

The Nature of a Pardon Under the United States Constitution

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A pardon is an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed. It is the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended, and not communicated officially to the court.

Chief Justice Marshall¹

A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.

Justice Holmes²

In 1833, for a unanimous court, Chief Justice Marshall defined a pardon in the above quoted words from his opinion in *United States v. Wilson*.³ This definition remained largely unchallenged for almost a century. In 1927, also for a unanimous court, Justice Holmes defined a pardon in the above quoted words from his opinion in *Biddle v. Perovich*.⁴ Clearly, the Holmes definition of a pardon conflicts with that advanced by Marshall; there is here little room for peaceful co-existence.

As one analysis has noted,⁵ it "is perhaps doubtful" whether Holmes' words in *Perovich* "sound the death knell" of the Marshall conception of a pardon as set forth in *Wilson*. However that may be, when judicial giants clash, scholastic interest is aroused. Accordingly, the primary purpose of this article is to analyze and resolve the Marshall-Holmes clash. To this end, the article will first explore the legal history of each justice's definition of a pardon, primarily as reflected in decisions of the United States Supreme Court. The two definitions will then be examined in the light of five policy considerations that bear upon the question of which definition should be preferred in

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1. *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833).

2. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

3. 32 U.S. (7 Pet.) 150 (1833).

4. 272 U.S. 480 (1927).

5. LEGISLATIVE REFERENCE SERVICE, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION*, S. DOC. NO. 39, 88th Cong., 1st Sess. 457 (1964). For a view that Holmes' statement in *Biddle* sounded the death knell of the Marshall position in relation to the requirement of acceptance by the pardonee, see Comment, *Presidential Pardons and the Common Law*, 53 N.C. L. REV. 785, 790 (1975).

the context of our constitutional system. The article will conclude by stating, on the basis of this discussion, a strong preference in favor of the Holmes definition of a pardon. Topically, the issue of the nature of the pardon power acquires heightened relevance from the controversy surrounding the exercise of the pardon power by President Ford in relation to Richard Nixon and by President Carter in relation to those who evaded the draft during the period of our military involvement in Viet Nam.

I. THE MARSHALL POSITION: A PARDON VIEWED AS A PRIVATE ACT OF GRACE

Marshall's private act definition of a pardon is contained in a case that involved a very narrow issue of law—whether a trial court could judicially notice a presidential pardon. In *United States v. Wilson*,⁶ the defendant, George Wilson, had been charged with two offenses against the laws of the United States: (1) robbery of the mail and putting the life of the carrier in jeopardy; and (2) robbery of the mail.⁷ For the first offense of robbing the mail and putting the life of the carrier in jeopardy, Wilson was tried, convicted, and sentenced to death. Before execution of sentence, however, President Jackson pardoned Wilson for "the crime for which he has been sentenced to suffer death, remitting the penalty aforesaid, with this express stipulation, that this pardon shall not extend to any judgment which may be had or obtained against him, in any other case or cases now pending before said court for other offences wherewith he may stand charged."⁸ After a plea of not guilty to the second offense of robbing the mail, Wilson was then tried and convicted. In relation to his trial on this second offense, Wilson expressly waived any benefits that might otherwise have accrued to him from the pardon he had received for the first offense.

At this juncture, the lower federal court before which the trial of the second offense was pending certified two questions to the United States Supreme Court: (1) Did the pardon of the first offense, in the light of the express stipulation contained in the pardon, block prosecution of the second offense; and (2) Could Wilson, in any event, derive benefit from the pardon without bringing it judicially before the trial court?⁹ Expressly reserving the first question, the Supreme Court answered the second question in the negative, holding "that the pardon in the proceedings mentioned, not having been brought judicially before the court by plea, motion or otherwise, cannot be

6. 32 U.S. (7 Pet.) 150 (1833).

7. *Id.* at 151.

8. *Id.* at 153.

9. *Id.* at 158-59.

noticed by the judges."¹⁰ This holding had the practical effect of allowing the second prosecution against Wilson to proceed unencumbered by the pardon.¹¹

Although narrow, the Court's holding in *Wilson* is open to question. Once the court had actual notice of the pardon, was it not the court's duty to determine the impact of the pardon upon the second proceeding against Wilson? There is no such duty, Marshall would answer, if a pardon is viewed as a private act of grace whose validity depends upon its acceptance by the pardonee. Thus, the narrow question considered in *Wilson* required Marshall to elaborate his conception of a pardon for purposes of constitutional adjudication.

In his elaboration, Marshall first described a pardon as a private act of grace;¹² he next considered the requisites for a pardon's validity. In words casting a long shadow over subsequent Court decisions, Marshall declared:

A pardon is a deed, to the validity of which delivery is essential, and delivery is not complete without acceptance. It may then be rejected by the person to whom it is tendered; and if it be rejected, we have discovered no power in a court to force it on him.¹³

This conception of a pardon clearly dictated the result in *Wilson*. If a pardon's validity depends upon its acceptance by the pardonee, Marshall is correct in holding that the court may ignore the pardon if the pardonee fails or refuses to assert it in bar of prosecution. If the pardonee does not assert the pardon it clearly indicates that he has not accepted it. Marshall's minor premise flows irresistibly from his major premise. It is the major premise—the requirement of acceptance—that most clearly demarcates the line between the Marshall and Holmes positions.

Historically, Marshall's major premise held sway throughout the nineteenth century and into the early part of the twentieth century. Marshall's private act definition of a pardon was first reaffirmed by dicta in the 1856 case of *Ex Parte Wells*.¹⁴ In *Wells*, the petitioner had been convicted of murder in the District of Columbia and sentenced to death. Before execution of the sentence, the petitioner was pardoned "upon condition that he be imprisoned during his natural life; that is, the sentence of death is hereby commuted to imprisonment for life in the penitentiary of Washington."¹⁵ On the day that he received the pardon, the petitioner accepted it in these words: "I

10. *Id.* at 163.

11. *Id.*

12. *Id.* at 160-61. See text accompanying note 1 *supra*.

13. *Id.* at 161.

14. 59 U.S. (18 How.) 307 (1856).

15. *Id.* at 308.

hereby accept the above and within pardon, with condition annexed."¹⁶ Later, the petitioner applied to the Circuit Court of the District of Columbia for a writ of habeas corpus "upon the ground that the pardon is absolute, and the condition of it void."¹⁷ The Circuit Court rejected the application for the writ, and petitioner appealed to the Supreme Court.

The *Wells* Court was thus confronted with the issue of the President's power to grant a conditional pardon. As Marshall had in *Wilson*,¹⁸ the *Wells* Court turned to English authorities to determine the nature and extent of the President's pardon power under the Constitution. Believing that these authorities amply supported the King's power to grant conditional pardons under English law,¹⁹ the Court concluded "that the President's power to do so exists under the constitution of the United States."²⁰ Having resolved this abstract question of constitutional law, the Court held that the lower federal court had "rightfully refused" the petitioner's application for a writ of habeas corpus.²¹

The conditional pardon issue dealt with in *Wells* will be developed more fully in later portions of this article.²² At this point it is only necessary to note that resolution of that issue in *Wells* did not require a resolution of the acceptance issue discussed by Marshall in *Wilson*; in *Wells* the petitioner had in fact accepted the pardon and the condition contained in it.²³ Accordingly, any statements made by the *Wells* Court regarding the acceptance issue were clearly dicta. Nevertheless, the *Wells* Court did make several tangential references to the fact of acceptance in the case before it, references indicating that the Court attached to that fact some degree of legal significance.²⁴ On balance, however, the Court's opinion in *Wells* lends only modest support to Marshall's conception of a pardon as set forth in *Wilson*.

16. *Id.*

17. *Id.* at 309.

18. In *Wilson*, Marshall drew upon English authorities in determining the nature of a pardon under the United States Constitution and justified this action in the following language:

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

32 U.S. (7 Pet.) at 160.

19. 59 U.S. (18 How.) at 311-13.

20. *Id.* at 315.

21. *Id.*

22. See notes 87-93 and accompanying text *infra*.

23. 59 U.S. (18 How.) at 308.

24. For example, in the course of its opinion, the Court stated that "the power to offer a condition, without ability to enforce its acceptance, when accepted by the convict, is the substitution, by himself, of a lesser punishment than the law has imposed upon him, and he cannot complain if the law executes the choice he has made." *Id.* at 315. This statement, with its emphasis on the pardonee's option of acceptance or rejection, harmonizes with the Marshall conception of a pardon as expressed in *Wilson*.

Stronger affirmation of the Marshall position was yet to come.

In a series of decisions in the post-Civil War decades, the Supreme Court resolved various constitutional law questions concerning the extent of the pardon power and the effect of a pardon upon the legal rights and capacities of the pardonee.²⁵ Some of these decisions also involved separation of power issues bearing upon the pardon power.²⁶ In none of these decisions, however, did the Supreme Court consider directly the propriety of Marshall's definition of a pardon as a private act of grace. More specifically, none of these decisions had cause to affirm or reject Marshall's statement in *Wilson* that the validity of a pardon depends upon its acceptance by the pardonee. This question lay dormant until its revival in the 1915 case of *Burdick v. United States*.²⁷

Burdick grew out of a probe by a federal grand jury into alleged custom frauds. Burdick was city editor of the *New York Tribune* and was called before the grand jury. He refused to answer questions about the informational sources of certain articles in the *New York Tribune* regarding the frauds under investigation. This refusal was based upon Burdick's assertion that his answers to the questions might tend to incriminate him. Burdick was then dismissed pending his appearance before the grand jury at a later date. When recalled before the grand jury, Burdick was handed a pardon signed by President Wilson and granting:

a full and unconditional pardon for all offenses against the United States which he, the said George Burdick, has committed or may have committed, or taken part in, in connection with the securing, writing about, or assisting in the publication of the information so incorporated in the aforementioned article, and in connection with any other article, matter, or thing concerning which he may be interrogated in the said grand jury proceeding, thereby absolving him from the consequences of every such criminal act.²⁸

Burdick refused to accept the pardon and again refused to answer grand jury questions concerning the informational sources of the *New York Tribune* articles. After repeatedly invoking the fifth

25. *Carlesi v. New York*, 233 U.S. 51 (1914) (pardon for offense against the United States did not preclude state government from taking that offense into account in assessing punishment under its "second offender" law); *Illinois Central R.R. Co. v. Bosworth*, 133 U.S. 92 (1890) (under the unique facts of that case, pardon restored pardonee to full power of control and disposition over residuary interest in real property); *Knote v. United States*, 95 U.S. 149 (1877) (pardon did not entitle pardonee to recover proceeds from sale of confiscated property, which proceeds were paid into the United States Treasury before the date of the pardon); *United States v. Klein*, 80 U.S. 128 (1872) (Congress could not stipulate to the federal courts the legal consequences to be accorded a pardon in judicial proceedings); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (Congress could not exclude pardonee from the practice of law in the courts of the United States because of Civil War offenses for which he had received a "full pardon").

26. *United States v. Klein*, 80 U.S. 128 (1872); *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

27. 236 U.S. 79 (1915).

28. *Id.* at 86.

amendment and refusing to answer questions put to him, Burdick was adjudged guilty of contempt by a federal district court. Burdick was then given a final opportunity to answer the questions presented to him by the grand jury and thereby purge himself of contempt. When Burdick once again refused to answer the proffered questions, the district court issued "a final order of commitment," and Burdick "was committed to the custody of the United States Marshal until he should purge himself of contempt, or until the further order of the court."²⁹ Burdick's challenge to his contempt conviction and subsequent confinement came before the Supreme Court under writ of error.

Burdick's challenge required the Supreme Court to review Marshall's definition of a pardon as set forth in *Wilson* and forced the Court to directly confront Marshall's conclusion in *Wilson* that the validity of a pardon depends upon its acceptance by the pardonee. The *Burdick* Court contended that the issue of acceptance was clearly and rightly decided in *Wilson*:

That a pardon by its mere issue has automatic effect resistless by him to whom it is tendered, forcing upon him by mere executive power whatever consequences it may have or however he may regard it, which seems to be the contention of the government in the case at bar, was rejected by the [*Wilson*] court with particularity and emphasis. The decision is unmistakable. A pardon was denominated as the "private" act, the "private deed," of the executive magistrate, and the denomination was advisedly selected to mark the incompleteness of the act or deed without its acceptance.³⁰

In supporting Marshall's conclusion on the issue of acceptance, the *Burdick* Court reasoned that "the grace of a pardon, though good its intention, may be only in pretense or seeming; in pretense, as having purpose not moving from the individual to whom it is offered; in seeming, as involving consequences of even greater disgrace than those from which it purports to relieve."³¹

Having ranged itself on the side of Marshall's conception of a pardon as a private act of grace, the *Burdick* Court concluded that, in the case before it, Burdick did not have to accept the pardon tendered to him by President Wilson and that, without such acceptance, the pardon had no legal validity.³² Without legal validity, the pardon lacked the capacity to confer on Burdick any immunity against criminal prosecution that might flow from his answers to the grand jury's questions regarding the informational sources of the *New York Tribune* articles. Accordingly, the Court held Burdick could properly refuse to answer such questions by invoking the protection of the fifth

29. *Id.* at 87.

30. *Id.* at 90.

31. *Id.*

32. *Id.* at 91.

amendment.³³ The Court, therefore, reversed Burdick's contempt conviction, "with directions to dismiss the proceedings in contempt and discharge Burdick from custody."³⁴

On the way to its conclusion, the *Burdick* Court had to hurdle a conceptual barrier presented by an earlier case, *Brown v. Walker*.³⁵ *Walker* involved the application of a federal immunity statute to witnesses testifying "before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission."³⁶ The statute conferred on any such witness immunity against criminal prosecution "for or on account of any transaction, matter or thing, concerning which he may testify . . . before said Commission or in obedience to its subpoena, . . . or in any such case or proceeding."³⁷

Theodore F. Brown, the petitioner in *Walker*, appeared before a federal grand jury in obedience to a subpoena of the Interstate Commerce Commission. He was asked questions concerning the rate practices of the Allegheny Valley Railway Company and refused to answer such questions on the ground that his answers might tend to incriminate him. When Brown persisted in his refusal after a show cause hearing before a federal district court, "he was adjudged to be in contempt and ordered to pay a fine of five dollars, and to be taken into custody until he should have answered the questions."³⁸ Shortly thereafter, the district court dismissed Brown's petition for a writ of habeas corpus, and Brown appealed that dismissal to the Supreme Court.

In affirming the lower court's action, the Supreme Court first considered the constitutionality of the federal immunity statute as applied to Brown's testimony before the grand jury. The Court held that the federal statute conferred on Brown an immunity equal in scope to that afforded by the privilege against self-incrimination contained in the fifth amendment to the Constitution.³⁹ The Court thus rejected

33. *Id.* at 93-95.

34. *Id.* at 95 (emphasis in original).

35. 161 U.S. 591 (1896).

36. Act of Feb. 11, 1893, ch. 83, 27 Stat. 443 (1893) (current version at 49 U.S.C. § 46 (1970)).

37. *Id.*

38. *Id.* at 593.

39. *Id.* at 600-06. The immunity statute involved in *Walker* conferred "transactional immunity" upon the witness. *Id.* at 594. This immunity is broader than what is constitutionally required. In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court held that transactional immunity "affords the witness considerably broader protection than does the Fifth Amendment privilege." Accordingly, the narrower "use and derivative use" immunity is constitutionally sufficient. *Id.* at 453. The Court in *Kastigar* described transactional immunity as according "full immunity from prosecution for the offense to which the compelled testimony relates," and use and derivative use immunity as providing "[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom." *Id.* For a fuller discussion of the two types of immunity and their constitutional implications, McCormick's Handbook of the Law of Evidence § 143 (2d 1972).

Brown's claim that the immunity conferred by the federal statute was constitutionally inadequate. Of particular importance for this study, the Court further held that the immunity conferred by the federal statute settled upon Brown irresistibly; that Brown was compelled to accept the mantle of statutory immunity whether he wanted it or not.⁴⁰ Once clothed with this immunity, Brown could no longer assert the privilege against self-incrimination as a legal basis for refusing to answer the questions proffered to him by the grand jury.⁴¹ The policy underlying the *Walker* holdings is summarized in the final paragraph of Justice Brown's majority opinion for the Court:

If, as was justly observed in the opinion of the court below, witnesses standing in Brown's position were at liberty to set up an immunity from testifying, the enforcement of the Interstate Commerce law or other analogous acts . . . would become impossible, since it is only from the mouths of those having knowledge of the inhibited contracts that the facts can be ascertained. While the constitutional provision in question [the privilege against self-incrimination] is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity, and we are, therefore, of opinion that the witness [Brown] was compellable to answer, and that the judgment of the court below must be *Affirmed*.⁴²

In the course of its opinion, the *Walker* Court catalogued several instances in which a witness would be precluded from asserting the privilege against self-incrimination.⁴³ Of particular relevance is the Court's assessment of the legal effect of a pardon on a witness's obligation to testify: "[I]f the witness has already received a pardon, he cannot longer set up his privilege, since he stands with respect to such offence as if it had never been committed."⁴⁴ Admittedly, this statement does not expressly address the issue of acceptance in relation to a pardon; the Court does not state whether the witness has the option of rejecting the immunity conferred by the pardon. The tenor of the Court's opinion, however, strongly supports the right of the federal government, by statute or by pardon, to thrust immunity involuntarily upon a recalcitrant witness.⁴⁵

The *Walker* holding on legislative immunity confronted the *Burdick* Court with a difficult conceptual challenge: To sustain its holding on the facts before it, the *Burdick* Court had necessarily to distinguish immunity conferred by act of Congress from that conferred by presi-

40. *Brown v. Walker*, 161 U.S. 591, 608-10 (1896).

41. *Id.*

42. *Id.* at 610.

43. *Id.* at 597-600.

44. *Id.* at 599.

45. In fact, the *Walker* Court described the immunity statute before it as "virtually an act of general amnesty" and stated that the President's power to pardon does not preclude Congress from passing acts of general amnesty. *Id.* at 601.

dential pardon. Conceding that "[t]here is plausibility" in the asserted analogy between the two types of immunity, the Court stated that this plausibility "disappears upon reflection."⁴⁵

The Court's "reflection" occurs in two separate passages of its opinion. In the first passage, the Court analyzed the relationship between the tender of a pardon and the pardonee's right to assert his privilege against self-incrimination:

Granting then that the pardon was legally issued and was sufficient for immunity, it was Burdick's right to refuse it, as we have seen, and it, therefore, not becoming effective, his right under the Constitution to decline to testify remained to be asserted; and the reasons for his action were personal.⁴⁷

This analysis is clearly premised on the position that the validity of a pardon depends upon its acceptance by the pardonee. Without that premise, nothing supports the Court's conclusion concerning Burdick's right to refuse the immunity tendered by the pardon. Recognizing that fact, the Court, in its second passage of reflection, set forth its perception of "the differences between legislative immunity and a pardon".⁴⁸

They are substantial. The latter [a pardon] carries an imputation of guilt; acceptance a confession of it. The former [legislative immunity] has no such imputation or confession. It is tantamount to the silence of the witness. It is non-committal. It is the unobtrusive act of the law giving protection against a sinister use of his testimony, not like a pardon requiring him to confess his guilt in order to avoid a conviction of it.⁴⁹

The Court's reasoning is circular. The Court states that a pardon, unlike a grant of legislative immunity, "carries an imputation of guilt,"⁵⁰ and, this is advanced as the reason for allowing the pardonee to refuse the immunity tendered by the pardon. A pardon, however, carries an imputation of guilt only if the validity of the pardon depends upon its acceptance by the pardonee. If the requirement of acceptance is removed, the imputation of guilt vanishes. It becomes circular, therefore, to use the imputation of guilt argument as a justification for the requirement of acceptance. Stripped of its circular reasoning, the *Burdick* Court's second passage of reflection is reduced to the naked assertion that a pardon requires acceptance because that is the nature of pardons.⁵¹ It is this assertion that would be subject to critical

46. *Burdick v. United States*, 236 U.S. 79, 92 (1915).

47. *Id.* at 94.

48. *Id.*

49. *Id.*

50. *Id.*

51. One is reminded of Gertrude Stein's poetic statement: "Rose is a rose is a rose is a rose." G. STEIN, *Sacred Emily* in *GEOGRAPHY AND PLAYS* at 187 (1922).

examination by Justice Holmes in the later case of *Biddle v. Perovich*.⁵²

II. THE HOLMES POSITION: A PARDON VIEWED AS AN INSTRUMENT OF THE PUBLIC WELFARE

With the opinion in *Burdick*, the Marshall conception of a pardon as a private act of grace reached its high-water mark. Ten years later, in the decision of *Ex Parte Grossman*,⁵³ judicial acceptance of the Marshall position began to ebb. *Grossman* did not involve the issue of whether the validity of a pardon depends upon its acceptance by the pardonee; nor does the *Grossman* opinion contain any express repudiation of the Marshall position on that issue.⁵⁴ The opinion, however, does discuss the function performed by the pardon power as a check against "undue harshness or evident mistake in the operation or enforcement of the criminal law."⁵⁵ This discussion occurs in the context of a more expansive discussion of the system of checks and balances created by the Constitution.⁵⁶ Thus, the *Grossman* opinion contains language that translates readily into Justice Holmes' later description of a pardon as "a part of the Constitutional scheme."⁵⁷

The implications of *Grossman* bore fruit only two years later in *Biddle v. Perovich*.⁵⁸ In 1905, petitioner Vuco Perovich was convicted of murder in the territory of Alaska and was sentenced to be hanged; this judgment of conviction and sentence was thereafter affirmed by the United States Supreme Court.⁵⁹ Execution of sentence was postponed from time to time, and in 1909, President Taft signed an instrument which commuted "the sentence of the said Vuco Perovich . . . to imprisonment for life in a penitentiary to be designated by the Attorney General of the United States."⁶⁰ As a result of President Taft's action, Perovich was transferred from a jail in Alaska to a federal penitentiary in Washington and ultimately to the federal penitentiary in Leavenworth, Kansas.

In 1925, Perovich filed an application for a writ of habeas corpus

52. 274 U.S. 480 (1927).

53. 267 U.S. 87 (1925).

54. In *Grossman*, the petitioner, Philip Grossman, had been convicted of the offense of criminal contempt against a district court of the United States. The President later granted to Grossman a pardon for the commission of that offense. The Supreme Court held that the President's power to grant pardons for offenses against the United States extends to the non-statutory offense of criminal contempt against a court of the United States. Accordingly, the Supreme Court sustained the validity of the President's pardon of Grossman against a claim that the pardon exceeded the President's constitutional authority.

55. 267 U.S. at 120.

56. *Id.* at 119-21.

57. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

58. 274 U.S. 480 (1927).

59. *Id.*

60. *Id.*

in the federal district court for the district of Kansas. The district court granted the writ and ordered that Perovich should be set free on the ground that "his removal from jail to a penitentiary and the order of the President were without his [Perovich's] consent and without legal authority."⁶¹ Defendant Biddle, warden of the federal penitentiary at Leavenworth, appealed the district court's order to the Court of Appeals for the Eighth Circuit. That court, in turn, certified to the United States Supreme Court the following question of law: "Did the President have authority to commute the sentence of Perovich from death to life imprisonment?"⁶²

Justice Holmes' opinion for the Supreme Court answered the certified question in the affirmative.⁶³ As a predicate to this conclusion, Holmes noted that the power to commute a judicial sentence is contained within the broader scope of the pardon power.⁶⁴ Holmes then confronted Perovich's contention that the commutation of his sentence was invalid without his consent. This confrontation led Holmes to articulate his own conception of a pardon. Holmes stated:

We will not go into history, but we will say a word about the principles of pardons in the law of the United States. A pardon in our days is not a private act of grace from an individual happening to possess power. It is a part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed.⁶⁵

Holmes continued by analogizing the exercise of the pardon power to the imposition of judicial sentence: "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."⁶⁶ Not content with abstractions, Holmes turned to the facts before him and described the practical difficulties that would flow from accepting Perovich's argument regarding consent:

When we come to the commutation of death to imprisonment for life it is hard to see how consent has any more to do with it than it has in the cases first put.⁶⁷ Supposing that Perovich did not accept the change, he could not have got himself hanged against the Executive order.

61. *Id.* at 488.

62. *Id.* at 486.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. The "cases first put" were set forth by Holmes in the following language:

No one doubts that a reduction of the term of an imprisonment or the amount of a fine would limit the sentence effectively on the one side and on the other would leave the reduced term or fine valid and to be enforced and that the convict's consent is not required.

Id. at 486-87.

Supposing that he did accept, he could not affect the judgment to be carried out. The considerations that led to the modification had nothing to do with his will.⁶⁸

Here, then, is a total repudiation of the Marshall conception of a pardon as a private act of grace. Building on the intimations of *Grossman*, Holmes stressed that the pardon power is a part of the constitutional scheme, a power possessed by the executive, not for the purpose merely of bestowing executive grace, but as a check against judicial and legislative excesses. More fundamentally, Holmes perceived the pardon power as an instrument of the public welfare, as serving a policy function much broader than satisfying the wishes of the pardonee. To make the validity of a pardon depend upon its acceptance by the pardonee would, under the Holmes analysis, defeat the efficacy of the pardon's broader policy function; the requirement of acceptance would permit the conception of the public welfare to be formed, at least in part, by the pardonee. As viewed by Holmes, this was the major weakness of the Marshall position, a weakness that Holmes underscored by stating bluntly that the pardonee should not have "any voice in what the law should do for the welfare of the whole."⁶⁹

The Holmes position on acceptance was reaffirmed obliquely in the 1974 Supreme Court decision of *Schick v. Reed*.⁷⁰ *Schick*, like *Biddle*, involved the issue of the validity of a conditional pardon. The particular pardon in *Schick* commuted a death sentence to life imprisonment upon the express condition that the pardonee "shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States and the regulations promulgated thereunder governing Federal prisoners confined in any civilian or military institutions . . . , or any acts amendatory or supplementary thereof."⁷¹ The *Schick* Court sustained the validity of this condition against a challenge that the condition was unconstitutional.⁷² In the course of its opinion, the Court dealt

68. *Id.* at 487 (1927).

69. *Id.*

70. 419 U.S. 256 (1974).

71. *Id.* at 258.

72. The petitioner, Maurice L. Schick, had received his pardon in 1960. In 1972, the Supreme Court rendered its "death penalty" decision in *Furman v. Georgia*, 408 U.S. 238 (1972). Schick claimed that had the 1960 pardon not commuted his death sentence, and if his death sentence had not yet been carried out by 1972, the *Furman* decision would have voided his sentence altogether. Based on that predicate, Schick further claimed that, after *Furman*, the most severe penalty he could have received under then existing statutory law was a sentence of life imprisonment subject to consideration for parole after 15 years. Accordingly, Schick argued that the no-parole condition attached to the commutation of his death sentence was, after *Furman*, no longer valid. The *Schick* Court rejected this argument, holding that the pardon power permits "the attachment of any condition which does not otherwise offend the Constitution." 419 U.S. at 266. In response to the contention that the condition attached to Schick's commutation was not authorized by statute, the Court stated:

peripherally with the question whether the validity of a conditional pardon depends upon the pardonee's acceptance of the condition. Discussing this issue in the context of English history, the Court noted:

Various types of conditions, both penal and nonpenal in nature, were employed. For example, it was common for a pardon or commutation to be granted on condition that the felon be transported to another place, and indeed our own Colonies were the recipients of numerous subjects of "banishment." This practice was never questioned despite the fact that British subjects generally could not be forced to leave the realm without an Act of Parliament and banishment was rarely authorized as a punishment for crime. The idea later developed that the subject's consent to transportation was necessary, but in most cases he was simply "agreeing" that his life should be spared. Thus, the requirement of consent was a legal fiction at best; in reality, by granting pardons or commutations conditional upon banishment, the Crown was exercising a power that was the equivalent and completely independent of legislative authorization.⁷³

The Court's reference to the requirement of consent as constituting a "legal fiction" is blurred by a later reference in the Court's opinion to acceptance as creating a type of estoppel against the pardonee. The Court reasoned that it "would be a curious logic to allow a convicted person who petitions for mercy to retain the full benefit of a lesser punishment with conditions, yet escape burdens readily assumed in accepting the commutation which he sought."⁷⁴ The Court's reference to "burdens readily assumed in accepting the commutation" is ambiguous. If the Court means only that a pardonee must bear the burdens of a conditional pardon along with its benefits, the Court's statement is unexceptionable and leaves untouched the basic issue of consent. Conversely, if the Court's language means more generally that the validity of a pardon turns upon its acceptance by the pardonee, such a conclusion conflicts with the *Schick* opinion's earlier description of the requirement of consent as constituting a legal fiction and muddies the waters that Holmes had tried to clear in *Biddle*. Even with its ambivalence, however, the *Schick* opinion, on the issue of acceptance, sides more with Holmes than with Marshall. Thus, the Holmes opinion in *Biddle* constitutes a watershed in the

The no-parole condition attached to the commutation of his [Schick's] death sentence is similar to sanctions imposed by legislatures such as mandatory minimum sentences or statutes otherwise precluding parole. . . . Similarly, the President's action derived solely from his Art. II powers; it did not depend upon Art. III of the UCMJ or any other statute fixing a death penalty for murder.

419 U.S. at 267. Implicit in the *Schick* decision is the proposition that a conditional pardon is subject to judicial review for the limited purpose of determining whether the condition attached to the pardon "offend[s] the Constitution."

73. 419 U.S. at 261-62.

74. *Id.* at 267.

Supreme Court's conception of the nature of a pardon under the American constitutional system.

III. HOLMES V. MARSHALL: WHY THE HOLMES POSITION SHOULD PREVAIL

The major thesis of this article is that the Holmes conception of a pardon better promotes the policy goals of the Constitution than does the Marshall conception. In defining the nature of a pardon in our "constitutional scheme," what policy goals are relevant? While not exhaustive, the following policy goals bear importantly on this question: (1) fidelity to the text of the Constitution; (2) fidelity to the historical bases for inclusion of the pardon power in the Constitution; (3) fidelity to the structural implications of our constitutional system; (4) the preservation of executive capacity to promote the public welfare; and (5) the preservation of executive capacity to bestow mercy. The Marshall and Holmes positions on the nature of a pardon will now be analyzed in the light of these five policy goals.

A. *Fidelity to the Text of the Constitution*

The wording of the Constitution is of paramount importance to a determination of the compatibility of the Marshall and Holmes conceptions of the pardon power with our constitutional scheme. If the constitutional mandate is clear and specific, it creates expectations in the nation that should not be ignored. To distort a constitutional provision of patent clarity invites the growth of cynicism among those subject to the Constitution's commands. Although many constitutional provisions lack patent clarity, the search for a "textually demonstrable constitutional"⁷⁵ mandate must still be made. The Constitution may indeed be a living document whose commands are shaped by the exigencies of society, but this concept of organic growth has not totally displaced the need for constitutional exegesis. Ascertaining the meaning of the Constitution requires more than taking a Gallup poll of the nation's current desires.

The only text in the Constitution relating to the pardon power is the grant of the pardon power in article II that states that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."⁷⁶ Clearly, this clause does not deal expressly with the issue of acceptance by the pardonee. While there is nothing in the clause that expressly makes the validity of a pardon turn upon its acceptance by the par-

75. The quoted phrase occurs in Justice Brennan's discussion of the political question doctrine in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

76. U.S. CONST., art. II, § 2, cl. 1.

donee, there is, by the same token, nothing in the clause that expressly precludes the superimposition of a requirement of acceptance. Neither does the text of the Constitution imply the existence or nonexistence of a requirement of acceptance. Thus, the appeal to constitutional text is inconclusive; there is no readily discernible textual mandate on the issue of acceptance.

Textual support for the Holmes position could be implied from the absence of an express requirement of acceptance in the pardon power clause. One may ask why the pardon power should be fettered with a requirement not included in the text of the Constitution. This argument, however, is circular. If the legal act that the law calls a pardon embraces a requirement of acceptance by the pardonee, that requirement is effectively included in the Constitution by the word "Pardons." Such reasoning returns us to the main inquiry of this article: What is the nature of a pardon under the American constitutional system? To this inquiry the text of the Constitution offers no convincing answer; resort must therefore be had to the remaining policy goals.

B. *Fidelity to the Historical Bases for Inclusion of the Pardon Power in the Constitution*

The records of the federal convention of 1787 are obviously the prime source for determining the historical bases that prompted inclusion of the pardon power in the Constitution. The records of the 1787 convention contain two important references to the pardon power. The first reference occurred on Monday, August 27, 1787, in the following context:

Mr. L. MARTIN moved to insert the words 'after conviction' after the words 'reprieves and pardons.'

Mr. WILSON objected that pardon before conviction might be necessary to obtain the testimony of accomplices. He stated the case of forgeries in which this might particularly happen.

Mr. L. MARTIN withdrew his motion.⁷⁷

The second reference occurred on Saturday, September 15, 1787, in the following context:

Art. II. Sect. 2. 'he shall have power to grant reprieves and pardons for offences against the U.S. &c'

Mr. RANDOLPH moved to 'except cases of treason.' The prerogative of pardon in these cases was too great a trust. The President may himself be guilty. The Traytors may be his *own* instruments.

Col: MASON supported the motion.⁷⁸

77. DEBATES IN THE FEDERAL CONVENTION OF 1787 471-72 (G. Hunt & J. Scott eds, 1920) [hereinafter cited as DEBATES].

78. *Id.* at 571.

There followed in the convention records a brief debate on Randolph's motion. The debaters suggested several ways in which the power to pardon in cases of treason might be shared with other branches of the federal government, particularly the legislative branch.⁷⁹ The convention rejected these power-sharing alternatives and then defeated Randolph's motion by a vote of eight states to two, with one state divided.⁸⁰ Accordingly, the President's power to pardon in cases of treason was preserved, and the pardon-power clause remained in the form in which it now appears in the Constitution.

Although skimpy, the convention references lend support to the Holmes public welfare conception of the pardon power, particularly with respect to the first reference concerning the effort to restrict the pardon power to pardons "after conviction." This effort was opposed successfully on the ground "that pardon before conviction might be necessary to obtain the testimony of accomplices."⁸¹ Surely, this reasoning contemplates the use of the pardon power by the President as an aid in law enforcement. Such a use springs naturally from a public welfare conception of the pardon power, a perspective that does not regard the validity of a pardon as turning upon its acceptance by the pardonee.

Quite obviously, use of the pardon power "to obtain the testimony of accomplices" would be substantially impaired if the validity of the pardon turned upon its acceptance by the accomplices. In many instances an accomplice would choose to reject the pardon in order to preserve his right to assert his privilege against self-incrimination. This, of course, is exactly the choice made by the witness in *Burdick v. United States*.⁸² It is that choice that the *Burdick* Court upheld on the basis of the Marshall conception of a pardon as a private act of grace dependent for its validity upon acceptance by the pardonee.⁸³ Clearly, therefore, the Marshall conception of a pardon blunts the public welfare function of the pardon power as envisioned by the convention debates under discussion. By way of contrast, the Holmes conception of a pardon as an instrument of the public welfare is ideally suited to use of the pardon power as an aid in law enforcement and, more particularly, "to obtain the testimony of accomplices."

The second convention reference⁸⁴ to the pardon power also suggests a public welfare emphasis. The debate leading to the conclusion that the President should retain the power to pardon in cases of trea-

79. *Id.*

80. *Id.* at 572.

81. *Id.* at 471.

82. 236 U.S. 79 (1915). See text accompanying notes 27-29 *supra*.

83. *Id.* at 90-91.

84. DEBATES, *supra* note 77, at 571-72.

son focused strongly on public welfare concerns; the question of acceptance in relation to the pardon power received no mention.⁸⁵ Concededly, the failure to mention the question of acceptance does not conclude the matter. The tenor of the debate, however, does indicate that the debate participants did not view the pardonee as having a veto power over the President's power to pardon in cases of treason. Again, as in the first convention reference to the pardon power, the convention records, by ready implication, favor the Holmes conception of a pardon over that of Marshall.

Further support for the Holmes conception of a pardon can be derived from Alexander Hamilton's discussion of the pardon power in Federalist Paper No. 74.⁸⁶ After making several general observations concerning the propriety of vesting the pardon power in one person, Hamilton focuses on the question of the President's power to pardon in cases of treason:

But the principal argument for reposing the power of pardoning in this case to the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.⁸⁷

At first glance, Hamilton's reference to "a well-timed offer" appears to favor the Marshall position on the issue of acceptance; reference to an offer implies the necessity of acceptance. In the context of Hamilton's remarks, however, this argument is specious. If, during the course of an insurgency, a pardon is offered to the insurgents, it would almost certainly be offered on the condition that the insurgents lay down their arms and affirm their loyalty to the government that is extending the pardon. It is difficult to conceive of the pardon being tendered on any other terms. In this setting, it is true that the pardon would lack force unless the insurgents perform the condition precedent. In a loose sense, therefore, one could speak of the pardon's validity as being dependent upon the insurgent's "acceptance" of the condition precedent. This manner of speech, however, confuses a requirement of acceptance with the power to pardon upon a stated condition.

Supreme Court decisions have clearly established the power of the President to pardon upon a stated condition.⁸⁸ Such conditions may vary widely.⁸⁹ Some conditions, as in cases involving a reduc-

85. *Id.*

86. THE FEDERALIST No. 74 at 462-65 (A. Hamilton). G.P. Putnam's Sons 1888).

87. *Id.* at 465.

88. Schick v. Reed, 419 U.S. 256, 266-67 (1974); Biddle v. Perovich, 274 U.S. 480, 486-88 (1927); Ex Parte Grossman, 267 U.S. 87, 120 (1925); United States v. Klein, 80 U.S. 128, 147-48 (1872); Ex Parte Wells, 59 U.S. (18 How.) 307, 314-15 (1856).

89. For a discussion of the history and types of conditional pardons that have been utilized

tion of sentence tied to a condition of no parole, do not contemplate any "performance" by the pardonee. Thus, the efficacy of the condition is not, in any practical sense, dependent upon the pardonee's willingness to engage in any specified course of conduct.⁹⁰ The condition can be effectively executed "in the teeth of his will."⁹¹ Other conditions, as in Hamilton's insurgency hypothetical, do contemplate performance by the pardonee. Here, the efficacy of the condition is tied directly to the pardonee's willingness to engage in a specified course of conduct. This results, however, not from the proposition that the validity of a pardon turns upon its acceptance by the pardonee, but from the proposition that the President can pardon upon a stated condition and that such condition may require performance by the pardonee. It is the nature of the condition, not a blanket requirement of acceptance, that places the whip hand in the pardonee.

Viewed in the light of a stated condition requiring performance by the pardonee, Hamilton's discussion of tendering a pardon to insurgents radiates a strong public welfare concern. His arguments for vesting the pardon power in a single person are based almost exclusively on a public welfare conception of the pardon power.⁹² Like Justice Holmes in *Biddle*, Hamilton does not concede to the pardonee "any voice in what the law should do for the welfare of the whole."⁹³ The tenor of Hamilton's remarks does not consist with the assumption of a power in the pardonee to block the executive's conception of the public welfare. In spirit, if not in letter, Hamilton is on the side of Holmes.

Contemporary history, as reflected in the records of the 1787 Convention and the Federalist Papers, thus favors the Holmes conception of a pardon as an instrument of the public welfare. Why should this history matter in determining the nature of a pardon under the Constitution? A constitutional provision derives its core meaning from the history that prompted its inclusion in the Constitution.⁹⁴

by Presidents in the exercise of the pardon power, see Part II of the Supreme Court's opinion in *Schick v. Reed*, 419 U.S. at 260-66.

90. An example of this type of condition is presented by the facts in *Schick v. Reed*. There, the pardonee's death sentence was commuted to life imprisonment upon the express condition that the pardonee "shall never have any rights, privileges, claims, or benefits arising under the parole and suspension or remission of sentence laws of the United States. . . ." 419 U.S. at 258.

91. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

92. THE FEDERALIST NO. 74 at 462-65 (A. Hamilton) (G.P. Putnam's Sons 1888). In rejecting the argument that the pardon power should be shared with a group of persons or with some other branch of the federal government, Hamilton reasoned "that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment, than any numerous body whatever." *Id.* at 464.

93. 274 U.S. at 487.

94. In the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), Justice Miller stressed the importance of history in the construction of the Constitution. In relation to the thirteenth, fourteenth and fifteenth amendments to the Constitution, Justice Miller stated:

That history is a primary aid in determining the policy function that the provision is designed to serve. While a given clause should not be limited in application to the particular historical condition that inspired its inclusion in the Constitution,⁹⁵ that historical condition is at least an important starting point in assessing meaning. In many areas of constitutional construction, it is still true, as Justice Holmes has stated elsewhere, that "a page of history is worth a volume of logic."⁹⁶ Moreover, fidelity to history promotes societal stability and continuity and militates against erratic deviations from the norm. Accordingly, if the debates at the Constitutional Convention evince, in relation to the pardon power, a strong public welfare concern, that fact should weigh heavily in favor of the Holmes conception of a pardon and against that of Marshall.

C. *Fidelity to the Structural Implications of Our Constitutional System*

In 1962, in the case of *Baker v. Carr*,⁹⁷ Justice Brennan identified the various elements of a "political question" in the following language:

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history; . . . Fortunately that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

Id. at 67-68.

95. In *Brown v. Board of Educ.* 347 U.S. 483 (1954), the Supreme Court, in construing the meaning of the equal protection clause of the fourteenth amendment in relation to racial segregation in the public schools, held that an appeal to history was "inconclusive" and therefore examined that clause against the existing role of public education in the United States. *Id.* at 489. Later in its opinion, the Court developed this point more fully:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Id. at 492-93. See also Justice Douglas' statement in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966), that "[n]otions of what constitutes equal treatment for purposes of the Equal Protection Clause do change." *Id.* at 669.

96. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). In a similar vein, Justice Holmes stated in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922), that "[i]f a thing has been practised for two hundred years by common consent, it will need a strong case" to overturn it.

97. 369 U.S. 186 (1962).

initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁹⁸

If the Supreme Court concludes that one or more of the above elements dominates a particular issue, the Court will label the issue a political question and will hold that the issue is not justiciable.⁹⁹ Although the political question doctrine may lack the potency that it possessed in earlier years, the doctrine still retains some degree of vitality;¹⁰⁰ it remains an important conceptual tool that the Court can use to preserve the structural implications of our constitutional system. If the Court believes that judicial resolution of an issue on the merits would unduly threaten those structural implications, particularly in relation to the constitutional prerogatives of the legislative and executive branches of the national government, the Court can discreetly withdraw from the field of battle under the political question banner.¹⁰¹ Thus, in Justice Brennan's words, the political question doctrine is "essentially a function of the separation of powers," an expression of judicial self-restraint that, in the context of our

98. *Id.* at 217.

99. For example, in *Coleman v. Miller*, 307 U.S. 433 (1939), the Supreme Court characterized as a political question the issue whether a state legislature could ratify an amendment to the Constitution after previously rejecting the amendment. As to this issue, the Court stated:

We think that . . . the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Id. at 450.

100. For a detailed discussion of the subject matter areas in which the political question doctrine still retains some degree of applicability, see Part IV of Justice Brennan's opinion in *Baker v. Carr*, 369 U.S. 186, 208-37 (1962). The subject matter areas listed by Brennan include questions dealing with foreign relations, dates of duration of hostilities, validity of enactments, the states of Indian tribes, and the republican form of government guarantee contained in article IV, § 4, of the U.S. Constitution. For recent examples of cases in which the political question doctrine has been applied, see *Gilligan v. Morgan*, 413 U.S. 1 (1973) (U.S. CONST. art. I, § 8, cl. 16 commits to Congress the authority to provide for "organizing, arming, and disciplining the Militia") and *Roudebush v. Hartke*, 405 U.S. 15 (1972) (U.S. CONST. art. I, § 5, commits to the Senate the final decision of which candidate received more lawful votes in an election for a Senate seat).

101. A still more subtle form of withdrawal occurs when the court decides a controversial issue on the merits but in such a way as to avoid a direct conflict with the branch of government whose action is being challenged. Thus, in *Powell v. McCormack*, 395 U.S. 486 (1969), the Court held that Adam Clayton Powell, Jr., had been unconstitutionally excluded from his seat in the United States House of Representatives. The Court, however, framed this holding in the form of a declaratory judgment and neatly sidestepped Powell's petition for a writ of mandamus ordering the Sergeant-at-Arms of the House to release Powell's congressional salary for the two years during which Powell was excluded from Congress. *Id.* at 550. As to the mandamus relief sought by Powell, the Court remanded the case to the United States District Court for the District of Columbia "for further proceedings consistent with this opinion." *Id.*

constitutional system, prevents judicial usurpation of non-judicial power.¹⁰²

In the light of the factors listed by Justice Brennan in *Baker v. Carr*, exercise of the pardon power under the Constitution represents the quintessential example of a political question. This is especially true with respect to the core determinations of when and for what reasons the pardon power should be exercised.¹⁰³ There exists "a textually demonstrable commitment of the issue" to the President;¹⁰⁴ a definite "lack of judicially discoverable and manageable standards" for fixing the criteria that should control the President in the exercise of the pardon power;¹⁰⁵ need for "an initial policy determination of a kind clearly for nonjudicial discretion";¹⁰⁶ the "impossibility of a

102. *Baker v. Carr*, 369 U.S. 186, 217 (1962). Although the primary emphasis of the political question doctrine is on the separation of powers among the three branches of the national government, the policy factors that bear upon the applicability of that doctrine are also relevant in determining whether the resolution of a particular question has been reserved to the States under the tenth amendment to the Constitution. For example, in *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court upheld Iowa's requirement that a person must reside in the state for one year before bringing a divorce action against a nonresident. Justice Rehnquist's opinion for the Court stressed that the area of domestic relations "has long been regarded as a virtually exclusive province of the States." *Id.* at 404.

103. Certain secondary questions involving the exercise of the pardon power have been held by the Supreme Court to be justiciable. Such questions include: in the case of a conditional pardon, does the condition "offend the Constitution?" *Schick v. Reed*, 419 U.S. 256 (1974); does the validity of a commutation depend upon its acceptance by the pardonee? *Biddle v. Perovich*, 274 U.S. 480 (1927); does the pardon power extend to non-statutory offenses against the United States? *Ex Parte Grossman*, 267 U.S. 87 (1925); to what extent does a pardon restore the pardonee to the full enjoyment of the legal rights possessed by the pardonee before his commission of the act for which he is pardoned? *Illinois Cent. R.R. Co. v. Bosworth*, 133 U.S. 92 (1890), *Knote v. United States*, 95 U.S. 149 (1877), *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1872), *Ex Parte Garland*, 71 U.S. (4 Wall.) 333 (1867); does the power to pardon include the power to pardon upon a stated condition? *Ex Parte Wells*, 59 U.S. (18 How.) 307 (1856). No Supreme Court decision, however, has even remotely indicated that the federal courts have the power to review on the merits the President's determination concerning when the pardon power should be exercised and for what reasons. To the contrary, the Supreme Court has stressed the independence of the President in making those core determinations. *See, e.g., Ex Parte Grossman*, 267 U.S. 87, 120-22 (1925); *United States v. Klein*, 80 U.S. 128, 147-48 (1872).

104. U.S. CONST. art. II, § 2, cl. 1 states that the President "shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

105. In *Powell v. McCormack*, 395 U.S. 486 (1969), the Supreme Court implied that if the exercise of a particular power by Congress or the President is not conditioned by criteria expressly set forth in the Constitution, such exercise is a more likely candidate for application of the political question doctrine. *Id.* at 506-07. Thus, while holding on the merits that Congress, in excluding members from either House, is limited to factual review of the age, citizenship, and residence criteria set forth respectively in article I, § 2, clause 2, and article I, § 3, clause 3 of the Constitution, the *Powell* Court expressed "no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated." *Id.* at 507 n.27. Like the congressional expulsion power set forth in article I, § 5, clause 2 of the Constitution, exercise of the pardon power is not conditioned by express constitutional criteria. This fact reinforces the desirability of applying the political question doctrine to exercise of the pardon power, especially in relation to the questions of when and for what reasons the pardon power should be exercised.

106. The Supreme Court has stressed the important check and balance function served by the pardon power. *Ex Parte Grossman*, 267 U.S. 87, 120-22 (1925); *United States v. Klein*, 80 U.S. 128, 147-48 (1872). All other considerations aside, application of the political question doctrine is more appropriate in relation to the exercise of a "check-and-balance" power, such

court's undertaking independent resolution [of the issue] without expressing lack of the respect due" the executive branch of the national government,¹⁰⁷ "an unusual need for unquestioning adherence to a [pardon] decision already made";¹⁰⁸ and, finally, the strong "potentiality of embarrassment from multifarious pronouncements" by the executive and the judiciary on the same pardon power issue.¹⁰⁹

Several statements in Supreme Court decisions support the proposition that the questions, when and for what reasons the pardon power should be exercised, are indeed political questions; questions whose resolution by the President is not subject to judicial review or congressional control. In *Schick v. Reed*,¹¹⁰ for example, the Court speaks of the pardon power as flowing "from the Constitution alone, not from any legislative enactments" and states that the power "cannot be modified, abridged, or diminished by the Congress."¹¹¹ Again, in *Ex Parte Grossman*,¹¹² Chief Justice Taft describes the check and balance function of the pardon power and stresses that "whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation

as the impeachment, veto, and pardon powers, than in relation to the exercise of a "normal," non-check-and-balance power, such as the congressional power to regulate interstate commerce. Generally speaking, judicial review of a check-and-balance power detracts from the function that such a power is intended to serve in the constitutional scheme.

107. In *United States v. Klein*, 80 U.S. 128 (1872), the Supreme Court reviewed a congressional act that stipulated the legal effect to be given to certain presidential pardons of persons who had participated in the rebellion against the United States during the course of the Civil War. Among other things, the Court held that the act in question constituted an unconstitutional infringement on the prerogative of the President in the exercise of the pardon power. The Court stated:

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.

Id. at 148. The quoted passage evidences a judicial attitude that is hostile to any encroachment by Congress or the Courts on the core prerogatives of the President in the exercise of the pardon power.

108. From the perspective of the pardonee, there is indeed "an unusual need for unquestioning adherence to a [pardon] decision already made." Quite apart from the acceptance issue, the pardonee has an intense need for finality in the pardon decision. The pardonee needs urgently to know that a pardon decision, once made by the President, cannot later be challenged on the basis that the pardon was granted at the wrong time or for improper reasons. In its impact on the pardonee's legal status and liberty interest, the unsettling effect of permitting such a challenge to be considered on the merits is obvious.

109. To permit "multifarious pronouncements" on the questions of whether a pardon was timely granted or granted for improper reasons would create confusion among those branches of the federal system not involved in the pardon decision. In the discharge of their own duties, persons occupying positions of official responsibility in any branch of the federal system have a strong need to know that a condition of finality attaches to a presidential pardon decision and that they can deal reliably with the pardonee on the basis of that finality.

110. 419 U.S. 256 (1974).

111. *Id.* at 266.

112. 267 U.S. 87 (1925).

in confidence that he will not abuse it."¹¹³ Significantly, in a later portion of his opinion, Chief Justice Taft suggests as the remedy for presidential abuse of discretion in the exercise of the pardon power "a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."¹¹⁴ In a similar vein, the Court, in *United States v. Klein*,¹¹⁵ underscored the President's prerogative in the exercise of the pardon power: "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."¹¹⁶

In the light of the Brennan criteria and the above judicial statements, it seems clear that the Court today would characterize as political questions inquiries concerning when and for what reasons the pardon power should be exercised. How does this conclusion relate to the issue whether the validity of a pardon depends upon its acceptance by the pardonee? To characterize exercise of the pardon power as a political question suggests something about the structural implications of our constitutional system in relation to the pardon power. It suggests a maximization of the area of unreviewable presidential discretion in the exercise of the pardon power. It suggests further that any requirement that would fetter that discretion bears "a heavy presumption against its constitutional validity."¹¹⁷

Clearly, a requirement of acceptance by the pardonee would fetter presidential discretion in the exercise of the pardon power.

113. *Id.* at 121.

114. *Id.*

115. 80 U.S. 128 (1872).

116. *Id.* at 147. Reference should also be made to Thomas Jefferson's defense of his right to exercise independent and unreviewable judgment in the exercise of the pardon power in relation to convictions under the Alien and Sedition Act. In a letter to Abigail Adams, Jefferson stated:

You seem to think it devolved on the judges to decide on the validity of the seditious law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistracies are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution. That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), reprinted in 8 THE WRITINGS OF THOMAS JEFFERSON 311 (P. Ford ed. 1897).

117. The quoted phrase is from the Court's per curiam opinion in *New York Times v. United States*, 403 U.S. 713, 714 (1971), in which it was used to express the Court's strongly negative attitude toward any "system of prior restraints of expression" that affects freedom of the press. *Id.*

It would do so by giving the pardonee a functional veto power over the President's decision to pardon. Moreover, a requirement of acceptance by the pardonee would create for every exercise of the pardon power a potential legal issue: Has acceptance occurred? The nature of this issue is such as to require judicial resolution of it. To attach conclusive weight to the President's claim that acceptance has occurred would, of course, milk the acceptance issue of all substance. On this issue, preservation of substance would require a final arbiter other than the President. Thus, a requirement of acceptance by the pardonee would hamper the President in the initial exercise of the pardon power and would render that exercise vulnerable to judicial review on the issue of acceptance. This result is contrary to the structural implications of our constitutional system as they relate to the pardon power.

The conclusions of the preceding paragraph are buttressed by the check and balance function that the pardon power is intended to serve in our constitutional system. As noted previously, the Supreme Court, in several decisions, has expressly articulated that function for the pardon power.¹¹⁸ Under our constitutional scheme, a check and balance power cannot perform its function if exercise of the power is subject to review by other branches of the federal system. If the check and balance function of the power is to retain potency, exercise of that power, in its main essentials, must be legally unreviewable.¹¹⁹ Accordingly, if a requirement of acceptance by the pardonee would increase the instances of judicial review of exercise of the pardon power, that fact alone weighs heavily against the adoption of such a requirement. The presumption should be in favor of preserving the scope of the President's unreviewable discretion in the exercise of the pardon power rather than in favor of restricting that scope. If, as the immediately preceding paragraphs have labored to demonstrate, the structure of our constitutional system does imply a presumption in favor of unreviewable discretion in the exercise of the pardon power, then the Holmes conception of a pardon, more persuasively than Marshall's, can claim the virtue of fidelity to that presumption.

D. *The Preservation of Executive Capacity to Promote the Public Welfare*

As applied to our constitutional system, the Holmes view, that the validity of a pardon does not turn upon its acceptance by the pardonee, means that the effectuation of the President's conception of

118. See e.g., *Ex Parte Grossman*, 267 U.S. 87, 120-22 (1925); *United States v. Klein*, 80 U.S. 128, 147-48 (1872).

119. The exercise of such a power is, of course, still reviewable through the workings of the political process. Such review may take the form of pressure exerted by political constituents, removal from office through the electoral process, and, ultimately, removal from office through the impeachment process.

the public welfare, as expressed in his exercise of the pardon power, cannot be blocked by the pardonee. In contrast, the Marshall conception of a pardon, embracing a requirement of acceptance by the pardonee, gives to the pardonee a functional veto power over the pardon decision. In terms of influence, the Marshall view makes the pardonee a joint decision-maker with the President in determining how and when the public welfare shall be promoted through exercise of the pardon power. The pardonee would be, admittedly, a distinctly junior partner in the decision-making process; the crucial power of initiation would still lie with the President. Demonstrably, however, the Marshall view would fetter the President's capacity to promote the public welfare in accordance with his own perception of what that welfare requires. The Holmes view eliminates the fetter and proceeds bluntly on the assumption that the pardonee should have no "voice in what the law should do for the welfare of the whole."¹²⁰

In relation to executive capacity to promote the public welfare, then, the Holmes conception of a pardon removes a restraint that the Marshall conception would impose. This raises the question, why remove this restraint, that is, why should the President be thus unfettered in his capacity to promote the public welfare through exercise of the pardon power? Two recent exercises of the pardon power—President Ford's pardon of Richard Nixon and President Carter's pardon of those who evaded the draft during the period of our military involvement in Viet Nam—persuasively suggest an answer. Each exercise compellingly reveals the serious policy deficiencies inherent in making the validity of a pardon turn upon its acceptance by the pardonee.

On September 8, 1974, President Ford granted to Richard Nixon "a full, free, and absolute pardon . . . for all offenses against the United States which he, Richard Nixon, has committed or may have committed or taken part in during the period from January 20, 1969, through August 9, 1974."¹²¹ In the body of the pardon, President Ford set forth the policy reasons for the pardon:

It is believed that a trial of Richard Nixon, if it became necessary, could not fairly begin until a year or more has elapsed. In the meantime, the tranquillity to which this nation has been restored by the events of recent weeks could be irreparably lost by the prospects of bringing to trial a former President of the United States. The prospects of such trial will cause prolonged and divisive debate over the propriety of ex-

120. *Biddle v. Perovich*, 274 U.S. 480, 487 (1927).

121. Proclamation 4311, 10 WEEKLY COMP. OF PRES. DOC. 1103 (September 13, 1974). Cf. *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867) (the pardon power "extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."). A statement to the same effect occurs in *Ex Parte Grossman*, 267 U.S. 87, 120 (1925).

posing to further punishment and degradation a man who has already paid the unprecedented penalty of relinquishing the highest elective office of the United States.¹²²

Quite obviously, President Ford perceived the Nixon pardon as promoting domestic tranquility, enabling the federal government to meet pressing domestic and foreign problems without having to operate under the shadow of a "prolonged and divisive" Nixon trial. One does not have to agree with Ford's perception of the public welfare in order to recognize that his stated reason for granting the Nixon pardon has some degree of plausibility. Moreover, the crucial question for purposes of this article is not whether we agree or disagree with Ford's decision to grant the pardon. The crucial question is: Do we believe that the validity of the pardon should have turned upon Nixon's willingness to accept it, that Nixon, in practical effect, should have had a functional veto power over Ford's perception of what the public welfare required?

If we say "yes" to that question, and if Nixon, perversely or quixotically, had refused to accept the pardon, Ford would have faced two unsavory alternatives: allow an unpardoned man, who had already been named as an unindicted co-conspirator in the commission of serious offenses against the United States, to remain unprosecuted, or initiate prosecution against Nixon in conflict with Ford's own perception of the public welfare. To say that a person in Nixon's position should have had the power to arrest the course of public policy on a matter so vital to the nation's welfare as the question of his own pardon is to expose dramatically the weakness of imposing a requirement of acceptance upon the President's exercise of the pardon power. If ever there was a person who, in Holmes' words, ought not "to have any voice in what the law should do for the welfare of the whole," Nixon, in relation to the question of his own pardon, was that person.

The weakness of the Marshall conception of a pardon is exposed still further when we consider President Carter's pardon of those who evaded the draft during the period of our military involvement in Viet Nam. On January 21, 1977, President Carter granted:

a full, complete and unconditional pardon to: (1) all persons who may have committed any offense between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act or any rule or regulation promulgated thereunder; and (2) all persons heretofore convicted, irrespective of the date of conviction, of any offense committed between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act, or any rule or regulation promulgated thereunder, restoring to them full political, civil and other rights.¹²³

The Carter pardon excludes from its reach persons who com-

122. Proclamation 4311, 10 WEEKLY COMP. OF PRES. DOC. 1103 (September 13, 1974).

123. Proclamation 4483, 13 WEEKLY COMP. OF PRES. DOC. 90 (January 24, 1977).

mitted an offense "involving force or violence" and persons who committed an offense "in connection with duties or responsibilities arising out of employment as agents, officers or employees of the Military Selective Service System."¹²⁴ In substance, therefore, the pardon applies to persons who committed non-violent draft evasion offenses during the nine-year period from 1964 to 1973; the pardon does not apply to deserters from military service.

Unlike Ford's pardon of Nixon, the Carter pardon does not set forth expressly the reasons for granting the pardon. It seems clear, however, that the Carter pardon was motivated primarily by a desire to promote national reconciliation, to heal some of the wounds still remaining from our military involvement in Viet Nam.¹²⁵ Again, one does not have to agree with Carter's pardon decision to recognize that a policy goal of national reconciliation embraces far more than each draft evader's perception of what the public welfare requires. To make the validity of Carter's pardon turn upon its acceptance by each individual pardonee would permit draft evaders, individually or as a group, to impair substantially the goal of national reconciliation that the pardon sought to promote. Here, as with Ford's pardon of Nixon, a requirement of acceptance would cripple the President's capacity to promote the public welfare in an area of vital national concern.

The Ford and Carter pardons illustrate cogently that the Marshall conception of a pardon is inadequate to meet the needs of our constitutional system; in those and similar contexts, the Marshall position would unduly hamper the President's capacity to promote the public welfare through exercise of the pardon power. Only the Holmes conception of a pardon permits the effective exercise of the President's power to act for the benefit of the public welfare.

E. *The Preservation of Executive Capacity to Bestow Mercy*

Whatever secondary reasons may prompt the inclusion of a power to pardon in a society's system of justice, the primary reason is undoubtedly the desire that the system, somewhere within its structure, have the capacity to bestow mercy.¹²⁶ In his Commentaries on the Laws of England, William Blackstone cited the King's pardon power as

124. *Id.* For a provocative analysis of congressional power to grant amnesty for war resisters, see Lusky, *Congressional Amnesty for War Resisters: Policy Considerations and Constitutional Problems*, 25 VAND. L. REV. 525 (1972).

125. See NEWSWEEK, January 31, 1977 at 28; U.S. NEWS & WORLD REP., January 31, 1977 at 22.

126. In *Ex Parte Wells*, 59 U.S. (18 How.) 307 (1856), the Supreme Court stressed the primacy of the mercy function of the pardon power: "Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in that attribute of Deity whose judgments are always tempered with mercy." *Id.* at 310.

one of the great advantages of monarchy in general, above any other form of government; that there is a magistrate who has it in his power to extend mercy, wherever he thinks it is deserved: holding a court of inquiry in his own breast, to soften the rigour of the general law, in such criminal cases as merit an exemption from punishment.¹²⁷

Echoing the substance of Blackstone's statement, Hamilton, in *Federalist Paper No. 74*, addressed the question of mercy in these words:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.¹²⁸

Thus, we can say with Portia in *The Merchant of Venice* that "[t]he quality of mercy is . . . twice blest"¹²⁹ and can safely conclude that any system of justice worthy of the name should have, somewhere within its structure, the capacity to bestow mercy.

How does the capacity to bestow mercy relate to the Holmes and Marshall conceptions of a pardon? Descriptively, the Marshall conception of a pardon does not meet the Hamilton criterion "that the benign prerogative of pardoning should be as little as possible fettered or embarrassed." A requirement of acceptance obviously blunts the capacity of the President to bestow mercy if the pardonee does not want to receive that mercy. More fundamentally, the requirement of acceptance involves the risk, in a pre-conviction setting, that guilt will be imputed to the pardonee through the act of acceptance. This is precisely the position taken by the Supreme Court in *Burdick v. United States*,¹³⁰ a decision that championed the Marshall view of the pardon power.¹³¹ In discussing the relationship between the act of accepting a pardon and the imputation of guilt to the pardonee, the *Burdick* Court contrasted the grant of a pardon with the grant of legislative immunity against criminal prosecution. The Court stated:

This brings us to the differences between legislative immunity and a pardon. They are substantial. The latter carries an imputation of guilt; acceptance a confession of it. The former has no such imputation or confession. It is tantamount to the silence of the witness. It is noncommittal. It is the unobtrusive act of the law given protection against a sinister use of his testimony, not like a pardon, requiring him to confess his guilt in order to avoid a conviction of it.¹³²

127. 4 W. BLACKSTONE, COMMENTARIES at 397.

128. THE FEDERALIST No. 74 at 463 (A. Hamilton) (G.P. Putnam's Sons 1888).

129. W. SHAKESPEARE, THE MERCHANT OF VENICE, Act IV, Scene I, in SHAKESPEARE: THE COMPLETE WORKS 606 (G.B. Harrison ed. 1968).

130. 236 U.S. 79 (1915).

131. See text accompanying notes 25-51 *supra*.

132. 236 U.S. at 94 (1915).

Concededly, an imputation of guilt to the pardonee need not flow inexorably from a requirement of acceptance. As one writer has urged, the pardonee's acceptance of a pre-conviction pardon is not inconsistent with a position of innocence; the pardonee may simply wish to avoid the expense, trauma, and other side effects of a criminal proceeding.¹³³ Inevitably, however, the pardonee's act of acceptance, if required to make the pardon valid, encourages the view that the pardonee, at least implicitly, has confessed his guilt in relation to the offense for which he is pardoned. This tendency to equate the act of acceptance with a confession of guilt was aptly expressed by Judge Learned Hand in his opinion for the district court in the *Burdick* case:

It is suggested that a pardon may not issue where the person pardoned has not at least admitted his crime. I need not consider this, because every one agrees, I believe, that if accepted the acceptance is at least admission enough. It is an admission that the grantee thinks it useful to him, which can only be in case he is in possible jeopardy, and hardly leaves him in position thereafter to assert its invalidity for lack of admission.¹³⁴

In relation to a pardon, therefore, a requirement of acceptance burdens the channels of mercy with a likely imputation of guilt to the pardonee. In sharp contrast, the Holmes conception of a pardon, by eliminating the requirement of acceptance, removes the threat that guilt will be imputed to the pardonee. It is legally impossible to impute guilt to a person who receives involuntarily the benefit of a pardon. Without the choice of acceptance or rejection, the pardonee cannot fairly be held to have made any kind of admission in relation to the offense that is the subject of the pardon. In words intended by the *Burdick* Court to be taken in a pejorative sense, a pardon, under the Holmes view, does "by its mere issue [have] automatic effect resistless by him to whom it is tendered."¹³⁵

The Holmes conception of a pardon thus frees the President to make a pardon decision without concern for the question of imputation of guilt to the pardonee. The President will not be deterred from granting a pardon because of any reluctance to place the pardonee in a position in which he must confess guilt to gain the benefit

133. W. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT* 77 (1941).

134. *United States v. Burdick*, 211 F. 492, 494 (S.D.N.Y. 1914). Significantly, Judge Hand went on to state that, on the facts before him, he did not have to resolve the issue of whether the validity of a pardon turns upon its acceptance by the pardonee. Even assuming a requirement of acceptance, Judge Hand reasoned that when

the question is of privilege, the witness only needs protection . . . , and he is protected when the means of safety lies at hand. If he obstinately refuses to accept it, it would be preposterous to let him keep on suppressing the truth, on the theory that it might injure him. Legal institutions are built on human needs and are not merely arenas for the exercise of scholastic ingenuity.

Id. Judge Hand's decision on this point was reversed by Justice McKenna's opinion for the Supreme Court in the *Burdick* case. 236 U.S. at 95 (1915).

135. *Id.* at 90.

of the pardon. To that extent, the President's capacity to bestow mercy is enhanced; to that same extent, the Holmes conception of a pardon, more truly than Marshall's conception, does "consist with the letter and spirit of the Constitution."¹³⁶

IV. CONCLUSION

In preferring the Holmes conception of a pardon to that of Marshall, this article has proceeded on a dominant underlying assumption: It is in accord with our constitutional scheme to maximize the areas in which the President has unreviewable discretion in the exercise of the pardon power. The five policy considerations discussed in the preceding sections support this assumption and, considered in totality, establish a strong case for acceptance of the Holmes position. Concomitantly, these policy considerations dictate a rejection of the Marshall proposition that the validity of a pardon turns upon its acceptance by the pardonee. If it be argued that a requirement of acceptance is necessary to give the pardonee adequate protection against presidential abuse, surely the decisive answer is that advanced by Chief Justice Taft in *Ex Parte Grossman*: "Exceptional cases like [presidential abuse of discretion in the exercise of the pardon power], if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."¹³⁷ Taft's words summarize the core reasoning of this article. In relation to the President's capacity to use the pardon power for its intended constitutional purposes, the requirement of acceptance comes at too high a price. On this question, the wisdom of Holmes should prevail.

136. The quoted phrase occurs in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), in the course of Chief Justice Marshall's description of the reach of congressional power under the necessary and proper clause of article I, § 8 of the Constitution.

137. 267 U.S. 87, 121 (1925). An argument can be made that, in relation to the pardon power, human dignity suffers if the pardonee is denied the right to choose between acceptance or non-acceptance of the pardon. Clearly, a root premise of our constitutional system is that certain individual rights are so important that government cannot take them away under the pretext of advancing the public welfare; that, indeed, to take such rights from the individual would harm the public welfare rather than advance it. With this general premise it is difficult to quarrel. The problem, of course, is to determine the individual rights to which the premise applies. In the context of a pardon decision, the main purpose of this article has been to persuade the reader that the claims of human dignity do not require the recognition of a right of acceptance or non-acceptance in the pardonee. Our constitutional system need not accord to the pardonee's asserted right of choice the same status that it accords to the specific guarantees of the Bill of Rights.