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I. INTRODUCTION

The Pardon Clause of the U.S. Constitution vests an extraordinary power in the president "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[1] On June 4, 2018, President Donald Trump tweeted, "As has been stated by numerous legal scholars, I have the absolute right to PARDON myself, but why would I do that when I have done nothing wrong?"[2] This tweet resurrected a long-pondered constitutional question: Can the president issue a self-pardon for acts committed before taking or while in office? The Pardon Clause prohibits the president from using the pardon power in "cases of impeachment," and its application is limited exclusively to federal crimes.[3] The text of the Pardon Clause imposes no other limitations.[4] Over the course of our nation's history, U.S. presidents have issued over twenty-eight thousand pardons, but to date, there have been no presidential self-pardons.[5] Whether self-pardons are permissible remains an open—and highly relevant—question.

Generally, self-pardons are seen as the epitome of corruption, and thus, corrosive to the rule of law.[6] Indeed, the public would likely have looked askance if President Trump had issued a self-pardon at the conclusion of the Mueller investigation.[7] But what if a president committed a federal crime for the good of our country, and then issued a self-pardon?

This Note first contends that a president has the authority to issue a self-pardon based on the Framers' original intent, judicial interpretation of the Pardon Clause, and the text and structure of the Constitution. A constitutional amendment would

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1. U.S. Const. art. II, § 2, cl. 1.

2. Donald J. Trump (@realDonaldTrump), Twitter (June 4, 2018, 5:35 AM), https://twitter.com/realdonaldtrump/status/1003616210922147841?lang=en [hereinafter Trump Tweet].

3. U.S. Const. art. II, § 2, cl. 1; *see also* Brian C. Kalt, *Pardon Me: The Constitutional Case Against Self-Pardons*, 106 Yale L.J. 779, 780 (1996).

4. *See* U.S. Const. art. II, § 2, cl. 1; *see also* Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 Okla. L. Rev. 197, 199 (1999).

5. Mark Hughes, *Presidential Pardon Records: The Number of Pardons Granted by U.S. Presidents Since 1789*, Infoplease, https://www.infoplease.com/history-and-government/us-presidents/presidential-pardons (last updated Feb. 28, 2017).

6. *See generally* Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 Geo. J.L. Pub. Pol'y 463 (2019). The authors assert that self-pardons:

> Should not pass legal muster . . . because they would violate what we might call the fiduciary law of public office. If the President tries to pardon himself, he is engaged in blatant self-dealing, transgressing both his oath and the primary prohibition to which he is subject as a fiduciary officer.

Id. at 475.

7. The Mueller investigation focused on "the Russian government's efforts to interfere in the 2016 presidential election, including any links or coordination between the Russian government and individuals associated with the Trump Campaign." Robert S. Mueller, *Report On The Investigation Into Russian Interference In The 2016 Presidential Election*, U.S. Dep't of Just. (Mar. 2019), https://www.justice.gov/storage/report.pdf (citations omitted).

likely be required to bar presidential self-pardons. Second, this Note argues that self-pardons should not be outlawed, so that the president may properly exercise his[8] Lockean executive prerogative.[9]

Part II of this Note discusses the historical roots of pardon power in the United States. Part III contends that self-pardons are constitutional. Part IV discusses the Lockean executive prerogative, and how self-pardons could allow the president to act outside the bounds of the law for the good of the whole in times of emergency. Finally, Part V concludes this Note.

II. THE HISTORY OF PARDON POWER

A. The English Tradition of Pardon Power

The Framers inherited the English conception of pardon power.[10] Early English kings bartered pardons for money or military service.[11] In the early twelfth century, William the Conqueror's son, Henry I, expanded the pardon power's scope to include clemency in the administration of justice.[12] William Blackstone would later note that clemency was used as a tool to "endear the sovereign to his subjects."[13]

After the Norman Conquest, English kings resisted Parliament's attempts to curb the scope of their pardon power, and by 1535, King Henry VIII had secured full pardon power.[14] In accordance with the principle that "the king can do no

8. This Note employs the male pronoun throughout. The author recognizes that the United States could have a woman president, but as of the time of this Note's publication all U.S. presidents have been, and the remaining candidates for the 2020 election are, men.

9. David Jenkins, *The Lockean Constitution: Separation of Powers and the Limits of Prerogative*, 56 McGill L.J. 543, 545–46 (2011). The Lockean executive prerogative posits that the "executive has a prerogative power to make exception decisions in emergencies, decisions without any institutional accountability." *Id.*

10. *See* Kalt, *supra* note 3, at 782.

11. *Id.* at 782–83.

12. William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 478 (1977) (stating that pardon power was left to the "justice and mercy of the sovereign alone") (citation omitted).

13. Nida, *supra* note 4, at 203. An example of the usefulness of clemency is when King George I, in 1717, issued the "Proclamation For Suppressing of Pirates," which granted blanket pardons to pirates allowing them to rejoin society, effectively ending the "golden age of piracy" in the Caribbean. Scott Rank & Matt Albers, *The Real Life Pirates of the Caribbean*, Hist. Unplugged Podcast (Aug. 28, 2017), https://podbay.fm/podcast/1237796990/e/1503903615. English pardons applied to criminal cases but never to civil cases. 2 Frederick Pollock & Fedrick William Maitland, The History of English Law Before the Time of Edward I 506–07 (2d ed. 1898).

14. *See* Danby Pickering, The Statutes at Large: From the First Year of K. Richard III to the Thirty-First Year of King Henry VIII 381–82 (1763). In 1535, King Henry VIII was endowed with "authority to pardon or remit any treasons, murders, manslaughters, or any kind of felonie . . . committed . . . by or against any person or persons in any part of this Realm." *Id.*

wrong," self-pardons were now a non-issue because the king was above the law and thus could not act unlawfully.[15]

Parliament eventually succeeded in curtailing the king's pardon power with the Act of Settlement in 1700, which barred pardons in cases of impeachment.[16] This Act was born out of an incident wherein Parliament initiated impeachment proceedings against Sir Thomas Osborne for conspiring with France against Parliament.[17] Osborne, who was following orders from King Charles II, had been directed to write a letter offering France neutrality in exchange for six-hundred thousand livres payable to Charles.[18] Osborne's actions directly undercut Parliament because just days earlier, it had begun preparations for war against France.[19] As sovereign, King Charles II was beyond Parliament's reach; Osborne, on the other hand, was not.[20]

However, King Charles II thwarted the impeachment proceedings by pardoning Osborne.[21] Parliament was incensed because its impeachment power served as a check on the Crown's authority.[22] While Parliament debated the legality of this pardon, King Charles II decided the issue for himself and dissolved Parliament altogether. [23] The actions of King Charles II led to the Act of Settlement in 1700, which outlawed pardons from preempting impeachments.[24]

B. The American Tradition of Pardon Power

As subjects of the Crown, American colonial governments inherited this near absolute pardon power.[25] The Crown had delegated broad pardon power to governors of the American colonies.[26] After the American Revolution, the Articles of Confederation

15. Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown 5 (Joseph Butterworth & Son 1820). Of course, Parliament could take extralegal action, as was seen in the removal of King Charles I. *See* Kalt, *supra* note 3, at 783.

16. 12 & 13 Will. 3, c. 2 (1700).

17. Sir Thomas Osborne was the Treasurer of England. 2 Gilbert Burnet, Bishop Burnet's History of His Own Time 206–09 (Clarendon Press 1823).

18. *See* Kalt, *supra* note 3, at 783 n. 33.

19. *Thomas Osborne, 1st Duke of Leeds*, Britannica, https://www.britannica.com/biography/Thomas-Osborne-1st-duke-of-Leeds (last updated Feb. 16, 2020).

20. *See id.*

21. *Id.*

22. *See* Kalt, *supra* note 3, at 784 ("The King's action sparked a 'constitutional confrontation' with Parliament, which had come to rely on the impeachment power to ensure proper governance.").

23. *Charles II*, Hist., https://www.history.co.uk/biographies/charles-ii (last visited Mar. 25, 2020).

24. *Id.* at 496; 12 & 13 Will. 3, c. 2 (1700). The text of the 1700 Act of Settlement stated that "no Pardon under the great seal of England [shall] be pleadable to an impeachment by the Commons in parliament." *Id.*

25. Kalt, *supra* note 3, at 782.

26. Duker, *supra* note 12, at 498–501 (noting the various American colonies where the Crown granted broad pardon power to the governor); *see also* Ashley M. Steiner, *Remission of Guilt or Removal of Punishment? The Effects of a Presidential Pardon*, 46 Emory L.J. 959, 964 (1997) (noting that the King delegated pardon power to local governors).

proposed a radical departure from the English standard in that no federal pardon power existed, and state constitutions restricted pardon power.[27] However, as the Articles' failings became evident through increasing economic disorganization, lack of centralized leadership, and legislative sloth, the young states of the new American union opted for a stronger central authority with an energetic executive.[28]

1. The Constitutional Convention of 1787 and Ratification

At the Constitutional Convention of 1787, neither the New Jersey nor the Virginia Plan included executive pardon power.[29] At the Convention, Charles Pinckney, Alexander Hamilton, and John Rutledge introduced a proposal that almost mirrored the 1700 Act of Settlement—the president would have complete pardon power, except in cases of impeachment.[30] On May 29, 1787, the proposal prevailed.[31]

Although the Framers did not explicitly discuss the concept of the self-pardon, they did contemplate the prospect that a president could abuse the pardon power.[32] Virginia delegate Edmund Randolph introduced a motion to amend the Pardon Clause to exempt "cases of treason," reasoning that the power was "too great a trust"

27. Duker, *supra* note 12, at 498–501.

28. Ted Brackemyre, *America's First Failure at Government: The Articles of Confederation*, U.S. Hist. Scene, https://ushistoryscene.com/article/articles-of-confederation/ (last visited Mar. 9, 2020); *see* Duker, *supra* note 12, at 501.

29. James Pfiffner, *Pardon Power*, The Heritage Guide to the Const., https://www.heritage.org/constitution/#!/articles/2/essays/89/pardon-power (last visited Mar. 9, 2020). The Virginia delegates to the Constitutional Convention, led by James Madison and George Washington, proposed a governmental plan that provided for proportional representation in a bicameral legislature and a strong national government with veto power over state laws. *Creating the United States*, Libr. of Congress, https://www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html (last visited Mar. 9, 2020). The Virginia Plan was designed to protect the interests of large states in a strong, national republic. In response to the Virginia Plan, the New Jersey delegates to the Constitutional Convention proposed the New Jersey Plan, which was designed to protect the security and power of the smaller states by limiting each state to one vote in Congress. *Id.*

30. Duker, *supra* note 12, at 501. Charles Pinckney and John Rutledge were delegates from South Carolina and Alexander Hamilton was a delegate from New York. Pfiffner, *supra* note 29. The Pardon Clause and the 1700 Act of Settlement were very similar. The only difference was that the Convention changed the language from "[h]e shall have power to grant reprieves and pardons, but his pardon shall *not be pleadable in bar of an impeachment*" to the current form of the Pardon Clause, "he shall have Power to grant Reprieves and Pardons for Offenses against the United States, *except in Cases of Impeachment.*" 2 Records of the Federal Convention of 1787 at 185 (Max Farrand ed. 1911) (reprinting Madison's notes) (emphasis added) [hereinafter Records]. Punishment for impeachment convictions in the United States is limited to removal or disqualification from office, but in England the penalty could also include imprisonment, fines, exile, forfeiture of property, or even death. Maurice Taylor Van Hecke, *Pardons in Impeachment Cases*, 24 Mich. L. Rev. 657, 659–60 (1926). At the Convention, the Framers rejected a motion by Roger Sherman, a delegate from Connecticut, to place the pardon power within the "consent of the Senate" because Virginia delegate George Mason thought that the Senate already had too much power. 5 Debates on the Adoption of the Federal Constitution in the Convention Held At Philadelphia, in 1787, at 480, 549 (J. Elliot ed. 1845) [hereinafter Debates]; Records, *supra* note 30, at 419.

31. *See* Pfiffner, *supra* note 29.

32. *See* Records, *supra* note 30, at 218.

to be left to a single man as "the president himself may be guilty," and the traitors could be his agents.[33] James Wilson, on the other hand, thought that a president should have the pardon power even in cases of treason, arguing that "if [the president] be himself a party to the guilt he can be impeached."[34] Ultimately, Wilson's view prevailed over Randolph's by a vote of eight to two.[35] Thus, the president was endowed with the pardon power "to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."[36]

After the Convention, the Constitution was presented to the individual colonies for ratification, and nearly all agreed that the president should have pardon power.[37] However, some colonies and Framers believed that Congress must concur with the president's exercise of the pardon power in cases of treason.[38] Hamilton asserted that a broad pardon power is necessarily vested exclusively with the president because "in seasons of insurrection and rebellion . . . a well-timed pardon . . . may restore the tranquility of the common wealth" and obtaining consent from the legislature would take too long and let "slip the golden opportunity."[39]

At the Virginia Ratifying Convention on June 18, 1778, George Mason argued that presidents should not have pardon power in cases of treason because they may pardon crimes that they advised.[40] James Madison acknowledged that Mason's objection was a rational fear but cited impeachment as the remedy, stating "there is one security . . . if the President be connected in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him."[41]

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33. *Id.* Mason elaborated that a president with unrestrained pardon power could use the power in cases of treason "to screen from punishment those whom he had secretly instigated to commit the crime, and thereby prevent a discovery of his own guilt." Pamphlets on the Constitution of the United States 350 (P. Ford ed. 1968) [hereinafter Pamphlets].

34. *See* Records, *supra* note 30, at 626.

35. Randolph's motion was supported only by Virginia and Georgia—states that were apprehensive of too much power residing in one individual. *Id.* at 627. For example, Georgia's Constitution at the time forbade the governor from issuing pardons. Kristen H. Fowler, *Limiting the Federal Pardon Power*, 83 Ind. L.J. 1651, 1654 (2008). Even today, Georgia is one of the few states where pardon authority rests exclusively with a governor-appointed board rather than with the governor. Asia Simone Burns, *Fewer Former Offenders Getting Pardoned in Georgia*, The Atlanta J.-Const. (Aug. 24, 2018), https://www.ajc.com/news/crime--law/georgia-pardons-give-offenders-second-chance/lQvw5FOT7lKKoD3kmxOHzL/.

36. U.S. Const. art. II, § 2, cl. 1.

37. D.W. Buffa, *The Pardon Power and Original Intent*, The Brookings Inst. (July 25, 2018), https://www.brookings.edu/blog/fixgov/2018/07/25/the-pardon-power-and-original-intent/. The Constitution required ratification by at least nine states to take effect. *Id.*

38. *Id.*

39. The Federalist No. 74, at 449 (Alexander Hamilton).

40. *See* 3 The Debates in the Several State Conventions of the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 496–97 (Jonathan Elliot ed., 1836) [hereinafter Debates in the Several State Conventions]; *see also* Buffa, *supra* note 37.

41. Buffa, *supra* note 37.

If the House of Representatives passes Articles of Impeachment, there must be a Senate trial.[42] During the impeachment trial the president continues to hold office until he is convicted and removed.[43] But what is to stop him from pardoning anyone involved in the crimes after impeachment has begun, including himself? According to Madison, a president holds office during impeachment proceedings, but no longer has the power to pardon.[44] Although this remains a plausible argument, Madison's interpretation remains theoretical and untested, as no president has yet issued a pardon during impeachment proceedings.[45]

2. Operation of the Pardon Power in American Law

Every president, except William Harrison and James Garfield, has issued at least one pardon.[46] Pardons have been generally left unfettered by the legislative and judicial branches.[47] Even the Supreme Court has not restricted the pardon power, and in fact, it has emphasized the president's broad discretion in its application.[48]

The text of the Constitution outlines two restrictions on the president's pardon power: it is limited to federal crimes, and it cannot be used in cases of impeachment.[49] Aside from these limitations, the pardon power is flexible.[50] Pardons can be issued at any time after a federal crime has been committed, even before an individual is charged or after a sentence is served.[51] The president can pardon a large group of federal offenders, a single offender for a general range of unspecified crimes, or even an unspecified group of individuals for a specific crime.[52] The president can also

42. *Impeachment*, U.S. House of Representatives: Hist., Art & Archives, https://history.house.gov/Institution/Origins-Development/Impeachment/ (last visited Mar. 9, 2020).

43. *See* Buffa, *supra* note 37.

44. *See* Debates in the Several State Conventions, *supra* note 40, at 498.

45. Although the House has never suspended a president's pardon power, Congress did hold oversight committees to assess the propriety of President Bill Clinton's last-minute pardons near the end of his second term, likely because he had been impeached. *President Clinton's Eleventh Hour Pardons: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001).

46. Hughes, *supra* note 5 (noting that both Harrison and Garfield died shortly into their presidencies).

47. *See* Pfiffner, *supra* note 29.

48. *See, e.g.*, Schick v. Reed, 419 U.S. 256, 265–66 (1974) (holding that the limitations of the pardon power must be found within the Constitution); Ex Parte Garland, 71 U.S. 333, 380 (1867) (emphasizing that the pardon power is only limited by the text of the Pardon Clause); United States v. Wilson, 32 U.S. 150, 161 (1833) (holding that the Court will not review the character of a pardon).

49. *See* U.S. Const. art. II, § 2, cl. 1.

50. Kalt, *supra* note 3, at 780.

51. *Id.*

52. *Id.* For example, President Jimmy Carter pardoned anyone who was convicted of draft evasion during the Vietnam War and requested a pardon. *Vietnam War Era Pardon Instructions*, U.S. Dep't of Just., https://www.justice.gov/pardon/vietnam-war-era-pardon-instructions (last updated Mar. 3, 2016).

"reimburse fines and forfeitures, grant reprieves, free prisoners, commute sentences, or attach a range of creative conditions to any of these options."[53]

Although some presidents have considered the option, a president issuing a self-pardon would be a matter of first impression. After the Watergate scandal, President Richard Nixon's lawyers presented him with a memorandum outlining his various options, including a self-pardon.[54] However, Nixon and his lawyers ultimately concluded that a self-pardon violates the fundamental principle that "no one may be a judge in his own case."[55] Nixon instead resigned from office, leaving newly sworn-in President Gerald Ford to pardon him, in the most famous pardon in American history.[56]

President George H. W. Bush also contemplated the possibility of issuing a self-pardon after losing his 1992 presidential reelection campaign.[57] At the time, Special Prosecutor Lawrence Walsh was zealously pursuing suspects in the Iran-Contra scandal, which could have ultimately implicated the President.[58] Bush's aides presented several viable options, including a self-pardon.[59] However, like Nixon, Bush ultimately decided not to utilize it.[60]

Similarly, President Bill Clinton was presented with the option of a self-pardon by aides following the scandals of his presidency, though it is uncertain whether he actually considered it.[61] Likewise, it is unknown if Trump considered a self-pardon to thwart the Mueller investigation.[62] His June 4, 2018, tweet indicates that he thought he could pardon himself but did not intend to do so.[63]

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53. Kalt, *supra* note 3, at 780–81.

54. Mary C. Lawton, *Presidential or Legislative Pardon of the President*, U.S. Dep't of Just. (Aug. 5, 1974), https://www.justice.gov/file/20856/download. In addition to a self-pardon, the memorandum outlined two other options. One was that Nixon could declare himself unable to carry on his duties as president under the Twenty-Fifth Amendment, and allow then Vice President Gerald Ford to assume the presidency and pardon him. *Id.* The other option was a "legislative pardon." *Id.*

55. *Id.*

56. *See* Kalt, *supra* note 3, at 779.

57. *Id.*

58. *Id.*

59. *See* Nida, *supra* note 4, at 216.

60. *See* Kalt, *supra* note 3, at 779.

61. John M. Broder, *Clinton Is Said to Decide Against Pardon for Himself*, N.Y. Times (Apr. 13, 2000), https://www.nytimes.com/2000/04/13/us/clinton-is-said-to-decide-against-pardon-for-himself.html. At the time, the N.Y. Times reported that according to Vice President Al Gore, Clinton would neither try to pardon himself nor accept a pardon from his successor. *Id. See also* Tim Marcin, *Bill Clinton Says He Never Considered Pardoning Himself*, Newsweek (June 6, 2018), https://www.newsweek.com/bill-clinton-says-never-considered-pardoning-himself-961484.

62. It is similarly unknown whether President Trump evaluated the legality of a self-pardon to deal with any fallout from his impeachment. However, based on the clear textual limits of the Pardon Clause, using a self-pardon to escape impeachment is almost certainly ineffective.

63. Trump Tweet, *supra* note 2.

While a sitting president has never issued a self pardon, a federal official has done so. In 1856, Isaac Stevens, the Governor of the territory of Washington—who had been appointed by President Franklin Pierce and granted the power to pardon by Congress—was charged with contempt of court and pardoned himself.[64] Despite Congressional disapproval of his self-pardon, Stevens' pardon power was construed to extend to self-pardons.[65] The president's pardon power may be interpreted the same way today.

The Twenty-Fifth Amendment, which was ratified after President John F. Kennedy was assassinated, provides a procedure for replacing the president with the vice president in the event of death, removal, resignation, or incapacitation. The Amendment, arguably, implicitly addresses the notion of self-pardons.[66] In a possible constitutional loophole in Section 3 of the Twenty-Fifth Amendment, the president can issue a constructive self-pardon by declaring he is temporarily unable to perform the duties of office, allowing the vice president to step in and pardon him, whereupon the original president can reassume duties with the protection of a pardon.[67]

III. THE CONSTITUTIONALITY OF THE SELF-PARDON

A. Arguments that a Presidential Self-Pardon is Unconstitutional

A common argument against the constitutionality of a self-pardon is that it is antithetical to the natural principle of the law that "no one may be a judge in his own case."[68] However, a self-pardon does not violate this maxim because the very purpose of a self-pardon is to prevent judgment.[69] A self-pardon is not a declaration of innocence, but rather, a preemptive exemption from punishment for a possible violation.[70]

Another argument against the constitutionality of self-pardons is that the structure of the Constitution tends to bar self-dealing within branches of the federal government.[71] Brian Kalt, in *Pardon Me: The Constitutional Case Against Self-Pardons*,

64. *See* Max Kutner, *No President has Pardoned Himself, but Governors and a Drunk Mayor Have*, Newsweek (July 24, 2017), https://www.newsweek.com/trump-granting-himself-pardon-governors-641150; David Mehl, *The First Historical Precedent for Trump Pardoning Himself is the Craziest Story Ever*, The Federalist, http://thefederalist.com/2017/11/03/historical-precedent-trump-pardoning-craziest-story-ever/ (last visited Mar. 9, 2020).

65. *Id.*

66. *See* Alan Blinder, *How the 25th Amendment Came to Be, by the People Behind It*, N.Y. Times (Sept. 7, 2018), https://www.nytimes.com/2018/09/07/us/what-is-25th-amendment.html.

67. *See* Scott Bomboy, *Explaining the Presidential Self-Pardon Debate*, Nat'l Const. Ctr. (June 4, 2018), https://constitutioncenter.org/blog/explaining-the-presidential-self-pardon-debate.

68. *See* Nida, *supra* note 4, at 199; Lawton, *supra* note 54.

69. *See* Nida, *supra* note 4, at 211–15. Several presidents have issued pardons to individuals who allegedly participated in scandals or criminal acts with previous presidents. *Id.* By issuing these pardons, trials were prevented, and the former presidents did not have to testify as witnesses and co-actors. *Id.*

70. *See* Paul Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 Ariz. St. L.J. 71, 82–83, 86–88 (2019).

71. *See* Kalt, *supra* note 3, at 794–95.

identifies a strong example of this prohibition against self-dealing within branches—the Chief Justice of the Supreme Court presides over a president's impeachment trial.[72] However, the notion that the Constitution bars self-dealing within each branch of government is itself incorrect.[73] The Constitution necessarily allows self-reference and self-dealing in order to solve the boundary problems that arise between coordinate branches, federal and state power, and in ordinary times and emergency situations.[74] For example, the federal government polices the boundary between state and local governments; the House can impeach and the Senate can remove its own members, and "in considering a controversy between the Executive and the Legislative, the Court decides on its own jurisdiction."[75] Additionally, the judicial branch consistently engages in technical self-dealing through judicial review.[76] Finally, some argue that self-pardons would give a president unchecked absolute power.[77] However, as recognized by James Wilson at the Constitutional Convention, and Madison at the Virginia Ratifying Convention, the punishment for a president's abuse of pardon power is impeachment.[78] As such, Congress is ultimately the check against presidential abuses, including those stemming from the use of pardon power.

B. Arguments that a Presidential Self-Pardon is Constitutional

Although self-pardons were not explicitly discussed at the Constitutional Convention or at any of the Ratification Conventions, contemporaneous records circumstantially indicate that the Framers would have intended self-pardons to be constitutional.[79] The Framers saw the need for a powerful central authority and thus,

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72. *Id.* Kalt cites another example—pursuant to the Twenty-Seventh Amendment, Congress can only legislate for a raise of its pay to take effect after the next election cycle. *Id.* at 794. However, this is not a bar on self-dealing; Congress is ultimately still raising its own pay—albeit on a delayed timeframe. There are no term limits in Congress and its members regularly serve more than one term. Nicandro Iannacci, *Should There be Term Limits for Members of Congress and the Supreme Court?*, Nat'l Const. Ctr. (Feb. 27, 2016), https://constitutioncenter.org/blog/should-there-be-term-limits-for-members-of-congress-and-the-supreme-court. Self-seeking and forward-minded members of Congress can still increase their own pay with the knowledge that incumbency provides a large boost in their chances of reelection. An example of a true bar on self-dealing would be the requirement that Congressional pay be raised through a Presidential Executive Order. *See generally id.*

73. *See* Robert Blecker, *If I Implore You and Order You to Set Me Free*, 49 N.Y.L. Sch. L. Rev. 561, 574 (2005).

74. *Id.*

75. *Id.*

76. *Id. See also* Marbury v. Madison, 5 U.S. 137, 177–78 (1803) (explaining judicial review is the power of the courts to assess the constitutionality or validity of any act of any of the three governmental branches).

77. *See* Kalt, *supra* note 3, at 790.

78. *See* Debates, *supra* note 30, at 549; *see also* Debates in the Several State Conventions, *supra* note 40, at 498.

79. *See* Debates, *supra* note 30, at 380; *see also* Debates in the Several State Conventions, *supra* note 40, at 498.

did little to curtail the broad power of the executive in the Constitution.[80] Indeed, there were several attempts at the Constitutional Convention to limit the pardon power, but all were rejected.[81]

The Framers recognized the possibility that presidents could abuse their pardon power.[82] Some Framers, for example, thought that the president should not be allowed to pardon in "cases of treason."[83] They worried that a traitorous president would pardon his accomplices, indirectly allowing himself to be spared.[84] Both Madison and James Wilson, however, quelled these fears by prescribing impeachment as the remedy for abuses of the pardon power.[85]

Furthermore, the Framers at the Convention conceded that the president has the power to pardon subordinate members of the executive branch. Assuming the executive branch is unitary,[86] these subordinates reside within the presidency, and therefore, allowing the president to pardon individuals within the executive branch amounts to a constructive self-pardon.[87]

While a presidential self-pardon would be a matter of first impression, there is precedent that gives insight into how the Supreme Court would view this exercise of the executive pardon power.[88] The Court has consistently found that the pardon power should be broadly construed, unquestioned, and subject only to the explicit textual limitations found in the Pardon Clause.[89] In 1833, the Court in *United States v. Wilson* reasoned that it would not judge the "character" of a pardon because it is a private action of the executive branch—the details of which the judiciary is not privy to.[90] Because a Court will not review the "character" of a pardon beyond the formalities of the document, a self-pardon is presumably constitutional from a

80. *See* Nida, *supra* note 4, at 217–18. *See generally Letter from Alexander Hamilton to James Duane (Sept. 3, 1780)*, Nat'l Hist. Publications & Recs. Commission, https://founders.archives.gov/documents/Hamilton/01-02-02-0838 (last visited Mar. 9, 2020).

81. For example, Roger Sherman's proposal at the Convention, which would have required the pardon power be subject to the "consent of the Senate," was rejected in favor of broad and unilateral executive pardon power. *See* Debates, *supra* note 30, at 480; *see also* P.S. Ruckman, Jr., *The Study of Mercy: What Political Scientists Know (And Don't Know) About the Pardon Power*, 9 U. St. Thomas L.J. 783, 803–05, 807–10 (2012).

82. *See* Records, *supra* note 30, at 426.

83. *Id.* at 563–64.

84. *Id. See also* Nida, *supra* note 4, at 218.

85. Records, *supra* note 30, at 422.

86. "At its most fundamental level, the modern theory of the unitary executive postulates that the authority to enforce federal law and to implement federal policy rests exclusively in the executive branch and ultimately, and most importantly, in the president." Karl Manheim & Allan Ides, *The Unitary Executive*, L.A. Law., Sept. 2006, at 24, 29.

87. Kalt, *supra* note 3, at 799.

88. Nida, *supra* note 4, at 220.

89. *Id.*

90. 32 U.S. 150, 161 (1833).

procedural standpoint so long as it was correctly executed and delivered.[91] In the 1867 case *Ex Parte Garland*, which involved President Andrew Johnson's pardon of a confederate official, the Court emphasized that the pardon power is "unlimited," except for cases of impeachment, and that it applies to "any class of offender" and to "every offence known to the law."[92] A sitting president who commits a federal crime would be within "any class of offender."[93] Furthermore, "every offence known to the law" would include any offense committed by a sitting president seeking to issue a self-pardon.

In 1974, the Court in *Schick v. Reed* held that any exercise of pardon power is constitutional "which does not otherwise offend the Constitution."[94] The Court affirmed that the Pardon Clause does not apply in cases of impeachment, and its application is limited to federal crimes.[95] The Pardon Clause is otherwise unlimited by the Constitution, which implies that the Constitution would permit self-pardons. The *expressio unius*[96] canon of construction further supports this argument, as it construes the express inclusion of some terms to imply the exclusion of others.[97] Under this analysis, the inclusion of the federal crime and impeachment limitations on the pardon power means the exclusion of all other limitations and thus, the Constitution would permit self-pardons.

Moreover, the structure of the Constitution does not actually bar self-pardons, as evidenced by a constitutional loophole in Section 3 of the Twenty-Fifth Amendment.[98] Although it does not explicitly mention self-pardons, through this section, the president can issue a constructive self-pardon by declaring he is temporarily unable to perform the duties of office.[99] This allows the vice president to become acting president, with the opportunity to issue a pardon for the former president's crimes.[100] Following the exercise of this loophole, the original president can reassume duties wearing the "Kevlar" of a pardon.[101]

The sum of these arguments weighs in favor of the constitutionality of a self-pardon and implies that a constitutional amendment would be required to bar this exercise of the power. But such an amendment would be a mistake, because not

91. Nida, *supra* note 4, at 220.

92. 71 U.S. 333, 380 (1867).

93. Nida, *supra* note 4, at 220.

94. 419 U.S. 256, 265–66 (1974).

95. U.S. Const. art. II, § 2, cl. 1.

96. *See* In re Bourgeos, 902 F.3d 446, 447 (5th Cir. 2018) (defining *expressio unius* as "the expression of one thing implies the exclusion of another").

97. *See* Antonin Scalia & Bryan A. Garner, Reading Law 428 (2012).

98. Scott Bomboy, *Explaining the Presidential Self-Pardon Debate*, Nat'l Const. Ctr. (June 4, 2018), https://constitutioncenter.org/blog/explaining-the-presidential-self-pardon-debate.

99. *Id.*

100. *Id.*

101. *Id.*

having the option to self-pardon could impede a president's exercise of Lockean executive prerogative.[102]

IV. SELF-PARDONS AND LOCKEAN EXECUTIVE PREROGATIVE

Unfettered executive exercise of the pardon power is consistent with the philosophical roots of the Constitution.[103] Self-pardons should not be outlawed because, in limited situations, a president may commit a federal crime for the good of the country. While it may seem counter-intuitive, there may come a time when a president would issue a self-pardon to advance the rule of law. Further, a self-pardon could enhance a president's exercise of executive prerogative in times of emergency.

A. An Overview of Executive Prerogative

Executive prerogative is an important mandate that many presidents have exercised.[104] Its philosophical foundation derives from the writings of John Locke, "the patron saint of the American Revolution."[105] Locke's *Two Treatises of Government* argues that by the "common law of nature," the executive has the extraconstitutional prerogative to act for the good of the whole, with such actions to be later confirmed

102. *See infra* Section IV.

103. *See supra* Section II.

104. *See* John C. Yoo, *George Washington and the Executive Power*, 5 U. St. Thomas J.L. & Pub. Pol'y 1, 29 (2010). An early example of the exercise of executive prerogative was when President George Washington circumvented Congress by unilaterally declaring neutrality in the war between England and France. *Id.* Washington's exercise of prerogative is an example of acting in the absence of the law, as the president's mandate to make peace was not defined by the Constitution. *See generally id.* This was highly controversial among the Framers. Madison and Hamilton published dueling letters under the pseudonyms of Helvidius and Pacificus, respectively. Madison thought that Congress should have the power to sue for peace because it has the ability to wage wars. *See* James Madison, *Helvidius Number 1, [24 August] 1793*, Nat'l Hist. Publications & Recs. Commission, https://founders.archives.gov/documents/Madison/01-15-02-0056 (last visited Mar. 9, 2020). Hamilton, on the other hand, argued that the president should have broad authority to make foreign policy decisions. *See* Alexander Hamilton, *1793: Pacificus (Hamilton), No. 1 (Pamphlet)*, Nat'l Hist. Publications & Recs. Commission, https://oll.libertyfund.org/pages/1793-pacificus-hamilton-no-1-pamphlet (last visited Mar. 9, 2020). Ultimately, Hamilton's view prevailed, and the President put forth a statement of neutrality. *See* Kate Brown, *Asserting the "Chief Magistrate's" Prerogatives: Washington, Hamilton, and the Development of the President's Discretionary Powers*, Wash. Papers (Jan. 19, 2015), http://gwpapers.virginia.edu/asserting-the-chief-magistrates-prerogatives-washington-hamilton-and-the-development-of-the-presidents-discretionary-powers/. Many presidents since Washington have used prerogative power—a famous example is President Abraham Lincoln's suspension of Habeas Corpus during the Civil War. *See* Kyndra K. Rotunda, *A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From the Civil War to the War on Terror*, 12 Chap. L. Rev. 449, 449–50 (2009).

105. Peter H. Russell, Canada's Odyssey: A Country Based on Incomplete Conquests 69 (2017). In fact, much of the language from the Declaration of Independence, often ascribed to Jefferson, is actually directly taken from Locke's writings. *See* Robert Curry, *Jefferson, Locke, and the Declaration of Independence*, Claremont Inst. (Mar. 17, 2017), https://www.claremont.org/crb/basicpage/jefferson-locke-and-the-declaration-of-independence/.

by the whole.[106] Locke argues that prerogative power is necessary because it is "impossible to foresee and so by laws to provide for, all accidents and necessities, that may concern the public."[107] Locke further notes that the law is deficient because proper deliberative bodies are slow, partisan, not always in session, and as Plato also recognized, the law's language constraints cannot possibly cover all circumstances, particularly situations in flux.[108] Thus, some laws are suboptimal in extraordinary times, which often call for extraordinary measures.

Three factors are necessary for an executive's action to be classified as an exercise of prerogative power: an extraordinary action, taken for the public good, and later confirmed by the public.[109] The fundamental concern, however, is who judges and regulates prerogative.[110] Who decides if it is an extraordinary situation that requires extralegal action for the good of society? Who decides when the extraordinary situation is over?[111] Locke notes that the executive's prerogative power can supersede legislative authority, and thus, Congress cannot limit the executive's prerogative power.[112] Instead, the power to regulate executive prerogative power is vested in the people through the electoral process, the impeachment process, the legal process, jury nullification, historical legacy, rebellion, and even a failure to rebel.[113] According to Locke, the two reasons why an executive should have the prerogative power to pardon are (1) in the interest of mercy, and (2) because "a man may come sometimes within the reach of the law, which makes no distinction of persons, by an action, that may deserve a reward and pardon."[114] The second reason is particularly important to the focus of this Note.

To illustrate the second reason, Locke offers the example of tearing down an innocent man's house to prevent the spread of fire to the entire neighborhood.[115]

106. *See* John Locke, The Second Treatise of Government 159 (C.B. MacPherson ed., Hackett Publ'g Co. 1980) (1690) [hereinafter Second Treatise]; *see also* Blecker, *supra* note 73, at 575.

107. Ross J. Corbett, *The Extraconstitutionality of Lockean Prerogative*, Brown U., www.brown.edu/Research/ppw/Corbett.doc (last visited Mar. 9, 2020); *see also* Second Treatise, *supra* note 106, at 153–67.

108. *See* Sandrine Berges, Plato on Virtue and the Law 34 (2009). Plato believed that no set of rules could possibly cover the various colors of human experience because of language constraints. *Id.* Instead, he thought a wise statesman should rule like a doctor, adjusting to the symptoms of the patient. *Id.* Likewise, Aristotle recognized that strict adherence to the law can also lead to strict injustice. *Id. See also* Second Treatise, *supra* note 106, at 159–60.

109. *See* Blecker, *supra* note 73, at 575.

110. *Id.*

111. *Id.*

112. *See* Corbett, *supra* note 107.

113. Locke refers to rebellion as an "appeal to heaven." Marc de Wilde, *Locke and the State of Exception: Towards a Modern Understanding of Emergency Government*, 6 Eur. Const. L. Rev. 249 (2010) (explaining Locke's theory that because no authority on earth can impose a legal remedy for an abuse of the prerogative, the people's only recourse is to "appeal to heaven," suggesting that God is the proper authority to sanction the executive).

114. *See* Second Treatise, *supra* note 106, at 159.

115. *Id.*

Although unlawful, the action would be construed as taken for the public good. Without acting on such prerogative power, the rest of the neighborhood would suffer.[116] Further, according to Locke, if someone other than the executive took the unlawful action of demolishing the house for the public good, this individual should be pardoned not out of mercy, but gratitude—as a reward for his extralegal actions.[117] Thus, the notion that the executive should be able to commit unlawful acts that benefit the whole, and pardon individuals that commit illegal acts that benefit the whole, supports the principle that Lockean executive prerogative justifies a president's self-pardon for taking unlawful action that benefits society.

B. Self-Pardons Might Be Necessary for the Exercise of Prerogative

In an arguably just exercise of prerogative power, Queen Elizabeth I of England went outside the bounds of the law to requisition much needed supplies to repulse the Spanish Armada, and thus saved Britain from imminent invasion.[118] This was an extralegal act for the good of the whole that was later confirmed by the whole.[119] However, consider the response had Queen Elizabeth I's exercise of prerogative power ended with a crushing defeat at the hands of the Spanish. The public and Parliament might have had a very different response. A detrimental outcome would likely not have been seen by the public as for the good of the whole. Yet the Queen's motivation to protect her country from imminent invasion would have been the same. As such, should executives not be protected from the fate of circumstance when their intentions are good?

A self-pardon might be necessary for the proper exercise of executive prerogative for two reasons: it could incentivize the executive to properly exercise prerogative powers when circumstances require, and in the interest of justice, it could protect the executive acting with the proper motivations from the tyranny of the majority.[120]

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116. *See* Corbett, *supra* note 107.

117. *See* Second Treatise, *supra* note 106, at 159. Locke does not suggest that this individual should receive an actual reward, but just that he not be punished for his illegal act. *See* Corbett, *supra* note 107.

118. *See* 1 John Knox Laughton, State Papers Relating to the Defeat of the Spanish Armada, Anno 1588 at 303 (1894); *Elizabeth I and the Spanish Armada, Investigation: Why did the English Fleet Defeat the Spanish Armada?*, The British Libr., https://www.bl.uk/learning/histcitizen/uk/armada/act/why.html (last visited Mar. 9, 2020); Rosemary Sgroi, *1589: 7th Parliament of Elizabeth I*, The Hist. of Parliament, http://www.historyofparliamentonline.org/volume/1558-1603/parliament/1589 (last visited Mar. 9, 2020).

119. Queen Elizabeth I's popularity surged after the defeat of the Spanish Fleet. *Queen Elizabeth I's Speech to the Troops at Tilbury,* Royal Museums Greenwich, https://www.rmg.co.uk/discover/explore/queen-elizabeth-i-speech-troops-tilbury (last visited Mar. 9, 2020). Lauded as the savior of England, songs were written, medals were struck, portraits were painted, and prints were published in her honor. *Id.* There was also a thanksgiving service at St. Paul's Cathedral to celebrate the "God-given victory" that was thronged with adoring subjects and rivaled any monarch's coronation. James McDermott, England and Spanish Armada: The Necessary Quarrel 299 (2005).

120. Self-pardons used in the correct exercise of executive prerogative might only occur in a narrow set of circumstances. A corrupt president committing crimes for his sole benefit, and not for the greater good, is more likely. Locke asserts that any extralegal action not for the good of the whole is actually not an

First, a bar on self-pardons could chill the executive's exercise of prerogative. The mere prospect of a self-pardon could assuage the executive's apprehension in operating unlawfully for public good. Without the available recourse of a self-pardon, a president might not exercise the prerogative for fear of prosecution. One might argue that a truly just leader operating in the interest of the greater good should put the people's interests ahead of his own.[121] However, self-interest and self-preservation are fundamental human instincts that operate on subconscious levels.[122] Although a president has never issued a self-pardon, the possibility of a self-pardon may well have influenced his decisions.

Second, a president who properly exercised prerogative power for the greater good should not be prosecuted. Madison warned that the tyranny of the majority is one of the greatest dangers to liberty and the rule of law.[123] A president properly exercising prerogative could fall victim to factionalism and passions of the majority.

Consider an example of the prerogative power in action: President Abraham Lincoln ordering General William Sherman's March to the Sea during the Civil War.[124] By this order, Lincoln arguably committed a war crime because he approved a relentless scorched-earth policy against civilian property, which left many in abject poverty and in danger of starvation—homes and barns were burned, food stores and fields pillaged, livestock taken, and transportation networks destroyed.[125] Yet, Lincoln did so to win the Civil War, save the Union, quash resistance to minimize casualties, and end the scourge of slavery.[126] Now, suppose a counterfactual scenario: there was strong Union opposition to Lincoln's order, and he preemptively pardoned

exercise of executive prerogative. *See* Corbett, *supra* note 107. Thus, an abuse of pardon power poses a legitimate danger to society.

121. *See* Second Treatise, *supra* note 106, at 159.

122. The American Psychological Association defines the self-preservation instinct as "the fundamental tendency of humans and nonhuman animals to behave so as to avoid injury and maximize chances of survival" and notes that Dr. Sigmund Freud proposed that self-preservation was one of two instincts that motivated human behavior. *Self-Preservation Instinct*, Am. Psychol. Ass'n, https://dictionary.apa.org/self-preservation-instinct (last visited Mar. 9, 2020).

123. The Federalist No. 10, at 77 (James Madison).

124. President Lincoln gave General William Tecumseh Sherman approval, transmitted through General Ulysses S. Grant, to carry out a military campaign in Georgia to cow the citizens of the Confederacy into submission. Anne J. Bailey, *Sherman's March to the Sea*, New Ga. Encyclopedia (Sept. 5, 2002), https://www.georgiaencyclopedia.org/articles/history-archaeology/shermans-march-sea. On October 9, 1864, Sherman sent Grant a letter stating that his intention in the campaign was to "make Georgia howl." *Id.* Lincoln was initially hesitant to give approval for the campaign, but ultimately was persuaded by the strategy and gave Sherman the go-ahead. *Id.* The campaign, which began on November 15 and lasted until December 21, 1864, saw sixty thousand Union soldiers cut a 285-mile swath through Georgia, burning and pillaging their way from Atlanta to Savannah. *Sherman's March to the Sea*, Hist. (Feb. 22, 2010), https://www.history.com/topics/american-civil-war/shermans-march.

125. Scott Rank & S.C. Gwynne, *When Does a Scorched-Earth Policy Work? A Look at the Civil War's Final Year*, Hist. Unplugged Podcast (Nov. 14, 2019).

126. *See generally* David Von Drehle, *Lincoln's Reluctant War: How Abolitionists Leaned on the President*, The Atlantic (Oct. 26, 2012), https://www.theatlantic.com/national/archive/2012/10/lincolns-reluctant-war-how-abolitionists-leaned-on-the-president/264125/.

himself after ordering the March to the Sea to avoid prosecution for a war crime.[127] A self-pardon in this scenario would indeed be for the good of the whole of the United States because it would allow a benevolent leader, acting to end a malevolent institution, such as slavery, to stay in power and allow the country to reap the benefits of his continued just rule.[128]

Even if President Lincoln's order was a proper exercise of executive prerogative, that alone may not have shielded him from the transient passions of the majority. Madison recognized that a constitution must be "a safeguard against the tyranny of [the people's] own passions."[129] In *The Federalist No. 10*, Madison noted that while factions and divisions are inevitable due to the nature of man, these groups are the most dangerous when they find a majority.[130] He thought the remedy was to have many factions, spread out over large geographical areas, so the majority would never find each other.[131] Despite Madison's warnings, this threat has persisted. Modern technology has rendered separating like-minded factions functionally impossible; factions metastasize into majorities from the far corners of the nation with mere tweets.[132] We now live with more factionalism than ever.[133]

Since the national trauma of Watergate, every president with the exception of President Barack Obama has faced independent counsel investigations.[134] It is now

127. The executive's pardon power allows for preemptive pardons for crimes that have not yet been charged. Ex Parte Garland, 71 U.S. 333, 380 (1867).

128. There is also an argument that Lincoln's Emancipation Proclamation was an act of executive prerogative. The Constitution as written—prior to the Thirteenth Amendment—was a slavery pact. Slavery is infamously enshrined in three places in the Constitution: the 1808 Clause, the Three-Fifths Clause, and the Fugitive Slave Clause. *See* David Azerrad, *What the Constitution Really Says About Race and Slavery*, The Heritage Found. (Dec. 28, 2015), https://www.heritage.org/the-constitution/commentary/what-the-constitution-really-says-about-race-and-slavery. The Emancipation Proclamation went against the text of the Constitution to deprive the South of their constitutional property rights (albeit in human beings). Abigail Perkiss, *Abraham Lincoln as Constitutional Radical: The 13th Amendment*, Nat'l Const. Ctr. (July 12, 2013), https://constitutioncenter.org/blog/illary-lincoln-as-constitutional-radical-the-13th-amendment. Yet, in acting outside the bounds of the written law through prerogative action, Lincoln pursued a higher, natural law, which ultimately was more in line with the spirit and the text of the Declaration of Independence—that all men are created equally and endowed by their creator with inalienable rights. *Id.* Of course, it is true that the Southern states were in rebellion and the Constitution as written did not apply to them, and therefore, the Emancipation Proclamation was, arguably, not an extralegal action. *See id.*

129. Blecker, *supra* note 73, at 563; The Federalist No. 63, at 384 (James Madison).

130. The Federalist No. 10, *supra* note 123, at 77–84.

131. *Id.*

132. Andrew Rudalevige, *Overcoming the Violence of Faction*, The Wash. Post (Oct. 16, 2013), https://www.washingtonpost.com/news/monkey-cage/wp/2013/10/16/overcoming-the-violence-of-faction/.

133. *Id. See also* Danielle Allen, *The Road From Serfdom*, The Atlantic (Dec. 2019), https://www.theatlantic.com/magazine/archive/2019/12/danielle--allen-american-citizens-serfdom/600778/.

134. Sonam Sheth, *Obama is the Only President Since Nixon Who Didn't Face an Independent Investigation*, Bus. Insider (Oct. 23, 2017), https://www.businessinsider.com/obama-nixon-trump-russia-independent-investigation-2017-10. While President Obama himself was not investigated, members of his administration were, including most notably, Secretary of State Hillary Clinton. Eric Bradner, *Hillary*

the norm of partisan politics. This pronounced partisan factionalism means that a just president acting unlawfully for the greater good may still be subject to prosecution. A self-pardon could be necessary to check this political problem.

C. Counterarguments to the Lockean Executive Prerogative

1. How Can a Self-Pardon Be Confirmed By the Whole?

Lockean prerogative requires that the extralegal action taken by the executive is for the good of the whole and later confirmed by the whole.[135] One can argue that a self-pardon constructively prevents the whole from later confirming the extralegal action. However, this argument fails for two reasons. First, a president is still subject to confirmation by the whole through the people's representatives in Congress that can impeach him for abusing the pardon power. Thus, Congress' failure to impeach could be considered an implied acquiescence and approval of his actions—notwithstanding considerations of political expedience when the president is of the same party as the congressional majority.[136] Second, the whole can still confirm or reject the use of prerogative power after a self-pardon. A president who issues a self-pardon is still subject to the judgment of the whole—either through the electoral process for a first-term president, or through historical legacy for a second-term president.[137] Furthermore, because a prosecution is a unilateral action of the executive branch,[138] the prosecution of a president cannot be considered a rejection by the whole.

2. How is Justifying a Self-Pardon to Benefit the Whole Different than a Choice of Evils Statute?

An additional counterargument is that a self-pardon is unnecessary to execute prerogative because of the possibility of a choice of evils defense.[139] Many jurisdictions have a choice of evils or necessity statute.[140] For example, New York Penal Law Section 35.05 provides that "an emergency measure to avoid an imminent public or

Clinton's Email Controversy Explained, CNN (Oct. 28, 2016), https://www.cnn.com/2015/09/03/politics/hillary-clinton-email-controversy-explained-2016/index.html.

135. *See* Blecker, *supra* note 73, at 575.

136. It must be noted that one reason a president might not be impeached is because his party controls a majority of Congress and wants their party to remain in power.

137. Jonathan Turley, *Yes, Trump Can Legally Pardon Himself or His Family. No, He Shouldn't*, Wash. Post (July 21, 2017), https://www.washingtonpost.com/outlook/yes-trump-can-legally-pardon-himself-or-his-family-no-he-shouldn't/2017/07/21/6134fb12-6e2d-11e7-b9e2-2056e768a7e5_story.html. It is indeed possible that a president may not care about his historical legacy, or that his legacy has been so ruined by the act for which he pardons himself that it cannot be saved, but historical legacy is still a way for society and future generations (the whole) to judge the exercise of Lockean prerogative. *See generally id.*

138. *See* Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting) (explaining that criminal prosecution is "the exercise of purely executive power").

139. *See generally* Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. Crim. L. & Criminology 289 (1974).

140. *Id.*

private injury" is not a crime.[141] However, this choice of evils argument is unpersuasive because there is no federal equivalent to New York's choice of evils or necessity statute, making it "an open question whether courts ever have authority to recognize a necessity not provided by statute."[142] Further, the Supreme Court has "not yet allowed the necessity defense in a federal criminal case."[143]

Even if a federal court allowed a necessity defense, a self-pardon may be independently necessary for the exercise of prerogative for two reasons. First, a necessity defense could only protect a president from getting convicted of a crime—it does not prevent him from being charged with a crime.[144] As such, a president who exercises prerogative will have to go through the experience of being charged with a crime, which could potentially undermine his entire political career and presidency. Additionally, putting a president on trial to determine if his actions constituted the lesser of two evils would be highly politicized, especially if he is charged by a local federal prosecutor in a district that is politically hostile to the president. In such instance, a jury is not indicative of the whole, but rather, of a small geographically isolated segment of the population, and thus, may opt to convict him on solely political reasons.[145]

Second, it would be far too difficult for a court or jury to assess the lesser of two evils with regard to an extralegal executive action. Although an executive is supposed to act for the good of society, prerogative action can ultimately be detrimental to some, while beneficial to others.[146] Passing judgment on such a difficult matter should not be left to a jury of ordinary citizens because a jury should only be concerned with the accused—and not the larger issues a nation faces. Furthermore, the jury would be required to step into the shoes of the president—a far too difficult task for a lay jury, that would lead to an unjust result.

3. Potential State Prosecutions

It can be argued that a self-pardon might be inconsequential because a state prosecutor could pursue prosecution against a self-pardoned president, as a self-

141. N.Y. Penal Law § 35.05 (McKinney 2020).

142. *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) (implying that the necessity defense could not apply without a statute).

143. Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Criminal Law?*, 75 U. Chi. L. Rev. 1259, 1268 (2008). The Supreme Court, however, has recognized that a common law necessity defense could be applied in federal cases, but has so far neglected to do so. Lower federal courts have applied the common law necessity defense but "have done so inconsistently." *Id.* at 1259.

144. It is an open question if a sitting president has immunity from prosecution while they are president. *See* Susan Low Bloch, *Can We Indict a Sitting President?*, *Foreword to* Ought A President of the United States Be Prosecuted, Geo. Univ. Law Ctr. 7 (1997).

145. *See generally* Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012) (discussing implicit biases present in the courtroom and their effect on the jury).

146. Locke's example of tearing down an innocent man's house to prevent the spread of fire to the entire neighborhood illustrates this notion. The action benefits the entire neighborhood but is detrimental to the individual who owns the house. *See* Schwartz, *supra* note 143.

pardon applies solely to federal crimes.[147] But it is still an open question of law whether a sitting president could be criminally charged.[148] The prevailing view is that a sitting president is immune from criminal prosecution while in office—any criminal prosecution must wait until his term is over or he is removed from office.[149] Thus, a president who justly exercises prerogative power for the greater good can be prosecuted at the state level once he leaves office—he is not absolutely protected by a self-pardon. A state's necessity or choice of evils statute can be useful under these circumstances. On the state level, a self-pardon may not fully indemnify a president for proper exercise of prerogative; however, coupling a self-pardon with a state's necessity or choice of evils statute may provide extra protections.

V. CONCLUSION

President Trump's tweet—"I have the absolute right to PARDON myself"—like it or not, is true.[150] The president has the authority to issue a self-pardon based on the Framers' original intent, judicial interpretation of the Pardon Clause, and the text and structure of the Constitution. This authority is vital, as it ensures that the president may properly exercise his Lockean executive prerogative. Locke posited that the executive should be able to commit unlawful acts during extraordinary times to benefit the whole, and should pardon individuals who commit such acts, subject to confirmation by the whole.

Although U.S. presidents have issued over twenty-eight thousand pardons, a president has never issued a self-pardon. Perhaps the first self-pardon will be issued by a president who commits an unlawful act during an emergency to benefit the United States. But what if the first self-pardon is one that is unjust, issued by a corrupt and self-interested president? This potential abuse of power would be a grave injustice perpetuated on the whole. However, as Locke asserted, any use of executive prerogative, such as pardon power, must be confirmed by the whole. Unjust self-pardons can still subject the president to judgment by the whole through impeachment, the electoral process, and historical legacy. Ultimately, these were the checks on pardon power the Framers envisioned and thus, a president who issued an unjust self-pardon would be unable to escape a form of judgment.

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147. Ann E. Marimow & Ellen Nakashima, *Meet the Manhattan District Attorney Doing Battle With President Trump in Court*, Wash. Post (Oct. 22, 2019), https://www.washingtonpost.com/local/legal-issues/meet-the-manhattan-district-attorney-doing-battle-with-president-trump-in-court/2019/10/21/bd0c7a0e-f0f9-11e9-8693-f487e46784aa_story.html; Alan Neuhauser, *States Attorneys General Lead the Charge Against President Donald Trump*, US News (Oct. 27, 2017), https://www.usnews.com/news/best-states/articles/2017-10-27/state-attorneys-general-lead-the-charge-against-president-donald-trump.

148. Adam Liptak, *A Constitutional Puzzle: Can the President Be Indicted?*, N.Y. Times (May 29, 2017), https://www.nytimes.com/2017/05/29/us/politics/a-constitutional-puzzle-can-the-president-be-indicted.html.

149. *Id.* Two common arguments why a president may be immune from prosecution while in office are (1) the Constitution does not expressly permit prosecution, and (2) prosecution would impede the president's ability to carry out his duties. Thus, a president is likely immune while in office but can still be prosecuted after leaving office. *See* Bloch, *supra* note 144, at 7–10.

150. Trump Tweet, *supra* note 2.