced it with the broader prohibition that clemency may not be granted "in cases of impeachment," suggests otherwise. Even if the Framers broadened the impeachment language for stylistic rather than substantive reasons,⁸¹ the "in Bar of an impeachment" limitation historically meant that a pardon could not prevent subsequent prosecution. According to Blackstone, "the king's pardon cannot be *pleaded* to any such impeachment, so as to *impede the inquiry, and stop the prosecution* of great and notorious offenders."⁸² Moreover, in *Ex parte Garland*, one of the most expansive interpretations of the clemency power ever issued, the Supreme Court stated that the president's authority "is unlimited, *with the exception* [of cases of impeachment.]"⁸³ Thus, it seems unlikely that the courts would allow a pardon to be used to prevent subsequent prosecution in cases where an office holder has been impeached and removed from office.⁸⁴

The "cases of impeachment" limitation could also be triggered if the president were to grant a pardon prior to conviction in an attempt to derail an ongoing impeachment. The president might, by pardoning the underlying offense constituting "high crimes and misdemeanors," attempt to eliminate the basis for the impeachment. Suppose, for example, that the House voted to impeach and remove a member of the president's administration for suspected violations of federal law. If, while the impeachment trial was pending, the president pardoned the official for all possible federal crimes he may have committed, could the official then ask a federal court to enjoin the impeachment trial on grounds that any impeachable offenses had been erased by the pardon?

81. See Louis Sirico, Jr., *How the Separation of Powers Doctrine Shaped the Executive*, 40 U. TOL. L. REV. 617, 640 n.198 (2009) (suggesting that the change in language was "more felicitous").

82. 4 WILLIAM BLACKSTONE, COMMENTARIES 392 (1979) (second emphasis added).

83. 71 U.S. (4 Wall.) 333, 380 (1866) (emphasis added).

84. Thus it may have been quite prudent for President Nixon to resign, as he did, prior to impeachment and removal from office. If he actually had been impeached, President Ford's full pardon likely would not have prevented Nixon's subsequent prosecution for violations of federal law.

While it might seem that such a use of the pardon power is plainly prohibited by the “in cases of impeachment limitation,” the courts could well decline to resolve the question of whether such a pardon is valid. In *Nixon v. United States*, where a federal judge sought a declaration that the Senate had violated its obligation to “try” all impeachments, the Court invoked the political question doctrine to hold that “the Judiciary, and the Supreme Court in particular, were not chosen to have any role in impeachments.”⁸⁵ According to the Court, “[j]udicial involvement in impeachment proceedings, even if only for purposes of judicial review, . . . would eviscerate the ‘important constitutional check’ placed on the Judiciary by the Framers.”⁸⁶ This recognition of broad congressional supremacy with respect to the impeachment process has caused commentators to conclude that Congress, not the courts, would have the final say in concluding what constitutes impeachable offenses.⁸⁷ By similar reasoning, Congress would be the proper body to determine whether such a pardon had been issued in “cases of impeachment,” and whether the impeachment could proceed notwithstanding the pardon. In such a situation, the judiciary presumably would decline to intervene to decide the effect of the pardon, and would instead defer to Congress to decide whether the pardon could stop the impeachment proceedings.

B. Clemency Grants that Undermine Fundamental Rights

The judiciary could also invalidate a grant of clemency that denied or significantly interfered with fundamental rights guaranteed by the Constitution. Such interference with a fundamental right could occur directly, as in *Burdick*,⁸⁸ where the Court invalidated a presidential pardon that had been issued to prevent the recipient from exercising his Fifth Amendment right against compelled testimony.⁸⁹

It is also possible that the courts would review a grant of clemency where an executive indirectly interfered with fundamental constitutional rights by making their surrender a condition of an applicant receiving clemency. An executive might, for example, insist that those seeking a pardon agree to give up their right to vote, to bear arms, or to resist suspicion-less

85. 506 U.S. 224, 234 (1993) (emphasis added).

86. *Id.* at 235.

87. See Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 82–88 (1989) (arguing that Congress properly may define those “political crimes” which constitute impeachable offenses); see also L. Darnell Weeden, *The Clinton Impeachment Indicates a Presidential Impeachable Offense is Only Limited by Constitutional Process and Congress’ Political Compass Directive*, 27 WM. MITCHELL L. REV. 2499, 2502–03 (2001) (“At the end of the impeachment day, an impeachable offense is defined by the political realities of an appropriate majority of the members of Congress and all the Constitution requires is that the important decision be justified as a serious political offense.”).

88. 236 U.S. 79 (1915).

89. See *supra* text accompanying notes 23–26, for a more comprehensive discussion of *Burdick*.

searches as a condition of receiving clemency.⁹⁰ The Supreme Court has never answered the question of whether such a conditional grant of clemency would be permissible, though the Court was presented with the issue on one occasion.

In *Woodard*, the U.S. Court of Appeals for the Sixth Circuit held that inmates had raised a colorable claim of unconstitutionality in their challenge to Ohio's practice of requiring death row inmates applying for clemency to participate in a private, uncounseled interview without a guarantee of immunity.⁹¹ The Sixth Circuit had reasoned that such a procedure placed death row inmates in the position of making "a 'Hobson's choice' between asserting the Fifth Amendment right and participating in the clemency review process."⁹² Although the Supreme Court reversed the Sixth Circuit's holding, it did so without addressing the lower court's unconstitutional condition rationale.⁹³

The only extended analysis by a court of whether a grant of clemency could be predicated on relinquishing a fundamental right is found in a district court opinion in a case initiated by Jimmy Hoffa, former president of the Teamster's union.⁹⁴ Hoffa had been convicted of various federal offenses including jury tampering, mail and wire fraud, and of conspiracy to defraud a Teamster's Union pension fund.⁹⁵ In 1971, just prior to Christmas, President Richard Nixon commuted Hoffa's sentence subject to the following condition: "that the said James R. Hoffa not engage in direct or indirect management of any labor organization prior to March sixth, 1980."⁹⁶ Hoffa was released and thereafter instituted an action in federal district court challenging the constitutionality of the commutation condition, alleging among other things that it infringed on his First Amendment rights of speech and association.⁹⁷

90. For an excellent, more extensive discussion of the issue of presidential conditional pardons, please see Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665 (2001).

91. 107 F.3d 1178, 1193 (6th Cir. 1997), *rev'd*, 523 U.S. 272 (1998).

92. *Id.* at 1189.

93. *Woodard*, 523 U.S. at 285–88 ("While the Court of Appeals accepted respondent's rubric of 'unconstitutional conditions,' we find it unnecessary to address it in deciding this case [because] the procedures of the Authority do not under any view violate the Fifth Amendment privilege.").

94. *Hoffa v. Saxbe*, 378 F. Supp. 1221 (D.D.C. 1974).

95. *Id.* at 1223.

96. *Id.* at 1224.

97. Hoffa also argued that the condition imposed by the president was invalid because it had been formulated as the result of a conspiracy involving Nixon, Charles Colson, and Teamster's union president Fred Fitzsimmons. *Id.* at 1225. However, the court refused to inquire into the president's reasons for issuing the pardon to Hoffa. *Id.* The court stated that even if Hoffa were correct that Nixon, in order to gain political advantage, had conspired with Teamsters officials to keep Hoffa out of the union, improper motives could not invalidate the commutation. *Id.* The court reasoned that, just as an act of Congress may not be attacked on the ground that the legislators who voted for its passage did so for improper reasons, so too is even the corrupt use of the presidential pardoning power insulated from judicial review. *Id.*

The district court ultimately rejected Hoffa's unconstitutional condition argument, but did recognize that in at least some circumstances, conditions imposed on a grant of clemency could violate the Constitution and be subject to invalidation by the judiciary. According to the court, the "framework of our constitutional system" establishes "limits beyond which the President may not go in imposing and subsequently enforcing . . . conditions" on clemency.⁹⁸ Thus, the court held that an executive may not use a conditional pardon in a way that is not "directly related to the public interest" or in a way that will "unreasonably infringe on the individual commuttee's constitutional freedoms."⁹⁹ Relying on an amicus brief filed by the American Civil Liberties Union, the Court offered one example of such an unconstitutional condition on clemency: "a condition requiring the commuttee to forego supporting any candidate for political office, except the President who commuted his sentence . . . would clearly" be unconstitutional.¹⁰⁰ Nevertheless, in applying its newly minted test to Hoffa's conditional commutation, the court was deferential, holding that the condition to forego union leadership was related to the public interest when tested under a "reasonableness" standard, and did not violate Hoffa's free speech rights because of the substantial governmental interest in preserving the integrity of labor organizations.¹⁰¹

Although no other court has applied the *Hoffa* standard in the context of a pardon or commutation, analogous decisions regarding conditions imposed on parole and bail suggest that the court was correct that some conditions imposed on otherwise discretionary grants of clemency will be invalidated by courts as unconstitutional. For example, while courts generally have broad latitude in placing restrictive conditions on bail,¹⁰² they may not impose conditions that deny basic First Amendment rights. Thus, when the government seeks to deny or revoke bail because the defendant may advocate ideas of which the government disapproves, courts sometimes reject such conditions as unconstitutional.¹⁰³ As Justice Jackson, sit-

98. *Id.* at 1234-35.

99. *Id.* at 1236. The district judge fashioned this standard without reference to any Supreme Court decisions, relying on a handful of decisions from lower federal courts and state courts which suggested that the executive could only impose conditions that were not "illegal or against public policy." *Lupo v. Zerbst*, 92 F.2d 362, 364 (5th Cir. 1937); *see also Kavalin v. White*, 44 F.2d 49, 51 (10th Cir. 1930).

100. *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1234-35 n.48 (D.D.C. 1974).

101. *Id.* at 1237-40.

102. *E.g.*, *United States v. Smith*, 444 F.2d 61, 62 (8th Cir. 1971) (noting that the courts have the inherent power to place restrictive conditions upon the granting of bail).

103. *E.g.*, *U.S. ex rel. Means v. Solem*, 440 F. Supp. 544 (D.C.S.D. 1977) (invalidating bail condition that required defendant to refrain from participating in most American Indian Movement activities); *Leary v. United States*, 431 F.2d 85, 89 (5th Cir. 1970) (stating that bail condition that would prevent defendant from engaging in "mere advocacy" of illegal drug use would impose an unconstitutional condition); *Williamson v. United States*, 184 F.2d 280, 282-83 (2d Cir. 1950) (holding that court could not revoke bail based on government's argument that speech advocating Communism was subversive).

ting by designation on the U.S. Court of Appeals for the Second Circuit, reasoned:

If the courts embark upon the practice of granting or withholding discretionary privileges or procedural advantages because of expressions or attitudes of a political nature, it is not difficult to see that within the limits of its logic the precedent could be carried to extremities to suppress or disadvantage political opposition.¹⁰⁴

In similar fashion, the courts have occasionally used the unconstitutional condition rationale to limit the terms placed on parole or probation. Generally speaking, the government may impose conditions on parole or probation, even if they require the surrender of constitutional rights.¹⁰⁵ For example, when good reason exists to do so, it is not unusual to subject parolees to warrantless searches or random drug testing, despite the fact that the Fourth Amendment would ordinarily preclude such government action. Courts have generally upheld such conditions on release.¹⁰⁶

Despite this broad latitude, conditions on probation or parole that deny certain fundamental rights, and are not clearly related to important governmental interests, have sometimes been invalidated. Courts may not condition probation on the defendant giving up her right to procreate or travel, at least where such conditions are not reasonably related to the government's legitimate interests in public safety or preventing recidivism.¹⁰⁷ Moreover, conditions on release that burden fundamental rights based only on a judge's "idiosyncrasies" are disfavored and may be invalidated.¹⁰⁸

104. *Williamson*, 184 F.2d at 283.

105. *See generally* *State v. Oakley*, 629 N.W.2d 200, 210 n.27 (Wis. 2001) (cataloguing probation conditions that require the surrender of fundamental rights).

106. *E.g.*, *Cusamano v. Alexander*, 691 F. Supp. 2d 312 (N.D.N.Y. 2009) (upholding constitutionality of parole conditions requiring parolee to participate in drug and alcohol abuse treatment programs, refrain from consuming alcohol or frequenting establishments that serve alcohol, refrain from driving or obtaining a driver's license, abide by a curfew established by his parole officer, participate in anger management counseling, and comply with any geographical restrictions imposed by parole officer); *State v. Turner*, 297 S.W.3d 155 (Tenn. 2009) (upholding as reasonable a parole condition requiring that the parolee submit to warrantless searches because of the diminished privacy interests, the goals sought to be attained by early release, and society's interest in protecting against recidivism).

107. *E.g.*, *State v. Mosburg*, 768 P.2d 313 (Kan. Ct. App. 1989) (invalidating as unconstitutional infringement on right of privacy a probation condition prohibiting defendant from becoming pregnant during term of her probation); *State v. Franklin*, 604 N.W.2d 79 (Minn. 2000) (invalidating as unrelated to rehabilitation and public safety probation condition excluding probationer from "the entire City of Minneapolis"); *State v. Livingston*, 372 N.E.2d 1335 (Ohio Ct. App. 1976) (invalidating as unconstitutional a parole condition requiring the defendant, who had been convicted of felony child abuse, to refrain from having another child for two years); *see also* *State v. Friberg*, 435 N.W.2d 509, 515–16 (Minn. 1989) (noting that conditions of probation must be reasonably related to the purposes of sentencing and must not be unduly restrictive of the probationer's liberty or autonomy, especially where fundamental right is implicated).

108. *Oakley*, 629 N.W.2d at 206 (noting that judges "abuse their discretion by imposing probation conditions on convicted individuals that reflect only their own idiosyncrasies [and should impose] probation conditions to further the objective of rehabilitation and protect society and potential victims from future wrongdoing.").

In the clemency context, as with other unconstitutional conditions cases, it is difficult to identify with precision the conditions that would actually be invalidated by the judiciary.¹⁰⁹ Nevertheless, the *Hoffa* court's example, coupled with the cases in which bail or probation conditions have been invalidated, suggest that if a condition were imposed that unreasonably advanced the executive's own interests or idiosyncrasies in violation of a fundamental right, the courts could properly invalidate the conditional aspect of the executive's grant of clemency.¹¹⁰ For example, if the president commuted or pardoned a sentence based on a condition that the recipient donate money to the president's reelection campaign or presidential library, it is difficult to imagine that the courts would uphold such a condition despite the *Hoffa* court's recognition that First Amendment activities can sometimes be curtailed as a condition of clemency.

But what about conditions that do not so obviously benefit the executive, but nevertheless implicate fundamental rights? Again, the executive actions of former Mississippi Governor Haley Barbour provide us with an intriguing example to consider. In 2010, Barbour indefinitely suspended the sentences of two sisters who had been incarcerated for robbery, thereby releasing them from prison, but only on the condition that one sister donate a kidney to her ill sibling.¹¹¹ This might be seen as an instance of conditional release for the public good (Barbour noted that it saved the state the

109. The doctrine of unconstitutional conditions has long been criticized by commentators because of its inconsistent, ad hoc application by courts. *See, e.g.*, ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1009–13 (4th ed. 2011) (describing the perplexing inconsistency of the Supreme Court decisions applying the unconstitutional conditions doctrine); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989) (concluding that the Supreme Court in applying the unconstitutional conditions doctrine has worked more by hunch and intuition than by systematic theory). Thus, even if the courts are willing to review a grant of clemency because the recipient has been required to give up a fundamental right, it is impossible to say with certainty which kinds of conditions would ultimately be found to be unconstitutional.

110. For a thoughtful argument that the *Hoffa* court is incorrect and that “the president’s choice of conditions largely should escape judicial review,” see Krent, *supra* note 90, at 1716. Professor Krent addresses only presidential conditional grants of clemency, not gubernatorial ones, and he is certainly correct that the courts ought to be “reluctant to interfere with presidential discretion except in the rarest of circumstances.” *Id.* Nevertheless, to the extent that he relies on “consent” of the clemency recipient to be a check on overreaching by the president, I believe that he asks too much of those placed in the position of bartering for their freedom, using fundamental rights as a bargaining chip. Moreover, the Supreme Court has held that consent to clemency is not required—a conditional commutation could presumably be imposed over the objection of the prisoner. *See Biddle v. Perovich*, 274 U.S. 480, 488 (1927) (“Just as the original punishment would be imposed without regard to the prisoner’s consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent determines what shall be done [regarding a commutation].”).

111. Krissa Thompson, *Prison Release “Conditioned on” Kidney Donation*, WASH. POST, Dec. 31, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004722_pf.html.

cost of daily dialysis treatments),¹¹² or as an instance of monarch-like idiosyncrasy, since Barbour could have saved the state money by simply releasing the ailing sister without any requirement that her healthy sister donate a kidney. He justified the suspended sentences because the sisters “no longer pose a threat to society,”¹¹³ but nevertheless imposed the condition of a kidney donation, thereby turning “what had been a gift into compensation.”¹¹⁴

One can readily imagine similar conditions being imposed on grants of clemency that implicate fundamental liberties: commutations might be offered in exchange for inmates agreeing to participate in medical experiments, undergo voluntary sterilization,¹¹⁵ or perform hazardous work for the state.¹¹⁶ In the Mississippi case, since the Scott sisters will remain on parole for the rest of their lives, the State of Mississippi could seek to reincarcerate Gladys Scott if she does not donate her kidney in timely fashion.¹¹⁷ Under such circumstances, if a clemency recipient could demonstrate that the specific condition imposed by the executive burdened a fundamental right without adequately advancing the public interest, the arguments for judicial intervention would seem compelling even under the *Hoffa* court’s lenient standard.¹¹⁸

C. Clemency Grants that Deny Equal Protection of the Law

Judicial review of clemency grants may also be appropriate where clemency is dispensed in a manner that violates equal protection principles. As Dafna Linzer and Jennifer LaFleur have reported, there has been a pro-

112. Timothy Williams, *Jailed Sisters Are Released for Kidney Transplant*, N.Y. TIMES, Jan. 7, 2011, http://www.nytimes.com/2011/01/08/us/08sisters.html?_r=0&pagewanted=print.

113. According to Barbour, the conditional release was justified for the following reasons: The Mississippi Department of Corrections believes the sisters no longer pose a threat to society. . . . Their incarceration is no longer necessary for public safety or rehabilitation, and Jamie Scott’s medical condition creates a substantial cost to the State of Mississippi. . . . Gladys Scott’s release is conditioned on her donating one of her kidneys to her sister, a procedure which should be scheduled with urgency.

Thompson, *supra* note 111 (internal quotation marks omitted).

114. Williams, *supra* note 112.

115. See *State v. Brown*, 326 S.E.2d 410 (S.C. 1985) (invalidating as contrary to public policy suspension of 30-year jail sentences conditioned on defendants agreeing to be castrated and successfully completing the surgical procedure).

116. See Stu Whitney, *Janklow Made Nearly 2,000 Sentence Commutations*, ABERDEEN AM. NEWS, Jun. 30, 2003, at 7A (describing Governor Bill Janklow’s system of commuting the sentences of inmates for “responding to tornadoes, floods and windstorms”).

117. Williams, *supra* note 112 (noting that many uncertainties affect whether a transplant will ever occur, given that the family cannot afford the procedure, it is unclear whether the sisters qualify for Medicaid, the sisters may not have compatible tissue types, and after having spent so many years in prison, neither sister may be healthy enough to undergo the transplant procedure).

118. See Krent, *supra* note 90, at 1693–94 (2001). Interestingly, despite his general resistance to judicial review of presidential clemency conditions, Professor Krent accepts that courts should invalidate grants of clemency conditioned on the donation of a kidney because such bargains “may cheapen the value of privacy and bodily integrity.” *Id.*

nounced racial disparity in the granting of presidential pardons.¹¹⁹ Their study of grants from 2001 through 2008 shows that “[w]hite criminals seeking presidential pardons . . . have been nearly four times as likely to succeed as minorities,” and that blacks have the poorest chance of receiving a pardon.¹²⁰ The racial disparity was especially apparent when particular pardon applicants were compared:

An African American woman from Little Rock, fined \$3,000 for underreporting her income in 1989, was denied a pardon; a white woman from the same city who faked multiple tax returns to collect more than \$25,000 in refunds got one. A black, first-time drug offender—a Vietnam veteran who got probation in South Carolina for possessing 1.1 grams of crack—was turned down. A white, fourth-time drug offender who did prison time for selling 1,050 grams of methamphetamine was pardoned.¹²¹

Linzer and LaFleur’s work suggests that race could well have played a role in pardon decisions. Although applications for presidential pardons do not include information about the race of the applicant, racial information is often listed in law enforcement documents. In addition, during the period of the study, no black attorneys worked in the Office of the Pardon Attorney; moreover, the Inspector General found that the head of the office had inappropriately used ethnic background as a ground to deny a pardon to an African American.¹²² Finally, the Office of the Pardon Attorney had utilized amorphous criteria such as an applicant’s “attitude” and “stability,” as grounds for recommending pardons, an approach that effectively “exclud[ed] large segments of society.”¹²³

While there have been no comprehensive statistical studies of racial disparities at the state level, there is also reason to believe that state clemency practices are not always color blind. When former Mississippi Governor Haley Barbour issued 222 grants of clemency from 2008 to 2011, the racial composition of the recipients was decidedly white. A study by Reuters reports that about sixty-four percent of Barbour’s grants went to

119. Linzer & LaFleur, *supra* note 6.

120. *Id.*

121. *Id.*

122. Linzer and LaFleur recount that in 2007, the Office of the Pardon Attorney recommended that a Brooklyn, New York, minister, Nigerian-born Chibueze Okorie, be denied a pardon. *Id.* Then U.S. Pardon Attorney, Roger Adams, opposed clemency for Okorie, who faced deportation because of a 1992 conviction for possessing heroin with intent to distribute. *Id.*

According to a report from the Justice Department’s Inspector General, Adams had said of Okorie, “This might sound racist,” but Okorie is “about as honest as you could expect for a Nigerian. Unfortunately, that’s not very honest.” *Id.*

Adams later justified his remark by stating that Nigerian immigrants “commit more crimes than other people” and that an applicant’s nationality is “an important consideration” in pardons. *Id.* The Inspector General’s report on the incident concluded, “Adams’ comments—and his use of nationality in the decision-making process—were inappropriate.” *Id.*

123. *Id.*

whites and thirty-one percent to blacks, despite the fact that sixty-five percent of those imprisoned in Mississippi are black.¹²⁴ These numbers do not prove that invidious racial discrimination caused the disparity.¹²⁵ Yet according to statisticians who reviewed the data, “[t]he odds of a random sample of the prison population coming out with the same or greater disparity in racial proportions as the pardons list is less than one in a trillion, if race were truly unrelated to pardons.”¹²⁶ Anecdotal evidence suggests that race can sometimes be a factor in state clemency decisions.¹²⁷

Gender likewise appears to be relevant in clemency decisions, particularly in capital cases. Professor Heise’s statistical comparison of executions and commutations in death penalty cases shows that women receive clemency at a disproportionately high rate.¹²⁸ He found that “[w]omen are significantly more likely to receive clemency than men, even after controlling for an array of background factors.”¹²⁹ Although he does not believe that his study alone supports a claim that states violate equal protection in the granting of clemency based on gender, he encourages “litigants to examine more closely specific states’ clemency processes and how these processes intersect, if at all, with gender.”¹³⁰

Racial and gender disparities are troubling in light of the obligation executives have of complying with equal protection principles when dispensing clemency.¹³¹ The Fourteenth Amendment by its terms prohibits

124. *Factbox: Balance of Mississippi Pardons by Race*, REUTERS (Jan. 20, 2012, 6:42PM), <http://www.reuters.com/article/2012/01/20/us-usa-mississippi-pardons-factbox-idUSTRE80J25R20120120>.

125. Reuters quotes Jack Glaser, Associate Professor of Public Policy at the University of California at Berkeley, who makes the point that the racial disparity, may have more complex underpinnings than simple racial prejudice:

“There’s also a very good chance that black prisoners are less likely to apply for pardons,” Glaser said. “They’re more likely to be disenfranchised and less likely to have financial means and so that could also be a source of the disparity. I guarantee that this disparity has many, many causes.”

Himanshu Ojha, Marcus Stern & Robbie Ward, *Insight: Mississippi Pardons Benefited Whites by Big Margin*, REUTERS (Jan. 20, 2012, 6:46PM), <http://www.reuters.com/article/2012/01/20/us-usa-mississippi-pardons-idUSTRE80J25K20120120>.

126. *Id.*

127. In South Carolina, Governor Coleman Blease described a pardon he granted in 1912 to a murderer named William H. Mills, whom Blease pardoned to fulfill a campaign promise: “I took the position that I was the servant of the people[,] . . . and when a community where a crime had been committed, with the best people, the white people, signing the petition, said that the criminal had been punished enough, I turned him out without regard to criticism.” James D. Barnett, *The Grounds of Pardon*, 17 AM. INST. CRIM. L. & CRIMINOLOGY 490, 507 (1927) (quoting *Modern Penology*, GOVERNOR’S CONFERENCE PROCEEDINGS 36, 53 (1912)) (internal quotation marks omitted).

128. Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structure*, 89 VA. L. REV. 239, 277 (2003).

129. *Id.*

130. *Id.* at 278.

131. See *Osborne v. Folmar*, 735 F.2d 1316, 1317 (11th Cir. 1984) (“[A] person may challenge a pardon or parole decision on equal protection grounds though he asserts a due process claim that fails.”).

states from denying equal protection of the law based on race and this prohibition has been extended to state gender classifications as well.¹³² In similar fashion, the Supreme Court has applied the principle of equal protection to the federal government, through the due process clause of the Fifth Amendment.¹³³ Moreover, the executive branch of the federal government cannot discriminate in a manner that denies equal protection of the law, even in performing discretionary functions such as prosecuting crimes.¹³⁴ Thus, presidential clemency practices that purposely discriminated on the basis of race presumably would also be subject to equal protection constraints, though the Supreme Court has never directly so held.¹³⁵

Assuming that a colorable equal protection claim could be pleaded against the president or a governor (undoubtedly a significant hurdle),¹³⁶ what, if anything, could the courts do? First, it appears that the remedy that would be most attractive to those who had been unlawfully denied clemency is unavailable: the courts would be incapable of granting, or ordering the executive to grant, a pardon or commutation.¹³⁷ Although courts have declared grants of clemency invalid,¹³⁸ no court has ever ordered that clemency be granted in a particular case. Such judicial action would undoubt-

132. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532 (1996).

133. *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954).

134. *Wayte v. United States*, 470 U.S. 598, 607–09, 608 n.9 (1985) (holding that although the executive has broad discretion as to whom to prosecute, a decision to selectively prosecute may not violate “ordinary equal protection standards”); *United States v. Batchelder*, 442 U.S. 114, 125, 126 n.9 (1979) (holding that selectivity in the enforcement of federal criminal laws is subject to equal protection constraints).

135. See Mark Strasser, *Some Reflections on the President’s Pardon Power*, 31 *CAP. U. L. REV.* 143, 153–54 (2003) (concluding that the president is subject to equal protection constraints despite the fact that the Supreme Court has not directly spoken to this issue).

136. The studies discussed above, though clearly disturbing, would likely not be enough to make out a viable equal protection claim under current law. The Linzer and LaFleur, Reuters, and Heise studies all tend to show that clemency practices have a disparate impact based on race or gender. However, the Supreme Court has held that discriminatory impact usually will not be enough to show invidious discrimination. *Washington v. Davis*, 426 U.S. 229, 230 (1976). Absent a truly “stark” disparate effect on a group, see *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886), those alleging discrimination on the basis of race or gender must also show discriminatory purpose by the government. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987) (race); *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (gender); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (race). Given that presidents and governors would be extremely reluctant to acknowledge that race or gender had played a role in clemency decision making, it would be difficult for litigants to satisfy the discriminatory purpose prong of an equal protection claim. See also Strasser, *supra* note 135, at 153–56 (concluding that it would be very difficult to establish a colorable equal protection claim against the president).

137. See *Ex parte United States*, 242 U.S. 27, 42 (1916) (noting that federal courts do not have inherent authority to relieve prisoners from the imposition of punishment because that right “belongs to the executive department”); *Graham v. Angelone*, 73 F. Supp. 2d 629, 629 (E.D. Va. 1999) (stating that clemency is a matter for the executive, not the judiciary); see also Morison, *supra* note 73, at 287–88 (concluding that the courts cannot issue a pardon or order the president to do so).

138. See *supra* text accompanying notes 49–58.

edly raise insurmountable separation of powers concerns, whether directed to the president or to the governor of a state.

However, it is well established that courts may enjoin discriminatory conduct by federal and state officials that violate equal protection principles, and courts can also provide other forms of relief. As Professor Strasser has observed, a court could “issue a declaratory judgment, for example, that race cannot be a dispositive factor in the determination of whether a pardon should be issued.”¹³⁹

While these types of declaratory and injunctive relief might not immediately benefit those denied clemency on the basis of a prohibited classification, they could have significant, salutary effects on the clemency process in the long run. Credible allegations of racial or gender discrimination could prompt the president or a governor to reconsider his approach to making clemency decisions. The Linzer and LaFleur report concerning the racial disparity in presidential pardons, coupled with the apparent mishandling of the commutation case of Clarence Aaron by the Office of the Pardon Attorney, have reportedly prompted the Obama administration to conduct an independent study of how clemency has been dispensed.¹⁴⁰ Moreover, a lawsuit instituted to obtain declaratory and injunctive relief would allow for further discovery regarding the executive’s clemency process, shedding light on whether improper considerations have played a role in clemency decisions. A judicial opinion citing an executive’s unconstitutional racial or gender considerations in reaching a clemency decision could also have powerful political repercussions. In an extreme case, a successful lawsuit establishing purposeful, unconstitutional actions by the executive in dispensing clemency might even constitute a basis for impeachment and removal from office.¹⁴¹

D. Clemency Practices That Deny Due Process of Law

The Supreme Court and lower courts have ruled that clemency procedures are indeed subject to the constitutional constraint of due process. However, the Supreme Court has never ruled either a federal or state clemency system to be unconstitutional. Moreover, the two cases in which the

139. Strasser, *supra* note 33, at 138–39.

140. Dafna Linzer, *Commutation Request Will Get a New Look*, WASH. POST, July 19, 2012, at A03, available at <http://www.propublica.org/article/obama-wants-review-of-prisoners-commutation-request>.

141. Prior to impeaching President Andrew Johnson, Congress investigated his pardoning practices by reviewing his bank accounts in a search for money he might have received in exchange for granting clemency. However, abuse of the pardon power did not appear as a charge in the eventual indictment for Johnson’s impeachment. Leonard B. Boudin, *The Presidential Pardons of James R. Hoffa and Richard M. Nixon: Have the Limitations on the Pardon Power Been Exceeded?*, 48 U. COLO. L. REV. 1, 16 (1976); see also 3 U.S. DEP’T OF JUSTICE, THE ATTORNEY GENERAL’S SURVEY OF RELEASE PROCEDURES 150–53 (1939) (describing the impeachment of Oklahoma Governor J.C. Walton for selling pardons).

Court has considered the application of due process principles to clemency suggest that the scope of judicial review is quite narrow.

In *Connecticut Board of Pardons v. Dumschat*,¹⁴² the Court rejected the claim of an inmate that the state pardon board's failure to provide him with a written statement of reasons for denying commutation violated his due process rights. A majority of the Court showed little sympathy for the due process claim, reasoning that since the Board of Pardons had "unfettered discretion" to grant clemency, the prisoner had at best a unilateral expectation of commutation that was insufficient to create a constitutionally protected liberty interest.¹⁴³ The Court also stated that "pardon and commutation decisions have not traditionally been the business of courts; as such, they are rarely, if ever, appropriate subjects for judicial review."¹⁴⁴

In the wake of *Dumschat*, the Court considered the question of whether clemency procedures could ever violate due process. In *Woodard*,¹⁴⁵ the Court rejected a challenge to Ohio's clemency procedure for death row inmates. Chief Justice Rehnquist, writing for four Justices, sought to extend the holding of *Dumschat* to rule that a prisoner never has an interest in obtaining clemency that is protected by due process: "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."¹⁴⁶ However, a majority of the Court¹⁴⁷ refused to accept this categorical rule. Justice O'Connor's controlling concurrence held instead that "some *minimal* procedural safeguards apply to clemency proceedings."¹⁴⁸ She stated that courts should intervene in certain extreme circumstances:

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.¹⁴⁹

However, Justice O'Connor concluded that Ohio's procedure, which provided for "notice of the [clemency] hearing and an opportunity to participate in an interview, comports with Ohio's regulations and observes

142. 452 U.S. 458, 467 (1981).

143. *Id.* at 466–67.

144. *Id.* at 464.

145. 523 U.S. 272, 289 (1998).

146. *Id.* at 285.

147. Justice O'Connor's concurring opinion holding that due process applies to the clemency procedures was joined by Justices Souter, Ginsburg, and Breyer. *Id.* at 288 (O'Connor, J., concurring). Justice Stevens, in dissent, also accepted Justice O'Connor's view that due process protections apply to clemency. *Id.* at 291 (Stevens, J., dissenting).

148. *Id.* at 289.

149. *Id.*

whatever limitations the due process clause may impose on clemency proceedings.”¹⁵⁰

Since *Woodard* was decided, Justice O’Connor has left the Court and it is unclear whether her view that due process protections apply to clemency procedures would still command a majority. In *District Attorney’s Office for Third Judicial District v. Osborne*, Chief Justice Roberts wrote on behalf of himself and four other Justices that “noncapital defendants do not have a liberty interest in traditional state executive clemency” and so “cannot challenge the constitutionality of *any procedures* available to vindicate an interest in state clemency.”¹⁵¹ The Roberts’ opinion cites *Dumschat* to support this categorical rule.¹⁵² *Osborne* suggests that, at least in non-capital cases, a majority of the Court may not accept Justice O’Connor’s view that “minimal” due process protections apply to clemency procedures.¹⁵³

However, it is uncertain that *Osborne* should be read this broadly. First, unlike *Woodard*, *Osborne* did not present the Court with a challenge to arbitrary clemency procedures, but instead sought recognition of a right to DNA testing of evidence predicated on the prisoner’s claim of a protected liberty interest in actually obtaining clemency.¹⁵⁴ Since *Dumschat* held that state law ordinarily does not create a liberty interest in *obtaining* clemency (as opposed to applying for or seeking clemency),¹⁵⁵ the *Osborne* majority correctly rejected the prisoner’s argument that his liberty interest in being granted clemency supported a due process right to DNA testing. However, *Dumschat* did not address the broader assertion made by Chief Justice Roberts, that non-capital defendants cannot challenge “any procedures” to vindicate an interest in state clemency. If the Court were confronted by a truly arbitrary clemency procedure—say one “infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence”¹⁵⁶—it would be required to address a far more difficult case than *Osborne* presented, and to grapple directly with the *Woodard* holding in regards to minimal procedural safeguards.

Second, Justice O’Connor did not limit her controlling concurrence in *Woodard* to capital cases. Inasmuch as the *Osborne* opinion does not overrule or even refer to *Woodard*, and disposes of the due process issue in two

150. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289–90 (1998).

151. 557 U.S. 52, 67–68 (2009) (emphasis added).

152. *Id.*

153. *See id.* at 52–75.

154. *Id.* at 67 (“*Osborne* argues that access to the State’s evidence is a ‘process’ needed to vindicate his right to prove himself innocent and get out of jail.”).

155. *See generally* Daniel T. Kobil, *Due Process in Death Penalty Commutation: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201 (1993) (differentiating between an interest in seeking clemency and in obtaining clemency). However, one court of appeals has read *Osborne* as foreclosing a claim that a prisoner has a liberty interest in meaningful access to state clemency mechanisms. *McKithen v. Brown*, 626 F.3d 143, 152 (2d Cir. 2010).

156. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 290–91 (1998) (Stevens, J., dissenting).

brief sentences, it is fair to conclude that Justice O'Connor's approach in *Woodard* is still good law.¹⁵⁷ Indeed, lower courts have assumed that O'Connor's *Woodard* approach controls, even post-*Osborne*.¹⁵⁸

Nevertheless, even applying the *Woodard* rule, lower courts have seldom found state clemency procedures to be unconstitutional. One of the few cases finding a colorable constitutional claim under *Woodard* is *Young v. Hayes*,¹⁵⁹ in which the U.S. Court of Appeals for the Eighth Circuit stayed an execution based on a potential denial of due process. In *Young*, a death row prisoner alleged that the circuit attorney had deliberately interfered with his efforts to present evidence to the governor by threatening to fire a subordinate if she provided truthful information that supported the inmate's petition for clemency. The Eighth Circuit found that this allegation, if proved, would constitute a denial of due process under *Woodard*:

Certainly the discretion of a governor to grant or deny clemency is unlimited in any ordinary circumstances. No claim is advanced here that the petitioner has a "liberty interest" in the grant of clemency or the right to any particular outcome when he seeks it. The allegation is quite different. . . . The claim here is that the State, acting through the Circuit Attorney of the City of St. Louis, has deliberately interfered with the efforts of petitioner to present evidence to the Governor. . . .

. . . Such conduct on the part of a state official is fundamentally unfair. It unconscionably interferes with a process that the State itself has created. The Constitution of the United States does not require that a state have a clemency procedure, but, in our view, it does require that, if such a procedure is created, the state's own officials refrain from frustrating it by threatening the job of a witness.¹⁶⁰

The Ninth Circuit Court of Appeals also found that an inmate facing execution had properly stated a claim of a violation of due process under *Woodard* in asserting that the state had misled his counsel about the issues to be considered in the clemency proceeding before the Governor.¹⁶¹ The Ninth Circuit refused to vacate a temporary restraining order issued by the

157. It is also possible that *Osborne* means that prisoners who are not facing capital punishment may never challenge clemency procedures on due process grounds, while death row inmates are allowed under *Woodard* to do so. However, given that the *Osborne* Court did not justify or even acknowledge establishing different rules for prisoners based on whether they have been sentenced to death, it is premature to draw such a conclusion. No lower courts have resolved the tension between *Osborne* and *Woodard* in this manner.

158. *PA Prison Soc. v. Cortes*, 622 F.3d 215, 243 (3d Cir. 2010) (citing *Woodard*, 523 U.S. at 276) (observing that "the procedures by which a pardon is granted must comply with the Due Process Clause"); *Link v. Nixon*, No. 2:11-CV-4040, 2011 WL 529577, at *4 (W.D. Mo. 2011) (citing *Woodard*, 523 U.S. at 289) (holding that "some minimal due process protections apply to a State clemency proceeding," in a capital case).

159. 218 F.3d 850, 852-53 (8th Cir. 2000).

160. *Id.* at 853.

161. *Wilson v. U.S. Dist. Court for N. Dist. of Cal.*, 161 F.3d 1185, 1187-88 (9th Cir. 1998).

district judge, delaying the execution of Jaturun Siripongs so that the trial court could consider the due process claim.¹⁶²

However, most claims of due process violations under *Woodard* have been unsuccessful. As the U.S. Court of Appeals for the Fifth Circuit noted in *Turner v. Epps*,¹⁶³ while it is “clear that some minimal due process safeguards do apply to clemency procedures. . . . these requirements really are *minimal*.” Thus, due process is not violated if a state court denies a death row inmate access to a psychiatric expert (paid for by the inmate), because the lack of expert assistance does not foreclose the prisoner from applying for clemency, “even if it does potentially result in a less effective and compelling clemency petition.”¹⁶⁴ The Kentucky Supreme Court has likewise held that due process is not violated when the state refuses to allow an inmate facing execution to interview prison personnel and other inmates in order to prepare his clemency application.¹⁶⁵

Apart from blatant interference with the clemency process akin to that alleged in *Young*,¹⁶⁶ courts are unwilling to allow *Woodard* to be used as a vehicle for improving clemency procedures. The *Woodard* standard was held not to be violated by Texas’ clemency process, which allegedly did not follow applicable state law or its own regulations, provided inadequate notice to prisoners of issues the clemency board would consider, and allowed the clemency board to act in secrecy, refuse to hold hearings, provide no reasons for its decisions, and keep no records of its actions.¹⁶⁷ In similar fashion, Tennessee was held not to have denied due process to a death row inmate through a clemency process in which the Board of Parole and Pardons was openly hostile to the witnesses the prisoner presented during clemency proceedings, and the state allegedly presented false and fabricated evidence opposing clemency.¹⁶⁸ Nor is it a denial of due process for the

162. Richard Marosi, *Siripongs Asks Davis, Court to Spare Life*, L.A. TIMES (Feb. 3, 1999), <http://articles.latimes.com/1999/feb/03/local/me-4461>. The trial court ultimately allowed the execution to go forward after conducting a hearing and determining that the Siripongs’ constitutional rights had not been violated. *Id.*

163. 460 Fed. App’x 322, 331 (5th Cir. 2012) (citing *Woodard*, 523 U.S. at 290–91 (O’Connor, J., concurring)).

164. *Id.*

165. *Baze v. Thompson*, 302 S.W.3d 57, 58, 60 (Ky. 2010) (upholding the denial of Baze’s due process claim because he had received the “minimal” procedural protections required under *Woodard*). In *Baze v. Parker*, 632 F.3d 338, 344–46 (6th Cir. 2011), the United States Court of Appeals for the Sixth Circuit did not consider the due process issue, but held that federal law did not permit a district court to order state officials not to interfere with the gathering of information in support of an indigent defendant’s state clemency application.

166. 218 F.3d 850, 853 (8th Cir. 2000).

167. *Faulder v. Tex. Bd. of Pardons & Paroles*, 178 F.3d 343, 344–45 (5th Cir. 1999).

168. *Workman v. Bell*, 245 F.3d 849, 852 (6th Cir. 2001). The court reasoned that it could only give relief to Workman if there had been fraud on the court by the state, and at most, the state’s alleged falsehoods constituted fraud on the Governor of Tennessee. *Id.* To the extent that the Sixth Circuit appears to believe that a fraudulent clemency process does not state a colorable due process claim, its holding is at odds with *Young v. Hayes*, 218 F.3d 850 (8th Cir. 2000). See *infra* text accompanying notes 159–60.

governor to announce that he will not consider granting clemency in capital cases, generally.¹⁶⁹

In short, the scope of judicial review of due process claims is narrow, even under the *Woodard* standard. The state may not, as Justice O'Connor states in her *Woodard* concurrence, adopt a patently arbitrary procedure for dispensing clemency.¹⁷⁰ Courts are also troubled by credible allegations that the state has deliberately sought to undermine the integrity of the clemency process. However, it appears that short of setting up a fraudulent process, clemency procedures can indeed be "minimal." Of course, any executive who takes seriously the dispensing of clemency, particularly in death penalty cases, would undoubtedly demand a thorough, fair clemency process that provides as much information as possible, presented in a professional manner.¹⁷¹ If, however, a jurisdiction sought to streamline the clemency process such as by denying clemency petitioners a public hearing or an opportunity to present evidence, litigants would face an uphill battle to invalidate such procedures under *Woodard's* "minimal" due process standard, at least as it has been interpreted up until now.¹⁷²

CONCLUSION

In his classic film, *Annie Hall*, Woody Allen shares an old Borscht Belt joke that also captures his paradoxical feelings about life:

There's an old joke. Uh, two elderly women are at a Catskills mountain resort, and one of 'em says: "Boy, the food at this place is really terrible." The other one says, "Yeah, I know, and such . . . small portions." Well, that's essentially how I feel about life. Full of loneliness and misery and suffering and unhappiness, and it's all over much too quickly.¹⁷³

This observation also captures the criticisms commonly leveled at the mechanism of clemency: it can be "terrible" since it is often administered poorly, and it is doled out in "small portions," because clemency is granted much too infrequently. Judicial review of clemency offers an attractive means of improving the quality of clemency decision-making, though it will

169. *Anderson v. Davis*, 279 F.3d 674, 676 (9th Cir. 2002).

170. *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 288–90 (1998).

171. See Brief of Current and Former Governors as Amici Curiae in Support of Petitioner, *Harbison v. Bell*, 556 U.S. 180 (2008) (No. 07-8521), 2008 WL 4264488 (advocating the appointment of counsel in death row clemency cases because of governors' desire to "exercise the clemency power in a manner that promotes fairness, accuracy, and public confidence in the criminal justice system").

172. *But see Link v. Luebbbers*, 830 F. Supp. 2d 729, 732–33 (E.D. Mo. 2011) (reimbursing attorneys in capital case for work challenging state clemency process under *Woodard*, characterizing issue of due process in clemency as "a developing area of law," and noting that the ABA Guidelines recommend that counsel be prepared to raise due process challenges in clemency proceedings).

173. *ANNIE HALL* (Charles H. Joffe 1977).

likely have little effect on the “small portions”—the atrophy of the power that is apparent in the federal and other systems.

Judicial review can properly be used to enforce textual limitations on the clemency power, such as the federal requirement that pardons may not be issued in cases of impeachment. It should also be used to limit the ability of executives to condition grants of clemency on the relinquishment of fundamental constitutional rights. Finally, it is appropriate for the courts, in some circumstances, to review clemency practices that deprive applicants of equal protection or due process of law. However, if clemency proponents hope to utilize the courts to impel executives to actually use the power more often, they will likely be disappointed. Only a powerful sense of personal responsibility on the part of particular executives, or a swelling public clamor for mercy instead of retribution, is likely to lead to greater use of the clemency power by governors or presidents.