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Forgetting Oblivion: The Demise of the Legislative Pardon

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BERNADETTE MEYLER*

FORGETTING OBLIVION: THE DEMISE OF THE LEGISLATIVE PARDON

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I INTRODUCTION

Despite several bouts of attempted reinterpretation, the presidential pardon power has generally been accepted as plenary since the aftermath of the Civil War. Out of heated blows thrown between Andrew Johnson and his Congress emerged a set of Supreme Court cases opining that amnesty was part of pardoning and suggesting that congressional attempts to control this presidential capacity would violate the separation of powers. Like many features of U.S. Constitutional law, this treatment of the relationship between pardoning and amnesty and the allocation of both to the President remains exceptional in relation to European legal systems.¹ Unlike a number of other divergences between

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¹ Adam Liptak's series of articles for the *N.Y. Times* in 2008 on the subject of American exceptionalism indicated some of the areas in which the U.S. diverges from other parts of the world, including the exclusionary rule derived from the Fourth Amendment and the adversarial selection of expert witnesses. Adam Liptak, *U.S. Is Alone in Rejecting All Evidence if Police Err*, N.Y. TIMES (July 19, 2008); Adam Liptak, *In U.S., Expert Witnesses Are Partisan*, N.Y.

U.S. and continental European constitutional law, however, the discrepancy cannot be attributed primarily to differences between the civil and common law systems.

At the time of the Founding, the common law of England distinguished between pardoning in individual cases—still the province of the King or Queen—and grants of amnesty or oblivion—the domain of Parliament.² This differentiation was not solely derived from the dominance of legislative sovereignty within the eighteenth century. Instead, it had arisen in the mid-seventeenth century, first suggested by the ill-fated King Charles I, then implemented by the Interregnum Parliament, and, finally, fully instated at the Restoration of King Charles II. Practice within the American colonies displayed greater variations, ranging from exalting the governor’s power of pardoning to passing acts of oblivion through the legislature.³

As I have argued in *Towards a Common Law Originalism*, an originalist approach to constitutional interpretation that aims to be faithful to Founding Era history must not rely predominantly on a simplified vision of the common law derived from Blackstone’s *Commentaries on the Laws of England*.⁴ Rather, such interpretation should examine the disparate strands of common laws—some emanating from the colonies and others from England, some more archaic and others more innovative—that coexisted at the time of the founding. The resulting common law originalist approach would treat eighteenth-century common law not as providing determinate answers that fix the meaning of particular constitutional clauses but instead as supplying the terms of a debate about certain concepts. It would assist in framing questions for judges or other constitutional interpreters in the present, but often refuse to settle them definitively through resort to history.

Were Article II to be interpreted from the vantage point of the common laws in place when the Constitution was ratified, a strong argument could be made that the President’s constitutional power to pardon should not be construed to extend as far as proclaiming amnesties. This very proposition raises the question, however, of whether the Constitution’s structural provisions partake of common law antecedents in the same manner as

TIMES (Aug. 12, 2008). For a discussion of the treatment of pardon and amnesty in French and German law, see *infra* notes 146-151 and accompanying text.

² See generally *infra* Section III.

³ See generally *infra* Section IV.

⁴ See generally Bernadette Meyler, *Towards a Common Law Originalism*, 51 STANFORD L. REV. 551 (2006).

guarantees of rights. Even if the rights of the new American citizen remained commensurate with those of the subject under the common law, the arrangement of government arguably altered too fundamentally in the shift from King to President and the change from parliamentary supremacy to the separation of powers to extrapolate common law constraints on executive power.

Several factors, however, suggest that this argument may not be as persuasive as it initially appears. To a significant extent, Article II's grants of authority echo the capacities of the English King.⁵ In addition, common law interpretation was itself applied to assessing the scope of parliamentary power in various contexts.⁶ Furthermore, the fact that the legal structures of the colonies experimented with diverse forms of political arrangement with respect to the allocation of pardon powers indicates that common law understandings of pardoning pertained not only to the King but also to other forms of executive official. Finally, to the extent that the claimed constitutional power of the President exceeds the scope enjoyed by the King even in the seventeenth century, the presumption that the move towards democracy in the American Constitution should alter our understanding of the effect of the common law backdrop cuts in the opposite direction. Indeed, debates about oblivion in the English context often foreshadowed what seem quite contemporary concerns in the United States about the President immunizing executive branch officials for extra-legal acts through the pardon power.⁷

Because the common laws were not univocal at the time of the Founding with regard to the scope of pardoning and its political location or locations, a common law originalist approach would not insist that Congress alone should be construed as capable of

⁵ See FEDERALIST 69 (Alexander Hamilton) (describing the analogies between the constitutional powers allocated to the President and those exercised by the English King, but simultaneously enumerating the substantial limitations on the President's deployment of those capacities).

⁶ For example, a late eighteenth-century treatise by Edward Christian, Professor of Law at Cambridge, applied a common law method to comprehend the scope of the power of Parliament. According to Christian, "The usage and custom of Parliament constitutes the Law of Parliament, which is part of the common law of the land, or part of the *Lex et Consuetudo Angliae*." AN EXAMINATION OF PRECEDENTS AND PRINCIPLES; FROM WHICH IT APPEARS THAT AN IMPEACHMENT IS DETERMINED BY A DISSOLUTION OF PARLIAMENT: WITH AN APPENDIX, IN WHICH ALL THE PRECEDENTS ARE COLLECTED 8 (2d ed., 1790).

⁷ See generally *infra* Section III.

granting amnesty. Rather, an originalism attentive to the common laws calls into question the inevitability of the determinations about the pardon power reached by the Supreme Court following the Civil War and indicates why these should be re-examined in light of the indeterminacy of the historical record and the normative considerations supporting congressional control over amnesty. As these cases themselves indicate, some of the entailments of amnesty—such as the restoration of those included to full citizenship and the return of confiscated property—involve powers like those of naturalization and spending that Article I explicitly gives to Congress.⁸ To the extent that an offer of amnesty precedes or amnesty is entailed by the cessation of hostilities, the Senate’s capacity to advise and consent the President on treaties may also be implicated. Nor should the absence of an explicit congressional ability to issue amnesties in the Constitution be considered determinative. Even the Supreme Court has affirmed that Congress may possess a power concurrent with the President to effect something like amnesty through the Commerce Clause or other provisions of Article I.⁹ From the common law originalist perspective, we should, therefore, keep our eye on the history of oblivion rather than allowing it to be overlooked or forgotten.

Remembering oblivion might also allow us to recover a different form of pardoning, one associated with transitional justice and the restoration of a community riven by civil strife.¹⁰ Today we associate pardoning with the highly salient and potentially corrupt instances of its application, such as the pardon of Marc Rich.¹¹ This vision stands in contrast to the history of pardoning, replete with more routine and general mitigations of punishment as well as the use of pardon as a political strategy.¹² Simultaneously, contemporary approaches to transitional justice, like the Truth and Reconciliation Commission in South Africa, emphasize knowledge

⁸ See generally *infra* Section II.

⁹ See *infra* notes 153-154 and accompanying text.

¹⁰ For a recent defense of the ancient version of amnesty as an alternative to contemporary practices of transitional justice, see Adriaan Lanni, *Transitional Justice in Ancient Athens: A Case Study*, 32 U. PENN. J. INT’L L. 551 (2010).

¹¹ See Margaret Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1195-1200 (2010) (analyzing the last-minute pardons of the Clinton era and how they emanated not only from presidential misjudgment but also from the Justice Department’s failure to produce sufficient pardon recommendations).

¹² See *id.* at 1172-93.

as the prerequisite for personal forgiveness and political amnesty.¹³ Oblivion presents an alternative model for moving forward, suggesting the possibility that certain kinds of conflicts would be better forgotten than remembered for the continued health of the polity.

Four components of oblivion emerge from an examination of the English and American histories of the practice: its focus on erasing instead of rehashing; its deployment after moments of civil unrest, often connected with foreign conflict; its capacity to settle widespread property disputes and restore the privileges and immunities of citizenship; and its legislative character. Although involving American actions abroad not at home, the most recent example of a missed opportunity to appeal to oblivion involved U.S. pressure on the Iraqi government not to grant amnesty to Baathists in 2006.¹⁴ Domestically, the potential for conflict between President and Congress over the capacity to issue amnesty came to the fore in the aftermath of the Vietnam War. When Congress held hearings in 1974 on the advisability of passing an amnesty covering those currently imprisoned or effectively exiled for evading the draft, the question of its ability to do so in light of the President's power of pardoning came to the fore and furnished one of the reasons that it failed to implement an oblivion.¹⁵

Other more contemporary problems overlap at least in part with situations that might earlier have called for oblivion. With the expansion of the rhetoric of war into areas like the war on drugs, and the resulting drastic sentences and sanctions imposed on offenders, a partial amnesty in that area could effectuate some of the purposes of oblivion by reintegrating a group of the

¹³ See Frank Haldemann, *Another Kind of Justice: Transitional Justice as Recognition*, 41 CORNELL INT'L L.J. 675 (2008) (elaborating the dominant approach to transitional justice and "constru[ing] transitional justice as a moral project of recognition").

¹⁴ Nathaniel Flick, *Give Amnesty, but Not to All*, N.Y. TIMES (Dec. 10, 2006) (explaining that "[t]he Iraq Study Group report points to a lack of national reconciliation as the 'fundamental cause of violence' in Iraq" and that it "concludes that the Iraqi government must find 'ways and means to reconcile with former bitter enemies' and that 'Iraqi amnesty proposals must not be undercut in Washington'").

¹⁵ H.R. Subcomm. on Cts., Civ. Liberties, & Administration of Just. of the Comm. on Judi., *H.R. 263, H.R. 674, H.R. 2167, H.R. 3100, H.R. 5195, H.R. 10979, H.R. 10980, H.R. 13001, H. Con. Res. 144, and H. Con. Res. 385 Relating to Amnesty*, 93d Cong. (Mar. 8, 11, 13, 1974).

disenfranchised into the political community. Likewise, calls for a student loan amnesty—acknowledged to be within congressional power, at least insofar as legislative action does not offend the Takings Clause—recall the property settlement function of oblivions.

In Section Two, the Article will examine the Supreme Court’s treatment of pardoning in the aftermath of the Civil War. Within the series of cases emerging from disputes between Presidents Lincoln and Johnson and Congress during the latter half of the nineteenth century, the Court both posited that amnesty and pardoning were synonymous and that the power to accomplish both rested in the hands of the President. At the same time, the Court indicated that certain conventional entailments of amnesty could only be effectuated by Congress, suggesting the problems with its own assertion of the identity of pardoning and amnesty. In order to uncover the nature of the difference between the two, Section Three turns to the early modern English equivalent of amnesty—oblivion. Arriving in England from Scotland and international law, oblivion took hold in the seventeenth century and became a significant parliamentary practice. Section Four then demonstrates the existence of colonial versions of oblivion—emerging almost simultaneous with the English forms—and examines their legislative implementation and persistence through the period of the American Revolution and the relations between the states and the Continental Congress. Given the significant Founding Era tradition of legislative oblivion even in states where pardoning was a gubernatorial power, a strong argument can be made from a common law originalist perspective for a congressional ability to issue amnesty or oblivion. The final Section evaluates the pragmatic considerations that might be taken into account by the constitutional decision-makers—whether Court, Congress, or President—assessing the prospects for issuing legislative amnesties and presents various normative reasons for increasing the role of Congress in this form of pardoning.

II *FROM KLEIN TO KNOTE*

While Alexander Hamilton’s remarks at the time of the Founding and the practice of some early presidents indicated that at least advocates of a strong executive believed the President could issue amnesties, the scope of the President’s pardon power was most firmly established by a set of cases arising after the Civil War. On December 8, 1863, hoping to provide an incentive to hasten the end of hostilities, President Lincoln issued a proclamation offering pardon and amnesty to any members of the

Confederacy who would put down their arms and take an oath of loyalty.¹⁶ Consistent in espousing broad executive authority, Lincoln insisted on the same day in his annual address to Congress that “the Constitution authorizes the Executive to grant or withhold pardon at his own absolute discretion” and that “he has clear constitutional power to withhold [pardon and restoration of forfeited rights] altogether or grant [them] upon the terms which he shall deem wisest for the public interest.”¹⁷

Although Lincoln had similarly maintained his ability to suspend the writ of habeas corpus without the assistance of Congress, the circumstances underlying his proclamation of amnesty differed significantly. In July of 1862, Congress had passed a statute authorizing the President “to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare.”¹⁸ This law itself was fully within Lincoln’s own cognizance when he issued the proclamation of pardon. Despite the subsequent affirmation of his own exclusive power, Lincoln’s actual proclamation cited not only the President’s constitutional capacity “to grant reprieves and pardons for offenses against the united States, except in cases of impeachment,” but also the fact that “laws have been enacted by Congress . . . declaring that the President was thereby authorized at any time thereafter by proclamation to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty”¹⁹ Notwithstanding Lincoln’s efforts to assert independent authority for his actions, Congress and the President were operating in harmony in this instance.

But discord soon arose. With growing recognition of the substantial financial toll that the Civil War had exacted from the nation and the ascendance of a spirit of retribution rather than reconciliation, members of Congress became increasingly resistant

¹⁶ For an excellent and detailed discussion of the history of this period, from which the general statements about the relation between Presidents Lincoln and Johnson and Congress are derived, see generally Jonathan Dorris, *Pardon and Amnesty under Lincoln and Johnson* (UNC Press, 1953).

¹⁷ Abraham Lincoln, Annual Message to Congress, Dec. 8, 1863, in *SELECTED WRITINGS AND SPEECHES: ABRAHAM LINCOLN* 407-09 (Gore Vidal ed., 1992).

¹⁸ 13 Stat. at Large, 737.

¹⁹ Abraham Lincoln, Proclamation of Amnesty and Reconciliation, Dec. 8, 1863, in *SELECTED WRITINGS AND SPEECHES*, *supra* note 17, at 411-412.

to offers of amnesty, offers that often entailed restoration of the forfeited property of former members of the Confederacy. As a result, after the end of the war, and after Andrew Johnson had replaced the assassinated Lincoln in office, Congress repealed its authorization of presidential pardon and amnesty on January 21, 1867. Adopting Lincoln's rhetoric and endowing it with even more ferocity of purpose, Johnson continued to maintain his exclusive capacity to decide on and implement amnesty in the face of this Congressional disapproval. A series of judicial decisions on the scope of the President's pardon power ensued. Almost uniformly, these affirmed an extremely expansive view of the President's ability under Article II "to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."²⁰ More broadly, the Reconstruction cases, from the 1865 decision in *Ex parte Garland* forwards, reinforced the notion that the consequences of pardoning were vast, including not only "restoring all civil rights" and "making [the one pardoned] a new man," but even "blot[ting] out of existence the guilt, so that, in the eye of the law, the offender is as innocent as if he had never committed the offence."²¹ The broad language eloquently employed in these opinions has furnished the basis for subsequent understanding of the source and consequences of pardoning.

In *Garland* itself, Justice Field had already affirmed that the pardoning "power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions."²² Deploying the language of royal sovereignty in his invocation of the prerogative of mercy, Field simultaneously suggested that the President's and the King's capacities might be commensurate and commensurately expansive. It was not until the case of *United States v. Klein*, however, resolved in 1871, that the Court was asked to confront the consequences of Congress's withdrawal of legislative permission for presidential pardons. In *Klein*, Chief Justice Samuel Chase used similarly expansive rhetoric in concluding that Congress's attempts to limit presidential amnesties were constitutionally ineffectual and that Congress could not strip the Court of Claims and the Supreme Court of jurisdiction over cases involving the abandoned or captured property of presidentially pardoned individuals. Notwithstanding the determination in *Klein*, however, only six years later, in an opinion in *United States v. Knote* again

²⁰ U.S. Const., art. 2.

²¹ *Ex parte Garland*, 71 U.S. 333, 380-81 (1866).

²² *Id.* at 380.

penned by Justice Field, the Court held that, once assets had been received into the treasury, even a presidential pardon could not restore them to the individual in question absent congressional approval.

The relationship between *Klein* and *Knote* has been the subject of some debate. One scholar has recently contended that looking from *Klein* to *Knote* and beyond fits within a general pattern by which the Supreme Court moves from affirming the exclusivity of the capacity of one branch in a particular area to the concurrent powers of several branches in that domain.²³ Another has seen the discrepancy between the outcomes as simply tracking the two different statutes under which the respective individuals' property had been confiscated.²⁴ Both arguments provide insight into the connection between the decisions, yet both in a sense overestimate the discrepancy between them. Close examination of *Klein* reveals not only its strong statements about the separation of powers, both between Congress and the judiciary and Congress and the President, but also its almost excessive reliance on Congress's intent, particularly its intent in passing the initial statute providing for the confiscation of property. From these passages we can conclude that, had Congress's intent been different—as it was in the statute considered in *Knote*—*Klein* might not have been permitted to recover his property, regardless of his jurisdictional capacity to bring a claim. This circumstance is significant because it suggests a sense even at the apex of assertions of the presidential pardon power that certain entailments of amnesty or oblivion, like the restoration of property that had already vested in the government or a private party, might still lie outside scope of the President's authority.

The core of *Klein* entails invalidation of a jurisdictional proviso on an appropriations bill that, in substance, rendered “acceptance of a pardon, without disclaimer, [] conclusive evidence of the acts pardoned, but [] null and void as evidence of the rights conferred by it, both in the Court of Claims and in [the Supreme Court].”²⁵ According to the majority opinion, this section

²³ Mark D. Rosen, “From Exclusivity to Concurrence,” 94 *Minn. L. Rev.* 1051 (2010).

²⁴ Jeffrey Crouch, *The Presidential Pardon Power* 46-48 (Kansas UP, 2009).

²⁵ *United States v. Klein*, 80 U.S. 128, 144 (1871). For an excellent recent account of the jurisdictional issues at stake in *Klein* and their potential relevance today, see Amanda Tyler, “The Story of *Klein*: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts,” in *Federal Courts Stories*,

of the law fell outside the scope of Congress's ability under Article III to carve exceptions in the Supreme Court's appellate jurisdiction.²⁶ Although Congress possessed the authority to "den[y] the right of appeal in a particular class of cases," in this instance it went as far as to impermissibly prescribe "a rule of decision, in causes pending."²⁷ Furthermore, as Chief Justice Chase added, "[t]he rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive."²⁸

Around these lucid and seemingly definitive statements about the limitations on Congress's ability to restrict the Supreme Court's appellate jurisdiction and infringe on the President's pardon power lurk a number of other rather obscure comments about Congress's intent in passing the proviso. At the beginning of the discussion of the relevant act, the opinion notes that, "Soon afterwards the provision in question was introduced . . . and became a part of the act, *with perhaps little consideration in either House of Congress.*"²⁹ Even more strangely, following discussion of the constitutional infirmities of the law with respect to the separation of powers, the majority concludes on the note of statutory interpretation:

We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfil the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims; which is ACCORDINGLY DONE.³⁰

Entirely implausibly, the opinion thus claimed to be following the true will of Congress—rather than its expressed purpose—instead of simply invalidating the jurisdictional provision on constitutional grounds.

Interpretation of another statute, however, furnishes a crucial pre-condition for even reaching the jurisdictional question. Indeed, the two dissenters, Justices Miller and Bradley, disagreed

Vicki Jackson and Judith Resnik eds. (NY: Foundation Press, 2010).

²⁶ *Id.* at 146. See U.S. Const. art. III, sect. 2 ("In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.").

²⁷ *Id.* at 145-146.

²⁸ *Id.* at 147.

²⁹ *Id.* at 143 (italics added).

³⁰ *Id.* at 148.

with the majority not on the constitutionality of the proviso but rather on the underlying issue of whether the Abandoned and Captured Property Act of 1863 left any remaining interest in the original property owner. According to Justice Miller, “I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the rebellion, is to me too apparent to be disregarded.”³¹ Because the intent of the statute was to deprive the owner of all rights to the property at issue, and “the property [had] already been seized and sold, and the proceeds paid into the treasury, . . . the pardon does not and cannot restore that which has thus completely passed away.”³² Although the outcome of *Klein* would seem to suggest that the majority deemed otherwise, their determination instead rested on a different understanding of Congress’s intent, an understanding that itself relied on Congress’s initial act of authorizing presidential pardons and amnesties.

In explaining the effect of the 1863 Act, Chief Justice Chase, writing for the majority, by contrast emphasized that the law was passed after the earlier 1862 statute—which also effected confiscations—authorized the President to grant pardon and amnesty.³³ The implication of his analysis was that the existence of the prior law indicated Congress’s intent to permit the President to restore property to pardoned individuals even under the later Abandoned and Captured Property Act. The subsequent repeal of Congress’s authorization of pardon and amnesty under the 1862 law in 1867 could not affect the meaning of the Abandoned and Captured Property Act, which had been enacted against the backdrop of the repealed provisions. Hence, as the opinion concluded, “it is impossible to believe, while the repealed provision was in full force, and the faith of the legislature as well as the Executive was engaged to the restoration of the rights of property promised by the latter, that the proceeds of property of persons pardoned, which had been paid into the treasury, were to be withheld from them.”³⁴

The following sentence confused matters, however, by relying on the effects of a presidential pardon per se rather than interpretation of the meaning of the Abandoned and Captured Property Act. According to Chief Justice Chase, “The repeal of the section in no respect changes the national obligation, for it does

³¹ *Id.* at 149 (Miller, J. dissenting).

³² *Id.* at 150 (Miller, J. dissenting).

³³ *Id.* at 139.

³⁴ *Id.* at 141-42.

not alter at all the operation of the pardon, or reduce in any degree the obligations of Congress under the Constitution to give full effect to it, if necessary, by legislation.”³⁵ It is this statement that raises a potential conflict with *United States v. Knote*, where the Court would support Congress’s independent ability to decide on whether to dispense monies from the treasury, regardless of the existence of a presidential pardon or amnesty. If Congress were, indeed, obligated to give full effect to any pardon or amnesty, it might be forced to pass legislation restoring property to pardoned individuals. According to *Knote*, however, it is subject to no such requirement.

The property at issue in *Knote* had been confiscated not under the Abandoned and Captured Property Act but instead under the 1862 confiscation act, the pardon and amnesty provisions of which had been repealed. While reiterating and even supplementing the expansive representation of the President’s pardon power provided in *Klein*, *Knote* nevertheless insisted that the pardon does not “affect any rights which have vested in others directly by the execution of the judgment for the offence, or which have been acquired by others whilst that judgment was in force.”³⁶ Hence, despite the vast scope of the President’s pardon, reaching amnesty as well, “there is this limit to it, as there is to all his powers,—it cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress. The Constitution places this restriction upon the pardoning power.”³⁷ The congressional capacity to dispose of assets from the federal fisc implied in the Court’s reasoning in *Klein* is explicitly brought to the fore in *Knote* and forms the basis for the decision in the case. Unlike the 1863 Act—the legislative intent of which the Court had interpreted in light of the pardon and amnesty provisions already passed in 1862—the 1862 Act itself had been divested of the entailments of pardon through the later repeal and could not be construed to permit restoration of forfeited property the value of which had already been deposited in the treasury.

It is precisely in these cases, including *Knote* itself, that the Court expressed its judgment that pardon and amnesty were the same, a judgment that carries over to the present day. It is precisely in these cases as well, however, that the Court’s reasoning suggests why the full entailments of amnesty may require legislative rather than simply presidential action. As *Klein* maintained, both exalting the President’s capacity and insisting on the erasing effects of the pardon, “To the executive alone is

³⁵ *Id.* at 142.

³⁶ *Knote*, 95 U.S. 149, 154.

³⁷ *Id.* at 4.

intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences.”³⁸ Citing these passages of *Klein*, *Knote* went even further. As Justice Field observed:

Some distinction has been made, or attempted to be made, between pardon and amnesty. It is sometimes said that the latter operates as an extinction of the offence of which it is the object, causing it to be forgotten, so far as the public interests are concerned, whilst the former only operates to remove the penalties of the offence. This distinction is not, however, recognized in our law. The Constitution does not use the word ‘amnesty;’ and, except that the term is generally employed where pardon is extended to whole classes or communities, instead of individuals, the distinction between them is one rather of philological interest than of legal importance. At all events, nothing can be gained in the consideration of the question before us by showing that there is any difference in their operation.³⁹

The extent of the effects of amnesty, however, and the fact that its entailments might, as *Knote* observes, require congressional action supports the possibility of a greater distinction that Field would like to acknowledge. To understand the full meaning of the “philological” difference and comprehend its potential implications for American law we must, however, turn back to the debates of an earlier moment in another country.

III OBLIVION ENTERS ENGLAND

Within early modern England, “amnesty” was addressed under the Latinate term of “oblivion.” As the second edition of Samuel Johnson’s *Dictionary* glossed “amnesty,” it consisted in “An act of oblivion; an act by which crimes against the government, to a certain time, are so obliterated, that they can never be brought into charge.” “Oblivion” itself he described somewhat symmetrically as “Amnesty: general pardon of crimes in a state.”⁴⁰ The concept of oblivion appears to have arrived in

³⁸ *Klein*, 147-148.

³⁹ *Knote* at 4.

⁴⁰ The 1708 edition of Boyer’s *Royal Dictionary* likewise equated the English “Act of Oblivion” with the French “amnistie.” *See A.*

England with the Stuart Kings, brought with them from Scotland, where an Act of Oblivion had been passed at least as early as the sixteenth century. Although general pardons had proliferated in England before, these remained somewhat distinct from oblivion in context and effect.⁴¹ Whereas general pardons were, in an early period, often proclaimed by the King, oblivion was legislatively enacted. Whereas general pardons occurred routinely on coronation and other occasions, oblivion was deemed necessary in the aftermath of rebellion or revolution. And whereas general pardons forgave preceding crimes, oblivion wiped them out. In the words of Bailey's *Universal Etymological Dictionary*, it "import[ed] that all Hostilities are at an End, passed by, and to be buried in Oblivion."⁴² As debates within the seventeenth century reveal, and Johnson's subsequent description confirms, oblivion did, however, exist in close proximity to the general pardon. Towards the end of the seventeenth century, the two could be seen as intertwined, and the general pardon itself became more legislative in nature.

In the heat of the Reformation, the 1560 Treaty of Edinburgh—signed by France and England and establishing Queen Elizabeth's dominion over England and Ireland—granted an oblivion for participation in hostilities in Scotland. As Queen Elizabeth's emissaries there informed her, the treaty provided that "All things done here against the laws shall be discharged, and a law of oblivion shall be established in this Parliament, excepting only such as the Estates here shall judge unworthy of this privilege."⁴³ Significantly, although the Scottish Lords agreed to the treaty, Mary Queen of Scots assented neither at the time nor subsequently. Of necessity, therefore, passage of oblivion rested with the Scottish Parliament, and the task of specifying exceptions also devolved to "the Estates." Only after some importuning was Queen Mary willing to assent to the Act itself, although she ultimately allowed it to be extended to cover activities undertaken through September 1, 1561. According to one account, "It was with some difficulty that the queen was brought to consent to this confirmation. She was afraid, that it might be considered as giving

Boyer, *The Royal Dictionary: French and English and English and French* (London, 1708), definition of *Act*.

⁴¹ For a thorough treatment of the nature of the general pardon in the sixteenth century, see Krista Kesselring, *Mercy and Authority in the Tudor State* (Cambridge UP, 2003).

⁴² N. Bailey, *An Universal Etymological English Dictionary* (London, 1724), definition of "amnesty."

⁴³ Haynes, *State Papers* (letter from William Cecil and Nicholas Wotton to Queen Elizabeth, July 8, 1560).

a sanction to the treaty of Edinburgh, which she was firmly resolved never to ratify; but upon the lords of parliament throwing themselves on their knees at her feet, and urging, that it was the only measure which could restore the public tranquillity, she gave her consent.”⁴⁴ Partly because of the context from which it arose, this sixteenth-century Scottish act of oblivion thus already assumed a legislative form.

It may not have been incidental that this oblivion was impelled by a treaty. The 1648 Treaty of Westphalia, frequently credited with inaugurating the modern regime of nation states enjoying territorial sovereignty, itself included a comprehensive oblivion.⁴⁵ Nor was this provision entirely an innovation—rather, the concept and clauses of oblivion had been developed within Renaissance treaties.⁴⁶ There is some evidence that the Treaty of Westphalia and other similar documents were influenced at least indirectly by Roman law, including the Roman conception of

⁴⁴ William Guthrie, *A General History of Scotland, From the Earliest Accounts to the Present Time*, vol .6, at 216 (London, 1768).

⁴⁵ See Treaty of Westphalia, art. II (“That there shall be on the one side and the other a perpetual Oblivion, Amnesty, or Pardon of all that has been committed since the beginning of these Troubles, in what place, or what manner soever the Hostilitys have been practise’d, in such a manner, that no body, under any pretext whatsoever, shall practice any Acts of Hostility, entertain any Enmity, or cause any Trouble to each other; neither as to Persons, Effects or Securitys, neither of themselves or by others, neither privately nor openly, neither directly nor indirectly, neither under the colour of Right, nor by the way of Deed, either within or without the extent of the Empire, notwithstanding all Covenants made before to the contrary: That they shall not act, or permit to be acted, any wrong or injury to any whatsoever; but that all that has pass’d on the one side, and the other, as well before as during the War, in Words, Writings, and Outrageous Actions, in Violences, Hostilitys, Damages and Expences, without any respect to Persons or Things, shall be entirely abolish’d in such a manner that all might be demanded of, or pretended to, by each other on that behalf, shall be bury’d in eternal Oblivion.”)

⁴⁶ See Randall Lesafer, *Conclusion*, in *Peace Treaties and International Law in European History: From the Late Middle Ages to World War I*, at 404 (Randall Lesafer ed., 2004) (“Important concepts and clauses such as *amicitia*, amnesty, and oblivion and restitution were already fully developed in the treaties of the Renaissance period”).

restitutio.⁴⁷ In the Westphalian context, this involved the incorporation of a clause allowing for the restoration of previous rights through a “general and unlimited amnesty.”⁴⁸ Athens had famously pioneered the device of amnesty in responding to the reign of the Thirty Tyrants in 403 B.C.⁴⁹ Although most Roman memory sanctions involved punishing individuals by erasing them from the public record, the possibility of a more political amnesty that would allow for the reintegration of the polity was also raised on several occasions.⁵⁰ These ancient antecedents may have infiltrated modern Europe through the terms of international peace treaties.

With the Stuart succession to the English throne—first through Mary’s son King James VI and I, and then via his own offspring, the ill-fated King Charles I—advocates for acts of oblivion arrived as well. Starting with the first Bishop’s War with the Scots in 1639, King Charles I began to press such legislation. Although the Scots agreed to cease their rebellion, when the subject of the Act of Oblivion arose in Parliament, they resisted it, and instead wished “to justifie themselves, and all their former proceedings, and urge an act of Iustification to be recorded in Parliament.”⁵¹ Following resumption of hostilities, the Scots (joined by the English Parliament) did eventually accept—and even solicit—another Act of Oblivion, one effect of which was to prevent Charles I from even mentioning it when responding to subsequent charges from Parliament.⁵²

⁴⁷ Laurens Winkel, *The Peace Treaties of Westphalia as an Instance of the Reception of Roman Law, in Peace Treaties and International Law*, *supra* note 46, at 222, 236.

⁴⁸ *Id.*

⁴⁹ For an illuminating and thorough defense of this amnesty and the potential for applying a similar technique today, see Adriaan Lanni, *Transitional Justice in Ancient Athens*, *supra* note 10.

⁵⁰ See HARRIET I. FLOWER, *THE ART OF FORGETTING: DISGRACE AND OBLIVION IN ROMAN POLITICAL CULTURE* 282-83 (2006) (“It is striking to see the concept of amnesty, as developed by the Athenians in 403 B.C. after the fall of the Thirty Tyrants, being invoked by Cicero after the Ides of March in 44 B.C. and again by the emperor Claudius in A.D. 41, when another Gaius Julius Caesar had been assassinated.”).

⁵¹ WILLIAM SANDERSON, *A COMPLEAT HISTORY OF THE LIFE AND RAIGNE OF KING CHARLES FROM HIS CRADLE TO HIS GRAVE* 254 (London: Humphrey Moseley, 1658).

⁵² *Id.* at 354. As Sanderson reported the King’s remarks in his history of Charles I’s reign: “As for the *Scots* Troubles, these unhappy Differences are wrapt up in perpetual silence by the Act

A number of subsequent assays at and failures to achieve Acts of Oblivion followed during the remainder of Charles I's reign, leading up to and through the beginnings of the English Civil War. As a rule, the King would propose such an enactment, and parliamentary forces would express opposition to pardoning those who were in league with Charles himself or were already under parliamentary investigation.⁵³ The response that King Charles framed to one iteration of this objection summarized his general posture on the subject, which insisted both upon loyalty to his adherents and oblivion as a means of achieving a more lasting peace:

[T]his he [Charles I] well knoweth, That a general Act of Oblivion is the best bond of Peace; and that after intestine troubles, the wisdom of this and other Kingdoms hath usually and happily in all Ages granted general Pardons,

of Oblivion passed in Parliaments of both Kingdoms, which stays him from any further Reply to revive the memory of these evils.” Sanderson, *supra* note 52, at 503.

⁵³ Sanderson's account demonstrates this dynamic. In 1644, King Charles explained that, “for the total removing of all Fears and Jealousies, his Majestie is willing to agree, that upon the conclusion of Peace, there shall be a general Act of Oblivion and free Pardon past by Act of Parliament in both his Kingdoms respectively.” *Id.* at 857-58. Parliament then demanded in 1646 that certain people be excepted from the peace and from any Act of Oblivion. Parliament insisted “[t]hat these persons shall expect no pardon. In a word all the persons of Honour and Quality that have taken up Arms for the King in *England* or *Scotland*, (which because the Treaty took no effect is but frivolous to insert.) And all such others as being processed by the Estates for Treason shall be condemned before the Act of Oblivion be passed,” and, furthermore, “[t]hat all Iudges, Officers, and Practicers of the Law, that have deserted the Parliament, be incapable of Office or Practice in the Law” *Id.* at 917.

Charles again suggested the possibility of an Act of Oblivion in 1647, observing that “the Army (for the rest though necessary, yet I suppose are not difficult to content) ought (in my judgment) to enjoy the liberty of their consciences, have an Act of Oblivion or Indempnity (which should extend to all the rest of my Subjects)” *Id.* at 1018. In 1648, he likewise urged “*That an Act of Amnestie or Oblivion be passed, the very means of all traverses which happened in the heat of War may be utterly deleted.* This Demand they liked not, but with cautely and limitations, by the benefit whereof the Parliament might persecute many of the Royallists.” *Id.* at 1096.

whereby the numerous discontentments of Persons and Families otherwise exposed to ruin, might not become fuel to new disorders, or seeds to future troubles. His Majesty therefore desires, that his two Houses of Parliament would seriously descend into these considerations, and likewise tenderly look upon his condition herein, and the perpetual dishonour that must cleave to him, if he shall thus abandon so many persons of Condition and Fortune that have engaged themselves with and for him, out of a sense of duty, and propounds as a very acceptable testimony of their affection to him, that a general Act of Oblivion and free Pardon be forthwith passed by Act of Parliament.⁵⁴

Although the Interregnum Parliament would eventually, after some delay, take this politic advice, and pass a general pardon of its own, Charles' plea, when made, fell upon deaf ears, and he never received the advantage of such an act.⁵⁵

The successive rejections of Charles' offers of and requests for oblivion did not, however, cause him to abandon belief in the power of pardoning, even beyond his own death. In his final letter to his already exiled son, Charles instructed the latter to follow his own course in preferring clemency and oblivion to revenge, both for religious and political reasons.⁵⁶ In exalting the power of pardoning to his son, Charles I wrote with more effect than in his entreaties to Parliament.

At the time of the Restoration, Charles II had already indicated several times his preference for pardoning over punishment. In his 1651 *Declaration to All His Loving Subjects of the Kingdome of England and Dominion of Wales*, issued from his camp at Woodhouse, Charles explained that he wished "to evidence how fare we are from Revenge" by "Declar[ing] and Engag[ing] Our Selfe to give Our Consent to a full Act of Oblivion and Indempnity for the security of all Our Subjects of England, and Dominion of Wales, in their Persons, Freedomes, and Estates, for all things done by them relating to these Wars these seven yeeres past, and that they shall never be called in question by Us for any of them," excepting only Cromwell, and some others "who did Actually sit, and Vote in the Murther of Our Royall Father." Charles had, likewise, promised passage of an Act of Oblivion to

⁵⁴ *Id.* at 983-84.

⁵⁵ The Parliamentary pardon is discussed in *The Cavaliers Jubilee: Or, Long look'd for come at last: viz. The Generall Pardon* (1652). The subtitle, "Long look'd for come at last," indicates even the Interregnum Parliament's reluctance to pass a general pardon and the resultant delay.

⁵⁶ Sanderson, *supra* note 51, at 1145-46.

his British subjects when seeking restoration, and subsequently opined to Parliament that, in the absence of this promise, “neither I nor You had been now here.”⁵⁷

Although Charles’ Declaration of Breda had assured his restored subjects of his inclination towards pardoning, some delay intervened between this speech and Parliament’s action on the subject.⁵⁸ Indeed, conflict broke out almost immediately during the parliamentary deliberations; one member had injudiciously claimed that those who first began the Civil War were as guilty as those who had ultimately executed Charles I, a statement that drew great resistance and would have led to punishment had the Parliament not been simultaneously considering mercy, pardon, and indemnity.⁵⁹ The time that lapsed between the Declaration of Breda and Parliament’s passage of the Act of Oblivion was construed by some as indicating the King’s retraction of his promises; as a result, and in response to these criticisms, Charles renewed his pleas to Parliament in favor of the Act.⁶⁰ As a member of the House subsequently recollected, passage of the oblivion ultimately occurred in haste and with a perception of necessity.⁶¹

The language of the Act as well as Charles’ speech accompanying it suggested two central purposes—to avoid the possibility of continued struggle based on the revolutionaries’ assumption that they remained in danger, and, counterintuitively, to enable harsher punishment of future treasonous activity.⁶² In service of the former goal, the Act announced the King’s desire “to bury all seeds of future Discords and remembrance of the former, as well in his own Breast as in the Breasts of his subjects one towards the other.”⁶³ Even the memory of the discords, not simply their consequences in punishment, would be eliminated; oblivion was not simply a velleity, but actually enforced by the Act. Anyone who, within three years of its passage, “presume[d]

⁵⁷ His Majesties Gracious Speech to the House of Peers, the 27th of July, 1660, Concerning the Speedy Passing of the Bill of Indempnity and Oblivion at 4.

⁵⁸ HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 4-5.

⁵⁹ *Id.* at 13-14.

⁶⁰ *Id.* at 15-16.

⁶¹ Hence in 1672, Waller claimed during debate that “sometimes we were in such great haste, that the Act of Oblivion, in its confirmation, was not read at all . . . —Are not necessity and speed acknowledged by the House?” DEBATES IN PARLIAMENT IN 1672, DEBATES OF THE HOUSE OF COMMONS 112-13.

⁶² Act of Oblivion.

⁶³ *Id.*

maliciously to call or alleadge of or object against any other person or persons, any Name or Names, or other Words of Reproach, any way tending to revive the Memory of the late Differences, or the Occasions thereof,” would be forced to pay the aggrieved individual a fairly significant fine.⁶⁴ As the controversy leading up to passing the Act had demonstrated, even discussing the revolutionary sequence of events could stir turmoil and lead to reputational harms that could spur continued violence.

At the same time, however, Charles insisted that his character for mercy would not lead him into a permissive reign. The oblivion specified in the Act covered a precise time period—from January 1, 1637 to June 4, 1660—and Charles accorded considerable significance to this delineation. As he announced, subdividing time into that included within the purview of the statute, that between the time designated and that in which he spoke, and all future time, “all I do very willingly pardon . . . that are pardon’d by this Act of Indemnity, to that Time which is mention’d in the Bill: Nay, I will tell you, That, from that Time to this Day, I will not use great Severity, except in such Cases where the Malice is notorious, and the Public Peace exceedingly concern’d. But for the Time to come, the same Discretion and Conscience, which dispos’d me to the Clemency I have express’ed (which is most agreeable to my Nature) will oblige me to all Rigour and Severity, how contrary soever it be to my Nature, towards those who shall not now acquiesce, but continue to manifest their Sedition and Dislike of the Government, either in Actions or Words.”⁶⁵ The same equitable characteristics of discretion and conscience that led Charles to seek out an Act of Oblivion thus become the justification for enhancing the severity of punishment for the future.

The terms in which the Act was drafted also demonstrated some anxiety about the generality of its scope. In its attempt to cover all contingencies, the Act of Oblivion included various catalogues of the circumstances it intended to comprehend. The Act thus enumerated all of the categories of activities it would cover, and insisted that it should be read *as if* it resembled a traditional pardon for very specific offenses: the “said Free Pardon, Indempnity and Oblivion, shall be as good and effectual in the Law to every of his said subjects, Bodies corporate, and others before rehearsed, in, for, and against all things which be not hereafter in this present Act excepted and foreprized, as the same pardon, Indempnity, and Oblivion should have been, if all Offices, Contempt, Forfeitures, Causes, Matters, Suits, Quarrels, Judgments

⁶⁴ *Id.* 1257.

⁶⁵ HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 17.

Executions, penalties, and all other things, not hereafter in this present Act excepted and foreprized, had been particularly, singularly, especially and plainly named, rehearsed and specified, and also pardoned by proper and expresse Words and Names”⁶⁶ The Act likewise provided for its own use as a defense by the “singular” subject in a particular court case despite its “general Words, Clauses, and Sentences.”⁶⁷

The 1652 Act of General Pardon and Oblivion passed under Oliver Cromwell had also taken pains to explain that it should be considered as effective in each instance as an individual pardon would have been.⁶⁸ It contained another provision, however, that suggested the linkage between oblivion and the restoration of property, a connection that has characterized a variety of subsequent amnesties and oblivions as well. As the statute recited, employing as many synonyms as possible to fully convey its point,

And the said Keepers of the Liberty of England by the Authority of this present Parliament, Granteth and freely giveth, Acquitteth, Pardoneth, Releaseth and Dischargeth to every of the persons, and to every of the said Bodies Corporate and others before rehearsed, and every of them, all Goods, Debts, Chattels, Fines, Issues, Profits, Amerciaments, Forfeitures, which to the said Keepers of the Liberty of England do or shall belong or appertain by reason of any Offence, Contempt, Trespass, Entry, Misdemeanor, Matter, Cause, Sequestration or Quarrel, had, suffered, done or committed by them or any of them before the said third day of September, and which be not hereafter in this Act foreprized and excepted.⁶⁹

The language of this release of confiscated goods and return of resources suggests the importance of the provision and the efforts taken to ensure it not be misconstrued. The danger of incorrect interpretation was itself the target of the following clause, which mandated that the Act “be taken in all Courts . . . most beneficial to

⁶⁶ Act of Oblivion.

⁶⁷ *Id.*

⁶⁸ “This free pardon as effectual as if all Offences had been particularly named,” in “An Act of General Pardon and Oblivion” (Feb. 24, 1651/2), *ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660* (1911), at 565-577. For a discussion of Cromwell’s support for this measure, see ANTONIA FRASER, *CROMWELL* 399 (1973).

⁶⁹ *Id.*

all and singular the Persons, Bodies Corporate, and others before rehearsed . . . without any ambiguity, question or other delay.”⁷⁰

Notwithstanding these Acts’ elaborate injunctions to forget, many insisted that the oblivions themselves should be remembered and argued about precisely what such recollection should entail. A satirical poem penned by Patrick Carey, presumably during the period of the Protectorate, after the dissolution of the Rump Parliament in 1653, took aim against the factions of the Barebones Parliament that appeared to have forgotten the oblivion. Urging Cromwell to consider his promise of oblivion and forgiveness of debts as itself a debt, Carey wrote:

The Parliament, ’tis said, resolve
That, some time e’er they were dissolved,
They’d pardon each Delinquent,
And that (all past scores to forget)
Good store of Lethe they did get,
And round about that drink went.

The Country for its faith was praised;
No more the Great Tax should be raised,
Arrears should all be quitted:
Our everlasting Parliament
Would now give up its government;
A new mould should be fitted.

Th’ Act of Oblivion’s laid aside,
Sects multiply, and subdivide,
’Gainst which no order’s taken;
And for th’ new Representative,
Faith (for my part) I’d e’en as lieve
The thought on’t were forsaken.

.
Cromwell! A promise is a debt,
Thou mad’st them say, they would forget;
O make them now remember!
If they their privileges urge:
Once more the house of office purge,
And scour out every member.⁷¹

This was neither an isolated instance of recrimination nor a charge leveled only against the government of the Interregnum period.

⁷⁰ *Id.*

⁷¹ [PATRICK CAREY,] POEMS FROM A MANUSCRIPT, WRITTEN IN THE TIME OF OLIVER CROMWELL 34 (1771).

What it might mean to remember oblivion—and how extensive forgetting should be remained a live question for a number of years.

More than half a century later, another writer raised the possibility that commemorating the date of the execution of King Charles I undermined the Act of Oblivion. As he opined, “the Law which enjoins the Observation of this Day, is inconsistent with, and directly repugnant to the Act of Oblivion.”⁷² Pointing out the paradox of issuing sermons from the pulpit about culpability for Charles’ death while ordinary subjects were barred from mentioning the conflicts, the anonymous pamphleteer voiced the view that, “Were it not for the reviving the Memory of Things on this Day, to which the Clergy are obligated, . . . the greatest Part of the Populace, whose Mouths are shut by the Act of Oblivion, tho’ in vain, whilst the Priest’s is open, wou’d by this Time, after so many Years, have been in a great Measure, if not altogether as ignorant, that any such Thing had been transacted on the Stage of *England*, as they are of the Act of Oblivion.”⁷³ Like Carey before him, this author advocated remembering the oblivion in order to forget other grievances that would re-open old wounds and spawn new strife.

Parliamentary discussion of the scope of the oblivion and the extent to which either new legislation or action taken against the King’s ministers might violate the Act revealed the legislative conception of the statute. Both supporters and opponents of King Charles II invoked the Act of Oblivion as setting a standard incompatible with subsequent legislative proposals. In “A Letter from a Person of Quality to his Friend in the Country,” often attributed to Anthony Ashley Cooper, first Earl of Shaftesbury, the author contended that the proposed “Act to prevent the dangers which may arise from persons disaffected to the government” implicitly contradicted the Act of Oblivion and, by “reviving of former miscarriages,” would “put[a] vast [] number of the king’s subjects in utter despair of having their crimes ever forgotten.”⁷⁴ While the suggestion here was that Parliament and the King should remain cognizant of their former promises, represented by the legislation they passed, debates within the House of Commons indicated that there might be legal ramifications if, in the absence of a further statute passed by Parliament, the King took steps inconsistent with the Act of Oblivion.

⁷² REASONS HUMBLY OFFER’D TO THE PARLIAMENT FOR ABROGATING THE OBSERVATION OF THE THIRTIETH OF JANUARY 14 (1715).

⁷³ *Id.* at 15.

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Contention over this issue came to a head during extensive debates about a series of addresses to the King advocating the removal of the Duke of Lauderdale, one of his ministers. At stake was the question of whether Charles himself could remove Lauderdale without violating the Act of Oblivion, a point that the King himself cleverly inserted into the discussion through his response to the first such address. In answering the House of Commons, the King invoked the specter of the Act of Oblivion and his horror of making incursions into its effects:

As to [Lauderdale's words], his Majesty perceived, that, if they had been spoken, they must have been spoken before the last Act of general pardon; and his Majesty, being sensible how great a satisfaction and security the inviolable preservation of the former Act of indemnity and oblivion has been to all his subjects, cannot but apprehend the dangerous consequences of enquiring into any thing that has been pardoned by an Act of general pardon, lest the example of that might give men cause to fear their security under the first Act of Oblivion.⁷⁵

Strategically referring to the precedent of the oblivion, Charles suggested that undermining a subsequent legislative pardon would open the earlier law to incursions as well. By associating the Act of General Pardon with the Act of Oblivion, Charles thereby asked the House to view the former as more akin to the latter than to the King's independent use of his prerogative to pardon.

The reaction that this statement anticipated might have been that of Sir Edward Dering, who, during the subsequent debate, maintained the equality of Parliament's several laws and insisted on the similarity of the effects of pardon and oblivion:

There is no distinction between an Act of Grace and Oblivion, in *West-minster-Hall*, and he hopes you will make none here—He hears not a lawyer speak in it. If an officer, or a deputy-lieutenant, be pardoned, as is said, for an offence, by Act of Parliament, surely no farther notice is taken of it. As to that alleged 'of the Act of Corporations, and the Assent and Consent in the Act of Uniformity, to be breaches made in the Act of Indemnity;' they are by Act of Parliament, which only can void another Act.⁷⁶

Under this account, it would entail an exercise of prerogative that could violate Parliament's earlier legislative statement for the King

⁷⁵ Response "given at the Court at *Whitehall*, the 7th day of *May* 1675," from 5 DEBATES OF THE HOUSE OF COMMONS, FROM THE YEAR 1667 TO THE YEAR 1694. COLLECTED BY THE HONBLE ANCHITELL GREY, ESQ. 107 (1763).

⁷⁶ 5 DEBATES OF THE HOUSE OF COMMONS 216.

to remove the Duke of Lauderdale. Only a properly passed statute—not simply an address by the House—could furnish sufficient legal grounds for overturning the Act of Oblivion, and, by extrapolation, other acts of general pardon. Another member, Sir Joseph Tredenham, expressed a similar sentiment, maintaining that, “Should the Duke of *Lauderdale* be banished, on this Address, the late Act of Pardon would be violated, or at least suspended. Should it be violated, the King may justly say, he has gone by measures we have given him.”⁷⁷ Likewise, Sir John Ernly remarked that, “If the Duke must answer against a public Act, and we have the benefit of a public Act, ’tis Strange.”⁷⁸ Even more definitively, Sir Henry Ford proclaimed that he “Believes that the King might have answered categorically, as well as hypothetically, if he had pleased, to your Address. . . . ’Tis for your sake the King removes [*Lauderdale*] not; and if not for yours, for the so many hundreds we represent. He violates not the Pardon.”⁷⁹

Not all members of the House were, however, convinced by the King’s answer, and some endeavored to draw lines between oblivion and pardon. One compared the King’s privilege of pardoning with his capacity to remove individuals from office and distinguished between the effects of an Act of General Pardon and an Act of Oblivion. As Sir Thomas Lee insisted, the House could continue to pursue *Lauderdale* without undermining the Act of Pardon: “That the Commons should shake the Act of Pardon, we are most studiously to clear. The comparison must lie betwixt an oblivion, and pardon of crimes, for safety, named especially. Will any man tell you, that the King, having power to pardon, by Grace, has not power to remove a servant, or his very Privy Council?”⁸⁰ Others supported distinguishing between the effects of an Act of Oblivion and a general pardon. Colonel Birch thus advocated a further “Address to the King, with hearty thanks for the Act of Grace; but would have some difference made between that and an Act of Oblivion. . . . He means fairly, would have hearty thanks returned the King for his gracious pardon, and would distinguish between an Act of Grace and Oblivion.”⁸¹ Ultimately, the House decided to renew their plea to the King and address him another time on the subject of *Lauderdale*.

These debates suggest a parliamentary conception of oblivion—and, in some cases, of general pardons as well. A number of subsequent general pardons were legislatively passed,

⁷⁷ *Id.* at 211.

⁷⁸ *Id.* at 213.

⁷⁹ *Id.* at 214.

⁸⁰ *Id.* at 212.

⁸¹ *Id.* at 215.

as well as a further Act of Oblivion under William III.⁸² Exegesis of the meaning of oblivion during the seventeenth and early eighteenth centuries indicated, however, that granting oblivion might entail a more radical forgetting of the events of the past than a general pardon, a forgetting that might even be incompatible with holidays memorializing aspects of a struggle. This forgetting could only be accomplished by Parliament itself, with the consent of the nation as well as of the King. Such forgetting was also accompanied in some instances by the restoration of forfeited property or immunization of the King's ministers, aspects of oblivion that would augur later features of amnesty.

This is not to suggest though that there were no advocates of the King's independent power to pardon, or that no one supported a royal grant of oblivion. One treatise adopting an internationalist approach to the subject following a general pardon under King George III insisted—despite including a number of statutory pardons in the Appendix—that mercy was the peculiar province of the English King. As the author of *The History of the Clemency of our English Monarchs* wrote, “Surely the Reader in the end, will be convinc'd, that Oblivion was the peculiar Characteristick of our Antient English Monarchs, tho' they had to deal with stubborn and undutiful Children.”⁸³ Reasoning from the laws of war and the law of nature as well as domestic precedent, the work insisted that the cessation of struggle should be

⁸² At the end of 1689, in response to pro-Jacobite rebellion in Ireland, King William “was pleas'd to recommend [to Parliament] the Passing of an Act of Oblivion, that his Subjects might see, he had no other Intentions, but to govern by Law, and to leave them without Excuse, that should attempt to disturb the Government in his Absence.” 2 LIFE AND REIGN OF KING WILLIAM III 356. The Parliament agreed. *Id.* at 357.

Several acts of general pardon were passed under Queen Anne and then King George III that echoed the language of the earlier acts of oblivion indicating that the pardon, although comprehensive in terms, would be as potent in effect as a series of more specific individual pardons. See “An Act for the Queens most Gracious, General, and Free Pardon, *Anno Regni Annae Reginae Septimo*, at the Parliament Summoned to be Held at *Westminster*, the Eighth Day of *July*, *Anno Dom.* 1708” (1709); “An Act for the Kings most Gracious, General, and Free Pardon, *Anno Regni Georgii Regis Tertio*, at the Parliament Begun and Holden at *Westminster*, the Seventeenth Day of *March*, *Anno Dom.* 1714” (1717).

⁸³ M.E., THE HISTORY OF THE CLEMENCY OF OUR ENGLISH MONARCHS 15 (1717).

accompanied by oblivion whether the conflict was of an international or domestic nature. According to M.E., the author of the treatise, it is a “Maxim, that no more Blood ought to be shed in any War, than answers the End for which Arms were first assum’d. This therefore holds good in Civil as in Foreign Wars, because the Utility, Convenience and Justice is equal in both at least, if the Scale does not turn on the Side of the Subject; because I look upon the Blood of such an one to be more previous than that of a more foreign Enemy.”⁸⁴ Because the King serves as the sovereign representative in the international arena and can agree to treaties of peace, he should, by extrapolation, be able to undertake oblivions in the domestic sphere. Approaching the pardon power from the internationalist vantage point thus led the writer of this history of clemency to view the King’s capacity with respect to foreign conflicts as indicating the extent of his pardoning power arising out of civil struggle.

This analysis in a sense short-circuited the development of oblivions within Scottish and then English law. Although akin to and perhaps ultimately derived from the terms of international peace treaties, domestic acts of oblivion came to assume a distinctly parliamentary form. As the legislative debates about the appropriate means for honoring an oblivion demonstrated, the capacity to pass oblivions was, by the end of the seventeenth century, generally deemed a parliamentary power. Oblivion itself, while resembling other forms of pardon in certain respects, possessed a distinct ability to erase the acts it covered and to restore the possession of confiscated or disputed property. The question of how to remember an act of oblivion while forgetting the events it purported to erase remained, however, something of a puzzle.

IV COLONIAL AND STATE OBLIVIONS

Pardoning practices diverged considerably within the American colonies, frequently varying with the political organization of the particular jurisdiction. Whereas the royal affiliation of the Carolinas promoted a strong vision of the executive pardon, colonies like Connecticut and Rhode Island instead allocated pardoning to the legislature.⁸⁵ Nor did the

⁸⁴ *Id.* at 76.

⁸⁵ For a survey of the formal provisions for pardoning within the colonial charters and constitutions, see William Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 497-501 (1977).

structure of pardoning necessarily remain stable during the course of colonies' history; the advent of royal charters or changes in political organization were often accompanied by alterations in the mechanisms for pardoning.⁸⁶ Yet in the vast majority of cases, the charters or constitutions of the colonies indicated at least the formal presumption of an executive pardon.⁸⁷ As often happens, however, the law on the books was not entirely consistent with the law in action. Even some of the colonies that explicitly designated pardoning the prerogative of the governor, like Maryland, enacted oblivions legislatively beginning as early as the mid-seventeenth century.

The actual practice of a number of colonies echoed that of England, distinguishing between pardon and oblivion and differentiating between the power to issue one or the other. The timing of the earliest American oblivion—preceding the English statute of 1652 by several years—suggests that the colonies did not simply receive the distinction fully constituted from the English context. The practice of oblivion, which came to England itself from the margins of its empire and from European traditions, developed distinct contours within the colonial setting, despite being shaped to some degree by the English experience. Although the English entailments of oblivion find parallels within the colonies, the latter were, if anything, more intent on promoting the process of forgetting, adding corporal and shaming punishments to the fines that the English had prescribed for bringing up events that should be dismissed from memory. As a number of historians of the Atlantic world have recently demonstrated, simply positing an English tradition received in America considerably oversimplifies the dynamic process of interchange not only between England and its colonies but also more broadly throughout the Atlantic. A wide range of methods have been employed for examining Atlantic history, but common emphases on circulation around the outskirts of the ocean, drawing international comparisons, and situating national history within a larger Atlantic frame have emerged.⁸⁸

⁸⁶ Under the “Body of Liberties” in Massachusetts, for example, the General Court was empowered to pardon, and executive officers could only reprieve a sentence for the period before that body met. With the Charter of 1691, however, pardoning passed back to the royally appointed governor. *See id.* at 497-98.

⁸⁷ *See id.*

⁸⁸ For a typology of modes of Atlantic history that discusses these aspects, see David Armitage, *Three Concepts of Atlantic History*, in *THE BRITISH ATLANTIC WORLD, 1500-1800* (David Armitage and Michael J. Braddick eds., 2d ed. 2009), at 11-30, 15 (“1. *Circum-Atlantic* history—the transnational history of the Atlantic

These approaches carry implications for constitutional scholarship, which has often remained content with diagnosing the English origins of American principles without acknowledging the fluid interactions between colony and empire and the infiltration of some not quite Anglo-Saxon conventions. The flourishing of oblivion in America during the seventeenth and eighteenth centuries furnishes one example of experimentation across the Atlantic with a practice that was almost as new in England as in the colonies.

Colonial legislatures' ability to issue acts of oblivion continued through the period leading up to the American Revolution, and the new states deployed this capacity quite extensively, often at the behest of the federal government. Following the Revolution, the Continental Congress—capable only of suggesting laws to the states rather than enacting national policy—recommended the passage of acts of oblivion to state legislatures, recommendations that were followed in a number of jurisdictions.⁸⁹ As examination of legislative journals and debates of both the local and federal variety indicates, the nominal place of pardoning within the state did not entirely dictate the form an oblivion would assume. It was not until the Whiskey Rebellion of 1794 that oblivion, in the new guise of amnesty, was offered unilaterally by President Washington during the congressional recess. Even then, Pennsylvania's parallel proffer was still termed an "act of oblivion," although in substance it had lost its legislative connection. The response to the Whiskey Rebellion hence marked the end of oblivion's ascendancy. Although Washington's early interpretation of the scope of the president's constitutional power to pardon has been taken by some scholars as indicating that Article II was intended to include amnesty, the history of oblivion through the post-Revolutionary period leading up to ratification demonstrates that it was frequently thought of as a legislative act.

world. 2. *Trans-Atlantic* history—the international history of the Atlantic world. 3. *Cis-Atlantic* history—national or regional history within an Atlantic context.”).

⁸⁹ State experimentation with the forms of pardoning did not, of course, end with ratification of the Constitution. As John Dinan has demonstrated, states have offered a number of structural responses to perceived executive abuses of the pardon power during the course of their constitutional histories. See John Dinan, *The Pardon Power and the American State Constitutional Tradition*, 35 *POLITY* 389-418 (April 2003).

One of the earliest examples of a colonial oblivion occurred in 1650, in the aftermath of civil tumult in Maryland.⁹⁰ Under the royal charter of 1632, Lord Baltimore enjoyed the ability “to Remit, Release, Pardon, and Abolish, all Crimes and Offences whatsoever against such Laws, whether before, or after Judgment passed.”⁹¹ On various occasions, the Lord Proprietor himself or his deputed governor accordingly granted pardons. Some years after suspension of the sentence of a man who had slaughtered a cow that did not belong to him, Pope Alvey, the legislature petitioned the Governor to pardon Alvey, and the request was honored.⁹² In other instances, the Proprietor Cecil Calvert used his pardon power—or instructed the Governor to employ it on his behalf—to remit punishment in cases of excusable homicide.⁹³ Pardoning could thus be performed by the colony’s executive authorities. Despite this circumstance, the Assembly joined together with the Lord Proprietor in enacting the 1650 oblivion.

The events giving rise to the need for oblivion had occurred some years earlier, in 1645 and 1646.⁹⁴ Founded in 1634 by Cecil Calvert, the Second Lord Baltimore, Maryland was unusual among the colonies in having a Catholic proprietor, whose brother, Leonard Calvert, was serving as governor. From nearly the beginning, religious and political tensions beset Maryland. Protestant inhabitants were chary about the Catholic leadership and not uninfluenced by the fiercely anti-Catholic rhetoric circulating

⁹⁰ See An Act of Oblivion. *Lib. C and WH. fol. 115. Lib. WH. fol. 135. and Lib. WH and L. fol. 6*, in *Bacon’s Laws of Maryland*, chap. XXIV, vol. 75, p. 37; see also An Act of Oblivion, April 1650, Proceedings and Acts of the General Assembly, Jan. 1637/8-September 1664, vol. 1, p. 301.

⁹¹ Maryland Charter of 1632, art. vii.

⁹² For a discussion of this pardon, see RAPHAEL SEMMES, CRIME AND PUNISHMENT IN EARLY MARYLAND 29 (1996) (1938). The petition and Governor’s response can be found in 2 ARCHIVES OF MARYLAND 370, 377 (Assembly Proceedings) (1674).

⁹³ See Semmes, *supra* note 92, at 134-36; 51 ARCHIVES OF MARYLAND 346-48; 10 ARCHIVES OF MARYLAND 141-44 (explaining that the “ffine” a jury imposed on someone who had accidentally killed a man “was afterwards remitted by the Governor upon the Lord Propriary’s Spl direccon”).

⁹⁴ For a comprehensive account of the underlying events and the religious, political, and economic factors contributing to them, see generally TIMONTHY B. RIORDAN, THE PLUNDERING TIME: MARYLAND AND THE ENGLISH CIVIL WAR, 1645-1646 (2004).

in England on the eve of the English Civil War.⁹⁵ They were simultaneously concerned with protecting their political capacities in Maryland; the Assembly rejected the first set of laws sent over from England by Lord Baltimore partly on the grounds that they should be able to generate their own and proceeded to argue strenuously though unsuccessfully for a lower house veto on all laws and their right to pass legislation that would last for three years.⁹⁶ It was against the backdrop of these religious and political tensions that English privateer Richard Ingle's takeover of the government occurred.

Ingle himself had been trading in Maryland and Virginia in 1642. A fervent supporter of Parliament over the King, he refused arrest in the name of King Charles for his role in an altercation on board his ship; as he stated, "If you had arrested mee in the King and Parliaments name I would have obeyed it for soe it is now."⁹⁷ He was later accused of treason for his statements promoting Parliament's authority and disparaging the King, and, although the first case against him ended with the inconclusive verdict of "Ignoramus," those opposing Ingle continued to pursue various judicial strategies against him. In the meantime, Ingle had received a letter of marque under a December 1643 act of Parliament, which "authoriz[ed] the seizure of vessels trading to

⁹⁵ *Id.* at 87 ("[I]ssues that would soon drag Maryland into the fray [of the Civil War] and nearly destroy the colony were apparent. As always, religion was foremost. The conflict between king and Parliament was primarily over constitutional issues, but it had more than a hint of religious dispute as well. Even though this conflict was between two Protestant factions, English Catholics could not avoid becoming a part of it. Father Thomas Hughes noted that while England divided itself between Royalists and Parliamentarians, both parties were openly anti-Catholic.").

⁹⁶ *See id.* at 25-26 ("In the first Assembly for which we have a record, [Thomas] Cornwaleys was one of the leaders who opposed the code of laws sent over by Lord Baltimore, asserting the right of freemen to initiate the legislation that affected their lives."); 37 ("When the [1642] session began, Robert Vaughn of Kent Island offered a motion in the name of all the burgesses that the Assembly be divided into upper and lower houses and that the lower house have the right to veto all legislation they did not like. Governor Calvert, aware that this would limit his ability to control the Assembly, and having no authority from Lord Baltimore to allow it, denied the request."); 42 (discussing the controversies over whether the Assembly could specify that certain bills would last for three years).

⁹⁷ *Id.* at 96.

ports that were hostile to the Parliament.”⁹⁸ In January of 1645, armed with the letter of marque, Ingle returned to Maryland, essaying to foment a more general Protestant resistance against the colonial government and, ultimate, to capture Governor Calvert and return him to England to be tried.⁹⁹ His missive to the Maryland Protestants seems to have been enthusiastically received, and it is likely that Ingle’s interventions did not only result in his capture of the ship “Looking Glass” and the pillaging of various areas in Maryland but even allowed for the establishment of a temporary Protestant government.¹⁰⁰ Although sparked by the intervention of an outsider, Ingle’s rebellion depended for the destruction it wrought—resulting in the dissolution of Maryland’s government for some time—on the participation of a number of colonists themselves.

Ingle did not receive the welcome reception in England that he had anticipated; instead, the High Court of Admiralty refused to ratify his seizure of “Looking Glass” and another victim of his plundering, Thomas Cornwalyes, pursued a separate action against him under common law.¹⁰¹ Governor Calvert, who had fled to England during the rebellion, made plans to return to Maryland, and proffered a pardon to smooth the path to his 1646 return.¹⁰² Why, then, was an Act of Oblivion still necessary in 1650?

It may not be possible to determine a single reason, but the circumstances leading up to the law render several explanations plausible. First, the uprising had been accompanied by significant amounts of plunder and disruptions in property rights. A legislative act might help to address some of the uncertainties

⁹⁸ *Id.* at 163.

⁹⁹ *Id.* at 184-85, 198.

¹⁰⁰ *Id.* at 191-98, 236-38.

¹⁰¹ *Id.* at 239-57.

¹⁰² *Id.* at 262 (“As part of his preparations, Calvert sent a pardon to the inhabitants of St. Mary’s, stating that if they would submit to Lord Baltimore’s authority their former crime of rebellion would be forgiven.”); Proceedings and Acts of the General Assembly (29 Dec. 1646), in 1 ARCHIVES OF MARYLAND 209 (“Testified that the Gouert afore their comeing upp out of Virgina declared to all the Souldiers in publicke and to these deponents in particulr in these words or to this effect that they weare to attend hym upon these terms, viz: that if he found the Inhabitants of St Maries had accepted his pardon for thier former rebellion and weare in obedience to his Lorp the Souldiers weare to expect no pillage there but he would receive the inhabitants in peace . . .”).

about ownership and liability arising from Ingle’s rebellion.¹⁰³ The language of the statute, addressing contractual obligations and their validity, supports this interpretation of why it was necessary. Second, the assent of the assembly added legitimacy to the earlier pardon, a reconfirmation that may have been rendered particularly important by Leonard Calvert’s intervening death. As a subsequent petition explained, the “[s]everall pardons by the former Governors Leo: Calvert Esq, mr Thomas Greene and . . . my Lord Baltemore then Proprietary of this Province” were “confirmed by an act of Assembly and an Act of oblivion to remitt all offences”¹⁰⁴ Third, granting a general legislative oblivion carried with it the additional benefit of being able to explicitly except Ingle himself as well as some compatriots from the benefit of the pardon. Finally, the oblivion could insist upon forgetting rather than simply forgiving.

The language of the statute explained the joint efforts of the Lord Proprietary and the Assembly and, strikingly, covered first civil and then criminal actions. After initially specifying that “ther shall bee an utter Abolition of all actions tending to recover damages for any faulte committed against any one in his Lordship’s peace by any of the party who were in Rebellion against his Lordship’s Government here,” the act proceeded to declare unenforceable all contracts made with any party in rebellion against the government and barred any suits to recover compensation for property or labor used in furtherance of the colony’s defense. Only then did the law indicate that all inhabitants—with some designated exceptions—would “bee absolutely and freely pardoned of all offences whatsoever Capitall or other” committed during the relevant period. Oblivion’s capacity to address and remove the financial obligations attendant upon civil crisis emerges particularly prominently from the order in which the statute treats contracts and crimes. Even more important than indemnification from punishment appears the

¹⁰³ Governor Calvert had already attempted to address some of these property disputes, but the persistence of a suit by Cornwallleys against John Sturman in 1651 suggests that neither his actions nor the oblivion itself had entirely eliminated such controversies. As Riordan notes, “Calvert had pardoned the rebels for their actions, but he was unwilling to let them keep their spoils. The rebels agreed to return any stolen goods they still had in their possession or to pay triple damages. Some of the plundered estates may have been recovered in this fashion, but there is no way to be certain.” Riordan, *supra* note 94, at 271. See also *The Humble Peticon of John Sturman*, 3 ARCHIVES OF MARYLAND 633 (1651).

¹⁰⁴ *Peticon of John Sturman*, *supra* note 103.

capacity of the legislature and Lord Proprietary together to wipe away any monetary complications produced by the rebellion.

The law differs in another respect from what would become the standard English structure of oblivion; those violating the proscription against remembering or speaking about the underlying events were subjected to corporal punishment rather than simply fines. Whereas English oblivions generally provided for damages against those raising the specter of prior revolutionary scenes, Maryland mandated that:

[F]or the better preserving of peace and unity it is alsoe enacted by the Authority and with the Consent aforesaide that all revileing speches practices or Attempts tending to the disturbance of the Amity desired, and intended, and namely all revileing or upbraiding of other with matter of plunder Rebellion or any other Odious or reproachfull tearmes for any matter or thing pardoned by his Lordship or abolished by vertue of this Act bee utterly forborne and layd aside upon payne of imprisonment during pleasure Fine banishment Stocks Pillory whipping any one or more of these¹⁰⁵

The rather fulsome enumeration in this passage of means by which forgetting could be undermined suggests the assembly's efforts to ensure that no one circumvent the spirit of its act. Lest the litany itself fail to deter anyone, the prospects of indefinite detention, exile, and physical torment should have had the desired effect. Not itself forgotten like some of its English analogues, this oblivion itself remained in force and was rendered part of the colony's permanent laws in 1676.

Although oblivions were not enacted indiscriminately within the colonies, legislative records demonstrate a number of instances where civil unrest or rebellion found closure in oblivion or oblivions ratified the inauguration of a new form of government. In Maryland itself, the Proprietors were overthrown by protestants at the time of the Glorious Revolution in England. When a new royal governor was installed, it was "[v]oted that an Act of oblivion be drawne up."¹⁰⁶ In Connecticut, where pardoning was given by the charter of 1662 to the general assembly,¹⁰⁷ this body

¹⁰⁵ Act of Oblivion, P.R.O. Colonial Entry Book No. 53 (April 1650), *in* 1 ARCHIVES OF MARYLAND 301.

¹⁰⁶ 13 ARCHIVES OF MARYLAND 370 (May 17, 1692) (Proceedings and Acts of the General Assembly, April 1684-June 1692).

¹⁰⁷ CONNECTICUT CHARTER OF 1662 ("Imprisonment or other Punishment upon Offenders and Delinquents according to the Curse of other Corporations within this our Kingdom of England, and the same Laws, Fines, Mulcts and Executions, to alter, change,

determined in 1665 that “all former actings that have past by the former power at New Haven, so farr as they have concerned this Colony (whilst they stood as a distinct Colony,) though they in their own nature have seemed uncomfortable to us, yet they are hereby buried in perpetuall oblivion, never to be called to account.”¹⁰⁸ This oblivion, although tersely described, carried with it consequences. When a subsequent lawsuit came before the general court, it “voated and by vote declared that the business that Mr. Brian Rosseter prosecuted against Mr. Leet in May Court, and in July last, and Mr. Leet’s appeale to this Court about it, is included in the act of oblivion and Mr. Leet by that act indemnified.”¹⁰⁹ Similarly, after William Penn was installed in Pennsylvania, “An Act of Oblivion was read thrice and confirmed” in the legislature.¹¹⁰ This oblivion was legislatively enacted despite the power of pardoning that had been given to Penn by the charter of 1681.¹¹¹

If oblivions were fortunately not required frequently during much of the seventeenth and eighteenth centuries, the situation altered rather drastically leading up to the American Revolution and in its aftermath. An exchange in 1774 between the royal government in England and the representatives of North Carolina demonstrates a war waged in the terms of oblivion. Recognizing the power of forgetting, King George III himself then offered oblivion to those of the colonists who would agree to put down arms. Finally, the Continental Congress encouraged the states to pass oblivions to settle disputes arising out of the recent conflict and a number of legislatures responded compliantly.

In the period leading up to 1771, some North Carolinians had become increasingly disaffected with the methods of tax

revoke, annul, release, or pardon under their Common Seal, as by the said General Assembly, or the major Part of them shall be thought fit”).

¹⁰⁸ PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 440 (“At a Generall Assembly held at Hartford, Aprill 20th, 1665”).

¹⁰⁹ PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 25 (“At a General Session Held at Hartford, October 12, 1665”).

¹¹⁰ PENNSYLVANIA ARCHIVES, ser. 8, vol. 1, at 36 (“Votes of Assembly,” 1683).

¹¹¹ 1681 CHARTER OF PENNSYLVANIA (“[W]ee doe likewise give and grant unto the said William Penn . . . to remits, release, pardon and abolish whether before Judgement or after all Crimes and Offences whatsoever comitted within the said Countrey against the said Lawes, Treason and willful and malitious Murder onely excepted, and in those Cases to grant Reprieves, until Our pleasure may bee known therein . . .”).

collection implemented by the colonial government and perceived the local officials charged with enforcing colonial policy as corrupt. Their general resistance, known as the “Regulator War,” culminated in the 1771 Battle of Alamance, sometimes considered the first moment of the American Revolution. Following this event, an act of indemnity was passed, phrased in extremely general terms. As the record of the assembly from December 16, 1771 read, “[a] Bill to indemnify such persons as have acted in defence of Government, and for the preservation of the public peace of this Province during the late insurrection from vexatious suits and prosecutions” was “[r]ead the third time and passed.”¹¹² The purpose of this indemnity was to settle some of the financial woes and debts arising out of the Regulator War that might also have been addressed by an oblivion. At the same time, discussions about the possibility of an act of oblivion itself commenced.

These deliberations evinced a delicate interplay between Crown and colony, King George seemingly retaining complete authority over pardoning while encouraging the North Carolina legislature to actually implement an oblivion. As American Secretary Hillsborough wrote to the governor of North Carolina in 1772, giving and taking away with the same hand:

[I] have the satisfaction to acquaint you that the King approves of what you propose upon that subject and has commanded me to signify to you his Majesty’s pleasure that you do recommend to the other Branches of the Legislature to concur with you in passing an act of pardon and Oblivion conformable thereto with such exceptions as shall be thought reasonable and proper, but you are not to give your assent to it without a clause being inserted therein suspending its execution until his Majesty’s Pleasure be known.¹¹³

Although Governor Martin promptly encouraged the North Carolina Assembly to pass an act of oblivion, controversies between the two houses about who would be excepted from its purview plagued the law and prevented its passage.¹¹⁴ Again the following year, at Martin’s continued insistence, the Council and

¹¹² 9 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 121 (Minutes of the Upper House General Assembly) (Dec. 16, 1771).

¹¹³ B.P.R.O. Am. & W. Ind.: No. Carolina vol. 210 (April 1, 1772).

¹¹⁴ 9 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 377 (Minutes of the Upper House General Assembly) (Martin’s address to the assembly), 381 (the assembly’s positive response), 433 (rejection of the oblivion on the third reading because of the deletion of several names by the lower house) (Jan. 25, 1773-March 6, 1773).

Lower House considered on several occasions “A Bill of pardon and oblivion to the persons concerned in the late insurrection except such persons as are therein excepted,” again failing to approve of the text on the final reading.¹¹⁵

Within that same 1774 session, the earlier act of indemnity returned as a provocation for further controversy with England. While the oblivion remained pending, the Lord Commissioners of Trade and Plantations reproved the colonial legislature for the broad terms of its prior indemnity, insisting that the language must be revised lest the entire law be disallowed—the mechanism for abrogating colonial statutes.¹¹⁶ Undaunted, the legislature’s upper house responded to Governor Martin with at least feigned surprise, noting that the language of their own law was patterned after similar statutes:

[W]e have taken under consideration the act of Indemnity . . . and finding that it is copied almost word for word from British Acts of Parliament upon similar occasions extending no benefit, protection or indemnity to His Majesty’s Subjects, who stood up in support of his Government in this Country, but such as have been extended to his Subjects of Great Britain, receive with surprise the information that the Lords Commissioners of Trade and Plantations, think an explanatory Act at all necessary. We are persuaded however, that if that Honble Board would but compare the Act of Indemnity with the Act of Parliament after which it was modeled, they would not continue to think themselves under the necessity of laying a Law to which their observations refer, before the King, for his Royal disallowance.¹¹⁷

If the Lords remained unimpressed with the similarity, the address continued with perhaps some irony, the assembly retained faith that the King himself would not treat his colonial subjects differently from his English ones and would therefore let the indemnity stand.¹¹⁸

¹¹⁵ 9 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 836 (March 7, 1774, read the first time and passed); *id.* at 846 (March 11, 1774, read the second time and passed); *id.* at 864 (March 22, 1774, read the third time and rejected).

¹¹⁶ 9 COLONIAL AND STATE RECORDS OF NORTH CAROLINA 877-78 (Minutes of the Lower House, March 4, 1774). For more on the process of disallowance, see generally MARY SARAH BILDER, *THE TRANSATLANTIC CONSTITUTION*.

¹¹⁷ *Id.* at 925 (March 18, 1774).

¹¹⁸ *Id.*

The sallies back and forth between colony and royal representatives over both indemnity and oblivion show the intricate political dynamics of penalty remission at the commencement of the American Revolution. Whereas English officials worried that indemnification would excessively advantage the colonists, and perhaps not entirely those of whom England itself approved, the King retained an investment in the sovereign display of mercy, which he attempted to exercise through the offer of oblivion. The actual practice of the colonial legislature, however, thwarted his efforts. Because the act of oblivion had to be passed by the assembly, the terms of the law and its exceptions could be subjected to debate just as would the language of any other statute. Despite the King's efforts, the colony could reject even oblivion if that oblivion failed to comply with its sense of the situation. Furthermore, the similarity between Parliamentary responses to civil war or rebellion in England and the North Carolina's act of indemnity could furnish a weapon for the assembly to deploy against any claim of inconsistency or repugnancy between colonial legislation and the laws of England. Although colonial acts of oblivion and similar laws had developed within America since 1650, the resemblance of these laws to English practice should serve to justify them within the colonial context. Precisely through echoing England's approach to oblivions, the North Carolina assembly thereby laid claim to its political autonomy.

With the full onslaught of revolution, King George III's efforts at offering oblivion continued,¹¹⁹ but it was not until the period of the Second Continental Congress that the dynamics of negotiation between a more general national authority and colonial or state efforts again became evident. Like the British King with the colonies, the Continental Congress attempted to persuade the states to adopt oblivions. The Continental Congress was more successful than the British King, however, at their task. Most notably, at the behest of the Continental Congress, an oblivion was proffered not simply towards those who were fighting or had fought on the wrong side in the Revolution but rather to those involved in more local boundary disputes. Within these discussions, however, a change was becoming evident, as the rhetoric of pardoning was increasingly conjoined with that of oblivion and recourse to the latter became more limited. Indeed, at

¹¹⁹ See "By his Excellency Sir Henry Clinton, Proclamation" (May 27, 1780) (alluding to "the gracious Offers which have been made to receive to his Majesty's Peace and Protection, with Pardon and Oblivion for their past Offences; all those his deluded and infatuated Subjects, who should return to their Duty, and a due Obedience to the Laws").

one point, an initial proposal recommending oblivion for those adhering to the British was reduced into a rather circumscribed pardon.

Already in 1778, the Continental Congress encouraged state action—whether legislative or executive—to ensure pardons of those purportedly misled into joining the British forces, encouraging citizens themselves to forget the underlying offences. According to the minutes of the meeting, it was

Resolved, That it be recommended to the legislatures of the several states to pass laws, or to the executive authority of each State, if invested with sufficient power, to issue proclamations, offering pardon, with such exceptions and under such limitations and restrictions as the several states shall think expedient, to such of their inhabitants or subjects, who have levied war against any of these states : and it is recommended to the good and faithful citizens of these states to receive such returning penitents with compassion and mercy, and to forgive and bury in oblivion their past failings and transgressions.”¹²⁰

Five hundred copies of this resolution in English and two hundred in German—along with the reasons for it—were ordered printed and disseminated.

When a committee reported back to the Continental Congress in June of 1782 recommending that the states “pass acts of pardon and oblivion in favor of such persons and description of offenders, who have heretofore joined or adhered to the armies of the King of Great Britain, under such restrictions, provisos, conditions and limitations as to the Legislature of the respective States may seem meet and advancive of the Peace, Safety and Interests of these United States,”¹²¹ however, the proposal was not immediately accepted and the measure was instead recommitted. The result was considerably less expansive, simply advising state legislatures that disloyal citizens might be encouraged to rejoin American forces through a pardon and that they should therefore “take into consideration the propriety of offering pardon to such non-commissioned officers and privates who have been refugees from these States and are now in the Corps of the Enemy.”¹²²

Oblivion was, however, more readily offered for conflicts between the states themselves. Attempting to deal with the

¹²⁰ 10 JOURNALS OF THE CONTINENTAL CONGRESS 381-82 (April 23, 1778).

¹²¹ 22 JOURNALS OF THE CONTINENTAL CONGRESS 335 (June 17, 1782).

¹²² 22 JOURNALS OF THE CONTINENTAL CONGRESS 378 (July 9, 1782).

ongoing dispute about the existence and delineation of Vermont from New York and New Hampshire, the Continental Congress instructed the latter states, also in 1782 to “pass acts of indemnity and oblivion, in favour of all such persons as have at any time previous to the passing such acts, acted under the authority of Vermont so called, in any manner whatsoever upon such persons submitting to the jurisdiction of the said States respectively: and provided always, that the said States of New York and New Hampshire, respectively, do pass acts confirming and establishing the titles of all persons whatever, to such lands as they do now actually occupy and possess within the limits of the district aforesaid”¹²³ New York quickly followed suit, and a few months later its “Act for Pardoning Certain Offences Committed in the North-Eastern Parts of this State” was reported to the Continental Congress, accompanied by a law detailing the disposition of disputed property, entitled “An Act for Quieting the Minds of the Inhabitants in the North-Eastern Parts of this State.”¹²⁴ The language of the Act specifically alluded to the fact that those pardoned had “implored the clemency of government, and humbly entreated the passing of an act of indemnity, oblivion and pardon.”¹²⁵ Notably, however, the statute specified that no one could avail himself of the pardon who was accused of treason on account of loyalty to the British government.¹²⁶ Even within this New York pardon, resistance to a more general oblivion that would cover the events of the Revolutionary War remained.

Another example of oblivion from the period, in North Carolina, also concerned a controversy about the boundaries of a state’s territory. The counties of Washington, Sullivan, and Greene essayed to set themselves up independently as the State of Franklin. As North Carolina resisted this continuing effort, one of its strategies for reintegrating the individuals involved in the effort for independence was to issue and re-issue oblivions to those involved. After an initial oblivion was passed in 1782, the question of whether to extend, amend or repeal it arose on a number of occasions throughout the following years, through 1789.¹²⁷ By its terms, the oblivion “restored . . . the said persons . .

¹²³ 22 JOURNALS OF THE CONTINENTAL CONGRESS 112-13 (March 1, 1782).

¹²⁴ 22 JOURNALS OF THE CONTINENTAL CONGRESS 282 (May 21, 1782).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ “An Act to Consign to Oblivion the Offences and Misconduct of Certain Persons in the Counties of Washington, Sullivan, Green and Hawkins,” 24 COLONIAL AND STATE RECORDS OF NORTH

. to all privileges of the other citizens of the State as if the said offences and misconduct had never existed.”¹²⁸ The act differed, however, from many similar statutes in that it failed to suggest a definitive resolution of property disputes in favor of one side or another and instead indicated that injustice in the disposition of property should be rectified by resort to the courts of common law.¹²⁹ The structure of oblivion was already changing, yet the act remained legislatively enacted and emphasized the renewed citizenship of those included in its terms.

While the minimalist notes from the sessions of the Continental Congress and the records from the various states indicate only general sentiments about the necessity for local acts of oblivion, a tract pseudonymously penned by Aedanus Burke as “Cassius” renders the political theory and the sense of historical precedents propelling this trend more perspicuous.¹³⁰ Burke, a lawyer and immigrant from Ireland, was serving in the South Carolina House of Representatives as well as on the South Carolina Supreme Court when *An Address to the Freemen of South Carolina* was published in Philadelphia in 1783.¹³¹ In the *Address*, Burke lambasts General Rutledge for extending an offer of pardon and oblivion to British loyalists that would last only during the limited period of thirty days.¹³² Burke also excoriates the legislature for passing acts of exclusion, confiscation and amercement, thereby depriving disloyal South Carolinians not only of the capacity to serve in the assembly but even the ability to even vote for their legislators while simultaneously divesting them of property. The only solution, he posits, would be an “act of amnesty or oblivion.”

As Burke reiterates several times, South Carolina’s method of responding to the Revolution represents the most extreme form of injustice, that of disguising revenge under the trappings of law. By passing acts designed to retaliate against those who had failed to fight alongside the revolutionaries, those in control of state government had made revenge look lawful. Rather than allowing the war to reach a graceful end, such legislation instead tends to foment further dissent:

CAROLINA 820 (Acts of the North Carolina General Assembly, 1786).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ For a general account of Burke’s life and politics, see JOHN C. MELENY, *THE PUBLIC LIFE OF AEDANUS BURKE: REVOLUTIONARY REPUBLICAN IN POST-REVOLUTIONARY SOUTH CAROLINA* (1989).

¹³¹ *See generally id.*

¹³² BURKE, *supra* note at 4, 11.

For if after a civil war, and one party vanquished, persecution was to go on; if the fury of laws and the fierce rage of passions prevailed, while the minds of men were yet fired by deadly revenge against their fallen adversaries; this would be worse than keeping up the war: it would be carrying on hostility under the shape of justice, which is the most oppressive, and of all other injustice, excites the greatest detestation, and the most violent factions and division.¹³³

Warning fellow South Carolinians about the judgment history would render upon them for adopting a merciless stance and rendering it part of the law itself, Burke likewise insists that, “To strike a blow of vengeance under the mask of justice, is the most to be execrated of all iniquity; and the historian who joins to a clear head, a good heart, never fails to deter posterity from such deeds by painting them in proper colours.”¹³⁴ Lest the inherent injustice of their activities not be rendered evident by Burke’s own treatise, he advises that the patterns of history suggest the egregiousness of South Carolina’s approach and that it will be so perceived in hindsight.

A particular and rather Hobbes theory of the state lies beneath Burke’s assumption that divesting individuals of the rights of citizenship and property because of failure to aid the revolutionary cause represents revenge rather than justice. Although Burke also cites Pufendorf and others, he touts Hobbes’s special relevance because “he lived in England in the time of the grand rebellion, when England then was, as Carolina was lately, distracted by a fierce war, and were persecuting each other, as the parliament forces, or those of the king got the better.”¹³⁵ From Hobbes and other thinkers, Burke derives the idea that, when the state fails in its obligation to protect the subject or citizen, natural law and the law of nations allow the latter to justifiably submit to a conquering force.¹³⁶ As Burke claims:

In this situation *necessity*, whose dominion triumphs over all human laws pointed out to our inhabitants, that as there was neither government, laws, nor army to protect them, they were at liberty to protect themselves, as well as they

¹³³ *Id.* at 29.

¹³⁴ *Id.* at 22.

¹³⁵ *Id.* at 6.

¹³⁶ For a discussion of Hobbes’s theory concerning the state’s duty to protect its subjects or citizens and its continued influence within contemporary international law, see generally ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011).

could. This is the law of Nature and of Nations: And all Statesmen, the best lawyers, and most eminent writers, agree, that when an invader over-runs a country, defeats the standing forces, and subverts its government, the inhabitants of such a country are justifiable to take the conqueror's protection and obey his laws; and whether the government be a monarchy or republick, it makes no difference, as the reason of the thing is the same.¹³⁷

Because adherence to British rule was authorized by the circumstances, those who chose that approach could not justifiably be punished for their actions.

Instead, they retained the rights of citizenship that they had previously possessed, even if those rights had lain dormant during the period of the Revolution. Burke expressed the desire “to shew, that on the restoration of the republic and law from British thralldom, the protection-men [i.e., those who sought protection under the British crown] who had been our citizens before, were as fully entitled to all the rights and freedom of citizenship, as those who were detained prisoners of war, or took refuge to the northward.”¹³⁸ His argument for this conclusion depends on the precepts of natural law, the law of nations, and the domestic law of South Carolina. As Burke asserts, “The laws of nations as well as the rights of nature therefore dictate, that when a country oppressed by a foreign power regains its liberty, the citizens should be restored to all the rights and liberties they before enjoyed.”¹³⁹ Critiquing the Exclusion Act, which prevented those who had not conformed to the terms of Rutledge's offer of pardon from serving in the legislature or electing members, he further insists that the fundamental laws of South Carolina bolster these individuals' rights:

This Act of Assembly supposes with the Governor, that all who did not come in within the time specified by the proclamation, and serve six months, had forfeited their liberty, and that such as obeyed, were restored to lost freedom. But the gentlemen of both Houses forgot, that the citizens of South-Carolina had to thank the Governor for nothing: Their rights and liberties were founded on something else besides parchment, or paper, or a proclamation; they were build on the laws of nature, and the fundamental laws of the State, and they were supported by the valour, and cemented by the blood of those brave men who fought, bled, and died in the cause of freedom,

¹³⁷ *Id.* at 5.

¹³⁸ *Id.* at 9.

¹³⁹ *Id.* at 9.

not for the usurpation of a few, but for the liberties and happiness of all.¹⁴⁰

Governing only in favor of those who were loyal to the American cause would, under this account, violate the very principle of “we the people,” allowing a particular faction to retain its ascendancy rather than providing for the well-being of every American citizen.

Among the many problems that Burke identifies in Rutledge’s proclamation is the way in which it reaffirmed the governor’s own power by offering individual pardons that would have to be solicited rather than proffering a more general oblivion. He writes of the proclamation that it requires “what perhaps was more mortifying; they must humble themselves and supplicate for mercy as criminals, at the feet of a man who a little before was a fellow citizen, no more than on a footing with themselves.”¹⁴¹ By insisting on supplication for mercy, Rutledge placed himself in a position of absolute rather than contingent power over other South Carolinians and thereby rendered himself tyrannical.

In Burke’s concluding argument for an Act of Oblivion, the peace of the republic, restoration of citizenship and return of property loom large. As authority for the grant of amnesty, Burke casts as far back as ancient history, citing episodes from Greece and Rome. The pre-eminent example or precedent to which he turns, however, is that of the Act of Oblivion passed immediately on King Charles II’s restoration to the English throne. He links the contemporary situation in America quite clearly to the moment of the Restoration in England: “[T]o make the matter still clearer, I shall draw a comparison between the conduct of the British nation, on the restoration, after the grand rebellion, and of our legislature on the re-establishment of our republic in 1782.”¹⁴² The paradigm provided by Charles II, who eschewed revenge in favor of peace, becomes the one to emulate. As Burke writes,

When the troubles were over, and Charles the Second was restored to the throne, he had his own injuries and the ruin of his friends, to avenge. But did he avenge those injuries? Did he dismiss his first parliament, as we did the last assembly, leaving the terrors of law hanging over the people’s heads; and resolve to send the court of sessions through the country, to fill it with condemnations and convicts, to the disgrace and utter distress of families, and add to the list of widows and orphans? He did nothing of all this. The very first bill he passed was an act of amnesty, to settle the distractions of the nation. Had he reasoned like

¹⁴⁰ *Id.* at 16.

¹⁴¹ *Id.* at 12.

¹⁴² *Id.* at 30.

our politicians, he would have fallen upon confiscation, banishment and amercement; and under pretence of preventing a future rebellion, he would like us, have passed acts to exclude from votes or seats in the legislature, such as were deemed enemies to royalty. Instead of such like measures, which would have only increased the nation's misfortunes, he passed a general amnesty; out of which forty nine of the late king's judges were excepted. These had a fair and public trial, and of the whole, ten only were executed. This was all the blood shed after so furious a civil war.¹⁴³

At the moment of the American Revolution, the very origins of oblivion in England with the English Revolution are recalled, and the justifications for the 1660 Act of Oblivion rehearsed. Despite the fact that the parliamentary oblivion under King Charles II accompanied a restoration of monarchy rather than a new form of republican government, the paradigm of amnesty that it established could be applied in America.

Acts of oblivion thus proliferated in colonial America and were even reaffirmed by the Second Continental Congress. As did many aspects of colonial common law bearing a family resemblance to English forms, these acts differed in certain respects from their analogues across the Atlantic. Under them, property was not always restored to those pardoned but was instead disposed of in disparate ways, and harsher punishments were sometimes prescribed for violating their terms. Nevertheless, and strikingly in the context of the explicit grants of pardoning power to governors and proprietors, oblivions remained legislatively enacted.

V PRAGMATICS OF PARDONING

Because the common law contexts of pardoning and amnesty are not determinative as to the distinction between the two and their respective locations within the branches of government, normative arguments drawn from both the historical record and contemporary debate may assist in deciding where the powers should lie constitutionally.¹⁴⁴ The strongest claims for presidential control over amnesty derive from a conception of amnesty as emergency power aptly articulated by Alexander Hamilton in *Federalist 74* and the lack of an explicit amnesty clause in Article I

¹⁴³ *Id.*

¹⁴⁴ See generally Meyler, *Towards a Common Law Originalism*, *supra* note 4.

granting the capacity to Congress. By contrast, the generality of amnesty and its ability to erase the memory of prior conduct, including perhaps immunizing executive branch officers from prosecution, suggests its suitability for legislative rather than executive action. Furthermore, many of the entailments of amnesty—including the restoration of confiscated funds or the return of individuals to full citizenship—call upon congressional powers over spending or naturalization.

While far from determinative in the context of U.S. constitutional law, the practice of several European countries, such as Germany and France, in constitutionally separating pardon from amnesty and the justifications that have been adduced for doing so illuminate some of the reasons for differentiating the two conceptually and allocating the former to an executive and the latter to a legislative branch. With the French Revolution, the legislative assembly assumed the capacity to grant amnesty.¹⁴⁵ This new location of the amnesty power was hardly uncontroversial, however, and only on the advent of the Third Republic in 1871 was the legislature finally accepted as the appropriate branch. Under the Constitution of 1958, Article 34 specifies that statutes must prescribe an amnesty.¹⁴⁶ Largely influenced by the French model, the German Weimar Constitution of 1919 similarly separated out pardoning from amnesty in its Article 49.¹⁴⁷ As that provision indicated, “The President exercises the right of pardon [*das Begnadigungsrecht*] for the Reich. Reich amnesties [*Reichsamnestien*] require a Reich statute.”¹⁴⁸

The normative rationales adduced for maintaining a legislative amnesty in France were two-fold, relying partly on the discrepancy between amnesty and pardoning and partly on the notion that amnesty constitutes a political act that must be fully subscribed to by the representatives of the people. On the first point, one writer claimed in 1848 that:

Pardon [la grâce] intervenes only when justice has accomplished its mission, when the law is satisfied, when

¹⁴⁵ JACQUES FOVIAUX, *LA RÉMISSION DES PEINES ET DES CONDAMNATIONS* 95-96 (1970) (“It was the legislative assembly which, on the 14th of September 1791, decreed a general amnesty for all revolutionary activities.”) (my translation).

¹⁴⁶ FRENCH CONSTITUTION OF 1958, art. 34 (“Statutes shall determine the rules concerning: . . . the determination of serious crimes and other major offenses and the penalties they carry; criminal procedure; amnesty; the setting up of new categories of courts and the status of members of the Judiciary.”).

¹⁴⁷ WEIMAR CONSTITUTION (1919), art. 49.

¹⁴⁸ *Id.*

all the interests are safe; it dispenses with punishment, but by the same token it confirms the sentence; it is associated with the judicial power so that that power's work may be completed in mitigating punishments that would be too harsh. Amnesty does not wait for judgment, but opposes it; amnesty stamps out the injunction of the law, prevents it from acting, suspends the function of the judge, suspends the execution of the laws. How can amnesty be comprehended by pardon? How can it be derived from pardon?¹⁴⁹

Whereas pardoning interacts with an established judicial process, amnesty thwarts the operations of that very system. Furthermore, the greater participation of the public in the process of legislative deliberation suggests the suitability of allocating a decision on amnesty to a national assembly than a sole executive officer. As French jurist Joseph Barthélemy wrote in *L'Amnistie*, "Amnesty is an act of high politics. . . . Amnesty is an essentially national act, an act of national reconciliation; it must therefore come from the organ which is supposed to receive the most directly the will of the citizens."¹⁵⁰ Despite articulating this argument for a legislative power of amnesty, even Barthélemy advocated a collaboration with the executive, suggesting that the government propose and the assembly then grant the amnesty. Although this recommendation was not adopted, a hybrid form has indeed developed, under which a law may delegate power to the executive to issue an amnesty.¹⁵¹

Although pardoning has been invoked surprisingly little by those debating the scope of executive power following the events of September 11, 2001, Alexander Hamilton's defense of a plenary presidential power in this area resonates with much recent reasoning about states of emergency. According to Hamilton,

[T]he principal argument for reposing the power of pardoning in this case in 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 tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the Legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip

¹⁴⁹ FAUSTIN HÉLIE, *TRAITÉ DE L'INSTRUCTION CRIMINELLE* 747 (1848) (my translation).

¹⁵⁰ JOSEPH BARTHÉLEMY, *L'AMNISTIE* 27 (1920).

¹⁵¹ FOVIAUX, *supra* note 145, at 111.

the golden opportunity. The loss of a week, a day, an hour, may sometimes be fatal.¹⁵²

For Hamilton, the relative speed of President and Congress, with the former poised to act quickly to avert disaster while the latter lingers over details, supported a broad presidential pardon, and, in particular, something that sounded very much like amnesty. Responses to this rationale have been developed in recent years in relation to other posited emergency powers. Many have, for instance, adduced the rapid passage of the USA Patriot Act as an example of Congress's capacity to address emergency situations as promptly as the President. Nevertheless, claims about timing and rapidity continue to be raised in aid of arguments for presidential emergency powers.

Additionally, supporters of presidential power over amnesty as well as pardon can cite to the contrast between Article I, which never mentions amnesty, and Article II, which explicitly states that the President may pardon. Despite the absence of any mention of amnesty in Article I, however, the Supreme Court itself acknowledged that a concurrent congressional power could still persist. In *Brown v. Walker* (1896), the Court upheld a challenged congressional act that secured witnesses immunity from prosecution, stating that it was “virtually an act of general amnesty, and belong[ed] to a class of legislation which is not uncommon either in England [] or in this country.”¹⁵³ As the opinion further affirmed, “[a]lthough the constitution vests in the president ‘power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment,’ this power has never been held to take from congress the power to pass acts of general amnesty, and is ordinarily exercised only in cases of individuals after conviction”¹⁵⁴ In the case in question, the amnesty was authorized as an incident to Congress's commerce power.

The rhetoric of amnesty in many circumstances also involves restoring individuals to full citizenship. When Congress considered whether to pass legislation granting amnesty to those who had avoided the draft during the Vietnam War, a number of comments referred to the expatriation of large groups of people and the desire to return the privileges of citizenship to them.¹⁵⁵

¹⁵² FEDERALIST PAPERS 74 (Alexander Hamilton).

¹⁵³ 161 U.S. 591, 601 (1896).

¹⁵⁴ *Id.*

¹⁵⁵ Record of hearings on the subject of the appropriate treatment of those who had refused to be drafted during the Vietnam War or who had otherwise avoided or left military service without authorization can be found in H.R. Subcomm. on Cts., Civ.

Congress's Article I power over naturalization would undergird its efforts to restore the capacities of those whose involvement in war—or, in the case of Vietnam, failure to become involved in war—might call into question their continued capacity as citizens. Furthermore, when the return of confiscated property is involved, at least when such property has already vested in the Treasury, Congress must pass legislation to fully implement the amnesty. As Justice Douglas's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* contended in another type of posited emergency, President Truman's constitutional capacity to seize the steel mills was contingent on congressional action to raise revenues and ensure just compensation for the taking.¹⁵⁶ One could similarly argue that the President's ability to grant amnesty, when it entails a financial component, is dependent on Congress's authorizing act. Finally, to the extent that amnesty occurs in conjunction with the resolution of foreign as well as domestic conflicts and the conclusion of a peace treaty, the Senate's role in confirming such agreements suggests that at least one branch of Congress should be involved.

A further pragmatic question might sway interpretation in favor of finding a congressional capacity to issue amnesty and limiting the President's power in this area. Given the fact that the English King lacked the abilities that advocates of a strong pardon power contend the President possesses, should we endorse an interpretation of the president's capacity that would render him more potent than George III?

VI CONCLUSION

Remembering oblivion and its distinctions from pardoning furnishes new possibilities for U.S. approaches to transitional justice within the international arena as well as methods for treating civil unrest at home. Although the speech protections of the First Amendment—not to mention the Cruel and Unusual Punishment Clause—would hardly permit a statute such as Maryland's 1650 Act of Oblivion to be passed today, other aspects of oblivion could be resuscitated. In particular, Congress could take up its capacity to enact amnesty in a broader set of circumstances than is currently acknowledged, and the connection between amnesty and the settling of property rights and restoration of citizenship could be reinvigorated. More fundamentally, the

Liberties, & Administration of Just. of the Comm. on Judi., *Relating to Amnesty*, 93d Cong. (Mar. 8, 11, 13, 1974).

¹⁵⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629-34 (1952).

value in certain circumstances of a general forgetting rather than an individual forgiving might return to public consciousness.