

THE SUBSTANCE OF PUNISHMENT UNDER THE BILL OF ATTAINDER CLAUSE

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This Note argues that the hallmark of illegal punishment under the Bill of Attainder Clause is the targeted deprivation of life, liberty, or property. While many have highlighted the due process function of prohibiting legislative punishment, no commentator has paid adequate attention to the substantive rights that this prohibition was designed to protect. The result has been widespread confusion as to when Congress may legislate with particularity and when it may not. This confusion manifested itself recently when a federal district court in New York struck down a law barring federal funding for the scandal-plagued Association of Community Organizations for Reform Now (ACORN). The Second Circuit reversed that decision on appeal, but it did nothing to fill the vacuum of guidance for determining when an individualized enactment is a legitimate regulation and when an illegal punishment. Beginning with the Constitution's special emphasis on the rights of "life, liberty, [and] property," this Note's interpretation finds ample support in the text, structure, and history of the Constitution. It also reveals an underlying symmetry in the protections of the Due Process and Bill of Attainder Clauses, which together prevent arbitrary deprivations at the hands of the executive and legislative branches. And finally, the Note's central argument fits with the common intuition that legislators, like executive officials, have much greater latitude when dealing with subsidies rather than individual rights.

INTRODUCTION.....	1178
I. THE TWO POLES OF PUNISHMENT UNDER THE BILL OF ATTAINDER CLAUSE.....	1181
A. <i>The Narrow Originalist Reading: Death and Corruption of Blood</i>	1182
B. <i>The Free-Form Test for Punishment</i>	1190
1. <i>The doctrine of motive and function</i>	1190
2. <i>Punishment as deprivation in the abstract</i>	1193
II. THE STRUCTURAL SYMMETRY OF LIFE, LIBERTY, AND PROPERTY	
PROTECTION UNDER THE CONSTITUTION	1197
A. <i>Federalism and the Historical Symmetry</i>	1198
B. <i>The Amorphous Content of Life, Liberty, and Property</i>	1203
C. <i>The Standard of Review</i>	1205
D. <i>Subsidy Denials and Other Constitutional Violations</i>	1205

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III. APPLICATIONS	1206
A. <i>The Civil War Cases</i>	1206
B. Brown.....	1207
C. Lovett	1207
D. ACORN.....	1208
E. <i>Public Utilities and Baseline Subsidies</i>	1209
F. <i>The Bank Tax</i>	1209
G. <i>Legislative Censure</i>	1210
CONCLUSION.....	1211

INTRODUCTION

In October 2009, President Barack Obama signed into law a congressional enactment halting the disbursement of federal funds to the scandal-plagued Association of Community Organizations for Reform Now (ACORN).¹ This came in the wake of widespread allegations of fraud, corruption, embezzlement, and other criminality among the group and its affiliates.² On a motion for injunctive and declaratory relief, the Eastern District of New York struck down the defunding law on the ground that it singled out a named group for punishment without trial, in violation of the Bill of Attainder Clause.³ A few months later, the Second Circuit reversed: Although the law did single out ACORN for unfavorable treatment, it was not a bill of attainder because it did not inflict any “punishment” on the group. It rather evinced a good faith effort by Congress to serve the legitimate purpose of maintaining integrity in the exercise of its spending power.⁴

These two cases showcase a deep and abiding puzzle in how the Bill of Attainder Clause is understood. It is generally agreed that Congress must be allowed to single out groups and individuals for *some* types of treatment. Congress can pass private bills, earmark unique subsidy recipients, and legislate with respect to “legitimate class[es] of one.”⁵ The overwhelming history and

1. See Continuing Appropriations Resolution, 2010, Pub. L. No. 111-68, div. B, § 163, 123 Stat. 2023, 2053 (2009) (“None of the funds made available by this joint resolution or any prior Act may be provided to [ACORN], or any of its affiliates, subsidiaries, or allied organizations.”).

2. See Andy Sullivan, *US Congress Denies Funds to Scandal-Hit Activist Group*, REUTERS, Sept. 17, 2009, available at <http://www.reuters.com/article/2009/09/17/idUSN17220793>.

3. *ACORN v. United States*, 692 F. Supp. 2d 260, 277, 281 (E.D.N.Y. 2009), *rev’d*, 618 F.3d 125 (2d Cir. 2010), *petition for cert. filed*, 79 U.S.L.W. 3514 (U.S. Feb. 22, 2011) (No. 10-1068). The Constitution bars bills of attainder at both the state and federal level. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”). For the sake of convenience, I refer to these provisions together as “the Bill of Attainder Clause” throughout this Note.

4. *ACORN v. United States*, 618 F.3d 125, 137, 142 (2d Cir. 2010).

5. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 472 (1977).

May 2011]

THE SUBSTANCE OF PUNISHMENT

1179

practice on this point render implausible the simple view that legislation must always be general and never particular. The challenge is how to identify “punishment,” and thereby to define the scope of “singling out” that the Bill of Attainder Clause prohibits.

Current doctrine meets this challenge by offering three deeply unsatisfying criteria of what constitutes punishment: first, “whether the challenged statute falls within the historical meaning of legislative punishment”; second, a functional test of “whether the statute, ‘viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes’”; and third, “whether the legislative record ‘evinces a congressional intent to punish.’”⁶

The problem here is that the second and third factors are hopelessly circular, vague, and indeterminate. They are circular because any determination of punishment based on a law’s “nonpunitive” characteristics itself requires a definition of punitiveness. The factors are vague and indeterminate because “punitiveness” admits of many different definitions that can dramatically alter the outcome of any case. As the *ACORN* case illustrates, the function and intent of almost any law can be characterized as either punitive or policy oriented, depending on the emphasis supplied. Even core examples of punishment, such as prison sentences and fines, serve some policy functions that can be described in nonpunitive terms: deterrence, incentivization, social coordination, etc. This makes any exclusive characterization of “punitive” intent and function at least incomplete, if not entirely arbitrary.

Others have recognized problems with the current doctrinal focus on legislative function and intent,⁷ but no work to this point has properly focused on the substantive scope of punishment that the Bill of Attainder Clause prohibits. Of the two most prominent views of the clause, one focuses on narrow historical practice and the other on the abstract requirement of legal generality. This Note argues that both of these approaches miss the mark.

This Note’s central claim is that “punishment” under the Bill of Attainder Clause must be understood in terms of the baseline of individual entitlements that the Constitution is designed to protect. The text, history, and structure of the document reveal a privileged place for the substantive rights of “life, liberty, [and] property.”⁸ The Fifth and Fourteenth Amendments guarantee that no person shall be deprived of these rights without due process of law.⁹ The Bill of

6. *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 852 (1984) (quoting *Nixon*, 433 U.S. at 473, 475-76, 478). For a comprehensive survey of bill of attainder doctrine, see Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the Decisional Law*, 5 HASTINGS CONST. L.Q. 767 (1978).

7. See, e.g., Eugene Volokh, *Would Defunding ACORN Be an Unconstitutional Bill of Attainder?*, VOLOKH CONSPIRACY (Sept. 15, 2009), <http://www.volokh.com/posts/1253048051.shtml>.

8. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

9. *Id.* amend. V; *id.* amend. XIV, § 1.

Attainder Clause guarantees that the legislature cannot circumvent this protection by imposing targeted life, liberty, or property deprivations under the guise of law. Life, liberty, or property deprivations must either be generalized across the population (as are legal prohibitions or taxes), or else applied in specific cases through a trial in accordance with due process. But when a life, liberty, or property deprivation is imposed on specific people or groups, a constitutional problem arises—either under the Due Process Clause (if the executive is the offending branch), or else under the Bill of Attainder Clause (if the offender is the legislature).

The corollary of this view is that no bill of attainder problem arises in the absence of a life, liberty, or property deprivation. The legislature, just as the executive branch, can single people out for special treatment as long as it does not deprive them of life, liberty, or property. Both branches may grant unique subsidies and, once granted, both branches may revoke them. Such revocation by itself is not unconstitutional because it does not inflict the requisite deprivation, as measured against the proper baseline of rights.

The existing scholarship has not adequately explored the connection between the Bill of Attainder Clause and the particular rights of life, liberty, and property protected by the Fifth and Fourteenth Amendments.¹⁰ This connection has broad implications both inside and outside the bill of attainder context. Aside from the high-profile *ACORN* case, the issue of attainder has also been invoked recently by some who argue that a proposed “bank tax” would be constitutionally impermissible if it singled out large financial institutions.¹¹ Under current doctrine, a strong response to this argument is that such a measure would not be punitive, but would rather serve the important policy goal of deterring risky investments that threaten system-wide financial instability. A life, liberty, and property reading of the Bill of Attainder Clause could dissolve the thorny issue of punitiveness and refocus attention on the more appropriate question of when a tax can properly be said to single someone out. On a broader level, this Note’s focus on life, liberty, and property raises the structural question of why the Constitution emphasizes these particular rights, whether these rights have any determinate content, and what implications this might have for interpreting other constitutional provisions.

Part I of this Note explores two prominent views of punishment under the Bill of Attainder Clause, one of which is too narrow and the other too broad.

10. The impressive work of Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 WIS. L. REV. 1203, acknowledges that the Bill of Attainder Clause “resonates with due process” and “is chiefly a guarantee of procedural fairness in the infliction of punishment,” *id.* at 1232, but it fails to make the critical link between the concept of punishment under the Bill of Attainder Clause and the substantive core of life, liberty, and property interests that are the touchstone of procedural protections under the Due Process Clauses.

11. See, e.g., John Carney, *The Bank Tax and the Constitutional Ban on Bills of Attainder*, BUS. INSIDER (Jan. 21, 2010), <http://www.businessinsider.com/the-bank-tax-and-the-constitutional-ban-on-bills-of-attainder-2010-1>.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1181

Part II stakes out a middle ground and advances a view of the Bill of Attainder Clause as part of an overarching constitutional scheme for the protection of life, liberty, and property rights against individualized deprivations without due process. This structural argument is consistent with a broad range of conceptions of the substantive scope of life, liberty, and property. Part III discusses the application of this view of the Bill of Attainder Clause to various precedents and hypotheticals.

I. THE TWO POLES OF PUNISHMENT UNDER THE BILL OF ATTAINDER CLAUSE

This Part critiques two polar opposite views of punishment under the Bill of Attainder Clause that together comprise the most common and compelling alternatives to the view I advocate. The first is the narrow originalist view advanced by Raoul Berger. He has argued forcefully that the clause should be confined to its narrow common law meaning: at common law, the only punishment inflicted by bills of attainder was a death sentence for treason or felony, accompanied by the corruption of blood (i.e., the inability to pass an inheritance).¹² The second view takes the opposite approach, holding that the clause proscribes any “punitive” enactment that imposes a “deprivation,” while insisting that the concept of “deprivation” should not be limited to the denial of vested rights but should rather be broadly defined to include denials of privilege.¹³ Other scholarly views have emphasized the clause’s resonance with areas of the law ranging from slavery to gay marriage.¹⁴

This Note focuses on the element of “punishment” and does not dwell on the question of what entails “singling out” under the Bill of Attainder Clause. In broad outline, the Supreme Court characterizes singling out as the picking out of an individual or group, either by name or some other identifying characteristics.¹⁵ This will suffice for the purposes of this Note, though the argument here is not committed to any particular view of what singling out requires. The

12. See Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 CORNELL L. REV. 355, 356 (1978).

13. Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 359-60 (1962) (stating that “the right-privilege dichotomy must be rejected” as inconsistent with the underlying rationale of the Bill of Attainder Clause).

14. See, e.g., Darrell A.H. Miller, *The Stain of Slavery: Notes Toward an Attainder Theory of the Thirteenth Amendment*, 38 U. TOL. L. REV. 1011, 1035 (2007); Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227, 238-40 (1998); Daniel H. Walker, Comment, *Are State Marriage Amendments Bills of Attainder?: A Case Study of Utah’s Amendment Three*, 2005 BYUL. REV. 799.

15. *United States v. Lovett*, 328 U.S. 303, 315 (1946) (describing singling out as the application of laws “to named individuals or to easily ascertainable members of a group”).

question concerning punishment is: what does the Bill of Attainder Clause prohibit the legislature from doing once it has singled someone out?

In understanding the competing interpretations of the clause, it will be helpful to take a brief tour of the doctrinal history. The Supreme Court itself has invoked the clause to strike down laws only five times, though lower courts have grappled with the issue more frequently. The first trio of Supreme Court cases came in the wake of the Civil War, when the Court struck down three separate state laws that barred former Confederates from serving as priests,¹⁶ from practicing law,¹⁷ and from taking advantage of certain state-court procedural devices.¹⁸ Much later, during the Cold War, the Court invoked the clause twice against the federal government to prevent the purging of Communists from federal employment¹⁹ and union leadership.²⁰

Three things are notable about these five cases. First, in all five cases the Court found that the disabilities imposed fell within the scope of the “punishment” the Bill of Attainder Clause prohibits. Second, all five cases involved the deprivation of life, liberty, or property rights. And third, in all five cases the Court emphasized the punitive nature of the enactments while downplaying the supporting policy rationales offered by the government.

After the Red Scare subsided, the Court rejected challenges under the Bill of Attainder Clause in two prominent cases. The first upheld a law that prohibited ex-President Richard Nixon from taking personal possession of his presidential papers and recordings.²¹ The second upheld a statute that “denie[d] federal financial assistance . . . to male [college] students who fail[ed] to register for the draft.”²² In both cases the Court downplayed the seriousness of the alleged “punishment,” while emphasizing the policy rationales offered by the government in support of the enactment.

A. *The Narrow Originalist Reading: Death and Corruption of Blood*

Any theory of the Bill of Attainder Clause must contend with Raoul Berger’s narrow but powerful originalist interpretation. He argues that the clause takes its meaning from the well-established common law tradition that existed at the time of the Founding, in which “[t]he inseparable indicia of a bill of attainder were crime, death, and corruption of blood.”²³ Berger emphasizes that bills imposing a punishment less than death were considered at common law to

16. See *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

17. See *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867).

18. See *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1873).

19. See *Lovett*, 328 U.S. 303.

20. See *United States v. Brown*, 381 U.S. 437 (1965).

21. See *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977).

22. See *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 843 (1984).

23. Berger, *supra* note 12, at 357.

be “bills of pains and penalties,” which were treated quite differently from bills of attainder. Berger points out that many prominent common law authorities observed this distinction, including Edward Coke, William Blackstone, Richard Wooddeson, and the proceedings of the English House of Commons.²⁴ The Framers and ratifiers of the Constitution would have been well aware of this distinction, he argues, and thus we can draw the inference that they acted purposefully in proscribing “bills of attainder” but not “bills of pains and penalties.” He supplements this descriptive historical account with the normative claim that, given the apparent clarity of the original meaning, it would be inappropriate for judges to deviate from it.²⁵

The Supreme Court has acknowledged the common law distinction²⁶ even as it has collapsed it. The collapse was made decisive in 1867 in *Cummings v. Missouri*,²⁷ the first case in which the Court invoked the Bill of Attainder Clause to strike down a law. The State of Missouri had effectively barred former Confederates and their sympathizers from serving in the priesthood, and a Roman Catholic priest challenged this restriction as a bill of attainder.²⁸ In laying out its bill of attainder analysis, the Court duly recognized the common law distinction: “A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties.”²⁹ But then the Court went on: “Within the meaning of the Constitution, bills of attainder include bills of pains and penalties.”³⁰

In support of this proposition, the *Cummings* Court cited *Fletcher v. Peck*, an 1810 case that marked one of the first instances in which the Supreme Court struck down a state law.³¹ The case arose from the famous Yazoo land grant, in which Georgia split up several million acres of recently claimed land and sold it to development companies at bargain prices. Peck later bought some of this land, which he in turn sold to Fletcher. Meanwhile, it came to light that the

24. *See id.* at 356 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *380-81; EDWARD COKE, COMMENTARY UPON LITTLETON *391a-92b (1628); 4 JOHN HATSELL, PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS 77-90, 217-24, 300-06 (1796); 2 RICHARD WOODDESON, A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND 621-26 (1792)).

25. *See id.* at 360-61.

26. *See Nixon*, 433 U.S. at 473 n.35; *United States v. Brown*, 381 U.S. 437, 441 (1965); *United States v. Lovett*, 328 U.S. 303, 315, 317 n.6 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

27. 71 U.S. (4 Wall.) 277.

28. *See id.* at 316-18. The Missouri state constitution required all priests to take an oath swearing, among other things, that they had never manifested “by act or word” a desire for the South to triumph in the Civil War, or indicated (by any means) “disaffection” to the United States government in the course of the war. *Id.* at 316-17. The Court found that this constitutional provision singled out former Confederates, and the question was whether denying them the right to serve as priests counted as punishment within the meaning of the Bill of Attainder Clause. *Id.* at 320.

29. *Id.* at 323.

30. *Id.*

31. *Id.* at 322 (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 137 (1810)).

original land sale had been facilitated by fraud and bribery of state legislators.³² The resulting scandal sparked a public outcry that drove many incumbents out of the Georgia statehouse. The new state legislature passed a law repealing the entire Yazoo grant, invalidating the titles of all private landowners in the Yazoo tracts and returning the land to the state. Fletcher was one of these private landowners, and he sued Peck for having sold the land with a defective title. Peck defended on the grounds that Georgia's revocation of title was unconstitutional.³³

The Court struck down the law unanimously. Chief Justice John Marshall wrote the opinion, holding that

[t]he State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.³⁴

The opinion based its holding on the common law of contract and the Contracts Clause of the Constitution, noting that a state could not pass a law "impairing the obligation of its own contracts."³⁵ Speaking to those who might be upset about the federal courts infringing on Georgia's sovereignty, the Court invoked the broad design of the Constitution:

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the constitution of the United States contains what may be deemed a bill of rights for the people of each state.³⁶

The Court noted that the constitutional ban on state bills of attainder and ex post facto laws was located in the same sentence of Article I, Section 9, as the ban on the impairment of contracts.³⁷ In the Court's reckoning, all of these constraints were directed at protecting the rights of citizens from political passions that might sweep the state legislatures.³⁸ Commenting on bills of attainder, the Court noted that there was no reason to think this type of abuse would be limited to death sentences: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both. In this form the power of

32. See Berger, *supra* note 12, at 367.

33. See STUART BANNER, HOW THE INDIANS LOST THEIR LAND 171-72 (2005).

34. *Fletcher*, 10 U.S. (6 Cranch) at 139.

35. *Id.*

36. *Id.* at 137-38.

37. *Id.*

38. *Id.* at 138.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1185

the legislature over the lives and fortunes of individuals is expressly restrained.”³⁹ What mattered for the bill of attainder analysis, then, was not that the deprivation took the form of a death sentence, but merely that a person or group was being singled out and deprived of rights without judicial process. As the Court in *Cummings* would later put it, the evil came from a “legislative enactment creating [a] deprivation without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.”⁴⁰

For Berger, this line of reasoning is badly mistaken. He dismisses Chief Justice Marshall’s commentary on the Bill of Attainder Clause in *Fletcher* as a mere “dictum” that was historically incorrect and incapable of supporting the expansion of the clause to reach punishments beyond death sentences.⁴¹ Given the supposedly clear common law distinction between bills of attainder and bills of pains and penalties, Berger is adamant that any sound interpretation must respect the Framers’ decision to include the former but not the latter in the constitutional text. “[T]he Framers employed words with full awareness of their significance and in order to accomplish definite objectives. The Court was not given a blank check to modernize the Constitution, still less to substitute its own views of policy for those of the Congress and state legislatures.”⁴²

There are several ways one might resist this argument. The first possibility is to reject absolute originalism in favor of an interpretive methodology that takes into account some nonoriginal sources of meaning. I have no desire to rehash familiar debates about originalism here, but even many originalists temper their approach with some limited forms of nonoriginalism, acknowledging that some cases may involve strong considerations counseling against a full-fledged devotion to original meaning.⁴³ The doctrine of stare decisis would seem especially appropriate here, where a century and a half of precedent has accumulated on the understanding that the constitutional ban on bills of attainder is not limited to legislative death sentences.

Putting aside methodological disputes, however, a careful review of the historical evidence casts serious doubt on Berger’s argument that the Framers clearly intended to exclude bills of pains and penalties from the Bill of Attainder Clause. Most people today understand the Bill of Attainder Clause to apply broadly against all legislative singling out for punishment, and the evidence suggests this transformation had already begun by the time the Constitution was ratified. It is plausible to think that the Framers used “bills of attainder” as

39. *Id.*

40. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

41. Berger, *supra* note 12, at 367-69.

42. *Id.* at 360-61.

43. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (“[I]n a crunch I may prove a faint-hearted originalist.”).

convenient shorthand for prohibiting legislative punishments defined more broadly than death sentences.

Though the constitutional prohibition on bills of attainder was sufficiently popular to be adopted without any recorded debate,⁴⁴ it is clear that at least some of the Founders were worried about legislative singling out for punishments other than death. In the years leading up to ratification, Alexander Hamilton had decried the practice of “disqualification, disfranchisement and banishment by acts of legislature.”⁴⁵ He denounced those who were “advocates for expelling a large number of their fellow-citizens unheard, untried; or if they cannot effect this, are for disenfranchising them in the face of the constitution, without the judgment of their peers, and contrary to the law of the land.”⁴⁶ The clear thrust of such language is that legislative punishments are unjust because they circumvent the traditional system of impartial judicial process—even if they do not impose death.

Berger acknowledges Hamilton’s view but dismisses it on the grounds that Hamilton “was not a disinterested witness,” since he had served as defense counsel for wealthy Loyalists who had been targeted by the New York state legislature in the wake of the Revolution.⁴⁷ On this subject, Berger claims, Hamilton “spoke as an attorney for the Tories, and . . . was thoroughly out of sympathy with the goals of the Founders.”⁴⁸ Whether or not this is a fair assessment, other authorities are not so easy to dismiss.

In *The Federalist No. 44*, James Madison addressed both bills of attainder and ex post facto laws in the same analysis. He wrote that both forms of enactment “are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights.”⁴⁹ Madison’s broad formulation here suggests that he saw in both the Ex Post Facto and the Bill of Attainder Clauses an acknowledgment of the need to guard not only the individual’s life but also other aspects of his “personal security and private rights” against legislative deprivations.⁵⁰ Madison would confirm this broad view in 1794, when he opposed a congressional resolution that would have imposed censure (without death penalty) on certain “self-created

44. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 376 (Max Farrand ed., rev. ed. 1937) (“Mr. Govr. Morris thought the precaution . . . essential as to bills of attainder. . . . The first part of the motion relating to bills of attainder was agreed to [without contradiction].”).

45. ALEXANDER HAMILTON, *A Letter from Phocion to the Considerate Citizens of New York* (1784), reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON 483, 485 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

46. *Id.*

47. Berger, *supra* note 12, at 383-84.

48. *Id.* at 385.

49. THE FEDERALIST NO. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961).

50. *Id.*

May 2011]

THE SUBSTANCE OF PUNISHMENT

1187

Democratic societies” that had allegedly incited insurrection against the new republic.⁵¹ The *Annals of Congress* reports Madison’s words: “It is in vain to say that this indiscriminate censure is no punishment. If it falls on classes, or individuals, it will be a severe punishment. . . . Is not this proposition, if voted, a vote of attainder?”⁵²

In making use of the broad definition of “attainder,” Madison echoed the writings of one of the Revolution’s intellectual heroes. Charles Montesquieu, writing in 1748, observed: “There are, in the states where one sets the most store by liberty, laws that violate it for a single person in order to keep it for all. Such are what are called *bills of attainder* in England.”⁵³ Montesquieu noted that Cicero (another of the Founders’ heroes) had favored the abolition of what the Romans had called “*privileges*” or “*privilegia*,” which were laws that singled out individuals for various types of punishment. Cicero opposed such laws “because the force of the law consists only in its being enacted for everyone.”⁵⁴ Common law theorist Richard Wooddeson, in his famous Oxford lecture series that commenced in 1777, drew the connection between Cicero and English practice, noting that “[t]he Roman *privilegia* seem to correspond to our bills of attainder, and bills of pains and penalties.”⁵⁵ The Framers would have been well aware of Cicero’s broad disapproval of all such targeted punishments, just as they would have been familiar with Montesquieu’s use of the phrase “bills of attainder” to encompass all targeted deprivations of liberty, including deprivations short of death.

The state constitutions also reflected broad opposition to legislative punishment beyond death sentences. For example, the Vermont Constitution of 1786, though it did not use the word “attainder,” declared: “No person ought, in any case, or in any time, to be declared guilty of treason or felony by the Legislature.”⁵⁶ The inclusion of the broad category of “felony” suggests the principle that legislatures should not impose penalties, even for crimes that would carry punishments short of death.

Berger cites the 1798 case of *Calder v. Bull* as an instance of the Supreme Court’s acknowledgment of the supposedly clear distinction between bills of attainder and bills of pains and penalties.⁵⁷ But the Court’s reasoning in *Calder* actually suggests that the line was blurred:

51. See 4 ANNALS OF CONG. 934 (1794), quoted in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 144 n.1 (1951) (Black, J., concurring).

52. *Id.*

53. MONTESQUIEU, THE SPIRIT OF THE LAWS 204 (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748).

54. *Id.*

55. 2 WOODDESON, *supra* note 24, at 641, quoted in Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380 app. 1 at 684 (1829) (Johnson, J., concurring).

56. VT. CONST. of 1786, ch. 2, § 17.

57. See Berger, *supra* note 12, at 357 n.11.

All the restrictions contained in the Constitution of the United States on the power of the State Legislatures, were provided in favour of the authority of the Federal Government. The prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less, punishment. These acts were legislative judgments; and an exercise of judicial power. Sometimes . . . they inflicted punishments, where the party was not, by law, liable to any punishment; and in other cases, they inflicted greater punishment, than the law annexed to the offence. The ground for the exercise of such legislative power was this, that the safety of the kingdom depended on the death, *or other punishment*, of the offender: as if traitors, when discovered, could be so formidable, or the government so insecure! With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such, *and similar*, acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing any bill of attainder; or any ex post facto law.⁵⁸

Like Madison, the *Calder* Court characterized “bills of attainder” and ex post facto laws together as reflecting a broad concern for attacks on citizens’ rights in circumvention of judicial process.

In 1803, a short time after *Calder* was decided, St. George Tucker, the noted Virginia lawyer and professor of law at the College of William and Mary, picked up on the broad definition:

Bills of attainder are legislative acts passed for the special purpose of attainting particular individuals of treason, or Felony, or to inflict pains and penalties beyond, or contrary to the common law. They are state-engines of oppression in the last resort, and of the most powerful and extensive operation, reaching to the absent and the dead, as well as to the present and the living.⁵⁹

Thomas Jefferson, himself a graduate of William and Mary, similarly defined bills of attainder without any reference to the narrow requirement of a death sentence. In 1812 he wrote:

The occasion and proper office of a bill of attainder is this: When a person charged with a crime withdraws from justice, or resists it by force, either in his own or a foreign country, no other means of bringing him to trial or punishment being practicable, a special act is passed by the legislature adapted to the particular case. This prescribes to him a sufficient time to appear and submit to a trial by his peers; declares that his refusal to appear shall be taken as a confession of guilt, as in the ordinary case of an offender at the bar refusing to plead, and pronounces the sentence which would have been rendered on his confession or conviction in a court of law.⁶⁰

58. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798) (emphasis altered).

59. 1 BLACKSTONE’S COMMENTARIES editor’s app. at 292 (St. George Tucker ed., Philadelphia, William Young Birch & Abraham Small 1803).

60. Letter from Thomas Jefferson to L.H. Girardin (Mar. 12, 1815), in 14 THE WRITINGS OF THOMAS JEFFERSON 271, 272-73 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

Jefferson here seems open to the possibility that bills of attainder could inflict a broad range of punishment. This parallels the formulations of Hamilton, Madison, Marshall, Tucker, and Montesquieu, casting serious doubt on Berger's claim that the public meaning of "bills of attainder" at the time of the Founding was strictly limited to enactments imposing death sentences.

Berger's view becomes even more implausible if we accept the view that the original principles of the Constitution should be interpreted in a way that supplies a consistency of purpose and function throughout the document. "[T]he soul of the law . . . is logic and reason,"⁶¹ and the question becomes whether there is any logical reason not to extend the Bill of Attainder Clause's protection to bar targeted punishments beyond death sentences.

We know from the Fifth Amendment that the Framers considered "life, liberty, [and] property" to be equally deserving of protection against arbitrary deprivations of rights in circumvention of judicial process. So why should the same rights not be equally protected against legislative abuses? If it is unjust for the legislature to impose execution on someone without judicial process, then why is it not similarly unjust to strip him of all his property or lock him away for life?

Alexander Hamilton made precisely this argument, emphasizing that the degree of punishment in a legislative deprivation might differ, but the injustice of circumventing judicial process would remain the same:

The principle is the same in both cases, with only this difference in the consequences; that [in the case of a lesser legislative deprivation] the citizen forfeits a part of his rights,—in the [case of a legislative death sentence] he would forfeit the whole. The degree of punishment is all that distinguishes the cases. In either justly considered, it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one, recognized by laws and the constitution of the state; I mean the trial by jury.⁶²

Chief Justice Marshall's opinion in *Fletcher v. Peck* paralleled this reasoning,⁶³ and the same reasoning was persuasive enough for Justice Story. In 1833, Justice Story acknowledged the common law distinction between bills of attainder and bills of pains and penalties. But he also noted that, "in the sense of the constitution, it seems that bills of attainder include bills of pains and penalties."⁶⁴ He explained that both types of legislative punishment

61. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 633 (2007) (Scalia, J., concurring in the judgment).

62. ALEXANDER HAMILTON, *A Second Letter from Phocion* (1784), reprinted in 3 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 45, at 530, 544.

63. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810) ("[The Framers had] manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment.").

64. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1338 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833).

have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free, as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.⁶⁵

In such circumstances it is proper to worry not only about life but also about other “rights and liberties” that the legislature might trample.

Thus, despite its impressive rigor, it seems that Berger’s reading of the Bill of Attainder Clause is not sustainable even if we accept his strict originalist interpretive methodology. The Founders were concerned not only with legislative death sentences but also with a broad range of punishments that might be imposed in circumvention of judicial process. The question that arises, then, is how to define “punishment” in a sensible way.

B. *The Free-Form Test for Punishment*

The chief rival to Berger’s interpretation of the Bill of Attainder Clause errs in the opposite direction: where Berger’s focus on the death penalty is too restrictive, the alternative view has developed in a way that is simply unhinged. The analytical core of the free-form view is that the “punishment” proscribed by the Bill of Attainder Clause cannot be limited to any particular form of deprivation. That is, punishment cannot be defined according to what the punishee is deprived of, but rather must depend on some other characteristics of the enactment that make it inherently punitive. This expansive view of punishment has developed in two distinct strands. The first focuses on legislative function and motive, which remain the doctrinal core of the Supreme Court’s bill of attainder jurisprudence. The second strand relies on a functional notion of legislative adjudication. Both of these free-form views of punishment are unworkable and unmoored from constitutional text, history, and structure.

1. *The doctrine of motive and function*

Under current Supreme Court doctrine, a bill of attainder is “a legislative act which inflicts punishment without a judicial trial.”⁶⁶ The determination of punishment takes into account the historical meaning of “bills of attainder,” but the inquiry doesn’t stop there. The Court employs two additional tests to determine whether an enactment is punitive. First is a “functional test . . . analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.”⁶⁷ When “legitimate legislative purposes do not appear, it

65. *Id.*

66. *United States v. Brown*, 381 U.S. 437, 462 (1965) (White, J., dissenting) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867)).

67. *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 475-76 (1977).

May 2011]

THE SUBSTANCE OF PUNISHMENT

1191

is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.”⁶⁸ Second is a “motivational” test, examining “whether the legislative record evinces a congressional intent to punish.”⁶⁹

The first problem to note with both of these formulations is that they are hopelessly circular. Each of them relies on some preexisting notion of punishment that the doctrine simply does not supply. It gets us nowhere to differentiate between “punitive” and “nonpunitive” legislative purposes because the distinction is impossible to sustain without some external definition of punitiveness. The question is whether there is any workable external definition that relies on legislative function and motive alone.

The deeper problem is that legislatures will always be able to offer some rationale for any bill that plausibly sounds nonpunitive. And many regulations that appear nonpunitive at first glance actually contain elements that strongly resemble the core “punitive” features of deterrence, retribution, and prevention.

For example, in *Ex parte Garland*, in which former Confederates were barred from serving as lawyers, it is quite impossible to characterize the imposed disability as either exclusively punitive or exclusively nonpunitive. On the one hand, the law appeared punitive in that it inflicted retribution on former secessionists, incapacitated them from subverting the legal system, and deterred others from following their example in the future. On the other hand, the state legislature asserted what seems to be a perfectly plausible “nonpunitive” policy rationale for the enactment: it simply wanted its lawyers to be faithful servants of the law, and former Confederates had shown themselves deficient in that respect by taking up arms against the nation and the Constitution they were sworn to uphold. Indeed, states regularly screen applicants to the bar based on holistic assessments of moral fitness and character, taking into account past behavior that may or may not have been proved in court. The primary policy justification for this is not that the states want to punish bad actors, but rather that they want to maintain the integrity of their legal systems and protect unsuspecting members of the public from hiring wayward attorneys.

The same problem plagues every determination of punitive/nonpunitive legislative function. The expulsion of Communists from federal employment in *Lovett*⁷⁰ can be seen as a nonpunitive policy reflecting a concern for filling sensitive positions in the American government with members of subversive organizations with ties to hostile foreign powers. Or it can be seen as punishment for the Communists’ political activities. Similarly, the denial of funding to ACORN can be seen as a punitive measure for the group’s alleged wrongdoing or as a reasonable policy concern that future federal funds be used responsibly.

68. *Id.* at 476.

69. *Id.* at 478.

70. *United States v. Lovett*, 328 U.S. 303 (1946).

One might be tempted to claim that punishment must be at least retrospective, if not retributive—in order to be punitive, an enactment must be imposed in retaliation for some past actions taken by the punishee. The Supreme Court has followed this logic in the past, rejecting one bill of attainder challenge because the law in question was “intended to prevent future action rather than to punish past action.”⁷¹ But soon after that, the Court explicitly rejected retrospectivity as a criterion of punishment under the Bill of Attainder Clause, noting that

a number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment . . . that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.⁷²

Indeed, it seems that almost any alleged punishment can be framed in either retrospective or prospective terms: The alleged exclusion of Confederate lawyers in *Ex parte Garland* was based on their past secessionist activities. On the other hand, the state’s policy of excluding them was designed with the forward-looking purpose of maintaining loyalty, integrity, and fidelity to the law among members of the state bar.

In the *Nixon* case, similarly, Congress singled out Richard Nixon and prevented him from taking possession of his presidential papers and audiotapes. Congress’s rationale was that they wanted to preserve this evidence for possible use in civil or criminal litigation involving Nixon or his associates. Given Nixon’s record of skulduggery in the Watergate affair, it was perfectly reasonable to worry that he would destroy this evidence. This could be construed retrospectively, as punishment for Nixon’s past actions. But the Court construed the law prospectively, holding that Nixon was a legitimate class of one whom the legislature was justified in targeting with an eye toward his likely future actions.⁷³

The same intractable problems plague the supposed distinction between punitive and nonpunitive legislative motivation. Legislative motive and intent can always be described as punitive or nonpunitive, retrospective or prospective. The “motivational” analysis is further complicated by the notorious difficulty of ascribing a single, monolithic mindset to a legislative body made up of diverse lawmakers harboring a plethora of different motives.

The upshot of all this is that the focus on legislative motive and function alone can provide no clear guidance for judges attempting to discern whether any given enactment satisfies the “punishment” component of the Bill of Attainder Clause.

71. *See* Am. Commc’ns Ass’n v. Douds, 339 U.S. 382, 414 (1950).

72. *United States v. Brown*, 381 U.S. 437, 458-59 (1964).

73. *Nixon*, 433 U.S. at 472, 476-77.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1193

2. Punishment as deprivation in the abstract

Modern understanding of the Bill of Attainder Clause owes an enormous amount to a *Yale Law Journal* comment John Hart Ely wrote in 1962 while he was still a law student. His analysis recognizes many of the problems of the doctrinal focus on motive and function.⁷⁴ But in spite of this insight, Ely commits a similarly fatal mistake by espousing his own free-form definition of punishment. He asserts that punishment cannot be determined by “the form or severity of the deprivation,” and that “the type of deprivation imposed by a statute is irrelevant to whether or not that statute falls within the constitutional provision.”⁷⁵ This notion found its way into the *Brown* decision, which stated that the Bill of Attainder Clause should be read “in light of the evil the Framers had sought to bar: legislative punishment, of *any form* or severity, of specifically designated persons or groups.”⁷⁶ Having thus eschewed “the form of the deprivation” as a determinative criterion for punishment, any proponent of this view must come up with an alternative.

Ely makes a valiant effort by claiming that the Bill of Attainder Clause “was intended as a broad implementation of the separation of powers . . . designed to limit the legislature in much the same way as the case and controversy requirement of article III limits the judiciary.”⁷⁷ His argument is that the legislature is constitutionally limited to making general rules, such that it lacks “the power to apply the law to particular individuals.”⁷⁸ He explains his theory with characteristic eloquence:

[A]rticle III, by limiting federal courts to cases and controversies, tells them, at least in theory, two things. First, they—unlike the legislature—may not create broad rules; they must content themselves with applying the law, either statutory or constitutional, to the particular disputes before them. And second, because they are restricted to adjudicating the rights of the litigants before them, they can act only retrospectively. On the other hand, the prohibition of ex post facto laws (and notions rooted in due process and the obligation of contracts clause) tell the legislature that in general it can act only prospectively. The bill of attainder clause, it is submitted, is a broad prohibition completing the legislative analogue of article III. For it tells legislatures that they may not apply their mandates to specific parties; they instead must leave the job of application to other tribunals.⁷⁹

74. See Comment, *supra* note 13, at 355 n.140.

75. *Id.* at 357.

76. *Brown*, 381 U.S. 437, 447 (1965) (emphasis added). It is perhaps no coincidence that *Brown* was written by Chief Justice Earl Warren during the time that Ely was clerking for him, shortly after publication of Ely’s *Yale Comment*. Despite the obvious influence of Ely’s theory of the Bill of Attainder Clause, however, the Supreme Court has not adopted it wholesale. This much is made clear by the *Nixon* case, which invokes the same tests for punitive function and motive that Ely had rejected.

77. Comment, *supra* note 13, at 366.

78. *Id.* at 347.

79. *Id.* (footnotes omitted).

In other words, Ely contends that what the Bill of Attainder Clause really aims at is the prevention of “trial by legislature.”⁸⁰ On this view, the problematic feature of a bill of attainder is that it constitutes an

application by Congress of . . . a broad rule to a fairly specific group of persons. . . . For when broad rules are applied to specific persons, in criminal or civil trials (the antithesis of rule-making proceedings), our society demands proof “beyond a reasonable doubt” or, at least, proof by a preponderance of the evidence, not mere reasonableness or rationality.⁸¹

Ely acknowledges that this analysis can be complicated, as the line between the judicial and legislative spheres is often blurry, but he does not consider the obstacle insurmountable:

Of course the distinction between rules of general applicability and the application of such rules to particular persons or groups is not a clear one. The separation of powers must therefore be viewed as setting up a continuum. At one extreme is the creation of broad policy judgments—general rules. These are left to the highly political, nonadversary legislative process. To demand more than a reasonable judgment at this level would be to trespass upon the legislative province. At the other extreme is the application of such a broad rule to a particular individual. Here our system demands that the decision be made under the circumstances most likely to insure fairness and certainty. This generally calls for an adversary proceeding accompanied by traditional judicial safeguards.⁸²

The looming problem for this view is that legislatures frequently act particularly rather than generally: they can pass private bills, earmark individual subsidy recipients, and legislate with respect to “legitimate class[es] of one.” All of these enactments “apply the law to particular individuals”⁸³ in the sense that Ely is worried about, and yet none of them can plausibly be considered a bill of attainder.

Though Ely does not directly address this problem, his answer seems to be that “apply[ing] a law to particular individuals” must impose a “deprivation” in order to be proscribed by the Bill of Attainder Clause. For such a critical point, though, he spends very little time considering what counts as a deprivation. Without saying so explicitly, he denies that the concept of deprivation requires the prior definition of some baseline of entitlements. But this denial is untenable. Unless you have some sense of whether a person is entitled to something, it is impossible to determine whether he has been deprived of it.

Ely goes to some lengths to insist that a “mere denial[] of privilege”⁸⁴ can constitute a punitive deprivation. He is worried primarily about two cases: The first is *Douds*, a 1950 case in which the Court suggested that the legislature

80. *Id.* at 348.

81. *Id.* at 350.

82. *Id.*

83. *Id.* at 347.

84. *Id.* at 358.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1195

does not inflict a deprivation if it “merely withdraws a privilege gratuitously granted by the Government.”⁸⁵ The other is the 1959 case of *Flemming v. Nestor*, which involved a challenge to a law that cut off Social Security benefits for aliens who had been deported. There the Court observed: “[W]hen we deal with a withholding of a noncontractual benefit under a social welfare program such as this, we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.”⁸⁶ As Ely notes, such cases suggest that the Constitution does not offer special protection to a person claiming to have been “deprived” of something unless the person had some prior entitlement to it.

In attacking this view, Ely relies heavily on the *Cummings* opinion of 1867, which explicitly rejected Missouri’s argument that punishment under the Bill of Attainder Clause must include the deprivation of life, liberty, or property.⁸⁷ The strange thing about this statement in *Cummings*, however, is that the case actually did involve a clear deprivation of liberty. The “bill of attainder” struck down in *Cummings* barred former Confederates from serving as priests. The freedom to be a priest—indeed, the freedom to choose one’s profession or to practice one’s religion however one chooses—should fit naturally within any proper definition of liberty. Thus the result of the case is perfectly consistent with the proposition that the Bill of Attainder Clause prohibits only life, liberty, or property deprivations, as long as the conception of life, liberty, and property is appropriately broad.

Indeed, from reading *Cummings*, it appears that the Court was reacting not so much against a life, liberty, and property conception of the Bill of Attainder Clause, but rather against the absurdly narrow conception of life, liberty, and property that Missouri advocated. The Court remarked:

The learned counsel [for Missouri] does not use these terms—life, liberty, and property—as comprehending every right known to the law. He does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors.⁸⁸

The Court then listed several examples of rights that Missouri’s definition of life, liberty, and property also failed to cover, including the right to vote and hold public office. The Court further stated:

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all

85. *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 390 (1950).

86. *Flemming v. Nestor*, 363 U.S. 603, 611 (1960).

87. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320-22 (1867).

88. *Id.* at 320.

positions, are alike open to everyone Any deprivation or suspension of any of these rights for past conduct is punishment.⁸⁹

Ely points to this language as a dispositive refutation of the idea that “the mere denial of a privilege” cannot constitute a deprivation. But this conclusion does not follow. The *Cummings* language suggests, rather, that the important rights it mentions should be considered as vested rights (i.e., part of the baseline of entitlements of all individuals) rather than “mere privileges.” This does not mean that we must abandon the idea of a baseline of entitlements, nor that all privileges should be considered worthy of procedural protection.

Indeed, all of the supposed “privileges” in *Cummings* fit comfortably within most common conceptions of life, liberty, and property rights. Modern jurisprudence recognizes that life, liberty, and property rights extend to all vested rights to which each person is entitled. There is a liberty interest in the right to vote and hold public office, as well as in the right to pursue the “avocation” of one’s choice.

The *Cummings* Court’s own definition of “deprivation” seems to presuppose some baseline of entitlements, even if it does not refer to this baseline in terms of “life, liberty, and property.” The Court writes: “The deprivation of any rights, civil or political, *previously enjoyed*, may be punishment, the circumstances attending and the causes of the deprivation determining this fact.”⁹⁰ This formulation, focusing on “rights . . . previously enjoyed,” strongly suggests a broad conception of vested rights that provide a baseline against which “deprivations” are measured. True, the *Cummings* Court rejected Missouri’s narrow “life, liberty, and property” formulation. But this was not a wholesale rejection of the baseline-entitlement view. It was merely a rejection of Missouri’s narrow formulation of “life, liberty, and property,” which utterly failed to include all of the vested rights that form the appropriate baseline of entitlements.

Contrary to Missouri’s position in *Cummings*, the constitutional guarantee of life, liberty, and property encompasses the full baseline of entitlements that are the touchstone of due process protections. The Due Process Clause requires that the executive and the judiciary not deprive anyone of these entitlements without a fair trial. And the Bill of Attainder Clause requires the same of the legislature. Without defining a concrete baseline of entitlements, Ely’s free-form view of “deprivation” must fail. For there can be no “deprivation,” and hence no punishment, in the absence of an entitlement.⁹¹

For this reason, Ely is wrong to portray the Bill of Attainder Clause as an analog to Article III, requiring the legislature to act generally just as the courts

89. *Id.* at 321-22.

90. *Id.* at 320 (emphasis added).

91. The D.C. Circuit recently affirmed this view at the urging of then-Solicitor General Elena Kagan. *See Kiyemba v. Obama*, 605 F.3d 1046, 1048 (D.C. Cir. 2010) (holding that restrictions on aliens’ rights to enter the country “are not legislative punishments; they deprive petitioners of no right they already possessed” (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 475, 481 (1977))).

May 2011]

THE SUBSTANCE OF PUNISHMENT

1197

must act particularly. The legislature *can* act particularly in many cases, as long as it does not inflict a “deprivation.” In the words of the *Cummings* Court, the problem with bills of attainder is that they “creat[e] the deprivation[s] without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.”⁹² Thus, it is more suitable to analogize the Bill of Attainder Clause to the Due Process Clause, which focuses on individualized⁹³ deprivations of life, liberty, or property in circumvention of judicial process. The conceptual function of “life, liberty, [and] property” is to set the baseline of entitlements necessary for determining whether a “deprivation” has occurred. The protections of the Due Process Clause only kick in when “life, liberty, or property” are threatened, and so too with the Bill of Attainder Clause. The Bill of Attainder Clause thus completes a scheme of symmetrical protection of life, liberty, and property rights, ensuring that they are equally protected from individualized deprivations by both the executive and legislative branches.

II. THE STRUCTURAL SYMMETRY OF LIFE, LIBERTY, AND PROPERTY PROTECTION UNDER THE CONSTITUTION

In the last Part, we saw how two extreme views of punishment under the Bill of Attainder Clause go wrong in opposite directions. Berger’s view is too narrow, since the history and purpose of the clause reveal a protection against a much broader scope of punishments than those imposing death sentences and corruption of blood. On the other hand, Ely’s free-form view of punishment is too broad, since it fails to define the substantive rights that are the object of the clause’s protection. Ely’s free-form view relies on the sweeping claim that “pre-Constitution bills of attainder were so varied in form and effect that the formulation of *any* narrow historical definition is impossible.”⁹⁴ But here he is only partially correct: The historical evidence does not support the extremely narrow definition that Berger advances. But every bill of attainder or “bill of pains and penalties” around the time of the Founding did in fact involve some form of life, liberty, or property deprivation, as long as one adopts appropriately (but not indefinitely) broad understandings of life, liberty, and property.

As Ely’s view tacitly concedes, the concept of “deprivation” is necessary to determine exactly what type of legislative singling out is barred by the Bill of

92. *Cummings*, 71 U.S. (4 Wall.) at 325.

93. The familiar *Londoner/Bi-Metallic* distinction holds that life, liberty, and property deprivations caused by executive action trigger due process protections only when such deprivations are individualized, not when they are general. (Generalized deprivations are assumed to be checked by the political process.) See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915); *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 386 (1908). The Bill of Attainder Clause is analogous to this rule, since it also requires the element of singling out.

94. Comment, *supra* note 13, at 366.

Attainder Clause. This is what separates permissible types of singling out (individual earmarks, private bills, etc.) from impermissible legislative punishment. The latter are impermissible because they involve the deprivation of vested rights. The constitutional concept of life, liberty, and property provides the baseline of vested rights. The Due Process Clause and the Bill of Attainder Clause together make clear that the executive and the legislature, respectively, cannot impose individualized deprivations against this baseline without affording judicial process.⁹⁵

The structure of the Constitution confirms this view. The Due Process Clause recognizes that the baseline entitlements of “life, liberty, [and] property” have a special status that demands special constitutional protection. If the free-form view of punishment were correct, such that the Bill of Attainder Clause prohibited the withdrawal of “mere privileges,” this would produce a strangely asymmetric result: the legislature would be prohibited from imposing such “deprivations,” but the executive would be free to do so. The executive branch, after all, is only constrained by due process when it deprives someone of a life, liberty, or property right. It is free to withhold discretionary privileges (i.e., things that are not life, liberty, or property entitlements) from any person or group, as long as it does not act arbitrarily or capriciously. It makes no sense to hold the legislature to a different standard.

This Part addresses four main concerns. First, I briefly examine the structural history of the Constitution’s symmetrical protection of life, liberty, and property rights. Second, I anticipate the objection that my theory is vacuous because it defines life, liberty, and property rights so loosely. Third, I propose that the Bill of Attainder Clause should be applied according to the familiar strict scrutiny analysis, such that some individualized legislative deprivations of life, liberty, or property rights can be justified if and only if they are narrowly tailored to serve a compelling government interest. Fourth, I consider how subsidy denials might still form the basis of constitutional violations in other areas of law.

A. *Federalism and the Historical Symmetry*

The original Constitution prohibited bills of attainder at both the state and federal level, while the original Due Process Clause protected life, liberty, and property rights against the federal government alone. The explanation for this is that the Framers generally entrusted the protection of life, liberty, and property rights to the states, all of which had their own constitutional guarantees of due process. Bills of attainder were exceptional because states had recently employed them, and some state constitutions continued to allow them. Anti-

95. The Bill of Attainder Clause’s requirement of “singling out” is mirrored by the *Londoner/Bi-Metallic* distinction that trigger the protections of the Due Process Clause only when deprivations of life, liberty, or property are individualized. *See supra* note 93.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1199

Loyalist enactments were a conspicuous evil that had attracted significant attention in the fledgling republic. In response to the crisis of revolution, “every state in the Union appears to have enacted bills of pains and penalties,”⁹⁶ which were legislative enactments singling out certain Loyalists and inflicting punishment on them without the benefit of a trial.⁹⁷ This practice was recognized as not only inherently unjust but also highly problematic in terms of normalizing relations with England after the war.

Even before the end of the war, George Washington and his generals had recognized the folly of allowing states to persecute Loyalists in a scattershot fashion without centralized control. The uncoordinated persecution and imprisonment of Loyalists by the various proto-state legislatures stood as “an effectual bar to an exchange of prisoners”⁹⁸ between the Americans and the British. Such an agreement was impossible, Washington wrote, because “General Howe would never consent to observe it on his part, if such a practice [of uncontrolled persecution] were to exist on ours.”⁹⁹ In other words, in order to coordinate a prisoner-exchange program, Washington needed to be able to control the punishment and imprisonment of Loyalists at a national level.

Washington appealed to Congress to rein in the states, and in April 1778 Congress responded by passing a resolution that “recommended” states offer pardon

to such of their Inhabitants or Subjects, as have levied War against any of these States, or adhered to, aided or abetted the Enemy, and shall surrender themselves to any Civil or Military Officer of any of these States, and shall return to the State to which they may belong before the 10th Day of *June* next.¹⁰⁰

The congressional resolution also stated that “it is recommended to the good and faithful Citizens of these States to receive such returning Penitents with Compassion and Mercy, and to forgive and bury in Oblivion their past Failings and Transgressions.”¹⁰¹ But the states largely refused to follow this recommendation. They had already established their own anti-Loyalist practices and did

96. Edward S. Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 515 (1925); see also CLAUDE HALSTEAD VAN TYNE, *THE LOYALISTS IN THE AMERICAN REVOLUTION* (1959); James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 81, 81 (1909). As noted above, “bills of pains and penalties” have been subsumed under “bills of attainder.” See *supra* Part I.A.

97. See, e.g., Act of Oct. 22, 1779, ch. 25, 1779 N.Y. Laws 173 (declaring Loyalists’ estates forfeited); Act of Mar. 6, 1778, ch. 784, 1778 Pa. Laws 750, *reprinted in* 9 STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 201 (James T. Mitchell & Henry Flanders eds., 1903) (same).

98. Thompson, *supra* note 96, at 90.

99. Letter from George Washington to Henry Laurens, President, Cont’l Cong. (Apr. 4, 1778), 5 THE WRITINGS OF GEORGE WASHINGTON 306, 308 (Jared Sparks ed., 1834).

100. Minutes of Charles Thomson, Sec’y, Cont’l Cong. (Apr. 23, 1778) (on file with the Library of Congress), available at <http://lcweb2.loc.gov/rbc/bdsdcc/044a1/044a101p.gif>.

101. *Id.*

not want to relent in the face of the ongoing threat of internal subversion. Beyond this, they had begun to enjoy the benefits of confiscating and selling Loyalist property, and they were not eager to relinquish the resulting profits. As one commentator has noted, the damage had been done: "Congress had taken the fatal step of allowing the rightful control over relations foreign to the states and truly national in principle to be alienated."¹⁰² There was no easy way of regaining this control, especially in the middle of a bitter war.

After the war ended, the continuing anti-Loyalist action among the states proved an ongoing hindrance to postwar negotiations in Europe. The United States conceded three provisions in the preliminary articles of peace in January 1783. (In its essential substance, this provisional treaty would become the Treaty of Paris.)¹⁰³ Article IV of the treaty provided that English merchants could recover debts fairly contracted by citizens of the United States.¹⁰⁴ Article V assured English subjects they would be able to reclaim property that had been confiscated from them.¹⁰⁵ And Article VI promised that the states would cease the prosecution and confiscation of Loyalists and their property.¹⁰⁶

America's diplomats needed to be able to give assurances of compliance to their counterparts in England, but they found their credibility in serious question due to the uncontrollable persecution of Loyalists back at home. As John Jay wrote to Egbert Benson of New York on September 12, 1783: "Your irregular and violent popular proceedings and resolutions against the tories hurt us in Europe. We are puzzled to answer the question, how it happens that if there be settled governments in America, the people of town and district should take upon themselves up to legislate."¹⁰⁷ The primary means of anti-Tory legislation were laws impairing the ability of British creditors to collect their debts, and laws that singled out Tories for certain disabilities—most commonly, banishment and the forfeiture of property.

Some states flatly asserted that Congress lacked the authority to ratify a treaty in derogation of the sovereign states' anti-Loyalist policies. This was reflected in a Massachusetts enactment of March 1784, "Asserting the Right of This Free and Sovereign Commonwealth to Expel Such Aliens as May Be Dangerous to the Peace and Good Order of Government."¹⁰⁸ Similarly, many Virginians stuck to the spirit of a resolution they had passed in 1781, which

102. Thompson, *supra* note 96, at 89.

103. *See* Definitive Treaty of Peace, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80; Provisional Articles, U.S.-Gr. Brit., Nov. 30, 1782, 8 Stat. 54.

104. Definitive Treaty of Peace, *supra* note 103, art. IV, 8 Stat. at 82.

105. *Id.* art. V, 8 Stat. at 82-83.

106. *Id.* art. VI, 8 Stat. at 83; *see also* Letter from John Adams to Henry Brockholst Livingston, Sec'y (Nov. 6, 1782), in 7 THE WORKS OF JOHN ADAMS 659, 661 (Charles Francis Adams ed., 1852).

107. Letter from John Jay to Egbert Benson (Sept. 12, 1783), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 74, 75 (Henry P. Johnston ed., 1891).

108. Thompson, *supra* note 96, at 169.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1201

stated “[t]hat all demands or requests of the British court for the restoration of property confiscated . . . were wholly inadmissible and that their delegates should be instructed to move Congress that they should direct the deputies for adjusting the peace not to agree to any such restitution.”¹⁰⁹ In essence, such enactments urged that no national treaty ought to be made that conflicted with any state policy. Meanwhile, New York took steps to solidify its policy of anti-Loyalist confiscation. In April 1784, the state passed a law providing for “the immediate sale of certain forfeited estates.”¹¹⁰

Other states followed a similar path. In 1784, North Carolina passed a law ordering the sale of all Loyalist property that it had confiscated, followed the next year by a law to secure the titles of those who had bought the confiscated property.¹¹¹ South Carolina also moved ahead with the sale of estates it had confiscated.¹¹² In 1783, New Jersey passed a law to recommence the sale of Loyalist estates that it had confiscated during the war, overturning its own law of 1781 that had halted such sales in anticipation of peace.¹¹³

By this point, the frustrations of America’s national leaders were palpable. In 1784, the British had decided to hold their troops’ garrisons in Montreal, Niagara, and Lake Erie until the most flagrant violators of the peace treaty, Virginia and New York, repealed their laws targeting British creditors and property owners.¹¹⁴ Lord Carmarthen sent to John Adams a list of state infringements of the terms of the treaty, prompting Congress to write again to the states urging them to move toward compliance.¹¹⁵ In New York, Alexander Hamilton and his allies struggled valiantly to repeal the state’s anti-Loyalist enactments. To strengthen his argument, Hamilton estimated that his state’s ongoing abuses and the retaliatory measures against the British who still occupied western New York were costing the state over a hundred thousand pounds per year.¹¹⁶ In Virginia, James Madison, George Mason, George Washington, James Monroe, and John Marshall formed an alliance to repeal their state’s anti-Loyalist enactments.¹¹⁷ In the end, however, both of these efforts failed. In New York and Virginia, the passions of antireconciliation won out; neither state agreed to scale back its anti-Loyalist enactments.¹¹⁸ With Congress unable

109. *Id.* at 168.

110. VAN TYNE, *supra* note 96, app. C at 337.

111. *See id.* app. C at 339.

112. *See id.* app. C at 340.

113. *See id.* app. C at 338.

114. *See* Allan Nevins, *The American States During and After the Revolution* 652 (Augustus M. Kelley 1969) (1924).

115. *See id.*

116. *See id.* at 654.

117. *See id.* at 653-54.

118. *See id.* at 654-56.

to force the matter, the peace agreement with Britain remained on shaky ground.¹¹⁹

In 1785, while serving as Minister Plenipotentiary to Great Britain, John Adams wrote back to the United States reporting that “American demands would not be met” as long as states maintained laws prohibiting the collection of British debts.¹²⁰ On May 26, 1786, he wrote again to Massachusetts State Senator Cotton Tufts:

The most insuperable bar to all my negotiations here has been laid by those States, which have made laws against the treaty. The Massachusetts is one of them. The law for suspending execution for British debts, however colored or disguised, I make no scruple to say to you is a direct breach of the treaty.¹²¹

Thus, as the Constitutional Convention of 1787 approached, the states’ practice of persecuting Loyalists and refusing to follow the national policy of reconciliation was a conspicuous problem. And the central government’s inability to control this problem ranked among the noted deficiencies of the Articles of Confederation. For this reason, the unique limitations on state action embodied in Article I, Section 10, of the Constitution can be seen as a response to the practical need to rein in the states in an area of national concern. It is no surprise that the state Bill of Attainder Clause is located in the same sentence of the Constitution as the Contracts Clause,¹²² since both were seen as key provisions for checking the anti-Loyalist excesses of the states. Among those charged with forming a cohesive and responsible national union, it was apparent that the states had to be stopped from targeting Loyalists by legislative enactment. To be sure, much of the anti-Loyalist persecution in the states was unofficial and extralegal. But when such persecution did occur within the legal system, it proceeded most conspicuously by legislative enactment, since attainder was a well-known practice with a host of precedents from English law. By targeting Loyalists directly through regularly enacted laws, states attempted to lend a semblance of legal process to their practices of confiscation, banishment, and other punishments imposed without judicial process.

In hindsight, of course, it is easy to argue that the Framers were mistaken in failing to extend the Constitution’s protection of life, liberty, and property rights to apply against the states. But that mistake was acknowledged with the ratification of the Civil War Amendments. The text of the Fourteenth Amendment specifically reaffirmed the unique constitutional importance of “life, liberty, [and] property,” and consolidated the protection of these substantive rights within a symmetrical framework that applies equally against executive, judicial, and legislative action at both the state and federal levels.

119. *See id.*

120. *See id.* at 652.

121. Letter from John Adams to Cotton Tufts (May 26, 1786), in 9 THE WORKS OF JOHN ADAMS 548, 548 (Charles Francis Adams ed., 1854).

122. *See* U.S. CONST. art. I, § 10, cl. 1.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1203

B. *The Amorphous Content of Life, Liberty, and Property*

Some may object that this theory dodges many difficult problems with the Bill of Attainder Clause by failing to specify exactly what counts as a deprivation of life, liberty, or property. But this open-endedness is more a virtue than a vice. Different views abound as to the scope of the rights of life, liberty, and property,¹²³ and this Note's argument for symmetrical life, liberty, and property protection is consistent with practically all of the various alternatives. The central claim is at heart a structural one: whatever the scope of the substantive rights protected under the heading of life, liberty, and property, this scope must be identical under both the Bill of Attainder and Due Process Clauses.

To be sure, the life, liberty, and property model will present tough cases because it is sometimes difficult to determine whether something qualifies as a genuine life, liberty, or property right rather than a mere gratuitous privilege that can be withheld at the government's discretion. But the clear language of the Due Process Clause compels us to draw this line: the clause specifically protects "life, liberty, [and] property." Thus, even if the concept of life, liberty, and property had no application at all to the Bill of Attainder Clause, we would still need to establish the scope of life, liberty, and property in order to apply the Due Process Clause.

The Due Process Clause requires procedural protections only for deprivations of life, liberty, or property rights. It does not require due process when the government withholds mere gratuities. And there is a reason for this: when a mere gratuity is withheld, nobody is harmed, and hence there is no great evil to protect against. There are some apparent exceptions to this rule, but they operate by expanding the conception of life, liberty, and property to include government benefits, not by claiming that due process protections apply outside the scope of life, liberty, and property rights. The paradigmatic case is *Goldberg v. Kelly*,¹²⁴ which extended the protections of the Due Process Clause by defining life, liberty, and property to include government welfare benefits, so that the government could not deny the benefits without due process. But this holding was limited to cases of "brutal need,"¹²⁵ where indigent plaintiffs faced crippling health risks if their welfare payments were cut off. This was the apex of the Warren Court's push to expand life, liberty, and property rights, and subsequent decisions soon reaffirmed that, in all but the most exceptional cases, gov-

123. For example, compare Thomas C. Grey, *The Disintegration of Property*, in NOMOS XXII: PROPERTY 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980) (arguing that traditional conceptions of property have become incoherent, such that property "ceases to be an important category in legal and political theory"), with RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985) (defending a traditional conception of private property in classical liberal terms).

124. 397 U.S. 254 (1970).

125. *Id.* at 261.

ernment gratuities fall outside the scope of life, liberty, or property and thus do not merit procedural protections.

So, while the precise scope of life, liberty, and property may be blurry around the edges, this does not mean that the concept of life, liberty, and property is entirely useless or indeterminate. Just as there are hard cases for distinguishing life, liberty, and property rights from mere gratuities, there are also easy ones. For example, if the executive branch is given discretion to dispense subsidies according to some broad policy rationale, the candidates who lose out on the subsidy do not have a claim that they have been deprived of any life, liberty, or property rights. The only claim they could have in such a case is if a statute has concretely entitled them to the subsidy, without leaving any discretion to the executive. Otherwise, they are not entitled to any judicial process before they are denied the subsidy. This is true a fortiori in the case of a legislative denial of the subsidy, since in this case the new enactment would supersede any prior statute that could serve as a basis for a nondiscretionary entitlement.

This is the heart of the symmetrical view of life, liberty, and property protection: the Bill of Attainder Clause is to the legislature what the Due Process Clause is to the executive. Both clauses prevent individualized deprivations of life, liberty, or property rights in circumvention of judicial process.¹²⁶ And the symmetry extends to the permissible actions of both branches as well: both the executive and legislative branches are permitted to impose life, liberty, or property deprivations as long as they are general and not particularized. Courts have seen fit to allow the delegation of broad rulemaking authority to administrative agencies in order to facilitate the functioning of the modern administrative state. The familiar *Londoner/Bi-Metallic* distinction in administrative law holds that life, liberty, or property deprivations pursuant to executive rulemaking trigger due process protections only when such deprivations are individualized, not when they are general.¹²⁷

126. Akhil Amar has noted that the Bill of Attainder Clause reflects, among others things, “a libertarian scheme of checks and balances by preventing any single branch of government from unilaterally depriving persons of life, liberty, or property.” Akhil Reed Amar, *Attainder and Amendment 2: Romer’s Rightness*, 95 MICH. L. REV. 203, 211 n.23 (1996). He is right to focus on life, liberty, and property, but wrong to focus on “one branch of government.” In fact, the standard bill of attainder is passed by the legislature and signed into law by the executive, implicating the coordinated activity of two branches of government. What really makes these enactments problematic is that they deprive life, liberty, or property without judicial process, not that they are imposed by a single branch of government.

127. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that no due process right attached to a property tax assessment that was generalized across the citizenry); *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385-86 (1908) (holding that a due process right attached to an individualized property tax assessment that was made based on particularized facts and circumstances).

May 2011]

THE SUBSTANCE OF PUNISHMENT

1205

C. The Standard of Review

There is no need to believe that all individualized life, liberty, or property deprivations must be struck down as bills of attainder. It is possible that courts should apply a strict scrutiny analysis, out of the recognition that rare cases may actually justify individualized life, liberty, or property deprivations that are narrowly tailored to serve a compelling government interest. The *Nixon* case¹²⁸ is an excellent candidate for such treatment. It may be that Nixon did not actually have a property right in taking possession of his presidential papers and recordings, in which case he was not deprived of any life, liberty, or property right and hence not legislatively punished. But even if he was deprived of a property right in his records, it seems that the deprivation could survive strict scrutiny. The legislature had a compelling interest in preserving the documents in question as evidence concerning the Watergate affair for potential use in criminal or civil proceedings. And Nixon posed a unique threat to this evidence, so the law targeting him was neither over- nor underinclusive.

D. Subsidy Denials and Other Constitutional Violations

While individualized subsidy denials by themselves are not inherently unconstitutional, such denials could be unconstitutional if they are used as a means to bring about other evils the Constitution forbids. When a subsidy is explicitly rewarded or denied on the basis of race, for example, the constitutional violation comes not from the mere denial, but rather from the fact that the denial is based on a suspect racial classification. A similar analysis applies in public forum cases, in which the government establishes a generally available subsidy to facilitate speech but then denies this subsidy to certain speakers on the basis of viewpoint. Here the constitutional violation comes not from the denial alone, but rather from the use of this denial to manipulate the private marketplace of speech in furtherance of an unconstitutional scheme of viewpoint discrimination.¹²⁹

This means that while a subsidy denial cannot run afoul of the Bill of Attainder Clause, it may still be unconstitutional if it is viewpoint discriminatory. This is particularly important given the history of bills of attainder, which were often used to target those who were deemed politically dangerous or subversive.¹³⁰ But the Bill of Attainder Clause should not be interpreted as a blanket prohibition on all political discrimination by the government because the First Amendment already fills this role.

128. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425 (1977).

129. See Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415 (1989).

130. See Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 500 (1984).

Nor should the Bill of Attainder Clause be seen as a catchall for striking down laws that single people out for no good reason. The Equal Protection Clause already requires that even nonsuspect classifications must be supported with a rational basis, meaning that the legislature cannot single out any person or group for any type of treatment without a plausible policy reason. Thus, we do not need the Bill of Attainder Clause to be confident that there are firm constitutional grounds for striking down many hypothetical instances of singling out for subsidy denials (e.g., singling out green-eyed people for the denial of future government gratuities).

III. APPLICATIONS

The Bill of Attainder Clause has recently sparked renewed interest, splitting political loyalties in two different contexts: Many on the political right have decried the district court injunction in favor of ACORN, while many on the left have celebrated it. Political controversy has also erupted on the question of whether the clause would prevent Congress from imposing a special “bank tax” on large financial institutions.¹³¹ In this Part, I will consider how my framework of the Bill of Attainder Clause might apply to various past cases and new hypotheticals. Whether the legislative enactment singles out someone for life, liberty, or property deprivation is a key question in all of these cases, but as we will see, it is not always dispositive.

A. *The Civil War Cases*

It is fairly clear that *Ex parte Garland*, *Cummings*, and *Pierce* all involved deprivations of what would today be considered life, liberty, or property rights. *Cummings* involved infringement of the liberty to serve as a priest.¹³² *Ex parte Garland* involved infringement of the liberty to practice law.¹³³ And *Pierce* involved the impairment of property rights by limiting the civil procedural devices available to former Confederates in state court.¹³⁴ There is some question as to whether the enactments in these cases satisfied the necessary “singling out” prong of the Bill of Attainder Clause, but that analysis involves deep questions of legislative specification. Perhaps the enactments should have been struck down solely under the Ex Post Facto Clause, since all of them involved the creation of post hoc penalties for past secessionist activity. But for our purposes, suffice it to say that these cases clearly involved life, liberty, or property deprivations and thus clearly satisfied the punishment prong of the Bill of Attainder Clause.

131. See, e.g., Carney, *supra* note 11.

132. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

133. 71 U.S. (4 Wall.) 333 (1867).

134. *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1873).

May 2011]

THE SUBSTANCE OF PUNISHMENT

1207

B. Brown

Like the Civil War cases, *Brown* clearly involved a deprivation of life, liberty, or property because it infringed on the liberty of private individuals to serve as union officers.¹³⁵ On any standard theory, there is clearly a liberty interest in being able to associate freely and direct one's own professional activities without government interference. And neither the legislature nor the executive can subvert this liberty interest in a targeted way without judicial process.

C. Lovett

Lovett concerned a law that singled out three Communist federal workers and permanently barred them from federal employment.¹³⁶ In striking down the law, the Court noted that the Framers of the Constitution "well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons."¹³⁷ So how did this case so clearly involve a life, liberty, or property interest?

Lovett involved two important features indicating that the employees were deprived of a life, liberty, or property right. The posture of *Lovett* was unique in that the Communist employees' suit sought pay for work they had already performed when the case was decided. The government agencies had decided to keep the employees despite the statute that Congress had enacted to cut off funding. Thus, the employees had a tangible property interest in the pay they had earned according to the standard contractual theory of quantum meruit.

Moreover, the *Lovett* Court found that the enactment in question did "not merely . . . cut off respondents' compensation through regular disbursing channels but permanently . . . bar[red] them from government service."¹³⁸ This suggests that there may be a liberty interest in being able to enter the government service. So perhaps the political rights of citizenship in a democracy include the opportunity to participate professionally in the ongoing conduct of one's government.

Unrelated to the life, liberty, and property analysis, but providing additional support for the *Lovett* holding, the Court noted that the enactment in question targeted the employees for their "subversive" political views and affiliations.¹³⁹ Thus the case implicated important First Amendment concerns as well as the Bill of Attainder Clause's historical purpose of preventing the singling out of dangerous political dissidents.

135. See *United States v. Brown*, 381 U.S. 437 (1965).

136. *United States v. Lovett*, 328 U.S. 303 (1946).

137. *Id.* at 317.

138. *Id.* at 313.

139. See *id.* at 308.

D. ACORN

*ACORN*¹⁴⁰ asks whether Congress can single out a named group and specify that it shall not receive any future discretionary subsidies administered by the executive branch. The enactment in this case was careful to specify that *ACORN* would not be denied payment for any work already completed pursuant to existing contracts with the government.¹⁴¹ So the question is: does the denial of future subsidies deprive the group of life, liberty, or property? This depends on whether *ACORN* has a property interest in the future subsidies, or perhaps a liberty interest in having an equal chance to apply for them.

To see how political perspective might affect this intuition, consider a case with a different political valence. Suppose that Congress had established a program to provide funding for public education regarding gun safety, to promote the responsible exercises of citizens' Second Amendment rights. Under the initial gun-safety statute, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) is given discretion to award funds to shooting ranges that offer gun-safety classes. The ATF enters into contracts with the National Rifle Association (NRA), which operates many shooting ranges and offers gun-safety courses to citizens of various ages.

Now, imagine a scandal erupts alleging that the NRA has engaged in corrupt, fraudulent, and unsafe practices in the administration of its gun-safety classes. Some of the allegations are criminal, and some simply charge that the NRA has been irresponsible in the use of government funds. In response, Congress passes an enactment providing that, while the NRA may receive funds it has earned under existing contracts, it shall not be awarded any future funds beyond this. Has the NRA been deprived of life, liberty, or property?

There is a strong intuition that *ACORN* and the NRA have no property interest in receiving subsidies that they never had any right to expect. The most plausible argument they might make is that they have a liberty interest in being able to apply on equal terms for these discretionary subsidies. But note that as a formal matter, they have actually not been prohibited from applying for the grants, only from receiving them, which was never a matter of entitlement. Under existing statutes, the executive branch always had the discretion to deny the subsidies indefinitely for any nonarbitrary reason, without offering any due process protections. And in other contexts, the existence of wide executive discretion has been found sufficient to preclude any claim of a life or liberty interest that would necessitate procedural protections.¹⁴² So it is difficult to see how

140. *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010).

141. *See ACORN v. United States*, 662 F. Supp. 2d 285, 299 (E.D.N.Y. 2009), *rev'd*, 618 F.3d 125 (2d Cir. 2010).

142. *See, e.g., Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285 (1998) (“[T]he executive’s clemency authority would cease to be a matter of grace committed to the executive authority if it were constrained by the sort of procedural requirements that respondent urges. . . . If clemency is granted, he obtains a benefit; if it is denied, he is no worse off than

May 2011]

THE SUBSTANCE OF PUNISHMENT

1209

a subsidy denial becomes problematic merely because it is imposed by legislative as opposed to executive discretion. If anything, the legislative denial is less problematic because it is not bound by any existing statutory entitlement, and it is more transparent (and arguably more democratic) than an indefinite series of executive denials would be.

E. *Public Utilities and Baseline Subsidies*

Note that the ACORN and NRA examples involve the denial of special discretionary subsidies. This distinguishes them from cases involving the denial of generally available subsidies that have come to be expected as a matter of right. Many people believe that such general subsidies form a new baseline of entitlements that fall within the heading of modern life, liberty, and property rights, thus entitling them to procedural protections before they can be denied. But this cannot be the case with special discretionary subsidies like those in the ACORN and NRA examples, in which only a few privileged groups receive the subsidies in order to facilitate particular policy goals that the legislature has defined.

F. *The Bank Tax*

In the wake of the recent financial collapse, some have suggested imposing a special tax on large financial institutions that make risky investments, primarily to serve two purposes: (1) to discourage banks from taking large risks that threaten to create negative externalities by creating widespread financial instability in the event of a market collapse; and (2) to generate tax revenue to create a government bailout fund that would provide emergency financing in the event of a large-scale bank failure, to offset the potential harm of risky investment behavior.¹⁴³

Some have insisted that a special tax levied against large banks would constitute a bill of attainder.¹⁴⁴ They would likely have no trouble with the “punishment” prong of the framework advanced in this Note; however, their argument would likely fail on the singling out prong, which is not the focus of this Note. It seems that a bank tax could be written in general terms to cover any

he was before.”); *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983) (holding that when laws “place no substantive limitations on official discretion[,] [they] create no liberty interest entitled to protection under the Due Process Clause”).

143. See Binyamin Appelbaum, *Obama Plan to Tax Large Financial Firms Designed to Pay for TARP Losses*, WASH. POST, Jan. 15, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011400927.html>.

144. See Eric Dash, *Wall St. Weighs a Challenge to a Proposed Tax*, N.Y. TIMES, Jan. 17, 2010, <http://www.nytimes.com/2010/01/18/business/18bank.html> (“In an e-mail message sent last week to the heads of Wall Street legal departments, executives of the lobbying group, the Securities Industry and Financial Markets Association, wrote that a bank tax might be unconstitutional because it would unfairly single out and penalize big banks.”).

person or company making risky investments above a certain dollar amount. This would not target any specific company or group of companies, but would apply equally to everyone who might invest money. Such a law would be functionally equivalent to special safety requirements imposed on those who work with high explosives: the special requirements are justified by the special risks that the behavior creates, and they apply only to people who choose to engage in the risky behavior.

G. *Legislative Censure*

What about Madison's claim that it would be a "vote of attainder" to support a legislative censure of a group accused of insurrection?¹⁴⁵ First we must consider the possibility that Madison meant this as a rhetorical flourish, or that he meant to limit it to cases involving the accusation of treason, the historical core of attainder cases. But discounting for these possibilities, there are three concrete ways in which the "censure" that Madison objected to did invade the life, liberty, or property rights of those it condemned. First, the censure arguably violated the common law right against defamation because it severely impugned the targeted group's reputation without due regard for the truth. As a much later case involving the executive denunciation of Communist organizations would put it, an official government proclamation that certain people or groups are dangerous subversives would "cripple the functioning and damage the reputation of those organizations in their respective communities and in the nation . . . [and thereby] violate each . . . organization's common-law right to be free from defamation."¹⁴⁶ In other words, the right against defamation is a life, liberty, or property right, and neither the legislature nor the executive can violate this right without first affording due judicial process.

Second, perhaps being declared guilty of a crime (such as insurrection) is *per se* punishment since it so clearly involves the type of judgment (and perhaps also state-imposed stigma) ordinarily reserved for the courts. This would recognize that judicial process is required not only for the substantive deprivations that are ordinarily meted out pursuant to a judicial conviction but also for the deliverance of explicit criminal verdicts. This could be accompanied by a view of life, liberty, and property interests that includes the right not to be branded officially guilty of a crime without a fair trial.

Third, as Akhil Amar has explained, a legislative enactment may infringe on life, liberty, or property rights indirectly, by impliedly withdrawing the protection of the law and encouraging private acts of violence against a targeted person or group.¹⁴⁷ Historically, this practice was reflected in cases of "outla-

145. See 4 ANNALS OF CONG. 934 (1794), *quoted in* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 144 n.1 (1951) (Black, J., concurring).

146. *McGrath*, 341 U.S. at 139.

147. Amar, *supra* note 126, at 212.

May 2011]

THE SUBSTANCE OF PUNISHMENT

1211

wry,” in which a disfavored person or group was “cast *out* of the protection of the *law*,”¹⁴⁸ resulting in open season for private assaults. “[B]y merely ‘targeting’ certain individuals, the government can often count on private citizens to pull the trigger.”¹⁴⁹ So perhaps a censure could be considered a violation of life, liberty, or property rights if it encourages private assault against any of these rights. This is less plausible than the first two explanations, but perhaps still worth considering.

CONCLUSION

The Bill of Attainder Clause and the Due Process Clause both recognize that isolated groups and individuals require judicial protection because they do not have the political power necessary to stave off rights violations that are targeted at them. For this reason, an individual person or group can only be stripped of vested rights after an impartial trial pursuant to a duly enacted and generally applicable rule. At the same time, both clauses must allow for some types of individualized treatment (by either the legislature or the executive) that falls within the scope of legitimate government activity. Both branches can issue discretionary subsidies or award individual medals of distinction, and otherwise act as they see fit, as long as they do not transgress the baseline of rights that the Constitution protects. The constitutional concept of life, liberty, and property provides the substance of this baseline, and is thus every bit as vital to the Bill of Attainder Clause as it is to the Due Process Clause.

148. *Id.*

149. *Id.*

1212

STANFORD LAW REVIEW

[Vol. 63:1177