NOTE

PARDONING CONTEMPT—RECONSIDERING THE CRIMINAL-CIVIL DIVIDE

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The Supreme Court has never authoritatively addressed the President's power to pardon civil contempt. But in Ex parte Grossman, Chief Justice Taft argued in dictum that the President categorically lacked such power. That conclusion, now taken for granted, purportedly rested on English precedent as crystallized by Blackstone. But pre-ratification English cases and treatises fail to support the criminal-civil distinction as the boundary of the President's power to pardon contempt. To the extent those English sources reveal at least an ambiguity in Article II, post-ratification American practice and normative considerations lend additional support to an alternative framework. Identifying a neglected indeterminacy as to the pardon power's reach over certain civil contemnors, this Note rejects Taft's criminal-civil divide and proposes a limiting principle centered on private legal interests. History, common law precedent, and functional considerations support a Constitution that permits pardoning contempt unless the pardon extinguishes private legal interests of third parties. Under this view, the President can pardon all criminal contemnors and can release from coercive fines or imprisonment those civil contemnors who owe tangible, but not equitable, relief. For criminal contemnors and this subset of civil contemnors, presidential pardons may face political or ethical obstacles, but should not face constitutional ones.

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INTRODUCTION

When the Supreme Court settles a question about some presidential power, lawyers and judges might eventually take the articulated rule for granted. But what if the Court's enunciation appeared only in dicta, the President had not subsequently tested the purported limitation, and there was good reason to think the Court was incorrect, or at least oversimplifying? To the extent considerations along those lines should weaken adherence to a judicial interpretation, the President's power to pardon civil contempt, limited by Chief Justice Taft's dictum in *Ex parte Grossman*,[1] warrants revisiting. That project requires examining criminal contempt as well. It is impossible to understand the chief executive's power in relation to one but not the other, and it is worth tracing Article II's contours in relation to both. Taft argued that the President could never pardon civil contempt. This Note rejects that categorical dictum and proposes a historically rooted conception of the pardon power focused on private legal interests.

In July 2017, the United States District Court for the District of Arizona found former Maricopa County Sheriff Joseph Arpaio guilty of criminal

[1] 267 U.S. 87, 111 (1925).

contempt.[2] Previously, a different federal judge had enjoined the Maricopa County Sheriff's Office from detaining persons for further investigation without reasonable suspicion that a crime had been committed.[3] Certain practices of the Sheriff's Office, that judge had found, likely violated the U.S. Constitution's Fourth Amendment.[4]

Less than a month after Arpaio's conviction for failing to comply with the injunction, President Trump granted him a pardon.[5] Because Arpaio violated an order protecting constitutional rights, and because Arpaio was notorious for his history of alleged racial profiling,[6] the pardon generated significant controversy. Media outlets characterized it as "[u]nmerited, [u]nnecessary, [and] [i]mpulsive,"[7] an abuse of the Article II pardon power,[8] and potentially beyond the reach of that power.[9] The grant of clemency was isolated, but it placed the President's power under significant public, if not academic, scrutiny.

Article II gives the President "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."[10] This Note does not assess any pardon's wisdom, or contemplate when a pardon within Article II's purview might constitute an abuse of power. Instead, it aims to articulate a new framework for

[2] United States v. Arpaio, No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180, at *7 (D. Ariz. July 31, 2017).

[3] Ortega-Melendres v. Arpaio, 836 F. Supp. 2d 959, 994 (D. Ariz. 2011), aff'd, Melendres v. Arpaio, 695 F.3d 990, 1003 (9th Cir. 2012).

[4] *Ortega-Melendres*, 836 F. Supp. 2d at 983–84.

[5] Executive Grant of Clemency of Joseph M. Arpaio (Aug. 25, 2017), https://www.-justice.gov/pardon/file/993586/download [perma.cc/5UVC-FBEG]. Arpaio had not yet been sentenced.

[6] Joe Hagan, The Long, Lawless Ride of Sheriff Joe Arpaio, Rolling Stone (Aug. 2, 2012), https://www.rollingstone.com/culture/news/the-long-lawless-ride-of-sheriff-joe-arpaio-20120802 [perma.cc/RG95-64WC] ("Locking up the innocent. Arresting his critics. Racial profiling. Meet America's meanest and most corrupt politician.").

[7] Andrew C. McCarthy, Trump's Unmerited, Unnecessary, Impulsive Pardon of Sheriff Arpaio, Nat'l Rev. (Aug. 29, 2017), http://www.nationalreview.com/article/450934/trumps-arpaio-pardon-unmerited-unnecessary-impulsive [perma.cc/DQR7-SLHW].

[8] John W. Dean & Ron Fein, Nixon Lawyer: Donald Trump Abused Pardon Power When He Freed Joe Arpaio, Time (Oct. 3, 2017), http://time.com/4966305/trump-arpaio-pardon-abuse/ [perma.cc/KAA6-MT5R].

[9] Laurence H. Tribe & Ron Fein, Trump's Pardon of Arpaio Can—and Should—Be Overturned, Wash. Post (Sept. 18, 2017), https://www.washingtonpost.com/opinions/the-presidential-pardon-power-is-not-absolute/2017/09/18/09d3497c-9ca5-11e7-9083-fbfddf68-04c2_story.html [perma.cc/P566-JEDB].

[10] U.S. Const. art. II, § 2.

addressing whether and to what extent presidential pardons can reach criminal and civil contempt.

Courts exercise their contempt power, often with summary process (which affords defendants a more limited set of rights), in response to disobedience, interference, or disrespect.[11] Expressly distinguishing between "criminal" and "civil" contempt is a post-ratification trend.[12] A court *punishes* a criminal contemnor, but *coerces* a civil contemnor in order to compel compliance with an order.[13] Courts do not always bother with these labels, but the distinction is constitutionally meaningful and worth emphasizing. Criminal contempt typically carries some fixed judicial sanction. In contrast, because civil contempt sanctions aim to induce compliance rather than punish, their terms apply indefinitely, with incarceration or a fine of some amount per time unit remaining in force until the contemnor complies or the sanction loses its coercive effect. For example, a sheriff currently disobeying an injunction might be jailed or fined until he or she takes some action to comply with the order. Because the court uses those devices to induce obedience, it has convicted the sheriff of civil contempt. By contrast, an ex-sheriff guilty of disobeying an injunction, but without power to now comply, might be fined or imprisoned as a penalty for disregarding the court's instructions. That sheriff is guilty of criminal contempt.

Chief Justice Taft's opinion in *Ex parte Grossman* held that the President can pardon criminal contempt.[14] In other words, the President can relieve a criminal contemnor from punitive sanctions. In dictum, Taft

[11] Ronald Goldfarb, The History of the Contempt Power, 1961 Wash. U. L.Q. 1, 1. The "source" of the contempt power and its unique procedural conventions—whether inherent in Anglo-American courts, implied by the Constitution, or statutory—is mostly outside the scope of this paper. See infra Section IV.B.

[12] Note that seventeenth- and eighteenth-century English courts did not speak in terms of "criminal contempt" and "civil contempt." When this Note discusses common law cases and treatises, it uses those labels as shorthand for when there exists a clean analogy between our modern understandings and the particular case or treatise discussed. It is usually easy to determine into which bucket seventeenth- and eighteenth-century English cases fall.

[13] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 828–29 (1994) (noting that contempt is civil when "the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus 'carries the keys of his prison in his own pocket.'. . . When a contempt involves the prior conduct of an isolated, prohibited act, the resulting sanction has no coercive effect. '[T]he defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense.'" (quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 442–43 (1911))). The same dichotomy applies to fines, which are civil only if the contemnor has an opportunity to purge them. Id. at 829.

[14] 267 U.S. 87, 122 (1925).

argued that the line between criminal and civil contempt straightforwardly represents the pardon power's boundary.[15] Under that view, the President cannot relieve a civil contemnor from coercive sanctions. No one has ever seriously questioned Taft's rule.[16] Identifying a neglected indeterminacy as to the pardon power's reach over certain civil contemnors, this Note pushes back on Taft's criminal-civil dichotomy in favor of a limiting principle centered on private rights that may not always track the criminal-civil line.

The Supreme Court has, before and after *Ex parte Grossman*, instructed pardon power interpreters to find guidance in English common law and colonial practice.[17] In some instances, those sources provide clear answers to contemporary inquiries, such as whether the President can pardon criminal contempt.[18] But other questions remain unanswered when interpreters use only this method. With respect to pardoning civil contempt, the relevant English cases do not map onto Article II due to the paucity of reported opinions and the legal-institutional differences between eighteenth-century England and the United States. Interpreters, therefore, should turn to common law *principles* rather than common law *practice*. Those principles set up a theoretical framework for measuring the pardon power's reach. To the extent ambiguity persists in their application, American post-ratification practice and functional arguments provide possible solutions.

Part I introduces the power to pardon contempt through *Ex parte Grossman*'s lens. There and elsewhere, the Court purports to use common law cases as the gold standard for revealing the pardon power's scope.[19] Part I also explains why the Court gravitates toward this historical approach when considering the power's reach: It is consistent with dominant Founding-era thinking and can often, but not always, reveal clear constitutional rules.

[15] Id. at 111.

[16] See, e.g., Noah A. Messing, A New Power? Civil Offenses and Presidential Clemency, 64 Buff. L. Rev. 661, 680 (2016) (arguing for a presidential power to pardon other civil offenses, but distinguishing civil contempt and *Ex parte Grossman*).

[17] See infra Part I.

[18] See infra note 32.

[19] Taft cites several pre-ratification English cases to support the case's holding that criminal contempt is pardonable. With respect to civil contempt, however, he invokes pre-ratification English legal treatises *and* post-ratification English cases, along with American cases in which the pardon power was not implicated. *Ex parte Grossman,* 267 U.S. at 110–11.

Part II explores English practice as to pardoning contempt before 1789 in order to discern whether Taft's distinction between criminal and civil contempt accurately reflects the common law. Taft describes the criminal-civil dichotomy as consistent with settled English law at ratification,[20] but that is an oversimplification. This Part argues that the criminal-civil line is relevant to the President's power because the President can always pardon criminal contempt. But for civil contemnors, English legal evidence points to at least two additional, neglected distinctions. Together, they support a pardon power that can reach civil contempt when doing so does not destroy the legal interests of private parties.

The first distinction separates a coercive sanction from the behavior it attempts to coerce. Common law cases suggest that the Crown may have been able to pardon the coercive imprisonment meant to compel compliance with a judgment for monetary compensation or property, though it could not extinguish the debt owed as a result of that judgment. While a competing interpretation of the common law is plausible, the King's power to relieve civil contemnors owing tangible relief from coercive confinement was, at least, ambiguous. The question whether pardoning coercive imprisonment extinguishes other parties' private legal interests runs through these cases. In lockstep with that theme, pre-ratification English treatises elevate private rights over other potential factors when describing limits on the King's pardon power. And those rights consist of private legal interests, not a narrower category of "vested" rights.

The second, resulting distinction separates civil contemnors owing some tangible relief like money or property and those owing equitable relief, like behavioral compliance with an injunction. The common law cases and treatises, and the key principles for which they stand, suggest that in 1789 the King may have been able to pardon sanctions intended to coerce payment of money or delivery of property. But there is little reason to believe that the King could pardon coercive imprisonment meant to induce behavioral, non-tangible compliance with a court order issued for the benefit of a private party.

While Part II reveals this historical question regarding the Executive's power to pardon coercive sanctions, Part III examines whether post-ratification American courts and politicians resolved it. On the whole, nineteenth- and early twentieth-century thinkers continued to focus on

[20] See id. at 111.

private rights but sent mixed signals while applying that principle to civil contemnors. Consistent with common law practice, American courts permitted pardons of criminal contempt. In dealing with hybrid judgments of a punitive and coercive nature, courts and political actors took a permissive view toward pardons for coercive imprisonment. President Fillmore, at least, granted one such pardon.[21] The contempt in these hybrid cases is not easily classifiable as criminal or civil. But pardons in such cases had similar practical effects on private legal interests as pardons of civil contemnors owing money or property. Nineteenth-century American evidence thus supports the President's ability to pardon coercive imprisonment when the relevant judgment is for tangible relief.

Part IV turns to functional arguments for and against permitting pardons of contempt. The Arpaio pardon sparked discussion as to how the President might abuse his power. But this Part examines how judges might abuse their power, consolidating judicial and scholarly arguments against an unrestrained contempt power. The functional arguments against allowing Presidents to pardon contempt often meet persuasive counters that the Executive should be able to check the otherwise extraordinary judicial power to imprison people with limited process.

Part V uses hypotheticals to demonstrate how the pardon power's scope, developed in Parts II and III, better balances the competing values discussed in Part IV. The examples aim to show how the common law distinction between coercive imprisonment and debt might balance executive and judicial power more effectively than the line between civil and criminal contempt articulated in Taft's dictum. But in the context of modern equitable relief owed to a private party, for which the historical English cases provide minimal guidance, functional considerations overwhelmingly support applying Taft's rule. Under the power so defined, President Trump could not have pardoned Arpaio had the latter been jailed for presiding over the *ongoing* disobedience of an injunction. But because Arpaio was no longer sheriff, his pending sentence was punitive, and his contempt both criminal and pardonable. More broadly, regardless of the wisdom of any particular pardon, historical and normative considerations support retaining the distinction between civil and criminal contempt, but only while advancing additional distinctions between debt and coercion, and between tangible and equitable relief.[22]

[21] See infra note 96 and accompanying text.

[22] Throughout this Note, I use the phrase "tangible relief" as shorthand for when a contemnor owes money or property to some party as the result of a judgment.

I. *EX PARTE GROSSMAN* AND THE COURT'S HISTORICAL APPROACH

The *Ex parte Grossman* Court reiterated the early instruction from *United States v. Wilson* that the pardon power be interpreted based on the common law and British institutions as they existed when the Constitution was ratified.[23] To the Court, leaving aside the Constitution's exception for cases of impeachment, the American and English pardon powers were substantively the same in 1789.[24]

That the United States imported the English pardon power in a constitution meant to establish a more democratic government may come as a surprise. Indeed, throughout the late nineteenth century, certain judges and scholars argued against exclusive reference to English and pre-ratification colonial practice, at least to the extent that such practice sanctioned pardoning criminal contempt.[25] But these arguments exaggerated the degree to which the Framers feared executive power.[26] Taft confronted them persuasively. To him, relying on English practice made sense because Article II's text was transparently based on analogous

[23] *Ex parte Grossman*, 267 U.S. at 108–09 ("As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it." (quoting United States v. Wilson, 32 U.S. 150, 160 (1833))).

[24] Id. at 110 ("[W]hen the words to grant pardons were used in the Constitution, they conveyed to the mind the authority as exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word pardon." (quoting Ex parte Wells, 59 U.S. (18 How.) 307, 311 (1855))).

[25] See, e.g., *Wells*, 59 U.S. at 318 (McLean, J., dissenting) ("The executive office in England and that of this country is so widely different, that doubts may be entertained whether it would be safe for a republican chief magistrate, who is the creature of the laws, to be influenced by the exercise of any leading power of the British sovereign."); In re Nevitt, 117 F. 448, 457 (8th Cir. 1902) (doubting the constitutional permissibility of pardoning criminal contempt in part because "the judicial power of the United States is not derived from the king, as it was in England, or from the president, but is granted by the people by means of the constitution.");Wilbur Larremore, Constitutional Regulation of Contempt of Court, 13 Harv. L. Rev. 615, 622 (1900) ("If there was any one English feature which emphatically the American people did not intend to take over in its entirety, it was that of the executive head of the state. . . . It follows that, while it cannot be said that English precedents on the pardoning power have no relevancy, they are not finally determinative, and have no force other than as illustrative arguments.").

[26] See Saikrishna Bangalore Prakash, Imperial from the Beginning 3 (2015) ("Though antipathy toward absolute monarchy was widespread, a surprising number thought limited monarchy was the cure to what ailed postrevolutionary America."); id. at 26 ("Many saw the president as a monarch, with powers rivaling, and in some cases exceeding, the powers granted to European sovereigns.").

English law,[27] and because the King's pardon power itself was limited in some respects.[28] Most persuasively, the Constitutional Convention featured no debate surrounding the pardon power's substance, strongly suggesting that the Framers "had in mind no necessity for curtailing this feature of the King's prerogative in transplanting it into the American governmental structures, save by excepting cases of impeachment."[29]

These rationales explain why the Court deferred so willingly to eighteenth-century English practice—it was foremost in the minds of the Framers, and history provided nowhere else to turn. Colonial practice could be instructive, but American colonial charters shed no light on which types of contempt the Governors' pardon power could reach, nor were there any colonial cases on point.[30] Alexander Hamilton's Federalist No. 69 buttressed Taft's case for a historical methodology: He referred to the pardon power as "resembl[ing] equally that of the king of Great Britain and of the governor of New York."[31]

Sometimes the Court's reliance on Founding-era English precedent provides manifest rules, as in cases of criminal contempt, which were undoubtedly subject to pardons by the King.[32] Taft's dictum implied that English practice clearly forbade pardons of coercive imprisonment for civil contemnors.[33] But English treatises, along with seventeenth- and

[27] *Ex parte Grossman*, 267 U.S. at 112.

[28] Id.

[29] Id. at 113. Substantive debates over what crimes the pardon power would reach were limited to whether or not treason should be pardonable. There was also debate over a potential requirement that the Senate consent to all pardons. James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 571 (Gaillard Hunt & James Brown Scott eds., Oxford Univ. Press 1920). Those Federalist Papers that referenced the pardon power focused on the impeachment exception and whether or not to exclude the crime of treason. See The Federalist Nos. 69, 74 (Alexander Hamilton).

[30] See Evarts Boutell Greene, The Provincial Governor in the English Colonies of North America 125–26 (1898) ("The . . . almost universal rule . . . was that the governor exercised the pardoning power except in cases of treason and wilful [sic] murder . . . ."). Greene's articulation does not tell us whether, for example, civil contempt was a "case" for these purposes.

[31] The Federalist No. 69 (Alexander Hamilton).

[32] See, e.g., Phipps v. Earl of Angelsea (1721) 24 Eng. Rep. 576, 1 P. Wms. 697 (Ch); Rex v. Oliver (1717) 145 Eng. Rep. 578, Bunbury 14 (Ex Ch); The King v. Buckenham (1664–65) 83 Eng. Rep. 1223. 1 Keble 751, 787, 852 (KB); The King v. Sir Anthony Mildmye (1615) 80 Eng. Rep. 1137, 2 Bulstrode 299 (KB); Thomas of Chartham v. Benet of Stamford (1313) 24 Selden Society 185 (Kent Eyre); William Hawkins, A Treatise of the Pleas of the Crown bk. II, ch. 37, § 33, at 391 (E. and R. Nutt and R. Gosling, Savoy, 3d ed. 1739).

[33] *Ex parte Grossman*, 267 U.S. at 111 ("[L]ong before our Constitution, a distinction had been recognized at common law between the effect of the King's pardon to wipe out the effect

eighteenth-century cases, tell a more nuanced story. Interpreters cannot confidently assess whether the President can pardon certain civil contemnors using only the Court's historical methodology. To say that English common law practice defines the American rule leaves interpreters empty-handed when no discernable common law practice existed.

II. COERCIVE IMPRISONMENT VS. DEBT UNDER THE COMMON LAW

While many cases demonstrate conclusively that the King could pardon what we now call criminal contempt, case law is less helpful with respect to civil contempt. Rather than throw up our hands, we might look to those cases and English legal treatises to derive principles that help us map the King's power onto Article II.

One possible rule would be that the Executive could simply pardon anyone in jail. But English debtors' jails, in which creditors could imprison debtors at their pleasure and free from executive interference, show this to be too blunt a characterization.[34] Another possibility is that pardons operated in criminal but not civil proceedings. This dichotomy lacks any clear support in English precedent, and simply begs the question—into what bucket should the relevant offense fall?[35]

Common law cases and treatises suggest that, in 1789, the King may have been able to pardon imprisonment meant to coerce compliance with a court order, but could not extinguish the debt that the order addressed. More generally, these sources reveal two instructive principles: First, the King could pardon any punitive sanction enforced in the interest of the public. Criminal (punitive) contempt fits neatly into this safe harbor of pardonable offenses. Second, the King could pardon judicial sanctions so long as the pardon did not extinguish a private party's legal interests.

of a sentence for contempt in so far as it had been imposed to punish the contemnor for violating the dignity of the court and the king, in the public interest, and its inefficacy to halt or interfere with the remedial part of the court's order necessary to secure the rights of the injured suitor. . . . For civil contempts, the punishment is remedial and for the benefit of the complainant, and a pardon cannot stop it. For criminal contempts the sentence is punitive in the public interest to vindicate the authority of the court and to deter other like derelictions.").

[34] See infra Section II.A.

[35] That the underlying action is civil or criminal does not help. Parties affiliated with criminal trials can be held in civil contempt (for, say, refusing to testify), while parties in civil actions (like Arpaio) can be held in criminal contempt. See U.S. Dep't of Justice, U.S. Attorney's Manual: Criminal Resource Manual § 753, https://www.justice.gov/jm/criminal-resource-manual-753-elements-offense-contempt [perma.cc/KKP8-2GFR].

When applied outside the punitive safe harbor, this latter principle narrows the inquiry to a particular pardon's effect on private rights.

A. The Common Law and Private Rights

In any civil contempt, there are two elements: whatever the contemnor owes to another party, and the coercive measures imposed by the court to induce compliance with the relevant order or judgment.[36] In *Bartram v. Dannett*, the Chancery expressly recognized this distinction.[37] Bartram owed costs to Dannett associated with a legal proceeding and was jailed in order to coerce payment.[38] Bartram then pleaded An Act for the King's Majesties most Gracious, General, and Free Pardon.[39] According to the Chancery, "[T]ho' the *Act* might pardon the Contempt or Disability, yet it did not pardon the Debt."[40] The court freed Bartram from imprisonment but left him still owing the costs to Dannett.[41] There are no holdings in the English reports before 1789 refuting or questioning this ruling.[42] As late as 1829, the Solicitor of the High Court of Chancery relied on *Dannett*'s holding in his treatise on Chancery practice.[43] *Dannett* shows

[36] See Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 829 (1994).

[37] (1675) 23 Eng. Rep. 132, Rep. Temp. Finch 240 (Ch). This reporter alternately uses the "Dennett" (on page 240) and "Dannett" (on page 253) spellings for the same party. Because the passage using "Dannett" contains more detail, I adopt that spelling here.

[38] Id.

[39] Bartram v. Dannett (1676) 23 Eng. Rep. 139, Rep. Temp. Finch 253 (citing Act of Indemnity 1673–74, 25 Car. 2 (Eng.)).

[40] Id.

[41] Id.

[42] See Rex v. Stokes (1774) 98 Eng. Rep. 1008, 1008–09, 1 Cowp. 136 (KB) (in which the attorneys argue whether *Bartram v. Dannett* is applicable).

[43] 1 Harding Grant, The Practice of the High Court of Chancery 106 (London, A. Maxwell, S. Sweet, R. Pheney & Stevens & Sons and Dublin, R. Milliken & Sons, 2d ed. 1829) ("A General pardon relieves from attachment by pardoning the contempt; but not the debt."); The King and Codrington v. Rodman (1630–31) 79 Eng. Rep. 774, 774–75, Cro. Car. 198, 198–99 (Spiritual Court). The defendant had been sentenced to excommunication for contempt in order to compel paying costs to the other party. The court ruled that a general pardon reached the punishment of excommunication because the pardon encompassed contempts of all courts without exception. Id. The plaintiff's attorney argued that the excommunication was "the means to enforce [the costs] to be paid," and if the costs were not pardoned, the excommunication should not be either. Id. The court disagreed, pardoning the excommunication but not the costs—and later, upon reexamination, discharged the costs as well. Id. At least in the seventeenth-century Spiritual Court, then, a general pardon could fully relieve what we would now think of as civil contempt, extinguishing not only the coercive sanction but also the debt. Whether it should be limited to its facts or to the Spiritual Court, no other cases approved pardoning the debt itself.

that, at least in seventeenth-century Chancery Court, the King could pardon coercive sanctions but could not extinguish the private rights of third parties (in *Dannett*, the right to the debt owed).

Taft's dictum, on the other hand, depended on a section of Blackstone's *Commentaries* that cited only *Rex v. Stokes*.[44] But that case fails to clearly support generalizations about pardoning civil contempt. In *Stokes*, the defendant was kept in prison, pursuant to a parliamentary statute, for failure to pay costs to the plaintiff.[45] While the debt resulted from removal fees associated with a legal dispute, it was not the consequence of any particular judgment or court order that the debtor disobeyed.[46] In other words, while the elements of modern civil contempt—debt and coercion—were present, a specific Act of Parliament, rather than an exercise of the judicial contempt power, commanded the debtor's incarceration.[47] But the King's Bench nevertheless referred to the situation as one of "contempt,"[48] and stated that the Crown's general pardon could not relieve the debtor's confinement.[49] Only Parliament's Insolvent Debtors Act could free the debtor.[50]

Stokes and *Dannett*, while abstruse, are plausibly reconcilable so as to cast doubt on Taft's dictum. These cases consistently focus on private rights. In both, the judges agreed that the King could not eliminate a civil debt, but in *Dannett*, the court maintained a distinction between coercive imprisonment and that debt.[51] *Dannett* featured a conviction for contempt—an offense against the court and therefore against the King.[52]

[44] 1 Cowp. 136. The case is referenced in a second reporter, Lofft 649–50, with slightly different (but consistent) content. I cite both below. *Stokes* itself refers to a prior unreported case of the same name, listing its date of decision as Mich. 23 Geo. 2. (As is customary in the old English reporters, the date of decision is demarcated by the term of the court's sitting and the year of the sovereign's reign. The case, noted as in the twenty-third Michaelmas term of George II's reign, was thus decided circa 1749–1750.) That case, as this court relates it, involved an Act of Indemnity that itself contained an exception for contempts. It is thus weak evidence of the scope of the King's pardon power more generally.

[45] 1 Cowp. 136. Those costs were associated with his removing an assault indictment to the court.

[46] Id.

[47] An Act to Prevent Delays of Proceedings att [sic] the Quarter Sessions of the Peace 1694, 5 & 6 W. & M. c. 11, § 2. The statute required imprisonment if costs were not paid within ten days.

[48] *Stokes*, 1 Cowp. 136.

[49] Id.

[50] Id.

[51] Bartram v. Dannett (1676) 23 Eng. Rep. 139, Rep. Temp. Finch 253.

[52] Id.

In *Stokes*, the imprisonment was for violating an act of Parliament—if there was a contempt, it was not a contempt of court.[53] Creditors' rights during the *Stokes* era further explain the superficial divergence in the cases. Acts of Parliament recognized a creditor's right to detain, "at his own pleasure," a debtor in prison until the debtor satisfied the debt.[54] While the debtor in *Stokes* was jailed under an Act of Parliament requiring attachment for non-payment of costs, that attachment came with no expiration date. The court viewed the imprisonment as a right of the creditor, with which only Parliament could interfere in the English system.[55] Thus, in a purely private confinement for a debt, as distinguished from contempt, the imprisonment implicated only the legal interests of a private party, the creditor.[56] Under those circumstances, "the Crown ha[d] nothing in it, as it concern[ed] the right between subject and subject."[57] But when a court convicted for contempt, even of a coercive nature, the penalty was not at the pleasure of the one to whom the judgment was owed. In those instances, the relevant interest was that of the court (and therefore the Crown and the public) in having its orders obeyed. Viewed this way, in *Stokes*, the King had no rights at stake as there was no genuine contempt of court. In *Dannett*, the King could relinquish his interest in the coercive imprisonment via pardon while leaving the private party's legal right to the debt undisturbed.

Without citing or mentioning *Dannett*, Blackstone implied that *Stokes* foreclosed its rule, such that by 1774 Parliament but not the King could pardon debtors, contemnors or not.[58] Admittedly, there are analytical similarities between a contemnor who owes costs to another party and the debtor in *Stokes*. Moreover, interpreters could cabin *Dannett* to Chancery Court. But Blackstone's purported rule hinges on a single reported case in which the prisoner violated an Act of Parliament rather than disobeying a judge. To confidently superimpose Blackstone's conclusion onto Article II, interpreters must put their faith in a dubious analogy between contempt and an antiquated creditors' rights regime, supported by

[53] *Stokes*, 1 Cowp. 136.

[54] Robert Malcolm Kerr, The Student's Blackstone 355 (London, John Murray 1858).

[55] 1 Cowp. 136.

[56] When it comes to the private action, do not be misled by the "Rex" in *Rex v. Stokes*. The reporter seemingly titled the (otherwise anonymous) case to mimic the unpublished precedent the King's Bench considered relevant to its analysis. See supra note 45.

[57] Rex v. Stokes (1774) 98 Eng. Rep. 845, 846, Lofft 649, 650.

[58] 4 William Blackstone, Commentaries *285.

threadbare common law precedent.[59] *Dannett* shows that Blackstone's rule could not have been categorical. At the very least, these cases do not provide the clean answer that Blackstone, through Taft's dictum, suggests.[60]

B. English Treatises and Private Rights

Principles regarding public and private rights embodied in English treatises lend further support to a pardon power that reaches some coercive sanctions. In his 1739 *A Treatise of Pleas of the Crown*, William Hawkins defined the King's pardon power in terms of public and private rights.[61] To Hawkins, the power extended to any offense "so far as the [public was] concerned in it,"[62] and was limited so as not to extinguish private legal interests.[63] With respect to the type of relief owed, Hawkins

[59] *The King v. Myers* (1786) 99 Eng. Rep. 1086, 1 T. R. 265 (KB), reversed *Ex parte Whitchurch* (1749) 26 Eng. Rep. 37, 37–39, 1 Atk. 55, 55–58 (Ch), in holding that not performing an award was a civil, not criminal offense. Neither case involved a pardon. The courts in *Myers* and *Whitchurch* dealt with the issue of whether or not an arrest could be executed on a Sunday, which was permissible for criminal but not civil offenses. A decision that people who failed to satisfy judgments could not be arrested on Sundays may have led courts and scholars to the inference that it was not pardonable, but that logical connection is not obvious. For our purposes, decisions that considered whether civil or criminal contempt were "crimes" outside the context of the pardon power seem like poor evidence of the scope of that power. For one thing, the category of "[o]ffenses against the United States" is likely wider than that of federal crimes. Prakash, supra note 26, at 104–05.

[60] Astute readers will note that these cases involved *general* pardons. The possible differences between the King's general and specific pardons for Article II interpretive purposes are outside the scope of this paper. Nevertheless, Taft relied on Blackstone's discussion of "general act[s] of pardon." Ex parte Grossman, 267 U.S. 87, 103 (1925). And it is unsurprising that Taft took the relevance of general pardons for granted. While general pardons and acts of indemnity were technically passed by Parliament, they were exercises of the King's prerogative. They were *always* initiated by the Crown and expedited through Parliament with no alterations made. 1 Blackstone, supra note 58, at *184 ("[W]hen an act of grace or pardon is passed, it is first signed by his majesty, and then read only once in each of the houses, without any new engrossing or amendment.") The pardon power was vested in the President without legislative participation not to limit its scope, but because "one man appears to be a more eligible dispenser of the mercy of the government than a body of men." The Federalist No. 74 (Alexander Hamilton).

[61] Hawkins, supra note 32, at 391.

[62] Id. Hawkins explicitly discussed pardoning of contempt for making a false return, which would fall into the modern category of criminal contempt. Id. § 26 at 388.

[63] Id. § 34, at 392 ("[T]he King cannot by any Dispensation, Release, Pardon or Grant whatsoever, bar any Right, whether of Entry, or Action, or any legal Interest, Benefit or Advantage whatsoever before vested in the Subject.").

recognized an exception for ongoing public nuisances, because a pardon would take away the only means of redressing the nuisance.[64]

Hawkins' requirement that the public be concerned in the offense for it to be pardonable does not foreclose pardoning civil contempt. Long after Hawkins wrote, civil contempt was still considered an offense against the Crown.[65] The exception Hawkins recognizes for public nuisances is thus a carve-out to the King's otherwise plenary pardon power with respect to offenses against the public—perhaps because nuisances functionally blur the line between public and private interests, and might sometimes be remediated by behavior rather than payment. Hawkins's discussion of private rights, moreover, says nothing about the detention that may be imposed to compel satisfaction of those rights. Finally, Hawkins recognized the distinction between coercive punishment and the legal interests of private parties. He stated that pardons for contempt of a court of equity would not discharge costs taxed to the party grieved, implying that they *would* discharge the imprisonment meant to compel payment of those costs, consistent with *Dannett*.[66]

It was Blackstone, writing later than Hawkins and closer to the Founding era, upon whom Chief Justice Taft primarily relied.[67] Blackstone derived questionable generalizations from *Stokes* with respect to civil contempt in particular, but the principles he identified elsewhere help clarify the pardon power. Blackstone considered the distinction between private and public injury critical.[68] He also clarified what separates the two. Put simply, private rights in the relevant sense are legal interests belonging to individuals that they may vindicate in court, while public rights are duties due to the entire community.[69] For our purposes,

[64] Id. § 33, at 391. Similarly, Hawkins considered sureties for keeping the peace and argued that such a recognizance could not be pardoned by the King, because the subject had "a Kind of Interest in it." Hawkins, bk. I, ch. 60 § 17, at 129.

[65] C.C. Langdell, A Summary of Equity Pleading 30 (Cambridge, Charles W. Sever & Co., 2d ed. 1883) ("[I]f he refuses obedience to the writ, he is guilty of a contempt, not to the chancellor, *but to the king*; and hence, when the chancellor proceeds to punish him for his contempt, he adopts a mode of proceeding unknown to any mere court of justice, the delinquent being treated as a rebel and contemner [sic] of the king's sovereignty." (emphasis added)); see also Geoffrey Gilbert, The History and Practice of Civil Actions 25 (London, P. Uriel & E. Brooke, 3d ed. 1779) (describing how contempt was considered "a great Breach of the King's Peace.").

[66] Hawkins, supra note 32 bk. II, ch. 37 § 43, at 394.

[67] Ex parte Grossman, 267 U.S. 87, 103 (1925).

[68] Like Hawkins, Blackstone reiterated that the King could pardon all offenses "merely against the crown, or the public." 4 Blackstone, supra note 58, at *398.

[69] Id. at *2–*3.

then, private rights include individual constitutional rights, even though they may seem "public" in a colloquial sense.

Blackstone cited Hawkins in acknowledging the public nuisance exception, but provided an additional justification: that a public nuisance "savours more of a *private* injury to each individual in the neighbourhood, than of a *public* wrong."[70] From Hawkins and Blackstone, along with the cases, the relevant limiting principle emerges: The Executive may pardon contemnors to the extent that the pardon does not extinguish private legal interests.

This principle adds content to the more conventional idea that the pardon power permits the Executive to surrender public rights but not interfere with private ones.[71] Here, the relevant private interests should not be limited to "vested" private rights but should include those legal interests for which private citizens can look to courts for protection.[72] Compliance with an injunction, for example, clearly implicates private interests in the sense relevant to Blackstone—but it would not be accurate to speak of private parties as having some "vested" right akin to a property right in the satisfaction of that prospective order.[73] I use the term private rights to describe the interests that Blackstone and Hawkins apparently had in mind—those susceptible to judicial vindication. Moreover, to the extent it speaks of surrendering public rights, the conventional formulation should embrace the public authority to coerce in addition to the more traditionally recognized public authority to punish.

C. Acknowledging Ambiguity

Taft argued that the pardon power's meaning derived from how the King exercised his prerogative before the American Revolution.[74] But his dictum likely ignored the distinction between coercive measures and debt because the issue was neither before him nor illuminated in Blackstone's treatises. The historical evidence cited above might be less material if all

[70] Id. at *399.

[71] See Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559, 568 (2007).

[72] See Ann Woolhandler, Public Rights, Private Rights, and Statutory Retroactivity, 94 Geo. L.J. 1015 (2006) (providing a thorough overview of vested rights).

[73] The legislature can interfere with prospective orders in contrast to, say, final judgments for damages. See Miller v. French, 530 U.S. 327, 343–44 (2000).

[74] Ex parte Grossman, 267 U.S. 87, 110 (1925).

that mattered were what the Framers thought about English practice.[75] But the Court has consistently pointed to *actual* English practice in articulating the pardon power's contours.[76]

English cases and principles suggest a more far-reaching pardon power than Taft's dictum. There is *at least* ambiguity as to whether the President can sometimes pardon coercive imprisonment. Beyond the safe harbor of pardoning punitive sanctions, with the private rights principle identified, the question reduces to one of application: whether pardoning a coercive sanction extinguishes a private legal interest.[77] To the extent that someone has a right to a judgment, coercive measures to enforce payment are arguably irrelevant to that right's existence, at least to the extent that other mechanisms for collection exist. But when the remedy is behavioral compliance with an injunction (for example, to stop a nuisance, or to stop violating the Fourth Amendment), the absence of alternative judgment-satisfying mechanisms might support folding the coercive sanction into the private right itself. Pardons in those situations would functionally amount to dispensations, wherein the Executive grants individuals licenses to continuously violate the law.[78] Scholars agree that the Constitution rejected an executive dispensation power.[79]

Taft claimed to rely on pre-ratification common law precedent, but he discussed post-ratification American and English practice. That suggests his possible awareness that English law, or the relationship between English practice and Article II, was not fully settled in 1789.[80] Based on this portion of his opinion, the modern Supreme Court has classified *Ex*

[75] It is more likely that the Framers simply did not think about pardons of civil contemnors at all. See supra note 29. And if they did, they would not necessarily have looked to Blackstone for guidance. See Martin Jordan Minot, Note, The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the *Commentaries*, 104 Va. L. Rev. 1359 (2018).

[76] See, e.g., Schick v. Reed, 419 U.S. 256, 262–63 (1974) (examining the English prerogative to pardon *as it stood in 1787* because "[t]he history of our executive pardoning power reveals a consistent pattern of adherence to the English common-law *practice*" (emphasis added)); *Ex parte Grossman*, 267 U.S. at 110–11; Ex parte Wells, 59 U.S. (18 How.) 307, 311 (1855).

[77] While the English cases do not discuss them, their logic would extend to coercive fines.

[78] See Prakash, supra note 26, at 93–94.

[79] Id.

[80] *Ex parte Grossman*, 267 U.S. at 118–19 ("Moreover, criminal contempts of a federal court have been pardoned for eighty-five years. In that time the power has been exercised twenty-seven times. . . . Such long practice under the pardoning power and acquiescence in it strongly sustains the construction it is based on."). The many common law cases describing pardons for criminal contempt suggest that Taft's examination of post-ratification practice in relation to criminal contempt was primarily rhetorical. See supra note 33.

parte Grossman with other cases in which longstanding, post-Founding practice properly informed constitutional interpretation.[81] Given the challenges in applying common law cases and even common law principles to certain civil contemnors, post-ratification American practice and functional arguments serve as appropriate interpretive guides.

III. PARDONING COERCIVE SANCTIONS IN THE UNITED STATES BEFORE *EX PARTE GROSSMAN*

The history after ratification, like that before it, supports a pardon power that reaches criminal contempt, reinforcing *Ex parte Grossman*'s central holding.[82] But to the extent that post-ratification history could settle the pardon power's meaning in relation to civil contempt, American practice, while mixed, hints at further justification for a power that reaches some coercive sanctions.

A. Pardoning Hybrid Sanctions

Formal pardons of hybrid sanctions could (and, in one case, did) substantively pardon coercive imprisonment. In 1869, future Supreme Court Justice Samuel Blatchford implicitly endorsed a pardon for coercive imprisonment as a judge in the Southern District of New York.[83] William Mullee had been found guilty of disobeying an injunction of the court, and was fined $2,500 as a penalty for his contempt. While the fine was punitive, it was to be paid to the plaintiffs in the suit out of which the

[81] NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014). Justice Breyer relates this interpretive approach to the Madisonian idea of liquidation, by which ambiguous constitutional provisions would have their meanings settled once a regular course of practice liquidated that meaning. Id. (citing Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 Writings of James Madison 447, 450 (G. Hunt ed., 1908)). For more on interpretation and liquidation, see Caleb Nelson, Originalism and Interpretive Conventions, 70 U. Chi. L. Rev. 519 (2003).

[82] In 1822, the Supreme Court denied a writ of habeas corpus, where a witness refused to answer a question and was held in contempt, because of limits on its jurisdiction to revise convictions of lower courts in *criminal* cases. Ex parte Kearney, 20 U.S. (7 Wheat.) 38, 42–45 (1822). The categorization of criminal contempt as a criminal offense helped justify the inference that a contempt charge falls within the pardon power's "Offences against the United States" language. *Ex parte Grossman*, 267 U.S. at 115. Note that, as in *The King v. Myers* (1786) 99 Eng. Rep. 1086; 1 TR 265 (KB), *Ex parte Kearney* did not implicate the pardon power, weakening that inference significantly. But a larger volume of common law cases made it obvious that the pardon power reached criminal contempt convictions. See supra note 32.

[83] In re Mullee, 17 F. Cas. 968, No. 9911 (C.C.S.D.N.Y. 1869) (No. 9,911).

contempt arose, and Mullee was imprisoned until the fine was paid.[84] Despite this remedial aspect of the imprisonment, Blatchford focused on the punitive purpose of the fine as an original matter.[85] Though President Grant had not issued a pardon, Blatchford determined that his court could not free the contemnor because the President had the power to do so, and that power was exclusive.[86]

Blatchford relied heavily on an 1852 memo from U.S. Attorney General John J. Crittenden to President Millard Fillmore providing guidance as to the reach of the pardon power.[87] The memo concerned a schooner's captain, Drayton, and its charterer, Sears, who were caught attempting to help a group of District of Columbia-area slaves escape on their boat.[88] They were each convicted of seventy-four counts of unlawfully transporting a slave and were sentenced to fines totaling $11,802 and $8,686, respectively.[89] One half of the fines were to be paid to the slave owners, with the other half going to the county.[90] Drayton and Sears were imprisoned until such time as they could pay the fines and costs adjudged against them, and remained in prison when Crittenden wrote to President Fillmore.[91]

Crittenden articulated an expansive pardon power. With the single exception for impeachments, he argued, "the power of the President [to pardon] is unqualified and unlimited . . . and includes the power of remitting fines, penalties and forfeitures."[92] Crittenden then honed in on whether the slave owners and public entities to whom the fines were owed had acquired an interest that the President could not divest via pardon.[93]

[84] Id. at 969.
[85] Id. at 971.
[86] Id.
[87] Pardoning Power of the President, 5 Op. Att'y. Gen. 579 (1852).
[88] See Speech of Hon. H.C. Burnett, of Kentucky, The Subject of National Politics, in the House of Representatives (n.p., n.d., July 28, 1856), *in* 2 Political Pamphlets of the United States from the Durrett Collection, 1840–1878, at 1, 9.
[89] Pardoning Power of the President, 5 Op. Att'y. Gen. 579, 580–81 (1852).
[90] Id. at 581.
[91] Id.
[92] Id. at 582 (citing 2 Story, Commentaries on the Constitution § 1504 (1833)). Perplexingly, though Crittenden cited § 1504 of Story's *Commentaries*, the language appears most similar to § 775, which states in relevant part, "[T]he power of pardon is general and unqualified, reaching from the highest to the lowest offences. The power of remission of fines, penalties, and forfeitures is also included in it . . . No law can abridge the constitutional powers of the executive department, or interrupt its right to interpose by pardon in such cases."
[93] Id. at 583.

He argued that the debt was an "expectancy," and so "the President's power to pardon [was] unquestionable."[94]

It may seem as though Crittenden was blurring the line between what we now call civil and criminal contempt. After all, requiring Drayton and Sears to pay fines to the slave owners seems remedial, not punitive. But Crittenden saw the ultimate recipient of the fines as less important than what he contestably deemed their main, punitive purpose.[95]

Unlike in *In re Mullee*, where the original contempt sanction was punitive and the contemnor was subsequently thrown in jail for non-payment, the original sanction imposed on Drayton and Sears was at least partly remedial. It was money owed to the slave owners. And while no pardon actually issued in *Mullee*, President Fillmore did pardon Drayton and Sears—but expressly held them bound to pay the slave owners.[96] Fillmore pardoned the coercive sanction but not the debt, just like the King in *Bartram v. Dannett*.

There are several ways to look at Crittenden's letter and Fillmore's subsequent pardon. Crittenden specifically distinguished private debts. The prosecution of Drayton and Sears was criminal, such that he could

[94] Id. (citing United States v. Morris, 10 Wheat. 246, 6 L. Ed. 314 (1825)). In *Morris*, the collector and surveyor of the port of Portland, Maine were entitled to half the value of certain forfeited goods. The Court found that until the money was actually paid to them, it was not a vested property interest, and the Secretary of the Treasury could remit the forfeiture. 10 Wheat. at 246–52. Crittenden went on to say (rather ambitiously) that even if the interests of the slave owners and the public entities *were* vested, they were vested only in subordination to the pardoning power of the President. 5 Op. Att'y. Gen. at 583. Note that, in the relevant sense, parties do not have any "vested" interest in prospective relief, which is why the legislature can modify prospective relief. Supra note 73. Based on common law evidence, I reject vested rights as the relevant limiting principle of the pardon power. But if anything, the vested rights conception would broaden the President's power by insulating a narrower category of private interests.

[95] 5 Op. Att'y. Gen. at 585 ("The imposition of these fines, into whatever pockets they may go when collected, is a *punishment* inflicted on a public prosecution, for an offence against the United States, and must be regarded as having its *primary*, if not its sole purpose, the vindication of public law and public justice."). The Maryland statute incorporated by Congress into federal law certainly does not make it obvious whether its purpose is mainly remedial or punitive. 2 The Laws of Maryland, ch. 67, § 19 (Annapolis, F. Green, William Kilty ed., 1800) ("[T]he party aggrieved shall recover damages in an action on the case against such offender or offenders, and such offender or offenders also shall be liable . . . [and] fined a sum not exceeding two hundred dollars, at the discretion of the court, one half to the use of the master or owner of such slave, the other half to the . . . county."). The federal statute stated that "all indictments shall run in the name of the United States, and conclude, against the peace and government thereof," but was otherwise substantially no different than the Maryland statute. 2 Stat. ch. 24, § 2, 115 (1801).

[96] Cong. Globe, 34th Cong., 1st sess. 1170 app. (1856).

cast the fines as punitive. Through that lens, the confinement did not neatly fit the civil contempt framework. On the other hand, the imprisonment of Drayton and Sears was akin to civil contempt in that they had the "keys to their own cells" through payment to the injured parties. Had the slave owners been entitled to their relief under a purely remedial statute granting them a private right of action, Fillmore's pardon would have had an identical effect on their legal interests.

One might argue that Blatchford and Crittenden's arguments are limited to cases in which a criminal penalty accompanies or includes a fine payable to an injured party. But Blatchford's holding and President Fillmore's pardon were at least consistent with the principles outlined in Part II. Contextualizing these episodes, Crittenden and Blatchford made contestable arguments about the punitive purpose of the relevant sanctions in an attempt to place them within the safe harbor of the pardon power. But Fillmore did not have to rely on those arguments or the safe harbor, because he respected private rights by leaving the debt untouched.

B. Guarding Judicial Independence

Just over two decades before *Ex parte Grossman*, Judge Walter Sanborn of the U.S. Court of Appeals for the Eighth Circuit held that civil contempt's coercive sanctions were not pardonable under any circumstances.[97] To him, executive branch interference with the civil contempt power was impermissible and absurd.[98] Taft's dictum was

[97] In re Nevitt, 117 F. 448, 453 (8th Cir. 1902) ("[T]here seems to have been no substantial dissent from the rule and practice that an order committing a defendant for contempt in refusing to pay a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the remedies of a party to the action is civil and remedial, and not criminal, in its nature; that it does not fall within the pardoning power of the president, because it is not an execution of the criminal laws of the land."). Here, judges themselves had been jailed for civil contempt until they complied with a mandamus directing them to levy a tax to pay a judgment against their county. No pardon actually issued, but Judge Sanborn's conclusion that "each court has exclusive jurisdiction of its own contempts" rested largely on his analysis of the presidential pardon power. Id. at 452.

[98] Id. at 456 ("The constitution granted this power to compel obedience to their injunctions . . . when it granted to them all the judicial power of the nation. This power is essential to their existence as judicial tribunals. Without it they would be without the means to enforce their orders, without the means to protect themselves against the defiance and the assaults of the reckless and the criminal, without respect, without dignity, and without usefulness."). Judge Sanborn drew in part from two early nineteenth-century cases that he claimed held that the Executive could not "release that portion of fines or penalties for violations of law which inured to the benefit of private individuals." Id. at 459–60 (citing Jones v. Shore's Executor, 14 U.S. (1 Wheat.) 462 (1816); United States v. Lancaster, 26 F. Cas. 859 (E.D. Pa. 1821)).

consistent with Sanborn's holding, if not his reasoning, on this point. By contrast, Sanborn (because he thought it to be an "interesting question") railed against criminal contempt pardons as well[99]:

> If the president has the power to pardon those who are committed for criminal contempts . . . this immemorial attribute of judicial power is thus practically withdrawn from the courts and transferred to the executive; for he may pardon whom he will, and he would have the power to so exercise this authority as to deprive the courts of all means to punish for disobedience of their orders. Is there any provision of the constitution of the United States which grants this inherent and essential attribute of judicial power, or the authority to control its exercise, to the executive?[100]

To Judge Sanborn, pardoning punishment for interrupting court proceedings was as unconscionable as pardoning punishment for failing to comply with a court's orders. He found *In re Mullee* unpersuasive because Judge Blatchford had not adequately considered judicial independence concerns, while cases like *Ex parte Kearney*, defining what we now call criminal contempt as a criminal offense, were decided without the pardon power in mind at all.[101]

In short, the post-ratification history contains mixed messages. The President could pardon federal punitive sanctions, even those that benefited private parties. Criminal contempt was pardoned repeatedly in England and the post-ratification United States, Sanborn's protestations notwithstanding. With regard to civil contempt, actual judgments were not pardonable, because the President could not extinguish private rights. Judge Sanborn, for one, was willing to collapse the rights to those judgments with the coercive measures available to courts to enforce them. Fillmore's pardon, however, supports *Dannett*'s distinction between

In reality, the pardon power only arose in *Jones* to the extent an attorney referenced it in an argument to which the Court paid no attention. *Jones*, 14 U.S. at 468. Regardless, these cases focus on the issue of the vested property rights of the relevant parties—rights which would be unaffected by pardons for imprisonment that do not reach the remedy owed to the other party.

[99] *In re Nevitt*, 117 F. at 456.

[100] Id. One might think that the answer to Judge Sanborn's question is simply "yes"—the pardon power—and note that there is no provision in the Constitution that mentions the contempt power. It is also probably the case that successive pardons for criminal contempt that have the effect of disabling the judiciary would represent an abuse of power, at least for impeachment purposes. See infra note 144.

[101] *In re Nevitt*, 117 F. at 457 (citing Ex parte Kearney, 20 U.S. (7 Wheat.) 38 (1822)).

coercive fines or imprisonment and the underlying judgment. The President pardoned the former, but could not pardon the latter.

Absent a definitive common law rule, the stronger argument may depend on whether the relief granted is tangible or equitable. Sanborn's position on civil contempt seems natural in the context of an injunction ordering some behavior to vindicate another party's private rights, where the specter of contempt may provide the only meaningful incentive to comply. That scenario seems analogous to the common law exception for nuisances, where a pardon would function more like a dispensation. By contrast, when it comes to damages or property, numerous alternative mechanisms, like garnishment or levy, might compel payment.[102] These functional considerations should not alone determine the scope of the pardon power, but they help explain why Taft's dictum drew the line between civil and criminal contempt and why he might have drawn additional lines consistent with common law principles.

Judge Sanborn acknowledged that his critique was merely a tangent he thought interesting.[103] But concerns about pardons and judicial independence merit a response. Others who feared an unrestrained contempt power, including Chief Justice Taft, met Sanborn's arguments regarding criminal contempt with reasoning equally pertinent to civil contempt.

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[102] See infra note 146.

[103] *In re Nevitt*, 117 F. at 456. Judge Sanborn was not alone in his reasoning. In *Taylor v. Goodrich*, 25 Tex. Civ. App. 109, 123–27 (1897), a Texas state judge held that the Governor of Texas could not pardon any contempt of court under the Texas constitution because contempt was not a criminal case. It referred to a Louisiana Supreme Court decision, *State v. Sauvinet*, 24 La. Ann. 119 (1872), holding that contempt of court was criminal and pardonable by that state's governor, as "clearly fallacious." *Taylor*, 25 Tex. Civ. App. at 124. It is worth noting that Justice Story's thinking, articulated in 1833, that the contempt power of Congress was not subject to presidential pardon, contained reasoning that would seem to apply equally if not more to the courts as it would to Congress. 3 Joseph Story, Commentaries on the Constitution of the United States § 1497 (Boston, Hillard, Gray & Co. 1833) ("The main object is to secure a purity, independence, and ability of the legislature adequate to the discharge of all their duties. If they can be overawed by force . . . or interrupted in their proceedings by violence, without the means of self-protection, it is obvious, that they will soon be found incapable of legislating with wisdom or independence. If the executive should possess the power of pardoning any such offender, they would be wholly dependent upon his good will and pleasure for the exercise of their own powers. . . . The constitution is silent in respect to the right of granting pardons in such cases, as it is in respect to the jurisdiction to punish for contempts. The latter arises by implication; and to make it effectual the former is excluded by implication."). To the extent Justice Story's concerns have any validity, they probably better fit the judiciary than the legislature, which can at least defend itself against abuses of the pardon power with impeachment.

IV. CHECKING THE CONTEMPT POWER

Proponents of a relatively narrow pardon power, like Judge Sanborn, frame contempt as preservative of judicial independence, a tool without which the courts could not function.[104] Admittedly, mapping the King's pardon power onto Article II is complicated not only by obscure historical evidence, but also by the Constitution's separation of powers. It is probably true that courts need some way to prevent interference by unruly litigants during their proceedings and to encourage compliance with their orders. But it does not follow that contempt as we know it, let alone a contempt power fully insulated from pardons, is necessary to achieve those ends. Indeed, the contempt power raises constitutional questions that pardons help to mitigate.

A. Contemnors Compared to Ordinary Criminal Defendants

The Supreme Court, along with Congress, has articulated a procedural regime for contempt proceedings that clumsily attempts to balance the rights of the accused with the need for courts to vindicate their authority.[105] Today, the process required in a contempt trial varies depending on the type of contempt and the severity of the penalty.[106] Criminal contempt proceedings require certain constitutional protections—no double jeopardy, notice of charges, assistance of counsel, the right to present a defense, and the "beyond a reasonable doubt" standard of proof.[107] Summary convictions are allowed for contempt occurring before the court, while protections increase the further removed from court the alleged contempt was committed.[108] While criminal contempt defendants have the right to a jury trial if facing imprisonment exceeding six months, no clear rule exists for when a fine becomes large enough to be considered a "serious criminal sanction" warranting a jury trial right.[109] Civil contempt proceedings require notice and an

[104] Supra note 98.

[105] See Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 832 (1994); Fed. R. Crim. P. 42.

[106] *Bagwell*, 512 U.S. at 826–27.

[107] Id. at 826.

[108] Id. at 833; Fed. R. Crim. P. 42(b). In criminal contempt proceedings, when the right to a jury trial is triggered, if the contempt involves disrespect or criticism of a judge, that judge is disqualified from presiding. Fed. R. Crim. P. 42(a)(3).

[109] *Bagwell*, 512 U.S. at 826–27.

opportunity to be heard, but no right to a jury trial exists, nor is proof beyond a reasonable doubt required.[110]

Justice Scalia advocated careful historical study as a method of determining the due process rights of a particular contemnor.[111] But this historical analysis becomes difficult when applied to enforcing injunctions that place courts in continuing supervisory roles over parties and institutions. In those circumstances, the predicament of the alleged contemnor is not unlike that of a criminal defendant,[112] and the alleged contemnor is at serious risk of erroneous deprivation without the right to a neutral fact-finder.[113] Justice Scalia thus concluded that the use of a civil process for punishing contempt "makes no sense except as a consequence of historical practice."[114] If there is any validity to that point, it is hardly a stretch to think that some civil contemnors, like all criminal contemnors, should be eligible for pardons, at least when the private rights of third parties are not directly at stake.

[110] Id. at 827. Congress has limited coercive sanctions for a narrow slice of civil contempt convictions. 28 U.S.C. § 1826 (2012) (limiting coercive confinement for witnesses who refuse to testify to the life of the court proceeding or the term of the grand jury, and in no event to longer than eighteen months). In general, courts agree that once it becomes obvious confinement is no longer coercive, or will not serve a coercive purpose, due process obligations require courts to release the contemnor. See, e.g., Shillitani v. United States, 384 U.S. 364, 371 (1966) ("[T]he justification for coercive imprisonment as applied to civil contempt depends upon the ability of the contemnor to comply with the court's order."). But even for recalcitrant witnesses, there remains "a broad discretion in the district courts to determine that a civil contempt sanction has lost its coercive effect upon a particular contemnor at some point short of eighteen months." Simkin v. United States, 715 F.2d 34, 37 (2d Cir. 1983). The determination is highly subjective, and even the possibility that a contemnor might change his or her mind could be reason to keep them imprisoned. In re Grand Jury Proceedings, 877 F.2d. 849, 850–51 (11th Cir. 1989). In the absence of a statutory cap for other civil contemnors, the *Shillitani* analysis is even more unbounded.

[111] *Bagwell*, 512 U.S. at 840 (Scalia, J., concurring).

[112] Id. at 842–43 ("[D]etermining compliance becomes . . . difficult. Credibility issues arise, for which the factfinding protections of the criminal law (including jury trial) become much more important. And when continuing prohibitions or obligations are imposed, the order cannot be complied with (and the contempt 'purged') in a single act; it continues to govern the party's behavior, on pain of punishment—not unlike the criminal law.").

[113] Id. at 834.

[114] Id. at 843.

B. Constitutional and Democratic Values

The Court's procedural regime for contemnors is strikingly arbitrary,[115] but it reflects the Court's grappling with competing interests.[116] In that difficult balancing project, judges (perhaps unsurprisingly) tend to understate the risks of an unchecked contempt power.

The argument that courts simply could not function without the contempt power traces back at least to Blackstone.[117] Since then, judges have repeatedly framed the power as necessary to the exercise of all other judicial powers.[118] Rhetorical invocations of the contempt power's purported "immemorial" history often undergird arguments for its protection against executive interference.[119] At least with respect to the differences between the procedural rights of contemnors and other defendants, these statements are inaccurate.[120] History does not support

[115] To some degree, it reflects the continuing influence of Blackstone's account of common law practice. See 4 Blackstone, supra note 58, at *286 ("If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned . . . . But in matters that arise at a distance . . . he must either stand committed, or put in bail, in order to answer upon oath to such *interrogatories* as shall be administered to him, for better information of the court with respect to the circumstances of the contempt.").

[116] *Bagwell*, 512 U.S. at 832 ("Our jurisprudence in the contempt area has attempted to balance the competing concerns of necessity and potential arbitrariness by allowing a relatively unencumbered contempt power when its exercise is most essential, and requiring progressively greater procedural protections when other considerations come into play.").

[117] 4 Blackstone, supra note 58, at *286 ("[L]aws without a competent authority to secure their administration from disobedience and contempt, would be vain and nugatory.").

[118] See, e.g., United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812); In re Nevitt, 117 F. 448, 456 (8th Cir. 1902).

[119] 4 Blackstone, supra note 58, at *286–88 ("The process of attachment, for these and the like contempts, must necessarily be as ancient as the laws themselves. . . . [T]his method, of making the defendant answer upon oath to a criminal charge, is not agreeable to the genius of the common law in any other instance . . . . And, with regard to this singular mode of trial, thus admitted in this one particular instance, I shall only for the present observe, that as the process by attachment in general appears to be extremely ancient, and has in more modern times been recognized, approved, and confirmed by several express acts of parliament . . . [it] by long and immemorial usage is now become the law of the land." (footnotes omitted)); Ex parte Robinson, 86 U.S. (19 Wall.) 505, 510 (1873) ("The power to punish for contempts is inherent in all courts . . . ."); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates . . . .").

[120] In an influential law review article from 1924, James Landis and future Supreme Court Justice Felix Frankfurter argued that the ancient origins of summary process in criminal contempt proceedings were a fiction. At least until 1720, contemnors whose offenses were committed out of view of the court enjoyed the same process as any other criminal defendant. Felix Frankfurter & James Landis, Power of Congress Over Procedure in Criminal Contempts

the claim that an unrestrained contempt power is embedded in the definition of an Anglo-American court.[121] More importantly, whether or not the contempt power is ancient is beside the point—even if the contempt power had existed since the beginning of time, that would not bear on the constitutionality of pardoning contempt. Executive mercy has its own longstanding roots, as do many pardonable offenses and sanctions. The fact that something is old has nothing to do with whether it is pardonable.

On the other side, critics question the contempt power's breadth and the limited rights it affords defendants. Given the alleged affront to the presiding judge or her orders, contempt proceedings are precisely those where the normative justifications for a right to trial by jury and other procedural protections are relatively strong.[122] The Court in *International Union, United Mine Workers of America* v. *Bagwell*, moreover, worried about how a judge's role in a civil contempt proceeding could be squared with the separation of functions that the Constitution assigns to the different branches. Judges in such cases have sole responsibility for "identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct."[123] An officer who executes functions of each branch simultaneously, without meaningful checks, may behave tyrannically.[124]

For those reasons, scholars have questioned whether the modern contempt power is aligned with democratic values. Just as certain

in "Inferior" Federal Courts—A Study in Separation of Powers, 37 Harv. L. Rev. 1010, 1046 (1924) ("[U]ntil 1720 there is no instance in the common-law precedents of punishment otherwise than after trial in the ordinary course and not by summary process."). The Star Chamber, a temporary court of "corrupt and arbitrary practices," was abolished in 1641, but had authority over all contempts while it was active. Despite its failure and reputation, its summary process for contempts eventually bled into the procedure of common law courts in part because of Blackstone's historical mischaracterization. Id. at 1045–52. Interestingly, when Frankfurter was a Supreme Court Justice, he argued that longstanding, unchallenged judicial practice should predominate over his *own* historical survey, against three Justices who, relying largely on Frankfurter's article, favored rethinking the rights of criminal contemnors. Green v. United States, 356 U.S. 165, 190 (1958) (Frankfurter, J., concurring).

[121] Frankfurter & Landis, supra note 120, at 1045–52.

[122] Bloom v. Illinois, 391 U.S. 194, 202 (1968) ("[A]n even more compelling argument can be made for providing a right to jury trial as a protection against the arbitrary exercise of official power. Contemptuous conduct, though a public wrong, often strikes at the most vulnerable and human qualities of a judge's temperament. Even when the contempt is not a direct insult to the court or the judge, it frequently represents a rejection of judicial authority, or an interference with the judicial process or with the duties of officers of the court.").

[123] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994).

[124] Id. (citing Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 822 (1987) (Scalia, J., concurring in the judgment)).

opponents of an expansive pardon power point to its use by the English monarch, critics have framed the contempt power's blunt force as "the law of kings."[125] After all, offenses against the King's courts were offenses against the King.[126] And the contempt power as it exists today may not be necessary to the functioning of courts. Other courts and adjudicative institutions manage to get by without it.[127] Criminal contempt makes for smooth trials, but a contempt power subject to more procedural checks could conceivably serve the same purpose.[128]

The 1830 impeachment trial of James Peck, a federal judge for the District of Missouri, lends credence to fears of judicial abuse.[129] A lawyer criticized one of the judge's opinions while an appeal was pending. Peck convicted the lawyer of contempt, imprisoned him for twenty-four hours, and disbarred him for eighteen months.[130] Relying primarily on the defense that he had acted in "good faith in following what purported to be the staunch precedents of the common law," the judge narrowly avoided conviction in the Senate.[131] In more recent times, questionable judicial treatment of alleged criminal and civil contemnors is pervasive, particularly when civil contemnors languish in jail for years.[132]

[125] Goldfarb, supra note 11, at 7.

[126] Id. at 9 (citing Sir John Fox, The Nature of Contempt of Court, 37 L.Q. Rev. 191, 194 (1921)).

[127] Goldfarb, supra note 11, at 16 ("[W]hat of other countries which do not have similar powers, or which have them only in limited and circumscribed instances? Is justice chaotic elsewhere than in America? And is it so necessary for control and order to have such a power as contempt? Do courts not have other disciplinary and punitive sanctions equally effective, yet better procedurally dedicated to an ordered liberty? . . . If the power is inherent in courts, how can it be that some courts are without it?").

[128] See Ronald Goldfarb, Contempt Power 300–01 (1963).

[129] Frankfurter & Landis, supra note 120, at 1024–27.

[130] Phillip I. Blumberg, Repressive Jurisprudence in the Early American Republic: The First Amendment and the Legacy of English Law 262 (2010).

[131] Frankfurter & Landis, supra note 120, at 1025, 1026. Judge Peck's age and blindness also reportedly made him a sympathetic figure by the time of his trial.

[132] See, e.g., United States v. Flynt, 756 F.2d 1352, 1366 (9th Cir. 1985) (holding that the district court abused its discretion by using summary proceedings to convict for contempt a person of questionable mental capacity to commit contempt); Gretchen Morgenson, In Fraud Case, 7 Years in Jail for Contempt, N.Y. Times (Feb. 16, 2007), http://www.nytimes.com/-2007/02/16/business/16jail.html [perma.cc/9GCZ-7HJP] (in which the defendant served more jail time for civil contempt than he would have had he been sentenced for securities fraud, the crime with which he was charged); Debra Cassens Weiss, Lawyer Freed After Spending 14 Years in Jail on Contempt Charge, ABA Journal (July 13, 2009), http://www.aba-journal.com/news/article/lawyer_freed_after_spending_14_years_in_jail_on_contempt_charge [perma.cc/8GG2-757G] (in which a lawyer was freed after spending fourteen years in jail

C. Applying Functional Arguments to Civil Contemnors

As described above, some courts have argued that their contempt power should be partially or completely insulated from the Article II pardon power. But the contempt power "uniquely is liable to abuse."[133] The constitutional questions that pervade contempt proceedings and convictions show that functional arguments against exercises of the pardon power run into persuasive functional arguments in the other direction. Courts could operate with a criminal contempt power subject to more procedural safeguards and enforce monetary judgments by means other than the threat of imprisonment. Thus, isolated pardons of criminal contempt and the imprisonment meant to compel payment of judgments do not necessarily weaken the judiciary. Presidential pardons can act as a safeguard against the price of judicial independence—the risk of arbitrary exercises of judicial power.

Taft specifically adopted this view, at least with respect to criminal contempt, in his *Ex parte Grossman* opinion.[134] To him, judicial independence was important but not absolute. It was qualified by the Constitution and the practical workings of government.[135] Taft saw the pardon power as an essential antidote to the inevitable instances in which courts might act with "undue harshness or evident mistake."[136] A President could pardon a normal criminal offense after conviction by jury, so the idea that a President could not pardon a conviction more vulnerable to needless severity was nonsensical.[137] In practice, this reasoning is equally applicable to that subset of civil contemnors owing tangible relief. Judges might erroneously conclude that their own orders have not been followed or fail to recognize when ostensibly coercive imprisonment lacks or has lost any coercive effect. With respect to both criminal contemnors and the relevant subset of civil contemnors, the qualified independence of the judiciary "is not likely to be permanently

for civil contempt after claiming he did not have the $2.5 million he owed his ex-wife as part of a divorce settlement).

[133] Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 831 (1994) (quoting Bloom v. Illinois, 391 U.S. 194, 202 (1968)) (internal quotation marks omitted).

[134] Ex parte Grossman, 267 U.S. 87, 119–22 (1925).

[135] Id. at 120.

[136] Id.

[137] Id. at 120–21.

strengthened by . . . minimizing the importance of the coordinating checks and balances of the Constitution."[138]

V. PARDONING CONTEMPT IN PRACTICE: HYPOTHETICALS AND THE OPTIMAL RULE

As a matter of both history and prudence, the President can pardon criminal contempt. Imagine, for example, that a judge imposes a harsh penalty (say, five months of imprisonment) for a single, accidental interruption of a court proceeding. Surely a pardon would be appropriate. To use a hypothetical loosely based on (and more sympathetic than) Arpaio's conviction, imagine that a county passes an ordinance banning the possession of AR-15 assault rifles within 400 feet of schools. The county has no other similar ordinances specifically regulating firearm possession in or near schools, and generally allows the open carry of licensed firearms. The county sheriff arrests several members of the community for violating the ordinance. The offenders challenge the constitutionality of the ordinance under the Second Amendment, and before the federal district judge makes a final determination on the merits, she enjoins the sheriff from making further arrests under the ordinance. The next week, the sheriff arrests three men for possessing AR-15 rifles near a school. The sheriff resigns from office the following day, and is subsequently convicted for criminal contempt for violating the injunction.[139] The judge sentences the sheriff to three months' imprisonment. The President issues a pardon.

Arpaio's actual pardon did no more violence to the independence of the judiciary than this one. The meaningful differences in this scenario are (a) our doubt in the reasoning underlying this judge's order and (b) the harshness of this punishment. Because the sheriff is no longer in office, the pardon will only impact compliance with court orders to the extent his successor may expect a pardon for similar conduct.[140] But this deterrence problem is present in all offenses the President might validly pardon.[141] Taft considered the argument that a President could render

[138] Id. at 122.

[139] The sheriff's contempt is necessarily criminal, rather than civil, because he has resigned and thus has no way of purging his non-compliance.

[140] *Ex parte Grossman*, 267 U.S. at 121 ("The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon future contempts.").

[141] Id.

courts ineffectual by successively pardoning criminal contempt.[142] Leaving practical obstacles to the realization of this scheme aside,[143] validly exercised constitutional power can become an abuse of power when deployed in such a way. Thus, "[e]xceptional cases like this, if to be imagined at all, would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President."[144]

Furthermore, normative values support allowing the President to pardon coercive sanctions when the relevant judgment is for some tangible relief. Imagine a scenario in which *X*, an out-of-state resident, has been driving around a city in a truck painted with racist messages. *Y* severely damages the truck with a baseball bat. *X* sues *Y* in federal court and wins a judgment for $10,000 in compensatory damages.[145] *Y* both refuses to pay the damages and attempts to prove her inability to do so. The judge, not believing *Y*, convicts her of civil contempt and imprisons her until she pays or the imprisonment loses its coercive effect. After thirty months, *Y* demonstrates no willingness to pay the judgment and maintains her inability to do so, but the district judge determines that she might change her mind, and decides the imprisonment retains sufficient coercive effect.

A pardon of *Y*'s imprisonment, leaving alone her debt, would be impermissible under Taft's basic formulation. As argued above, historical evidence suggests it may have been allowed under English legal principles as of 1789. Practically speaking, if *Y* had the assets necessary

[142] Id.

[143] With respect to punishing an ex-sheriff for violating an injunction, the President would have to pardon a sequence of officials, all of whom leave office or otherwise become incapable of compliance, before being convicted for criminal (pardonable) contempt.

[144] *Ex parte Grossman*, 267 U.S. at 121. Moreover, based on the debates at the Constitutional Convention, if a presidential pardon implicitly amounts to pardoning crimes "advised" by the President himself, the pardon might be an abuse of power for the purposes of impeachment. George Mason worried that the President might pardon crimes after suggesting they be committed. James Madison addressed those concerns, arguing that "if the President be connected, in any suspicious manner, with any person, and there be grounds to believe he will shelter him, the House of Representatives can impeach him . . . ." In Convention, Richmond, June 18, 1788, *in* 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 488, 498 (Jonathan Elliot ed., Philadelphia, J.B. Lippincott & Co., 2d ed. 1881); see also Cass Sunstein, Impeachment: A Citizen's Guide 121–22 (2017) (arguing that a President who, believing police officers have been unfairly treated, announces he will pardon any police officer accused of assault or murder, could be impeached).

[145] Assume that the plaintiff satisfied 28 U.S.C. § 1332(a)'s amount in controversy requirement despite the final judgment.

to satisfy the judgment, they could be seized in various ways to satisfy *X*'s private right to the debt.[146] If *Y* lacked the funds, the imprisonment would serve no coercive purpose, and thus there could be no actual civil contempt. While it may be argued that imprisonment incentivizes *Y* to find a way to pay the judgment, her incarceration keeps her from earning money. And while it is admittedly possible that such pardons would encourage people like *Y* to hide funds from attachment to avoid paying,[147] *any* pardon reduces deterrence with respect to the offense over which it operates.

Allowing these pardons is thus at least normatively defensible. Rejecting them results in seemingly arbitrary line-drawing if one accepts President Fillmore's pardon of Drayton and Sears. Their imprisonment was meant, at least in part, to coerce payment of damages. Their pardon had the same functional effect on the private rights of the slave owners as would a pardon of the coercive sanctions of a civil contemnor owing tangible relief in a more conventional suit.

By contrast, historical and functional arguments do not support a pardon power that reaches civil contemnors refusing to act in some manner (rather than pay some debt or deliver some property). Generally, the President should not be able to pardon contempt for *ongoing* non-compliance with an order for equitable relief, in part because contempt may be the only means of enforcement.[148] Imagine that Arpaio remained acting Sheriff when convicted. If he could have complied with the injunction by, for example, issuing an administrative order directing his officers to stop harassing Hispanic drivers, he could have been coercively jailed for civil contempt until he did so. There is no way to garnish or levy an administrative order. If pardoned, this hypothetical Arpaio could have continued violating the Fourth Amendment while relying on a de facto dispensation. This example demonstrates more vividly why allowing the President to extinguish private rights via pardons in cases of equitable relief contradicts common law principles. While we might imagine regimes in which courts or legislatures can set up alternative coercive

[146] Garnishment, levy, attachment, or other practical means could be employed, with whatever additional costs incurred by the execution charged to the contemnor and similarly collected. Goldfarb, supra note 128, at 295–96.

[147] Goldfarb suggests that where "insufficient powers of execution exist, the legislature should provide adequate machinery." Id. at 296. Admittedly, this may not be possible in all instances.

[148] See id. at 292.

mechanisms to ensure compliance with equitable orders, those solutions are not available to private litigants in any standardized way. The question is not one of judicial or legislative creativity, but rather how private parties entitled to legal relief in specific cases might have their interests satisfied after an order issues. Money and property are susceptible to seizure in a way that behavior is not.

CONCLUSION

Taft's dictum persists mostly unquestioned. But current events have amply demonstrated that scholars should scrutinize it—even if that scrutiny reveals that the problems associated with certain pardons are more political or ethical than they are constitutional. The private rights framework set forth here should be helpful in evaluating more specific, latent questions that may emerge.[149]

By focusing on private rights, it is possible to build on Taft's dictum to identify the pardon power's true scope over convicted contemnors. The resulting rules recognize the legal and practical distinctions between coercive measures and actual judgments, and between different types of relief. They remain faithful to historical principles by sustaining only those executive actions that respect private legal interests. This limiting principle matters in the common law cases and treatises, explains post-ratification American practice to some degree, and aligns with functional considerations. It should guide how we interpret the pardon power today.

[149] For example, what if the party to whom the contemnor owes compliance *is* the Executive? It is hard to see how most civil contempts arising during federal criminal investigations or prosecutions implicate the rights of any private party. In those contexts, there may be a persuasive case for the private legal interests principle allowing for pardons, even though the compliance owed does not relate to any tangible judgment or debt. On the other hand, pardons in these situations might strongly resemble impermissible dispensations. And scenarios along these lines might be more likely to arise when the Executive has some legally meaningful relationship with the contemnor—raising serious questions outside this Note's scope.