The Bill of Attainder Doctrine: A Survey of the Decisional Law

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Introduction

The purpose of this article is to examine the bill of attainder doctrine as it has been developed by various state and federal court decisions during the past century.[1] Part I of this essay will consider briefly both the origin of attainders in English common law and the justifications offered for the two major provisions of the United States Constitution that expressly proscribe the enactment of such legislation.[2] In

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1. Although there is considerable confusion on this subject, for the purposes of this article, a "bill of attainder" is defined to consist of four separate elements: (1) a legislative act (2) imposing punishment (3) upon a designated person or class of persons (4) without benefit of judicial trial. The United States Supreme Court has adopted this quadripartite definition. United States v. Lovett, 328 U.S. 303, 315 (1946), *cited in* United States v. Brown, 381 U.S. 437, 448-49 (1965).

2. U.S. CONST. art. I, § 9, cl. 3: "No Bill of Attainder or ex post facto Law shall be passed" (a restriction applying only to Congress; *see* Smith v. State, 227 Ind. 672, 675, 87 N.E.2d 881, 882 (1949)); U.S. CONST. art. I, § 10, cl. 1:

> *No State shall* enter into any Treaty, Alliance or Confederation; grant Letters of Marque and Reprisal; coin Money, emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; *pass any Bill of Attainder*, ex post Facto Law or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

(Emphasis added).

Throughout this article, the author will assume that the nature and scope of the bill of attainder doctrine are identical, regardless of which of these two constitutional prohibitions is being discussed. The United States Supreme Court has indicated that such an assumption is permissible. Thus, Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), a case dealing with article one, section ten, has been followed or distinguished in decisions involving article one, section nine. *See* United States v. Brown, 381 U.S. 437, 447-48 (1965); United States v. Lovett, 328 U.S. 303, 315 (1946); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 380 (1867). Similarly, *Ex parte Garland* has been cited and differentiated in cases concerning article one, section ten. *See* Garner v. Board of Pub. Works, 341 U.S. 716, 723 (1951); Dent v. West Virginia, 129 U.S. 114, 128 (1889). *Accord*, Davis, *United States v. Lovett and the Attainder Bogey in Modern Legislation*, 1950 WASH. U.L.Q. 13, 16 [hereinafter cited as Davis].

The Constitution also prohibits the courts from imposing attainders of treason which work "Corruption of Blood or Forfeiture." U.S. CONST. art. III, § 3, cl. 2. That provision will not be discussed in this article; for an analysis of its meaning, *see* Wallick v. Van Riswick, 92 U.S. 202, 210 (1875).

Part II, the author will analyze *Cummings v. Missouri*[3] and *Ex parte Garland*,[4] the two watershed decisions of the United States Supreme Court that form the basis for all modern considerations of the bill of attainder doctrine. Part III of this article will consider the definition of an attainder, component by component, and will scrutinize the holdings of state and federal courts rendered between 1865 and 1964 with respect to each component. Particular attention will be accorded to the problematic aspects of each definitional element and the various techniques which the courts have relied upon to resolve those problems. In Part IV, the author will analyze *United States v. Brown*,[5] the 1965 decision of the United States Supreme Court that completely revitalized the bill of attainder doctrine. Part V will essentially repeat the step-by-step procedure undertaken in Part III, but will focus on the decisions of lower federal and state courts rendered between 1965 and 1976 in an effort to determine whether those courts have attempted to implement the expansive mandate of *Brown*. Finally, in Part VI, the author will scrutinize the rulings of the United States Supreme Court on the bill of attainder doctrine in the decade since *Brown*, culminating in the recent case of *Nixon v. Administrator of General Services*.[6]

I. The Historical Background of the Bill of Attainder Doctrine

A. In English Common Law

A bill of attainder is generally described as a legislative act that imposes a punitive sanction upon either named individuals and groups or a sufficiently well-described but unnamed person or group of persons, without any of the procedural safeguards commonly associated with a complete judicial trial.[7] In English common law, a "bill of attainder" technically referred to an enactment exacting the punishment

3. 71 U.S. (4 Wall.) 277 (1867).
4. 71 U.S. (4 Wall.) 333 (1867).
5. 381 U.S. 437 (1965).
6. 433 U.S. 425 (1977).
7. *See* note 1 *supra*. *See generally* Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 90-161 (1956) [hereinafter cited as CHAFEE]; T. COKE, FOURTH INSTITUTE 14, 36-39 (1809); 1 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 536-37 (8th ed. W. Carrington 1927); T. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 311 (3d ed. A. McLaughlin 1898) [hereinafter cited as COOLEY]; J. POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 319-21 (4th ed. 1879); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION § 1344 (5th ed. M. Bigelow 1891) [hereinafter cited as STORY]; L. TRIBE, AMERICAN CONSTITUTIONAL LAW 484-501 (1978) [hereinafter cited as TRIBE].

of death; lesser, non-capital punishments, such as imprisonment,[8] confiscation of property by the Crown,[9] banishment from the realm[10] or disenfranchisement[11] were imposed through the medium of a "bill of

8. *See, e.g.*, 9 Geo. 1, c. 15; 5 STATS. U.K. 448 (1722), *reprinted in full in* Blair v. Ridgely, 41 Mo. 40, 60-61 (1867): "and be it enacted . . . that the said John Plunket shall be detained and kept in close and safe custody, without bail or mainprize, during the pleasure of his majesty, his heirs and successors, in any gaol or prison within the Kingdom of Great Britain . . . ."; 10 & 11 Will. 3, c. 13; 4 STATS. U.K. 13 (1669): "An Act for continuing the imprisonment of *Counter* and others, for the late horrid conspiracy to assassinate the person of his sacred Majesty."

9. *See, e.g.*, 9 Geo. 1, c. 15; 5 STATS. U.K. 448 (1722), *reprinted in* Blair v. Ridgely, 41 Mo. 40, 60-61 (1867): "and be it enacted . . . that the said John Plunket shall forfeit to his majesty all his lands, tenements, hereditaments, goods and chattels whatsoever"; 13 Car. 2, c. 15; 3 STATS. U.K. 212-13 (1661): imposing "Pains, Penalties and Forfeitures" upon the "Manors, Lands and Hereditaments, Chattels Real and other Things" of specified parties; 12 Car. 2, c. 30; 3 STATS. U.K. 201, 202 (1660):

> And that all and every the Manors, Messuages, Lands, Tenements, Rents, Reversions, Remainders, Possessions, Rights, Conditions, Interests, Offices, Fees, Annuities and all other hereditaments, Leases for Years, Chattels Real and other Things of that Nature, whatsoever they be, of them the said [Oliver Cromwell and fifty other named persons] . . . shall stand and be forfeited to your Majesty;

29 Hen. 6, c. 1; 1 STATS. U.K. 623 (1450): forfeiting to the King the lands of all those previously attainted.

10. *See, e.g.*, 9 Geo. 1, c. 17; 5 STATS. U.K. 449-50 (1722), *reprinted in* Blair v. Ridgely, 41 Mo/40, 59-60 (1867):

> and be it enacted . . . that the said Francis, Lord Bishop of Rochester . . . shall and do suffer perpetual exile, and be forever banished this realm and all other his majesty's dominions, and shall depart out of the same on or before the five and twentieth day of June, in the Year of our Lord one thousand seven hundred and twenty-three . . . .;

19 Car. 2, c. 10; 3 STATS. U.K. 314 (1667), *reprinted in* Clarendon's Case, 6 How. St. Tr. 291, 391 (1667): "be it enacted . . . that the said Edward, Earl of Clarendon, shall and do suffer perpetual exile, and be forever banished this realm and all other his Majesty's Dominions . . . ."; 27 Eliz., c. 2, § 2; 2 STATS. U.K. 633 (1585):

> be it ordained, established and enacted . . . That all and every Jesuits, . . . shall within Forty Days next after the End of this present Session of Parliament depart out of the Realm of *England*, and out of all other her Highness Realms and Dominions, if the Wind, Weather and Passage shall serve for the same, or else so soon after the End of the said forty Days, as the Wind, Weather and Passage shall so serve.

11. *See, e.g.*, 1 & 2 Geo. 4, c. 47; 26 STATS. U.K. 358 (1821):

> Whereas there was most notorious Bribery and Corruption previous to the Election of Burgesses to serve in the last Parliament for the Borough of *Grampound*, in the county of *Cornwall* . . . that it may be enacted . . . That the Borough of *Grampound* . . . shall cease to elect and return Burgesses to serve in the High Court of Parliament;

22 Geo. 3, c. 31, § 1; 14 STATS. U.K. 188 (1782):

> Whereas there was most notorious and general Bribery and Corruption at the last Election of Burgesses to serve in Parliament for the Borough of *Crickdale* in the County of *Wilts* . . . be it enacted . . . That from henceforth it shall be and may be lawful to and for every Freeholder being above the Age of twenty-one Years, who shall have, within the Hundreds or Divisions of *Highworth, Crickdale, Staple, Kingsbridge* and *Malmsbury* . . . a Freehold of the clear Yearly value of forty

pains and penalties."[12] This distinction in terminology is no longer recognized in the United States.[13]

While there is little consensus on the subject,[14] the formats of most bills of attainder passed by Parliament disclose a common stylistic and structural pattern. Most such legislation evinces five separate charac-

> Shillings, to give his Vote at every Election of a Burgess or Burgesses to serve in Parliament for the said Borough of *Crickdale*;

11 Geo. 3, c. 55, § 1; 11 STATS. U.K. 314 (1771):

> Whereas a wicked and corrupt society, calling itself *the Christian Society*, hath for several Years subsisted in the Borough of *New Shoreham*, in the County of *Sussex*, . . . [a]nd whereas it appears that the chief End of the Institution of the said Society was for the Purpose of selling, from time to time, the Seat or Seats in Parliament for the said Borough . . . That the said [named members of the Society] shall be, and by virtue of this Act, are henceforth incapacitated and disabled from giving any Vote at any Election for the chusing of a Member or Members to serve in Parliament.

Section two of this same act imposed a disability upon the electorate of New Shoreham similar to that imposed by the bill of pains and penalties against the borough of Crickdale, quoted *supra*.

12. For discussions of the distinction between bills of attainder and bills of pains and penalties, *see, e.g.*, STORY, *supra* note 7, at § 1344; Davis, *supra* note 2, at 14; Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603, 605 (1951) [hereinafter cited as Wormuth]; Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212, 214 (1966) [hereinafter cited as *Need for Clarification*]; Comment, *The Constitutional Prohibition of Bills of Attainder: A Waning Guaranty of Judicial Trial*, 63 YALE L.J. 844, 847 (1954) [hereinafter cited as *Waning Guaranty*].

13. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473-74 (1977); United States v. Brown, 381 U.S. 437, 447 (1965); United States v. Lovett, 328 U.S. 303, 317 n.6 (1946); Drehman v. Stifle, 75 U.S. (8 Wall.) 595, 601 (1870); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); *In re* Yung Sing Hee, 36 F. 437, 439 (C.C.D. Ore. 1888); *In re* Shorter, 22 F. Cas. 16, 19 (D. Ala. 1865) (No. 12,811); *Ex parte* Law, 15 F. Cas. 3, 10 (S.D. Ga. 1866) (No. 8,126). This principle seems to have originated in the following erroneous dictum of Chief Justice Marshall: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810).

14. Commentators disagree as to the essentials of a bill of attainder under English law. Justice Miller found four essential elements: (1) corruption of blood, (2) legislative conviction and sentencing, (3) a punishment determined by no previously fixed rule and (4) the absence of the usual procedural safeguards. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 388 (1867) (Miller, J., dissenting, joined by Chase, C.J., and Swayne & Davis, JJ.). On the other hand, Justice Frankfurter believed the "distinguishing characteristic" of a bill of attainder to be "the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding of fact." United States v. Lovett, 328 U.S. 303, 321-22 (1946) (Frankfurter, J., concurring, joined by Reed, J.). Thus, for him, a classical bill of attainder would have to contain a declaration of guilt and a retributive infliction of punishment. *See id.* at 325. For a criticism of this thesis, see text accompanying notes 373-392 *infra*. Another commentator has concluded that a typical bill of attainder at English common law had only three key features: (1) identified subjects; (2) a penal intent on the part of the legislature, which is apparent from the document itself and (3) imposition of a capital or non-capital burden. *See* Comment, *Punishment: Its Meaning in Relation to Separation of Power and Substantive Constitutional Restrictions and Its Use in the Lovett, Trop, Perez and Speiser Cases*, 34 IND. L.J. 231, 238-39 (1959) [hereinafter cited as *Punishment*].

teristics: (1) the designation of a certain person or group of persons, (2) the recital of their crimes, (3) the pronouncement of their guilt, (4) the judgment of the legislature upon them and (5) a summary of the punishment imposed against them.[15] The attainder of the Duke of Monmouth, enacted in 1685, offers a concise illustration of this schema:

> WHEREAS *James* duke of *Monmouth* has in an hostile manner invaded this kingdom, and is now in open rebellion, levying war against the King, contrary to the Duty of his Allegiance; Be it enacted by the King's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this Parliament assembled, and by the authority of the same, that the said James duke of Monmouth stand and be convicted and attainted of high treason, and that he suffer pains of death and incur all forfeitures as a traitor convicted and attainted of high treason.[16]

In this manner, Parliament singled out the Duke of Monmouth by name, stipulated his crime of rebellion, declared him guilty of high treason, judged him to "be convicted and attainted" of that offense and imposed the punishments of death and forfeiture upon him. Not only did the statute inflict a penalty usually attendant upon a conviction of treason without affording the adjudged traitor the benefits of a judicial trial, but it also exacted the additional, barbaric punishment implicit in the word "attainder": the punishment of "corruption of blood." Justice Miller, in his dissent in the case of *Ex parte Garland*,[17] explained succinctly the consequences inherent in that phrase:

> The word attainder is derived, by Sir Thomas Tomlins, in his law dictionary, from the words *attincta* and *attinctura*, and is defined to be "the stain or corruption of the blood of a criminal capitally condemned; the immediate inseparable consequence of the common law, on the pronouncing the sentence of death." The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance.[18]

The obvious intent behind such a practice was to ensure that the descendants of the condemned man would also be compelled to pay for his crime. Imposition of such an unjust relic of feudal times by a judge

15. This schema was first developed in Davis, *supra* note 2, at 14-15. *Cf. Need for Clarification, supra* note 12, at 214 (same, except it omits element (4)).

16. 1 Jac. 2, c. 2; 3 STATS. U.K. 403 (1685), *quoted in* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473 n.35 (1977).

17. 71 U.S. (4 Wall.) 333 (1867).

18. *Id.* at 387 (Miller, J., dissenting, joined by Chase, C.J., and Swayne & Davis, JJ.). *See also* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND * 380 (3d ed. T. Cooley 1884).

after a fully adversary trial was regrettable enough;[19] its imposition by legislative fiat without any hearing whatsoever explains why the bill of attainder was an especially intolerable component of the English legal system.[20]

The origins of the bill of attainder are unclear. Most commentators suggest that such legislation first appeared during the fourteenth or fifteenth century, primarily as a device for escheating the estates of dead rebels.[21] In fact, the first Parliamentary act possessing most of the traditional attributes of an attainder was a statute passed in 1392, during the reign of Richard II, for the purpose of preserving the Crown from ecclesiastical incursions committed by members of the Roman Catholic Church.[22] The subject matter of this bill presaged one use subsequent regents made of bills of attainder and bills of pains and penalties; they were favored devices for consolidating the establishment of Protestantism in England.[23] But such legislation was primarily utilized by English kings and queens as a convenient method of political re-

19. Attainder as a consequence of *judicial* conviction for treason has since been abolished in England. Forfeiture Act of 1870, 33 & 34 Vict., c. 23; 5 L. REP. 197-205 (1870). The United States Constitution has a similar prohibition. *See* note 2 *supra*.

20. A cautionary aside is necessary regarding the use of the verb "was." As several commentators have noted, Parliament to this day retains the power to enact a bill of attainder; it has merely refrained from exercising that power for the past two centuries. *See* 21 H. HALSBURY, THE LAWS OF ENGLAND 727 (1912); *Need for Clarification, supra* note 12, at 215-16. *See also* Somervell, *Acts of Attainder*, 67 L.Q. REV. 306, 311-13 (1951) [hereinafter cited as Somervell].

21. *See* CHAFEE, *supra* note 7, at 102; Davis, *supra* note 2, at 14; Somervell, *supra* note 20, at 306-07; *Need for Clarification, supra* note 12, at 214. *See generally* G. ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 228-30 (1st ed. 1921); J. BELLAMY, THE LAW OF TREASON IN THE LATER MIDDLE AGES 177-205 (1970) [hereinafter cited as BELLAMY]; H. POTTER, OUTLINE OF ENGLISH LEGAL HISTORY 100 (5th ed. 1958); Pound, *Justice According to Law*, 14 COLUM. L. REV. 1, 1-12 (1914).

22. 26 Ric. 2, c. 5; 1 STATS. U.K. 406, 407-08 (1392):

> That if any purchase or pursue or cause to be purchased or pursued in the Court of *Rome*, or elsewhere, by any such Translations, Processes, and Sentences of Excommunications, Bulls, Instruments, or any other Things whatsoever which touch the King, against him, his Crown, and his Regality, or his Realm . . . that they, their Notaries, Procurators, Maintainers, Abettors, Fautors, and Counsellors, shall be put out of the King's Protection . . . and their Lands and Tenements, Goods and Chattels, Forfeit to our Lord the King . . . and that they be attached by their Bodies, if they may be found, and brought before the King and his council, there to answer . . . or that Process be made against them by *Praemunire Facias* . . . .

23. *See, e.g.*, 3 Jac. 1, c. 2, § 1; 3 STATS. U.K. 38 (1605): in confirming the convictions of specified parties, their crimes were recited as follows,

> That whereas *Arthur Creswel* Jesuit . . . *Oswald Tesmond* Jesuit and *Thomas Winter*. . . did traitorously and against the Duty of their Allegiance, move and incite *Philip*, then and yet King of *Spain* . . . with force to invade this Kingdom of *England*, and to join with the Papists and discontented Persons within this Realm of *England*, to depose and overthrow the same late Queen of and from her Crown . . . and to restore the superstitious, Romish Religion within the same, and to

pression.[24] As Justice Story once stated:

> Bills of this sort have been most usually passed in England in times of rebellion or 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.[25]

While it is true that bills of attainder and bills of pains and penalties were employed most often to harass religious and political minorities, several examples suggest that they might also have been used as a means of punishing former[26] or deterring potential[27] lawbreakers who

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> bring this ancient, famous and most renowned Kingdom to utter Ruin and miserable Captivity . . . .;

27 Eliz. c. 2, § 3; 2 STATS. U.K. 633 (1585): "And be it further enacted . . . That it shall not be lawful to or for any Jesuit . . . to come into, be or remain in any part of this Realm, or any other her Highness Dominions, after the End of . . . forty Days . . . and if he do, that then every such offence shall be taken and adjudged to be High Treason . . . ."; 5 Eliz., c.1, § 2; 2 STATS. U.K. 531-32 (1558):

> Be it therefore enacted . . . That if any Person or Persons . . . shall by writing, Cyphering, Printing, Preaching or Teaching, Deed or Act, advisedly and wittingly hold or stand with, to extol, set forth, maintain or defend the Authority, Jurisdiction or Power of the Bishop of Rome . . . That then every such Person . . . being therof lawfully indicted or presented within one Year next after any such offences by him . . . and being lawfully convicted or attainted at any Time after, according to the Laws of this Realm, for every such Default and Offence, shall incur unto the Dangers, Penalties, Pains and Forfeitures ordained and provided by the Statute of Provision and *Praemunire*, made in the Sixteenth Year of the Reign of King *Richard* the Second.

24. *See, e.g.*, 13 Will. 3, c. 3, § 1; 4 STATS. U.K. 81 (1701):

> Whereas the pretended Prince of WALES hath . . . openly and traitorously, with Design to dethrone your Majesty, assumed the Name and Title of JAMES the Third . . . That the said pretended Prince of WALES stand and be convicted and attainted of High Treason, and that he suffer Pains of Death, and incur all Forfeitures, as a Traitor convicted and attainted of High Treason;

1 Jac. 2, c. 3; 3 STATS. U.K. 403 (1685), *see* text accompanying note 16 *supra*; 12 Car. 2, c. 30; 3 STATS. U.K. 201, 202 (1660):

> and be it enacted by the Authority of this present Parliament, That the said *Oliver Cromwell* deceased, *Henry Ireton* deceased, *John Bradshaw* deceased and *Thomas Pride* deceased, shall by Virtue of this Act, be adjudged and be convicted and attainted of High Treason to all Intents and Purposes, as if every of them respectively, had been attainted in their lives . . . .;

16 Car. 1, c. 37; 3 STATS. U.K. 144 (1640): an act passed to reduce the number of rebels in Ireland; 24 Eliz., c. 1; 2 STATS. U.K. 633 (1585):

> Four and twenty Persons . . . by the Queen's Commission shall examine the Offences of such as shall make any open Invasion or Rebellion within this Realm . . . who after judgment given and published by Proclamation, shall be disabled to have or pretend Title to the Crown: And thereupon every Person shall be pursued to Death by all the Queen's Subjects . . . .

25. STORY, *supra* note 7, at § 1338.

26. For examples, *see* the statutes quoted in note 11 *supra*. In all those instances, the crimes complained of and cited were simple bribery and corruption, not rebellion or treason.

27. The statutes quoted in note 11 *supra* arguably were intended to have a subsidiary deterrent effect. The severity of the punishment imposed would seem to be designed to cause

were not members of dissident factions. At any rate, most commentators concur that the use of bills of attainder died out in the seventeenth century, citing the attainder of John Fenwick in 1696 as the last example.[28] Although later instances of attainder exist,[29] the utilization of such enactments certainly did not persist beyond the eighteenth century. By contrast, the last efforts to legislate a bill of pains and penalties occurred as late as the 1820's.[30]

A few comments should be offered about the scope of attainders in English common law, particularly with respect to how their victims were designated, what conduct served as the basis for punishment and what procedures were followed in enacting them. With respect to designation of victims, the legislation most commonly identified the persons affected by name.[31] But there are many instances in which the

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potential lawbreakers to refrain from engaging in criminal conduct. Also, *see, e.g.*, 28 Hen. 8, c. 18; 2 STATS. U.K. 261 (1539):

> It shall be High Treason for any Man to espouse, marry or take to his Wife, any of the King's Children being lawfully born, or otherwise commonly reputed for his children, or any of the King's Sisters, or Aunts of the Part of the Father, or any of the lawful Children of the King's Brethren or Sisters, or to contract Matrimony with any of them, without the King's License first had under the Great Seal, or to deflower any of them being unmarried: And the Woman so offending shall incur the like Danger.

28. *See* CHAFEE, *supra* note 7, at 103-04; Wormuth, *supra* note 12, at 605; *Need For Clarification, supra* note 12, at 215.

29. An example of a present, absolute attainder would be 13 Will. 3, c. 3, § 1; 4 STATS. U.K. 81 (1701), *quoted in* note 24 *supra*. For examples of conditional attainders, *see, e.g.*, 9 Geo. 1, c. 17; 5 STATS. U.K. 449-50 (1722), *reprinted in* Blair v. Ridgely, 41 Mo. 40, 60 (1867):

> and that if the said Francis, Lord Bishop of Rochester, shall return into or be found in this realm . . . he, the said Francis, Lord Bishop of Rochester, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer and forfeit as in cases of felony without benefit of clergy, and shall be utterly incapable of any pardon from his majesty, his heirs or successors;

9 Geo. 1, c. 15; 5 STATS. U.K. 448 (1722), *reprinted in* Blair v. Ridgely, 41 Mo. at 60-61:

> be it Further enacted . . . that if the said John Plunket shall break such gaol . . . that then the said John Plunket, and all and every person and persons whatsoever who shall be aiding or assisting the said John Plunket in breaking such gaol or prison, or in making such escape as aforesaid, or who shall by force take or rescue the said John Plunket out of such custody, gaol or prison, during the continuance of his imprisonment by virtue of this act, being thereof lawfully convicted, shall be adjudged guilty of felony, and shall suffer death, as in case of felony, without benefit of clergy.

30. *See* Davis, *supra* note 2, at 15; *Need for Clarification, supra* note 12, at 215. In 1820, Parliament unsuccessfully sought to pass a bill punishing Queen Caroline, wife of King George IV. For an account of those proceedings, *see* CHAFEE, *supra* note 7, at 136-37. The commentators cited above claim that this was the last effort to enact a bill of penalties. But at least one successful attempt occurred a year later. *See* 1 & 2 Geo. 4, c. 47; 26 STATS. U.K. 358 (1821), *quoted in* note 11 *supra*.

31. *See, e.g.*, 13 Will. 3, c. 3, § 1; 4 STATS. U.K. 81 (1701), *quoted in* note 24 *supra*; 1 Jac. 2, c. 2; 3 STATS. U.K. 403 (1685), *see* text accompanying note 16 *supra*; 19 Car. 2, c. 10;

victims consisted of a class of unnamed persons, each of whom could only be identified by recourse to the general description given the class.[32] In such cases, the number of individuals constituting the class could be fixed[33] or variable.[34] With respect to the type of conduct that could serve as a cause for punishment, a tripartite typology can be identified. Most commonly, bills of attainder or bills of pains and penalties imposed present disabilities arising from past conduct.[35] But often such legislation imposed future disabilities stemming from past conduct.[36] In these instances, the punishment would be conditional and the potential victim could avoid it by the commission of a future act that was the subject of the condition. Finally, in a few cases, punishment would be imposed exclusively for future conduct, *i.e.*, a penalty would attach only if a potential victim undertook a specific course of conduct at some time in the future.[37] With respect to the type of procedure involved in a legislative hearing to enact a bill of attainder, the

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3 STATS. U.K. 314 (1667), *quoted in* note 10 *supra*; 13 Car. 2, c. 15; 3 STATS. U.K. 212-13 (1661), *quoted in* note 9 *supra*; 12 Car. 2, c. 30; 3 STATS. U.K. 201, 202 (1660), *quoted in* note 9 *supra*; 3 Jac. 1, c. 2, §§ 1, 2; 3 STATS. U.K. 38 (1605), *quoted in* note 23 *supra*.

32. *See, e.g.*, 2 Geo. 4, c. 47; 26 STATS. U.K. 358 (1821), *quoted in* note 11 *supra*; 22 Geo. 3, c. 31, § 1; 14 STATS. U.K. 188 (1782), *quoted in* note 11 *supra*; 27 Eliz., c. 2, § 2; 2 STATS. U.K. 633 (1585), *quoted in* note 10 *supra*; 5 Eliz., c. 1, § 2; 2 STATS. U.K. 531-32 (1558), *quoted in* note 23 *supra*; 28 Hen. 8, c. 18; 2 STATS. U.K. 261 (1539), *quoted in* note 27 *supra*.

33. *See, e.g.*, 27 Eliz., c. 2, § 2; 2 STATS. U.K. 633 (1585), *quoted in* note 10 *supra*; 24 Eliz., c. 1, § 2, IR. STAT. AT LARGE 391 (1582), *reprinted in Ex parte* Law, 15 F. Cas. 3, 9 (S.D. Ga. 1866) (No. 8,126):

> That as well the said James [Eustace, late Viscount Baltinglas], and all others the said offenders and persons before named, as such others who by actual rebellion, and other traitorous practices have committed said abominable and detestable treason and rebellion, and have died and been slain in their said actual rebellion and treasons . . . shall be . . . convicted and attainted of high treason;

26 Hen. 8, c. 25, § 2; 3 STATS. OF THE REALM 529 (1534): "that all such persons which be or heretofore have been comforters, partakers, abettors, confederates and adherents unto the said [Thomas Fitzgerald, earl of Kildare] in his false and traitorous acts and purposes, shall in likewise stand and be attainted, adjudged and convicted of high treason."

34. *See, e.g.*, 22 Geo. 3, c. 31, §1; 14 STATS. U.K. 188 (1782), *quoted in* note 11 *supra*; 11 Geo. 3, c. 55, § 2; 11 STATS. U.K. 314 (1771), *see* note 11 *supra*; 5 Eliz., c. 1, § 2; 2 STATS. U.K.633 (1585), *quoted in* note 23 *supra*; 26 Ric. 2, c. 5; 1 STATS. U.K. 406, 407-08 (1392), *quoted in* note 22 *supra*.

35. *See* the examples cited in note 31 *supra*.

36. *See, e.g.*, 9 Geo. 1, c. 15; 5 STATS. U.K. 488 (1722), *quoted in* note 29 *supra*; 17 Car. 2, c. 5, § 1; 3 STATS. U.K. 297 (1665) (an act attainting Thomas Doleman, Joseph Bampfield and Thomas Scot of treason "if they render not themselves by a Day"); 27 Eliz., c. 2, § 3; 2 STATS. U.K. 633 (1585), *quoted in* note 23 *supra*; 28 Hen. 8, c. 18; 2 STATS. U.K. 261 (1536) *quoted in* note 27 *supra*.

37. *See, e.g.*, 13 Will. 3, c. 3, § 2; 4 STATS. U.K. 81-82 (1701):

> That if any of the subjects of the Crown of *England*, from and after the first Day of *March*, one thousand seven hundred and one, shall, within this Realm or without, hold, entertain, or keep any intelligence or correspondence . . . with the said pre-

best adjective available to describe what might transpire is "chaotic." Parliament might grant one threatened with attainder a full hearing but it was not obliged to do so.[38] The circuslike quality of the debates preceding the attainder of John Fenwick has been described vividly by Macaulay:

> The arbiters of the prisoner's fate came in and went out as they chose. They heard a fragment here and there of what was said against him, and a fragment here and there of what was said in his favour. During the progress of the bill they were exposed to every species of influence. One member was threatened by the electors of his borough with the loss of his seat. . . . In the debates arts were practised and passions excited which are unknown to well constituted tribunals, but from which no great popular assembly divided into parties ever was or ever will be free. The rhetoric of one orator called forth loud cries of "Hear him." Another was coughed and scraped down. A third spoke against time in order that his friends who were supping might come in to divide. If the life of the most worthless man could be sported with thus, was the life of the most virtuous man secure?[39]

Another critic, describing these same debates, noted that the legislators admitted "the testimony of a *single* witness, not *upon oath*, by allowing written evidence not competent in ordinary trials, and by hearing proof of what had been sworn, where Sir John Fenwick was not a party, nor present, and of things transacted by his *wife*, which could not legally exculpate or convict her husband."[40] It was this legacy that the found-

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> tended Prince of WALES . . . such person so offending . . . shall be taken deemed and adjudged to be guilty of High Treason . . . .;

9 Geo. 1, c. 15; 5 STATS. U.K. 448 (1722), *quoted in* note 29 *supra*; 17 Car. 2, c. 5, § 2; 3 STATS. U.K. 297 (1665), *quoted in* Davis, *supra* note 2, at 15:

> And be it further enacted . . . That all subjects who from and after the first day of February next ensuing shall at any time during the continuance of the said War serve the States of the United Provinces . . . . shall be and are hereby attainted of High Treason and shall suffer and forfeit to all intents and purposes as persons attainted of High Treason ought to do;

27 Eliz., c. 2, § 4; 2 STATS. U.K. 633 (1585):

> And every Person which after the End of the same forty Days, and after such Time of Departure as is before limited and appointed, shall wittingly and willingly receive, relieve, comfort, aid or maintain any such Jesuit . . . knowing him to be a Jesuit . . . shall also for such offence be adjudged a Felon, without Benefit of Clergy, and suffer Death, lose and Forfeit, as in case of one attainted of Felony;

26 Ric. 2, c. 5; 1 STATS. U.K. 406, 407-08 (1392) *quoted in* note 22 *supra*. One commentator has argued that attainders at common law were never exclusively prospective in form. *See Punishment, supra* note 14, at 241-42. As the examples cited suggest, this assertion is inaccurate. *See* notes 373-91 and accompanying text *infra*.

38. COOLEY, *supra* note 7, at 311.

39. 5 T. MACAULAY, HISTORY OF ENGLAND 198 (1886).

40. 2 R. WOODDESON, VINERIAN LECTURES, No. 41 at 636 (1792). *See also* CHAFEE, *supra* note 7, at 133-35.

ing fathers confronted when they convened to draft the Constitution in 1787.

B. In the Constitution

Those assembled at the Constitutional Convention in Philadelphia adopted the two prohibitions against bills of attainder contained in article one, sections nine and ten[41] without debate.[42] This suggests that they were aware of and consciously chose to avoid the evils of the English system.[43] Even if they were unaware of Parliament's excesses, they probably knew that many of the state legislatures had enacted bills of attainder or bills of pains and penalties in order to punish loyalists during the American Revolution.[44]

In order to understand why these two prohibitions are present in the Constitution, two different but related justifications may be advanced: one is based on the theory of separation of powers; the other has its source in the concept of procedural due process. The first justification may be summarized as follows. The structure of American government, as set forth in the first three articles of the Constitution, is an embodiment of the fundamental doctrine of separation of powers. Not only are the legislative, executive and judicial branches independent (and interdependent) components of this nation's political system, but each branch also serves (and was intended to serve) as a check and balance on the potential hegemony of the others.[45] When a legislature enacts a bill of attainder, it disturbs this delicate equilibrium by arrogating to itself the power to try and convict—a power that is properly vested solely in the judiciary. Such a legislative act not only violates the abstract principle of separation of powers endorsed by the Constitution, but it also, as a practical matter, saps the authority of the other coordi-

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41. *See* note 2 *supra*.

42. *See* J. MADISON, JOURNAL OF THE FEDERAL CONVENTION 586, 727-28 (J. Scott ed. 1893).

43. *See* Davis, *supra* note 2, at 13 n.4; Wormuth, *supra* note 12, at 605; *Need for Clarification, supra* note 12, at 216 n.30.

44. *See, e.g.*, 5 MASS. ACTS 912 (1778); 4 S.C. ACTS 450 (1838); 9 VA. STAT. 463-64 (Hening 1821). *See generally* C. VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION Apps. B & C (1902); Dolan, *Evolution of the Bill of Attainder in the United States*, 2 CATH. U. OF AMERICA L. REV. 27, 28-29 (1951-52); Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV.1, 19-32 (1948); Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 81, 147 (1948).

45. For informative discussions of the concept of separation of powers in the context of considerations of the bill of attainder doctrine, *see* Wormuth, *supra* note 12, at 603-05; Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 343-48 (1962) [hereinafter cited as *Bounds of Specification*].

nate branches of government. The result of such a diminution of authority could be legislative tyranny. To foreclose that possibility, the Founding Fathers inserted dual prohibitions against the enactment of bills of attainder, limiting the power of both the state and federal legislatures to encroach upon those areas of responsibility accorded to the judicial branch of government. This justification was well-expressed by two of the three authors of *The Federalist Papers* in their efforts to convince the legislatures of the former colonies to ratify the Constitution. As James Madison asserted:

> Bills of Attainder, *ex post facto* laws, and laws impairing obligations of contracts, are contrary to the first principles of the social compact and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State Constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights; and I am much deceived if they have not, in so doing, as faithfully consulted the genuine sentiments and the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the first link in a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.[46]

Similarly, Alexander Hamilton stated:

> The complete independence of the courts of justice is particularly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.[47]

46. THE FEDERALIST No. 44, at 279 (H. Lodge ed. 1888) (J. Madison) [hereinafter cited as THE FEDERALIST]. *But see* United States v. Brown, 381 U.S. 437, 473 (1965) (White, J., dissenting).

47. THE FEDERALIST, *supra* note 46, No. 78, at 484-85 (A. Hamilton).

These two quotations illustrate the basic doctrine: the power to try, convict and then punish is a judicial power that the legislative branch may not attempt to exercise.[48]

The second justification for the constitutional proscriptions against enactment of bills of attainder has its origins in the concept of procedural due process. The thesis may be presented as follows. When a legislature tries, condemns and punishes a person or a class of persons, it is imposing a sanction in a manner similar to that of a court of law. But a trial in a court of law affords the accused certain distinct procedural benefits, such as the right to be fully apprised of the charge against him, the right to have counsel present, the right to appear and introduce evidence in his own behalf, the right to confront and cross-examine those who give adverse testimony and the right to have an impartial jury hear the case. Trial by legislature offers no such safeguards. The person being condemned may never be informed of the crime he is alleged to have committed; he may not be permitted to have his attorney attend the proceedings, he may not himself be allowed to appear or present exculpatory evidence; he may be convicted on the basis of rumor and hearsay and he may have his guilt determined by a biased group of legislators yielding to the current prejudices of the electorate.[49] As Justice Story, the most forceful proponent of the thesis, stated:

> In [cases involving bills of attainder], the legislature assumes judicial magistracy, pronouncing on the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are comformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest powers of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions.[50]

In sum, the constitutional prohibitions of article one, sections nine and ten were a reaction to four centuries of Parliamentary abuse. They were adopted both in order to further the principle of separation of

48. For discussions by the United States Supreme Court on the subject of separation of powers in the context of rulings on the attainder doctrine, *see* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 469 (1977); United States v. Brown, 381 U.S. 437, 442-44 (1965).

49. *See* notes 39-40 and accompanying text *supra*. For discussions by the United States Supreme Court on the subject of procedural due process in the context of rulings on the attainder doctrine, *see* United States v. Brown, 381 U.S. 437, 445-46 (1965); United States v. Lovett, 328 U.S. 303, 316-38 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 322 (1867) (quoting Fletcher v. Peck 10 U.S. (6 Cranch) 87, 137 (1810)).

50. STORY, *supra* note 7, § 1344 at 216. *See* notes 68, 75 *infra*.

powers and to protect personal rights against governmental incursions.[51] It was this legacy which the United States Supreme Court dealt with in its interpretations of those two provisions in the cases of *Cummings v. Missouri*[52] and *Ex parte Garland*.[53]

II. Two Watershed Decisions

A. *Cummings v. Missouri*[54]

In June of 1865, the voters of Missouri ratified the adoption of a new state constitution. Article two, section three of that charter set forth lengthy and complex categories of acts, the commission of which precluded any future individual exercise of the franchise.[55] Section six

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51. A third justification for the prohibitions, in article one, sections nine and ten, one which has its basis in *realpolitik* rather than any abstract principles of political or legal philosophy, has been advanced by Professor Chafee. He suggested that the proscriptions against bills of attainder were inserted in the Constitution in order to protect the property of loyalists and thus further one of the chief aims of the Treaty of Versailles, concluded between the United States and Great Britain in 1783. *See* CHAFEE, *supra* note 7, at 97-98.

52. 71 U.S. (4 Wall.) 277 (1867).

53. 71 U.S. (4 Wall.) 333 (1867).

54. 71 U.S. (4 Wall.) 277 (1867).

55. Because it may be usefully compared with later examples of test oaths that were not found to come within the prohibitions of the bill of attainder clauses, and because it is enlightening to consider the broad scope of this oath, the relevant portions of article two, section three of the Missouri Constitution will be quoted in full:

> At any election held by the people under this Constitution, or in pursuance of any law of this State . . . no person shall be deemed a qualified voter, who *has ever been in armed hostility to the United States, or to the lawful authorities thereof*, or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever, in any manner, adhered to the enemies, foreign or domestic, of the United States, either by contributing to them, or by unlawfully sending within their lines, money, goods, letters, or information, or has ever disloyally held communication with such enemies; or has ever advised or aided any person to enter the service of such enemies, *or has ever, by act or word, manifested his adherence to the cause* of such enemies, or his *desire for their triumph* over the arms of the United States, or *his sympathy* with those engaged in exciting or carrying on rebellion against the United States; or has ever, except under overpowering compulsion, submitted to the authority, or been in the service of the so-called "Confederate States of America;" or has ever left this State and gone within the lines of the armies of the so-called "Confederate States of America," with the purpose of adhering to said States or armies; or has ever been a member of, or connected with, any order, society or organization inimical to the government of the United States, or to the government of this State; or has ever engaged in guerrilla warfare against loyal inhabitants of the United States, or in that description of marauding commonly known as "bushwacking;" *or has ever knowingly and willingly harbored, aided, or countenanced any person* so engaged; or *has ever come into or left this State, for the purpose of avoiding enrollment for or draft into the military service of the United States; or has ever, with a view to avoid enrollment in the militia of this State, or to escape the performance of duty therein*, or for any other purpose, enrolled himself, or authorized himself to be enrolled, by or before any officer, as disloyal, or a southern sympathizer, or *in any other terms indicating his disaffection to the Government of the United States* in its contest with

specified an expurgatory oath that incorporated by reference the categories of conduct set out in section three.[56] In general, this test oath required a denial that one had ever served the Confederacy or evinced, either by word or act, disaffection with the Union; it also exacted a promise to support the state and federal constitutions. Persons who fell within any of the classifications designated in section three were summarily denied the opportunity to hold any public or corporate office, to teach, or to hold property in trust for any religious denomination.[57] Section seven of the state constitution required present governmental officers to subscribe to the oath set forth in section six within sixty days or suffer automatic forfeiture of their positions, while section nine imposed the same requirement upon attorneys and upon ministers who wished to preach, teach or solemnize marriages within the state of Missouri.[58] Pursuant to section fourteen, failure to execute the oath rendered a person liable for a fine of five hundred dollars or six months in prison or both. Swearing falsely was an offense punishable as perjury, conviction of which entailed a term of two years or more in the state penitentiary.[59]

> the rebellion, or his sympathy with those engaged in such rebellion; or, having ever voted at any election by the people in this State, or in any other of the United States, or in any of their Territories, or under the United States, shall thereafter have sought or received, under claim of alienage, the protection of any Foreign government, through any consul or other officer thereof, in order to secure exemption from military duty in the militia of this State, or in the army of the United States: *nor shall any such person be capable of holding in this State any office of honor, trust, or profit under its authority; or of being an officer, councilman, director, trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority; or of acting as a professor or teacher in any educational institution, or in any common or other school; or of holding any real estate or other property in trust for the use of any church, religious society or congregation.*

71 U.S. (4 Wall.) at 279-80 (emphases in original).

56. The specific language of the oath was as follows:

> I, A.B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the Constitution of the State of Missouri . . . and have carefully considered the same; that I have never, directly or indirectly, done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic; that I will bear true faith and allegiance to the United States, and any law or ordinance of any State to the contrary notwithstanding; that I will, to the best of my ability, protect and defend the Union of the United States, and not allow the same to be broken up and dissolved, or the government thereof to be destroyed or overthrown, under any circumstances, if in my power to prevent it; that I will support the Constitution of the State of Missouri; and that I will make this oath without any mental reservation or evasion, and hold it to be binding on me.

Id. at 280-81.

57. *See* note 55 *supra.*

58. 71 U.S. (4 Wall.) at 281.

59. *Id.*

In September of 1865, Father Cummings, a duly ordained Roman Catholic Priest, was convicted in the circuit court of Pike County, Missouri, for preaching without first having executed the required expurgatory oath. He was assessed the prescribed fine plus court costs, but because he was unable to pay, he was promptly jailed. His conviction was upheld by the Supreme Court of Missouri. But on appeal on a writ of error, the United States Supreme Court overturned Father Cummings' conviction.[60] Justice Field, in his opinion for a five-member majority,[61] found the cited sections of the Missouri constitution violative of both the prohibition against bills of attainder and that against ex post facto laws contained in article one, section ten of the United States Constitution.[62]

The majority opinion initially noted that the test oath in question had three general characteristics. First, it was retrospective because it imposed present disabilities for past conduct; second, it penalized both overt acts of disloyalty and the mere expression of sentiments evincing disaffection with the Union; third, it failed to differentiate between those who harbored treasonous motives and those who did not.[63] Justice Field conceded that the State of Missouri had the right to establish qualifications for admission into a profession, but indicated that it could not utilize this right as a pretext for penalizing previously non-

60. *See id.* at 281-82.

61. Justice Field was joined by Justices Fuller, Clifford, Grier and Nelson. Justice Miller, joined by Chief Justice Chase and Justices Swayne and Davis, wrote a vigorous dissent in the *Garland* case that applied with equal force to the majority's ruling in *Cummings. See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 382-99 (1867) (Miller, J., dissenting, joined by Chase, C.J., and Swayne & Davis, JJ.); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 332 (1867) (Miller, J., dissenting, joined by Chase, C.J., and Swayne & Davis, JJ.). For a summary and discussion of Justice Miller's dissent, *see* notes 82-91 and accompanying text *infra*.

62. The discussion of the ex post facto violation may be found in Cummings v. Missouri, 71 U.S. (4 Wall.) at 325-32, and will not be discussed in this article. It should be noted at this juncture that at least three state courts ruled on challenges to statutorily-created expurgatory oaths prior to the Supreme Court's decision in *Cummings*. In each case, the enactments were upheld as constitutional. *See* Cohen v. Wright, 22 Cal. 293, 321, 329 (1863) (statute exacted oath of allegiance upon attorneys and litigants seeking to appear in California courts; no direct discussion of the bill of attainder doctrine); Anderson v. Baker, 23 Md. 531, 624-25 (1865) (statute required voters to execute test oath; held that the definition of a bill of attainder should not be so expansively construed as to curtail the powers reserved to the state); *Ex parte* Stratton, 1 W. Va. 304, 306 (1866) (statute imposed oath of loyalty as a condition to the retention of public office; found no ex post facto violation). However, at least the Supreme Court of Minnesota had previously held that an enactment disabling rebels from suing or defending in that state's courts violated the ex post facto prohibition contained in the state constitution. *See* Davis v. Pierse, 7 Minn. 1, 5 (1862).

63. 71 U.S. (4 Wall.) at 318.

punishable conduct.[64] The restrictions imposed by the loyalty oath were said not to be legitimate qualifications because they were irrelevant to a person's fitness to hold a designated office or to practice a specified profession. Thus, the fact that Father Cummings may have at one time left Missouri to avoid conscription was deemed to bear no relationship to his general ability to disseminate the doctrines of Catholicism or to administer the sacraments. Therefore, Justice Field concluded that the oath in question was exacted not because the state sought to limit access to particular professions so that only the most qualified would be able to practice, " but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen."[65]

Relying on a brief survey of French and English law, the majority opinion asserted that:

> [T]he deprivation of any rights, civil or political, previously enjoyed may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment.[66]

Having thus preliminarily defined the concept of punishment, Justice Field then examined article one, section ten of the Constitution. A bill of attainder was accordingly defined as "a legislative act which inflicts punishment without a judicial trial"[67] and, at least in American law, encompassed a bill of pains and penalties.[68] After noting that such a

64. *Id.* at 319.

65. *Id.* at 320.

66. *Id.*

67. *Id.* at 323. It should be noted that Justice Field omits that portion of the definition of a bill of attainder which requires the presence of named or sufficiently well-designated victims. *See* note 1 *supra*. One commentator has suggested that this component was implicit in the definition actually advanced. *See Need for Clarification, supra* note 12, at 218 n.46. But in light of the rather broad language used by the majority, *see* text accompanying note 70 *infra*, it seems fairer to say that the specificity component of the usual definition of a bill of attainder was added by later decisions and was not required by *Cummings. See* note 1 *supra*.

68. 71 U.S. (4 Wall.) at 323. For the origins of this thesis, see note 13 *supra*. It should be noted that Justice Field also emphasized at this juncture the lack of due process afforded the victim of a bill of attainder. *Id.* His language copies, almost word for word, that of Justice Story, cited earlier. *See* text accompanying note 50 *supra*.

bill can inflict punishment absolutely or conditionally,[69] Justice Field concluded that the challenged provisions of the Missouri constitution did indeed establish a presumption of culpability and impose conditional penalties, thereby attainting Father Cummings as effectively as if he had been specifically named and pronounced guilty. Thus,

> The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmaker in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.[70]

With these broad strokes, Justice Field sketched the outlines of the modern bill of attainder doctrine.

B. *Ex parte Garland*

On the same day that the Court decided *Cummings v. Missouri*, it also handed down a decision in the case of *Ex parte Garland*.[71] On July 2, 1862, Congress passed a statute setting forth an expurgatory oath to which all persons thereafter serving in the civilian and military departments of the federal government (other than the President) were compelled to subscribe.[72] This oath exacted both an affirmation of allegiance to the Constitution and a denial from the one executing it that he had ever aided, served or supported any authority inimical to the United States.[73] If the individual swore falsely, he was subject to a

69. *Id.* at 324. For a discussion of *Cummings* and conditional attainders, *see* notes 373-382 and accompanying text *infra*.

70. *Id.* at 325. *See also* United States v. Lovett, 328 U.S. 303, 327 (1946) (Frankfurter, J., concurring).

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

72. Act of July 2, 1862, ch. 128, 12 Stat. 502.

73. The specific language of the oath was as follows:

> I, A.B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; *that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto;* that I have neither sought nor accepted, nor attempted to exercise the functions of *any office whatever, under any authority or pretended authority in hostility to the United States*; that I have not yielded a voluntary support to any pretended government, authority, power or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United

conviction for perjury; once convicted, he would be precluded from enjoying governmental employment in the future.[74] On January 24, 1865, Congress enacted a law prescribing that no person could appear as an attorney in federal court without first executing the oath stipulated in the prior statute.[75]

A. H. Garland had been admitted to practice in federal court in December of 1860. From May, 1861 through January, 1865, he served as a representative for Arkansas in the Congress of Confederate States. In July of 1865, Garland received a presidential pardon contingent upon his subscription to an oath set forth in an executive proclamation dated May 29, 1865. That oath required only an affirmation of support for the state and federal constitutions and all federal laws relating to manumission of slaves. He duly executed that oath and then brought suit in federal court to have the congressional act of January 24, 1865, declared unconstitutional.[76]

Justice Field, speaking on behalf of the same five-member majority that had prevailed in *Cummings*, found the act to be invalid. As in *Cummings*, he noted that the act of Congress penalized past conduct, including conduct other than overt acts, and that it applied not only to those who gave "cordial and active support" to the Confederacy, but also to those who "yielded a reluctant obedience to the existing order,

> States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God . . . .

71 U.S. (4 Wall.) at 334-35 (emphases in original).

74. *Id.*

75. Act of January 24, 1865, ch. 20, 13 Stat. 424. Prior to the Court's ruling in *Garland*, several lower federal courts had found this statute to be unconstitutional. *See In re* Shorter, 22 F. Cas. 16, 19 (D. Ala. 1865) (No. 12,811); *Ex parte* Law, 15 F. Cas. 3, 10 (S.D. Ga. 1866) (No. 8,126); *In re* Baxter, 2 F. Cas. 1043, 1044 (E.D. Tenn. 1866) (No. 1,118). *See generally* W. ROBINSON, JUSTICE IN GREY 596-98 (1941). The ruling in *Baxter* was based on the ex post facto prohibition, but *Shorter* and *Law* both found the statute to be a bill of attainder. *Law*, in particular, offers this useful statement:

> I cannot regard the retrospective part of the oath otherwise than as a bill of pains and penalties . . . . In the arbitrary, technical sense, it may not be so called; but when it is so plainly observable that by its own inherent force it effectuates the destruction of the rights of a large order of persons, and is substantially and in effect a bill of pains and penalties, I know no other term in our language adequate to express it. By operation of the legislative will alone, the petitioner is already adjudged—adjudged without due process of law; and although forthcoming, not called to trial, according to the general laws of the land; the statute affecting his person as directly and accurately as though he were named in its body,—disenabling him from appearing or being heard as an attorney or counselor, at the bar of this court, and thereby depriving him of the right to acquire and own property, by his professional skill and labor.

76. 71 U.S. (4 Wall.) at 335-37.

established without their co-operation."[77] Since the statute effected punishment in that it mandated, as a practical matter, a perpetual exclusion from the right to practice an ordinary avocation, it was deemed to be subject to the prohibition against bills of attainder contained in article one, section nine of the Constitution.[78]

The majority continued by stating that because an attorney is an officer of the court, he is properly subject only to judicial, not legislative, discipline.[79] It admitted that "[t]he legislature may undoubtedly prescribe qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life."[80] But that power was said to be limited by the same constitutional constraints imposed upon the state of Missouri in *Cummings*.[81] Consequently, the Court abrogated the act of January 24, 1865.

C. Some General Observations

At this juncture, it is useful to offer a few preliminary generalizations about the *Cummings* and *Garland* cases. First of all, it is necessary to realize that the *Cummings* decision utterly revolutionized the bill of attainder doctrine. This is borne out by a careful consideration of Justice Miller's dissent in *Ex parte Garland*.[82] After reviewing the classical definition of a bill of attainder at English common law,[83] Justice Miller painstakingly enumerated the reasons why the act of Congress involved in *Garland* and the provisions of the Missouri constitution challenged in *Cummings* did not fit within that definition. As he noted, these legislative acts did not work corruption of blood, which was a traditional consequence of an attainder.[84] Nor, he argued, did they sufficiently designate the persons attained. Thus the act of Congress in *Garland*

> only required [an oath] of those who propose to accept an office or to practice law; and as a prerequisite to the exercise of the

77. *Id.* at 376-77.
78. *Id.* at 377.
79. *Id.* at 378-79.
80. *Id.* at 379.
81. *Id.* at 380. The Court also noted that, as applied in the case at bar, the congressional act had the effect of attempting to countermand an unconditional executive pardon; such an attempt, said Justice Field, was beyond the powers of Congress. *Id.* at 381.
82. 71 U.S. (4 Wall.) 333, 382-90 (1867) (Miller, J., dissenting, joined by Chase, C.J., and Swayne & Davis, JJ.)
83. *Id.* at 388. *See* note 14 *supra*, for a summary of Justice Miller's discussion.
84. *Id.* at 389. *See* note 18 and accompanying text *supra* for a discussion of this concept.

> functions of a lawyer, or the officer, it is demanded of all persons alike. It is said to be directed, as a class, to those who were engaged in the Rebellion; but this is manifestly incorrect, as the oath is exacted alike from the loyal and disloyal, under the same circumstances, and *none* are compelled to take it.[85]

Moreover, claimed Justice Miller, the challenged legislation declared no conviction, pronounced no sentence and inflicted no punishment.[86]

An examination of Justice Miller's critique of the majority opinion yields mixed conclusions. The two statutes in question essentially deprived persons of the ability to practice their professions. Although this was not one of the usual penalties imposed at common law,[87] it is ar-

85. *Id.* at 389-90 (emphasis in original).

86. *Id.* at 390. It should be noted that the division within the United States Supreme Court was mirrored by the various decisions regarding the validity of test oaths rendered by state courts during the succeeding quarter century. A number of state courts invalidated such legislation. *See, e.g.*, Burkett v. McCarty, 73 Ky. (10 Bush) 758, 761 (1874) (expurgatory oath exacted from voters); Commonwealth v. Jones, 73 Ky. (10 Bush) 725, 740 (1874) (anti-duelling oath required of public officials); State *ex rel.* Pittman v. Adams, 44 Mo. 570, 587 (1869) (act requiring dismissal of curators of private college who failed to execute a test oath); State v. Heighland, 41 Mo. 388, 389 (1867) (expurgatory oath imposed upon teachers); Murphy & Glover Test Oath Cases, 41 Mo. 340, 387-88 (1867) (test oath exacted from ministers); Green v. Shumway, 39 N.Y. 418, 425 (1868) (expurgatory oath required of voters); Lynch v. Hoffman, 7 W. Va. 553, 557 (1874) (test oath imposed upon litigants); Ross v. Jenkins, 7 W. Va. 284, 287 (1874) (challenge to same statute involved in *Lynch*); Pierce v. Carskadon, 6 W. Va. 383, 386 (1873) (same); Kyle v. Jenkins, 6 W. Va. 371, 375-76 (1873) (expurgatory oath imposed upon suitors). But other decisions upheld the validity of various types of test oaths. *See, e.g.*, Shepherd v. Grimmett, 3 Ida. 403, 411, 31 P. 793, 796 (1892) (anti-Mormon test oath required of voters); Wooley v. Watkins, 2 Ida. 590, 602-03, 22. P. 102, 106 (1889) (same); Boyd v. Mills, 53 Kan. 594, 604, 37 P. 16, 18 (1894) (expurgatory oath exacted from voters); State *ex rel.* Wingate v. Woodson, 41 Mo. 227, 230 (1867) (same); Blair v. Ridgely, 41 Mo. 40, 124 (1867) (same); Ridley v. Sherbrook, 43 Tenn. (3 Coldwell) 569, 577-78 (1867) (same); *Ex parte* Quarrier & Fitzhugh, 4 W. Va. 210, 222 (1870) (test oath imposed upon attorneys); Randolph v. Good, 3 W. Va. 551, 553-54 (1869) (expurgatory oath exacted from voters); *Ex parte* Hunter, 2 W. Va. 122, 151, 166 (1867) (test oath imposed upon all attorneys seeking to practice in state courts).

87. *But see* 9 Geo. 1, c. 17; 5 STATS. U.K. 449-50 (1722), *reprinted in* Blair v. Ridgely, 41 Mo. 40, 60-61 (1867): "and that the said Francis, Lord Bishop of Rochester, shall from thenceforth forever be disabled, and be incapable of and from taking, holding or enjoying any office, dignity, promotion, benefice or employment within this realm . . . ."; 19 Car. 2, c. 10; 3 STATS. U.K. 314 (1667), *reprinted in* Clarendon's Case, 6 How. St. Tr. 291, 391 (1667): "and [Edward, Earl of Clarendon] shall be forever disabled from having, holding or enjoying any office or place of public trust, or any other employment whatsoever"; 21 Ric. 2, c. 6; 1 STATS. U.K. 418 (1397): excluding the sons of certain named persons from ever serving in Parliament. These examples are distinguishable from the statutes involved in *Cummings* and *Garland* on several grounds. First, at least with respect to the bills against the Bishop of Rochester and the Earl of Clarendon, the denials of the right to hold office were part and parcel of general forfeitures of all property. The same is not true of the legislation in *Cummings* and *Garland*. Second, the Missouri Constitution (except with respect to the voting provisions and employment provisions of article two, section three) and the act of Congress imposed conditional deprivations, while these English bills exacted absolute depri-

guably just as serious a deprivation for the individual as forfeiture of property or disenfranchisement.[88] It is true that the challenged legislation did not work corruption of blood, but corruption of blood at common law was only the consequence of the imposition of a sentence of death and, by definition, a bill of pains and penalties (as these enactments were) does not impose a capital sanction.[89] It is equally true that the class affected by the statute was not just that class which served or sympathized with the Confederacy, but included those who sought to retain or attain public office or practice a certain profession; the former was a subclass of the latter. But that latter class of persons, though not presently fixed, was not too indefinite to serve as the subject of an attainder; variable classes of persons had been attainted at common law.[90] Nevertheless, it *is* true that the enactments in question neither stated a legislative conviction nor pronounced a sentence of guilt; in those respects, they failed to meet the traditional criteria for a bill of attainder.[91] Yet the net effect of Justice Field's opinion was to sweep away those traditional criteria and to replace them with a simplified, streamlined definition that required no particularly precise format. Thus, Justice Field's opinion marked a new departure and perhaps it was the novelty of the direction taken by the majority to which Justice Miller took exception. At any rate, it is accurate to say that the modern doctrine of bills of attainder dates from the *Cummings* decision.

Second, it is important to note that the *Cummings* decision does permit the states to impose qualifications and, by extension, disqualifications, upon an entrant to a profession. The problem is how to determine which types of qualifications or disqualifications are constitutionally justifiable. In *Cummings*, the Court concerned itself with whether acts constituting a disqualification were rationally related

vations. Third, these English bills created disabilities directed against a fixed class of persons while the legislation in *Cummings* and *Garland* imposed potential deprivations upon a variable class (*i.e.*, anyone declining to execute the oath required, regardless of his motive for failing to do so).

88. In fact, it may be argued that the denial of the right to practice one's profession works an indirect forfeiture. *See* note 75 *supra*.

89. Justice Miller's objection makes sense only if one assumes that he, unlike Justice Field, did not believe that the term "bill of attainder" encompassed what were called "bills of pains and penalties" at common law. *Accord*, Davis, *supra* note 2, at 21 n.29. For a discussion of the distinctions between these two terms, *see* notes 8-12 and accompanying text *supra*. A literal acceptance of Justice Miller's thesis would be self-defeating. Since even a capital sentence did not work "corruption of blood" in American law, it would seem that a strict insistence upon such a requirement would yield the result that *no* legislative act could be properly labelled as a bill of attainder.

90. *See* note 34 and accompanying text *supra*.

91. *See* note 15 and accompanying text *supra*.

to the issue of an entrant's fitness to practice his intended profession.[92] One commentator has suggested that the same standard was not applied in *Garland* because an oath disavowing participation in rebellion is relevant to an individual's fitness to practice law.[93] But, in point of fact, the opposite is true, at least with respect to the specific facts involved in each case. Whether or not one served in or supported the Confederacy would seem to have as little connection with his ability adequately to represent a client in federal court as it would with respect to his ability to preach Catholicism. As the Court stated in dictum in a case decided twelve years later, the rule of relevancy developed in *Cummings* also applied in *Garland*.[94] The implications arising from the judicial adoption of a relevancy standard are manifold. Nevertheless, the key implication would seem to be that courts confronting bill of attainder challenges cannot rely on fixed principles; instead, they must in each instance scrutinize the subject matter of the state law together with the basis upon which it imposes a disability and then determine whether such a disability is a legitimate device for effectuating the state's regulatory purpose.

Finally, it should be emphasized that both *Cummings* and *Garland* proffer an expansive notion of the bill of attainder doctrine. In *Cummings*, the majority stated that deprivation of some right or privilege to which a citizen is normally entitled may be classifiable as a punishment, depending upon the attendant circumstances.[95] This definition may well be the broadest construction the United States

92. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1867). One commentator has characterized this discussion of relevancy as a "gratuitous" observation; he suggests that the gravamen of the decision was that the enactments in question were deemed by the Court to be little more than disguised punitive measures. *Waning Guaranty, supra* note 12, at 850 n.44. This is an inaccurate conclusion. It is true that the Court struck down the challenged provisions of the Missouri constitution because they imposed punishment and were therefore bills of attainder; but these enactments were said to be punitive *because* they imposed disabilities on the basis of acts that were irrelevant to one's fitness to practice one's chosen profession. *See* 71 U.S. (4 Wall.) at 320. Thus, the relevancy discussion was a crucial element of the Court's punishment analysis, which in turn was the basis for its conclusion that the challenged legislation did in fact constitute a bill of attainder. A dozen years after *Cummings* and *Garland*, Justice Field, speaking for the majority in another case, emphasized this point very clearly: "The constitution of Missouri and the act of Congress in question in [*Cummings* and *Garland*, respectively] were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions." Dent v. West Virginia, 129 U.S. 114, 129 (1889).

93. *See* Wormuth, *supra* note 12, at 606. *See* notes 579-89 and accompanying text *infra*.

94. *See* note 92 *supra*.

95. 71 U.S. (4 Wall.) at 320.

Supreme Court has ever given the term "punishment."[96] Although the phrase "depending upon the attendant circumstances" is a significant caveat, it seems fair to say that a literal adherence to the language of *Cummings* might have enabled the Court to avoid some of the conceptual difficulties it later encountered regarding the subject of punishment.[97] More importantly, however, the Court in *Cummings* explicitly indicated that in dealing with the bill of attainder doctrine, it would concern itself with substance, not form; it would look at the nature and effect of the disability imposed, regardless of how the legislature chose to characterize that disability.

One could reasonably have expected that as a consequence of *Cummings* and *Garland*, much federal and state legislation directed against political, religious, or other social minorities might succumb to bill of attainder challenges. In fact, the reverse is true. In the one hundred and ten years since *Cummings* was decided, only twenty-two decisions have invalidated legislation on bill of attainder grounds.[98] Thus, the discussion in the remainder of this article will serve a dual purpose. It will analyze how the courts have interpreted the doctrines of *Cummings* and *Garland* and, more importantly, it will focus upon the stratagems devised by succeeding courts to *avoid* finding bills of attainder.

III. Development of the Bill of Attainder Doctrine: Pre-*Brown*

As was noted earlier,[99] the modern definition of a bill of attainder has four distinct components: it is (1) a legislative act (2) imposing punishment (3) upon a designated person or class of persons (4) without

96. For alternative formulations offered by the Court, *see* notes 503, 506, and 515 and accompanying text *infra*.

97. *See* notes 516-524 and accompanying text *infra*.

98. United States v. Brown, 381 U.S. 437, 440 (1965); United States v. Lovett, 328 U.S. 303, 315 (1946); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1872); Putty v. United States, 220 F.2d 473, 478 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955); Davis v. Berry, 216 F. 413, 419 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917); *In re* Yung Sing Hee, 36 F. 437, 439 (C.C.D. Ore. 1888); Blawis v. Bolin, 358 F. Supp. 349, 354 (D. Ariz. 1973); Dodge v. Nakai, 298 F. Supp. 26, 34 (D. Ariz. 1969); Steinberg v. United States, 163 F. Supp. 590, 592 (Ct. Cl. 1958); Jones v. Slick, 56 So. 2d 459, 461 (Fla. 1953); McNealy v. Gregory, 13 Fla. 417, 450 (1870); Burkett v. McCarty, 73 Ky. (10 Bush) 758, 761 (1874); Commonwealth v. Jones, 73 Ky. (10 Bush) 725, 740 (1874); State *ex rel.* Pittman v. Adams, 44 Mo. 570, 589 (1869); State v. Heighland, 41 Mo. 254, 255 (1867); Green v. Shumway, 39 N.Y. 418, 425 (1868); Thompson v. Wallin, 196 Misc. 686, 696-97, 93 N.Y.S. 2d 274, 285 (1949), *rev'd*, 301 N.Y. 476, 95 N.E.2d 806 (1950); Opinion to the House of Representatives, 80 R.I. 281, 285-86, 96 A.2d 623, 626 (1953); Lynch v. Hoffman, 7 W. Va. 553, 557 (1874); Ross v. Jenkins, 7 W. Va. 284, 287 (1874); Kyle v. Jenkins, 6 W. Va. 371, 375-76 (1873).

99. *See* note 1 *supra*.

benefit of judicial trial. This section of the article will analyze the further development of the bill of attainder doctrine by both state and federal courts; the discussion will be confined generally, but not exclusively, to decisions rendered between 1867 and 1965.[100] To accomplish this purpose, each component of a bill of attainder will be analyzed in a separate section.

A. "A Legislative Act"

Superficially, this first component of the definition of a bill of attainder would seem to present few difficulties, but its simplicity is deceptive. Two facets of the concept of "legislative act" will be explored in this section of the article. The first problem is the formulation of guidelines for determining when a legislature is acting in a legislative capacity. The other issue is the proposed extension of the principles underlying the bill of attainder doctrine to acts of the executive branch of government.

1. Criteria for Determining Legislative Capacity

The initial problem can be stated succinctly: how does a court decide whether a particular act of the legislature is an exercise of its legislative functions and thus is potentially subject to the proscription against bills of attainder? A possible approach may be found by referring to English history. A bill of attainder at common law always originated as a proposed law which Parliament debated and then voted upon; once passed, it was codified as part of the statutes of the realm.[101] Although some objections may be raised to such a formalistic interpretation of the phrase "acting in its legislative capacity,"[102] in ninety-nine

100. The structure of this article reflects the author's conviction that the decision in United States v. Brown, 381 U.S. 437 (1965), is second in importance only to *Cummings* itself and thus merits separate discussion. In some areas of the bill of attainder doctrine (*e.g.*, the scope of the term "legislative act"), however, the *Brown* decision had no impact. With respect to those substantive areas, the author will scrutinize both pre- and post-*Brown* rulings. But with respect to those substantive areas dealt with in *Brown*, post-1965 cases will be analyzed in Part V of this article. *See* notes 805-1061 and accompanying text *infra*.

101. *See* the sources cited in note 21 *supra*.

102. This formulation would not encompass certain suggested extensions of the bill of attainder doctrine to such matters as legislative contempt citations or the efforts of congressional investigative committees to punish persons subpoenaed to testify before them by exposing such persons to undesirable publicity. The former extension has been proposed by several justices of the United States Supreme Court. *See* Barenblatt v. United States, 360 U.S. 109, 154-62 (1959) (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.); Uphaus v. Wyman, 360 U.S. 72, 108 (1959) (Black, J., dissenting, joined by Douglas, J.). The latter theory has been most prominently advanced by two commentators. *See* CHAFEE, *supra* note 7, at 159-60; *Punishment, supra* note 14, at 249 n.91. Under the definition cited in

of one hundred cases, this rather obvious definition will suffice. Thus, the major decisions of the United States Supreme Court invalidating statutes as bills of attainder mentioned (and needed to mention) the legislative act requirement cursorily because the petitioners in those cases were challenging directly the constitutionality of specific laws.[103]

But there are a few borderline cases arising from atypical factual situations in which the courts have been compelled to grapple with the meaning of the words "legislative act." Thus, in *French v. Senate of California*,[104] the petitioner, a duly elected state senator, had been charged with taking a bribe in return for casting a favorable vote on a piece of proposed legislation. In February of 1905, he was expelled from his seat by a resolution of the senate in accordance with the plenary power to discipline its own members vested in that assembly by a provision of the California constitution.[105] Among the challenges raised by French before the state supreme court was the contention that the resolution amounted to a bill of attainder. The court disagreed, finding that the act of the senate lacked the "force of law."[106] The rationale offered in support of this assertion was that whereas a true bill of attainder extinguished "civil and political rights and capacities," the resolution of expulsion merely deprived French of his right to occupy his seat in the senate.[107]

In *McNealy v. Gregory*,[108] a new constitution for the state of Florida was adopted by a convention of elected delegates in 1868. One provision of that charter required the state courts to find a failure of consideration in all cases involving promissory notes, deeds or bills of sale given in exchange for slaves; no suits could be based on such deeds or notes executed after January 10, 1861.[109] The Florida Supreme

the text, neither situation would present the possibility of a viable bill of attainder challenge, because neither situation would involve the enactment of a law.

103. *See* United States v. Brown, 381 U.S. 437, 441, 447-48 (1965); United States v. Lovett, 328 U.S. 303, 315 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867).

104. 146 Cal. 604, 80 P. 1031 (1905).

105. *Id.* at 605, 80 P. at 1032. *See* CAL. CONST. art. IV, § 5, *formerly* art. IV, § 9.

106. 146 Cal. at 611, 80 P. at 1034. *Cf.* Faxon v. School Comm., 331 Mass. 531, 538, 120 N.E.2d 772, 776 (1954) (said the committee, in dismissing a teacher who failed to cooperate with a legislative committee investigating Communism, was not making a "rule or regulation of a legislative nature").

107. 146 Cal. at 611, 80 P. at 1034. *Cf.* Bond v. Floyd, 251 F. Supp. 333, 345 (N.D. Ga. 1966), *rev'd on other grounds*, 385 U.S. 116 (1967) (said action of Georgia House of Representatives denying plaintiff his seat had a "rational basis"). The holding in *French* may be simply a variant way of expressing the conclusion that the case presented a nonjusticiable controversy. For a federal view of the justiciability issue on somewhat similar facts, see Powell v. McCormack, 395 U.S. 486, 548-49 (1969).

108. 13 Fla. 417 (1870).

109. *Id.* at 419-20. *See* FLA. CONST. OF 1868 art. XVI, § 26.

Court found this provision to be unconstitutional.[110] Before arriving at that conclusion, however, it had to decide whether the action of the convention in adopting such a provision was a legislative or a judicial act. The court delineated certain differences between the two. First, legislative acts prescribed rules to control others, while judicial acts essentially adhered to pre-existing rules; second, unlike legislative acts, judicial acts "follow notice."[111] Based on these distinctions, the Florida Supreme Court offered two possible characterizations of the adoption of the constitutional provision in question: either the act of the convention was wholly legislative because the delegates had laid down a rule applicable to a class of judgments rather than one judgment in particular and because the deliberations of the delegates were not accompanied by notice to and a hearing for the affected parties,[112] or the act of the convention was partly legislative and partly judicial because it declared a legal doctrine applicable to a set of common factual situations and because it prescribed a prospective rule for the state's courts to follow.[113] Under either interpretation, the state supreme court found the challenged provision to be a bill of attainder because it denied those being deprived of their bargained-for contractual rights the safeguards inherent in a full-fledged judicial trial.[114]

Dodge v. Nakai[115] involved a suit to enjoin enforcement of an order by the Navajo Tribal Council excluding one Mitchell, a director of the Dineheiina Nahiilna Be Agaditahe, Inc., a non-profit corporation, and others from the tribe's Arizona reservation lands. The order arose from an incident that had occurred during a meeting of the Navajo Tribal Council Advisory Committee. Mitchell was alleged to have engaged in contemptuous laughter, which provoked a scuffle with a committee member.[116] After noting that Indian tribes exercising powers of self-government are prohibited from enacting bills of attainder,[117] the federal district court confronted a difficult problem since the tribal council is vested with both legislative and judicial powers by the provi-

110. 13 Fla. at 450.

111. *Id.* at 439.

112. *Id.* at 440.

113. *Id.* at 441.

114. *Id.* at 442-43, 450. The court also noted that in its view the electorate had not delegated the capacity to exercise judicial powers. *Id.* at 444-46. Thus, that part of the opinion discussing the possibility that the act of the convention might be characterized as partly legislative and partly judicial is dictum.

115. 298 F. Supp. 26 (D. Ariz. 1969).

116. *Id.* at 31.

117. *See* 25 U.S.C. § 1302(9) (1970).

sions of the Navajo Tribal Code,[118] it was necessary to decide whether the council's act was judicial or legislative in nature. The court pointed out that a specific section of the tribal code listed certain grounds for exclusion from reservation lands and Mitchell's act did not fall within any of the enumerated categories.[119] Since no rule of general application subjected non-Navajos to possible exclusion for engaging in the kind of conduct Mitchell was accused of committing, the council could *not* be said to have acted in a judicial capacity, which the court defined as "a role characterized by the interpretation and individual application of existing rules of general application."[120] If the council was not exercising its judicial powers, then its act had to be a legislative one and, in light of the penalty imposed, constituted a bill of attainder.[121]

These cases illustrate the various ways in which courts define the term "legislative act." *French* stands for the proposition that the governing criterion is whether the legislature's resolution has the "force of law."[122] This purported reason for distinguishing the state senate's action from a bill of attainder is conclusory in nature; the court never explicitly indicates what the phrase "force of law" signifies. Arguably, from the perspective of French, a senatorial resolution denying him the privilege of occupying the office to which he was duly elected had an impact equal to that which would have resulted had both houses of the California legislature enacted, with the approval of the governor, a bill specifying that "Senator French is hereafter denied the right to serve out the remainder of his term of office." The California Supreme Court embellished its conclusory statement with references to the nature of the penalty exacted; thus, a legislative act is one which apparently must result in the deprivation of certain nebulous "civil and political rights and capacities."[123] This assertion may be challenged on three grounds:

118. *See* 298 F. Supp. at 33. The court cited Navajo Tribal Code, tit. 17, §§ 1781-1786.

119. 298 F. Supp. at 34. *See* Navajo Tribal Code, tit. 17, § 1782.

120. 298 F. Supp. at 34.

121. *Id.*; the court cited the case of Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963), in support of its assertion that exclusion from reservation lands amounted to punishment. *See* note 515 and accompanying text *infra*.

122. *See* note 106 and accompanying text *supra*. The California Supreme Court's use of this phrase is not unique. More recently, the United States Supreme Court has stated that when a legislative body delegates rulemaking powers to an administrative agency, that agency's exercise of the delegated power yields rules having the force or status of law. *See, e.g.*, Abbot Labs v. Gardner, 387 U.S. 136, 151-52 (1967); Paul v. United States, 371 U.S. 245, 255 (1963); Public Util. Comm'n v. United States, 355 U.S. 534, 542 (1958). It is important to note that the United States Supreme Court utilizes the phrase only to *describe* the effect of a specific type of delegation, whereas the California Supreme Court utilizes it to *distinguish* the senatorial resolution involved in *French* from a truly legislative act.

123. *See* note 107 and accompanying text *supra*.

First, the unexplained reference to rights and capacities is hopelessly vague; second, the court erroneously made the element of punishment (the second component of the definition of a bill of attainder) the primary basis for determining whether the senate acted in a legislative capacity, thereby inextricably confusing two quite separate factors; finally, the court invoked English history but conveniently neglected to mention that some bills of pains and penalties at common law did impose the penalty of loss of the right to hold an existing office.[124]

McNealy also presents some difficulties. The Florida Supreme Court stated initially that a legislative act fixes a prospective rule, whereas a judicial act applies an existing rule.[125] While this is a common formulation,[126] *McNealy* makes an uncommon use of it. The court concluded that the bill of attainder doctrine applies both to legislative acts and to partly legislative and partly judicial acts.[127] The confusing nature of the court's opinion arises from the fact that it combined the fourth component of the definition of a bill of attainder ("without the safeguards of a judicial trial") with the first component ("a legislative act"). The result is an example of circular logic; it is redundant to make the absence of trial-type safeguards a criterion for defining the words "legislative act" when the sole purpose of even attempting such a definition is to ascertain if the prohibition against bills of attainder is applicable. A bill of attainder, by definition, applies only to those legislative acts unaccompanied by the procedural protections inherent in a full judicial trial. While the consideration of procedural due process is relevant to any analysis of the bill of attainder doctrine,[128] it is not a useful referent for determining whether a particular act of the legislature was an exercise of its legislative functions. Thus, the prohibition of article one, section ten applies to legislative acts

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124. *See* note 87 *supra*.

125. *See* note 111 and accompanying text *supra*.

126. *See* Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908) (Holmes, J., for the Court):

> A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power;

J. DICKINSON, ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES 21 (1927): "What distinguishes legislation from adjudication is that the former affects the rights of individuals in the abstract and must be applied in a further proceeding before the legal position of any particular individual will be definitely touched by it; while adjudication operates concretely upon individuals in their individual capacity."

127. *See* notes 112-113 and accompanying text *supra*.

128. *See* notes 49-50 and accompanying text *supra*.

usurping judicial functions, not mixed legislative and judicial acts carried out without notice and a hearing. The latter may constitute a denial of due process but they are not readily classifiable as bills of attainder *if* the assembly so acting is vested with both legislative and judicial authority.[129] Of course, it should be noted that the discussion of quasi-judicial and quasi-legislative acts in *McNealy* is dictum as the court believed that the act of the Florida constitutional convention was wholly legislative in nature because it prescribed a prospective rule and did not follow notice.[130] The notice aspect of this definition has been dealt with earlier, but the first aspect also provides no help because legislatures are constitutionally permitted to enact retroactive rules so long as the retroactive features of the enactment are reasonable[131] and often such retroactive legislation is challenged unsuccessfully as a bill of attainder.[132] In sum, the *McNealy* decision creates more difficulties

129. One reason why the ultimate holding of *McNealy* is not objectionable is that the court concluded that the state constitutional convention was not vested with both types of authority. *See* note 114 *supra.*

130. 13 Fla. at 440.

131. *See, e.g.*, Massey Motors v. United States, 364 U.S. 92, 102 (1960) (allowed retroactive application of 1956 treasury regulation defining depreciation to taxable years of 1950 and 1951); FHA v. Darlington, 358 U.S. 84, 91-92 (1958) (sustained application of 1954 amendment prohibiting use of housing constructed under FHA-insured mortgages as transient hotel to premises built in 1949), Lichter v. United States, 334 U.S. 742, 788-89 (1948) (allowed application of Renegotiation Act permitting the government to recover excess profits realized by wartime contractors to contracts entered into before April, 1942, the date the act went into effect); Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 316 (1945) (permitted Minnesota to apply a statute of limitations for securities fraud cases enacted in 1941 to a suit lodged in 1937); Welch v. Henry, 305 U.S. 134, 151 (1938) (allowed Wisconsin legislature to tax corporate dividends earned in 1933 at a rate set by a statute passed in 1935); Mahler v. Eby, 264 U.S. 32, 39 (1924) (upheld 1920 law providing for deportation of aliens who committed certain classes of acts as it was applied to persons who fell within the coverage of the statute only because of 1918 convictions). *See generally*, Greenblatt, *Judicial Limitations on Retroactive Civil Legislation*, 51 Nw. U.L. REV. 540, 550-66 (1956); Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 697-726 (1960); Slawson, *Constitutional and Legislative Considerations in Retroactive Lawmaking*, 48 CALIF. L. REV. 216, 235-51 (1960); Weinberg & Simon, *The Constitutionality of the Portal-to-Portal Act of 1947 in the light of decisions Affecting Retroactive Legislation in the Supreme Court*, 22 TEMP. L.Q. 369, 371-90 (1948). For a recent consideration by the Supreme Court of the general permissibility of retroactive civil legislation, see Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 14-20 (1976).

132. *See, e.g.*, Garner v. Board of Pub. Works, 341 U.S. 716, 723 (1951) (loyalty oath requiring disavowal of membership in subversive organization for the preceding five years); Hawker v. New York, 170 U.S. 189, 196 (1898) (statute disqualifying convicted felons from practicing medicine applied to one who was convicted before the statute was enacted); Drehman v. Stifle, 75 U.S. (8 Wall.) 595, 601 (1870) (postwar Missouri statute provided immunity from suit for acts done during the Civil War on behalf of the military government); United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976) (anti-racketeering statute applying to acts committed before it took effect); MacKay v. McAlexander, 268 F.2d 35, 37 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960)

than it solves.

Contrast *McNealy* and *Nakai*, which does offer a workable definition of a legislative act. *Nakai* describes a legislative act in a negative fashion rather than attempting to formulate an all-encompassing definition. With regard to a judicial act, *Nakai* offers the following tripartite typology: such an act involves (1) an individual application of (2) existing rules of (3) general application.[133] If any of these three elements is missing, the act is, *ipso facto*, deemed to be legislative in nature. This approach has a great deal of merit. It is not overly expansive,[134] but by requiring the conjunction of three independent factors before a specific act can be removed from the "legislative" category, it offers a reasonably reliable means of identifying the wide variety of acts that can be characterized as legislative in nature.[135]

2. Pseudo-Bills of Attainder

The traditional definition of a bill of attainder refers to *legislative* acts that punish specified persons or groups without the safeguards of a judicial trial. Despite some contrary indications,[136] no attempt had

(statute ordering deportation for one joining the Communist Party even if one did so prior to its enactment); Putty v. United States, 220 F.2d 473, 478 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955) (amendment to the Organic Act of the Trust Territory of Guam retroactively validating prosecutions based on informations); Butcher v. Maybury, 8 F.2d 155, 158 (W.D. Wash. 1925) (statute revoking existing permits for naturopaths and setting up a new licensing procedure); State v. Fourchy, 106 La. 743, 751, 31 So. 325, 329 (1901) (claimed retroactive application of statute specifying grounds for disbarment of attorneys). Of all these cases, only *Putty* found merit in the bill of attainder challenge.

133. *See* note 120 and accompanying text *supra*. It should be noted that some of these same determinants were discussed in *McNealy*. *See* 13 Fla. at 440; but the Florida court adopted a quite different definition.

134. Thus, the proposed extensions involving contempt citations and smear tactics by investigative committees discussed in note 102 *supra* would not fit within this definition; the former would be deemed judicial in nature while the latter would be deemed outside the scope of this definition altogether. For a consideration of legislative contempt citations and the bill of attainder doctrine, see notes 811-864 and accompanying text *infra*.

135. Applying the definition set forth in *Nakai*, it can be seen that the act of the constitutional convention in *McNealy* was legislative in nature because it applied a newly-created rule of less than general application, while the senatorial resolution in *French* was probably judicial in nature, presuming the senate had a rule that members charged with bribery should be expelled.

136. *See In re* De Giacomo, 7 F. Cas. 366 (S.D.N.Y. 1874) (No. 3, 747). That case involved a challenge to an Italo-American convention providing for the mutual extradition of fugitives charged with felonies. The authorities of Naples had issued an arrest warrant for the crime of murder against the petitioner. He was taken into custody in New York City. *Id.* at 366. The court reviewed the meaning of the bill of attainder clause of article one, section nine and concluded that the convention in question did nothing prohibited by that clause. *Id.* at 370. The underlying implication was that if such a convention was sufficiently extreme, it might be invalidated as a bill of attainder. In at least one other case, however, a

been made to extend the restrictions implicit in the bill of attainder doctrine to other branches of government until Justice Black's pathbreaking concurrence in *Joint Anti-Fascist Refugee Committee v. McGrath*.[137] That case arose from a challenge to official action undertaken pursuant to President Truman's Executive Order No. 9835,[138] which authorized the United States Attorney General to compile a list of totalitarian, fascist, communist and subversive organizations to be used by the loyalty review board in assessing whether or not to disbar allegedly untrustworthy individual employees of the executive departments of the federal government.[139] Organizations were included on the list without any hearing or notice; some of these entities challenged the executive order as violative of the due process clause of the Fifth Amendment. Of the eight justices participating, five found the methods used by the Attorney General in compiling the list to be constitutionally impermissible; but the views of these five justices were expressed in the course of five separate opinions.[140] Justice Black, in his concurrence, argued that the Attorney General's list was the equivalent of a bill of attainder:

> Moreover, officially prepared and proclaimed governmental blacklists possess almost every quality of bills of attainder, the use of which was from the beginning forbidden to both national and state governments. . . . It is true that the classic bill of attainder was a condemnation by the legislature following investigation by that body, . . . while in the present case the Attorney General performed the official tasks. But I cannot believe that

court offered a narrow construction of the bill of attainder doctrine; when a plaintiff sought to challenge an executive order setting up a Loyalty Review Board as being in violation of article one, section nine of the Constitution, the district court for the District of Columbia responded by distinguishing precedent, United States v. Lovett, 328 U.S. 303 (1946), on the theory that the case at bar involved an executive, not a legislative, act. *See* Washington v. Clark, 84 F. Supp. 964, 966-67 (D.D.C. 1949), *aff'd without considering the point sub. nom.* Washington v. McGrath, 182 F.2d 375 (D.C. Cir. 1950).

137. 341 U.S. 123 (1951).

138. 3 C.F.R. §§ 129-131 (1947 Supp.).

139. 341 U.S. at 124-35.

140. Justice Burton, joined by Justice Douglas found Attorney General McGrath's act "patently arbitrary." *Id.* at 138. Justice Douglas, in a separate concurring opinion, also found a denial of a fair trial. *Id.* at 183 (Douglas, J., concurring). After a careful analysis, Justice Frankfurter concluded that the way the list was compiled yielded a valid claim of denial of due process. *Id.* at 173-74 (Frankfurter, J., concurring). Justice Jackson, in a separate concurrence, arrived at the same conclusion expressed by Justice Frankfurter. *Id.* at 187 (Jackson, J., concurring). Justice Black's views are developed in the text. *See* note 141 and accompanying text *infra*. Justice Reed, joined by Chief Justice Vinson and Justice Minton, dissented. After reviewing various constitutional objections, they claimed the Attorney General's act was permissible. *See id.* at 187-213 (Reed. J., dissenting, joined by Vinson, C.J., and Minton, J.).

> the authors of the Constitution, who outlawed the bill of attainder, inadvertently endowed the executive with power to engage in the same tyrannical practices that had made the bill such an odious institution.[141]

One supporting citation but no precedential case authority was offered for this startling assertion.[142] Justice Black's theory has never commanded the allegiance of more than two members of the Supreme Court[143] and at least one lower federal court decision has repudiated it.[144] But dicta in a number of cases suggest that a few courts may be willing to adopt Justice Black's thesis, even though none of them refer specifically to his concurring opinion.

In *Bauer v. Acheson*,[145] the plaintiff was an American citizen who had been employed in occupied Germany by the Civil Censorship Division of the Military Government until 1948. In 1951, while sojourning in France, she learned her passport had been revoked by the State Department on the grounds that "her activities [were] contrary to the best interests of the United States."[146] She was told that her passport would be revalidated only if she chose to make a one-way return trip to the United States.[147] The relevant statute simply authorized the Secretary of State to grant passports on whatever terms the President might designate;[148] in Executive Order No. 7856, the President instructed the Secretary to develop his own procedures and substantive rules regard-

141. *Id.* at 143-44 (Black. J., concurring) (footnote omitted).

142. Justice Black cited a statement by James Madison claiming that a vote in favor or a resolution against certain "Democratic societies" by the members of Congress would be a vote for attainder. *Id.* at 144 n.1 (citing 4 ANNALS OF CONGRESS 934 (1794)). Of course, this citation has nothing whatsoever to do with *executive* acts, so its germaneness is unapparent.

143. *See* Uphaus v. Wyman, 360 U.S. 72, 108 (1959) (Black. J., dissenting, joined by Douglas, J.) (case involving contempt order issued against a recalcitrant witness subpoenaed to testify before an investigative committee chaired by the New Hampshire Attorney General); Peters v. Hobby, 349 U.S. 331, 352 (1955) (Douglas, J., concurring) (case involving a three-year disbarment by the Civil Service Loyalty Review Commission); Barsky v. Board of Regents, 347 U.S. 442, 459-61 (1954) (Black. J., dissenting, joined by Douglas, J.) (case involving a six month suspension of a doctor's license for failure to testify before a congressional investigative committee).

144. Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967) (challenge to a "black book" containing the names of undesirable persons that was compiled by the Nevada Gaming Commission; as a result of his name being included in the book, plaintiff was denied entry into a number of Las Vegas casinos). *See also* American Broadcasting Co. v. United States, 110 F. Supp. 374, 390 (S.D.N.Y. 1953) (challenge to FCC order regulating television lottery programs. Attainder objection dismissed as inapplicable, without citing *McGrath*).

145. 106 F. Supp. 445 (D.D.C. 1952).

146. *Id.* at 447-48.

147. *Id.* at 448.

148. 22 U.S.C. § 211(a) (1926). *See* 106 F. Supp. at 448.

ing the issuance and revocation of passports.[149] Thus, plaintiff's objection was really directed at regulations unilaterally promulgated by an executive department. In dismissing the attainder challenge, the district court for the District of Columbia noted:

> It is possible that by arbitrary administration the statute and regulation here attacked might be made to partake of the nature of a bill of attainder or ex post facto law, but such application is not inherent. Since they are susceptible of a constitutional interpretation, the court must construe the statute and regulations as constitutional.[150]

In *Sentner v. Colarelli*,[151] the plaintiff was a resident alien. An order of deportation had been entered against her on April 8, 1953. On October 9, 1953, the Immigration and Naturalization Service issued an Order of Supervision.[152] Its authority for doing so was section 242(d) of the Immigration and Naturalization Act, which provides that if a final deportation order has been outstanding against an alien for over six months, the Attorney General may, pending deportation, issue an order requiring the alien to report to local immigration offices, submit to medical and psychological examinations, give information under oath as to his activities and associations and "conform to such reasonable written restrictions on his conduct or activities as are prescribed by the Attorney General in his case."[153] The terms of the supervisory order required, *inter alia*, that the plaintiff disassociate herself from the Communist Party or its affiliates and refrain from associating with persons she knew or believed to be members of the Party.[154] Again, the constitutional challenge was raised primarily against the content of the departmental order, not against the statute itself. The district court for the eastern district of Mississippi noted in dictum: "[T]he ad hoc nature of these restrictions, applying only to a specific named individual, would appear to raise substantial questions under the due process and bill of attainder clauses of the Constitution. . . ."[155] One implication of this

149. 106 F. Supp. at 448-49. *See* 22 C.F.R. § 51.77 (1949).

150. 106 F. Supp. at 450. The district court, however, did hold that it was a denial of due process to revoke a passport without first granting a hearing. *Id.* at 452-53. This view was later adopted by the United States Supreme Court. Kent v. Dulles, 357 U.S. 116, 125 (1958). *See* 22 C.F.R. §§ 51.80-51.105 (1977).

151. 145 F. Supp. 569 (E.D. Mo. 1956), *aff'd without considering the point sub nom.* Barton v. Sentner, 353 U.S. 963 (1957).

152. 145 F. Supp. at 572.

153. *Id. See* 8 U.S.C. § 1252 (d) (1970). In a later, unrelated case, this *statute* was held not to be a bill of attainder. Dymytryshyn v. Esperdy, 285 F. Supp. 507, 510 (S.D.N.Y. 1968).

154. 145 F. Supp. at 573.

155. *Id.* at 578.

statement is that in another case the court might have relied solely on the prescription against attainders to invalidate an order of supervision.

In *DeRieux v. Five Smiths, Inc.*,[156] the owners of the Atlanta Falcons, a professional football team, were accused of charging admission prices that violated the ninety-day wage and price freeze implemented by Executive Order No. 11615, promulgated by President Nixon in 1971.[157] The Economic Stabilization Act of 1970 authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries" at specified levels.[158] The Emergency Court of Appeals dismissed the bill of attainder challenge, not because the subject of the challenge was an executive order, but because the government was seeking the civil remedies of an injunction and restitution rather than pursuing a criminal prosecution and because the substantive offense with which the plaintiffs were charged was not itself criminal in nature.[159] The implication in these statements is that if a criminal prosecution had been instituted, the court might have seriously entertained a challenge based on article one, section nine of the Constitution.

The argument could be advanced that in each of these cases Congress had delegated rulemaking authority to the executive branch and that therefore the passport regulations, the order of supervision and the wage and price controls were a species of legislative act.[160] Such a con-

156. 499 F.2d 1321 (Emer. Ct. App. 1974).

157. *See* 36 Fed. Reg. 15727 (1971).

158. *See* Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 796 (codified at 12 U.S.C. § 1904 note (1970)).

159. 499 F.2d at 1335.

160. It is certainly true that all three cases are instances of validly delegated rulemaking power. Such a delegation usually requires only an "intelligible standard." Sunshine Coal Co. v. Adkins, 310 U.S. 381, 398 (1940), United States v. Rock Royal Co-op Inc., 307 U.S. 533, 577 (1939); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928). *See* Jaffe, *An Essay on Delegation of Legislative Power*, 47 COLUM. L. REV. 359, 561, 567 (1947). But even delegations bereft of standards (such as, possibly, the passport statute, *see* note 148 and accompanying text *supra*) have been upheld. Fahey v. Mallonee, 332 U.S. 245, 250 (1947); St. Louis I.M. & S.R. Co. v. Taylor, 210 U.S. 281, 287 (1908). But acts done by an executive department pursuant to a valid delegation do not, *ipso facto*, become "legislative acts." The adjective "legislative" does not mean "rulemaking" in this context. It signifies "of or concerning a legislature" and executive departments are not legislatures.

One other case is worth mentioning in this context. It involved a suit brought by five members of the Blue Ridge Lodge no. 816 of the Brotherhood of Railroad Trainmen alleging that an amended collective bargaining agreement between their union and the Clinchfield Railroad Company providing for the compulsory retirement of employees covered by the Railway Labor Act, 45 U.S.C. §§ 151-188 (1970), who reached the age of seventy constituted a bill of attainder. Instead of holding that the constitutional proscription against attainders could not apply to an agreement between a union and a private employer, even though they act pursuant to statutory guidelines, the court dismissed the challenge because it

tention ignores reality, however. In each case, the regulations were formulated, disseminated and enforced by an office of the executive branch, either through the medium of an executive order or of an intradepartmental regulation. The restrictions challenged in these suits can only logically be characterized as executive acts.

But even that counter-argument cannot be applied to the case of *Hoffa v. Saxbe*.[161] That suit was based on a constitutional challenge to the terms of a Presidential commutation. James R. Hoffa, former president of the Teamsters Union, had begun serving on March 7, 1967 an aggregate thirteen-year sentence arising from convictions on two counts of jury tampering and four counts of mail and wire fraud. The plaintiff would have been eligible for early release on November 28, 1975, but instead his sentence was commuted by President Nixon on December 23, 1971.[162] The commutation provided that Hoffa could "not engage in direct or indirect management of any labor organization prior to March sixth, 1980," the date when his original thirteen-year sentence would have expired.[163] The plaintiff challenged this condition as a bill of attainder.[164] The United States district court for the District of Columbia responded by citing the decision in *DeVeau v. Braisted*,[165] in which the United States Supreme Court had upheld a statute disqualifying convicted felons from serving on the New York Waterfront Commission on the theory that the statute did not constitute a legislative determination of guilt because the legislature had merely relied on the recorded evidence of a prior conviction.[166] Admitting *DeVeau* was distinguishable because it considered a legislative rather than an executive act,[167] the court stated:

> Just as the restriction in *DeVeau* was promulgated pursuant to proper legislative authority, we have found that the condition at-

found that the plaintiffs derived no property right to continued employment from the collective bargaining agreement. *See* Goodin v. Clinchfield R.R. Co., 125 F. Supp. 441, 449 (E.D. Tenn. 1954), *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956).

161. 378 F. Supp. 1221 (D.D.C. 1974).

162. *Id.* at 1223.

163. *Id.* at 1224-25.

164. *Id.* at 1238. He did not cite article one, section nine of the Constitution in support of his argument, but rather relied on the Fifth Amendment. One way to interpret this is to say that he used the term "bill of attainder" as a label for describing the manner in which he was allegedly denied due process of law. The factor militating against this interpretation is the district court's reference to De Veau v. Braisted, 363 U.S. 144 (1960), *see* note 168 and accompanying text *infra*, which discusses the term "bill of attainder" as it has been defined in the context of article one, section ten of the Constitution.

165. 363 U.S. 144 (1960). *See* notes 658-661 and accompanying text *infra*.

166. *Id.* at 160.

167. 378 F. Supp. at 1239.

tached to Hoffa's commutation emanated from the President's explicit grant of power under Article II, Section 2, Clause One of the Constitution. To say that the President is "legislating" when he attaches a condition such as the one at issue here is simply to beg the question; if the President's power includes the authority to attach conditions to pardons or commutations, the fact that the resulting condition is similar to legislatively-imposed restrictions does not make the condition a legislative act. The separation of powers doctrine has not been so stringently applied. We conclude, therefore, that the constitutional principles sustaining the regulation in *DeVeau* equally apply to the condition under challenge.[168]

The *Hoffa* decision is an anomaly. On the one hand, the court admits that a Presidential commutation is not a legislative act; on the other hand, it states that the interpretation given to the proscriptions against bills of attainder in the Constitution in a case involving a legislative act does apply to such a commutation. The court in *Hoffa*, then, seems to accept and apply the theory of pseudo-attainders devised by Justice Black, although the result of such an application was to sustain the constitutionality of the official act in question.

All these cases quite understandably fail to consider the larger question of whether a theory of pseudo-bills of attainder is justifiable. One critic has remarked scornfully that:

The fact that the Constitution prohibits *bills* of attainder and that the prohibition is contained in that section of the constitution which places specific restrictions on congressional action seems clearly to refute any pseudo-bill of attainder concept. The effect of such efforts to invoke the bill of attainder clause where it is not applicable is to obscure even further the meaning of that constitutional protection.[169]

How one approaches the issue depends upon how one interprets Justice Black's original statement. If he meant to find the constitutional proscription against bills of attainder applicable to executive acts, he was ignoring history. It may be that Parliament was initially a pliant tool of

168. *Id. Compare Hoffa with* Huffman v. Estelle, 536 F.2d 1106 (5th Cir. 1976). There, the petitioner charged that the act of the governor of Texas in commuting his death sentence to a term of ninety-nine years in prison constituted a bill of attainder. The Fifth Circuit simply remarked that this allegation had no merit. *Id.* at 1107.

169. *Need for Clarification, supra* note 12, at 233 (emphasis in original). *But see* TRIBE, *supra* note 7, at 499-501. Professor Tribe accepts Justice Black's thesis that the attainder doctrine should be extended to executive acts, both because such an extension is desirable in light of the current tendency of instutitional fractionalization of power and because it makes little sense to permit agents of the executive, but not legislators, to try and punish individuals without any procedural safeguards.

the king and subserviently enacted attainders at his slightest whim,[170] but that does not negate the fact that a bill of attainder in English law was a legislative enactment.[171] Although the justifications underlying the bill of attainder doctrine—separation of powers and procedural due process[172]— are equally important limits on the authority of the executive branch, the doctrine itself was clearly intended to curb legislative, not executive, tyranny.[173]

Nevertheless, there is another possible interpretation of Justice Black's language. Perhaps he meant that the restrictions on legislative power embodied in the proscriptions against bills of attainder should be applied, *mutatis mutandis*, to executive acts. Such an application

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170. One commentator has said that because "of [the king's] ability from 1461 to dominate completely the lords and the commons in parliament, his control over attainder was virtually complete." BELLAMY, *supra* note 21, at 211-12. *Accord*, R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS 29 (1973); Davis, *supra* note 2, at 14; *Need for Clarification, supra* note 12, at 214.

171. *See* sources cited in note 21 *supra*.

172. *See* notes 45-51 and accompanying text *supra*.

173. *See* notes 46, 47 and 50 and accompanying texts *supra. Accord*, United States v. Brown, 381 U.S. 437, 442-46 (1965). To date, no court or commentator has suggested that the bill of attainder doctrine should apply to the judicial branch. There is authority to the effect that it does not. Groppi v. Froehlich, 311 F. Supp. 765, 771 (W.D. Wis.), *aff'd without considering the point sub nom.* Groppi v. Leslie, 436 F.2d 326 (7th Cir. 1970), *vacated on other grounds*, 404 U.S. 496 (1972). This would seem to be consistent with the decisions holding that the ex post facto prohibitions of the Constitution do not bind the judiciary. Frank v. Mangum, 237 U.S. 309, 344 (1915); Ross v. Oregon, 227 U.S. 150, 161 (1913); United States *ex rel.* Almeida v. Rundle, 255 F. Supp. 936, 944 (E.D. Pa. 1966), *cert. denied*, 393 U.S. 863 (1968); United States v. General Elec. Co., 80 F. Supp. 989, 1004 (S.D.N.Y. 1948). *But cf.* Marks v. United States, 430 U.S. 188, 195 (1977); Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964); United States v. Jacobs, 513 F.2d 564, 566 (9th Cir. 1974); United States v. Sherpix, Inc., 512 F.2d 1361, 1366 (D.C. Cir. 1975); United States v. Wasserman, 504 F.2d 1012, 1015-16 (5th Cir. 1974); United States v. B & H Dist. Corp., 375 F. Supp. 136, 141-42 n.5 (W.D. Wis. 1974). These latter decisions indicate that due process considerations impose substantially the same restraints upon courts as the ex post facto clauses impose upon legislatures. *See* Lehmann & Eklund, *Constitutional Review: Supreme Court, 1976-77 Term*, 5 HASTINGS CONST. L.Q. 61, 164-79 (1978) [hereinafter cited as Lehmann & Eklund]. Perhaps an analogous argument can be made about the restraints imposed by the bill of attainder clauses in the Constitution. One other indication that a court may be willing to extend the bill of attainder doctrine should be noted. In Banks v. Banks, 98 So. 2d 337 (Fla. 1957), a husband claimed that a divorce decree giving his wife a lifetime right to receive the rents and income accruing from his properties was a bill of attainder. The court replied:

> The decree in this cause did not divest the defendant of his interest in the real property and, as we view it, left him the absolute owner of the personal property in his home, subject to the use thereof by the plaintiff for her natural lifetime. The portion of the decree relating to the property does not constitute a taking of the defendant's property. It does not amount to a bill of attainder.

Id. at 339. Implicit in this language is the suggestion that a divorce decree effectuating a taking of property might "amount to" a bill of attainder.

would not be an attempt to extend article one, sections nine and ten of the Constitution, but would rather serve as a specific technique for assuring the constitutional guarantees of procedural due process. Given the relative reluctance of courts to invalidate legislation as a bill of attainder, however,[174] it might be wiser to rely on the due process clause of the Fifth (or, by analogy, the Fourteenth) Amendment, as did the other four justices in *McGrath*.[175] Thus, the most telling objection to the pseudo-bill of attainder theory may be grounded not upon its ahistoricism but rather upon its superfluousness.

B. "Inflicting Punishment"

The second component of the definition of a bill of attainder is by far the most controversial and troublesome aspect of the subject with which courts have had to contend.[176] In this portion of the article, the author will consider three broad topics. The first deals with problems of methodology, *i.e.*, how the determination that an enactment is punitive may be made. Under this heading, the author will discuss the troublesome problem of whether courts may rely on the motives of legislators as a basis for concluding that a challenged law is penal in character. The second major topic to be discussed concerns the various techniques by which courts avoid classifying legislation as punitive in nature. In particular, the author will show how courts have (1) asserted that the term "punishment" encompasses only the imposition of "criminal," not "civil" sanctions, (2) defined punishment to include only retributive rather than prospective exactions, (3) defined punishment in reliance on the putative distinction between "rights" and "privileges" and (4) found that certain types of deprivations are intrinsically nonpenal. The final major topic to be discussed concerns the key distinction

174. *See* note 98 and accompanying text *supra*.

175. *See* note 140 *supra*. The same approach was taken by the three-judge district court in Bauer v. Acheson, 106 F. Supp. 445 (D.D.C. 1952). *See* note 150 *supra*.

176. The key decisions of the United States Supreme Court on the subject of bills of attainder indicate that the Court's concern over the issue of punishment often takes precedence over consideration of the other definitional elements of this subject. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473-83 (1977); United States v. Brown, 381 U.S. 437, 456-60 (1965); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86-88 (1961); Flemming v. Nestor, 363 U.S. 603, 612-20 (1960); Garner v. Board of Pub. Works, 341 U.S. 716, 722-23 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 413-15 (1950); United States v. Lovett, 328 U.S. 303, 307-14, 316 (1946); Hawker v. New York, 170 U.S. 189, 191-200 (1898); Dent v. West Virginia, 129 U.S. 114, 128 (1889); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318-22, 324-25 (1867). This imbalance has led some commentators to conclude that the Court should not focus on the issue of punishment to such a great degree. *See Need for Clarification*, *supra* note 12, at 242; *Waning Guaranty*, *supra* note 12, at 860.

which courts have relied on in circumscribing the scope of the bill of attainder doctrine, namely, the distinction between regulation and punishment.

1. Legislative Motive

Two interrelated questions will be considered in this subsection. The first is whether courts confronting attainder claims may inquire into the possible existence of a punitive motive on the part of the legislature in enacting the challenged bill.[177] If analysis of motive is presumed to be a permissible judicial technique, the second question is whether courts may scrutinize extrinsic evidence in order to determine the absence or presence of punitive motive.

In *Cummings v. Missouri*,[178] the Court mentioned the concept of legislative "purpose" in the course of its analysis of bills of attainder,[179] but it did so cursorily and its brief comment furnished no guidelines on which subsequent decisions could rely. The decision establishing that legislative motive is a legitimate subject of judicial inquiry (at least in the context of suits involving bill of attainder challenges) is *United States v. Lovett*,[180] decided by the United States Supreme Court in 1946. That case arose from the enactment of the Urgent Deficiency Appropriations Act of 1943,[181] section 304 of which provided that the allocations made available by the act could not be used to pay the salaries of three named federal employees— Goodwin B. Watson, William E. Dodd, Jr., and Robert M. Lovett—after November 15, 1943, unless those persons were appointed to governmental positions with the ad-

177. At the outset, it is necessary to distinguish "motive" and "intent." When a court examines legislative intent, it seeks to establish what the legislators meant when they enacted particular language into law; when a court examines legislative motive, it seeks to establish why (*i.e.*, for what purpose) a certain law was enacted. *See* Trimble v. Gordon, 430 U.S. 762, 782-83 (1977) (Rehnquist, J., dissenting); Starkweather v. Blair, 245 Minn. 371, 380, 71 N.W.2d 869, 876 (1955). This distinction is necessary because often commentators and courts forget it. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 478 (1977); Flemming v. Nestor, 363 U.S. 603, 615 (1960); American Communications Ass'n v. Douds, 339 U.S. 382, 414 (1950); *Punishment, supra* note 14, at 244. The problem is exacerbated because, as many commentators have noted, imprecise discussion on the part of theorists (and courts) has historically blurred the obvious distinction between legislative intent and legislative purpose or motive. *See* Bruncken, *Interpretation of the Written Law*, 25 YALE L.J. 129, 134 (1915) [hereinafter cited as Bruncken]; Davis, *supra* note 2, at 33; Lehmann & Eklund, *supra* note 173, at 96-97; MacCallum, *Legislative Intent*, 75 YALE L.J. 754, 754 n.3 (1966); Willis, *Statute Interpretation in a Nutshell*, 16 CAN. BAR REV. 1, 3-4 (1938).

178. 71 U.S. (4 Wall.) 277 (1867).

179. *Id.* at 325. *See* note 70 and accompanying text *supra*.

180. 328 U.S. 303 (1946).

181. 57 Stat. 431 (1943).

vice and consent of the Senate.[182] The government continued to retain Lovett and his colleagues in their administrative jobs. To recover wages earned after November 15, 1943, the three individuals lodged a joint lawsuit in the Court of Claims. The five judges in that court agreed that the plaintiffs were entitled to compensation, although they did so for various reasons.[183] Consequently, the government appealed to the United States Supreme Court. Six of the eight justices participating in the decision upheld the ruling of the Court of Claims.[184]

In holding that the challenged rider to the Urgent Deficiency Appropriations Act was a bill of attainder, the majority stated that any

182. *Id.* at 450. Section 304 provides:

> No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

Goodwin Watson was a chief analyst for the Foreign Broadcast Information Service. He had written tracts in favor of the U.S.S.R. and Loyalist Spain and, when questioned by a congressional subcommittee, claimed he was a member of the "right wing" of the American Labor Party. William Dodd, Jr., was an assistant news editor at the Federal Communications Commission. He had been a member of the American League for Peace and Democracy (an acknowledged Communist front organization) and the Washington Bookshop (included on the Justice Department's subversive list); he had also been a prominent contributor to the Harry Bridges Defense Fund. As for Robert Lovett, at the time he was government secretary to the Virgin Islands and had a long history of involvement in so-called "radical causes." He also had affiliations with the American League for Peace and Democracy (and its predecessor, the American League Against War and Fascism) and the American People's Mobilization (and its predecessor, the American Peace Mobilization, also a Communist Front organization). *See* W. GOODMAN, THE COMMITTEE: THE EXTRAORDINARY CAREER OF THE HOUSE COMMITTEE ON UN-AMERICAN ACTIVITIES 145-46 (1969 ed.) [hereinafter cited as GOODMAN].

183. *See* Lovett v. United States, 66 F. Supp. 142, 147-48 (Ct. Cl. 1945) (Whaley, C.J., joined by Littleton, J.) (held that the rider effected a "mere stoppage of disbursing routine" that did not extinguish the government's obligation to pay for services rendered); *id.* at 148 (Whitaker, J., concurring) (held that the rider was a bill of attainder); *id.* at 150 (Jones, J., concurring) (held that Congress exceeded its delegated powers in enacting the rider); *id.* at 151 (Madden, J., concurring) (held that the enactment violated both article one, section nine and the Fifth Amendment).

184. Justice Black was joined by Chief Justice Stone and Justices Burton, Douglas, Murphy and Rutledge. Justice Frankfurter, joined by Justice Reed, wrote a separate concurrence. 328 U.S. at 318-30 (Frankfurter, J., concurring, joined by Reed, J.). *See* notes 193-196 and accompanying text *infra*. Justice Jackson, who at the time was serving as the chief American prosecutor in the Nuremberg War Crimes Trials, did not participate.

analysis of this constitutional challenge "require[d] an interpretation of the meaning and purpose of the section, which in turn require[d] an understanding of the circumstances leading to its passage."[185] In the five succeeding pages, the majority considered the legislative history underlying section 304. The genesis of the section was a peroration delivered by the chairman of the House Un-American Activities Committee, Congressman Martin Dies, on February 1, 1943. In that speech, he named thirty-nine government employees whom he characterized as "radical bureaucrats" and affiliates of "Communist front organizations."[186] He urged Congress to cut off their salaries. As a consequence, a rider was offered to the Treasury-Post Office Appropriations Bill designed to do precisely what Congressman Dies had suggested. A caustic debate ensued; some congressmen said that the speech of February 1st was itself sufficient proof of guilt, while others branded the rider as "legislative lynching."[187] Finally, it was agreed to defer a vote on the rider until a special subcommittee of the Appropriations Committee could investigate the thirty-nine persons in question so that "each man would have his day in court."[188] The theory underlying the creation of a special subcommittee was that "if [the thirty-nine named persons] are guilty, then the quicker the Government removes them the sooner and the more certainly will we protect the Nation against sabotage and fifth-column activity."[189] The subcommittee gave each accused employee a chance to testify on his own behalf, but relied primarily on dossiers furnished by the House Un-American Activities Committee and the F.B.I. The final report found Watson, Dodd and Lovett to be affiliated with subversive organizations and thus unfit to hold positions of public trust. The House voted for the rider but the Senate later deleted it. After five House-Senate conferences, it was reinserted and eventually adopted by the Senate. The President signed the bill under protest.[190]

Based on these facts, Justice Black, speaking for the majority, concluded that the purpose of the rider was to bar Watson, Dodd and Lovett from further governmental service: "[a]ny other interpretation

185. 328 U.S. at 307. For other accounts of the stormy history of section 304, *see* GOODMAN, *supra* note 182, at 139-52; Schuman, *Bill of Attainder in the 78th Congress*, 37 AM. POL. SCI. REV. 819 (1943).

186. 328 U.S. at 308-09 (quoting 89 CONG. REC. 474 (1943) (remarks of Rep. Dies)).

187. *Id.* at 309 (quoting 89 CONG. REC. 651 (1943) (remarks of Rep. Tarver)).

188. *Id.* at 309-10 (quoting 89 CONG. REC. 711 (1943) (remarks of Rep. Cannon)).

189. *Id.* at 310 (quoting 89 CONG. REC. 741 (1943) (remarks of Rep. Cannon)).

190. *Id.* at 313. Actually, this was not the first effort by the House of Representatives to cut off the salaries of persons suspected of being subversive, and in at least one prior case it had been temporarily successful. *See* GOODMAN, *supra* note 182, at 141.

of the section would completely frustrate the purpose of all who sponsored § 304, which clearly was to 'purge' the then existing and all future lists of government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job."[191] Consequently, the majority claimed the rider operated as a bill of attainder because it punished named individuals without judicial trial and thus fell within that class of legislation prohibited by article one, section nine of the Constitution.[192] Justice Frankfurter's concurrence, in which Justice Reed joined, essentially adopted the view expounded by two judges on the court of claims[193] that the rider merely curtailed the disbursing routine, but did not relieve the government of its obligation to pay for services rendered.[194] He concluded that the rider was not a bill of attainder because it specified no offense and pronounced no judgment of condemnation.[195] As Justice Frankfurter read the legislative history:

> The Senate five times rejected the substance of § 304. It finally prevailed, not because the Senate joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of § 304) without passing any judgment on their past conduct or present views.
>
> Section 304 became law by the President's signature. His motive in allowing it to become law is free from doubt. He rejected the notion that the respondents were "subversive," and explicitly stated that he wished to retain them in the service of the government. . . . But to hold that a measure which did not express a judgment of condemnation by the Senate and carried an affirmative disavowal of such condemnation by the President constitutes a bill of attainder, disregards the historic tests for determining what is a bill of attainder.[196]

191. 328 U.S. at 314.

192. *Id.* at 315-16. For Justice Black's views on that component of the definition of a bill of attainder involving the safeguards of a judicial trial, *see* note 627 and accompanying text *infra.*

193. *See* note 183 *supra.*

194. 328 U.S. at 330 (Frankfurther, J., joined by Reed, J., concurring).

195. *Id.* at 323-24. *See* note 14 *supra.* For a discussion of Justice Frankfurter's views on prospectivity and bills of attainder, *see* notes 341-346 and accompanying text *infra.*

196. *Id.* at 325. Other commentators agreed that section 304 was not an attainder because it specified no punishment. *See, e.g.*, Davis, *supra* note 2, at 28; Norville, *Bill of Attainder—A Rediscovered Weapon Against Discriminatory Legislation* 26 ORE. L. REV. 78, 107-09 (1946).

Thus, *Lovett* clearly stands for the proposition that judicial determination of legislative motive is a legitimate device for ascertaining whether a challenged enactment imposes punishment.[197] Subsequent decisions of the United States Supreme Court have relied on *Lovett* to reach an identical conclusion.[198] But the state courts have been considerably more reluctant to adopt such a technique. A few examples are instructive.

Thompson v. Wallin[199] involved a challenge to New York's notori-

197. Two commentators have suggested that the portion of Justice Black's majority opinion reciting the legislative history of section 304 was included *solely* in order to point out that the purpose of the rider was to effect removals from office rather than to curtail payment of wages. Davis, *supra* note 2, at 29; *Waning Guaranty, supra* note 12, at 849 n.36. Both authors, however, mistakenly ignore Justice Black's clear statement that his review of legislative history was inserted in order to show why the rider amounted to a bill of attainder. *See* 328 U.S. at 307. *Accord,* United States v. O'Brien, 391 U.S. 367, 383-84 n.30 (1968).

198. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 478 (1977), Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 83-86 (1961); Flemming v. Nestor, 363 U.S. 603, 615-20 (1960); DeVeau v. Braisted, 363 U.S. 144, 160 (1960); American Communications Ass'n v. Douds, 339 U.S. 382, 387-89, 413 (1950). *Accord,* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169-184 (1963); Trop v. Dulles, 356 U.S. 86, 94-97 (1958). These last two cases do not involve bills of attainder but do offer extensive discussions of the nature of punishment in a constitutional sense. *See* notes 497-515 and accompanying text *infra.*

199. 196 Misc. 686, 93 N.Y.S.2d 274 (1949), *rev'd sub. nom.* L'Hommedieu v. Board of Regents, 276 App. Div. 494, 95 N.Y.S.2d 443 (3d Dep't), *aff'd,* 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub. nom.* Adler v. Board of Educ., 342 U.S. 485 (1952). The history of this set of lawsuits is somewhat complex because the New York Court of Appeals actually ruled on three different cases consolidated under the label of *Thompson v. Wallin.* Two of the cases, involving Thompson and L'Hommedieu, were jointly decided by Judge Schirick in 1949; he found the challenged enactment to be a bill of attainder. Thompson v. Wallin, 196 Misc. 686, 696-97, 93 N.Y.S.2d 274, 285 (1949). *See* notes 206-208 and accompanying text *infra.* The Appellate Division reversed, specifically disagreeing with Judge Schirick on this point. L'Hommedieu v. Board of Regents, 276 App. Div. 494, 507, 95 N.Y.S.2d 443, 455 (3d Dep't 1950). The third case was *Lederman v. Board of Education.* In that suit, the trial court, in an opinion authored by Judge Hearn, held that the Feinberg Law, *see* notes 203-204 and accompanying text *infra,* embodied the concept of guilt by association and thus violated the due process guarantees of the Fifth and Fourteenth Amendments. Lederman v. Board of Educ., 196 Misc. 873, 884-85, 95 N.Y.S.2d 114, 124-25 (1949). The Appellate Division also reversed this ruling. Lederman v. Board of Educ., 276 App. Div. 527, 530, 96 N.Y.S.2d 466, 471 (2d Dep't 1950). The New York Court of Appeals affirmed both rulings of the Appellate Division and specifically found that the Feinberg Law was not a bill of attainder. Thompson v. Wallin, 301 N.Y. 476, 493, 95 N.E.2d 806, 814 (1950). *Lederman* was eventually appealed to the United States Supreme Court, which held, by a six to three margin, that the enactment was constitutional on the theories that an individual's associations are a factor in determining his loyalties and that because public employment is a privilege, no right is infringed when conditions are imposed upon its obtainment or retention. Adler v. Board of Educ., 342 U.S. 485, 492-93 (1952). In light of the conclusions reached in *Adler,* the Court dismissed an appeal in *Thompson.* Thompson v. Wallin, 342 U.S. 801 (1952). The story of this case does not end there, however. Fourteen years later, a three-judge district court again upheld the constitutionality of the Feinberg Law; it relied on *Thompson* in concluding that the enactment was not a bill of attainder. Keyishian v. Board of Regents, 255 F. Supp. 981, 988-89

ous Feinberg Law.[200] In 1917, the New York legislature passed a statute providing that any employee in the state public school system who uttered seditious statements could be summarily dismissed.[201] In 1939, a second law was passed stating that no person could be hired or could retain a position as a civil servant in the state government if he or she espoused, published and issued written material that advocated or joined an organization that advocated overthrow of the government by unlawful means.[202] Finally, in 1949, the Feinberg Law was passed. Section one of that statute recited the legislature's conclusion that members of subversive organizations, particularly the Communist Party, were infiltrating the ranks of the New York public school system's employees and exercising a baneful influence upon schoolchildren.[203] Consequently, section three required the board of regents to adopt reg-

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(W.D.N.Y. 1966). On appeal, however, the United States Supreme Court invalidated the challenged provisions, stating that although the purpose of the statute was legitimate, the means that had been used to accomplish that purpose were overbroad. Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967).

200. N.Y. EDUC. LAW § 3022 (McKinney 1973).

201. N.Y. EDUC. LAW § 3021 (McKinney 1973).

202. N.Y. CIV. SERV. LAW § 105(1), (2) (McKinney 1973), *formerly* N.Y. CIV. SERV. LAW § 12(a) (McKinney 1940).

203. 1949 N.Y. Laws, ch. 360, § 1:

> The legislature hereby finds and declares that there is common report that members of subversive groups, and *particularly of the communist party and certain of its affiliated organizations*, have infiltrated into public employment in the public schools of this state. This has occurred despite the existence of statutes designed to prevent the appointment to or the retention in employment in public office and particularly in the public schools of the state of members of any organization which teaches or advocates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence or by any unlawful means. The consequence of any such infiltration into the public schools is that subversive propaganda can be disseminated among children of tender years by those who teach them and to whom the children look for guidance, authority and leadership. The legislature finds that members of such groups frequently use their office or position to advocate and teach subversive doctrines. The legislature finds that members of such groups are frequently bound by oath, agreement, pledge or understanding to follow, advocate and teach a prescribed party line or group dogma or doctrine without regard to truth or free inquiry. The legislature finds that such dissemination of propaganda may be and frequently is sufficiently subtle to escape detection in the classroom. It is difficult, therefore, to measure the menace of such infiltration in the schools by conduct in the classroom. The legislature further finds and declares that in order to protect the children in our state from such subversive influence it is essential that the laws prohibiting persons who are members of subversive groups, *such as the communist party and its affiliated organizations*, from obtaining or retaining employment in the public schools, be rigorously enforced. The legislature deplores the failure heretofore to prevent such infiltration which threatens dangerously to become a commonplace in our schools. To this end, the board of regents, which is charged primarily with the responsibility of supervising the public school systems in the state, should be admonished and directed to take affirmative action to meet this grave menace and to report thereon regularly to the state legislature.

(Emphasis added).

ulations for the removal of persons violating the provisions of the statutes adopted in 1917 and 1939; to facilitate its rulemaking functions, the board was also directed to compile a list of subversive organizations.[204] Among others, Robert Thompson, chairman of the New York branch of the Communist Party, sought a declaratory judgment that the Feinberg Law was unconstitutional.[205] The trial court, in an opinion authored by Judge Schirick, pointed out that section one of the challenged act specifically named the Communist Party, adjudged it to be a menace and charged the board of regents with taking affirmative measures to combat this perceived threat.[206] The court concluded that the board was, in effect, directed to include the Communist Party on its list of subversive organizations and then utilize that list to disqualify persons from public employment.[207] Since there was no proof that Party membership bore "any logical relation" to one's fitness to teach, the statute was found to be a bill of attainder.[208] The Appellate Division reversed Judge Schirick.[209] The New York Court of Appeals affirmed and held that section one of the Feinberg Law was merely a preamble declaring a legislative purpose and not part of the substantive portion of the statute itself.[210] Thus, it could not be relied upon to in-

204. *See* N.Y. EDUC. LAW § 3022 (1), (2) (McKinney 1973). Subdivision two defined a subversive organization as one which "advocate[s], advise[s], teach[es] or embrace[s] the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be-overthrown or overturned by force, violence or any unlawful means, or . . . advocate[s], advise[s], teach[es] or embrace[s] the duty, necessity or propriety of adopting any such doctrine . . . ."

205. Thompson v. Wallin, 196 Misc. 686, 692, 93 N.Y.S.2d 274, 280 (1949).

206. *Id.* at 696, 93 N.Y.S.2d at 284.

207. *Id.* at 697, 93 N.Y.S.2d at 285.

208. *Id.*

209. L'Hommedieu v. Board of Regents, 276 App. Div. 494, 507, 95 N.Y.S.2d 443, 455 (3d Dep't 1950). *See* note 199 *supra*.

210. Thompson v. Wallin, 301 N.Y. 476, 493, 95 N.E.2d 806, 814 (1950). *Accord*, on similar facts, Hammond v. Frankfeld, 194 Md. 487, 491, 71 A.2d 482, 483 (1950). This statement is, at best, a half-truth. The language of a preamble may be deemed to be part of a statute when that language explicates or clarifies a term located in the substantive portion of the statute itself. *See* H. BLACK, HANDBOOK ON THE CONSTRUCTION AND INTERPRETATION OF THE LAWS 176-81 (1896); 2 J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 4804 at 348 (F. Horack ed. 1943); Note, *The Legal Effect of Preambles—Statutes*, 41 CORNELL L.Q. 134, 136 (1955). The United States Supreme Court has also adopted this view. Yazoo & M.V.R. Co. v. Thomas, 132 U.S. 174, 188 (1889). In the case of the Feinberg Law, section one refers to the Communist Party as an example of a subversive organization. *See* note 203 *supra*. Arguably, this reference was meant to clarify the definition of a "subversive organization" in section three by providing the board of regents with an example of the type of organization with which the legislature was concerned. If this is so, then Judge Schirick was quite accurate when he said that section three should be read *in pari materia* with section one. There is also an argument that section one should not be construed merely as a preamble unrelated to the operating provisions of the act itself. *See* note 288 *infra*.

validate the remainder of the challenged legislation. The court also noted that any judgment by the board that an organization was subversive could be attacked in an administrative hearing and that no punishment was inflicted on the organization itself.[211]

In *Starkweather v. Blair*,[212] the plaintiff was an employee of the Game and Fish Division of the Minnesota Department of Conservation. On December 3, 1946, he was made the assistant director of that division; that posting was certified as permanent on March 24, 1949. In its 1953 appropriations bill, the Minnesota legislature stipulated specifically that no funds were to be allocated as salary for anyone holding the position of assistant director of the Game and Fish Division.[213] Accordingly, the defendant Blair, plaintiff's immediate supervisor, notified him that his position was being discontinued and that he would be laid off.[214] After losing his job, the plaintiff challenged the appropriations act as a bill of attainder. Admitting that *Lovett* endorsed judicial inquiries into legislative motive,[215] the Minnesota Supreme Court nonetheless concluded such an inquiry was unwise:

> As long as the legislature does not transcend the limitations placed upon it by the constitution, its motives in passing legislation are not the subject of proper judicial inquiry. That does not mean that the legislature may use a constitutional power to accomplish an unconstitutional result, but, before it can be held that the latter has been done, it must appear that the end result of the act accomplished some purpose proscribed by the constitution.[216]

Moreover, the court pointed out a practical obstacle to any proposed scrutiny of motive: the debates (either on the floor or in committee) of the Minnesota legislature were not recorded, except for those excerpts printed in the house and senate journals; furthermore, the court declined to ascertain legislative purpose "by resort to extraneous evidence which was not part of the journal entry."[217] In fact, the only evidence presented to the court was the testimony of Blair and of Starkweather during trial.[218] Based on such an unsubstantial record, the court found no punitive motive on the part of the legislature. Neither did it find

211. Thompson v. Wallin, 301 N.Y. 476, 493, 95 N.E.2d 806, 814 (1950).
212. 245 Minn. 371, 71 N.W.2d 869 (1955).
213. *Id.* at 373-74, 71 N.W.2d at 872.
214. *Id.* at 374, 71 N.W.2d at 872-73.
215. *Id.* at 379, 71 N.W.2d at 875.
216. *Id.* at 380, 71 N.W.2d at 876.
217. *Id. See also* Eliot, *The Lawyer and Legislation*, 26 ROCKY MT. L. REV.359, 362-63 (1954).
218. 245 Minn. at 381-83, 71 N.W.2d at 876-77.

that the plaintiff had committed any act meriting punishment.[219] As for *Lovett*, the Minnesota Supreme Court pointed out that the legislation in that case had, in effect, banned three persons from further federal service, whereas the appropriations bill in the case at bar did not foreclose the possibility that the plaintiff could hold other governmental positions.[220] Thus, the state court concluded that the bill of attainder challenge was without merit.[221]

In *California State Employees Association v. Flournoy*[222] it was alleged on behalf of employees of the University of California and the California State Colleges that item 247 of the legislature's 1970 budget constituted a bill of attainder. The Board of Regents of the University of California had voted to give university employees a 7.2% salary increase; the trustees of the California State Colleges had approved a similar 7% raise for their employees.[223] In formulating the 1970 budget, however, the legislature deleted the raises in item 247 and instead granted *all* state employees a flat 5% pay raise.[224] Because the legislature allegedly took this action in retaliation for "political and social conditions" on Californian campuses,[225] it was argued that this impermissible motive rendered the challenged budgetary item violative of the proscription against bills of attainder contained in both the state and federal constitutions.[226] The district court of appeals disagreed. It distinguished *Lovett*, on the grounds that that case involved both a denial of wages and a concerted effort to foreclose named persons from further federal service.[227] By contrast, the budgetary item under attack was not tantamount to a ban on continuing state employment.[228] Thus, the court concluded that legislation withholding salary increases from a class of public employees could not approach "in penal character" the statute invalidated in *Lovett*.[229] With respect to the contention that the legislature harbored a retaliatory motive, the court stated it was bound by state law to consider only the language of the enactment itself and

219. *Id.* at 385, 71 N.W.2d at 878.
220. *Id.* at 386, 71 N.W.2d at 879.
221. *Id.*
222. 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (1973).
223. *Id.* at 223, 108 Cal. Rptr. at 254.
224. *Id.*
225. *Id.* at 223-24, 108 Cal. Rptr. at 255.
226. *Id. See* CAL. CONST. art. I, § 16.
227. 32 Cal. App. 3d at 226, 108 Cal. Rptr. at 256.
228. *Id.*
229. *Id.* at 229, 108 Cal. Rptr. at 258.

that language disclosed no impermissible purpose.[230]

These decisions exemplify the independent stances adopted by some state courts with respect to judicial recognition of legislative motive. The New York Court of Appeals chose to ignore a legislative purpose stated within the text of the enactment itself. While the Minnesota Supreme Court evinced an innate distrust of any invitation to scrutinize legislative motive, it did recognize that the paucity of recorded legislative debates made such an interpretative technique difficult to apply. Yet the California district court of appeal refused to even consider examining legislative motive, believing such a heuristic approach to be outside the proper role of the state judiciary. These decisions by no means represent a majority position; many state courts do take into account legislative purpose, although they often do so in a very conclusory fashion.[231]

Thus, as suggested, *Lovett* has not been adopted wholeheartedly by the state courts. Indeed, for a time there existed genuine doubt as to whether that case even bound federal courts. This doubt arose because of dicta in Justice Black's majority opinion in *Palmer v. Thompson*,[232] decided in 1971. In that case, a lower federal court had held that the practice of maintaining "separate but equal" recreational facilities in the city of Jackson, Mississippi, violated the Thirteenth and Fourteenth Amendments to the Constitution.[233] The city council responded by completely closing down five municipal swimming pools that it either owned or leased. A group of blacks filed suit to compel the city to reopen the pools and operate them on a desegregated basis; the district court declined to grant their request and the United States Court of Appeals for the Fifth Circuit affirmed, finding no violation of the equal protection clause because the council's action affected all races

230. *Id.* at 228, 108 Cal. Rptr. at 258. *See* Stevenson v. Colgan, 91 Cal. 649, 652-53, 27 P. 1089, 1090 (1891).

231. *See, e.g.*, Department of Social Welfare v. Gardiner, 94 Cal. App. 2d 431, 433, 210 P.2d 855, 856 (1949); People v. Casa Co., 35 Cal. App. 194, 199-200, 169 P. 454, 457 (1917); Smith v. City of Gainesville, 93 So. 2d 105, 106-07 (Fla. 1957); State v. Fourchy, 106 La. 743, 751, 31 So. 325, 329 (1901); Sheridan v. Gardner, 347 Mass. 8, 14, 196 N.E.2d 303, 308 (1964); State *ex rel.* Wilcox v. Gilbert, 126 Minn. 95, 103, 147 N.W. 953, 956 (1914); *In re* Claim of Albertson, 8 N.Y.2d 77, 84-85, 168 N.E.2d 242, 244, 202 N.Y.S. 2d 5, 9 (1960); Skinner v. State *ex rel.* Williamson, 189 Okla. 235, 237, 115 P.2d 123, 126 (1941), *rev'd on other grounds sub nom.* Skinner v. Oklahoma, 316 U.S. 535 (1942). As can be seen from some of the foregoing citations, the positions of the courts in California, Minnesota and New York are not entirely consistent on this issue.

232. 403 U.S. 217 (1971).

233. Clark v. Thompson, 206 F. Supp. 539, 543 (S.D. Miss. 1962), *aff'd*, 313 F.2d 637 (5th Cir.), *cert. denied*, 375 U.S. 951 (1963).

equally.[234] The United States Supreme Court, in a five-to-four decision, upheld the ruling of the Fifth Circuit.[235] With respect to the contention that the city council's decision to close the pools was motivated by a desire to avoid racial integration, Justice Black distinguished prior equal protection cases involving scrutiny of legislative motive[236] and concluded that such a technique was inadvisable for two reasons. First, it would be extremely difficult for a court to ascertain the dominant motive underlying the passage of a given law; second, it would be futile to invalidate a statute due to the fact it was enacted with bad motives because a legislature could simply re-enact it for legitimate reasons.[237]

Justice Black's opinion in *Palmer* contrasts starkly with his earlier views in *Lovett*. While it is true that the discussion of motive in the former case was in the context of the Fourteenth Amendment,[238] the majority opinion cited supporting case authority involving situations unrelated to the equal protection clause of the Constitution.[239] Thus, it seemed that the opinion in *Palmer* seriously undercut the precedential value of *Lovett*; but in fact, the former decision probably has no effect on the latter because the Court appears to regard scrutiny of a possible punitive motive on the part of a legislature as an exception to the broad

234. Palmer v. Thompson, 419 F.2d 1222, 1227-28 (5th Cir. 1969).

235. 403 U.S. at 219 (Black. J., joined by Burger, C.J., and Harlan, Stewart & Blackmun, JJ.).

236. *Id.* at 225. *See* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 231 (1964) (Court considered segregationist motives underlying the closing of county schools); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (Court looked at the purpose behind a gerrymandering bill enacted by the Alabama legislature). Justice Black distinguished *Griffin* by saying that in that case the state was financing private schools that excluded blacks; he pointed out that in *Gomillion* the effect of the gerrymander was to remove all blacks from the voting rolls of the city of Tuskegee. Justice Black, however, ignored other cases in which the Court quite consciously looked at motive. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 107 (1968) (Court considered legislature's motive in enacting a statute prohibiting the teaching of Darwinism in public schools); Abingdon School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (Court struck down Bible-reading program by scrutinizing its "purpose and primary effect.") *See also* Washington v. Davis, 426 U.S. 229, 242-44 (1976) (official action does not violate the due process clause of the Fifth Amendment unless a plaintiff can show racially disproportionate impact and racially discriminatory intent or purpose); Keyes v. School Dist. No. 1, 413 U.S. 189, 208 (1973) (Court found de jure segregation is distinguishable from de facto segregation by reference to the presence of a discriminatory purpose).There does not appear to be any sound reason to conclude that the term "legislative purpose" signifies something other than what is referred to by the term "legislative motive." Thus, Justice Black's curt dismissal of precedent tends to gloss over a rather complex body of case law.

237. 403 U.S. at 225. *Accord*, Wright v. Council of Emporia, 407 U.S. 451, 461-62 (1972). *But see* Washington v. Davis, 426 U.S. 229, 244 n.11 (1976).

238. *See* 403 U.S. at 225-26.

239. *Id.* at 224 (citing United States v. O'Brien, 391 U.S. 367, 383 (1968); Fletcher v. Peck 10 U.S. (6 Cranch) 87, 130 (1810)).

rule promulgated in *Palmer*. This thesis was advanced in Chief Justice Warren's opinion for the Court in *United States v. O'Brien*,[240] decided three years before *Palmer*. In that case, the majority stated in a footnote that the Court would permit analysis of motive "in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose."[241] Suits involving bill of attainder challenges were listed as the chief exemplar of this "very limited" class.[242] Similarly, in *Nixon v. Administrator of General Services*,[243] decided in 1977, Justice Brennan and five of his colleagues[244] agreed that one determinant of punishment for the purpose of analyzing a bill of attainder claim was an inquiry "whether the legislative record evinces a congressional intent to punish."[245] The decision in *Palmer* was never even mentioned. Thus, at least in the federal courts, judicial scrutiny of legislative motive is a permissible method for determining the punitive nature of a challenged enactment.

The foregoing discussion raises the more fundamental question whether such scrutiny is a *legitimate* analytical tool. Justice Black's opinion in *Lovett* fails to consider this question. He simply relates the legislative history of the rider to the Urgent Deficiency Appropriations Act of 1943 and then states that the rider operated as a bill of attainder in light of that history. Nevertheless, there are some convincing reasons favoring judicial scrutiny of legislative motive. First, an examination of the text of a modern statute may not reveal whether its legislative purpose was punitive.[246] If a court is required to characterize a challenged enactment solely on the basis of its text, few laws will be struck down as bills of attainder for the simple reason that no legislature is likely to provide courts with obvious justifications for abrogating its handiwork. In Justice Frankfurter's opinion, however, such a restriction on judicial review is not undesirable because other provisions of the Constitution adequately protect the civil liberties of individuals.[247] Of course, judi-

240. 391 U.S. 367 (1968).

241. *Id.* at 383 n.30.

242. *Id.*

243. 433 U.S. 425 (1977).

244. He was joined by Justices Blackmun, Marshall, Powell, Stevens and Stewart. *Id.* at 428. Justice White concurred only in the result. *See id.* at 487 (White, J., concurring in the judgment).

245. *Id.* at 478. The use of the word "intent" is misleading and, hopefully, inadvertent. See note 177 *supra.*

246. This state of affairs is to be contrasted with bills of attainder at common law, which were easily identifiable because they contained legislative determinations of guilt. *See* note 15 and accompanying text *supra.*

247. United States v. Lovett, 328 U.S. 303, 326 (1946) (Frankfurter, J., concurring). *Accord, Punishment, supra* note 14, at 268-69.

cial adoption of that approach would lead to the evisceration of the safeguards afforded by the bill of attainder clauses. As Professor Zachariah Chafee has theorized:

> It is hardly conceivable that Congress would ever pass an old-fashioned bill of attainder. Hence it is futile to stop with nullifying such statutes. The real danger will come from new kinds of legislative determinations of guilt and legislative impositions of punishment upon individuals. Consequently, the Court in the *Lovett* case did much for freedom when it was willing to regard the attainder clause as directed generally against attempts by Congress or state legislatures to take into their own hands the conviction and sentencing of private citizens and officials, without the safeguards of trial in a courtroom.[248]

If it is desirable to ensure that the proscriptions against bills of attainder will continue to serve as viable bulwarks against legislative tyranny, the *Lovett* approach is a legitimate means of achieving that goal. The text of the rider to the Urgent Deficiency Appropriations Act at issue in that case appeared relatively innocuous.[249] It merely deprived named persons of wages unless they were appointed and confirmed before a certain date. Nor was this condition inherently unreasonable. The executive departments could easily have complied with it; they chose not to do so in order that they might have a test case to litigate in the courts.[250] Thus, the only way a bill of attainder challenge could have prevailed in *Lovett* was for the Court to engage in scrutiny of the underlying record in order to ascertain why the rider was enacted. In an indirect way, *Cummings v. Missouri*[251] also supports such a judicial technique. Justice Field warned that the Constitution was concerned with substance, not shadows, and that too stringent an adherence to formalistic details would unfairly allow the legislature to evade an explicit constitutional limit on its powers.[252] Arguably, the majority opinion in *Lovett* implements Justice Field's directive[253] by considering the challenged enactment in context before attempting to characterize it. Thus the methodology adopted by Justice Black in *Lovett* is not the breach of tradition one might initially assume. More importantly, this methodology adapts the proscriptions against bills of

248. CHAFEE, *supra* note 7, at 155.

249. *See* note 182 *supra* for the text of the rider. Some critics contended that section 304 was no more than a law prescribing qualifications for office. *See* note 196 *supra*.

250. GOODMAN, *supra* note 182, at 151.

251. 71 U.S. (4 Wall.) 277 (1867).

252. *Id.* at 325. *See* note 70 and accompanying text *supra*.

253. Even one of the most stringent critics of *Lovett* has admitted as much. Davis, *supra* note 2, at 19 n.23.

attainder to changing times and to the increased sophistication of legislative draftsmen.

The second argument for scrutinizing legislative motive in bill of attainder cases was made by Chief Justice Warren in *United States v. O'Brien*.[254] He claimed that in such cases the constitutional issue involved necessarily mandates judicial consideration of legislative purpose.[255] It is easy to see why this is so. One component of the definition of a bill of attainder is punishment, but the mere fact that a law imposes a sanction does not necessarily mean that it is punitive. Thus, a rule regulating the qualifications of professional engineers,[256] a statute revoking the license of any commodities trading firm that files for bankruptcy and wins court approval of a reorganization plan,[257] an enactment authorizing administrators to enter and inspect places of employment in order to determine whether they comply with health and safety codes[258] and an ordinance restricting a person's ability to maintain cowpens and stables within city limits[259] all may infringe individual freedoms but they do so for regulatory, not punitive, purposes. The legislatures were concerned with the skills of engineers, the solvency of licensed commodity merchants, the welfare of employees and the health of urban residents, not with punishing a person or a class of persons. Where the statute explicitly evinces a purpose of punishing (as did English bills of attainder), reliance on the text of the law alone is sufficient. But where the statute imposes a sanction without explanation and where the reason for doing so may either be regulatory or punitive, the *very nature of the inquiry* requires a scrutiny of legislative motive. For this reason, bill of attainder cases inherently necessitate the type of inquiry engaged in by the Court in *Lovett*. Failure to conduct such an inquiry is tantamount to an abdication of a court's responsibility to provide meaningful judicial review of allegedly unconstitutional legislative adjudications.

A third and more generic justification for scrutiny of legislative

254. 391 U.S. 367 (1968).

255. *See* notes 241-242 and accompanying text *supra*.

256. CAL. BUS. & PROF. CODE §§ 6700-6799 (West 1975). *See* Smith v. California, 336 F.2d 530, 534 (9th Cir. 1964).

257. 7 U.S.C. § 499h(b) (1976). *See* Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir. 1967), *cert. denied*, 389 U.S. 835 (1968). *Accord*, George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1975).

258. 29 U.S.C. § 657(a) (1970). *See* Stockwell Mfg. Co. v. Usery, 536 F.2d 1306, 1310 n.9 (10th Cir. 1976).

259. *See* Davis v. Mayor of Savannah, 147 Ga. 605, 606, 95 S.E. 6, 7 (1918) (ordinance issued by the city of Savannah).

motive has been offered by Professor Brest.[260] His argument may be stated as follows. As a basic legal premise, the government is constitutionally prohibited from pursuing certain illicit objectives. When a decisionmaker takes an illicit objective into account, that act may determine the outcome of his decision, even though his desire to implement the illicit objective may not be a "dominant" motive. Objection to such a decision on the ground that it was made for an illicit purpose is legitimate. If a court concludes a decisionmaker gave weight to an illicit objective, it is constitutionally required to invalidate the decision he reached. Under this analysis, a court is required to examine legislative motive if the plaintiff demonstrates that a desire to achieve an illicit objective played a significant, though not necessarily decisive, role in the decisionmaking process. A suspect motive will trigger strict scrutiny; an illicit motive will cause the challenged decision to be invalidated. Should the decisionmaker re-adopt the previously invalidated rule, the burden shifts to him to show that it was re-adopted for entirely legitimate purposes.[261] Professor Brest's theory has implications for cases other than those involving issues of punishment. It is a general justification for considering motives of legislators and is based on an

260. Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 116-18 [hereinafter cited as Brest].

261. *Id.* at 130-31. One commentator has objected that the type of decision involved in *Palmer* is beyond the "purview" of the equal protection clause of the Fourteenth Amendment, as mediated by the principle of anti-discrimination. Fiss, *Groups and the Equal Protection Clause* in EQUALITY AND PREFERENTIAL TREATMENT 118 (M. Cohen, T. Nagel & T. Scanlon ed. 1977). But another has proposed a model of judicial inquiry into legislative motive involving a methodology similar to that utilized in equal protection analysis. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970). Professor Ely concludes that inquiry into motive is permissible only where the decisionmaker has made either a random or a discretionary choice. *Id.* at 1261-75, 1281-84. If the making of a random decision involved the use of non-random criteria, the decisionmaker must defend his action, usually by advancing a rational justification. *Id.* at 1269-71. However, if those affected by his decision suffer an infringement of a fundamental interest, the burden of justification imposed upon the decisionmaker will become correlatively more stringent. *Id.* at 1269. Where the decisionmaker is making a discretionary choice (*i.e.*, one that is inherently non-rational or one in which the relationship between the choice made and the goal sought can be satisfied by merely making a choice) similar rules apply. The administrator need only bring forth a rational justification unless a fundamental interest is affected, in which case an extraordinary justification must be presented. *Id.* This model posits a less activist role for the judiciary than that proposed by Professor Brest. Not only does it severely limit the areas in which scrutiny of motives will be allowed, but the evaluative criteria to be used embody a great deference to the judgment of the decisionmaker. The "two-tier" scrutiny advocated by Professor Ely is essentially an extension of the methodology (developed for other purposes) that is used in equal protection cases. *See Forum: Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645, 646-47 (1975). For an analysis of Professor Ely's discussion of motivation in legislating, *see* Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 141-46 (1972).

activist interpretation of the role of judicial review in this nation's political system. This theory indicates that judicial inquiry into legislative motive may be not only a pragmatic interpretative technique, but also a device whereby courts can fulfill their constitutional duties.

Four arguments have been made in opposition to judicial scrutiny of legislative motive. First, it has been suggested that inquiry into motive is improper both because it invites unwarranted intrusion by the judiciary into legislative processes[262] and because it evinces disrespect for governmental policymaking bodies.[263] This argument has its basis in the self-limiting concept of judicial restraint advanced by Justice Frankfurter in *Lovett*.[264] A corollary argument is the belief that it is beyond the province of the courts to determine whether a law is "good" or "bad," "wise" or "unwise."[265] As Professor Brest correctly points out, however, scrutiny of legislative purpose involves an evaluation of the goodness or badness of the motives of legislators, not the end product of their decisionmaking deliberations.[266]

A third counter-argument, one to which both Chief Justice Warren[267]and Justice Black[268] have subscribed, is that examining legislative motive is futile because the legislature can simply re-enact for ostensibly legitimate reasons legislation that the courts have held invalid because of the improper motive of the lawmakers. Indeed, this would seem to be the lesson taught by *Lovett*. The net result of the approach taken in that case is to compel legislators to conceal their bad motives in an effort to thwart the courts. Thus, if the legislature wishes to have its enactment pass judicial scrutiny, its members need only dissemble about their motives for endorsing it. This criticism is a serious one. Professor Brest suggests that where a legislature re-adopts a statute previously abrogated by the courts because of improper motive, the courts should presume that those same impermissible motives underlie the second enactment unless the legislature can convincingly demonstrate otherwise.[269] But this suggestion is difficult to implement; not only does

262. A. BICKEL, THE LEAST DANGEROUS BRANCH 215 (1963) [hereinafter cited as BICKEL]. *See* Brest, *supra* note 260, at 128.

263. BICKEL, *supra* note 262, at 214; Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1093 (1969). *See* Brest, *supra* note 260, at 128.

264. *See* United States v. Lovett, 328 U.S. 303, 326-27, 329-30 (1946) (Frankfurter, J., concurring, joined by Reed, J.).

265. *See* Brest, *supra* note 260, at 127. *See also* United States v. O'Brien, 391 U.S. 367, 384 (1968).

266. Brest, *supra* note 260, at 128.

267. United States v. O'Brien, 391 U.S. 367, 384 (1968).

268. Palmer v. Thompson, 403 U.S. 217, 225 (1971).

269. *See* note 261 and accompanying text *supra*.

it require a presumption that legislators will invariably prevaricate about their motives for re-enactment, but it also does not account for the more troublesome problem raised by the legislature's dissembling about its motives for passing a piece of legislation in the first instance. If the supporters of the rider to the Urgent Deficiency Appropriations Act involved in *Lovett* had said that they endorsed this amendment not because they believed Watson, Dodd and Lovett to be guilty of subversion, but because they wanted to delete unnecessary administrative expenditures, should the Court have presumed such a rationale was patently unbelievable and was only meant to disguise their true, impermissible motives? The difficulties arising from such an approach are sufficiently disturbing to suggest, at the very least, that the technique used in *Lovett* may only be helpful in similar types of situations in which purportedly bad motives are apparent from the record.

The most telling objection to scrutiny of legislative motive, however, is that such a motive is simply unascertainable; the Court in both *Palmer v. Thompson*[270] and *United States v. O'Brien*[271] advanced this objection. The best statement of this argument appeared in a seminal article written by Professor Radin in 1930.[272] Although he discusses the concept of legislative intent, his criticism would apply equally well to the concept of legislative motive.[273]

> A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.
>
> That the intention of the legislature is undiscoverable in any real sense is almost an immediate inference from a statement of the proposition. The chances that of several hundred men each will have exactly the same determinate situations in mind as possible reductions of a given determinable, are infinitesimally small. The chance is still smaller that a given determinate, the litigated issue, will not only be within the minds of all these men but will be certain to be selected by all of them as the present limit to which the determinable should be narrowed. In an extreme case, it might be that we could learn all that was in the mind of the draftsman, or of a committee of half a dozen men

270. 403 U.S. 217, 225 (1971).

271. 391 U.S. 367, 384 (1968).

272. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930) [hereinafter cited as Radin].

273. As suggested earlier, the concepts of "intent" and "motive" should be carefully distinguished. *See* note 177 *supra*. But Professor Radin's critique is one that is applicable to any effort to divine the collective state of mind of a decisionmaking group.

> who completely approved of every word. But when this draft is submitted to the legislature and at once accepted without a dissentient voice and without debate, what have we then learned of the intentions of the four or five hundred approvers? Even if the contents of the minds of the legislators were uniform, we have no means of knowing that content except by external utterances or behavior of these hundreds of men, and in almost every case the only external act is the extremely ambiguous one of acquiescence, which may be motivated in literally hundreds of ways, and which by itself indicates little or nothing of the pictures which the statutory descriptions imply. It is not impossible that this knowledge could be obtained. But how probable it is, even venturesome mathematicians will scarcely undertake to compute.[274]

The lessons implicit in these two paragraphs may be amplified by a consideration of *Lovett*. Initially, there exists the fallacy of reifying the concept of motive, as if it were something that is tangible or quantifiable. The reason a legislator votes for a bill may depend on a congeries of purposes or motives, many of which may conflict with one another. So it is deceptive to say a legislator had a particular motive for casting his vote in the way he did. Those who voted for the rider to the appropriations bill may have been motivated by a belief that Watson, Dodd and Lovett were subversives, or they may have been trying to retaliate against President Roosevelt and his policies,[275] or they may have believed wartime security necessitated the removal of the three persons named, or they may have sought more congressional control over Presidential appointments[276] or, as Justice Frankfurter suggested,[277] they may have been more interested in getting a vital appropriations bill enacted into law. More likely, individual legislators might have harbored a combination of several of these motives. The moral is that consideration of legislative motive as a unitary concept is erroneous.

274. Radin, *supra* note 272, at 870-71. *Accord*, Bruncken, *supra* note 177, at 130; Corry, *The Use of Legislative History in the Interpretation of Statutes*, 32 CAN. BAR REV. 624, 637 (1954) [hereinafter cited as Corry]; de Sloovère, *Preliminary Questions in Statutory Interpretation*, 9 N.Y.U.L. REV. 407, 415 (1932). Justice Cardozo criticized judicial inquiry into legislative motive by bemoaning the fact that, with such an approach, "psychoanalysis has spread to unaccustomed fields." United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting). *But see* Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 892 (1930) [hereinafter cited as Landis]: "To ignore legislative processes and legislative history in the processes of interpretation, is to turn one's back on whatever history may reveal as to the direction of the political and economic forces of our time." For an overview of the various approaches to this general area of the law, see Witherspoon, *Administrative Discretion to Determine Statutory Meaning: "The Middle Road" I*, 40 TEX. L. REV. 751, 753-71 (1962).

275. *See* GOODMAN, *supra* note 182, at 139-40.

276. *See id.* at 149-50.

277. *See* note 196 and accompanying text *supra*.

This fallacy is compounded when one speaks in terms of the motive of the House of Representatives or the Senate. Justice Black in *Lovett* cited statements of those opposing the rider,[278] those who said Watson, Dodd and Lovett were on trial[279] and those expressing the conclusions of the subcommittee.[280] Common sense alone should dictate that the first class of statements was irrelevant. Even presuming the other two classes of statements indicated that the speakers had tried and convicted Watson, Dodd and Lovett in their own minds, how can these sentiments be imputed to the House as a whole? To maintain that such statements were representative of the opinions of the 318 men who voted for the Urgent Deficiency Appropriations Act is unconscionable because it posits an assumption based on insufficient evidence. Even assuming those in the House who voted for the rider meant to find Watson, Dodd and Lovett guilty of subversion, Justice Frankfurter points out that bills become law after being passed by the House and the Senate and then being signed by the President.[281] In the case of the Urgent Deficiency Appropriations Act, President Roosevelt did not believe that Watson, Dodd and Lovett were guilty of anything.[282] Moreover, the Senate rejected the rider at first[283] and although senators participating in the joint congressional conferences did eventually yield to the demands of the House on the grounds of expediency,[284] they managed to insert a compromise escapability clause into the text of the rider allowing for Presidential appointment coupled with senatorial confirmation before November 15, 1943.[285] Justice Black never examined the motives of the members of the Senate, even though without its vote the enactment could never have become law. Noting this omission, Justice Frankfurter implicitly raised a rather disturbing question:

278. *See* United States v. Lovett, 328 U.S. 303, 309 (1946). *See* note 187 and accompanying text *supra*. In quoting and apparently relying on the statements of members of the opposition in Congress, Justice Black may have acted erroneously. A series of cases have often repeated the view that opposition statements may not be utilized in order to determine legislative intent or purpose. *See, e.g.*, Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1976); NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 66 (1964); Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 288 (1956); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

279. *See* 328 U.S. at 309-10. *See* notes 188-189 and accompanying text *supra*.

280. *See id.* at 311-12.

281. *See* note 196 and accompanying text *supra*.

282. Justice Black acknowledged this. 328 U.S. at 313.

283. *See id.* at 312-13.

284. Senator McKellar said: "The Senate conferees have most reluctantly felt obliged to yield to this unjust provision in order to get the appropriation bill out of Congress and enacted into law." 89 CONG. REC. 6407 (1943) (remarks of Sen. McKellar), *quoted in* GOODMAN, *supra* note 182, at 149.

285. GOODMAN, *supra* note 182, at 149. For the text of the statute, *see* note 182 *supra*.

if the approval of three institutions (the House, the Senate and the Presidency) is necessary to enact legislation and only one of those institutions (the House) is said to harbor a collective illicit motive, can the enactment be invalidated because of that bad motive, without any showing of the culpability of the other two institutions? *Lovett* indicates the answer is in the affirmative; thus, it establishes a very questionable principle.

One conclusion to be derived from the discussion of these four objections to judicial scrutiny of legislative motive (intrusion into plus disrespect for the decisionmaking processes of a coordinate branch of government, improper exaltation of judicial notions about the wisdom or worth of a particular law, futility and unascertainability) is that courts should simply cease attempting to accomplish the impossible and should eschew further efforts to ascertain the purposes underlying legislative enactments. But such a draconian conclusion ignores the fact that if courts are foreclosed from scrutinizing motive, they will have great difficulty resolving bill of attainder challenges to statutes imposing sanctions but omitting recitals of purpose. The net effect of such a foreclosure might well be the undermining of the bill of attainder doctrine.

Is there a way to reconcile the need for judicial scrutiny of legislative motive in bill of attainder cases and the objections against such a technique? Of these objections, the first two—intrusion plus disrespect and improper exaltation—are essentially expressions of a policy founded upon a theory of judicial self-restraint; whether or not a given court will accede to such objections depends upon the juristic philosophies of its members. The criticism of futility is, on closer examination, an *irrelevant* criticism. To refuse to invalidate a statute enacted for illicit motives because it may later be re-enacted for permissible purposes requires courts to predict future legislative responses and to dispose of a case on the basis of those predictions. One response to such an approach is: decide only one case at a time. A court has no business concerning itself with what a legislature might do if it renders an adverse decree; rather, it should restrict its considerations to the law currently being challenged. Nevertheless, this response neglects a more fundamental problem. What if the legislature "falsifies" the record so that a law appears to be enacted for ostensibly legitimate purposes when, in fact, those who vote for it harbor illicit motives? The obvious response to this is that if extrinsic evidence discloses only permissible motives, the court's duty is to uphold the challenged law, which is to say that a plaintiff who has a legitimate objection may not prevail in

some instances. The alternative, however, is for courts to embroil themselves in the chimerical task of attempting to ascertain the motives that the members of the legislature really harbored, rather than those that they merely claimed to harbor. The evidentiary obstacles entailed in showing that persons are misrepresenting their own states of mind would, quite frankly, be insurmountable. Moreover, it should be noted that it is highly unlikely that all the members of a legislature will (or even can) act in concert to disguise their ulterior motives; to even posit such a situation is to presume a level of intramural cooperation and unanimity of which few, if any, legislative bodies are capable. This leaves the final objection: unascertainability. A close examination of this objection suggests it is not really directed so much at scrutiny of motive per se as at the *manner* in which such scrutiny is conducted. Professor Radin's categorical critique is really an attack on the way in which courts derive conclusions about collective purposes. Thus, the objection of unascertainability can be met if the Court is willing to do that which it failed to do in *Lovett* and subsequent cases: promulgate guidelines with respect to the types of evidence it will consider in examining legislative purpose. This is not a simple task, by any means. But even a casual consideration of the subject suggests that certain classes of evidence are either so inherently unreliable, *e.g.*, the characterization of a proposed piece of legislation offered by its opponents, or so collateral in nature, *e.g.*, the statements of legislators regarding what they hope their preliminary investigations will accomplish, that they should not be taken into account, whereas other classes of evidence, *e.g.*, the statements of a committee's members regarding their purposes for drafting a proposed bill, are relevant, at least so long as a court does not attempt to derive too much from them, *e.g.*, deducing the collective motive of the legislature from the statements of the committee members. Unless the United States Supreme Court attempts to devise general criteria governing its inquiry into motive in bill of attainder cases, it simply exposes itself to justifiable criticisms like those of Professor Corry, who believes that "[a]ll that reference to legislative history can do is to help mask the judge's law-making."[286]

Assuming judicial consideration of legislative purpose is a valid tool, however, should extrinsic evidence (*e.g.*, records of debates, committee reports, testimony of witnesses, etc.) be relied upon? *Lovett* indicates the answer is in the affirmative.[287] Although Justice Black failed

286. Corry, *supra* note 274, at 637.

287. The Supreme Court has consistently stated that it is impermissible to rely on the statements of individual lawmakers made during the course of debates on a bill for the

to so state, the primary rationale is again one of necessity. The need to conduct an independent inquiry into the subject of legislative motive exists only where the purpose of the law being challenged is not expressed in the text of the enactment itself.[288] In such cases, the courts have no choice but to rely on legislative history found in extrinsic records, providing such records exist. Reliance on extrinsic evidence by courts is not tolerated in England,[289] but as Justice Frankfurter once noted, the English rule is far too simplistic because it may exclude evidence that is logically probative of some disputed issue in a case.[290] To

purpose of determining legislative intent. *See, e.g.*, McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 493-94 (1931); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474-75 (1921); Lapina v. Williams, 232 U.S. 78, 90 (1914); Binns v. United States, 194 U.S. 486, 495 (1904); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897); Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). But the Court has often relied on reports made by a committee member in charge of the passage of a bill. *See* Duplex Printing Press Co. v. Deering, 254 U.S. at 475; United States v. St. Paul, Minn. & Manitoba Ry., 247 U.S. 310, 318 (1918); United States v. Coca Cola Co., 241 U.S. 265, 281 (1916); Pennsylvania R.R. v. International Coal Mining Co., 230 U.S. 184, 198-99 (1913); Binns v. United States, 194 U.S. at 495. Indeed, the Court almost always utilizes legislative history as an aid in construing a statute; for an exhaustive list of Supreme Court cases using such evidence for the decade between 1938 and 1948, *see* Commissioner v. Estate of Church, 335 U.S. 632, 687-89 (1949) (Frankfurter, J., dissenting).

288. For this reason, the Feinberg Law, *see* notes 203-204 and accompanying text *supra*, can be construed as a bill of attainder. Section one of that enactment, which the New York Court of Appeals labelled a "preamble," *see* note 210 and accompanying text *supra*, resembles that portion of a classical English bill of attainder which recites crimes, pronounces guilt and declares a judgment. *See* note 15 and accompanying text *supra*. Thus, section one (1) names the Communist Party, (2) declares the dissemination of its tenets to be a menace, (3) finds that such dissemination is taking place in the New York public school system and (4) charges the board of regents to take specific action, as specified in section three. It is true section one is not an *operative* part of the statute but, by definition, a recital of offenses and a censorial pronouncement are descriptive, *not* prescriptive. The only prescriptive portion of an English bill of attainder was that portion which imposed punishment, but that does not mean that the other portions of such a bill were surplusage. Rather, those other portions comprised the rationale for both imposing a sanction and selecting how grave a sanction to impose. On this theory, sections one and three of the Feinberg Law, construed as a unit, conform to the classical definition of a bill of attainder at common law. One would have expected that, in light of United States v. Brown, 381 U.S. 437 (1965), the United States Supreme Court, on being given the opportunity to reevaluate the Feinberg Law, would have invalidated it as a bill of attainder. But, as noted, the Court chose to overturn the enactment on the theory of overbreadth. *See* note 199 *supra*. For possible reasons why the Court used an overbreadth rather than an attainder analysis to invalidate this legislation, *see* note 985 *infra*.

289. *See* Viscountess Rhondda's Claim, [1922] 2 A.C. 339, 383; Rex v. Board of Educ., [1909] 2 K.B. 1045, 1057, 1072; Millar v. Taylor, 4 Burr. 2303, 2332 (1769). *See also* 1 H. HALSBURY, THE LAWS OF ENGLAND 141 (1907).

290. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 541 (1947). *Cf.* Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 KAN. L. REV. 1, 16-17 (1954) (suggests such extrinsic evidence is valuable as a source of ideas, but should not be deemed to be binding authority); Landis, *supra* note 274, at 892.

simultaneously endorse a policy of judicial review of legislative motive in bill of attainder cases but deny the judiciary the right to examine legislative history contained in extrinsic records is contradictory: acceptance of the former technique necessarily implies utilization of and reliance on the latter type of evidence.

2. *Methods For Finding That a Sanction is Nonpenal*

As suggested earlier,[291] a history of the bill of attainder doctrine in this country entails a chronicle of the various means by which state and federal courts have sought to avoid invalidating legislation as a bill of attainder. This subsection and the three succeeding it will deal with spurious distinctions or definitions utilized by courts in order to arrive at the conclusion that a challenged enactment does not fit within the prohibitions of article one, sections nine and ten of the Constitution.

a. **Civil v. Criminal Penalties and Procedures**

The first such distinction focuses on whether or not the statute being attacked may be characterized as civil or criminal in nature. This approach consists of two different but related branches of thought. One is based on the fallacious proposition that the proscriptions against bills of attainder apply only in criminal, not civil, proceedings;[292] the other is founded on the erroneous theory that these proscriptions apply only where the statutory penalty sought to be imposed may be designated as criminal rather than civil in nature.

The first branch of this apocryphal dichotomy has its modern origins in the case of *United States v. Distillery*,[293] decided by a federal district court in Delaware in 1870. That suit involved a libel of information instituted by federal tax assessors against a distillery located in Wilmington. The owners of the premises had failed to pay a specified tax assessed against them pursuant to federal legislation enacted in 1868.[294] As a consequence of this default, revenue agents seized the property in question and then lodged a suit to have a federal court declare the seized premises forfeited to the government.[295] As part of their defense, the property owners alleged that the statute imposing the

291. *See* note 98 and accompanying text *supra*.

292. An alternative way of stating this contention is that the prohibition against bills of attainder applies only to punishment for a crime, which, of course, can only be imposed after a full criminal trial or trialtype hearing.

293. 25 F. Cas. 866 (D. Dela. 1870) (No. 14,965).

294. Act of July 20, 1868, Pub. L. No. 186, § 42, 15 Stat. 142. The act imposed a tax on the manufacture of distilled spirits.

295. 25 F. Cas. at 866.

tax amounted "in practical effect" to a bill of attainder.[296] The district court judge disagreed:

> In answer, it is obvious to remark, that these clauses [article one, section nine, clause three and article three, section three, clause two] of the constitution of the United States have respect to high crimes, and punishment of them, restraining rigor, and guarding against arbitrarily enacting guilt. The case before the court is a civil suit in rem, against the thing, to ratify the seizure of it, and the provision of the act of congress under which it is alleged to be forfeited, and therefore was seized, is a regulation of civil policy framed to secure to the United States fair payment of taxes imposed for the support of the government, a regulation of civil policy to accomplish a purpose vital to government; for without revenue the government cannot exist; and what measures may be requisite to enforce the collection of a tax, it is for Congress, in the exercise of its legislative power, to determine.[297]

This thesis has been reiterated by a number of other courts in varying contexts,[298] and was advanced most recently by the United States Court of Appeals for the Tenth Circuit in a case involving a challenge to certain inspection provisions of the Occupational Safety and Health Act.[299]

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296. *Id.* at 867. *See* Cole v. Cardoza, 441 F.2d 1337, 1341 (6th Cir. 1971) (in suit alleging that statute imposing special tax on the occupation of wagering was a bill of attainder, held the assessment of a tax is not punishment).

297. 25 F. Cas. at 867. *But cf.* Doe *ex dem.* Gaines v. Buford, 31 Ky. (1 Dana) 481, 509-10 (1833) (opinion of Nicholas, J.) (holding forfeiture enforced in a civil proceeding, either *in personam* or *in rem*, may serve as the punishment component of a bill of attainder). The Delaware district court judge's assertions about article three, section three are accurate. *See* note 2 *supra*. But that section of the Constitution refers only to the high crime of treason, whereas bills of attainder (or, more accurately, bills of pains and penalties) at common law were applied not only to treason but also to lesser offenses, such as voting fraud. *See* notes 23-24, 27 and accompanying text *supra*.

298. *See* De Rieux v. Five Smiths, Inc., 499 F.2d 1321, 1335 (Emer. Ct. App. 1974) (found attainder claim inapplicable where the government sought to enforce wage and price controls by means of a suit requesting an injunction and restitution, rather than a criminal prosecution); Moffett v. Commerce Trust Co., 354 Mo. 1098, 1104, 193 S.W.2d 588, 592 (1946), *appeal dismissed*, 329 U.S. 669 (1946) (found attainder challenge to a statute exacting treble costs from one who files three successive defective pleadings was meritless because the law was one of civil procedure); Skinner v. State *ex rel.* Williamson, 189 Okla. 235, 237, 115 P.2d 123, 125 (1941), *rev'd on other grounds sub. nom.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (held Oklahoma Habitual Criminal Sterilization Act was not susceptible to an attainder challenge because the legislature was said not to have intended a criminal prosecution); State *ex rel.* Carroll v. Simmons, 61 Wash. 2d 146, 152, 377 P.2d 421, 424 (1962), *cert. denied*, 374 U.S. 808 (1963) (held statute depriving incumbent official of his office upon conviction of a felony was no attainder because "unrelated to . . . rights in a criminal proceeding.")

299. 29 U.S.C. § 657(a) (1970). *See* Stockwell Mfg. Co. v. Usery, 536 F.2d 1306, 1310 n.9 (10th Cir. 1976) (found bill of attainder and ex post facto clauses apply only to criminal acts and have no relevance to a civil suit). The Tenth Circuit cited Johannessen v. United

The second branch of the dichotomy is concerned with whether the sanction being imposed by the challenged enactment is civil or criminal in nature. A paradigmatic case in this respect is *State ex rel. Wilcox v. Ryder*.[300] That suit involved a Minnesota statute providing for the abatement of bawdy houses. Section one of the challenged enactment declared that any building erected, maintained or used "for lewdness" was a public nuisance; section two authorized any county attorney or private citizen to bring an action in equity on behalf of the state to enjoin such a nuisance.[301] The trial court was empowered to issue an *ex parte* temporary injunction and the property owners were allowed only three days in which to file an answer. After trial and upon sufficient proof of the existence of a nuisance, section five of the challenged statute authorized the court to issue orders that the premises in question be shut down completely for one year and that all the personalty therein be seized and sold.[302] Any unauthorized use of the premises during the one-year period constituted contempt of court and was punishable by a fine of one thousand dollars or three to six months in prison or both.[303] In addition, section eight of the act authorized the imposition of a "penalty of three hundred dollars" against the property holder; this sum was to be entered in the county auditor's rolls as a "tax upon the property" in question.[304]

The defendants claimed that since the provisions of the act were penal in nature, they were entitled to a trial by jury.[305] The Minnesota Supreme Court responded that the purpose of the statute was to suppress immoral uses of property rather than to punish the property owners themselves, unless, of course, their conduct constituted contempt of court.[306] But the three hundred dollar penalty imposed by section eight of the act both required and received extensive analysis. The court noted that although this assessment was designated to be a penalty by the text of the act itself, it was to be "imposed, treated and collected as a tax;"[307] moreover, there was no punishment prescribed for failure to pay this amount.[308] Therefore, the court concluded that this assessment

States, 225 U.S. 227, 242 (1912), in support of its thesis; but that case refers only to ex post facto laws. *See* note 314 and accompanying text *infra*.

300. 126 Minn. 95, 147 N.W. 953 (1914).

301. *Id.* at 98, 147 N.W. at 954. *See* 1913 Minn. Laws ch. 562, §§ 8717-8726.

302. 126 Minn. at 99, 147 N.W. at 955.

303. *Id.* at 100, 147 N.W. at 955.

304. *Id.*

305. *Id.* at 102, 147 N.W. at 956.

306. *Id.* at 103, 147 N.W. at 956.

307. *Id.* at 105, 147 N.W. at 957.

308. *Id.*

and the act as a whole were nonpenal, which disposed of the defendants' points "based upon the constitutional provisions relating to . . . bills of attainder, and ex post facto laws."[309] Again, several courts in various contexts have arrived at similar conclusions based upon an identical theory.[310]

A consideration of *Cummings v. Missouri*,[311] *Ex parte Garland*[312] and *United States v. Lovett*[313] will show why this purported distinction is, in fact, false. The first branch of the distinction relies on the civil nature of the underlying proceeding for support. While it is true that the prohibitions in the Constitution against ex post facto laws apply

309. *Id.* at 106, 147 N.W. at 957.

310. *See* Westmoreland v. Chapman, 268 Cal. App. 2d 1, 5, 74 Cal. Rptr. 363, 366 (1968) (in the case of attainder challenge to a law requiring revocation of the driver's license of one who is arrested on suspicion of driving while intoxicated and refuses to submit to chemical test, held that the challenge was meritless because revocation of a license is not a criminal penalty); Department of Social Welfare v. Gardiner, 94 Cal. App. 2d 431, 433, 210 P.2d 855, 856 (1949) (stated that law requiring remuneration from the estate of one who improperly requested and received welfare benefits was not an attainder by distinguishing between penalties imposed upon wrongdoers and recoupments from debtors and between laws that merely seek to ensure compliance with conditions and laws obtaining money for the state); People v. Casa Co., 35 Cal. App. 194, 199-200, 169 P. 454, 457 (1917) (stated that nuisance statute was no attainder because one-year shutdown provision was only intended as a means of abatement, not punishment); Moore v. Commonwealth, 293 Ky. 55, 57, 168 S.W.2d 342, 343 (1943) (quoting House and Lot v. State *ex rel.* Patterson, 204 Ala. 108, 109, 85 So. 382, 382 (1920)) (held law providing for forfeiture of property used in connection with the sale or manufacture of liquor in dry territory was valid because bills of attainder "have nothing to do with the case, for they relate to legislative punishment . . . of criminal or supposed criminal offenses, whereas that part of the statute to which we have referred is justified on the ground that it is a provision for the abatement of nuisances"; only *Moore* referred to the prohibition in the Federal Constitution); Daly v. State, 296 Minn. 238, 239, 207 N.W.2d 541, 543 (1973) (held motorist's implied consent law not an attainder because it imposed no criminal punishment, but only the revocation of a driver's license); Moffett v. Commerce Trust Co., 354 Mo. 1098, 1104, 193 S.W.2d 588, 592 (1946), *appeal dismissed*, 329 U.S. 669 (1946) (held law imposing treble costs upon one filing three successive defective pleadings was no attainder because it authorized neither fine nor imprisonment, but only a money judgment); Lanza v. Wagner, 30 Misc. 2d 212, 214, 220 N.Y.S. 2d 477, 481 (1961), *aff'd per curiam*, 15 App. Div. 2d 552, 222 N.Y.S. 2d 1019 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 317, 324-25, 183 N.E.2d 670, 674, 229 N.Y.S. 2d 380, 385-86 (1962), *cert. denied*, 371 U.S. 901 (1963) (held by trial court that law dismissing incumbent members of the state's board of education because of generalized corruption in the state's educational administrative system was no attainder because it lacked three prerequisites: the citation for a crime, the taking of property and the meting out of punishment); Skinner v. State *ex rel.* Williamson, 189 Okla. 235, 237, 115 P.2d 123, 126 (1941), *rev'd on other grounds sub nom.* Skinner v. Oklahoma, 316 U.S. 535 (1942) (stated with respect to attainder challenge to Oklahoma Habitual Criminal Sterilization Act that such a challenge did not apply where the law in question imposed no punishment for crime).

311. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra.*

312. 71 U.S. (4 Wall.) 333 (1867). *See* notes 71-81 and accompanying text *supra.*

313. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra.*

only to criminal proceedings,[314] the same rule does not apply with respect to the prohibitions against bills of attainder. Although *Cummings* involved an appeal from a criminal conviction for preaching in the state of Missouri without first having executed a prescribed expurgatory oath,[315] both *Garland* and *Lovett* involved civil suits. In *Garland*, the petitioner had not been convicted of any crime; instead, he was the one seeking a declaratory judgment that a specific act of Congress was unconstitutional.[316] This was unquestionably a civil proceeding; no statutory violation had yet been committed. In *Lovett*, the three petitioners instituted a *civil* suit in the Court of Claims to recover back wages;[317] on an appeal by the government of an award in their favor, the United States Supreme Court dealt with the issue of whether the statute denying them their salaries constituted a bill of attainder,[318] and concluded that it did.[319] It might be argued that in *Lovett* and *Cummings* the victims of the legislature were challenging the validity of its enactment, whereas in *United States v. Distillery*[320] the government had lodged a suit to enforce a statutory provision. In fact, however, the Delaware district court in the latter case seems to offer a broad-based generalization distinguishing civil and criminal suits.[321] Although the court does add some remarks about the government's need to enforce revenue-raising provisions,[322] later cases make no distinction as to whether the underlying lawsuit was instituted to challenge or enforce a law.[323] Nor does language in any Supreme Court opinion endorse such a dichotomy. In fact, Justice Black in *Lovett*

314. Galvan v. Press, 347 U.S. 522, 531 (1954); Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Johannessen v. United States, 225 U.S. 227, 242 (1912); Carpenter v. Pennsylvania, 58 U.S. (17 How.) 456, 463 (1855); Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834); Calder v. Bull, 3 U.S. (3 Dall.) 385, 390 (1798). This proposition has been scathingly criticized by Justice William Johnson. *See* Satterlee v. Matthewson, 27 U.S. (2 Pet.) 380, 681-87 (1829) (appendix by Johnson, J.); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 286-87 (1827) (Johnson, J., dissenting). Moreover, the Court has eroded this proposition by ruling that state legislatures cannot evade the proscription against ex post facto laws by giving a civil form to essentially criminal statutes. Burgess v. Salmon, 97 U.S. (7 Otto) 381, 385 (1878); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327 (1867).

315. *See* note 60 and accompanying text *supra*.

316. *See* note 76 and accompanying text *supra*.

317. *See* note 183 and accompanying text *supra*.

318. This issue was discussed by only two judges in the lower court. *See* note 183 and accompanying text *supra*.

319. *See* note 192 and accompanying text *supra*.

320. 25 F. Cas. 866 (D. Dela. 1870) (No. 14,965). *See* notes 293-297 and accompanying text *supra*.

321. *Id.* at 867. *See* note 297 and accompanying text *supra*.

322. *See id.*

323. *See* note 298 *supra*.

stated with respect to the rider to the Urgent Deficiency Appropriations Act of 1943 that, "[t]he fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals. . . makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal."[324] This statement, though it does not refer to the nature of the underlying lawsuit, suggests that a facile approach which declines to recognize bill of attainder challenges in civil suits is improper because the labels "civil" and "criminal" cannot be used to undercut a constitutional guarantee. This is not to say that the case of *United States v. Distillery* and subsequent, similar decisions do not implicitly involve a valid distinction; it can be contended that the statutes involved in those cases are simply regulatory rather than punitive in nature. But the decisions in question fail to rely on such a legitimate analysis, depending instead on the false civil/criminal distinction. That distinction, at least in the context of bill of attainder claims, was and is spurious.

The second branch of this false distinction, which hinges on whether the statutory sanction being imposed is civil or criminal in nature, initially seems difficult to refute. Exactions imposed by English bills of attainder or bills of pains and penalties were always sanctions imposed upon those Parliament adjudged to be guilty of crimes and thus, in that sense, were *criminal* sanctions.[325] Even in *Lovett*, Justice Black was careful to point out that denial of future employment was a sanction "only invoked for special types of odious and dangerous crimes."[326] On closer inspection, however, this putative distinction collapses. The very nature of a bill of attainder involves a legislative infliction of *punishment* and, as indicated, when a legislature exacts a punitive sanction it does so because it has adjudged its victim to be guilty of an offense meriting punishment, *i.e.*, guilty of a *crime*. This crime may not necessarily be found on existing statute books.[327] Thus, in *Lovett*, while advocacy of the cause of Loyalist Spain, or participation in the Harry Bridges Defense Fund, or affiliation with the Washington Bookshop were not prohibited by law, the House of Representatives, or at least a number of its members, apparently con-

324. 328 U.S. at 316. This language would also seem to dispose of the alternative way of stating this first branch of the civil/criminal distinction. *See* note 292 *supra*.

325. *See* note 15 and accompanying text *supra*.

326. 328 U.S. at 316.

327. *Cf.* United States v. Lovett, 328 U.S. 303, 323 (1946) (Frankfurter, J., concurring, joined by Reed J.), in which Justice Frankfurter points out that a bill of attainder may also be an ex post facto law. This was true in *Cummings* and *Garland*, for example. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377-78 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325, 328 (1867).

sidered those acts, when committed by one or more of the three persons named in the rider to the appropriations bill, to be criminal acts meriting punishment.[328] In this sense, any sanction imposed by a bill of attainder is, by definition, a *criminal* sanction. For a court to ask whether a statute imposes a criminal or civil sanction is, therefore, to posit the wrong question. The proper question is whether the statute is punitive or regulatory in nature.[329]

Apart from this argument, the second branch of the dichotomy may be assailed on other grounds. In particular, there is the troublesome question of what criteria a court should utilize when determining whether a sanction is criminal or civil. The United States Supreme Court has stated that the severity of the penalty imposed is not a decisive consideration in ascertaining whether or not a particular exaction is punitive,[330] so distinguishing between criminal and civil sanctions on that basis is impermissible.[331] *Wilcox* seems to suggest that if the chal-

328. *See* note 182 *supra*.

329. *Cf. Punishment, supra* note 14, at 244-46. The author of that commentary suggests that in all bill of attainder cases the focus of a court should be on the legislature's purported "intent to punish," not on the nature of the burden actually imposed.

330. *See* Flemming v. Nestor, 363 U.S. 603, 616 n.9 (1960); Trop v. Dulles, 356 U.S. 86, 96 n.18 (1958). *But see* French v. Senate of California, 146 Cal. 604, 611, 80 P. 1031, 1034 (1905) (no attainder if no "extinction of civil and political rights and capacities"); Hirschman v. County of Los Angeles, 231 P.2d 140, 143 (App. Div. Super. Ct. 1951), *aff'd on other grounds*, 39 Cal. 2d 698, 249 P.2d 287 (1952) (stated that bill of attainder at common law "did not merely cause a slight unpleasantness or inconvenience but without a conviction by a jury or a court, without indictment or accusation, without any legal evidence the property of men and women were [*sic*] confiscated, they were driven from their homes, their furniture was burned and their food destroyed. Sometimes they were permitted to live, scorned by their fellows, driven to the forest or sent beyond the seas. It was a common occurrence that a man who had incurred the hatred of the King or his henchmen would without trial be hanged or quartered and drawn."); Moffett v. Commerce Trust Co., 354 Mo. 1098, 1104, 193 S.W.2d 588, 594 (1946), *appeal dismissed*, 329 U.S. 669 (1946) (said that statute involved imposed only a money judgment, not a fine or imprisonment); State v. Graves, 352 Mo. 1102, 1114, 182 S.W.2d 46, 54 (1944) (with respect to attainder challenge to a statute providing that a defendant on trial in a criminal prosecution who testifies on his own behalf could be impeached by proof of a prior conviction, stated that there was a "vast difference" between the severity of the statute in question and the one involved in *Cummings*). All these decisions ignore the fact that bills of pains and penalties at common law imposed a wide array of punishments, some quite stringent and some less so. *See* notes 8-11, 87 and accompanying text *supra*.

331. Other suggestions for distinguishing civil from criminal penalties are also unhelpful. The United States Supreme Court has indicated that the label (or description) provided by the legislature in the text of the enactment itself is not decisive. United States v. Constantine, 296 U.S. 287, 294 (1935); United States v. LaFranca, 282 U.S. 568, 572 (1931). Other theorists have argued that if the statute contains two types of burdens, then one must be civil, H. KELSEN, GENERAL THEORY OF LAW AND STATE 50 (1945), or that if the statute enriches no one person, it must be criminal, J. TURNER, KENNY'S OUTLINES OF CRIMINAL LAW 538 (16th ed. 1952). Yet other attempts to draw distinctions have been embodied in

lenged enactment imposes a sanction that may possibly be deemed civil in nature, a bill of attainder challenge cannot prevail. The court in that case concluded that because the $300 exaction in the Minnesota nuisance statute could be labelled a tax rather than a fine, no punishment was involved.[332] Similarly, in other cases it has been held that a statute exacting treble costs for filing three successive defective pleadings[333] or a law revoking driving licenses for refusal to submit to chemical tests after arrest on suspicion of driving while intoxicated[334] cannot be bills of attainder because no criminal sanction is being imposed. While one might not wish to argue with the results of these decisions,[335] one can take issue with the contentions advanced by these courts. The distinctions they draw are simply irrelevant. *Cummings* teaches that the proscriptions against bills of attainder cannot be avoided by drafting a statute in any particular form.[336] Justice Field noted that punishment implied more than mere deprivations of life, liberty and property—the types of sanctions that counsel for the state of Missouri contended were associated traditionally with retribution for crimes.[337] Punishment, he said, could include disqualification from the pursuits of a lawful avocation or from a position of trust.[338] In the context of the bill of attainder doctrine, punishment is a very flexible concept encompassing a variety of exactions. To permit the state to avoid the proscriptions against bills of attainder by labelling a statutory sanction as civil rather than criminal is to permit what Justice Field condemned: the exaltation of form over substance in order to evade a constitutional mandate.

b. Prospectivity and Retrospectivity

The second spurious distinction espoused by various state and federal courts is based on the proposition that bills of attainder can only be

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overbroad maxims such as "criminal sanctions punish; civil sanctions compensate" or "if the sanction is narrow-gauge, it's civil; if broad-gauge, it's criminal." As one commentator has persuasively argued, all these formulations are simply inadequate. *See Punishment, supra* note 14, at 275-81.

332. *See* note 307 and accompanying text *supra*.

333. Moffett v. Commerce Trust Co., 354 Mo. 1098, 1104, 193 S.W.2d 588, 594 (1946), *appeal dismissed*, 329 U.S. 669 (1946).

334. Westmoreland v. Chapman, 268 Cal. App. 2d 1, 5, 74 Cal. Rptr. 363, 366 (1968).

335. It could be argued that the purpose of these statutes is regulatory, not punitive. For a discussion of this distinction, *see* notes 525-590 and accompanying text *infra*.

336. *See* 71 U.S. (4 Wall.) at 325. *See* note 70 and accompanying text *supra*. *See also* Bauer v. Acheson, 106 F. Supp. 445, 450 (D.D.C. 1952) (said constitutional prohibitions against bills of attainder apply to both criminal and civil penalties, as long as they are imposed by enactments that meet all the other definitional requirements).

337. 71 U.S. (4 Wall.) at 320.

338. *Id.* at 320-21.

retrospective in nature. The modern origins of this distinction are usually traced[339] to certain statements made by Justice Frankfurter in his concurrence in *United States v. Lovett.*[340] The operative language is as follows:

> All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable *ex post facto*. Frequently a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—"No Bill of Attainder or ex post facto law shall be passed." No one claims that § 304 is an *ex post facto* law. If it is in substance a punishment for acts deemed "subversive" (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be *ex post facto*. Therefore if § 304 is a bill of attainder it is also an *ex post facto* law. But if it is not an *ex post facto* law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made.[341]

On the basis of these remarks, several commentators have credited Justice Frankfurter with developing the doctrine that deprivations imposed by bills of attainder can apply only to past acts.[342] This characterization of his beliefs is accurate but requires some amplification.[343] Justice Frankfurter based his analysis in *Lovett* on the premise that the term "bill of attainder" was precisely defined at common law.[344] Two elements of the definition he used were the recital of a crime and the pronouncement of guilt;[345] implicit in his formulation is the assumption that at some prior point in time the victim of an attainder committed an act that the legislature found to be objectionable, to which guilt was said to attach and for which a punishment was pre-

339. Wormuth, *supra* note 12, at 607; *Need for Clarification, supra* note 12, at 223; *Waning Guaranty, supra* note 12, at 851.

340. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra.*

341. *Id.* at 322-23 (Frankfurter, J., concurring, joined by Reed, J.).

342. *See* sources cited in note 339 *supra.*

343. It is accurate to say that he believed that bills of attainder were retrospective in nature; but his remarks were confined to the facts of a single case. Thus, the doctrine of retrospectivity was really developed by a later decision. *See* notes 349-355 and accompanying text *infra.*

344. This is not exactly correct. Commentators disagree about the essential characteristics of a bill of attainder at common law. *See* notes 14-15 and accompanying text *supra.*

345. *See* note 14 *supra.* For Justice Frankfurter's discussion of the essential characteristics of a bill of attainder in the context of the legislative history of the rider involved in *Lovett, see* note 196 and accompanying text *supra.*

scribed. Thus, in Justice Frankfurter's view, a bill of attainder would, as a practical matter, only be enacted in order to inflict penalties upon a person for prior conduct which the legislating authority deemed punishable. The foregoing analysis is implicit in the language of the *Lovett* concurrence; but it is a theory that must be extrapolated from remarks that are carefully confined to the case at bar. Justice Frankfurter noted that if the rider to the appropriations bill involved in *Lovett* were a bill of attainder, then it must necessarily be ex post facto in nature, because it would be criminalizing (*i.e.*, defining as punishable) previously noncriminal conduct. His argument was that because no conduct was declared to be a punishable offense, there was no ex post facto problem; and if no offense was designated, then there must have been no prior conduct to which guilt attached and for which sanctions could be imposed. Thus, in Justice Frankfurter's view, the petitioners were relying on the wrong provision of the Constitution.[346] The key feature of his remarks is that the implied conclusion that bills of attainder apply only to past conduct is dictated by his initial premises, premises that are themselves based upon a precise schematization of the elements of a bill of attainder at common law.

This rather rigorous logicality[347] was not emulated by Chief Justice Vinson, who, at least in the context of analyzing the scope of the constitutional proscriptions against bills of attainder, became Justice Frankfurter's epigone.[348] Four years after *Lovett*, the United States Supreme Court was confronted with the case of *American Communications Association v. Douds*.[349] This suit[350] involved a challenge to sub-

346. 328 U.S. at 326. *See* note 247 and accompanying text *supra*.

347. Justice Frankfurter's logic *was* rigorous. Nonetheless, it was also based on a false premise concerning bills of attainder at common law. *See* notes 383-391 and accompanying text *infra*.

348. *See* Wormuth, *supra* note 12, at 607; *Need for Clarification, supra* note 12, at 223; *Waning Guaranty, supra* note 12, at 851-52.

349. 339 U.S. 382 (1950).

350. More accurately, two suits. The first, involving the American Communications Association, arose from a suit seeking to enjoin the National Labor Relations Board from holding a representation election without permitting the association's name to appear on the ballot, because of its noncompliance with section 9(h). A three-judge district court upheld the constitutionality of the act. Douds v. American Communications Ass'n, 79 F. Supp. 563, 565 (S.D.N.Y. 1948). That court relied on a decision by another three-judge tribunal in Washington D.C., which had held that section 9(h) inflicted no punishment, but merely withheld a privilege "from one who cannot or will not meet the valid conditions on which it is offered." National Maritime Union v. Herzog, 78 F. Supp. 146, 164 (D.D.C. 1948). The second suit involved in *Douds* arose from an action by the National Labor Relations Board postponing the effective date of a compulsory bargaining order pending union compliance with section 9(h). Inland Steel Co., 77 N.L.R.B. 1, 16 (1947). On appeal, two judges of a three-judge panel of the Seventh Circuit Court of Appeals concluded that section 9(h) was

section (h) of section nine of the Labor-Management and Relations Act of 1947,[351] which stipulated that no union was entitled to claim the jurisdiction of the National Labor Relations Board in mediating labor disputes unless each officer of the union had filed or was filing with the Board an affidavit stating "that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."[352] Congress had apparently enacted this provision in order to prevent "political strikes" like the one that had occurred at the Milwaukee facility of the Allis-Chalmers Manufacturing Co. in 1941. Witnesses had testified that certain union officers who were also members of the Communist Party had instigated that strike in the hope of starting a snowballing effect that would cripple the national defense program.[353]

One of the objections raised against this provision of the Labor Management Relations Act was that it constituted a bill of attainder in violation of article one, section nine of the Constitution. Chief Justice Vinson, speaking for a plurality of three,[354] distinguished the Court's

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not a bill of attainder. Inland Steel Co. v. N.L.R.B., 170 F.2d 247, 267 (7th Cir. 1948) (Kerner, J., joined by Minton, J.). The third judge concluded that section 9(h) was void for vagueness. *Id.* at 263 (Major, J., dissenting in part). After the decision in *Douds*, the United States Supreme Court affirmed the *Herzog* decision in a per curiam ruling. National Maritime Union v. Herzog, 334 U.S. 854 (1948).

351. 61 Stat. 146, 29 U.S.C. § 159(h) (1947), *replaced by* 29 U.S.C. § 504 (1970). That latter statute was held to be unconstitutional in United States v. Brown, 381 U.S. 437 (1965). As a result, many judges have assumed that *Brown* overruled *Douds, sub silentio. See* note 920 and accompanying text *infra.*

352. 339 U.S. at 386. A false execution of the affidavit subjected a person to a criminal prosecution under the federal criminal code. The affidavit in question bears some similarity to a few of the provisions incorporated by reference in the oath involved in *Cummings*, especially those provisions relating to membership in any organization "inimical to the government." *See* note 55 *supra.* The major difference is that the oath in the Missouri Constitution refers to the commission of stated acts in the *past* tense, while section 9(h) refers to the commission of stated acts in the *present* tense. *See* note 56 *supra.* That distinction proved to be decisive in the opinion of Chief Justice Vinson. *See* note 355 and accompanying text *infra.*

353. 339 U.S. at 388. *But see* Wormuth, *supra* note 12, at 615 n.58.

354. Chief Justice Vinson was joined by Justices Reed and Burton. Justices Douglas, Clark and Minton did not participate in this case. Of the remaining three justices, only one dissented categorically. *See id.* at 445-53 (Black, J., dissenting). The other two dissented in part. *See id.* at 415-22 (Frankfurter, J., dissenting in part and concurring in part); *id.* at 422-45 (Jackson, J., dissenting in part and concurring in part). Justice Black held that section 9(h) violated the First Amendment. *Id.* at 446. He did not really discuss the attainder issue. Interestingly enough, Justice Frankfurter disagreed with the Chief Justice's attainder analysis; but rather than discussing that subject, he indicated that some of the avowals contained in the affidavit were phrased too broadly to be constitutional. *Id.* at 420-21. As for Justice

prior rulings in *Lovett, Cummings* and *Garland* as follows:

> the individuals involved were in fact being punished for *past* actions, whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9(h) is intended to prevent future action rather than to punish past action.
>
> This distinction is emphasized by the fact that members of those groups identified in § 9(h) are free to serve as union officers if at any time they renounce the allegiances which constituted a bar to signing in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in § 9(h), is not a bar to resumption of the position. In the cases relied upon by the unions on the other hand, this Court has emphasized that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result. . . . Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder.[355]

Chief Justice Vinson's statements present a sharp contrast to those of Justice Frankfurter in *Lovett*.[356] Unlike Justice Frankfurter, Chief Justice Vinson presented no theoretical foundation upon which his observations may be based; it is not clear how he would define the term "bill of attainder." In fact, his statements are assertions unsupported by any citations to controlling case authority.[357] More importantly, however, Chief Justice Vinson managed to obfuscate the true nature of section 9(h). While the ultimate purpose of Congress in enacting this provision may have been to prevent political strikes, the enactment accomplished that purpose by an indirect method. That method involved an effective prohibition against Communists serving as union officers. The statute thus is directed primarily at a course of action begun at some point in the past and continued in the present.[358] While Congress

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Jackson, he claimed that Congress had the right to compel disclosure of membership in subversive organizations. *Id.* at 435. But he said that the oath required by section 9(h) was partially unconstitutional because it proscribed mere belief without more. *Id.* at 441-42. *See also* Bryson v. United States, 396 U.S. 64, 75 (1969) (Douglas, J., dissenting, joined by Black, J.).

355. 339 U.S. at 413-14 (emphases in original).

356. *See* note 341 and accompanying text *supra*.

357. He did not even cite Justice Frankfurter's concurrence in *Lovett*.

358. Of course, section 9(h) would also reach a course of action begun entirely in the

may have deemed such a course of action to be a harbinger of future conduct, this does not negate the fact that the statute is concerned with continuing affiliations and advocacy insofar as it imposes deprivations upon persons because of patterns of activity or belief begun before but still continuing when they incurred a duty to file an affidavit with the National Labor Relations Board. Chief Justice Vinson emphasized the escapability feature of section 9(h), the fact if a Communist renounces his allegiance to the Party and revises his beliefs so that he would be able to execute truthfully the prescribed affidavit, then he would be permitted to hold union office. This does distinguish section 9(h) from the act of Congress and the provisions of the Missouri constitution involved in *Garland* and *Cummings*, respectively: both were concerned with past acts that become final and immutable as soon as they were committed.[359] But the escapability feature of the provision challenged in *Douds* only emphasizes the true nature of that provision. The deterrent aspect of section 9(h) was aimed at compelling a person to do a certain act (renunciation of allegiance) before, not after, he executed the affidavit. Thus, if a professed Communist signed the required affidavit, his offense would be complete and he could be prosecuted regardless of any subsequent disavowals of his adherence to the tenets espoused by the Party. Similarly, a person who had renounced his beliefs in Communism and then executed the affidavit (and thus represented truthfully his present state of mind), but subsequently recanted his prior renunciation, would not fall within the literal terms of a statute requiring only an avowal of current belief (although the government could certainly use his subsequent conduct as evidence of the fact that the affidavit was executed falsely). Thus, in all cases, section 9(h) focuses primarily on present affiliation and advocacy beginning at some point in the past.

Consequently, Chief Justice Vinson's facile distinction between past action and future conduct glosses over some genuine complexities. He admitted that the history of past activities is a foundation for the judgment as to what future conduct is likely to be, but this only obscures the fact that it is past conduct (reflected in either present beliefs or a current affiliation) that is the basis for imposing any disability. The effect of *Douds* was thus to confuse hopelessly an already abstruse area of the law; not only did the plurality decision advance the proposition

present, but such a factual possibility is relatively unimportant; one is unlikely to initiate the forbidden affiliation or advocacy at the very same moment one executes the affidavit. On the meaning of "affiliation" in section 9(h), *see* note 1072 *infra*.

359. *See* notes 55-56, 73, 75 *supra*.

that bills of attainder could not be prospective in nature, but it also blurred the line of demarcation between prospectivity and retrospectivity.

Although Chief Justice Vinson's opinion represented the views of only three justices,[360] many state and federal courts have relied on the dichotomy that he identified.[361] But at least Chief Justice Vinson required a relatively close causal connection between that which the statute proscribed (the incumbency of Communists in union offices) and that which Congress ultimately sought to prevent (political strikes). Moreover, the latter factor had been rather narrowly defined by Congress.[362] Later cases, however, turned on far flimsier showings of causality. Thus, in *Albertson v. Millard*,[363] a federal district court upheld

360. *See* note 354 *supra*.

361. They did so in a variety of contexts. *See* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961) (statute involving registration of Communist action organizations); Albertson v. Millard, 106 F. Supp. 635, 644-45 (E.D. Mich. 1952), *vacated*, 345 U.S. 242 (1953) (law for registering of Communists and denying them a place on the ballot in state elections); Orange Coast Junior College Dist. v. St. John, 146 Cal. App. 2d 455, 461, 303 P.2d 1056, 1060 (1956) (provision of state's Dilworth Act exacting anti-Communist oath from public school teachers); Board of Educ. v. Cooper, 136 Cal. App. 2d 513, 525-26, 289 P.2d 80, 81-82 (1955) (provision of Dilworth Act mandating dismissal of teachers refusing to cooperate with legislative committees investigating subversion); Shub v. Simpson, 196 Md. 177, 195, 76 A.2d 332, 339-40 (1950), *appeal dismissed*, 340 U.S. 881 (1950) (state's Ober Act requiring candidates for public office to file affidavits stating that they are not subversives); Opinion of the Justices, 332 Mass. 785, 789, 127 N.E.2d 663, 666 (1955) (proposed statute requiring dismissal of teachers who refuse to answer questions put to them by legislative investigating committees regarding their Communist affiliations); Thorp v. Board of Trustees, 6 N.J. 498, 516, 79 A.2d 462, 469 (1951) (statute exacting loyalty oath from public school teachers); Peters v. New York City Housing Auth., 9 Misc. 2d 942, 950, 128 N.Y.S. 2d 224, 230-31 (1953), *mod. on other grounds*, 283 App. Div. 801, 128 N.Y.S. 2d 712 (2d Dep't), *rev'd on other grounds*, 307 N.Y. 519, 121 N.E.2d 529 (1954) (Gwinn Amendment to 1937 Federal housing act providing that no unit constructed with government funds could be occupied by one failing to file an affidavit certifying his non-affiliation with the Communist Party); Weinstock v. Ladisky, 197 Misc. 859, 875, 98 N.Y.S.2d 85, 100-01 (1950) (amendment to union constitution banning fascists and subversives); Dworken v. Collopy, 56 Ohio L. Abs. 513, 521, 91 N.E.2d 564, 570 (1950) (statute denying welfare benefits to subversives); Nostrand v. Balmer, 53 Wash. 2d 460, 476, 335 P.2d 10, 19 (1959) (state statute prohibiting public employment of subversives); Huntamer v. Coe, 40 Wash. 2d 767, 773, 246 P.2d 489, 493 (1952) (statute requiring candidate for public office to file an affidavit stating that he is not a subversive). *But cf.* Opinion to the House of Representatives, 80 R.I. 281, 285-86, 96 A.2d 623, 626 (1953) (advisory opinion citing *Douds* as support for the conclusion that a proposed law, which would require the relatives (and their spouses) of either an elected official (or his or her spouse) or the director of any municipal agency (or his or her spouse) to be disqualified from holding any appointive municipal office during the elected term of the official or the tenure of the director, was a bill of attainder).

362. *See* note 253 and accompanying text *supra*.

363. 106 F. Supp. 635 (E.D. Mich. 1952), *vacated on other grounds*, 345 U.S. 242 (1953). The Supreme Court vacated the judgment of the lower federal court for the purpose of allowing state courts an opportunity to construe the challenged statute. *Id.* at 245.

the constitutionality of the Michigan Trucks Act of 1952, which required that any person who remained within the state of Michigan for five consecutive days and was a knowing member of a "Communist-front organization" (as defined by the act) had to register with the state police and that neither the name of the Communist Party nor the names of its members could be printed on the ballot in state elections.[364] Citing *Douds*, the court held:

> The plaintiffs are subject to possible loss of opportunity to seek election to public office only because there is substantial ground that their beliefs and loyalties will be transformed into future conduct. The history of past or present conduct may be the foundation for judgment as to what that future conduct is likely to be. The registration provisions are intended to prevent future action rather than to punish past action.[365]

In *Communist Party of the United States v. Subversive Activities Control Board*,[366] a challenge was raised against, *inter alia*, subsection (a) of section fourteen of the Subversive Activities Control Act of 1950,[367] which required the Party to register as a "Communist-action" organization and file annual statements with the Board. Speaking on behalf of himself and four colleagues, Justice Frankfurter stated without any supporting citations that "[f]ar from attaching to the past and ineradicable actions of an organization, the application of the registration section is made to turn upon continuingly contemporaneous fact; its obligations arise only because, and endure only so long as, an organization presently conducts operations of a described character."[368] Thus, in *Albertson*, the district court was satisfied that the electoral restrictions were necessary because of the general tendency of Communists to translate their beliefs concerning world revolution into action.[369] In the *Communist Party* case, Justice Frankfurter specifically

364. 106 F. Supp. at 639. *See* 1952 Mich. Pub. Acts 117, §§ 4, 5, 7.

365. 106 F. Supp. at 644-45.

366. 367 U.S. 1 (1961). For a detailed accounting of the tangled history of this litigation, *see* note 720 *infra*.

367. 50 U.S.C. § 781(a) (1970).

368. 367 U.S. at 87. Justice Frankfurter was joined by Justices Clark, Harlan, Stewart and Whittaker. Justice Black dissented, finding an attainder. *Id.* at 146 (Black, J., dissenting) (and at least one commentator would agree with him: *see Bounds of Specification, supra* note 45, at 361). Chief Justice Warren's dissent found a violation of the Fifth Amendment. *Id.* at 137 (Warren, C.J., dissenting). So did Justice Douglas. *Id.* at 190 (Douglas, J., dissenting). Justice Brennan, joined by the Chief Justice, dissented in part, concluding also that portions of the statute infringed the privilege against self-incrimination. *Id.* at 200-01 (Brennan, J., dissenting in part, joined by Warren, C.J.).

369. 106 F. Supp. at 642-43. The court found a "superabundance" of evidence that the Communist Party was dedicated to violent overthrow of democracies. It cited, in particular, testimony given in the case of Dennis v. United States, 341 U.S. 494 (1951), and the findings

relied on the congressional findings that "the world Communist movement [possessed a purpose] to employ deceit, secrecy, infiltration, and sabotage as means to establish a Communist totalitarian dictatorship . . . and utilize[d] action organizations" to effect that purpose.[370] Whereas the nexus of causality in *Douds* was relatively well-defined, in these two cases the future conduct feared by legislators amounted to little more than broad, expansively-defined tendencies on the part of certain political groups. While it is undoubtedly true that the government "need not wait until the putsch is about to be executed,"[371] there nevertheless appeared to be few practical and even fewer constitutional limitations on the types of preventive legislation that would be upheld by reliance on the dichotomy advanced in *Douds*. At least this was the state of the law until the decision in *United States v. Brown*.[372]

The more profound problem, however, is whether or not Chief Justice Vinson's assertions in *Douds* were historically correct. Both *Cummings* and *Garland* suggest that they were not. It is true, as Chief Justice Vinson pointed out, that those cases involved the imposition of sanctions for past acts. Justice Field reiterated this point on several occasions,[373] but he never extrapolated any general theory concerning the permissible scope of a bill of attainder from these observations. One commentator has argued[374] that the result in *Douds* was "diametrically opposed" to the statement in *Cummings* that bills of attainder may inflict punishment absolutely or conditionally.[375] But, as has been suggested elsewhere,[376] that language is not helpful because it refers only to the mode of imposing sanctions, not to the temporal referents of the conduct for which those sanctions are being imposed. There are, however, indications implicit in *Cummings* that favor a theory of prospec-

of a resolution adopted by the American Bar Association, which expelled its members who were also affiliated with the Communist Party. 106 F. Supp. at 643. Rarely has the doctrine of judicial notice been applied so creatively.

370. 367 U.S. at 83.

371. Dennis v. United States, 341 U.S. 494, 509 (1951) (Vinson, C.J., for the Court).

372. 381 U.S. 437 (1965). *See* notes 898-945 and accompanying text *infra*.

373. *See Ex parte* Garland, 71 U.S. (4 Wall.) 333, 376 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 318, 327 (1867). *See also* Dent v. West Virginia, 129 U.S. 114, 128 (1889) (Field, J., for the Court). But the oaths in *Cummings* and *Garland* also involved prospective commitments. *See* notes 56, 73 *supra*. These promissory affirmations of loyalty were valid in 1867, *Ex parte* Garland, 71 U.S. (4 Wall.) at 376; *Ex parte* Law, 15 F. Cas. 3, 10 (S.D. Ga. 1866) (No. 8,126), *see* note 75 *supra*, and are valid today, Cole v. Richardson, 405 U.S. 676, 679-80 (1972) (promissory oaths permissible as a condition to public employment so long as they do not impinge upon protected speech or associational activities).

374. *Waning Guaranty, supra* note 12, at 852 n.58.

375. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1867).

376. *Punishment, supra* note 14, at 241.

tive bills of attainder. Justice Field cites as authority for his discussion of conditional punishment[377] the opinion of Judge Nicholas in *Doe ex dem. Gaines v. Buford*.[378] Another portion of *Buford* stated that bills of attainder "have generally been applied to punish offenses already committed; but they have been and may be, applied to the punishment of *those thereafter to be committed*, or for criminal omissions thereafter incurring."[379] Although Justice Field did not adopt this language of Judge Nicholas,[380] he did cite examples of bills of attainder at common law in support of his analysis of the meaning of punishment. Thus, for all its revolutionizing of the bill of attainder doctrine,[381] *Cummings* sanctioned reliance upon historical examples by courts confronting attainder claims.[382] With this in mind, it is easy to discern the error inherent in Chief Justice Vinson's statements in *Douds* because some bills of attainder in English history were prospective in nature. These bills imposed sanctions upon conduct occurring at some unspecified time in the future. For example, language in section four of the bill against the Jesuits, enacted in 1585 during the reign of Elizabeth I, provided:

> And every Person which after the End of the same forty days, and after such time of departure as is before limited and appointed, shall wittingly and willingly receive, relieve, comfort, aid or maintain any such Jesuit . . . knowing him to be a Jesuit . . . shall also for such offence be adjudged a felon, without Benefit of Clergy, and suffer Death, lose and forfeit, as in Case of

377. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1867).

378. 31 Ky. (1 Dana) 481 (1833).

379. *Id.* at 510 (opinion of Nicholas, J.) (emphasis added). One commentator has argued that *Buford* is unreliable precedent because (1) only one of the two judges hearing the case found a violation of the proscriptions against bills of attainder, (2) since the challenged act required a forfeiture to the commonwealth of tracts of land exceeding one hundred acres unless the proprietor made certain improvements thereon, alternative remedies like ejectment were unfeasible, *see id.* at 508, (3) Judge Nicholas was said to have deemed the statute in question to be penal and (4) Judge Nicholas was said to have misconstrued the attainder against the Earl of Clarendon, 19 Car. 2, c. 10; 3 STATS. U.K. 314 (1667), *reprinted in* Clarendon's Case, 6 How. St. Tr. 291, 391 (1667), as a prospective attainder, whereas in fact it imposed only a conditional punishment. *See Punishment, supra* note 14, at 241-42 n.56. Objections (1) through (3) are irrelevant. But objection (4) is correct; yet while it is true that Judge Nicholas did not cite any precedent in support of his generalization, such precedent does exist. *See* notes 383-384 and accompanying text *infra*.

380. Although he did quote a statement appearing one sentence later. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1867) (quoting Doe *ex dem.* Gaines v. Buford, 31 Ky. (1 Dana) 481, 510 (1833) (opinion of Nicholas, J.)).

381. *See* notes 82-91 and accompanying text *supra*.

382. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320-21, 323-24 (1867). Later decisions have corroborated the thesis that the United States Supreme Court may utilize history to explicate the meaning of the concept of punishment in the context of the bill of attainder doctrine. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473-74 (1977); United States v. Brown, 381 U.S. 437, 441-42 (1965).

one attainted of felony.[383]

This attainder is clearly prospective. While it is true that some act must occur before the taint of felony can attach (and thus, in that very narrow sense, the deprivation is inflicted for a past act), the statute is directed at a class of activity, which, by its terms, could not have taken place at the date of its enactment. The focus of the language quoted is exclusively prospective, not retrospective. In light of this and other examples,[384] Chief Justice Vinson's statements in *Douds* simply reflect an unfamiliarity with English common law, which, according to *Cummings*, may be relied upon, at least for the purpose of analyzing the punishment component of a bill of attainder.

Nevertheless, at least one commentator has advanced a comparatively sophisticated defense of *Douds*.[385] He suggests that if *Cummings* and *Buford* label as an attainder a statute inflicting punishment conditioned on future conduct upon the members of a "shifting" group (*i.e.*, one whose number is not fixed as of the time of the enactment of the statute[386]), then these two cases would indeed be irreconcilable with *Douds*.[387] But he concludes that *Cummings* and *Buford* support a much more limited proposition, namely that:

> Attainder in the future is limited to situations where persons are named in a statute; the conduct for which they are being punished is actually past conduct. These named persons are given a future choice to remove themselves from the classification, and that choice is either illusory or one that has no relation to substantive policy. Any expansion of this statement comes from a misunderstanding or misconstruction of *Cummins* [*sic*] and [*Buford*] and a refusal to recognize *Douds* . . . .[388]

The problem with this theory is that, like *Douds*, it ignores history. As indicated,[389] *Cummings* relied on English history, which is replete[390] with examples of attainders like section four of the act of 1585, quoted previously.[391] That act describes no fixed class because there was no way of determining who would render assistance to the Jesuits in the future. The persons who would become affected by the law have committed no objectionable act prior to its passage, so they are not being

383. 27 Eliz., c. 2, § 4; 2 STATS. U.K. 633 (1585).
384. *See* note 34 *supra*.
385. *See Punishment, supra* note 14, at 239-41.
386. *Id.* at 239.
387. *Id.* at 241.
388. *Id.*
389. *See* note 382 and accompanying text *supra*.
390. *See* note 34 *supra*.
391. *See* note 383 and accompanying text *supra*.

punished for past conduct. Moreover, the choice given such persons to remove themselves from the statutory classification by declining knowingly to aid Jesuits is real, not illusory; no punishment will attach if they refrain from acting. Under all criteria, then, section four of the act of 1585 is an exclusively prospective attainder. It does, of course, contradict the logic of *Douds*, but this contradiction only underscores the fact that *Douds*, when interpreted in light of *Cummings*, was decided incorrectly.[392]

c. Rights v. Privileges

The third and perhaps the most pernicious of these spurious distinctions is based on the putative dichotomy between rights and privileges.[393] The underlying theory may be summarized as follows: if a person is only being deprived of a privilege granted by the state, then that deprivation cannot constitute a punishment because the state is entitled to grant or withhold privileges at its pleasure; consequently, if no punishment is being inflicted, then, by definition, the challenged enactment cannot be a bill of attainder. In the context of the prohibitions contained in article one, sections nine and ten of the Constitution, this theory has its greatest impact in three different areas: legislative deprivations of the franchise, of positions of public employment and of equal access to state facilities and disbursements. Each one of these subjects will be discussed in turn, followed by a brief overview of the rights/privileges dichotomy in general as it relates to the bill of attainder doctrine.

392. *Accord*, Wormuth, *supra* note 12, at 607; *Need for Clarification, supra* note 12, at 240; *Bounds of Specification, supra* note 45, at 338; *Waning Guaranty, supra* note 12, at 851-52. *Cf.* Davis, *supra* note 2, at 41 (criticizing Justice Frankfurter's *Lovett* concurrence by noting that prospective attainders existed at common law).

393. A note on terminology is necessary. Perhaps the most functional method of distinguishing between rights and privileges is to consider the safeguards that must accompany the curtailment of either of these classes of interests. It is recognized that a "right" is a legally-protected interest that may be terminated only through due process of law whereas a "privilege" is a residual category covering all interests that may be terminated without the protections of a notice and a hearing. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 7.12 at 175 (3d ed. 1972) [hereinafter cited as DAVIS]; Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1442 (1968) [hereinafter cited as Van Alstyne]. But at this point a caveat is required. Arguably, some of the decisions that will be discussed in this section use the term "right" as a means of expressing a moral judgment. Thus, when a court states that a petitioner has no "right" to a given item, it may simply be indicating that, in the opinion of the presiding judge, it would be *wrong* to allow the petitioner to succeed in staking a claim to some given *res*. *See, e.g.*, Dworken v. Collopy, 56 Ohio L. Abs. 513, 524-28, 91 N.E.2d 564, 572-75 (1950). *See* notes 440-442 and accompanying text *infra*. For a general discussion of this distinction and the confusion it can cause, see R. DWORKIN, TAKING RIGHTS SERIOUSLY 188-92 (1977).

(1) Voting

Both before and after the decisions of the United States Supreme Court in *Cummings* and *Garland*, state tribunals had held that legislative deprivations of the franchise could not be bills of attainder.[394] The reason advanced for this conclusion was the theory that the so-called "right to vote" was really no right at all, but rather a privilege, or, at best, a "conventional" right[395] that could be terminated at will by the state. Quotations from a few of these cases betray their nineteenth-century origins. In *Blair v. Ridgely*,[396] for example, the Missouri Supreme Court upheld the validity of the test oath for voters that had been involved tangentially in *Cummings*[397] by endorsing the view that:

> The right to vote or to exercise the privilege of the elective franchise is neither a natural, absolute, nor a vested right of which a man cannot be deprived but by due process of law, but it is purely a conventional right, and may be enlarged or restricted, granted or withheld, at pleasure, with or without fault, for outside of society, and disconnected with government, no person either has or can exercise the elective franchise as a natural right, and he only receives it upon entering the social compact, subject to such qualifications as the state may prescribe.[398]

Similarly, in *Shepherd v. Grimmett*,[399] the Idaho Supreme Court

394. *See* Washington v. State, 75 Ala. 582, 585 (1884); Shepherd v. Grimmett, 3 Ida. 403, 411-12, 31 P. 793, 796 (1892); Wooley v. Watkins, 2 Ida. 590, 602-03, 22 P. 102, 106 (1889); Boyd v. Mills, 53 Kan. 594, 604, 37 P. 16, 18 (1894); Anderson v. Baker, 23 Md. 531, 624-25 (1865); Blair v. Ridgely, 41 Mo. 40, 123 (1867); Randolph v. Good, 3 W. Va. 551, 555 (1869). *Contra*, Burkett v. McCarty, 73 Ky. (10 Bush) 758, 761 (1874); Green v. Shumway, 39 N.Y. 418, 425 (1868).

395. *See, e.g.*, Washington v. State 75 Ala. 582, 585 (1884) ("honorable privilege, and not. . . a personal right or attribute of personal liberty"); Shepherd v. Grimmett, 3 Ida. 403, 411, 31 P. 793, 796 (1892) ("privilege conferred or withheld by the lawmaking power"); Wooley v. Watkins, 2 Ida. 590, 603, 22 P. 102, 106 (1889) (conventional right); Anderson v. Baker, 23 Md. 531, 619 (1865) ("not one of the universal inalienable rights with which all men are endowed by their Creator, but . . . altogether conventional"); Blair v. Ridgely, 41 Mo. 40, 120 (1867) (conventional right); Ridley v. Sherbrook, 43 Tenn. (3 Coldwell) 569, 577 (1867) ("political privilege or grant, that may be extended or recalled, at the will of the sovereign power"). As *Anderson* suggests, a "conventional right" means one conferred by virtue of the social compact, rather than one of the rights a person has in the state of nature.

396. 41 Mo. 40 (1867).

397. *See* note 55 and accompanying text *supra*.

398. This quotation is actually the text of a headnote to the *Blair* case, as printed in the ninety-seventh volume of *American Decisions*. Blair v. Ridgely, 97 Am. Dec. 248 (1867). That headnote is a pastiche of several separate statements made by the court within a span of three pages of the original opinion. Blair v. Ridgely, 41 Mo. 40, 119-21 (1867). It should be noted that the *Blair* case was eventually appealed to the United States Supreme Court, where it was affirmed by an equally divided group of justices in an unreported opinion. *See* 1 C. FAIRMAN, RECONSTRUCTION AND REUNION 1864-88, at 616 (1971).

399. 3 Ida. 403, 31 P. 793 (1892).

upheld the constitutionality of an anti-Mormon expurgatory oath that required the voter to affirm that he had neither practiced nor advocated the practice of polygamy. It distinguished this law from the enactments challenged in *Cummings* and *Garland* by noting that those enactments foreclosed the capacity to practice certain professions and that this capacity was deemed to be:

> a natural right attaching to every man, both in a state of nature and as a member of society, and as sacred and inviolable as the right to till the soil, and in no sense similar to the right of suffrage, which we have seen is a privilege conferred or withheld by the lawmaking power.[400]

Are these distinctions legitimate? *Cummings v. Missouri*,[401] as the Idaho court noted, involved restrictions on specified professions. But the provisions of the Missouri constitution creating these restrictions incorporated by reference all the affirmations contained in another provision exacting an oath from prospective voters.[402] Justice Field said that the nature and scope of the affirmations themselves were too broad to be relevant to the issue of one's fitness to engage in a specific avocation.[403] The courts in *Shepherd* and *Blair* failed to demonstrate why those recitals would be any *more* relevant to one's capacity to exercise the franchise. But the issue of relevancy does not reach the larger problem of whether or not disenfranchisement is punishment. Yet here too *Cummings* supplied some guidelines. Justice Field stated that "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."[404] He then illustrated this proposition by citing, *inter alia*, an English stature that disenfranchised those who committed contempts against the king's title[405] and the provisions of the French penal code that punish by suspending the right to vote.[406] The inference that arises from these statements is that deprivation of a civil right is punishment and voting is a civil right. Thus, the logic of *Cummings* dictates the conclusion that rights/privileges distinction has no place in a discussion of legislative deprivations of the franchise. So the attempt of the Idaho Supreme Court in *Shepherd* to distinguish

400. *Id.* at 411-12, 31 P. at 796.

401. 71 U.S. (4 Wall.) 277 (1867).

402. *See* note 56 and accompanying text *supra.*

403. 71 U.S. (4 Wall.) at 319. *See* note 65 and accompanying text *supra.*

404. *Id.* at 320.

405. *Id.* at 321. *See* 1 Geo. 1, c. 13; 5 STATS. U.K. 30, 31 (1714). Of course, a number of bills of pains and penalties at common law imposed the deprivation of disenfranchisement. *See* note 11 and accompanying text *supra.*

406. 71 U.S. (4 Wall.) at 321.

Cummings was simply misinformed. A truer reading of the latter case would compel the conclusion reached by the New York Court of Appeals in *Green v. Shumway*,[407] which held that a law imposing a test oath upon voters requiring them to deny service in or support for the confederacy inflicted the loss "of a right guaranteed [to a citizen] by the Constitution, and the laws of the land, and one of the most inestimable and invaluable privileges of a free government."[408]

Thus, *Cummings* should have silenced all doubts that suspension of the franchise could be a punitive sanction within the meaning of the definition of a bill of attainder. Yet *Shepherd*, for example, was decided in 1892, a quarter century after *Cummings*. One way to explain that decision and similar rulings is that they inadvertently (or consciously) misconstrued the mandate of the earlier opinion by the United States Supreme Court. But implicit in the decisions of courts utilizing the rights/privileges distinction is a second thesis: the state has an inherently plenary power to regulate the exercise of the franchise and it could therefore deny the vote to those whom it considered to be untrustworthy or undeserving, without any due process of law. A dictum discussing the proscriptions against bills of attainder in an opinion of the United States Supreme Court rendered after *Cummings* confirmed this broad conception of the regulatory power of the state.[409]

407. 39 N.Y. 418 (1868).

408. *Id.* at 421. *Accord*, Burkett v. McCarty, 73 Ky. (10 Bush) 758, 761 (1874) (suffrage is an "organic right being fundamental and above legislative power"). The Idaho Supreme Court in *Shepherd* distinguished *Green* on the ground that the case was really decided on the basis of the New York constitution. Shepherd v. Grimmett, 3 Ida. 403, 412, 31 P. 793, 796 (1892). It is true that the New York Court of Appeals relied partially on the state constitution. *See* 39 N.Y. at 425-26. But it did so as an afterthought; its primary analysis was based on *Cummings* and the federal Constitution. *See id.* at 423-25.

409. Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176 (1874). The case involved a challenge to the provision of the Missouri constitution, which excluded women from voting. The Court said:

> Women were excluded from suffrage in nearly all the States by the express provisions of their constitutions and laws. If that had been equivalent to a bill of attainder, certainly its abrogation would not have been left to implication. Nothing less than express language would have been employed to effect so radical a change.

The attitude of the Court during this period is perhaps best exemplified by Yick Wo v. Hopkins, 118 U.S. 356 (1886). There the Court stated, "Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless [the franchise] is regarded as a fundamental political right, because preservative of all rights." *Id.* at 370. This right was said to be subject to "reasonable and uniform" regulations respecting the time and manner of its exercise, including the establishment of qualifications for voters. *Id.* at 371. *Yick Wo* epitomizes the semantic confusion surrounding the subject: in the same sentence it labels suffrage as a privilege that may or may not ripen into a right, but wholly fails to explain that key qualifying phrase "under certain conditions".

Nevertheless, the modern view is unquestionably that the franchise is a right, not a privilege;[410] more importantly, it is a *fundamental* right so that any legislative attempt to impinge upon it must undergo strict judicial scrutiny.[411] Thus, the distinctions drawn by cases like *Blair* and *Shepherd* were invalid both at the time those cases were decided and today.

(2) Public Employment

The second area in which the rights/privileges distinctions has been utilized is legislative deprivations of positions of public employment. For a long time, courts have relied upon the notorious remark made by Justice Holmes in the decision of *McAuliffe v. City of New Bedford*[412] that a person may have a constitutional right to discuss politics, but he has no constitutional right to be a policeman or other public official.[413] The conventional wisdom was that no person had an inherent claim to a position of public service and therefore, that such positions could be meted out with whatever conditions the state might

410. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Reynolds v. Sims, 377 U.S. 533, 561-62 (1964). *Cf.* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). *See* note 409 *supra*.

411. Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Bullock v. Carter, 405 U.S. 134, 143 (1972); Evans v. Cornman, 398 U.S. 419, 422 (1970).

412. 155 Mass. 216, 29 N.E. 517 (1892).

413. *Id.* at 220, 29 N.E. at 517. Justice Holmes added, "[t]here are few employments for hire in which the servant does not agree to suspend his constitutional right of free speech, as well as of idleness, by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him." *Id.* at 220, 29 N.E. at 517-18. For a discussion of the evolution of Justice Holmes' views on this subject, *see* Van Alstyne, *supra* note 393, at 1458-64. The views of the United States Supreme Court on this subject defy easy characterization; language can be found supporting entirely contrasting philosophies. *Compare* Crenshaw v. United States, 134 U.S. 99, 108 (1890) ("in substance, a statute under which one takes office, and which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbent shall not be dismissed therefrom. Whatever the form of the statute, the officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation.") *with* Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) ("The established doctrine is that this liberty [protected by the Fourteenth Amendment's guarantee of due process] may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of the police power is not final or conclusive but is subject to supervision by the courts"; the decision reversed the conviction of a schoolteacher who taught German to his pupils in violation of state law.) *Meyer* might be distinguished from *Crenshaw* in that the former case involved a criminal prosecution rather than administrative action. Yet the marked attitudinal discrepancy between the two views of public employment expressed in these cases is really emblematic of the Court's stance toward the rights/privileges distinction and public service. *See* notes 426-435 and accompanying text *infra*.

wish to attach. If the individual seeking public employment found those conditions to be intolerable, he could simply locate a job elsewhere.

The fullest illustration of this reasoning appears in the case of *City of Detroit v. Division 26 of the Amalgamated Association of Streetcar, Electric Railway and Motor Coach Employees of America*,[414] decided by the Supreme Court of Michigan in 1952. In that suit, the city filed a bill in equity to determine the constitutionality of the state's Hutchinson Act[415] and its applicability to employees of Detroit's municipal transit system. The act specified that public employees were not allowed to strike and those who did would automatically lose their jobs and forfeit their pension and retirement benefits.[416] The state supreme court held:

> We know of no constitutional provision which gives an individual the right to be employed in governmental service or to continue therein. If there is no such right then there is no constitutional inhibition of reasonable restrictions or limitations being applied thereto, and such restrictions or limitations could not be held to be in the nature of bills of attainder.
>
> . . . .
>
> There is ample authority to the effect that public employment does not vest in such employees any fixed or permanent rights of employment. As individuals or in groups public employees may discontinue their employment, but, having done so, such public employees have no vested right to insist upon their reemployment on terms or conditions agreeable to the employees, or even without compliance with such conditions. To hold otherwise would result in public agencies being powerless to render public service and to effectively administer public affairs; and the public would thereby be deprived of its right to efficient government.[417]

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414. 332 Mich. 237, 51 N.W.2d 228 (1952), *appeal dismissed*, 344 U.S. 805 (1952).

415. MICH. STAT. ANN. § 17.455(1)-(7) (1947).

416. 332 Mich. at 243-44, 51 N.W.2d at 231.

417. *Id.* at 252-53, 51 N.W.2d at 232-33. *Cf.* Gallas v. Sanchez, 48 Haw. 370, 373-75, 405 P.2d 772, 775-76 (1965) (upheld statute removing civil service status of incumbent personnel directors by saying petitioners held their jobs at the pleasure of the state commission, so challenged enactment could not constitute punishment as long as it was reasonable); Faxon v. School Comm., 331 Mass. 531, 538, 120 N.E.2d 772, 776 (1954) (followed analysis of *McAuliffe* with the conclusion that there would be insurmountable difficulties "in considering the dismissal of a teacher for the good of the schools as a punishment of the teacher."); Gaidamavice v. Nenaygo Bd. of County Rd. Comm'rs, 341 Mich. 280, 288, 67 N.W.2d 178, 182 (1954) (cited *Detroit* case at length); State *ex rel.* Wingate v. Woodson, 41 Mo. 227, 230 (1867) (incorporated by reference the logic of Blair v. Ridgely, 41 Mo. 40 (1867), with respect to a challenge to a test oath exacted from candidates for public office); *Ex parte* Stratton, 1 W. Va. 304, 306 (1866) (upheld test oath for public officers against ex post facto challenge, stating: "[n]o one having a natural or inalienable *right* to an office, it follows that all who seek it must accept the office with all the restrictions and conditions imposed by law"). *But cf.* Commonwealth v. Jones, 73 Ky. (10 Bush) 725, 746 (1874) (in striking down

Implicit in this statement is the disturbing concept that the safeguards of the Constitution have been exchanged by that class of persons known as public employees in return for their jobs.[418] If so, any infringement of the rights of such employees could not constitute punishment.

The Hutchinson Act might be defended on the theory (which was mentioned by the court) that it is an essentially regulatory piece of legislation enacted to ensure that public employees cannot deprive communities of vital services. But the rights/privileges analysis has also figured predominantly in other cases involving, for example, challenges to a resolution by a county board of road commissioners dismissing an employee after he had voted in favor of unionizing himself and his coworkers,[419] or a decision by the Boston School Committee to discharge a teacher who had exercised his Fifth Amendment privilege against self-incrimination in response to questioning by a congressional committee concerning his alleged Communist affiliations.[420] Thus, the rights/privileges distinction was used by some courts in cases where it would be rather difficult to characterize the challenged enactment as being regulatory in nature.

Here again, a careful reading of *Cummings* suggests that the logic of decisions like that of the Michigan Supreme Court in the *Detroit* case was ill-advised. The provisions of the Missouri constitution at issue in *Cummings* exacted an oath not only from private professionals

anti-duelling test oath as a bill of attainder, called tenure in public office a "valuable right"); State *ex rel.* Pittman v. Adams, 44 Mo. 570, 585-86 (1869) (in striking down a statute removing curators of St. Charles College who failed to execute a test oath, said reinstatement would give the petitioners "no new rights only such as arise from peaceable possession, claiming title and subject to any lawful proceeding to test that title.") *See also* Gray v. McLendon, 134 Ga. 224, 253, 67 S.E. 859, 872-73 (1910) (upheld statute authorizing expulsion of officeholders against attainder challenge by finding it simply deprived one so expelled of the "right to hold the particular office" in the present).

418. This was probably a false proposition, even in 1952. *See* United Pub. Workers v. Mitchell, 330 U.S. 75, 100 (1947) ("Appellants urge that federal employees are protected by the Bill of Rights and that Congress may not enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employees shall attend mass or take any active part in missionary work. None would deny such limitations on congressional power . . . ."); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923), *see* note 413 *supra.* It is certainly false today. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 233-35 (1977); City of Madison Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n, 429 U.S. 167, 175 (1976); Elrod v. Burns, 427 U.S. 347, 357-59 (1976); Epperson v. Arkansas, 393 U.S. 97, 107 (1968); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 605-06 (1966).

419. Gaidamavice v. Nenaygo Bd. of County Rd. Comm'rs, 341 Mich. 280, 288, 67 N.W.2d 178, 182 (1954).

420. Faxon v. School Comm., 331 Mass. 531, 538, 120 N.E.2d 772, 776 (1954).

but also from persons "holding any office of honor, trust, or profit, under the constitution or laws thereof, or under any municipal corporation. . . ."[421] Thus, the challenged provisions also reached *public* employees. As Justice Field emphasized:

> 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 positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.[422]

Certainly there is no broader statement in any decision of the United States Supreme Court to the effect that a position of public employment, once obtained, has the attributes of a right and may not be terminated lightly or without regard for constitutional inhibitions. This doctrine was re-emphasized in *United States v. Lovett*[423] where Justice Black held that "permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type."[424] It might be argued that *Cummings* and *Lovett* apply only where there is a perpetual exclusion from governmental service and not in situations where there is an exclusion that persists only if the victim of the enactment fails to discard certain prohibited affiliations or revise certain forbidden beliefs.[425] But the broad mandate of *Cummings* ("any deprivation or suspension") belies any attempt to construct distinctions based upon semantic niceties in this area.

Cummings and *Lovett* should have taught courts once and for all that deprivation of a position of public employment can constitute punishment as that term is used in the context of a definition of a bill of attainder. But as can be seen, the *Detroit* case was decided six years after *Lovett* and reached an entirely different conclusion. The problem is that key decisions rendered by the federal courts in the 1950's advanced theories inconsistent not only with *Lovett* and *Cummings*, but with each other. Thus, in *Bailey v. Richardson*,[426] the United States Court of Appeals for the District of Columbia upheld the discharge by

421. 71 U.S. (4 Wall.) at 281.

422. *Id.* at 321-22.

423. 328 U.S. 303 (1946).

424. *Id.* at 316.

425. A good example would be the type of oath involved in American Communications Ass'n v. Douds, 339 U.S. 382 (1950), which was phrased entirely in the present tense. *See* note 352 and accompanying text *supra*.

426. 182 F.2d 46 (D.C. Cir. 1950), *aff'd per curiam by an equally divided court*, 341 U.S. 918 (1951).

a Loyalty Review Board of a training officer from the United States Employment Service on the theory that:

> To hold office at the will of a superior and to be removable therefrom only by constitutional due process of law are opposite and inherently conflicting ideas. Due process of law is not applicable unless one is being deprived of something to which he has a right.
>
> Constitutionally, the criterion for retention or removal of subordinate employees is the confidence of superior executive officials. Confidence is not controllable by process.[427]

Similarly, in *Adler v. Board of Education*,[428] the United States Supreme Court found the Feinberg law[429] to be constitutional. Justice Minton, speaking for the majority, said that the imposition of conditions on the privilege of public employment was permissible and if such an employee disliked the restrictions, then he would be:

> at liberty to retain his beliefs and associations and go elsewhere . . . . If. . . a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech and assembly except in the remote sense that limitation is inherent in any choice.[430]

Yet the same year, the Court, in *Wieman v. Updergraff*,[431] held unconstitutional an Oklahoma statute exacting an expurgatory oath from public officials that proscribed mere membership in a subversive organization without any showing of scienter.[432] Justice Frankfurter's majority opinion noted that

> "to draw . . . the facile generalization that there is no constitutionally protected right to public employment is to obscure the issue . . . .We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that con-

427. 182 F.2d at 58.

428. 342 U.S. 485 (1952). *See* note 199 *supra.*

429. *See* notes 200-204 and accompanying text *supra.*

430. 342 U.S. at 492-93.

431. 344 U.S. 183 (1952). The Oklahoma Supreme Court had held that the statute in question was not a bill of attainder. Board of Regents v. Updegraff, 205 Okl. 301, 312, 237 P.2d 131, 138 (1951). In doing so, it relied on the decision of the United States Supreme Court in Garner v. Board of Pub. Works, 341 U.S. 716 (1951). *See* notes 520-527 and accompanying text *infra.* But the Oklahoma court neglected to note that *Garner* specifically left open the constitutionality of expurgatory oaths proscribing unknowing membership in specified organizations. *See id.* at 723-24 n.*. It was this point upon which the Supreme Court focused.

432. 344 U.S. at 191.

> stitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory."[433]

Similarly, in *Slochower v. Board of Higher Education*,[434] the Court voided a municipal ordinance requiring dismissal of every New York employee who exercised the privilege against self-incrimination to avoid answering a question related to his official conduct by saying "to state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and nondiscriminatory terms laid down by the proper authorities."[435]

These decisions are symptomatic of the confusion that surrounded the rights/privileges analysis. The court of appeals in *Bailey*, like the Michigan Supreme Court in the *Detroit* case, endorsed the position that a public employee has, *ipso facto*, traded away his constitutional due process protections. The Supreme Court in *Adler* offered the Delphic remark that any state enactment requiring a person to choose between either his job or his political affiliations is permissible because it infringes liberty only to the extent that the act of choosing infringes liberty. Yet *Wieman* describes the rights/privileges distinction endorsed in *Adler* and *Bailey* as "facile" and condemns arbitrary deprivations, while *Slochower* proffers a paradox by equating the assertion that one has no constitutional right to public employment with the assertion that one indeed does have such a right and a rather broad one, at that. In light of all this tortured logic, it is not surprising that the Michigan Supreme Court in the *Detroit* case should place little credence in the doctrines of *Cummings* and *Lovett*. Fortunately, however, decisions like *Adler* and *Bailey* are certifiable antiques.[436] As Justice Blackmun said in a 1971 ruling, "this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege.' "[437] Thus, whereas *Cummings* and *Lovett* suggested that public employment might be a

433. *Id.* at 191-92.

434. 350 U.S. 551 (1956).

435. *Id.* at 555.

436. The Supreme Court has since indicated that the basis of the holding in *Bailey* "has been thoroughly undermined in recent years." Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972). Similarly, the precedential value of *Adler* was undercut in a 1967 decision involving the same statute. Keyishian v. Board of Regents, 385 U.S. 589 (1967). *See* note 199 *supra*.

437. Graham v. Richardson, 403 U.S. 365, 374 (1971). *See* note 455 and accompanying text *infra*. Professor Davis dates the erosion of the rights/privileges doctrine in this area from 1959. *See* DAVIS, *supra* note 393, § 7.13 at 181 (citing Greene v. McElroy, 360 U.S. 474, 496 (1959)).

species of right rather than a privilege, the modern rule obviates the necessity for even discussing such a distinction.

(3) Access to Facilities and Funds

The third area in which the rights/privileges distinction has had a significant impact is the access to governmental facilities and disbursements. Again, the underlying premise is that where the state makes available an institutional service or a gratuity, it may specify the terms on which individuals have access to that institution or gratuity with impunity. This is because those individuals seek conferral of a privilege, not a pre-ordained right; hence the imposition of restrictive terms cannot be a source of punishment.

Two examples will suffice. In *Pierce v. Carskadon*,[438] the West Virginia Supreme Court held that an amendment to a statute, providing that a nonresident defendant in an attachment suit who suffers a default judgment without having been present within the state could reopen the judgment within one year only if he first executed an oath denying that he had ever served, aided or voluntarily submitted to the authority of the Confederacy, was not a bill of attainder because it affected no "vested rights."[439] Similarly, an Ohio trial court in *Dworken*

438. 4 W. Va. 234 (1870).

439. *Id.* at 248. *Cf.* National Maritime Union of America v. Herzog, 78 F. Supp. 146, 164 (D.D.C. 1948), *aff'd*, 334 U.S. 854 (1950) (held statute denying the jurisdiction of the National Labor Relations Board to unions whose officers failed to execute a prescribed expurgatory oath was not an attainder because such jurisdiction was a privilege rightfully withheld "from one who cannot or will not meet the valid conditions on which it is offered"); Cohen v. Wright, 22 Cal. 293, 319 (1863) (upheld statute exacting test oath from attorneys and suitors, stating: "[t]he right to practice law [and thus appear in state courts as an attorney] is not an absolute right, derived from the law of nature. It is the mere creature of the statute, and when the license is issued and the official oath taken, which authorizes the attorney to exercise the right, it confers but a statutory privilege, subject to the control of the Legislature"); Losier v. Sherman, 157 Kan. 153, 156, 139 P.2d 272, 273 (1943) (upheld statute providing that a judgment creditor who assigned his account against the debtor to a collection agency would not be entitled to receive any of the amount recovered by that agency in any subsequent garnishment proceeding undertaken pursuant to the statute, stating: "[t]he statute conferred a right on the creditor of which he could avail himself if he observed its terms and conditions. The choice was his and it may not be said that the provision in question is in any sense a bill of attainder"); *Ex parte* Quarrier & Fitzhugh, 4 W. Va. 210, 220 (1870) (validated attorney's test oath; found the privilege to practice (and thus appear as an attorney in West Virginian courts) could be revoked "and the more especially so if the privilege, thus withdrawn, was originally granted and subsequently continued for the public good. And the case is even stronger where the privilege in question was only granted during good behavior, and only withdrawn as a precautionary measure, to guard the public safety . . . ."); *Ex parte* Hunter, 2 W. Va. 122, 144 (1867) (validated attorney's test oath on the ground that "[i]t is the right of every citizen to appear in court by attorney, but it is not the right of every citizen to appear in court as an attorney-at-law for another . . . . This is a special privilege conferred on a few only—and the qualifications and fitness most carefully

v. Collopy[440] upheld a statute denying unemployment benefits to one administratively determined to be either a subversive or a member of a subversive organization on the theory that:

> In the last analysis, unemployment compensation is a gratuity furnished by the state, from a fund paid in by the employers and to which the worker makes no contributions and the privilege to participate therein has been made conditioned upon the recipient not being engaged in efforts to destroy the very source from which he seeks that gratuity.[441]

At least partly on the basis of this logic, an attainder challenge failed.[442]

Here, too, courts were drawing improper distinctions. With respect to access to state facilities, *Cummings* had stated, three years before the decision of the West Virginia Supreme Court in *Carskadon*, that denying a person the opportunity to appear in state courts was a form of punishment.[443] Thus, when the *Carskadon* case was appealed to the United States Supreme Court, that Court overturned the state tribunal's ruling in a two-sentence *per curiam* opinion characterizing the challenged enactment as a bill of attainder and deeming it to be unconsitutional in light of *Cummings* and *Garland*.[444] The denial of access to state disbursements, however, is more troublesome. This is so because

guarded.") *But cf. Ex parte* Law, 15 F. Cas. 3, 10 (S.D. Ga. 1866) (No. 8,126). *See* note 75 *supra*. While cases like *Cohen, Hunter* and *Quarrier* seem to involve solely the regulation of private professions, they in fact involve much more. The statutes in those cases disbar *previously qualified* professionals for past conduct, and by denying that class of persons access to state courts, deprive them of their livelihood. Thus they are institutional access cases in as crucial a sense as are cases like *Carskadon*. It should also be noted that the United States Supreme Court had an opportunity to rule on the statute involved in *Herzog* in the case of American Communications Ass'n v. Douds, 339 U.S. 382 (1950). There, the Court stated that the withholding of the jurisdiction of the National Labor Relations Board could not be treated "as if it merely withdraws a privilege." *Id.* at 390. This remark conflicts squarely with the cited language in *Herzog*.

440. 56 Ohio L. Abs. 513, 91 N.E.2d 564 (1950).

441. *Id.* at 524, 91 N.E.2d at 872. *See also* State v. Hamilton, 92 Ohio App. 285, 287, 110 N.E.2d 37, 40 (1951) (cited *Dworken* with approval in case involving a challenge to the same statute).

442. 56 Ohio L. Abs. at 524, 91 N.E.2d at 572.

443. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1867). However, Justice Field denominated this opportunity as a "privilege."

444. Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1872). As a result, the West Virginia courts promptly reversed themselves and invalidated test oaths imposed on litigants. *See* Lynch v. Hoffman, 7 W. Va. 553, 556 (1874); Ross v. Jenkins, 7 W. Va. 284, 287 (1874); Pierce v. Carskadon 6 W. Va. 383, 386 (1873); Kyle v. Jenkins, 6 W. Va. 371, 375-76 (1873). Yet in another class of cases, where statutes immunized from suit persons who had committed tortious acts under the authority of military governments during the Civil War, the United States Supreme Court concluded that the challenged enactments imposed no punishment by denying certain potential plaintiffs the right to sue, but rather resembled, in effect, an indemnity act. Drehman v. Stifle, 75 U.S. (8 Wall.) 595, 601 (1870). *Accord*, Clark v.

of the case of *Flemming v. Nestor*,[445] decided by the United States Supreme Court in 1960. There, a resident alien who had emigrated from Bulgaria to the United States in 1913 and remained in this country argued that subsection (n) of section 202 of the Social Security Act[446] was a bill of attainder. That section specified that a deportee would no longer be eligible to receive social security old-age benefits. The petitioner had begun receiving such benefits in November of 1955, slightly more than a year after section 202(n) had been enacted. In July of 1956, he was deported for having been a member of the Communist Party from 1933 to 1939.[447] A district court ruled that the challenged enactment violated the Fifth Amendment[448] but the Supreme Court reversed. Justice Harlan, writing for a five-member majority,[449] concluded that the statute could not be a bill of attainder because it was regulatory, not punitive.[450] Yet in the course of his discussion, he made a point of noting that all the petitioner was deprived of was a "noncontractual governmental benefit."[451] This language suggested that the Court in 1960 might be willing to look at deprivation of social security benefits only as a loss of something amounting to a privilege and thus not serious enough to constitute punishment. But a decade later in *Goldberg v. Kelly*,[452] a case involving a state's withdrawal of welfare

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Dick, 5 F. Cas. 865, 867 (D. Mo. 1870) (No. 2,818). Both decisions rejected bill of attainder challenges.

445. 363 U.S. 603 (1960).

446. 42 U.S.C. § 402(n) (1970).

447. 363 U.S. at 605.

448. Nestor v. Folsom, 169 F. Supp. 922, 934 (D.D.C. 1959).

449. Justice Harlan was joined by Justices Clark, Frankfurter, Stewart and Whittaker. Two dissenters concluded that the statute was a bill of attainder. *See* 363 U.S. at 627 (Black, J., dissenting); *id.* at 629 (Douglas, J., dissenting). The other two dissenters (joined by Justice Douglas) deemed the challenged enactment to be unconstitutional as an ex post facto law. *Id.* at 640 (Brennan, J., dissenting, joined by Warren, C.J., and Douglas, J.).

450. 363 U.S. at 616-17.

451. *Id.* at 617. *Cf.* Reyes v. Flemming, 287 F.2d 735, 736 (1st Cir. 1961) (challenge to 42 U.S.C. § 417(d)(2) (1970), which denies social security wage credits to survivors of soldiers killed as a lawful punishment for military offenses committed during wartime); Thompson v. Whittier, 185 F. Supp. 306, 312 (D.D.C. 1960), *appeal dismissed*, 365 U.S. 465 (1961), *aff'd sub nom.* Thompson v. Gleason, 317 F.2d 901, 907 (D.C. Cir. 1962) (challenge to 38 U.S.C. § 3504 (1970), which operated so as to curtail the veterans' disability benefits paid to an honorable dischargee who had subsequently spoken out against the Korean War). Both cases dismissed attainder challenges by citing *Flemming v. Nestor. See also* Simmons v. United States, 120 F. Supp. 641, 649 (M.D. Pa. 1954) (dismissed attainder challenge to 38 U.S.C. § 711 (1970) (repealed 1972), *former* 38 U.S.C. § 812 (1940), denying recovery on National Service Life Insurance policy where insured was executed for murder; held, no forfeiture, only inherent limitation on risk assumed). *But see* Reich, *The New Property*, 73 YALE L.J. 733, 769 (1964) (criticizing *Nestor*). This critique proved to be influential. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970).

452. 397 U.S. 254 (1970).

payments, the Court stated, "such benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a "privilege" and not a "right." ' "[453] In light of this *volte-face*, the cited language in *Flemming* is probably of questionable precedential value.

(4) Some General Observations

Although the subject is not completely free of doubt,[454] it is probably accurate to assert that during the past fifteen years the rights/privileges distinction became a defunct tenet of constitutional law.[455] Indeed, at least in the context of the bill of attainder doctrine, this development was adumbrated over a century ago by the decision in *Cummings*.

Although on several occasions in that opinion Justice Field referred to "civil and political rights,"[456] at one point he implied that the

453. *Id.* at 262. *But cf.* Califano v. Webster, 430 U.S. 313, 321 (1977) (in rejecting an age-based discrimination challenge to certain provisions of the Social Security Act, observed that, under the logic of *Flemming v. Nestor*, old age benefit payments cannot be constitutionally immunized against retroactive alteration).

454. *See* Bishop v. Wood, 426 U.S. 341, 353 n.4 (1976) (Brennan, J., dissenting). Justice Brennan suggests the majority in *Bishop*, by holding that a state may define unilaterally the meaning of the term "property" in the context of the due process clause of the Fourteenth Amendment, has, in effect, resurrected the rights/privileges distinction, because a state may now be able to create categories of interests not protected by any constitutional guarantees. *See also* Meachum v. Fano, 427 U.S. 215, 216, (1976) (stating that well-behaved prisoner has no due process right entitling him to avoid being transferred to a prison where conditions are less favorable absent some state law conferring such a right).

455. This point has been emphasized in various contexts. Board of Regents v. Roth, 408 U.S. 564, 571 n.9 (1972) (dismissal from a position of public employment); Graham v. Richardson, 403 U.S. 365, 374 (1971) (denial of welfare benefits to aliens); Bell v. Burson, 402 U.S. 535, 539 (1971) (revocation of driver's license); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (general withdrawal of welfare benefits); Shapiro v. Thompson, 394 U.S. 618, 627 n.6 (1969) (imposition of residency requirements for those seeking to receive welfare payments); Sherbert v. Verner, 374 U.S. 398, 404-05 (1963) (denial of unemployment benefits). *See generally* Van Alstyne, *supra* note 393, at 1445-58. He points out four distinct concepts that have contributed to the erosion of the rights/privileges distinction: the doctrine of unconstitutional conditions, the rule of "indirect unconstitutional effect," procedural due process and the bill of attainder doctrine itself. In support of this assertion regarding the effect of the bill of attainder doctrine on the rights/privileges distinction, Van Alstyne cites primarily United States v. Brown, 381 U.S. 437 (1965). *See* notes 730-766 and accompanying text *infra*. But, as a matter of fact, the Court in *Brown* never even discussed this distinction and the cases cited above do not derive from *Brown* any teaching on this point. Thus, it is probably more accurate to say that the erosion of the rights/privileges distinction was a phenomenon that occurred independently from the judicial development of the bill of attainder doctrine during the past three decades.

456. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 321, 322-34, 325 (1867).

challenged provisions of the Missouri constitution were objectionable because they inflicted punishment by depriving persons "of some of the rights and privileges of the citizen."[457] An inference that may be drawn both from this statement and from the general analysis undertaken in *Cummings* is that the concept of punishment in no way depends upon the label attached to that which a person is being deprived of; thus, it is arguable that the term "rights," as used by Justice Field, was meant to encompass privileges as well.

Rarely have courts attempted to give extended consideration to the term "civil and political rights" as that term is employed in *Cummings*. There are two interesting exceptions. The first is the case of *Davis v. Berry*.[458] In that suit, a challenge was raised against an Iowa statute authorizing vasectomies on "idiots, feeble-minded, drunkards, drug fiends, epileptics, syphilitics, moral and sexual perverts [and made such surgery] mandatory as to criminals who have been twice convicted of a felony."[459] The petitioner had received two separate sentences for felony convictions, the first occurring in another state before the passage of the statute.[460] The federal district court held:

> One of the rights of every man of sound mind is to enter into the marriage relation. Such is one of his civil rights, and deprivation or suspension of any civil right for past conduct is punishment for such conduct, and this fulfills the definition of a bill of attainder, because a bill of attainder is a legislative act which inflicts punishment without a jury trial. . . .[461]

457. *Id.* at 320.

458. 216 F. 413 (S.D. Iowa 1914), *vacated on other grounds*, 242 U.S. 468 (1917). The Supreme Court vacated the judgment of the district court by relying on an opinion of Iowa's attorney general stating that the challenged enactment could apply only against persons who had committed two felonies *after* the passage of the law. Therefore, the Iowa statute could not affect the petitioner, who had committed only one felony since the date of passage. As a result, the lower court's ruling was vacated as moot. *Id.* at 470.

459. 216 F. at 414.

460. *Id.*

461. *Id.* at 419. *Davis* was an advanced decision for its time. In 1927, the United States Supreme Court held that a state had the authority to perform a salpingectomy upon a feeble-minded inmate of one of its mental institutions. Justice Holmes, writing for the Court, remarked that "[t]he principle that sustains compulsory vaccination is broad enough to cover the cutting of the Fallopian tubes." Buck v. Bell, 274 U.S. 200, 207 (1927). In a later litigation, a plaintiff challenged the constitutionality of Oklahoma's Habitual Criminal Sterilization Act, which provided for the vasectomy of one convicted of larceny on three different occasions. The state supreme court dismissed a bill of attainder challenge. Skinner v. State *ex rel.* Williamson, 189 Okla. 235, 237, 115 P.2d 123, 126 (1941). The court reached this conclusion by claiming that the act had a eugenic, rather than a punitive, purpose. On appeal, the United States Supreme Court found that the statute violated the equal protection clause of the Fourteenth Amendment. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

The second exception is *Steinberg v. United States*.[462] That case involved a statute cutting off the annuity of any retired federal employee who, on the ground of self-incrimination, refused either to testify or to produce records when ordered to do so by a court, a grand jury or a legislative investigating committee seeking to make inquiries concerning his former governmental service.[463] The plaintiff, an Internal Revenue Service agent, had retired in 1951; in 1954, he exercised his privilege against self-incrimination in response to a subpoena issued by a federal grand jury in New York. He was subsequently indicted but was eventually found not guilty of all offenses charged. In August of 1955, the plaintiff's retirement annuity was suspended and that suspension later was made permanent.[464] A plurality of judges on the Court of Claims[465] held:

> Notwithstanding that plaintiff had no vested or contractual right to his annuity, we believe that Congress in prescribing a punishment for persons who exercised a constitutional right has acted beyond the scope of the Constitution. Congress may repeal laws which it has passed but Congress even with Presidential approval cannot repeal a constitutional provision, nor exact a penalty as a condition to the exercise of a constitutional privilege.[466]

On this theory, the plurality deemed the statute in question to be a bill of pains and penalties.[467]

These cases are interesting because of the expansive readings they give to the term "civil and political rights" used in *Cummings*. Thus *Davis*, decided in 1914, found a *civil right* of procreation protected by

462. 163 F. Supp. 590 (Ct. Cl. 1958).

463. *Id.* at 590. *See* 5 U.S.C. § 740(d) (1954).

464. 163 F. Supp. at 590-91.

465. The primary opinion was written by Judge Laramore and concurred in by Judge Littleton. Chief Judge Jones concurred separately in the result. *Id.* at 592-94 (Jones, C.J., concurring). He concluded that the plaintiff had a vested right to his annuity. *Id.* at 593. Therefore, Congress could not extinguish that obligation; but the chief judge stated that he was uncertain whether the act in question was an unlawful exercise of legislative power because he was unsure whether or not the act was merely a restriction on appropriation or an attempt to destroy a vested right, and therefore he elected not to pass on its constitutionality. *Id.* at 594. Judge Whittaker also concurred separately. *Id.* at 594-97 (Whittaker, J., concurring). He also believed that the plaintiff had a vested right to an annuity because that annuity was, in effect, deferred compensation for services rendered. *Id.* at 594. Therefore, he concluded that Congress had effected an attempted disvestiture of that right without due process of law. *Id.* at 596. Alternatively, he believed that penalizing the exercise of a constitutional right was "an unjust, an arbitrary, and an unreasonable discrimination" against the plaintiff. *Id.* Only Judge Madden dissented; he characterized the decision of Congress embodied in the challenged enactment as "eminently fair and sensible." *Id.* at 598 (Madden, J., dissenting).

466. 163 F. Supp. at 592.

467. *Id.*

the bill of attainder clause nine years before the United States Supreme Court was to intimate that such an interest exists.[468] In *Steinberg*, the plurality admitted there was no right to any retirement annuity but said the concept of punishment encompassed all penalties placed upon the exercise of freedoms granted by the bill of rights. It remains to be seen whether future courts will be willing to adopt seriously such expansive readings of the proscriptions against bills of attainder. To date, no court has attempted to offer a broad-guaged definition of the term "civil and political rights" used in *Cummings*. Nor has the "incorporationist" theory of *Steinberg* been explored or developed, perhaps because many enactments might legitimately be questioned under such an approach. But these decisions do point in new directions; they do suggest ways of defining the punishment component of a bill of attainder that merit further examination by the judiciary.

If it is true that the rights/privileges distinction is moribund, what remains? An answer was provided by the United States Supreme Court in *Board of Regents v. Roth*.[469] Justice Stewart's majority opinion in that case suggested that with the abandonment of reliance upon the rights/privileges dichotomy, the inquiry shifted to whether a person can claim the infringement of either a liberty or a property interest.[470] The former was said to include both a variety of personal freedoms[471] and also one's interest in one's reputation;[472] the latter was said to cover

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468.
> While this Court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). *See also* Bjerkan v. United States, 529 F.2d 125, 128 (7th Cir. 1975). The appellate court in this case cited *Cummings* for the proposition that any deprivation of a person's basic civil rights by a state because of a federal conviction that was the subject of a subsequent presidential pardon would constitute both punishment and an infringement of the pardoning power. Among the rights enumerated by the court were those of the franchise, jury service and the opportunity to work in certain professions.

469. 408 U.S. 564 (1972).

470. *Id.* at 571.

471. *Id.* at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). *See* note 468 *supra*.

472. 408 U.S. at 573 (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)). *But see* Paul v. Davis, 424 U.S. 693, 701 (1976) (held, at least for the purposes of a suit lodged under 42 U.S.C. § 1983 (1970), that reputation alone, apart from some tangible interest like employment, is not such an interest that its deprivation will invoke the safeguards of the due process clause of the Fourteenth Amendment). For an analysis of *Paul* and a compilation of lower federal court decisions construing it, *see* Lehmann, *Bivens and Its Progeny:*

all interests in benefits where one can allege a "legitimate claim of entitlement."[473]

This type of analysis is exemplified by the decision of the United States Court of Appeals for the Fifth Circuit in the case of *Muzquiz v. City of San Antonio*.[474] In that suit, former municipal firemen and policemen challenged the constitutionality of a pension fund program created by the city pursuant to guidelines set forth in a state statute.[475] The fund offered death or disability benefits to policemen and firemen (or their families) killed or injured in the line of duty; it also provided retirement benefits to those who had been employed by the city long enough to become eligible. If an employee quit before becoming eligible, he received no refunds for the amounts already contributed. It was this last feature that was attacked as a bill of attainder. The court admitted that the rights/privileges doctrine had been thoroughly discredited.[476] But it characterized the pension plan as follows:

> While the plaintiffs contributed to the pension fund, they in return received protection in the event of death or disability far in excess of their contributions. This protection continued so long as they remained employed as firemen or policemen. They thus enjoyed the benefits of their contributions during their term of employment, and no other compensation is due them.[477]

In light of this conclusion, the court was subsequently able to dismiss the bill of attainder challenge on the theory that the plaintiffs were not punished because they suffered no deprivation of property to which they had a legitimate claim.[478] From the perspective of the plaintiff, the property-entitlement approach probably seems as fruitless as the former rights/privileges analysis; under the newer technique the *Muzquiz* court, for instance, still accorded the bill of attainder challenge only the briefest of considerations. But the newer approach *is* decidedly better because it requires courts to examine what the plaintiff claims he is being deprived of and his interest in that item and thereby precludes them from substituting the invocation of labels for the task of legal

The Scope of a Constitutional Cause of Action for Torts Committed by Government Officials, 4 HASTINGS CONST. L.Q. 531, 600-03 & n.488 (1977).

473. 408 U.S. at 577. *See also* Goss v. Lopez, 419 U.S. 565, 573 (1975); Arnett v. Kennedy, 416 U.S. 134, 165-67 (1974) (Powell, J., concurring in part, joined by Blackmun, J.).

474. 520 F.2d 993 (5th Cir. 1975).

475. *Id.* at 995-96. *See* TEX. CIV. CODE ANN. § 6243f (1971).

476. 520 F.2d at 1001.

477. *Id.*

478. *Id.* at 1002. *Cf.* Goodin v. Clinchfield R. Co., 125 F. Supp. 441, 449 (E.D. Tenn. 1954) *aff'd*, 229 F.2d 578 (6th Cir.), *cert. denied*, 351 U.S. 953 (1956). *See* note 160 *supra*.

reasoning. To that extent, the liberty/property analysis is an improvement, although admittedly not necessarily *much* of an improvement.

d. Punishment Per Se

This subsection, unlike the three previous ones, does not deal with judicial efforts to draw false distinctions. Rather it is concerned with various decisions that have ruled that a particular sanction is not intrinsically penal. These cases rejected attainder challenges by advancing a negative definition of punishment, by holding that a given deprivation, by *its very nature*, can never be punitive. This approach has been utilized most prominently in cases involving attainder challenges in which the plaintiff is a resident alien and the sanction sought to be imposed is deportation. The United States Supreme Court has said repeatedly that deportation of an alien, unlike banishment of a citizen, is not punishment.[479] Although some decisions of the Court have admitted that deportation of an alien may, on occasion, be the effective equivalent of exiling a citizen,[480] the prevailing view is that expressed by Justice Frankfurter in *Galvan v. Press*.[481] He concluded that a statute precribing deportation for membership in the Communist Party[482] was not an ex post facto law as applied to one who had terminated his membership in the Party four years before the enactment of the statute:

> In light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power, . . . much could be said for the view, were we writing on a clean slate, that the Due Process Clause qualifies the scope of political discretion heretofore recognized as belonging to Congress in regulating the entry and deportation of aliens. And since the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto*

479. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 616 (1960); Galvan v. Press, 347 U.S. 522, 530-31 (1954); Harisiades v. Shaughnessy, 342 U.S. 580, 593-96 (1952); Carlson v. Landon, 342 U.S. 524, 537 (1952); Mahler v. Eby, 264 U.S. 32, 39 (1924); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Johannessen v. United States, 225 U.S. 227, 242 (1912); Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893). Most commentators conclude that the distinction between banishment and deportation is ill-advised and argue that the latter sanction is indeed punishment. *See Need for Clarification, supra* note 12, at 241; *Bounds of Specification, supra* note 45, at 356-57; Note, *Special Legislation Discriminating Against Specified Individuals and Groups*, 51 YALE L.J. 1358, 1363-64 (1942).

480. *See, e.g.*, Immigration & Naturalization Serv. v. Errico, 385 U.S. 214, 225 (1966); Barber v. Gonzales, 347 U.S. 637, 642-43 (1954); Galvan v. Press, 347 U.S. 522, 530 (1954); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947); Bridges v. Wixon, 326 U.S. 135, 147 (1945).

481. 347 U.S. 522 (1954).

482. 8 U.S.C. § 1251(a)(6)(c) (1970).

> Clause, even though applicable only to punitive legislation, should be applied to deportation. . . .
>
> But the slàte is not clean. As to the extent of the power of Congress under review, there is not merely a "page of history,". . . but a whole volume. Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government. And whatever might have been said at an earlier date for applying the *ex post facto* Clause, it has been the unbroken rule of this court that it has no application to deportation.[483]

Relying on this logic, numerous courts have held that provisions of the immigration and nationality laws imposing the sanction of deportation for specified acts cannot, by definition, be bills of attainder because deportation is not punishment.[484] An illuminating example of this logic is presented by the decision in the case of *In re Yung Sing Hee*.[485] That case involved a challenge to an act of Congress passed in 1884 amending an 1882 statute; the combined effect of both laws was that if any "Chinese laborer" residing in the United States left the country for any reason, he or she would be perpetually barred from

483. 347 U.S. at 530-31 (citations omitted).

484. *See* MacKay v. McAlexander, 268 F.2d 35, 37 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960) (challenge to 8 U.S.C. § 1251(a)(6) (1970), authorizing deportation of any alien who is or was a member of the Communist Party); Ocon v. Guercio, 237 F.2d 177, 180 (9th Cir. 1956) (same statute as in *MacKay*); United States v. Heikkinen, 221 F.2d 890, 893 (7th Cir. 1955) (Major, J., joined by Shnackenberg, J.), *aff'd*, 240 F.2d 94 (7th Cir. 1957), *rev'd on other grounds*, 355 U.S. 273 (1958) (same statute as in *MacKay*); Quattrone v. Nicolls, 210 F.2d 513, 519 (1st Cir.), *cert. denied*, 347 U.S. 976 (1954) (challenge to 8 U.S.C. § 1182 (1970), authorizing deportation of any alien who advocates, or is a member of an organization which advocates forcible overthrow of the government); Fougherouse v. Brownell, 163 F. Supp. 580, 588 (D. Ore. 1958) (same statute as in *MacKay*); Niukkanen v. Boyd, 148 F. Supp. 106, 107 (D. Ore. 1956), *aff'd*, 241 F.2d 938, 938 (9th Cir. 1957), *aff'd*, 265 F.2d 825, 827 (9th Cir. 1958) (same statute as in *MacKay*). *But see* Jimenez v. Barber, 226 F.2d 449, 451 (9th Cir. 1955), *aff'd*, 235 F.2d 922 (9th Cir. 1956), *cert. denied*, 355 U.S. 903 (1957) (challenge to ruling that the petitioner was not eligible to be considered for a suspension of deportation pursuant to the predecessor of 8 U.S.C. § 1254 (1970); said in dictum: "Likewise the scope of the bill of attainder clause is unclear as applied to the taking away of a right or privilege because of beliefs, memberships or associations."); Sentner v. Colarelli, 145 F. Supp. 569, 578 (E.D. Mo. 1956), *aff'd without considering the point sub nom.* Barton v. Sentner, 353 U.S. 963 (1957) (said in dictum that attainder proscription might apply to the terms of an order of supervision issued against one appealing a pending deportation order; *see* notes 151-155 and accompanying text *supra*).

485. 36 F. 437 (C.C.D. Ore. 1888).

ever returning.[486] The petitioner was the daughter of a merchant; she had been born in San Francisco in 1863. In 1880, her parents returned to China; she accompanied them, but apparently always intended to return to the United States. On the last phase of her return voyage, she chartered passage on a steamer travelling from Vancouver, British Columbia, to Portland, Oregon. However, when the vessel arrived in Portland, she was denied the opportunity to disembark on the theory that the Chinese exclusion acts of 1882 and 1884 applied to her.[487] The federal district court found that she was an American citizen of Chinese descent.[488] It doubted whether she was a "laborer," but concluded that if she were neither a citizen nor a laborer, the state could rightfully deny her the right to land unless she could produce a certificate issued by her own government confirming her identity and occupation.[489] Thus, it was said that only insofar as the acts of Congress were intended to apply to citizens, they were bills of pains and penalties, because they inflicted the sanction of banishment without any judicial trial.[490] Implicit in this assertion was the premise that if, for instance, the petitioner had been an alien living in the United States for seventeen years, then the government could rightfully deny her the opportunity to disembark.

It is difficult to ascertain *why* federal courts have concluded that deportation of an alien cannot be punishment. At least five possible rationales for this conclusion may be advanced. First, it may be argued that deportation is not a punitive sanction because Congress has plenary power[491] to regulate the entry of aliens into and exclusion of aliens from this country and, therefore, that this power is not constrained by other constitutional limitations, such as the proscription against bills of attainder in article one, section nine. Secondly, one might contend that whereas banishment is directed against citizens, deportation is directed against aliens and the latter class of persons is simply not entitled to rely on constitutional protections like the bill of attainder clause. A third argument might be that whereas banishment of a citizen abridges a right to reside within this country, deportation of an alien abridges only a privilege of residency which the deporting country may revoke at will. Fourth, one could contend that deportation

486. *See id.* at 438-39. *See* 22 Stat. 58 (1882), *amended by* 23 Stat. 118, § 15 (1884).

487. 36 F. at 438.

488. *Id.*

489. *Id.* at 439.

490. *Id.*

491. *See* U.S. CONST. art. I, § 8, cl. 4, saying Congress has power "to establish an uniform rule of naturalization."

is not punishment because it imposes only a civil rather than a criminal sanction. Finally, it might be argued that deportation, by its very nature, cannot be classified as punishment.

Rationales three and four, based, respectively, on the rights/privileges and criminal/civil distinctions, may be dismissed out of hand. Both are grounded on false distinctions which have been thoroughly discarded by modern decisions.[492] The first rationale, founded on the broad nature of congressional power to regulate immigration and naturalization, is inaccurate because it overstates the issue. Justice Frankfurter in *Galvan*[493] stated unequivocally that although regulation of aliens is "peculiarly concerned with the political conduct of government," the executive branch is nevertheless constrained by "the procedural safeguards of due process." Since the bill of attainder doctrine is, in part, justified by considerations of procedural due process,[494] it would be incorrect to presume that it does not restrict the manner in which the regulations governing entry and exclusion of aliens are administered.[495] The second rationale, that aliens as a class cannot rely on the safeguards provided by the bill of attainder clause, might seem to be superficially plausible. Certainly the key distinction between banishment and deportation is not the severity of the penalty; being excluded from the country can be as traumatic an experience for an alien as it would be for a native-born citizen. The major difference between banishment and deportation is actually the legal status of the victim, suggesting implicitly that non-citizens, as a class, may not invoke the constitutional proscription against bills of attainder in order to invalidate legislation directed against them. But this, too, overstates the case. If Congress passed a law that all aliens joining the Communist Party should be summarily executed or that all aliens expressing dissatisfaction over the government's immigration policies should be imprisoned without trial, there would seem to be little doubt that these enactments

492. For a discussion of the criminal/civil distinction, *see* notes 291-338 and accompanying text *supra*; for a discussion of the rights/privileges distinction, *see* notes 393-478 and accompanying text *supra*.

493. *See* note 483 and accompanying text *supra*.

494. *See* notes 49-51 and accompanying text *supra*.

495. But the United States Supreme Court has indicated that whatever administrative findings are made by the government preceding a decision to deport carry a conclusive presumption of accuracy and will therefore be subject to minimal judicial review, regardless of the fact that a potential deportee is not entitled to a jury trial. *See, e.g.*, Zakonaite v. Wolf, 226 U.S. 272, 275 (1912); Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912); Tang Tun v. Edsell, 223 U.S. 673, 675 (1911); Chin Yow v. United States, 208 U.S. 8, 11 (1908); Turner v. Williams, 194 U.S. 279, 290-91 (1904); Wong Wing v. United States, 163 U.S. 228, 237 (1896); United States v. Zucker, 161 U.S. 475, 481 (1896).

would be unconstitutional as bills of attainder. Certainly, the United States Supreme Court has never intimated that aliens as a class may not invoke the protections afforded by the bill of attainder clause.[496] Therefore, this proposed rationale has little merit. Thus, one is compelled to conclude that there is something inherent in the sanction of deportation that prevents it from constituting punishment.

In order to analyze this argument, it is necessary to consider how the United States Supreme Court has defined punishment as a general matter of constitutional law. That consideration entails a brief scrutiny of three decisions rendered between 1958 and 1963, only one of which actually involved a bill of attainder challenge. The first of these cases was *Trop v. Dulles*.[497] That lawsuit involved questions about the constitutionality of section 401(g) of the Immigration and Nationality Act of 1940,[498] which mandated denationalization of all persons convicted by court-martial for the crime of desertion in wartime. The petitioner in this case was a former serviceman who had been stationed in French Morocco during World War II and had escaped from a military stockade in which he was being incarcerated for a disciplinary infraction. After being court-martialed for and convicted of the crime of desertion and having served the prescribed sentence, the petitioner sought a passport in 1952 in order to return to the United States; his request was denied on the basis of section 401(g),[499] and an intermediate appellate court confirmed his loss of citizenship.[500] Chief Justice Warren, speaking for a divided court,[501] concluded that the statute was invalid be-

496. But at least one court has indicated that a class of persons may be effectively denied the capacity to invoke the constitutional proscriptions against bills of attainder. In Cody v. United States, 460 F.2d 34 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1973), a federal law restricting the sale of firearms to ex-felons was upheld on the theory that the "legislature, in exercising its rule-making powers, may disqualify convicted felons from pursuing activities open to others without running afoul of the bill of attainder clause." 460 F.2d at 37.

497. 356 U.S. 86 (1958).

498. Act of October 14, 1940, Pub. L. No. 76-853, 54 Stat. 1137.

499. *See* 356 U.S. at 87-88.

500. Trop v. Dulles, 239 F.2d 527, 530 (2d Cir. 1956).

501. He was joined in his opinion by Justices Black, Douglas and Whittaker. Justices Black and Douglas also penned a joint concurring opinion, wherein they additionally contended that a military tribunal lacked the inherent power to denationalize any person. 356 U.S. at 104-05 (Black, J., concurring, joined by Douglas, J.). Justice Brennan also concurred with the result reached by the plurality. *Id.* at 105-14 (Brennan, J., concurring). But he claimed it was the Court's duty to consider whether there was a rational connection between the terms of the enactment and the power Congress claimed it was exercising. *Id.* at 105. In this instance, he said that he found no such connection. *Id.* at 113-14. Justice Frankfurter registered a scathing dissent. *Id.* at 114-28 (Frankfurter, J., dissenting, joined by Burton, Clark and Harlan, JJ.) His conclusion was that the statute was no more than an exercise of a vested legislative power. *Id.* at 128. The intensity of the dissent can be explained by the fact

cause it violated the Eighth Amendment's ban against cruel and unusual punishment.[502] In the course of his analysis, he offered the following remarks about punishment:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and nonpenal effect. The controlling nature of such statutes normally depends on the evident purpose of the legislature. The point may be illustrated by the situation of an ordinary felon. A person who commits a bank robbery, for instance, loses his right to liberty and often his right to vote. If, in the exercise of the power to protect banks, both sanctions were imposed for the purpose of punishing bank robbers, the statutes authorizing both disabilities would be penal. But because the purpose of the latter statute is to designate a reasonable ground of eligibility for voting, this law is sustained as a nonpenal exercise of the power to regulate the franchise.[503]

In *Flemming v. Nestor*,[504] the Court upheld a statute denying social security old-age benefits to deportees. Justice Harlan's majority opinion rejected a bill of attainder challenge by concluding that the enactment in question was essentially regulatory rather than punitive in nature.[505] In the course of reaching this conclusion, he made the following statement about punishment:

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that at the same time it decided *Trop*, the Court upheld the constitutionality of section 401(e) of the 1940 act which denationalized citizens who voted in foreign elections. *See* Perez v. Brownell, 356 U.S. 44, 62 (1958). In *Perez*, three members of the prevailing coalition in *Trop* had dissented. *See id.* at 62-78 (Warren, C.J., dissenting, joined by Black and Douglas, JJ.) (found the challenged statute overbroad and beyond the powers of Congress); *id.* at 79-84 (Douglas, J., dissenting, joined by Black, J.) (similar theory of dissent). Nine years later, a differently constituted Court overruled *Perez*. Afroyim v. Rusk, 387 U.S. 253, 268 (1967). *See generally* Schwartz, *American Citizenship After Afroyim and Bellei: Continuing Controversy*, 2 HASTINGS CONST. L.Q. 1003, 1013-20 (1975) [hereinafter cited as Schwartz].

502. 356 U.S. at 101 (footnotes omitted).

503. *Id.* at 96-97 (footnotes omitted). At another juncture in his opinion, Chief Justice Warren noted the Court's practice of saying that deportation is not punishment. He admitted that such a view was "highly fictional," but went on to say that the government could not rely on that fiction because the case at bar involved denationalization of a citizen rather than denaturalization of an alien. *Id.* at 98.

504. 363 U.S. 603 (1960). *See* notes 445-451 and accompanying text *supra*.

505. *Id.* at 617.

> Where the source of legislative concern can be thought to be the activity or status from which the individual is barred, the disqualification is not punishment even though it may bear harshly upon one affected. The contrary is the case where the statute in question is evidently aimed at the person or class of persons disqualified.[506]

Because of this logic, Justice Harlan noted that the Court had declined to interfere with legislative regulation of "activities within its sphere of concern,"[507] harsh as that regulation may be. As an example, he cited prior decisions of the Court concluding that deportation is not a punitive sanction.[508]

Finally, in *Kennedy v. Mendoza-Martinez*,[509] the Court was confronted with a complex consolidated suit[510] challenging the constitutionality of section 401(j) of the amended Immigration and Nationality Act of 1940,[511] which mandated the withdrawal of citizenship from all persons remaining outside the jurisdiction of the United States during wartime in order to avoid military service.[512] Justice White's opinion for the Court[513] found the statute unconstitutional because it effected

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506. *Id.* at 614.

507. *Id.* at 616.

508. *Id.*

509. 372 U.S. 144 (1963).

510. There were two cases involved. In the first, one Mendoza-Martinez, who was a citizen of both Mexico and the United States, visited the former country in 1942 in order to avoid military conscription. He returned to the United States in 1946; six years later, expatriation proceedings were begun against him. *See* 372 U.S. at 147-48. In an unreported decision, a federal district court upheld the administrative deetermination to expatriate, and the United States Court of Appeals for the Ninth Circuit affirmed. Mendoza-Martinez v. Mackey, 238 F.2d 239, 240 (9th Cir. 1956). The United States Supreme Court vacated that ruling and remanded the case for reconsideration in light of Trop v. Dulles, 356 U.S. 86 (1958), *see* notes 497-503 and accompanying text *supra*. Mendoza-Martinez v. Mackey, 356 U.S. 258 (1958). In a second unreported opinion, a federal district court voided the challenged enactment and an appellate panel of the Ninth Circuit affirmed that ruling. Mendoza-Martinez v. Rodgers, 192 F. Supp. 1, 3 (N.D. Cal. 1960). In the second case involved in *Kennedy*, one Cort, an American citizen, visited England in 1951. In February, 1953, his draft board ordered him to report for induction. He failed to do so and, a year later, left England for Czechoslovakia. In 1959, he sought to receive an American passport and was informed of his denationalization. A three-judge district court held that the statute in question was unconstitutional. Cort v. Herter, 187 F. Supp. 683, 688 (D.D.C. 1960).

511. Act of Oct. 14, 1940, Pub. L. No. 76-853, 54 Stat. 1137, *amended by* Act of Sept. 27, 1944, Pub. L. No. 78-431, ch. 418, 58 Stat. 746, *amended by* Act of June 27, 1952, Pub. L. No. 82-414, § 349(a)(10), 66 Stat. 163, 267-68 (repealed by Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1258). The section of the 1952 act repeated the language of the provision of the 1944 amendment, but added the presumption that noncompliance with prescribed procedures for dealing with a draft board's notice indicated an intent to evade conscription.

512. *See* Schwartz, *supra* note 501, at 1006-08.

513. Justice White was joined by Chief Justice Warren and Justices Black and Douglas. The latter two justices also penned a brief separate opinion reciting their dissents in Perez v.

denationalization without affording any of the procedural safeguards guaranteed by the fifth and sixth amendments.[514] Included in his opinion was the following definition of the constitutional meaning of punishment:

> The punitive nature of the sanction here is evident under the tests traditionally applied to determine whether an Act of Congress is penal or regulatory in character, even though in other cases this problem has been extremely difficult and elusive of solution. Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry and may often point in differing directions. Absent conclusive evidence of congressional intent as to the penal nature of a statute, these factors must be considered in relation to the statute on its face.[515]

Brownell, 356 U.S. 44 (1958), and affirming the assertions expressed therein. 372 U.S. at 186 (Douglas, J., concurring, joined by Black, J.). Justice Brennan issued a separate concurrence. *Id.* at 187-97 (Brennan, J., concurring), but joined the Court in its discussion of punishment. *Id.* at 187. There were three dissenters. *See id.* at 197-201 (Harlan, J., dissenting, joined by Clark, J.); *id.* at 201-20 (Stewart, J., dissenting).

514. 372 U.S. at 165-66.

515. *Id.* at 168-69 (footnotes omitted). The Court in *Kennedy* cited considerable case authority in support of its seven criteria. On the need to show an affirmative disability or restraint, it referred to *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867) (exclusion from the practice of law in federal courts; *see* notes 71-81 and accompanying text *supra*); United States v. Lovett, 328 U.S. 303, 316 (1946) (debarment from positions of federal employment; *see* notes 180-198 and accompanying text *supra*) and Flemming v. Nestor, 363 U.S. 603, 617 (1960) (denial of noncontractual governmental benefits held not to be punitive; *see* notes 445-451 and accompanying text *supra*). With respect to considerations of history, the Court cited Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320-21 (1867) (disqualification from one's lawful avocation as a clergyman deemed punitive; *see* notes 54-70 and accompanying text *supra*) and the decisions of *Ex parte* Wilson, 114 U.S. 417, 426-29 (1885); Mackin v. United States, 117 U.S. 348, 350-52 (1886) and Wong Wing v. United States, 163 U.S. 228, 236 (1896) (all holding that the sanctions of imprisonment and compulsory hard labor fall within the category of infamous punishments). Regarding the issue of scienter, Justice White pointed to Helwig v. United States, 188 U.S. 605, 610-12 (1903) (held, an additional duty imposed for making an undervalued customs declaration, even in good faith or through ignorance or mistake, which duty is greatly in excess of the maximum amount of the regular ad valorem assessment, operates as a penalty) and Bailey v. Drexel Furniture Co., 259 U.S. 20, 37-38 (1922) (deemed federal excise tax imposed upon one who knowingly employs minors to be punitive). Respecting the criterion of whether or not an enactment promotes retribution or deterrence, the majority referred to United States v. Constantine, 296 U.S. 287, 295 (1935) (federal excise tax enacted from retail liquor dealers doing business contrary to local state or municipal law held to be penal) and Trop v. Dulles, 356 U.S. 86, 96 (1958) (provision denationalizing wartime deserters deemed to be punitive; *see* notes 497-503 and

These proposed definitions are unhelpful in varying ways.[516] The

accompanying text *supra*). On whether or not the behavior which is the subject of a sanction is already a crime, the majority in *Kennedy* cited *Constantine* again and the decisions of Lipke v. Lederer, 259 U.S. 557, 562 (1922) (tax under Volstead Act levied against one charged with violations of liquor laws held invalid because it had the characteristics of a fine) and United States v. LaFranca, 282 U.S. 568, 572-73 (1931) (same). Regarding the possibility of an alternative purpose, Justice White offered citations to Cummings v. Missouri, 71 U.S. (4 Wall.) at 319; Bailey v. Drexel Furniture Co., 259 U.S. at 43; Lipke v. Lederer, 259 U.S. at 561-62; United States v. LaFranca, 282 U.S. at 572; Trop v. Dulles, 356 U.S. at 96-97; and Flemming v. Nestor, 363 U.S. at 615, 617. On the final criterion of excessiveness, the Court made references to Cummings v. Missouri, 71 U.S. (4 Wall.) at 318; Helwig v. United States, 188 U.S. at 613; United States v. Constantine, 296 U.S. at 295; and Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956) (upheld $2,000 as liquidated damages for fraudulent purchase of war surplus goods if it were shown that such an amount is not so unreasonable to convert the damages into a penalty). It should be noted that the Court in *Kennedy*, after presenting this heptad of factors, remarked that "a detailed examination along such lines is unnecessary, because the objective manifestations of congressional purpose indicate conclusively that the provisions in question can only be interpreted as punitive." 372 U.S. at 169 (footnote omitted). It then restricted its scrutiny to the statements of purpose underlying the enactment of and the judicial construction of the predecessor of section 401(j), Act of March 3, 1865, ch. 79, § 21, 13 Stat. 490, see note 641 *infra*. 372 U.S. at 170-79. This exegesis was followed by a brief analysis of the immediate legislative history of section 401(j) itself, an analysis which was said to confirm the conclusion that the statute was intended to be punitive. *Id.* at 180-84.

516. It should be noted that although *Trop* and *Kennedy* did not discuss the bill of attainder clauses, the analysis of punishment offered in those decisions has influenced subsequent rulings on attainder challenges. For cases citing *Trop, see, e.g.*, Cody v. United States, 460 F.2d 34, 37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1973) (statute placing restrictions on the ability of ex-felons to purchase firearms); Green v. Board of Elections, 380 F.2d 445, 449 (2d Cir.), *cert. denied*, 389 U.S. 1048 (1967) (statute disenfranchising those convicted of a felony in federal court); Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 372 (D.D.C. 1976) (law regulating the custody and control of former President Nixon's private papers); Mones v. Austin, 318 F. Supp. 653, 658 (S.D. Fla. 1970) (rule prohibiting those formerly convicted of bookmaking from patronizing state racetracks); Thompson v. Whittier, 185 F. Supp. 306, 310-11 (D.D.C. 1960), *appeal dismissed*, 365 U.S. 465 (1961), *aff'd sub nom.* Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962) (enactment depriving veterans' benefits from an honorable dischargee who subsequently engages in disloyal conduct). For cases citing *Kennedy, see, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 476 (1977) (same statute referred to above); Green v. Board of Elections, 380 F.2d at 450; Mones v. Austin, 318 F. Supp. at 657; Dodge v. Nakai, 298 F. Supp. 26, 34 (D. Ariz. 1969) (resolution expelling certain parties from reservation lands; *see* notes 115-121 and accompanying text *supra*). *See also* United States v. O'Brien, 391 U.S. 367, 383-84 n.30 (1968) (noting similarity of inquiry in *Trop, Kennedy* and attainder decisions). The decision of the Court in Flemming v. Nestor has also been influential in a number of subsequent cases involving attainder claims. *See, e.g.*, Monaco v. United States, 523 F.2d 935, 940 (9th Cir.), *cert. denied*, 424 U.S. 911 (1975) (Dual Compensation Act of 1964, 5 U.S.C. §§ 3501-03 (1976), giving civil service preferences to fewer classes of retired servicemen than had previously been the case); Reyes v. Flemming, 287 F.2d 735, 736 (1st Cir. 1961) (statute denying survivors' benefit to the relatives of veterans punished by execution during wartime); Nixon v. Administrator of Gen. Servs., 408 F. Supp. at 373; Mones v. Austin, 318 F. Supp. at 658; Thompson v. Whittier, 185 F. Supp. at 312; Sheridan v. Gardmer, 347 Mass. 8, 14, 196 N.E.2d 303, 308 (1964) (law prohibiting ex-felons or members of their families from serving on the Massachusetts Crime Commission).

Court in *Trop* provides an excellent example of circular reasoning. It says that in order to ascertain if an enactment is penal, one must look at the motive or purpose of the legislators. But the object of that search is the motive to punish, *i.e.*, the purpose to inflict punishment, the very term that one is seeking to define in the first place. As examples of a punitive purpose, Chief Justice Warren offers two concepts: the reprimand of the wrongdoer and the deterrence of others; punishment includes any legislative sanction enacted to effectuate these purposes. Tested in the light of this language, laws deporting aliens who join or have joined the Communist Party or who advocate forcible overthrow of the government[517] are undeniably punitive. Congress has decided that such acts are blameworthy and has elected to penalize those who commit them by expelling those wrongdoers from this country. The imposition of such a draconian penalty was undoubtedly also intended to deter other aliens who might have considered engaging in the proscribed courses of conduct. Yet Chief Justice Warren carefully noted that, although the view that deportation is not punishment may be "fictional," his opinion in *Trop* did not necessarily undermine that view.[518] Considering legislative purpose can be a useful judicial technique, but its usefulness lies not in its utilization as a referent for defining the concept of punishment, but rather in its application as a guideline for determining whether a given enactment is regulatory or penal. A by-product of such a determination is, at best, a list of the many sanctions that are *not* punishment, at least within the confines of a particular factual framework. The approach advocated in *Trop* thus yields a negative definition of punishment by circumscribing the bounds of those classes of purposes that the Court will be content to categorize as regulatory. The language in *Trop* would be helpful if courts had dismissed attainder challenges to naturalization statutes on the theory that such statutes merely prescribe qualifications for continued residency, but the courts instead dismissed such challenges by concluding that deportation is not punishment per se.[519] *Trop* would seem to suggest that such

517. *See* note 484 *supra*.

518. *See* Trop v. Dulles, 356 U.S. 86, 98 (1958). *See* note 503 *supra*.

519. *See* note 484 and accompanying text *supra*. The emphasis in this section has been on the subject of deportation, because that subject presents the most useful exemplar of the punishment per se problem. However, a few other cases suggest that the same approach might be applied to other types of sanctions. *See* United States v. Ricketson, 498 F.2d 367, 374 (7th Cir. 1974) (challenge to a change in the rules of evidence respecting the acquisition of depositions; held, such a change is not an attainder because it is not punishment); Cole v. Cardoza, 441 F.2d 1337, 1341 (6th Cir. 1971) (challenge to statutes imposing excise taxes on amounts wagered and a special tax on the occupation of wagering; held, it is not punishment to assess a tax); Cox v. State, 222 Tenn. 606, 614, 439 S.W.2d 267, 271 (1969) (challenge to a

assertions are inaccurate (or, at best, unproven), because the courts never really considered the purpose of the legislators in enacting the provisions being questioned.[520] But the irrelevance of Chief Justice Warren's remarks, at least in the view of those lower federal courts, is underscored by the counterargument that if the sanction ultimately being imposed could never be classified as punitive, then why Congress chose to pass a statute invoking that sanction for specified offenses is unimportant. *Trop* then, resolves no problems in this area.

Neither does *Flemming*. There, the Court snatched an aphorism from Justice Field's opinion in *Cummings v. Missouri*[521] and elevated it into a definition of punishment: a statute imposing disqualifications on a status or activity is not punitive, while one imposing disqualifications on a person or persons is. In the context of *Cummings*, this statement made sense because it was relatively easy to see that preventing a Catholic priest from preaching his religion within Missouri because he had allegedly left that state during the Civil War in order to avoid military service, was the imposition of a disability on an individual *qua* individual rather than on an individual *qua* priest. But in the deportation cases, that dichotomy breaks down. In those cases, disabilities are imposed upon one's status as a resident alien and, arguably, that status cannot be so neatly differentiated from the person to whom it attaches. Thus, when one is deported for having once been a member of the Communist Party, there is no pretense that the legislature is establishing qualifications for a profession or avocation, as in *Cummings*; rather, it is imposing a disqualification on one's official identity as a foreign resident in this country. Applying the rule of *Flemming* in support of decisions saying deportation is not punishment requires one to argue that the deprivation being exacted by Congress is one that affects only a person's official status, rather than the person himself. This presumes that the two are separable and discrete, but, arguably, they are not. It is possible to distinguish between laws affecting a person and laws affecting what that person may do; it is less possible to distinguish between laws affecting a person and laws affecting how the government defines who that person is. In modern society, the concept of selfhood is, to a great extent, dependent upon the status conferred upon an indi-

law providing that if a person charged with a crime is adjudged to be insane and is thereafter committed, costs of such commitment are to be paid from his estate, if any; held, no attainder because no punishment, only commitment for the benefit of a defendant).

520. Of course, had the courts undertaken such a consideration, they would have then confronted all the problems attendant to judicial scrutiny of legislative motive. *See* notes 177-190 and accompanying text *supra*.

521. 71 U.S. (4 Wall.) 277, 320 (1867). *See* note 532 and accompanying text *infra*.

vidual by the state; one's official identity affects both one's own definition of oneself and how others perceive and deal with that self. The language in *Cummings* which *Flemming* relies upon was only meant to serve as a shorthand method of expressing the rule of relevance, that is, whether the qualification being imposed reasonably related to one's fitness to practice a profession. To remove that language from its specific context and transmogrify it into a general definition of punishment is unsound because the language in question was never meant to serve as a rule of universal application and, in making it serve as such, the Court in *Flemming* fashioned a remedy that was worse than the disease it was intended to cure.

Kennedy, however, is a different matter. Justice White's decision adopts as its main criterion for determining whether a given enactment is punitive the rule laid down in *Trop*: legislative purpose. But in the high percentage of cases where such scrutiny yields no conclusive results, he advances seven subsidiary criteria: whether the statute in question imposes disabilities, inflicts an historically penal sanction, requires scienter, promotes retribution and deterrence, applies an additional sanction to already criminal conduct, effectuates a possible nonpenal purpose and imposes too excessive a sanction to secure that purpose. Taken individually, few of these tests are adequate; statutes imposing disabilities are not necessarily punitive, criminal statutes do not always require scienter nor do they always apply to pre-existing crimes, excessiveness of a sanction does not necessarily imply that it is punitive, and so on. But Justice White said that one should consider these seven tests together. This statement does not mean that if a law meets only four or five of these criteria then it is, *ipso facto*, nonpenal; these criteria are not meant to operate as a general definition of punishment, but rather are merely meant to serve as relevant guidelines for any inquiry about whether a given statute is punitive or not. This approach invites a scrupulous case-by-case analysis. In that respect it has merit; but, unfortunately, it provides a very nebulous decisionmaking technique. What happens when some factors support one conclusion and others suggest another? Are all these factors to be accorded equal weight? Justice White notes the potential problem, but never discusses it. What happens for example, when it is not apparent what aims the statute will promote or what purpose it was designed to effect? Are these terms simply deleted from the judge's decisional calculus or should he give a legislature the benefit of his doubts? The language in *Kennedy* is symptomatic of the difficulties in dealing with the elusive problem of punishment; the traditional tests described by Justice White do direct

judicial attention to profitable areas of inquiry, but they also provide scant assistance in enabling a judge to rationalize and derive a conclusion from all the conflicting evidence such an inquiry is likely to produce. As a result, the criteria cited in *Kennedy* only exacerbate, rather than resolve, the underlying problem of how punishment is to be defined. Yet, even so, application of the *Kennedy* tests to, for example, a statute deporting all aliens who are or were members of the Communist Party[522] betrays its penal aspects: it imposes a disability of expulsion; it forces one to leave the country where he presently resides and there is an historical basis for labeling that as punishment, even if the resident is not also a citizen;[523] it promotes retribution against those who do join the party and deters others from becoming members; if its purpose is to regulate the political activities of aliens, its sanction is suspiciously excessive, whereas if its purpose is to prohibit aliens from joining the Party, its sanction is clearly excessive, because mere membership in the Party is not, in and of itself, a crime. So the tests laid down in *Kennedy*, unhelpful as they are, do militate against the conclusion that deportation for being a member of the Communist Party is not punishment.

The conclusion that may be derived from the foregoing analysis is simple: deportation of an alien, like banishment of a citizen, is punishment; any view to the contrary is based upon the doctrine of *stare decisis*, not the dictates of logic. But this criticism does not mean that the courts rejecting attainder challenges to naturalization laws necessarily made incorrect rulings; the statutes in question may have been upheld alternatively as regulatory enactments. But utilization of the regulation/punishment distinction would have required those courts to analyze the questions of what Congress was seeking to regulate and whether or not the means it used bore a rational connection to the ends it sought. And that analysis, if rigorously conducted, would have compelled consideration of many imponderables which lower federal courts may simply have been unwilling to deal with.[524] Thus, the "deportation is not punishment per se" label may be revealed for exactly what it is: not a conclusion founded upon any painstaking analysis of the constitutional meaning of the term "punishment," but rather a subterfuge by which courts could shirk their responsibility to solve legal

522. *See* note 484 *supra*.

523. Consider, for instance, the parliamentary bill expelling all Jesuits from England. 27 Eliz., c.2, § 2; 2 STATS. U.K. 633 (1585), *quoted in* note 10 *supra*.

524. The most troublesome of which would probably be that concerning the ability of Congress to exact a deprivation for beliefs or associations. *See* Jimenez v. Barber, 226 F.2d 449, 451 (9th Cir. 1955), *quoted in* note 484 *supra*.

issues by the utilization of logic and reason, rather than the invocation of some facile descriptive tag.

3. Regulation v. Punishment

After having considered four spurious distinctions and definitions drawn by courts in analyzing the bill of attainder doctrine, it is now necessary to consider the genuine distinction that may be made between regulation and punishment. The problem is simply summarized. Many statutes impose sanctions upon specified groups of persons without judicial trial, but the underlying purpose of such statutes is regulatory, not punitive. Thus, for example, courts have dismissed bill of attainder challenges to a law governing the conditions on which automobiles may be bought or sold within a state,[525] a statute authorizing federal district courts to entertain suits to cancel certificates of naturalization obtained by fraud,[526] an ordinance requiring revocation of a liquor license where the licenseholder has engaged in illegal betting practices on the premises where liquor is being sold,[527] a rule exempting supervisors from the coverage of the National Labor Relations Act,[528] and an enactment prohibiting the organization of private militias without prior licensing by the governor of the state.[529] All these laws are designed to regulate a defined class of transactions, not to punish groups of persons. Legislators were concerned, respectively, with curtailing fraudulent practices by automobile dealers, rescinding naturalization certificates acquired through knowing misrepresentations, preventing the efforts of organized crime to establish a syndicate of bookie outlets, limiting the coverage of the National Labor Relations Act to employees rather than agents of management and preventing the flourishing of armed, civilian paramilitary groups likely to engage in vigilantism.[530] The extension of the proscription against bills of attain-

525. TENN. CODE ANN. §§ 59-1701 to 59-1720 (1968). *See* Ford Motor Co. v. Pace, 206 Tenn. 559, 582, 335 S.W.2d 360, 370 (1960).

526. Act of June 29, 1906, ch. 3592, § 15, 34 Stat. 601. *See* United States v. Mansour, 170 F. 671, 675 (S.D.N.Y. 1908).

527. FLA. STAT. ANN. § 561.291 (West 1962). *See* Southern Bell Tel. & Tel. Co. v. 1901 Collins Corp., 83 So.2d 865, 873 (Fla. 1955).

528. 29 U.S.C. § 152(3) (1970). *See* NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 579 (6th Cir. 1948), *cert. denied sub nom.* Foremen's Ass'n v. Edward G. Budd Mfg. Co., 335 U.S. 908 (1949).

529. Act of May 28, 1879, 1879 Ill. Laws, ch. 192. *See* Presser v. Illinois, 116 U.S. 252, 268 (1886).

530. For other examples, *see* text accompanying notes 256-259 *supra*. *Cf.* United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n.13 (1977) (stated the constitutional prohibitions of article one, section ten limit the power of states only with respect to the subject of punishment).

der to such enactments would effectively undermine the ability of Congress and local legislatures to pass any meaningful *regulatory* measures. The problem, then, is not whether the distinction between regulation and punishment is valid; that will be presumed. The problem is rather one of extracting from the language of decisions refusing to construe regulatory enactments as bills of attainder a coherent theory for distinguishing regulation from punishment. A resolution of this problem may best be attempted by considering four key decisions rendered by the United States Supreme Court during a period extending from 1867 to 1951.

In *Cummings v. Missouri*,[531] Justice Field limned the broad outlines of a theory for distinguishing regulation from punishment. He admitted that a state could prescribe qualifications that each person would have to meet in order to practice a profession or avocation, but such qualifications could not be exacted "in order to reach the person, not the calling."[532] There must be a relationship between the acts or omissions constituting a *dis*qualification and an individual's fitness to undertake the practice of a certain profession. In a word, the state bears the burden of showing that such acts or omissions are *relevant*. A closer reading of *Cummings*, however, suggests that the state might have a difficult task of bearing that burden. Justice Field indicated that the list of acts incorporated by reference in the oath prescribed by the Missouri constitution was divisible into three categories: (1) acts constituting "offenses of the highest grade, to which, upon conviction, heavy penalties are attached";[533] (2) acts which had never previously been classified as legal offenses, but which might nevertheless be morally blameworthy and (3) acts which, under most circumstances, could never be blameworthy.[534] Certainly, one would have little difficulty in agreeing with Justice Field that it is impermissible to penalize mere disaffection with the Union or sympathy for the Confederacy. But other types of proscribed acts, *e.g.*, engaging in bushwacking, sending information to insurgents in wartime or aiding *guerrilleros* to evade capture, *would* seem to be very relevant to an individual's subsequent fitness to hold positions of public trust; one might seriously doubt the wisdom of appointing as a marshal, for example, someone who had previously served as a member of Quantrill's Raiders. Justice Field seemed to recognize this problem when he intimated that innocent acts could be le-

531. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

532. *Id.* at 320.

533. *Id.* at 316.

534. *Id. See* note 55 *supra*.

gitimately distinguished from acts motivated by "malignant enmity," and that desires or sympathies could be similarly distinguished from "overt and visible acts of hostility to the government."[535] At one juncture in his opinion, he condemned the challenged enactment because it failed to draw distinctions between those who "ever expressed sympathy with any who were drawn into the rebellion, even if the recipients of that sympathy were connected by the closest ties of blood . . . [and those who were] the most active and the most cruel of the rebels . . . .";[536] at another, he admitted that "*many* of the acts have no possible relation to [one's] fitness for those pursuits and professions."[537] Thus, the oath could have been exacted only for the purpose of penalizing persons like Cummings because the challenged provision of the Missouri constitution encompassed past conduct that was irrelevant as well as that which was relevant to his fitness to practice his profession. As Justice Field himself stated, the oath as a whole was exacted "not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment."[538] The net effect of the decision in *Cummings* is that it severely limits the type of prior occurrence for which a subsequent sanction may be imposed. As the Court pointed out,

> it by no means follows that, under the form of creating a qualification or attaching a condition, the states can in effect inflict a punishment for a past act which was not punishable at the time it was committed. The question is not as to the existence of the power of the state over matters of internal police, but whether that power has been made in the present case an instrument for the infliction of punishment against the inhibition of the Constitution.[539]

From this assertion one might derive the conclusion that a legislature could unilaterally punish a person for any past act for which he could have been subjected to a criminal prosecution. But this conclusion is inaccurate. When the Court went on to analyze bills of attainder in general, it observed that the constitutional inhibitions against such an enactment are based in part on the rationale that it is forbidden for legislatures to punish "without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice

535. *Id.* at 318.

536. *Id.*

537. *Id.* at 319 (emphasis added). *See also* Dent v. West Virginia, 129 U.S. 114, 128 (1889).

538. 71 U.S. (4 Wall.) at 319.

539. *Id.* at 320.

by the established tribunals."[540] Thus, as a practical matter, *Cummings* precludes a state from imposing test oaths conditioning deprivations upon anything other than past acts which are relevant to professional fitness and which have been the subjects of prior criminal convictions. Justice Field's discussion of the regulation-punishment distinction is therefore implicitly qualified by his later analysis of the judicial trial component of the bill of attainder doctrine. As a result, the Court barred Missouri from denying persons the right to practice their professions on the basis of past acts or beliefs which may have been extremely relevant in determining vocational fitness but which never served as the basis for a judgment of culpability by a court of law. Consequently, the net effect of Justice Field's analysis of the regulation-punishment distinction, coupled with his discussion of the need for affording each individual the safeguards of a judicial trial, is to bar legislatures from exacting deprivations for past acts unless and until a judicial tribunal has branded those acts as crimes.

The teachings of *Cummings* were clarified and, to some extent, mitigated, a dozen years later by the decision in *Dent v. West Virginia*.[541] In that case, a challenge was raised against a statute that required anyone seeking to practice medicine within the state to first acquire a certificate from the West Virginia Board of Health stipulating that the licentiate had either graduated from a reputable medical college, practiced medicine within the state continuously for the decade prior to March 8, 1881, or been found, upon examination, to be qualified to serve as a physician.[542] One who practiced without such a certificate could be punished as a misdemeanant.[543] In June of 1882, the petitioner was indicted and convicted for practicing medicine in Preston County, West Virginia, without a certificate. He had received a diploma from the American Medical Eclectic College of Cincinnati, Ohio, but the board of health had concluded it was not a reputable institution. Since he had only been practicing in the county since 1876, he could not claim the benefit of the ten-year provision in the statute, and he had refused to submit to any examination by the board.[544] After being fined fifty dollars, the petitioner obtained a writ of error to the Supreme Court of West Virginia. That tribunal concluded that no serious argument could be broached against the constitutionality of the

540. *Id.* at 325.
541. 129 U.S. 114 (1889).
542. *See id.* at 115-17. *See* 1882 W. Va. Acts, ch. 93, §§ 9, 15.
543. 129 U.S. at 117.
544. *Id.* at 117-18.

statute in question.[545] On appeal, the United States Supreme Court affirmed this ruling in a unanimous decision authored by Justice Field. He pointed out that the statute was not arbitrary because it applied to all resident physicians, imposed achievable qualifications and was enforced in a reasonable manner.[546] He then distinguished *Cummings* and *Ex parte Garland*[547] by concluding:

> The constitution of Missouri and the act of Congress in question in those cases were designed to deprive parties of their right to continue in their professions for past acts or past expressions of desires and sympathies, many of which had no bearing upon their fitness to continue in their professions. The law of West Virginia was intended to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under authority of the state.[548]

Thus, the statute in *Dent* was deemed to be an example of a legitimate qualificatory scheme because it imposed *only relevant* prerequisites. Requiring an examination, evidence of graduation from a reputable institution or a decade of responsible practice were deemed reasonable methods of determining fitness to undertake the profession of medicine.

Dent did not involve test oaths or governmental scrutiny of past beliefs. Moreover, as the Court noted,[549] the prerequisites imposed by the West Virginia statute worked no perpetual bar to the practice of medicine since an applicant could always acquire a certificate by taking an examination or, if necessary, continuing his education so that he might receive a diploma from a reputable college.[550] This was entirely different from *Cummings*, where the Missouri constitution had no analogous escapability feature. On these bases, *Dent* was distinguishable from *Cummings* and thus was arguably not even governed by the precedent of the latter case. Yet the authors of the former decision nev-

545. State v. Dent, 25 W. Va. 1, 19 (1884).

546. 129 U.S. at 124.

547. 71 U.S. (4 Wall.) 333 (1867). *See* notes 71-81 and accompanying text *supra*.

548. 129 U.S. at 128.

549. *Id.* at 124.

550. One commentator has argued that *Dent* established the principle that a law creating attainable qualifications which all persons could theoretically meet is not a bill of attainder. *Waning Guaranty, supra* note 12, at 850. This assertion is misleading. The Court mentions the fact that the West Virginia statute imposed achievable qualifications only in passing; it never expounded any full-blown theory about whether or not an enactment containing escapability features can attaint. Indeed, the United States Supreme Court subsequently indicated that the mere fact that a challenged enactment imposes a disability upon a person that can be avoided by conforming to a further mandate contained in the statute itself was not decisive in determining whether such an enactment could be construed as a bill of attainder. *See* United States v. Brown, 381 U.S. 437, 457 n.32 (1965).

ertheless felt constrained to differentiate the two cases. Justice Field in *Dent* advanced a thoroughly reasonable proposition: if the state of West Virginia could license physicians, it should also be able to satisfy itself about the competency of potential licenseholders. Thus, the possession of sufficient medical skills and training was deemed a relevant subject of inquiry and the means used to measure it (evidence of a diploma from an accredited college, proof of satisfactory diagnosis and treatment over an extended period or the successful passage of a standardized exam) were reasonable in themselves. But the ultimate importance of *Dent* is that it purports to derive from *Cummings* a fixed principle: the state can impose conditions on access to a profession that entail a consideration of *all* past conduct relevant to potential professional competency. The sensibility of this thesis is self-evident in the context of a case like *Dent*, but it is not at all clear that it has equal applicability to cases like *Cummings*. Nor is it evident that Justice Field's explication of *Cummings* in *Dent* deals adequately with the unexpected complexities and ambiguities of his own opinion in the former case.

A decade later, in *Hawker v. New York*,[551] the Court reinterpreted the rule of relevancy. In that case, the petitioner had been convicted of committing an abortion in 1878 and was sentenced to a term of ten years in the state penitentiary. In 1896, he was found guilty of practicing medicine in violation of statute enacted in 1893, which provided that a convicted felon could not practice as a doctor in the state of New York and that if he attempted to do so, he could be charged with a misdemeanor.[552] The petitioner alleged that this statute was unconstitutional, *inter alia*, both as a bill of attainder and as an ex post facto law. Although the Appellate Division overturned his conviction,[553] the New York Court of Appeals reinstated it, specifically repudiating the attainder claim by pointing out that the statute in question prescribed only an additional penalty for a prior conviction.[554] The United States Supreme Court, in a six-to-three ruling, upheld the validity of the challenged enactment.[555] Justice Brewer, writing for the majority, asserted that the state could inquire legitimately into the character as well as the compe-

551. 170 U.S. 189 (1898).

552. *See id.* at 189-90. *See* 1893 N.Y. Laws, ch. 661, § 153.

553. The appellate division concluded that insofar as the statute in question was applied prospectively, it was valid, but insofar as it was given retroactive effect, it was unconstitutional. Since the petitioner had committed the underlying felony fifteen years before the date of enactment, his conviction could not stand. *See* People v. Hawker, 14 App. Div. 188, 193, 43 N.Y.S. 516, 520 (1st Dep't 1897).

554. People v. Hawker, 152 N.Y. 234, 240, 46 N.E. 607, 608 (1897).

555. The three dissenting justices contended that the New York statute was unconstitu-

tence of an applicant for a professional license.[556] Since character was a permissible topic of scrutiny, he went on to conclude that the state could determine the method by which that complex of traits could be ascertained, provided the method finally selected only takes into account "whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test."[557] Thus, the Court laid down the precept that the legislature may consider whatever is "ordinarily" indicative of bad character in determining whether a prospective licentiate is qualified.[558] As long as the administrative inquiry fell within these bounds, the question of whether other characterological tests would be more satisfactory was deemed to be one best left to the discretion of the legislature.[559] Having thus stated its premises, the Court found itself able to dispose of the bill of attainder challenge quite easily. Justice Brewer noted that good people do not commit felonies, and as the petitioner had been convicted of a felony, he was presumptively "a man of such bad character as to render it unsafe to trust lives and health of citizens to his care."[560] He pointed out that while superficially the challenged enactment appeared to impose an additional punishment for a past offense, in fact it was designed to protect the public from untrustworthy physicians.[561] Although the rule adopted by the New York legislature operated harshly and arbitrarily because it denied a license solely on the basis of a prior conviction without ascertaining whether the prospective licenseholder had in fact rehabilitated himself, the Court concluded that the legislature was within its rights to make a rule of general application "based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established."[562] The Court distinguished *Cummings* and *Garland* by essentially reiterating the rationale of *Dent*: the legislation in question was "not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled, and naming what is deemed to be and what is in fact appropriate evidence of such qualifications."[563] *Hawker* went beyond *Dent* in several respects. First, the New York statute, unlike the West Virginia law,

tional as an ex post facto law. *See* 170 U.S. at 200-05 (Harlan, J., dissenting, joined by Peckham, and McKenna, JJ.).

556. *Id.* at 194.
557. *Id.* at 195.
558. *Id.*
559. *Id.* at 197.
560. *Id.* at 196.
561. *Id.*
562. *Id.* at 197.
563. *Id.* at 200.

had no escapability features. Once a person was convicted of a felony, there was no way for him to avoid automatic disqualification. Second, while the West Virginia ordinance dealt solely with the issue of professional competence, the New York enactment had a wider scope in that it compelled consideration of personality traits, although the admissible evidence for those traits was a record of conviction. Third, and most importantly, although *Hawker* purported to apply the relevance test of *Dent*, it in fact did more than that. Justice Brewer admitted that in some cases proof of a prior conviction might be irrelevant to one's fitness to practice a profession because the person in question might have rehabilitated himself; as long as the legislative classification itself was "reasonable," that was sufficient.[564] Thus *Hawker* actually eroded the theory expounded by *Dent*, while pretending to espouse it.

The combined effect of *Dent* and *Hawker* was to allow states to regulate access to licensed professions by requiring an administrative ascertainment of individual character as well as competence and character as evidenced by past *conduct*.[565] In *Garner v. Board of Public*

564. *Id.* at 197. One commentator has stated that what the author refers to as the relevancy test established by *Dent* and *Hawker* was not intended to serve "as a valid general test for bills of attainder, but as a means of suggesting that the label 'qualification' does not preclude a finding of punishment in a bill of attainder context." *Need for Clarification, supra* note 12, at 239 n.160. This is an inaccurate conclusion. It is true that "relevancy" or "reasonable relationship" is not a general test for an attainder; but it is false to suggest that all the rule of relevancy does is indicate that some types of qualifications are punishment. The rule is intended to enable courts to distinguish regulation from punishment; *by definition*, if a statute is merely regulatory, it cannot be a bill of attainder. Conversely, if a statute establishes an ostensible qualificatory scheme that is actually punitive (because the legislatively-denominated bases for classification are irrelevant), it will fall within the proscriptions of article one, section nine or ten of the Constitution (assuming the other three definitional criteria are met).

565. Many state and federal courts rendered decisions prior to 1965 relying either explicitly or implicitly on the regulation-punishment distinction established by *Dent* and *Hawker* in order to reject bill of attainder challenges to various types of enactments. *See, e.g.*, Flemming v. Nestor, 363 U.S. 603, 617 (1960) (statute denying social security benefits to deportees); De Veau v. Braisted, 363 U.S. 144, 160 (1960) (enactment prohibiting exfelons from soliciting or collecting union dues from persons covered by New York's Waterfront Commission Act); Smith v. California, 336 F.2d 530, 534 (9th Cir. 1964) (code provisions prescribing qualifications for professional engineers); Inland Steel Co. v. NLRB, 170 F.2d 247, 267 (7th Cir. 1948), *aff'd sub nom.* American Communications Ass'n v. Douds, 339 U.S. 382 (1950) (rule withholding jurisdiction of the National Labor Relations Board from unions whose officers fail to execute a test oath); NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 579 (6th Cir. 1948), *cert. denied sub nom.* Foremen's Ass'n v. Edward G. Budd Mfg. Co., 335 U.S. 908 (1949) (provision of the Taft-Hartley Act excluding supervisors from coverage of the National Labor Relations Act); Butcher v. Maybury, 8 F.2d 155, 158 (W.D. Wash. 1925) (statute creating a new qualificatory scheme for naturopaths); Thompson v. Whittier, 185 F. Supp. 306, 311-12 (D.D.C. 1960), *appeal dismissed*, 365 U.S. 465 (1961), *aff'd sub nom.* Thompson v. Gleason, 317 F.2d 901 (D.C. Cir. 1962) (enactment denying veterans' disability benefits to honorable dischargees committing disloyal acts); Washington

Works,[566] however, the Court sanctioned the ultimate step by permitting legislative scrutiny into past *beliefs*. The case arose from a 1941 amendment to the charter of the city of Los Angeles, which stipulated that no person could hold municipal office who advocated or belonged to an organization that advocated the violent overthrow of the government; the same bar to employment applied against those committing the proscribed acts or holding the proscribed beliefs within five years prior to the effective date of the amendment.[567] The city enforced this charter provision by enacting a municipal ordinance in 1948 that created an expurgatory oath reiterating the terms of the 1941 amend-

v. State, 75 Ala. 582, 585 (1884) (law disenfranchising persons convicted of treason, embezzlement of public funds, malfeasance in office and other crimes); Southern Bell Tel. & Tel. Co. v. Nineteen Hundred and One Collins Corp., 83 So. 2d 865, 873 (Fla. 1955) (statute revoking the liquor license of tavern owners conducting bookmaking operations on their premises); Davis v. Mayor of Savannah, 147 Ga. 605, 606, 95 S.E. 6, 7 (1918) (ordinance prohibiting the maintenance of cowpens and stables within city limits); Crampton v. O'Mara, 193 Ind. 551, 555, 139 N.E. 360, 362 (1923), *writ of error dismissed*, 267 U.S. 575 (1925) (rule disqualifying one sentenced to a term exceeding six months for violating federal law from holding state office); *In re* Platz, 60 Nev. 296, 309, 108 P.2d 858, 864 (1940) (provision requiring disbarment of an attorney whose license was suspended and who practiced law during that period of suspension); France v. State, 57 Ohio St. 1, 20, 47 N.E. 1041, 1043 (1897) (enactment mandating denial of a license to a prospective physician who had committed felonies, acts of gross immorality, acts of drunkenness or the like); Ford Motor Co. v. Pace, 206 Tenn. 559, 582, 335 S.W.2d 360, 370 (1960) (law governing the sale and purchase of automobiles); Davis v. Beeler, 185 Tenn. 638, 653-54, 207 S.W.2d 343, 350 (1947), *appeal dismissed*, 333 U.S. 859 (1948) (statute providing for the licensing of naturopaths); Pierce Oil Corp. v. Weinert, 106 Tex. 435, 439, 167 S.W. 808, 810 (1914) (enactment denying foreign corporations that violate local antitrust laws the right to do business in Texas); State *ex rel.* Carroll v. Simmons, 61 Wash. 2d 146, 147, 377 P.2d 421, 422 (1962), *cert. denied*, 374 U.S. 808 (1963) (provision stipulating that a public official who is convicted of a felony while in office will automatically forfeit his position); Fox v. Territory, 2 Wash. Terr. 297, 300, 5 P. 603, 605 (1884) (statute prescribing qualifications for physicians); State v. Coubal, 248 Wis. 247, 262, 21 N.W.2d 381, 390 (1946) (law stipulating that one who permits gambling on his premises may have his liquor license revoked). Even the one major decision striking down a proposed qualificatory rule relied on the relevancy test. In Opinion to the House of Representatives, 80 R.I. 281, 96 A.2d 623 (1953), the Rhode Island Supreme Court had to consider the validity of a proposed law disqualifying the relatives (and their spouses) of an elected official (or his or her spouse) or an agency head (or his or her spouse) from holding any appointive municipal office during the elected term of the official or the tenure of the agency head. The relatives so affected included children, grandchildren, parents, grandparents, brothers, sisters, half-brothers and half-sisters. *Id.* at 282, 96 A.2d at 624. The court noted that relatives were prohibited from taking any post, not just a post under the official in question; for instance, a person could not serve as a streetsweeper if he was the spouse of a half-sister of the municipal recorder of deeds. *See id.* at 284, 96 A.2d at 625. Thus, the court concluded, "such an extreme disqualification may subject the provision in its present form to the claim that it is an arbitrary and direct proscription of a class, that it exceeds a reasonable exercise of police powers and that in effect it is at least in the nature of a bill of attainder." *Id.* at 285, 96 A.2d at 626.

566. 341 U.S. 716 (1951).

567. *Id.* at 717-18. *See* 1941 Cal. Stats., ch. 67.

ment.[568] All existing municipal employees had to execute this oath prior to January 6, 1949; some of them filed suit, alleging that the municipal ordinance was both a bill of attainder and an ex post facto law. The California district court of appeals rejected the attainder challenge,[569] citing *American Communications Association v. Douds*.[570] On appeal, the United States Supreme Court upheld the validity of the oath. Justice Clark, writing for himself and four of his colleagues,[571]

568. 341 U.S. at 718-19. The oath read:

> I further swear (or affirm) that I do not advise, advocate or teach, and have not within the period beginning five (5) years prior to the effective date of the ordinance requiring the making of this oath or affirmation, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America or of the State of California and that I am not now and have not, within said period, been or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means of the Government of the United States of America, or of the State of California. I further swear (or affirm) that I will not, while I am in the service of the City of Los Angeles, advise, advocate or teach, or be or become a member of or affiliated with any group, association, society, organization or party which advises, advocates or teaches, or has, within said period, advised, advocated or taught, the overthrow by force, violence or other unlawful means, of the Government of the United States of America, or of the State of California. . . .

569. Garner v. Board of Pub. Works, 98 Cal. App. 2d 493, 499, 220 P.2d 958, 961 (1950).

570. 339 U.S. 382 (1950). *See* 98 Cal. App. 2d at 497-98, 220 P.2d at 960-61. This reliance seems questionable. The oath in *Douds* was phrased entirely in the present tense, *see* note 352 and accompanying text *supra*, and the Court in that case advanced the argument that, because of this, it referred solely to prospective conduct, *see* note 355 and accompanying text *supra*. The oath in *Garner*, however, is phrased both in the present and the past tenses and reaches past, present and future conduct. *See* note 522 *supra*.

571. The other four were Chief Justice Vinson and Justices Jackson, Minton and Reed. Justice Frankfurter dissented in part, claiming that the oath impermissibly proscribed membership in an organization not known to advocate subversion at the time one joined. 341 U.S. at 726 (Frankfurter, J., concurring in part and dissenting in part). Justice Burton registered the objection that the oath had an improper retrospective effect. *Id.* at 729 (Burton, J., concurring in part and dissenting in part). In his dissent, Justice Black alleged that the majority's decision "creates considerable doubt as to the continuing validity" of *Cummings* and its analysis of bills of attainder and ex post facto laws. *Id.* at 730-31 (Black, J., dissenting). Similarly, Justice Douglas condemned the Los Angeles ordinance as a bill of attainder. *Id.* at 736 (Douglas, J., dissenting, joined by Black, J.). The majority opinion *did* skirt the objections of Justices Frankfurter and Burton. It found that the municipal ordinance was not an ex post facto law because the oath it created extended back in time only to 1943 while the original amendment to the city charter had been passed in 1941; thus the activity covered by the oath had already been proscribed two years before the beginning of the time span covered by that oath. *Id.* at 721. This rather ingenious argument was advanced in two paragraphs occupying half of one page. Justice Frankfurter's contention was countered by a footnote arguing that, although the statute itself did not mention any requirement of scienter, California courts had construed *other* similar statutes in a way that required proof of knowing membership. *See id.* at 723-24 n.* (citing People v. Steelik, 187 Cal. 361, 376, 203 P. 78, 84 (1921) (construing the California Criminal Syndicalism Act of 1919)). A year later, the Court struck down another similar test oath because it declined to make this assumption

concluded that the municipal ordinance was a general regulation that merely imposed "standards of qualification and eligibility for employment."[572] He cited *Dent* and *Hawker* for the proposition that the holdings of *Cummings* and *Garland* are "inapplicable when the legislature establishes reasonable qualifications for a vocational pursuit with the necessary effect of disqualifying some persons presently engaged in it."[573]

With *Garner*, the Court had come full circle by upholding an expurgatory oath proscribing past political associations and beliefs on the theory that inquiry into such subjects was a legitimate means of determining qualifications for public offices in general, rather than particular professions. The effect of this decision was to undermine *Cummings*. Like the provisions of the Missouri constitution in *Cummings*, the expurgatory oath established by the Los Angeles ordinance proscribed past affiliations and advocacy; yet by invoking the label of "regulation," the Court held such an enactment was beyond the constitutional proscriptions against bills of attainder. Many lower courts have since followed suit.[574] Although Justice Clark in *Garner* claimed to rely on the *Dent-Hawker* relevance test, his purported adherence to those decisions was spurious. He presumed that mere advocacy unaccompanied by conduct or a prior criminal conviction could be a reason for permanently disqualifying a person from public employment. Neither *Dent* nor *Hawker* advanced such a thesis; *Cummings* rejected it explicitly by pointing out that mere past expressions of desires and disaffections are irrelevant to present fitness to serve in a position of public trust.[575] More importantly, although the Court in *Garner* pretended to apply a theory of relevance, it had in fact

about what the Oklahoma courts might do. *See* Wieman v. Updegraff, 344 U.S. 183, 191 (1952). *See* note 431 *supra*.

572. 341 U.S. at 722.

573. *Id.* at 723. *See also* Hirschman v. Los Angeles County, 231 P.2d 140, 143 (App. Dep't Super. Ct. 1951), *aff'd on other grounds*, 39 Cal. 2d 698, 249 P.2d 287 (1952) (upheld the same oath, as applied to county employees, against a bill of attainder challenge; found the city's board of supervisors merely sought to "acquaint themselves with whether an employee of the county holds to a philosophy inimical to the maintenance of the state").

574. All these cases dealt with the validity of anti-subversive expurgatory oaths exacted from public employees. *See* Heckler v. Shepard, 243 F. Supp. 841, 850 (D. Idaho 1965); Orange Coast Junior College Dist. v. St. John, 146 Cal. App. 2d 455, 461, 303 P.2d 1056, 1060 (1956); Pickus v. Board of Educ., 9 Ill. 2d 599, 608, 138 N.E.2d 532, 538-39 (1956); Dworken v. Cleveland Bd. of Educ., 57 Ohio L. Abs. 449, 463, 94 N.E.2d 18, 27 (1950), *appeal dismissed*, 156 Ohio St. 346, 102 N.E.2d 253 (1951); Board of Regents v. Updegraff, 205 Okl. 301, 312, 237 P.2d 131, 138 (1951), *rev'd on other grounds sub nom.* Wieman v. Updegraff, 344 U.S. 183 (1952); Nostrand v. Balmer, 53 Wash. 2d 460, 476, 335 P.2d 10, 19 (1959). For post-1965 cases following *Garner, see* note 983 *infra*.

575. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1867).

undermined that theory. Under the Los Angeles ordinance any person who had advocated or belonged to a group that had advocated subversion at any point in the five years preceding the effective date of the enactment was barred from serving as a municipal employee, regardless of whether or not he had since repudiated his former beliefs or terminated his former affiliation. Thus, even a person who had thoroughly revised his political philosophy and who could truthfully swear that he did not presently advocate subversion and would not do so in the future would be excluded from further public employment; he or she would be branded as unfit and untrustworthy because of a past episode that no longer had any bearing on the present or the future. This type of indiscriminate, arbitrary imposition of sanctions is exactly what the Court in *Cummings* had condemned.

Thus, with each subsequent construction of the relevancy standard it became increasingly difficult to reconcile the Court's interpretation of the regulation/punishment distinction with the broad mandate of *Cummings*. By the time *Garner* was decided in 1951, the relevancy standard had been so loosely construed as to become almost meaningless. Nor were other proposals for distinguishing between punishment and regulation any more useful. One commentator has argued that a statute imposing disabilities works against a fixed group, *i.e.*, one whose members are identifiable at the time of enactment, while a statute imposing qualifications works against a shifting group, *i.e.*, one whose members are unascertainable at the time of enactment.[576] As has been indicated elsewhere,[577] this thesis ignores contrary examples of bills of attainder at English common law. More importantly, however, it fails to explain *Garner*, where the Court construed a statute affecting a fixed group[578] as one that was exclusively regulatory in nature. Thus, this proposed theory is both historically unsound and inadequate to explain the decisions rendered by the United States Supreme Court.

576. *See Punishment, supra* note 14, at 239.

577. *See* notes 385-391 and accompanying text *supra.*

578. The group was fixed in two senses. First, at least one subclass of the statute's victims was determinable in that it comprised those public employees committing subversive advocacy between 1943 and 1948. A second determinable subclass consisted of all such employees on the municipal rolls at the time of the enactment who did not advocate subversion, but who subsequently came to do so before they executed the oath and before January 6, 1949. Only those who had committed no past acts of subversion and who had not advocated subversion at the time they executed the oath but who, when doing so, harbored an intent to become a subversive in the future might be deemed to be members of a shifting class. But even that group was not truly shifting in that it could only consist of municipal employees who had been hired before January 6, 1949. Yet the commentator developing the notion of fixed and shifting groups appears to believe that the Court's characterization of the statute involved in *Garner* as regulatory is correct. *See Punishment, supra* note 14, at 241.

A more sophisticated theory has been advanced by Professor Wormuth.[579] He begins with the premise that there can be no attainder objections when a legislature establishes qualifications for a vocation because the mere creation of qualifications excludes no one, since all are eligible to qualify themselves.[580] For him, the problems arise when a legislature imposes disqualifications. Yet even in those instances, restrictions are inherently valid when there is no implicit censorial judgment of individuals, but only the derivation of presumptions about character from aspects of common knowledge or principles of general psychology.[581] This would explain a case like *Hawker* where it could be argued it is common knowledge that ex-felons are likely to have bad characters.[582] But Professor Wormuth would draw the line where legislatively-imposed disqualifications result from a "judgment that the proscribed persons possess a characteristic not found in people in general. It rests, not upon general psychology, but upon evidence. It is a determination, judicial in nature, of culpability or blameworthiness."[583] To his credit, Professor Wormuth acknowledges a key difficulty. In citing *Hawker* as an example of a case in which there existed a "notorious connection between the disqualification and the activity barred,"[584] he admits that the very same characterization could be made of *Ex parte Garland*[585] because past acts of disloyalty are probative evidence of lack of present fitness to be a practicing attorney in federal courts. But he distinguishes the two cases by stating that the statute in *Garland*, in effect, identified its victims, whereas those affected by the enactment in *Hawker* were "determined by an impersonal process outside the control of the legislature."[586] Therefore, the law involved in *Garland* was properly deemed to be a bill of attainder, while that involved in *Hawker* was properly construed not to be one.

This theory has its flaws. In the first place, inherent in any creation of qualifications is the imposition of disqualifications;[587] one who fails to meet prescribed prerequisites is automatically disqualified. Whether or not the mere establishment of qualifications *ipso facto* excludes cer-

579. *See* Wormuth, *supra* note 12, at 608-14.

580. *Id.* at 609.

581. *Id.* at 610.

582. The Court in that case adopted this approach. *See* note 559 and accompanying text *supra*.

583. Wormuth, *supra* note 12, at 610.

584. *Id.* at 612.

585. 71 U.S. (4 Wall.) 333 (1867).

586. Wormuth, *supra* note 12, at 613.

587. Even the Court in *Garner* recognized this point. *See* note 573 and accompanying text *supra*.

tain persons from ever attaining a status of eligibility requires a consideration of both the phrasing of the qualificatory standards themselves and the social context in which those standards are being enforced. For example, if a statute of State X permitted the licensure of resident physicians only if each prospective licentiate could produce a diploma issued by an accredited medical college within State X, and the various colleges so accredited admitted white students only, one would have to conclude that the statute, though it *ostensibly* established only qualificatory standards, really imposed disqualifications on any nonwhite seeking to practice medicine within State X. Thus, reliance on an abstract distinction between qualificatory and disqualificatory enactments is misplaced because the two may often merge in reality.

Apart from this, there are other difficulties with Professor Wormuth's thesis. He fails to make an adequate distinction between cases like *Hawker* and *Cummings*. If it is "common knowledge" that a former felon possesses a character which makes him unfit to practice medicine, then it should also be an item of "common knowledge" that former service as a *guerrillero* renders one unfit to serve in a position of public trust in a state where, a few years earlier, guerrilla warfare had been rampant. Yet *Cummings* found unconstitutional a statute imposing the latter disability. Professor Wormuth would distinguish the *Cummings* type of case from the *Hawker* type of case by saying that in the latter situation, (a) the identity of the persons affected is not ascertainable from the terms of the statute itself, but (b) is rather ascertainable only by reference to extrinsic factors outside the legislature's control. It is true that the class of persons affected by the enactment in *Hawker* included all persons who had in the past committed or who would in the future commit felonies; thus, at the time of the passage of that law, the identities of the members of that class could only be partially ascertained. But the same is true in *Cummings*. The class of persons affected by the challenged provisions of the Missouri constitution consisted of all those who declined to execute the prescribed expurgatory oath. That class of persons was comprised of those whose identities were readily ascertainable because of their past conduct, as well as those unascertainable persons who might decline to take the oath at some point in the future, not because they had committed any of the specified proscribed acts, but rather because they believed the state had no right to demand such affirmations as a matter of principle, or because they did not wish to swear perpetual allegiance to the Constitution, or because they were atheists and thus could not execute an oath which referred to God, or because they had no intention of faithfully

executing the duties of the office they were about to enter or for some other similar independent reason. Thus, Professor Wormuth's attempt to distinguish the *Hawker* type of case from the *Cummings* type of case on this basis is ill-conceived. Reference to an "impersonal process outside the control of the legislature" is also unilluminating. Certainly the legislature has no control over the fact that persons are indicted, convicted and sentenced for the commission of a felony by the judicial system. But neither does it have control over the fact that at some previous point in time, persons served or sympathized with the Confederacy. From the perspective of a legislature convened several years later, those decisions to express sympathy or render service may also be deemed the results of an "impersonal" process.

Moreover, Professor Wormuth's thesis provides no credible explanation for the decision in *Garner*. That case involved a class of persons whose identity could not be inferred from the text of the statute itself; arguably, the identity of those persons was determined by the lawmakers themselves (rather than by impersonal, external processes) because only they or their agents could define the meaning of the concept of "advocacy of the violent overthrow of the government," as that concept would be applied to the facts presented in each individual case history.[588] Yet the Court in *Garner* deemed the challenged enactment

588. This point merits some elaboration. Many of the prohibitions in *Cummings* involved actual past acts. *See* note 55 *supra*. If one had committed bushwacking or had left the state to avoid conscription, one's act could easily be corroborated and whether that act fell within the statutory proscription could be determined with relative ease because the description provided by the statute itself was susceptible to a specific interpretation. The definitions of "bushwacking" or "to avoid conscription" are relatively free of ambiguity. The same, of course, could not be said of other descriptions included in the prohibitions of the Missouri constitution like "inimical to the government" or "disaffection."

However, the Los Angeles ordinance involved in *Garner* was wholly ambiguous in several respects and those ambiguities could be resolved, not by reference to a dictionary, but only by discretionary judgments on the part of those administering and enforcing the law. The oath proscribed advising, advocating and teaching subversion. But what does advocacy or advice mean? It *could* include anything from giving instruction in guerrilla tactics, to teaching the *Communist Manifesto* as an example of rhetoric, to standing upon a soapbox and saying that the President and all members of Congress should be hanged. Even the United States Supreme Court admitted as much when it drew the distinction between advocacy of forcible overthrow as abstract doctrine and advocacy of action to that end and said only the latter could be legislated against. Yates v. United States, 354 U.S. 298, 318-20 (1957). The oath also speaks of overthrow by force, violence or other unlawful means. Again, this language is so broad it can only be practically defined in the course of case-by-case administrative action: the agent of the legislature might conclude that the act proscribes both the advocacy of urban terrorism and the advice to cast a ballot for Henry Wallace in the 1948 election. These difficulties are only compounded by reference to membership or affiliation in an organization advocating forcible overthrow. The Los Angeles Board of Supervisors appeared to be resolving those difficulties by compiling its own subversives list: it

to be no more than an exercise in regulation.[589] For all these reasons, Professor Wormuth's theory does not provide a feasible distinction between regulation and punishment.

The foregoing discussion yields an ineluctable conclusion: *Garner* and, to a much lesser extent, *Hawker* simply cannot be reconciled with *Cummings*. These two decisions subvert rather than perpetuate the doctrine of the latter case. Thus, the net effect of *Dent, Hawker* and *Garner* was to expand the distinction between regulation and punishment to the extent that reliance on that distinction would allow courts to negate all the protections afforded by the bill of attainder clauses of the Constitution. At least that was the state of the law until *United States v. Brown*.[590]

C. "Upon a Designated Person or Class of Persons"

Superficially, this component of the definition of a bill of attainder would seem to present few difficulties and, indeed, until recent times, it presented none. But in the three decades since 1945 the issue of the ascertainability of the victims of an attainder has received more and more consideration in judicial decisions.[591] The problem is simply stated: just how specifically must an enactment refer to its intended victims before it can be classified as a bill of attainder? Of course, where the challenged statute lists its victims by name[592] or is so phrased

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also required affidavits admitting or denying membership in the Communist Party or the Communist Political Association. Garner v. Board of Pub. Works, 341 U.S. 716, 719 (1951). The problem is that the statutory language is susceptible to so many constructions that the correct (or at least controlling) construction cannot be ascertained by recourse to lexicographical definitions, but rather must be determined by reference to what definition the legislature itself elects to promulgate. Thus, the coverage of the Los Angeles statute could only be discovered by considering the patterns of enforcement undertaken by those responsible for administering it.

589. Of course, it is possible that Professor Wormuth would say *Garner* was incorrectly decided. Although his article was published a year before that decision, he did evince scorn for the decision in American Communications Ass'n v. Douds, 339 U.S. 382 (1950). *See* Wormuth, *supra* note 12, at 619.

590. 381 U.S. 437 (1965). *See* notes 946-989 and accompanying text *infra*.

591. This subsection will only deal with the evolution of the topic up to the decision of the United States Supreme Court in United States v. Brown, 381 U.S. 437 (1965). For an analysis of *Brown* and subsequent cases dealing with this subject, *see* notes 990-1061 and accompanying text *infra*.

592. But merely because a statute names its victims does not mean, *ipso facto*, that it is a bill of attainder. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 (1977); *Cf.* Marshall v. Sawyer, 365 F.2d 105, 111 (9th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967) (blacklist maintained by the Nevada Gaming Commission; *see* note 144 and accompanying text *supra*); Hoffa v. Saxbe, 378 F. Supp. 1221, 1239 (D.D.C. 1974) (Presidential commutation; *see* notes 161-168 and accompanying text *supra*); Gaidamavice v. Nenaygo Bd. of County Comm'rs, 341 Mich. 280, 288, 67 N.W.2d 178, 180 (1954) (resolution allegedly terminating

that it can only operate against a very few identifiable persons,[593] there is no specificity problem; indeed, bills of attainder and bills of pains and penalties at common law affecting either named persons[594] or easily ascertainable groups[595] or sometimes both[596] were common. But where the law in question is of generalized applicability some courts have claimed that it is too unspecific to be a bill of attainder. Thus, a federal appellate court held that a provision of the Taft-Hartley Act[597] excluding supervisors from the coverage of the National Labor Relations Act did not attaint, because it did not operate against named persons, but rather expressed "a policy, applicable to all within a general classification, not found to be either arbitrary or invalid; it is remedial public legislation rather than punitive to the individual. Congress was not interested in the activities of supervisors as individuals."[598] Similarly, the New Jersey Supreme Court upheld a statute providing for compulsory arbitration of labor disputes involving the employees of public utilities[599] against an attainder challenge on the theory that the enactment was not directed specifically against the particular union that had instituted the lawsuit,[600] and a New York trial court dismissed

plaintiff's employment because of his union activities); Christie v. Lueth, 256 Wis. 326, 332, 61 N.W.2d 338, 341 (1953) (resolution setting up a special committee to investigate the petitioner). Other examples are provided by the cases involving attainder challenges to contempt citations. *See* notes 811-864 and accompanying text *infra*.

593. Here, too, specificity without more precludes any finding of a bill of attainder. *See, e.g.*, Flood v. Margis, 64 F.R.D. 59, 61 (E.D. Wis. 1974) (denial of license to operate a mobile home park); State *ex rel.* Brassell v. Teasley, 194 Ala. 574, 581, 69 So. 723, 725 (1915) (statute limiting eligibility to hold municipal office by excluding persons who had been incumbents during the immediately previous term); Gallas v. Sanchez, 48 Haw. 370, 375-76, 405 P.2d 772, 776 (1965) (law removing civil service status of incumbent personnel directors); Bessette v. Commissioner of Pub. Works, 348 Mass. 605, 609-10, 204 N.E.2d 909, 912 (1965) (enactment in effect abolishing the position of the state's Director of the Division of Waterways); Starkweather v. Blair, 245 Minn. 371, 386, 71 N.W.2d 869, 879 (1955) (appropriation bill in effect abolishing the position of the state's assistant director of the Game and Fish Division; *see* notes 212-221 and accompanying text *supra*).

594. *See* note 31 and accompanying text *supra*.

595. *See* note 32 and accompanying text *supra*. For a discussion of a theory contending that bills of attainder at common law applied only against fixed groups, see notes 385-391 and accompanying text *supra*.

596. *See, e.g.*, 9 Geo. 1, c. 15; 5 STATS. U.K. 448 (1722), *quoted in* notes 8, 9 and 29 *supra*; 13 Will. 3, c. 3, §§ 1, 2; 4 STATS. U.K. 81-82 (1701), *quoted in* notes 24 and 37 *supra*; 26 Hen. 8, c. 25, § 2; 3 STATS. OF THE REALM 529 (1534), *quoted in* note 33 *supra*.

597. 29 U.S.C. § 152(3) (1970).

598. NLRB v. Edward G. Budd Mfg. Co., 169 F.2d 571, 579 (6th Cir. 1948), *cert. denied sub nom.* Foremen's Ass'n v. Edward G. Budd Mfg. Co., 335 U.S. 908 (1949). *Cf.* Cockrill v. United States, 292 F.2d 288, 290 (Ct. Cl. 1961) (defined an attainder as a legislative act attempting to exercise the power to adjudicate the cases of individuals).

599. N.J. STAT. ANN. § 34:13B-20 (1965).

600. Van Riper v. Traffic Tel. Workers Fed'n, 2 N.J. 335, 352, 66 A.2d 616, 625 (1949).

an attainder objection to an enactment terminating the tenure of the members of an existing state board of education[601] because that enactment failed to name particular persons and did not designate the existing board as a unit.[602]

Implicit in these rulings is the conclusion that if a challenged provision does not identify its purported victims with sufficient specificity, it cannot be a bill of attainder.[603] The rulings of the United States Supreme Court on this topic are, unfortunately, somewhat confusing. *Cummings v. Missouri*[604] *never* even mentioned specificity as one of the definitional requirements of a bill of attainder.[605] This omission is understandable when one remembers that the challenged provisions of the Missouri constitution in that case imposed sanctions upon such nebulous groups as those giving "comfort, countenance or support" to the Confederacy, or those belonging to organizations "inimical to the Government" or those expressing either disaffection with the Union or sympathy for the forces of secession and rebellion.[606] These designations were imprecise and unspecific, yet the Court held that an oath incorporating them by reference was a bill of attainder.[607] The implicit lesson of *Cummings* is that a piece of legislation can attaint even though it describes its intended victims in a generalized manner.

The specificity requirement was adopted by the Court in *United States v. Lovett*,[608] in which Justice Black defined a bill of attainder as a legislative act inflicting punishment without trial upon "named individuals" or "easily ascertainable members of a group."[609] Nevertheless, this requirement was never explicated in *Lovett* because that case involved an enactment directed against three named individuals.[610] The entire subject lay dormant for fifteen years until the decision of the Court in *Communist Party of the United States v. Subversive Activities Control Board*.[611] That case involved various constitutional challenges

601. 1961 N.Y. Laws, ch. 971.

602. Lanza v. Wagner, 30 Misc. 2d 212, 214, 220 N.Y.S.2d 477, 481 (1961), *aff'd per curiam*, 15 App. Div. 2d 552, 222 N.Y.S.2d 1019 (2d Dep't 1961), *aff'd*, 11 N.Y.2d 317, 324-25, 183 N.E.2d 670, 674, 229 N.Y.S.2d 380, 385-86 (1962), *cert. denied*, 371 U.S. 901 (1963).

603. For other, similar conclusions reached in cases decided after 1965, *see* notes 1020-1031 and accompanying text *infra*.

604. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

605. *See id.* at 323. *See* note 67 and accompanying text *supra*.

606. *See* note 55 *supra*.

607. 71 U.S. (4 Wall.) at 323-25.

608. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra*.

609. *See id.* at 315.

610. *See* note 182 *supra*.

611. 367 U.S. 1 (1961). *See* notes 366-368, 370 and accompanying text *supra*.

to the Subversive Activities Control Act of 1950,[612] which required "Communist-action" and "Communist-front" organizations to register with and report annually to the government; the statute also imposed various disabilities upon such organizations and their members.[613] Justice Frankfurter's opinion for the majority concluded the act was not an attainder, because, *inter alia*,

> it attaches not to specified organizations but to described activities in which an organization may or may not engage. The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons. See *Cummings v. Missouri*, 4 Wall 277, *Ex parte Garland*, 4 Wall 333.[614]

This is a rather startling conclusion when one considers the text of the act itself. Section 3(3) defines a "Communist-action" organization as one substantially directed, dominated or controlled by a foreign Communist government or the world Communist movement and operated primarily to advance the objectives of such a government or movement.[615] Similarly, section 7(b) described a "Communist-front"

612. 64 Stat. 987, 50 U.S.C. §§ 781-826 (1950) (repealed in part 1968).

613. *See* 367 U.S. at 9-16. The act required annual accountings, membership lists and printing press lists from the affected organizations. 50 U.S.C. § 782(b) (1970) ("Communist action" groups); *id.* at § 786(b) ("Communist front'" groups), *repealed*, Act of Jan. 2, 1968, Pub. L. No. 90-237, § 5, 81 Stat. 766. The statute also stipulated that anyone joining a "Communist action" organization knowing it to be registered as such, but whose name is not included on that entity's membership list must personally register with the government within sixty days after acquiring such knowledge. 50 U.S.C. § 787(a) (1950), *repealed*, Act of Jan. 2, 1968, Pub. L. No. 90-237, § 5, 81 Stat. 766. This section was subsequently held to violate the self-incrimination provisions of the Fifth Amendment. Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 77-78 (1965). The 1950 act also made it unlawful for: (1) a member of the government to communicate with a member of a "Communist action" organization, 50 U.S.C. § 783(b) (1970); (2) a member of a "Communist action" organization to receive information from a governmental employee, *id.* § 783(c); (3) a member of a "Communist action" organization to engage in employment in a defense facility, 50 U.S.C. § 784(a)(1)(D) (1950); this provision was struck down as unconstitutional in United States v. Robel, 389 U.S. 258, 266 (1967); (4) a member of a "Communist action" organization to apply for a passport, 50 U.S.C. § 785 (1950); this provision was struck down as unconstitutional in Aptheker v. Secretary of State, 378 U.S. 500, 514 (1964); (5) a "Communist action" organization to broadcast or advertise without identifying itself as such to the public, 50 U.S.C. § 789 (1970). The act also denied tax exemptions to such organizations. *Id.* § 790.

614. 367 U.S. at 86. *But see id.* at 146 (Black, J., dissenting); *Bounds of Specification, supra* note 45, at 361.

615. 50 U.S.C. § 782(3)(a) (1970). The original act also regulated any "section, branch, fraction, or cell" of a "Communist action" organization, but that provision was subsequently revised. 50 U.S.C. § 782(3)(b) (1950), *amended*, Act of Jan. 2, 1968, Pub. L. No. 90-237, § 2, 81 Stat. 765.

organization as one operated for the purpose of giving aid and support to Communist action groups, foreign Communist governments, or the world Communist movement.[616] Pursuant to section 13(e), an entity's status as a "Communist-action" organization is to be determined by considering eight fixed factors, namely, the extent to which its policies are developed in conformity with the directives of foreign Communist governments, the extent to which its policies deviate from those of such governments, the extent to which it receives material support from foreign Communist states, the extent to which its members are instructed in the tactics of Communism in such states, the extent to which it reports to foreign Communist governments, the extent to which its members are subject to discipline by such governments, the extent to which its leaders consider their allegiance to the United States subordinate to their allegiance to such foreign governments and the extent to which it conceals its foreign domination by failing to disclose membership lists and other relevant data.[617] Similarly, section 13(f) defined a "Communist-front" organization by ascertaining if it was managed by members of a foreign Communist government or a "Communist-action" organization, if it received financial support from such entities, if it promoted objectives espoused by such entities and if its positions deviated from the doctrines advanced by such entities.[618] While this statute does not mention organizations by name,[619] it is specious to claim that it fails to specify; in fact, the law provides painstakingly detailed descriptions of organizational characteristics so that those entities affected will be easily ascertainable. The fact that the Communist Party, for instance, can change its policies and thus avoid the coverage of the act is irrelevant to the issue of whether the terms of the act itself are sufficiently specific.[620] The key concern is not what the intended victim of an alleged attainder might do to avoid a legislative sanction but rather whether the descriptive apparatus contained within the text of the statute in question ensures that the petitioner is indeed one of the intended vic-

616. 50 U.S.C. § 786(b) (1950), *repealed*, Act of Jan. 2, 1968, Pub. L. No. 90-237, § 5, 81 Stat. 766.

617. 50 U.S.C. § 792(e) (1970).

618. 50 U.S.C. § 792(f) (1970).

619. Justice Frankfurter made much of the fact that Congress refused to outlaw the Communist Party by name. *See* 367 U.S. at 84-85.

620. It is relevant (or was relevant, in 1961) to the issue of whether or not the challenged enactment was exclusively prospective in nature and thus not punitive. *See* notes 339-392 and accompanying text *supra*. But that distinction, false as it is, relates solely to the issue of punishment and not to the issue of specificity, as Justice Frankfurter seemed to imply.

tims.[621] While Justice Frankfurter purported to apply *Cummings*, he did, in fact, repudiate the logic of that decision, for the challenged provisions in that case were far less specific than those involved in the *Communist Party* decision. It is difficult to reconcile the conclusion that a statute imposing disabilities upon members of organizations "inimical to the Government" is a bill of attainder with the thesis that a law imposing disabilities on members of the organizations described in sections 3(3), 7(b), 13(e) and (f) of the Subversive Activities Control Act of 1950 is not. Thus, by 1965, when the United States Supreme Court decided the *Brown* case,[622] the subject of specificity was shrouded in confusion.

D. "Without the Safeguards of a Judicial Trial"

A few commentators have characterized the judicial trial aspect as the "forgotten" element of the definition of a bill of attainder.[623] This is only partly accurate. While the United States Supreme Court has slighted this aspect of the subject,[624] many lower federal and state courts have rejected attainder challenges by relying explicitly or implicitly on the theory that the petitioners in question were given an adequate hearing before legislative sanctions were imposed upon them.[625]

621. This issue might also involve aspects of standing. *See* notes 1051-1061 and accompanying text *infra.*

622. United States v. Brown, 381 U.S. 437 (1965). *See* notes 1005-1061 and accompanying text *infra.*

623. *See Need for Clarification, supra* note 12, at 242; *Waning Guaranty, supra* note 12, at 857.

624. The Court has accorded meaningful consideration to this topic in only three of its decisions. *See* De Veau v. Braisted, 363 U.S. 144, 160 (1960); United States v. Lovett, 328 U.S. 303, 317-18 (1946); Hawker v. New York, 170 U.S. 189, 196-97 (1898). *See also* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961).

625. *See* Cody v. United States, 460 F.2d 34, 37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1973) (challenge to 18 U.S.C. § 922(a)(6) (1976), which restricts ex-felons from purchasing firearms; held the statute was not an attainder in light of the holding in De Veau v. Braisted, 363 U.S. 144, 160 (1960)); United States v. Karnes, 437 F.2d 284, 289 (9th Cir.), *cert. denied*, 402 U.S. 1008 (1971); (challenge to 18 U.S.C. § 1202(a)(2) (1976), which prohibits persons dishonorably discharged from the armed forces from transporting firearms in interstate commerce; upheld as merely a legislative recognition of a prior judicial conviction); Williams v. United States, 426 F.2d 253, 255 (9th Cir.), *cert. denied*, 400 U.S. 881 (1970) (challenge to 15 U.S.C. § 902(e) (1976), prohibiting persons convicted of a crime punishable by more than one year in prison from transporting ammunition or firearms in interstate commerce; found no attainder because the prior conviction and interstate transportation had to be judicially established); Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967) (challenge to 7 U.S.C. § 499h(b) (1976), requiring the revocation of the licenses of commodity dealers who file for bankruptcy and receive court approval of a reorganization plan; held, no attainder because revocation occurs after an administrative hearing subject to judicial review); Byers v. Crouse, 339 F.2d 550, 552 (10th Cir. 1964), *cert. denied*, 382 U.S. 933 (1965) (challenge to Kansas Habitual Criminal Act,

Thus, this component of the definition of a bill of attainder has both required and received a relatively extensive amount of analysis.

permitting a judge to impose a more stringent sentence upon those deemed to be habitual criminals; found no attainder, citing People v. Lawrence, 390 Ill. 499, 504-05, 61 N.E.2d 361, 364 (1945) (*see infra*)); Postma v. International Bhd. of Teamsters, Local 294, 337 F.2d 609, 611 (2d Cir. 1964) (challenge to 29 U.S.C. § 504 (1970), prohibiting, *inter alia*, ex-felons from serving as union officers; held valid, citing De Veau v. Braisted, 363 U.S. 144, 160 (1960)); Dodez v. United States, 154 F.2d 637, 638 (6th Cir.), *rev'd on other grounds sub nom.* Gibson v. United States, 329 U.S. 338 (1946) (challenge to various provisions of the Selective Service Act of 1940, 50 U.S.C. app. §§ 301-309a (1940); found no punishment without judicial trial because a draftee had available a writ of habeas corpus with which to challenge the constitutionality of the enactments in question); Story v. Rives, 97 F.2d 182, 188 (D.C. Cir.), *cert. denied*, 305 U.S. 595 (1938) (challenge to 18 U.S.C. § 716(b) (1932), authorizing revocation of parole granted to ex-felons who subsequently commit another crime; said the statute did not attaint, but merely compelled the petitioner to serve the balance of his initial sentence); United States v. Furem, 389 F. Supp. 285, 286 (E.D. Wis. 1973) (challenge to same statute involved in *Cody*; found no attainder, citing *Cody*); United States v. Three Winchester 30-30 Caliber Level Action Carbines, Model 94, 363 F. Supp. 322, 323 (E.D. Wis. 1973), *aff'd*, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974) (challenge to 18 U.S.C. § 1202(a) (1976), prohibiting felon from possessing firearms; found no attainder, citing *Cody*); Keyishian v. Board of Regents, 255 F. Supp. 981, 987-88 (W.D.N.Y. 1966), *rev'd on other grounds*, 385 U.S. 589 (1967) (challenge to New York's Feinberg Law, *see* notes 203-204 and accompanying text *supra*; held, no attainder because the petitioners were accorded a pretermination administrative hearing); United States *ex rel.* Heacock v. Myers, 251 F. Supp. 773, 774 (E.D. Pa.), *aff'd*, 367 F.2d 583 (3d Cir. 1966), *cert. denied sub nom.* Heacock v. Rundle, 386 U.S. 925 (1967) (challenge to a Pennsylvanian statute authorizing revocation of parole of one committing another crime; held as constitutional, citing United States *ex rel.* Horne v. Pennsylvania Bd. of Parole, 234 F. Supp. 368, 370 (E.D. Pa. 1964) (*see infra*)); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 244 F. Supp. 745, 746 n.1 (W.D. Pa. 1965), *vacated on other grounds*, 372 F.2d 86 (3d Cir. 1966), *rev'd*, 389 U.S. 463 (1967) (challenge to same statute involved in *Postma*; found no attainder, citing the logic of Hawker v. New York, 170 U.S. 189, 196-97 (1898)); United States *ex rel.* Kloiber v. Myers, 237 F. Supp. 682, 684 (E.D. Pa. 1965) (challenge to same statute involved in *Heacock*; held, no attainder, citing *Story*); United States *ex rel.* Horne v. Pennsylvania Bd. of Parole, 234 F. Supp. 368, 370 (E.D. Pa. 1964) (challenge to same law involved in *Heacock*; found no attainder, citing *Story* for the proposition that the petitioner suffered a deprivation only after a full judicial trial); Dalton v. Warden, Maryland Penitentiary, 216 F. Supp. 600, 603 (D. Md.), *cert. denied sub nom.* Bosler v. Dalton, 373 U.S. 942 (1963) (challenge to Maryland act allowing an administrative board the discretion to give or deny a recommitted parolee credit for the time he was on parole; dismissed attainder argument as meritless); United States v. Kuzma, 141 F. Supp. 91, 94 (E.D. Pa. 1954) (challenge to the Smith Act, 18 U.S.C. § 2385 (1976), proscribing subversive advocacy; upheld because penalties could be assessed against the petitioners only after a full judicial trial); United States v. Silverman, 132 F. Supp. 820, 832 (D. Conn. 1955) (challenge to the Smith Act; found no attainder because the petitioner was "entitled to a full judicial trial in this case"); Peer v. Skeen, 108 F. Supp. 921, 922 (N.D.W. Va.), *cert. denied*, 342 U.S. 930 (1952) (challenge to West Virginian habitual criminal statute; found no attainder, citing People v. Lawrence, 390 Ill. 499, 504-05, 61 N.E.2d 361, 364 (1945) (see *infra*)); United States *ex rel.* Lubbers v. Reimer, 22 F. Supp. 573, 575 (S.D.N.Y. 1938) (challenge to 8 U.S.C. § 213a (1937), authorizing deportation of an immigrant who enters the country by promising fraudulently to marry a citizen; found no attainder because sanctions imposed only after an administrative hearing); United States v. Stein, 18 F.R.D. 17, 20 (S.D.N.Y. 1955) (challenge to the Smith Act; found no attainder, citing *Silverman*);

The meaning of the phrase "safeguards of a judicial trial" should be self-evident. It simply signifies that if a legislature wishes to adjudicate the cases of individuals, it must provide those individuals with the same procedural protections which they would be entitled to were they

Westmoreland v. Chapman, 268 Cal. App. 2d 1, 5, 74 Cal. Rptr. 363, 366 (1968) (challenge to Californian law requiring the revocation of the license of any driver refusing to submit to sobriety tests; said revocation preceded by full administrative hearing); People v. Douglas, 187 Cal. App. 2d 802, 811, 10 Cal. Rptr. 188, 194 (1961) (challenge to Californian habitual criminal statute; upheld because it merely increased the penalty attendant to a criminal conviction); People v. Israel, 91 Cal. App. 2d 773, 784, 206 P.2d 62, 69 (1949) (challenge to same statute involved in *Douglas*; upheld because punishment was said to be imposed only after a full trial); Perez v. Board of Police Comm'rs, 78 Cal. App. 2d 638, 650, 178 P.2d 537, 544 (1947) (challenge to resolution of the defendant board stipulating that no police officer could remain or become a union member; found no attainder because the Los Angeles city charter was said to provide for a full trial); People v. Camperlingo, 69 Cal. App. 466, 474, 231 P. 601, 603 (1924) (challenge to state law prohibiting ex-felon from possessing a firearm; found no attainder because deprivation imposed only after prior felony conviction); People v. Lawrence, 390 Ill. 499, 504-05, 61 N.E.2d 361, 364 (1945), *cert. denied*, 326 U.S. 731 (1945) (challenge to Illinois habitual criminal statute; held, that the law does not punish without trial because a person's "prior conviction is no ingredient of the main offense, but is merely a matter of aggravation going solely to the punishment to be imposed, and we do not see how that could attaint the class of persons referred to"); Hamilton v. Indiana *ex rel.* Van Natta, — Ind. App. —, 323 N.E.2d 659, 660-61 (1975) (challenge to state law depriving habitual traffic offenders of their driver's licenses; found no attainder because deprivation occurred only after repeated convictions); Daly v. State, 296 Minn. 238, 239, 207 N.W.2d 541, 543 (1973) (challenge to state law revoking license of motorist refusing to submit to sobriety tests; upheld because those affected were entitled to judicial review of revocation decision); King v. Swenson, 423 S.W.2d 699, 704-05 (Mo. 1968) (challenge to state statute providing that the sentence of one convicted of committing a crime while incarcerated shall commence to run only after the expiration of the sentence for which the inmate is being held; found no attainder because guilt was to be judicially determined); Oueilhe v. Lovell, 560 P.2d 1348, 1350 (Nev. 1977) (challenge to Las Vegas ordinance prohibiting the operation of businesses promoting wrestling between members of the opposite sex; held, no attainder because a violation of the enactment would be the subject of a judicial determination); Williams v. Sills, 55 N.J. 178, 186, 260 A.2d 505, 509 (1970) (challenge to state law requiring an uninsured motorist involved in an automobile accident to post bond or suffer forfeiture of his or her driver's license; upheld because review of any forfeiture was said to be left up to the courts); Application of Marvin, 53 N.J. 147, 154-55, 249 A.2d 377, 381 (1969), *cert. denied*, 396 U.S. 821 (1969) (challenge to state enactment requiring an applicant for a pistol permit to disclose membership in subversive organizations; upheld because key determinations were to be made by the judiciary); Thompson v. Wallin, 301 N.Y. 476, 493, 95 N.E.2d 806, 814 (1950), *aff'd sub nom.* Adler v. Board of Educ., 342 U.S. 485 (1952) (challenge to New York's Feinberg Law (see notes 203-204 and accompanying text *supra*); found no attainder because of the availability of an administrative hearing); Weinstock v. Ladisky, 197 Misc. 859, 875, 98 N.Y.S.2d 85, 101 (1950) (challenge to union charter banning subversives; found no attainder because charter provided for a "hearing" to determine guilt); Commonwealth *ex rel.* Thomas v. Myers, 419 Pa. 577, 581, 215 A.2d 617, 619-20 (1966) (challenge to same statute involved in *Heacock*; found no attainder, citing *Horne*); Cox v. State, 222 Tenn. 606, 614, 439 S.W.2d 267, 271 (1969) (challenge to law providing that a person charged with a crime who is thereafter deemed insane and committed may be compelled to have his estate pay commitment costs; found no attainder because of jury trial on issue of insanity); State v. Scheffel, 82 Wash. 2d 872, 881, 514 P.2d 1052, 1058 (1973) (challenge to

being tried in a court of law. Justice Black emphasized this point quite forcefully in his opinion for the Court in the case of *United States v. Lovett*:[626]

> Those who wrote out Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts . . . . And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him. . . . When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.[627]

This language is uncompromising. It establishes a simple syllogism, namely, that the bill of attainder clauses were intended to prevent legislatures from inflicting punishment without judicial trial. Therefore, if the legislature wishes to enact punitive laws, the sanctions imposed by those laws must be accompanied by the same set of procedural safeguards available at a trial. As Justice Black himself points out, this syllogism is not innovative; it does no more than restate the traditional due process justification for the proscriptions against bills of attainder.[628]

One important gloss has been added to the basic interpretation promulgated by Justice Black in *Lovett*. In *Putty v. United States*,[629] the petitioner was convicted on January 27, 1953 of conspiracy and theft of federal property by a district court located in the Trust Terri-

law depriving habitual traffic offenders of licenses; found no attainder because of the availability of an administrative hearing).

626. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra*.

627. *Id.* at 317-18. *Accord*, Barenblatt v. United States, 360 U.S. 109, 160 (1959) (Black, J., dissenting).

628. *See* notes 49-51 and accompanying text *supra*.

629. 220 F.2d 473 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955).

tory of Guam.[630] His conviction had been based on an information filed by the local prosecutor; at the time, however, the Organic Act of Guam applied the federal rules of criminal procedure, which required grand jury indictments.[631] Accordingly, in 1954, two decisions of the United States Court of Appeals for the Ninth Circuit held that Guamanian prosecutions based on informations were invalid.[632] Subsequently, on August 27, 1954, Congress amended the Organic Act of Guam by passing a statute that validated all convictions founded upon prosecutorial informations filed since August 1, 1950.[633] The Ninth Circuit, after concluding that the proscription against bills of attainder applied to territories,[634] characterized the 1954 amendment as one enacted for the purpose of denying a class of defendants in criminal cases the power to attack collaterally the judgments of conviction rendered by trial courts lacking jurisdiction.[635] It therefore found that the amendment "would inflict imprisonment on them 'without a judicial trial' and mark them as felons with subsequent denial of employment, etc."[636] Thus, in *Putty* it was held that an attempt by a legislature to cure retroactively a jurisdictional defect in a criminal conviction, thereby denying the person convicted the opportunity to wage a collateral attack on the proceedings against him, was a bill of attainder. The case underscores the fact that the concept of a "judicial trial," as discussed in *Lovett*, entails providing a defendant procedural fairness both at the indictment stage of the proceedings against him and at the appeal stages.

Unfortunately, *Lovett* and *Putty* are rarities. Both the United States Supreme Court and lower state and federal courts have not conformed strictly to the mandates of *Lovett* and the tradition that *Lovett* represents. In this section, two areas of discrepancy between the ideal stated in *Lovett* and the reality promulgated by other courts will be examined: the timing of the judicial trial afforded to the victim of a given enactment and the nature of the trial afforded to such a person.

630. 220 F.2d at 474.

631. *See id. See* 48 U.S.C. § 1424(b) (1970).

632. Hatchett v. Government of Guam, 212 F.2d 767, 772 (9th Cir. 1954); Pugh v. United States, 212 F.2d 761, 763 (9th Cir. 1954).

633. *See* Act of August 27, 1954, Pub. L. No. 679, ch. 1017, 68 Stat. 882.

634. 220 F.2d at 475. *See* Dorr v. United States, 195 U.S. 138, 142 (1904) (quoting Scott v. Sandford, 60 U.S. (19 How.) 393, 614 (1857); Downes v. Bidwell, 182 U.S. 244, 276-77 (1901)).

635. 220 F.2d at 478.

636. *Id.*

1. Timing of the Hearing

Problems of timing can be most readily comprehended by establishing a typology of the cases presenting such problems. A cursory consideration of the various decisions yields the conclusion that there are four major types of cases which the courts have confronted. The first type is the least troublesome; it involves situations in which a statute exacts deprivations from an individual after a full judicial trial. This class of cases is best exemplified by the Smith Act decisions, particularly *United States v. Kuzma*.[637] The Smith Act[638] proscribes the advocacy of, or membership in or establishment of an organization that advocates forcible overthrow of the government; thus, it defines a particular offense. Conspiracy to commit this offense is punishable under the terms of the general federal conspiracy statute[639] and, of course, a full judicial trial precedes such punishment. The court in *Kuzma*, confronted with an indictment alleging conspiracy to violate the Smith Act accordingly asserted the enactment conformed to the accepted pattern of criminal legislation because it defined an offense and, in conjunction with another statute, penalized a conspiracy to commit that offense.[640] Thus, conviction under the general conspiracy statute was, necessarily, a prerequisite to the imposition of any penal sanction. Consequently,

637. 141 F. Supp. 91 (E.D. Pa. 1954). The other Smith Act cases adopting a similar position are United States v. Silverman, 132 F. Supp. 820, 832 (D. Conn. 1955); United States v. Stein, 18 F.R.D. 17, 20 (S.D.N.Y. 1955), *aff'd*, 140 F. Supp. 761, 767 (S.D.N.Y. 1956). In both *Kuzma* and *Silverman*, convictions for violation of federal conspiracy laws were obtained but not uniformly affirmed on appeal. *See* United States v. Kuzma, 249 F.2d 619, 623 (3d Cir. 1957) (upheld convictions wherever there was some evidence those convicted subscribed to and approved of the teaching of Marxism-Leninism); United States v. Silverman, 248 F.2d 671, 686-87 (2d Cir. 1957), *cert. denied*, 355 U.S. 942 (1958) (reversed convictions because evidence adduced at trial indicated advocacy falling short of incitement).

638. 18 U.S.C. § 2385 (1976). The general constitutionality of the act was upheld by a total of six justices in three different opinions in the case of Dennis v. United States, 341 U.S. 494 (1951). The major opinion adopted the view that courts in subversive advocacy cases could legitimately ask " 'whether the gravity of the "evil," discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.' " *Id.* at 510 (Vinson, C.J., joined by Burton, Minton & Reed, JJ.) (quoting United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950) (opinion of L. Hand, J.)). Several years later, a differently constituted plurality held that the act prohibited only advocacy of action rather than advocacy of ideas. Yates v. United States, 354 U.S. 298, 324-25 (1957) (Harlan, J., joined by Warren, C.J., and Frankfurter, J.) Finally, in 1961, a majority of the Court held that the membership provisions of the act applied only to persons possessing knowledge of an organization's proscribed advocacy and harboring a specific intent to forcibly overthrow the government. Scales v. United States, 367 U.S. 203, 229-30 (1961). *Accord*, Noto v. United States, 367 U.S. 290, 299-300 (1961). *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 110-29 (1970)[hereinafter cited as EMERSON].

639. 18 U.S.C. § 371 (1976). *See* note 1074 *infra*.

640. 141 F. Supp. at 94.

the court noted that the two statutes did not combine to create a bill of pains and penalties because the defendants were afforded a full judicial trial at which, *inter alia*, an attainder challenge could be thoroughly litigated.[641] *Kuzma*, and cases like it,[642] present few problems because they meet the criteria laid down by Justice Black in *Lovett*. The legislature is not itself trying individuals but is instead defining a crime; individual guilt is at all times determined by a court of law, thus ensuring the defendant all the usual safeguards inherent in a criminal adjudication.

The second type of case also presents relatively few difficulties. It involves the situation in which a deprivation is first imposed upon an individual and he is then given a subsequent opportunity to test the validity of that imposition in the courts. A few examples will illustrate the problem. In *Dodez v. United States*,[643] the United States Court of Appeals for the Sixth Circuit concluded that the Selective Training and Service Act of 1940[644] was not an attainder because "the writ of habeas corpus is available to protect rights of the individual after his induction into the service. The Constitution does not guarantee one the right to select his own tribunal or his own method of procedure."[645] Thus, if a

641. *Id.*

642. *Id. See* Perez v. Board of Police Comm'rs, 78 Cal. App. 2d 638, 650, 178 P.2d 537, 544 (1947); King v. Swenson, 423 S.W.2d 699, 704-05 (Mo. 1968). For brief discussions of these cases, *see* note 625 *supra*. *Cf.* State v. Thompson, 221 Kan. 165, 173, 558 P.2d 1079, 1085 (1976) (challenge to statute prohibiting forcible sodomy; held, it does not contain the elements of an attainder, including lack of judicial trial); State v. McPhaul, 116 N.H. —, 362 A.2d 199, 201 (1976) (challenge to murder statute; held, no attainder, because no legislative determination of guilt). *See also* Gotcheus v. Matheson, 58 Barb. 153, 160 (1870), *rev'd on other grounds*, 61 N.Y. 420 (1875); Huber v. Reilly, 53 Pa. St. Rep. 112, 121 (1866). Both of these cases involved attainder challenges to an act of Congress denationalizing deserters, Act of March 3, 1865, ch. 79, § 21, 13 Stat. 490. In each lawsuit, alleged deserters who had never been court-martialed were denied the right to vote in state elections because they were said to have forfeited their citizenship. Both the New York and Pennsylvanian courts held that the act in question did not attaint because it contemplated a court-martial on the underlying charge of desertion prior to denationalization. Therefore, each court held that the plaintiff in question, never having been court-martialed, was entitled to cast his ballot.

643. 154 F.2d 637 (6th Cir.), *rev'd on other grounds sub nom.* Gibson v. United States, 329 U.S. 338 (1946).

644. 54 Stat. 885, 50 U.S.C. app. §§ 301-309a (1940).

645. 154 F.2d at 638. In the context of the factual situation in *Dodez*, this statement is classifiable as a dictum. The petitioner in that case, a member of the Jehovah's Witnesses, was aggrieved about the failure of his local draft board to reclassify him from IV-E (conscientious objector status) to IV-D (minister of religion status); he therefore failed to respond to requests to report for alternative non-combatant service and was tried, convicted and sentenced to five years in prison. *See id.* at 640-41. Thus, his particular case did not fit within the option described by the court of appeals. Dodez also argued that he had exhausted his administrative remedies and thus was entitled to judicial review of his selective service classification as a defense to his indictment. *Id.* at 638. The Sixth Circuit cited a 1944 decision

draftee discontented with his classification wished to challenge the administrative determination made in his case without first breaking the law, he had to submit to military service and then seek redress through the courts. In *Application of Marvin*,[646] a New Jersey enactment[647] deemed to permit the state to require applicants for pistol permits to disclose membership in subversive organizations was found not to be a bill of attainder both because the state had an overriding interest in restricting sales of firearms to certain classes of untrustworthy persons and because it ensured that all key adjudicative determinations (most particularly, the definition of "subversive organization") would be left to the courts.[648] Yet the New Jersey Supreme Court neglected to consider the timing problem: a companion statutory provision permitted one denied a permit the right to request a hearing only within the thirty-day period following the administrative refusal.[649] Similarly, in *Williams v. Sills*,[650] an attainder challenge was raised against another New Jersey law requiring the state's director of the Department of Motor Vehicles to suspend the license of any uninsured motorist involved in an automobile accident causing personal injury or property damage exceeding two hundred dollars unless that motorist posted a prescribed

of the Supreme Court in support of the theory that the petitioner had not exhausted his administrative remedies because he had failed to report for induction. *Id.* (citing Falbo v. United States, 320 U.S. 549, 553 (1944)). On appeal, the United States Supreme Court reversed on this point, asserting that Dodez could defend against the charge of desertion made against him in his criminal trial by showing that his local draft board improperly refused to reclassify him. Gibson v. United States, 329 U.S. 338, 350 (1946).

This issue has prompted one commentator to raise an interesting contention. He argues that courts improperly emphasize whether or not a statutory scheme provides for a trial and hearing when they should instead be focusing on whether the legislature acted with the intent to burden a fixed class. *Punishment, supra* note 14, at 253. As a result of this illegitimate emphasis, he contends that the courts ignore whether or not the trial in question affords an individual a meaningful opportunity to challenge both his inclusion within the class created by the enactment in question and the constitutionality of so legislating a fixed class; he then cites *Dodez* as an example of a situation in which a petitioner may be precluded from raising the broader constitutional issue of punishment. *Id.* at 253-55. But *Gibson* explicitly grants persons like Dodez the right to raise such an issue, so the criticism is misplaced in this context; Dodez, like the defendants in *Kuzma*, *see* note 641 and accompanying text *supra*, was entitled to raise all constitutional defenses to any criminal charges arising from his violation of the statute. The problem with the *Dodez* case is really the issue of timing rather than the substantive nature of the judicial hearing afforded. But other cases do present issues about an individual's ability to raise broad constitutional challenges within the context of statutorily-prescribed administrative hearings. *See* note 720 *infra*.

646. 53 N.J. 147, 249 A.2d 377 (1969), *cert. denied*, 396 U.S. 821 (1969).

647. N.J. STAT. ANN. § 2A:151-35 (West 1973).

648. 53 N.J. at 154-55, 249 A.2d at 381.

649. N.J. STAT. ANN. § 2A:151-34 (West 1973).

650. 55 N.J. 178, 260 A.2d 505 (1970).

surety bond or filed a notice of release or settlement.[651] This statute was upheld because the court concluded that the administrative decision to suspend was subject to judicial review after the fact.[652]

Each of these decisions ignores a basic point: one of the underlying "safeguards of a judicial trial" is that a hearing *precedes* imposition of any sanction. In *Dodez, Marvin* and *Williams*, the courts endorsed statutory schemes whereby individuals were accorded a hearing only after the state had inflicted a deprivation upon them; to say that such schemes satisfy the requirement of a judicial trial is to undermine the very safeguards that that requirement was designed to protect. This last assertion does not mean that these three cases were decided incorrectly. The acts in question might well be construed as regulatory rather than punitive legislation[653] (and, indeed, the courts in *Williams* and *Marvin* explicitly, and the court in *Dodez* implicitly, advanced such a construction[654]) in order to avoid the proscription against bills of attainder. But it is important to realize that while the results reached may have been right, the reasoning used was, at least in part, wrong.

The third type of case involves a situation in which an individual has been tried and convicted in the past and the state now seeks to impose an additional deprivation upon him because of that conviction without granting him a new trial. Two decisions of the United States Supreme Court typify this genre. In *Hawker v. New York*,[655] the Court upheld a state law denying ex-felons licenses to practice medicine. After noting that good character was a legitimate prerequisite which the state could insist upon and that the absence or presence of a prior felony conviction was a reliable indicator of whether or not a person possessed a bad character,[656] the Court said:

> That the form in which this legislation is cast suggests the idea of the imposition of an additional punishment for past offenses is not conclusive. We must look at the substance and not the form, and the statute should be regarded as though it in terms declared that one who had violated the criminal laws of the state should be deemed of such bad character as to be unfit to practice medicine, and that the record of a trial and conviction should be

651. N.J. STAT. ANN. § 39:6-25(a), (b) (West 1973).

652. 55 N.J. at 186, 260 A.2d at 509.

653. For an analysis of this distinction, see notes 479-544 and accompanying text *supra*.

654. *See* Dodez v. United States, 154 F.2d 637, 638 (6th Cir. 1946) (said the challenged enactment did not impose punishment without a judicial trial); Williams v. Sills, 55 N.J. 178, 186, 260 A.2d 505, 509 (1970); Application of Marvin, 53 N.J. 147, 154-55, 249 A.2d 377, 381 (1969) (both decisions labelling the acts questioned as regulatory).

655. 170 U.S. 189 (1898). *See* notes 505-518 and accompanying text *supra*.

656. *Id.* at 196.

> conclusive evidence of such violation. . . . The State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character. The vital matter is not the conviction, but the violation of law. The former is merely the prescribed evidence of the latter. Suppose the statute had contained only a clause declaring that no one should be permitted to act as a physician who had violated the criminal laws of the state, leaving the question of violation to be determined according to the ordinary rules of evidence, would it not seem strange to hold that that which conclusively established the fact effectually relieved one from the consequences of such violation?
>
> It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist.[657]

Over half a century later, in *DeVeau v. Braisted*,[658] the Supreme Court had occasion to consider the validity of section eight of the New York Water-front Commission Act of 1953,[659] which forbade a union to assess contributions from employees licensed pursuant to the act if any officer or agent of the union had ever been convicted of a felony. Justice Frankfurter's plurality opinion[660] dismissed an attainder challenge by remarking that the statute did not substitute a legislative for a judicial determination of guilt but rather embodied only those implications of culpability already inherent in the prior conviction of any union officer affected by the act.[661]

Both these decisions pose some thorny problems. As the Court in *Hawker* noted, the New York statute in that case established, in effect,

657. *Id.* at 196-97.

658. 363 U.S. 144 (1960).

659. 1953 N.Y. Laws, chs. 882, 883, UNCONSOL. LAWS §§ 9801-9937 (McKinney 1953). All three levels of the New York judicial system had upheld the constitutionality of this enactment. *See* De Veau v. Braisted, 11 Misc. 2d 661, 664, 166 N.Y.S.2d 751, 754 (1957), *aff'd*, 5 App. Div. 2d 603, 614, 174 N.Y.S.2d 596, 607 (2d Dep't 1958), *aff'd*, 5 N.Y.2d 236, 242, 157 N.E.2d 165, 168, 5 N.Y.S.2d 793, 797 (1959).

660. Justice Frankfurter was joined by Justices Clark, Stewart and Whittaker. Justice Harlan did not participate. Justice Brennan's separate concurrence characterized the statute as a "reasonable means for achieving a legitimate state aim." 363 U.S. at 161 (Brennan, J., concurring). A group of three dissenters concluded that federal law (most particularly, the Labor Management Reporting and Disclosure Act, Pub. L. No. 86-257, 73 Stat. 519 (1959) (current version at 29 U.S.C. §§ 401-525 (Supp. V 1975)) governed the field to the exclusion of other state legislation. 363 U.S. at 164 (Douglas, J., dissenting, joined by Warren, C.J., and Black, J.).

661. 363 U.S. at 160.

an irrebuttable presumption: because one has been convicted of a felony, it therefore follows that one is necessarily unfit to practice medicine. This conclusive assumption is not merely harsh; it is possibly unconstitutional: "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments."[662] But the inequity of such a statute is even more fundamental. Implicit in the Court's approach in *Hawker* is the thesis that the state is imposing a disability on the basis of a conviction arising from a prior trial, a conviction that is supposedly conclusive evidence of moral degeneracy; therefore, the disability is being exacted after and as a result of a full adjudication in a court of law. While *Hawker* does not expressly make this connection,[663] *DeVeau* and other lower court

662. Vlandis v. Kline, 412 U.S. 441, 446 (1973) (struck down a Connecticut statute conclusively presuming a student attending a state university to be a non-resident for tuition purposes if he or she had lived outside the state at any time during the preceding year). *Accord*, Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 646 (1974) (challenge to mandatory maternity leave regulation for public school teachers incorporating a presumption that a woman could not teach classes after her fourth month of pregnancy; held "the conclusive presumption embodied in these rules, like that in *Vlandis*, is neither 'necessarily [nor] universally true,' and is violative of the Due Process Clause."); Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973) (challenge to a provision of the federal food stamp act withholding eligibility to participate in the food stamp program from any household that includes a member who is eighteen or older and who is claimed as a dependent for income tax purposes by one who is not a member of an eligible household; held "the deduction taken for the benefit of the parent in the prior year is not a rational measure of the need of a different household with which the child of the tax-deducting parent lives and rests on an irrebuttable presumption often contrary to fact."); Stanley v. Illinois, 405 U.S. 645, 657 (1972) (challenge to state law containing conclusive assumption that unmarried fathers are incompetent to raise their children; said this procedure "forecloses the determinative issues of competence and care, when it explicitly disclaims present realities in deference to past formalities, it needlessly risks running roughshod over important interests of both parent and child."); Heiner v. Donnan, 285 U.S. 312, 329 (1932) (challenge to a provision of the Internal Revenue Act creating a conclusive presumption that a gift made within two years of the donor's death is classifiable as a gift made in contemplation of death; said a law "creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause. . . .") Critical reaction to the doctrine of irrebuttable presumptions has been mixed, although it is probably accurate to say that a preponderance of the commentators on the subject believe that it is a wholly unprecedented and unfounded theory of constitutional law. *Compare* Tribe, *From Environmental Foundations to Constitutional Structures: Learning From Nature's Future*, 84 YALE L.J. 545, 553-54 (1975) (approving of the technique) *with* Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534, 1544-49 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449, 462-74 (1975) (disapproving of the technique as it has been applied).

663. The closest the Court comes to doing so is in the following statement:

> The conviction is, as between the State and the defendant, an adjudication of the fact. So if the legislature enacts that one who has been convicted of crime shall no longer engage in the practice of medicine, it is simply applying the doctrine of *res judicata* and invoking the conclusive adjudication of the fact that the man has violated the criminal law, and is presumptively, therefore, a man of such bad character as to render it unsafe to trust the lives and health of citizens to his care.

decisions do.[664] The difficulty with this contention is that the issues of a person's guilt for a certain crime and a person's fitness to practice a profession arise in different contexts and involve differing concerns. A judicial determination of the former issue is not intended also to decide the latter issue. Absent a full hearing on each denial of an individual application for a professional license, there is no way to consider the variety of factors that need to be taken into account, including: the age of the person when he committed the prior felony, the nature of the felony itself, whether the prior sentence was the result of plea bargaining, the mitigating circumstances (if any) surrounding the commission of the prior felony, the nature of the sentence handed down as a result of conviction, the lapse of time between the commission of the felony and the application for a professional license, the extent to which the ex-felon can be said to have rehabilitated himself, whether or not he was paroled for good behavior, whether or not he ever breached the conditions of that parole, whether or not the felony for which he was convicted related directly (as in *Hawker*)[665] to the profession he now seeks to practice, whether or not the licensing statute might be unconstitutional solely as applied to the particular applicant in question[666] and so on. The original trial court might consider the first four of these issues, but it will do so only to the extent that they bear upon the defendant's culpability for the crime with which he is charged; analyzing how these issues bear upon the defendant's prospective fitness to practice a profession is simply beyond the scope of the trial court's inquiry. Similarly, the trial court is in no position to take into account the other seven enumerated factors because all of these factors *postdate* the trial on the felony charge. Thus, the courts arguing that a person who has a subsequent deprivation inflicted upon him because of his status as an

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Hawker v. New York, 170 U.S. 189, 196 (1898).

664. *See* Cody v. United States, 460 F.2d 34, 37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1973); United States v. Karnes, 437 F.2d 284, 289 (9th Cir.), *cert. denied*, 402 U.S. 1008 (1971); Williams v. United States, 426 F.2d 253, 255 (9th Cir.), *cert. denied*, 400 U.S. 881 (1970); Postma v. International Bhd. of Teamsters, Local 294, 337 F.2d 609, 611 (2d Cir. 1964); United States v. Furem, 389 F. Supp. 285, 286 (E.D. Wis. 1975); United States v. Three Winchester 30-30 Caliber Level Action Carbines, Model 94, 363 F. Supp. 322, 323 (E.D. Wis. 1973), *aff'd*, 504 F.2d 1288, 1290 n.5 (7th Cir. 1974); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 244 F. Supp. 745, 746 n.1 (W.D. Pa. 1965), *vacated on other grounds*, 372 F.2d 86 (3d Cir. 1966), *rev'd*, 389 U.S. 463 (1967); People v. Camperlingo, 69 Cal. App. 466, 474, 231 P. 601, 603 (1924). For brief descriptions of these cases, *see* note 625 *supra* .

665. Hawker had been convicted of committing an illegal abortion. *See* notes 551-552 and accompanying text *supra*.

666. Hawker also claimed that the law, as applied to him, was ex post facto. One New York appellate court and three justices of the United States Supreme Court agreed with this contention. *See* notes 553, 559 *supra*.

ex-felon cannot be the victim of an attainder because he had a prior trial are really denying such a person any meaningful hearing whatsoever.

The fourth and final type of case involves the situation in which there exists both a prior and present trial, each of which results in a conviction, and an additional penalty included in the sentence arising from the second conviction, which is added because of the combined effect of the two convictions. Two major variants of this situation are prevalent. The first is exemplified by *Story v. Rives*.[667] The appellant in that case was convicted of robbery in the District of Columbia on January 20, 1933. He was sentenced to serve a prison term of from two years and seven months, to five years.[668] On September 30, 1936, Story was released conditionally pursuant to an 1875 federal statute that provided for early release of convicts who exhibit good conduct while in prison.[669] In November of 1936, a warrant was issued for the detention of the appellant; he was taken into custody, indicted and convicted of having committed a second crime while on release.[670] Under a 1932 federal statute, a person whose sentence was reduced for good conduct while in prison could be treated as if he had been paroled and, if he violated the terms of his release, could thus be required to serve not only the full duration of the sentence for his second conviction, but also the unexpired term of his prior sentence, which had been reduced provisionally.[671] The United States Court of Appeals for the District of Columbia dismissed an attainder challenge on the ground that:

> The act does not attempt "to inflict punishment without a judicial trial," or otherwise. The penalty suffered by a prisoner who is returned to custody following violation of the conditions of his release is the serving of the balance of his sentence, for which credit for good conduct was provisionally allowed. The rule applicable is the same as that which controls when a prisoner is returned to custody following a breach of parole. The sentence originally imposed was merely suspended during the period of parole.[672]

667. 97 F.2d 182 (D.C. Cir.), *cert. denied*, 305 U.S. 595 (1938).

668. 97 F.2d at 183.

669. Act of March 3, 1875, 18 Stat. 479, *amended*, Act of June 21, 1902, 32 Stat. 397 (codified at 18 U.S.C. §§ 710-713 (1902)).

670. 97 F.2d at 184.

671. *Id. See* Act of June 29, 1932, 47 Stat. 381 (codified at 18 U.S.C. § 7166 (1932)).

672. 97 F.2d at 188. The logic of *Story* has been followed, either explicitly or implicitly, by a group of federal and state rulings on the constitutionality of the Pennsylvania Board of Parole Act, PA. STAT. ANN. tit. 61, § 331.21a (1964). *See* United States *ex rel.* Heacock v. Myers, 251 F. Supp. 773, 774 (E.D. Pa.), *aff'd*, 367 F.2d 583 (3d Cir. 1966), *cert. denied sub nom.* Heacock v. Rundle, 386 U.S. 925 (1967); United States *ex rel.* Kloiber v. Myers, 237 F.

The second variant is typified by *People v. Lawrence*.[673] That case involved a challenge to the Illinois Habitual Criminal Act,[674] which permits a judge to impose a more severe sentence upon a defendant found guilty of committing a felony who has been convicted at least once before and thus may be deemed an habitual criminal. The petitioner in *Lawrence*, having been so characterized, received a twenty-year sentence for a second conviction of robbery.[675] The Illinois Supreme Court pointed out that a prior conviction was not an ingredient of the main offense charged, but merely a matter of aggravation with respect to the punishment to be imposed.[676] As a result, it found no infliction of a penalty without judicial trial because the punishment imposed was for the new crime only, but was "heavier if the [defendant was] a habitual criminal, and in this respect he [had] been given a judicial trial."[677] Thus, an attainder challenge was rejected.[678]

These cases offer an interesting contrast. On balance, it can be seen that *Story* was correctly decided. The initial sentence imposed upon the appellant in that case followed a full judicial trial on the underlying charge. That sentence was reduced provisionally as a matter of grace and nothing prevented the state from attaching a condition to that reduction.[679] In *Story*, the appellant was not being penalized without a trial but rather was being compelled to serve the remainder of a sentence handed down after full proceedings in a court of law. The point to remember is that the first (and provisionally reduced) and second sentences imposed upon Story were exacted as a result of a judicial

Supp. 682, 684 (E.D. Pa. 1965), United States *ex rel.* Horne v. Pennsylvania Bd. of Parole, 234 F. Supp. 368, 370 (E.D. Pa. 1964); Commonwealth *ex rel.* Thomas v. Myers, 419 Pa. 577, 581, 215 A.2d 617, 619-20 (1966).

673. 390 Ill. 499, 61 N.E.2d 361 (1945), *cert. denied*, 326 U.S. 731 (1945).

674. ILL. REV. STAT. ch. 38, ¶ 602 (1943).

675. 390 Ill. at 501, 61 N.E.2d at 362.

676. *Id.* at 504-05, 61 N.E.2d at 364.

677. *Id.* at 504, 61 N.E.2d at 364.

678. *Id.* at 504-05, 61 N.E.2d at 364. Various state habitual criminal acts have been defended against attainder challenges by state and federal courts applying the rationale of *Lawrence. See* Byers v. Crouse, 339 F.2d 550, 552 (10th Cir. 1964), *cert. denied*, 382 U.S. 933 (1965); Peer v. Skeen, 108 F. Supp. 921, 922 (N.D. W.Va.), *cert. denied*, 342 U.S. 930 (1952); People v. Douglas, 187 Cal. App. 2d 802, 811, 10 Cal. Rptr. 188, 194 (1960); People v. Israel, 91 Cal. App. 2d 773, 784, 206 P.2d 62, 69 (1949). *Cf.* Hamilton v. Indiana *ex rel.* Van Natta, — Ind. App. —, 323 N.E.2d 659, 660-61 (1975) (*see* note 625 *supra*, for a brief description of this case).

679. *Accord*, Douglas v. King, 110 F.2d 911, 913 (8th Cir. 1940) (challenge to 18 U.S.C. § 876 (1930), which found that a prisoner adjudged insane and hospitalized was ineligible for the benefits of the reduced-sentence act involved in *Story*, *see* note 669 and accompanying text *supra*; held section 876 was not a bill of attainder since the reduced-sentence act accorded, at best, a conditional right and that condition had been suspended by the onset of the petitioner's insanity).

finding of the commission of specific criminal acts. The same is not true in *Lawrence*. There, the state is not exacting a penalty as the result of a conviction for a particular, discrete crime; rather it is inflicting an additional and quite separate punishment upon a person for having achieved the status of an habitual criminal. Yet the petitioner in *Lawrence* was never granted a hearing on his putative habitual criminality; the presiding judge simply deduced such criminality because of a prior conviction for a felony. The logic of such a deduction is irrelevant;[680] at all times, the defendant has been tried only with respect to the commission of specific crimes, never with respect to his status as an inveterate offender. Thus, to say that a statute permitting a judge to inflict additional punishment upon one whom he deems to be an habitual criminal is not a bill of attainder because the person so punished received a full trial is an example of incorrect reasoning; it is founded on the erroneous premise that several judicial trials for one purpose (determination of guilt in a given factual context) can serve as a trial for another, independent purpose (determination of habitual criminality). The conclusion to be drawn from this typology of cases is that in two of five factual situations, the judicial trial component of the definition of a bill of attainder has not been slighted. In the three remaining situations, however, it has been construed in such a fashion as to render meaningless the safeguards it purports to provide.

2. *Nature of the Hearing*

Where, as in the Smith Act cases,[681] a statute provides for a full trial in the first instance by a court of law, there exists little doubt that a defendant will receive the procedural safeguards mandated by Justice Black in *Lovett*[682] and elaborated upon by the Ninth Circuit in *Putty*.[683] But a number of statutes impose deprivations and authorize only limited judicial proceedings or substitute administrative for judicial hearings. Three examples will suffice to illustrate the problem. In *Thompson v. Wallin*,[684] the New York Court of Appeals upheld the

680. In fact, one could argue it is illogical. The mere fact that a person has received two separate felony convictions does not *necessarily* indicate that he is an habitual criminal. Before that judgment can be made, it is necessary to undertake a full inquiry into the circumstances surrounding both convictions and the conduct of the defendant during the period between the two convictions.

681. *See* notes 637-642 and accompanying text *supra*.

682. *See* note 627 and accompanying text *supra*.

683. *See* notes 629-636 and accompanying text *supra*.

684. 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub nom.* Adler v. Board of Educ., 342 U.S. 485 (1952). *See* notes 199-211 and accompanying text *supra*.

Feinberg Law[685] against an attainder challenge partly on the theory that the statute afforded a sufficient hearing. It noted that while the act authorized the state's board of education to compile a list of subversive organizations to be used in determining whether or not to dismiss individual teachers, the text of the enactment also made "provision for a hearing to be had on appropriate notice, which hearing is afforded any organization as to which the Board of Regents shall determine to institute an inquiry."[686] Moreover, the court remarked that any organization aggrieved by a decision of the board could seek relief through what is known in New York civil practice as an article seventy-eight proceeding.[687] Accordingly, it concluded that the Feinberg Law had none of the attributes of a bill of attainder.[688]

The explicit premise adopted by the court was that an administrative hearing by the Board of Regents followed, if necessary, by an article seventy-eight proceeding, sufficed as a substitute for a full judicial trial. That premise is incorrect. While the Feinberg Law authorized the board to hold hearings, it prescribed no procedure governing those hearings.[689] The board, then, was free to follow any ad hoc approach it might choose: it could deny suspected organizations the right to have counsel present, it could admit rumor and hearsay into evidence, it could ask self-incriminating questions of witnesses, and so on. Nor does an article seventy-eight proceeding cure these procedural defects.

685. *See* notes 203-204 and accompanying text *supra.*

686. 301 N.Y. at 493, 95 N.E.2d at 814.

687. *Id.*

688. *Id. Accord,* Keyishian v. Board of Regents, 255 F. Supp. 981, 988-89 (W.D.N.Y. 1966), *rev'd on other grounds,* 385 U.S. 589 (1967), *see* note 199, *supra. See also* Zeluck v. Board of Educ., 62 Misc. 2d 274, 275, 307 N.Y.S.2d 329, 332-33 (1970), *aff'd,* 36 App. Div. 2d 615, 319 N.Y.S.2d 409 (2d Dep't 1971) (upheld New York's Taylor Law, which regulates state civil servants, against an attainder challenge by pointing out that the law (which, *inter alia,* mandates dismissal of public employees who go on strike) provided for a pretermination administrative hearing, the findings of which were reviewable by an article seventy-eight proceeding).

689. The relevant section of the Feinberg Law reads:

> The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a listing of organizations which it finds to be subversive. . . . The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request. . . from such federal agencies or authorities any supporting material or evidence that may be made available to it.

N.Y. EDUC. LAW § 3022(2) (McKinney 1973). Not only does the statute fail to provide for a hearing procedure, but it also permits the board to rely on the findings of other "agencies and authorities" that may have compiled evidence by wholly informal means.

Such a proceeding, while it occurs in a court of law,[690] is limited to an inquiry into four rather narrow questions concerning the official action at issue.[691] Although the rules of pleading in such a proceeding are almost identical to those prevailing in a full trial,[692] the right to a jury is not as extensive; if the issue in contention is whether an administrative determination is supported by substantial evidence based on the record as a whole, issues of fact will be decided either by a referee or by a judge at the trial term of the supreme court.[693] Moreover, as Judge Hearn noted in *Lederman v. Board of Education*,[694] if an organization or one of its members wished to challenge its inclusion on a list of subversives, the presiding judge in an article seventy-eight proceeding might possibly refuse to subject the administrative decision of the Board of Regents to exacting scrutiny on the theory that the controversy caused by that decision is nonjusticiable in nature.[695] Consequently,

> A teacher is then charged with membership in the listed organization. At such hearing the organization is deemed to be subversive within the definition of Civil Service Law, § 12-a even though the finding was by an administrative body and, as to the accused teacher, the supporting evidence was hearsay and he had no opportunity to meet it. In short—the listing, as to him, was ex parte.[696]

690. N.Y. CIV. PRAC. LAW § 7804(b) (McKinney 1973) (says an article seventy-eight proceeding is to be brought in the appropriate special term of the supreme court).

691. The four questions are: whether an agency or officer failed to perform a legal duty; whether an agency or officer proceeded or will proceed in excess of jurisdiction; whether an administrative determination was made in violation of lawful procedure or constituted an error of law or abuse of discretion; and whether an administrative determination is supported by substantial evidence based on the record as a whole. N.Y. CIV. PRAC. LAW § 7803 (McKinney 1973).

692. *Compare* N.Y. CIV. PRAC. LAW § 7804(d) (McKinney 1973) *with* N.Y. CIV. PRAC. LAW § 402 (McKinney 1973).

693. An independent section of New York's civil practice code preserves trial by jury on all issues so triable, and would govern article seventy-eight proceedings. N.Y. CIV. PRAC. LAW § 410 (McKinney 1973). But as noted in the text, a provision of article seventy-eight precludes jury trial in certain situations. N.Y. CIV. PRAC. LAW § 7804(h) (McKinney 1973).

694. 196 Misc. 873, 95 N.Y.S.2d 114 (1949), *rev'd*, 276 App. Div. 527, 96 N.Y.S.2d 466 (2d Dep't), *aff'd sub nom.* Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub nom.* Adler v. Board of Educ., 342 U.S. 485 (1952). *See* note 199 *supra*.

695. 196 Misc. at 881, 95 N.Y.S.2d at 121.

696. *Id.* Judge Hearn noted that a dismissed teacher had certain options. He or she could appeal to the state Commissioner of Education rather than to the courts, *see* N.Y. EDUC. LAW § 310 (McKinney 1973), but then any determination by that officer would be final and nonreviewable by *any* court. 196 Misc. at 882, 95 N.Y.S.2d at 122. If the teacher chose to institute an article seventy-eight proceeding, which he or she could, under N.Y. EDUC. LAW § 2523 (McKinney 1973), Judge Hearn characterized the level of judicial review as inadequate, if not illusory. 196 Misc. at 852, 95 N.Y.S.2d at 122 (citing Matter of Park

This system simply does not accord an individual the procedural safeguards mandated by *Lovett*. The Board of Regents is constrained by few considerations of due process, yet the record it compiles, by admitting whatever evidence it wishes, forms the basis for a review proceeding that may be either non-existent (if the reviewing court deems the administrative decision to be nonjusticiable) or minimal at best (due to the inherently narrow focus of an article seventy-eight proceeding) and that may or may not be accompanied by a jury trial.

Westmoreland v. Chapman[697] is another case in point. In that decision, a California district court of appeal upheld a statute depriving a person of his driver's license if he failed to submit to certain sobriety tests when requested to do so by police officers.[698] The court found no attainder partly because it claimed an individual was entitled to an administrative hearing before his license was revoked.[699] But again, the court failed to analyze adequately the nature and limitations of that hearing. Under the California Vehicle Code, a licenseholder is entitled to only an informal hearing unless he requests otherwise[700] and where the action is taken "on grounds ascertainable on examination or reexamination" under the code, he is never entitled to a formal hearing.[701] If all a licenseholder receives is an informal proceeding, he is permitted, at best, to file a written, or make an oral, statement on his own behalf;[702] that is the utmost extent of his procedural rights.[703] Even

East Land Corp. v. Finkelstein, 299 N.Y. 70, 75, 85 N.E.2d 869, 872 (1949); Kirn v. Noyes, 262 App. Div. 581, 584, 31 N.Y.S.2d 90, 92 (3d Dep't 1941)). Finally, he noted that the likelihood of a teacher being allowed to perfect an appeal under the state civil service law, N.Y. CIV. SERV. LAW § 105(1), (2) (McKinney 1973), *formerly* N.Y. CIV. SERV. LAW § 12(a) (McKinney 1940), was almost nil in light of the two alternative remedies present in the state's education code. 196 Misc. at 882-83, 95 N.Y.S.2d at 122-23.

697. 268 Cal. App. 2d 1, 74 Cal. Rptr. 363 (1968).

698. CAL. VEH. CODE § 13353 (West 1975).

699. 268 Cal. App. 2d at 5, 74 Cal. Rptr. at 366.

700. CAL. VEH. CODE §§ 14106-14107 (West 1975). The decision to grant the request is entirely a discretionary one. *See also id.* § 14100 (prescribing limits for the right to a hearing on demand).

701. *Id.* § 14102.

702. *Id.* § 14104.

703. The safeguards generally provided by the state's Administrative Procedure Act, CAL. GOV'T CODE §§ 11500-11523 (West 1975), yield to the provisions of the vehicle code whenever a variance exists. Lacy v. Orr, 276 Cal. App. 2d 198, 201, 81 Cal. Rptr. 276, 279 (1969). Thus it has been held that the protections afforded by the APA do not apply in informal hearings. Hough v. McCarthy, 54 Cal. 2d 273, 286-87, 353 P.2d 276, 285, 5 Cal. Rptr. 668, 677 (1960). A particular section of the vehicle code stipulates that in *formal* hearings the APA governs all matters not covered by that code. CAL. VEH. CODE § 14112 (West 1975). *But see* Reirdon v. Director of the Dept. of Motor Vehicles, 266 Cal. App. 2d 808, 811, 72 Cal. Rptr. 614, 616 (1968) (claimed the APA is not applicable in formal hearings held pursuant to CAL. VEH. CODE § 14107 (West 1975) and accordingly held that hearing

if the licentiate is granted a formal hearing, however, the nature of that hearing is limited. Such a proceeding is conducted by the director of the Department of Motor Vehicles, or a referee or hearing board appointed by him.[704] The presiding officers may admit hearsay[705] and other specified types of evidence, including reports of their own investigators and testimony received in other, separate cases.[706] Moreover, the director of the department (or a managerial employee appointed by him) has full discretion to reverse or modify the order of the hearing boards,[707] and his ruling can only be tested by a writ of mandamus to an appropriate superior court, wherein a judge is charged with determining if the administrative findings are supported by substantial evidence in light of the whole record, or in certain cases, by the weight of the evidence.[708] Measured against the standards laid down in *Lovett*, this hearing procedure is a poor substitute for a judicial trial. An informal proceeding provides few safeguards, while a formal hearing does not preclude such protections as trial by jury, the right of confrontation, or the right to have an impartial party rule on the alleged bias of the presiding officer.[709]

A third example is presented by *United States ex rel. Lubbers v. Reimer*.[710] That case involved a challenge to a federal statute authorizing deportation of an alien who had gained access to the country by fraudulently promising to marry a citizen.[711] The federal district court dismissed an attainder challenge by remarking that deportation was ac-

officers in such proceedings need not be attorneys, at least with respect to cases involving suspension of drivers' licenses).

704. CAL. VEH. CODE § 14107 (West 1975).

705. *Id.* § 14110.

706. *Id.* § 14108(b), (c). It has been held that even in the case of sworn statements of witnesses that were improperly admitted into evidence as official records, their admission would not provide sufficient grounds to vacate the findings of a formal hearing if the petitioner's own testimony could be construed so as to support a suspension order. Goss v. Department of Motor Vehicles, 264 Cal. App. 2d 268, 270, 70 Cal. Rptr. 447, 448 (1968).

707. CAL. VEH. CODE § 14110 (West 1975).

708. *See* CAL. CIV. PROC. CODE § 1094.5(c) (West 1975). *See* Bixby v. Pierno, 4 Cal. 3d 130, 143, 481 P.2d 242, 251, 93 Cal. Rptr. 234, 243 (1971) (holding that whenever an agency determination affects fundamental rights, a trial court reviewing the evidence under a writ of mandamus must exercise independent judgment in assessing that evidence); Strumsky v. San Diego County Employees Retirement Ass'n, 11 Cal. 3d 28, 32, 520 P.2d 29, 35, 112 Cal. Rptr. 805, 807 (1974) (applied the *Bixby* rule to both state agencies of statewide jurisdiction and state agencies of local jurisdiction). *See generally* Note, *Strumsky v. San Diego County Employees Retirement Association: Determining the Scope of Judicial Review in Administrative Decisions in California*, 26 HASTINGS L.J. 1465-1501 (1975).

709. *See* CAL. GOV'T CODE § 11512(c) (West 1975). For the applicability of this section, *see* note 703 *supra*.

710. 22 F. Supp. 573 (S.D.N.Y. 1938).

711. 8 U.S.C. § 213(a) (1937).

companied by an administrative hearing.[712] But in deportation cases, circa 1938, procedural safeguards were minimal. Since deportation is not a penal sanction,[713] a potential deportee is not entitled to trial by jury.[714] He also has no right to refuse to answer incriminating but relevant questions[715] nor must his responses made during a preliminary interrogation during which he was denied counsel be excluded from evidence.[716] Hearsay is admissible in deportation proceedings[717] and, at least formerly, the potential deportee bore the burden of proof as to the lawfulness of his entry into the country.[718] *Lubbers* presents perhaps the most extreme case in which a purported substitute for a judicial trial provided almost none of the due process protections inherent in a judicial proceeding.

These cases are difficult to reconcile with *Lovett*.[719] Justice Black's

712. 22 F. Supp. at 575. For the nature of deportation hearings at this point in time, *see generally* J. CLARK, DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE 363-88 (1968 ed.) Under modern immigration law, an alien whose deportability is inquired into is entitled to: (1) notice of the charges against him and the timing of his hearing; (2) counsel at the hearing; (3) examine adverse evidence, present favorable evidence and cross-examine witnesses; and (4) a decision based only on probative evidence. 8 U.S.C. § 1252(b) (1970).

713. *See* note 479 and accompanying text *supra*.

714. Zakonaite v. Wolf, 226 U.S. 272, 275 (1912); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904); Wong Wing v. United States, 163 U.S. 228, 237 (1896); United States v. Zucker, 161 U.S. 475, 481 (1895); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). However, the Court in *Wong Wing* did point out that trial by jury was mandatory where the sanction of deportation was accompanied by a term of imprisonment.

715. United States *ex rel.* Rennie v. Brooks, 284 F. 908, 909-10 (E.D. Mich. 1922); *In re* Chan Foo Lin, 243 F. 137, 139-40 (6th Cir. 1917); Tom Wah v. United States, 163 F. 1008, 1009 (2d Cir. 1908).

716. Loh Wah Suey v. Backus, 225 U.S. 460, 470 (1912); *In re* Kosopud, 272 F. 330, 336 (N.D. Ohio 1920); *Ex parte* Ah Sue, 270 F. 356, 357 (W.D. Wash. 1920); Guiney v. Bonham, 261 F. 582, 585 (9th Cir. 1919); *Ex parte* Chin Quock Wah, 224 F. 138, 139 (W.D. Wash. 1915); *Ex parte* Garcia, 205 F. 53, 55-59 (N.D. Cal. 1913); United States *ex rel.* Buccino v. Williams, 190 F. 897, 899 (S.D.N.Y. 1911).

717. Tang Tun v. Edsell, 223 U.S. 673, 679-81 (1912); Lewis *ex rel.* Lai Thuey Lem v. Johnson, 16 F.2d 180, 182 (1st Cir. 1926); United States *ex rel.* Georgian v. Uhl, 271 F. 676, 677 (2d Cir. 1921).

718. United States *ex rel.* Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 110 (1927) (construing Act of May 26, 1924, ch. 190, § 23, 43 Stat. 165). *But see* Woodby v. Immigration & Naturalization Serv., 385 U.S. 276, 286 (1966) (construing 8 U.S.C. § 1105a(a)(1) (1970); the Court in this case concluded that "no deportation order may be entered unless it is found by clear, unequivocal and convincing evidence that the facts alleged as grounds for deportation are true").

719. Nor are these the only cases that could be cited. *See* Daly v. State, 296 Minn. 238, 239, 207 N.W.2d 541, 543 (1973); State v. Scheffel, 82 Wash. 2d 872, 881, 514 P.2d 1052, 1058 (1973). *Daly* upheld a Minnesota statute, which, like the enactment involved in *Westmoreland*, revoked the license of a driver who declined to submit to a sobriety test; the court found no attainder because it claimed the administrative decision to revoke was subject to full judicial review. In fact, this statement was correct; the Minnesotan act provides significantly greater safeguards to the individual than were afforded by the Californian stat-

language in that case is susceptible to two possible interpretations. The first is that a legislative infliction of punishment is only constitutional if it provides for a full-fledged trial in a court of law. If this interpretation is accurate, then the statutory schemes involved in *Thompson, Westmoreland* and *Lubbers*, to the extent that they punish rather than regulate, are bills of attainder and are not saved from being so classified because they provide for administrative hearing procedures. But a more pragmatic construction of Justice Black's language would yield the conclusion that, in order to avoid the proscription against bills of attainder, a legislative act inflicting punishment must provide, at the very least, a substitute for a judicial trial that accords a person the very

utory scheme questioned in *Westmoreland*. Under Minnesota law, before the state commissioner of public safety can revoke any license, there must be a nonjury hearing before a municipal or county judge charged with determining the answers to four questions: whether the police officer requesting the motorist to submit to a sobriety test had probable cause to believe the latter was driving while intoxicated; whether the motorist was lawfully arrested; whether the motorist refused to permit the test and, if so, whether his refusal was reasonable; and whether the police officer informed the motorist of the possible consequences of his refusal and his right to have the sobriety test administered by an impartial third party. MINN. STAT. ANN. § 169.123 subd. 6 (West Supp. 1976). If a person's license is revoked, he may file a petition for review in state district court within twenty days after the revocation decision was rendered; that court must afford a jury trial de novo. *Id.* § 169.123 subd. 7. Thus the Minnesota statute, unlike its Californian counterparts, provides for an initial judicial hearing followed, in effect, by a new trial on appeal. In *Scheffel*, the Washington Supreme Court dismissed an attainder challenge against the state's habitual traffic offenders statute (which requires those motorists involved in three or more accidents resulting in convictions to forfeit their licenses) because it was said that the statute afforded an adequate prerevocation hearing. In fact, the law stipulates that once a prosecuting attorney files a complaint incorporating transcripts of the three prior convictions in state superior court, the presiding judge is authorized to issue a "show cause order" to the motorist in question requesting him to bring forth reasons why he should not be barred from operating a vehicle on the state's highways. WASH. REV. CODE ANN. § 46.65.050 (West Supp. 1977). Unless the superior court finds a misidentification or absence of habitual offense, it is authorized to revoke a license for five years. *Id.* § 46.65.060. An appeal from such a decision may be had "in the same manner and form as such an appeal would be noted, perfected, and tried in any criminal case." *Id.* § 46.65.110. Although the statute is ambiguous about the nature of the initial hearing (and, indeed, would seem to place the burden of proof on the motorist rather than on the state), in practice, a licenseholder is entitled to be represented by counsel, and submit memoranda, present testimony and make oral arguments on his own behalf. *See* State v. Scheffel, 82 Wash.2d at 874, 514 P.2d at 1054. Moreover, the appeal procedure would appear to incorporate the usual safeguards of a judicial hearing (although, unlike the statute in *Daly*, it distinctly provides for an appeal, as opposed to a trial de novo). *See also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961) (upheld the registration provisions of the Subversive Activities Control Act of 1950, 50 U.S.C. §§ 781-785 (1970), against an attainder challenge by noting, *inter alia*, that the decision to place an organization on the list of those required to register "must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence"; the Court never scrutinized the extent of the procedural safeguards afforded in that initial administrative hearing in the context of the attainder challenge).

same procedural safeguards.[720] And this the statutes in *Thompson,*

720. At this juncture, it is necessary to consider a point adverted to earlier, *see* note 645 *supra*: do these purported substitutes for a judicial trial offer an opportunity to raise a constitutional challenge to the very statutory scheme creating the substitute? The answer would seem to be no. Such a challenge would simply be beyond the scope of the inquiry in a deportation hearing or a license revocation proceeding, or so it would appear. The problem is underscored by considering the procedural contexts in which constitutional claims were raised in *Thompson, Westmoreland, Lubbers* and the three cases cited in note 719. Thus, in *Thompson*, two separate constitutional challenges were made, one by means of a declaratory judgment proceeding and one, oddly enough, by New York City school employees in an article seventy-eight proceeding. Thompson v. Wallin, 196 Misc. 686, 692, 93 N.Y.S.2d 274, 280 (1949). This is odd because constitutional questions would not appear to fit within any of the four narrowly-phrased issues which may be raised in such a proceeding, *see* note 691 *supra*. In *Westmoreland*, on the other hand, the constitutional challenge was raised after the administrative hearing by means of an alternative writ of mandate. Westmoreland v. Chapman, 268 Cal. App. 2d 1, 4, 74 Cal. Rptr. 363, 363 (1968). Similarly in *Lubbers*, an attainder challenge was advanced not during the deportation hearing, but as part of a subsequent habeas corpus proceeding. United States *ex rel.* Lubbers v. Reimer, 22 F. Supp. 573, 574 (S.D.N.Y. 1938).

The pattern does not vary in *Daly* and *Scheffel*, see note 719 *supra*; in the former case, the constitutional claims were apparently raised in the course of the statutorily-prescribed *appellate* procedure, Daly v. State, 296 Minn. 238, 238, 207 N.W.2d 541, 542 (1973), whereas the constitutional issues involved in *Scheffel* were deemed important enough to merit a direct appeal to the Washington supreme court, State v. Scheffel, 82 Wash. 2d 872, 874, 514 P.2d 1052, 1054 (1973). But perhaps the most interesting procedural history is that underlying the case of Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961). *See* note 719 *supra*. On November 22, 1950, the Attorney General requested the Board to order the Communist Party to register as a "Communist action organization." The Party sought a preliminary injunction in a three-judge district court, but was summarily denied that remedy. Communist Party v. McGrath, 96 F. Supp. 47, 47 (D.D.C. 1951). Subsequent hearings before the Board extending from April 23 to July 1, 1952 yielded 14,000-plus pages of testimony. On April 20, 1953, the Board declared the Party to be a "Communist action organization." The Party then sought appellate relief under section 14(a) of the Subversive Activities Control Act of 1950, 50 U.S.C. § 793(a) (1950), which permits a reviewing court to order the Board to adduce additional evidence if a movant can show that such evidence is material. The Party claimed that three witnesses appearing before the Board had perjured themselves, but the United States Court of Appeals for the District of Columbia Circuit denied a motion to adduce additional evidence. Communist Party v. Subversive Activities Control Bd., 223 F.2d 531, 576 (D.C. Cir. 1954). The Supreme Court reversed, however, ordering the Board to base its findings solely on untainted testimony. Communist Party v. Subversive Activities Control Bd., 351 U.S. 115, 125 (1956). On remand, the Board denied the Party's requests to reopen the record and to adduce additional evidence, but it did decide to re-examine the allegedly perjuring witnesses. On December 18, 1956, the Board issued a modified report reconfirming its original conclusions but expunging the testimony of three witnesses. The District of Columbia Circuit affirmed most of the Board's actions, but directed it to produce documents relating to the testimony of a fourth witness, one Mrs. Markward, whom the Party claimed had also lied while under oath. Communist Party v. Subversive Activities Control Bd., 254 F.2d 314, 332-33 (D.C. Cir. 1958). The scope of the remand was subsequently enlarged to require production of recorded statements made to the FBI by one Victor Budenz, a witness for the Attorney General. The hearings were convened for a third time, the Board reevaluated the credibility of Budenz and Markward and issued a modified report on second remand, again recommending classification of the Party as a "Communist action organization." The Party once more appealed under section 14(a), but this time was

Westmoreland and *Lubbers* fail to do. Thus, it would seem that, to the extent the courts in those cases dismissed attainder challenges on the theory that the enactments in question provided adequate hearings, they were mistaken. An obvious objection could be raised at this juncture: if a statutory scheme must provide the equivalent of a full judicial trial, it will be inefficient to administer. The equally obvious response is that if the proscriptions against bills of attainder are to truly provide a "bulwark in favor of personal security and private rights,"[721] then such rights cannot be sacrificed upon the altar of administrative expediency. Nor is it permissible for legislatures to provide some of the protections listed by Justice Black and eschew others. There is no indication that he believed some of his enumerated safeguards were of less importance than others; rather, it would seem that he believed "procedural due process" entails an indivisible set of measures consisting of *all* the protections that he cited. This conclusion is not meant to suggest that all statutes imposing deprivations after an administrative hearing are unconstitutional per se. The bill of attainder clauses apply only to punitive enactments; the statute involved in *Westmoreland* and, less assuredly, that involved in *Lubbers* might be construed as regulatory.[722] Thus, the ultimate conclusions arrived at in these cases are not necessarily invalid; it is simply that the reasons given for reaching those conclusions misconstrue and therefore subvert the meaning of the judicial trial component of the definition of a bill of attainder.

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denied any relief. Communist Party v. Subversive Activities Control Bd., 277 F.2d 78, 83 (D.C. Cir. 1959). It was this decision that was appealed to the Supreme Court. *See* 367 U.S. at 19-22. Much can be said in favor of the view that if a procedural substitute is created for a full judicial trial in the first instance, that substitute must accord a person the opportunity to raise a constitutional challenge at the initial hearing. Yet the decisions of the four state courts cited in this footnote and the implicit ruling of the United States Supreme Court in the *Communist Party* case is that due process is not offended if such a challenge can only be raised on appeal. *Lubbers* goes even further and sanctions a system whereby constitutional questions may be raised only after an administrative hearing, in the course of a wholly independent habeas corpus proceeding. All these decisions, therefore, dilute the meaningful safeguards supposedly preserved in the judicial trial aspect of the concept of a bill of attainder.

721. *See* note 46 and accompanying text *supra*.

722. *Westmoreland*, at least, relies in part on the punishment/regulation distinction. See Westmoreland v. Chapman, 268 Cal. App.2d 1, 5, 74 Cal. Rptr. 363, 366 (1968). *Cf.* Beamon v. Department of Motor Vehicles, 180 Cal. App. 2d 200, 210, 4 Cal. Rptr. 396, 403 (1960) (said suspension or revocation of a driver's license is not a penal sanction). The statute involved in *Thompson*, however, is, in this author's opinion, unquestionably a bill of attainder. *See* notes 210, 288 *supra*.

IV. A Renascence: The *Brown* Case

A. The Case

In enacting the Labor-Management Relations Act of 1947,[723] Congress included within that statute section 9(h), which required each officer of a labor union to execute an expurgatory oath disclaiming present membership in or affiliation with the Communist Party and present advocacy of or present membership in an organization advocating forcible overthrow of the government. Execution of the oath was a condition precedent to that union's obtainment of the jurisdiction of the National Labor Relations Board in mediating labor disputes.[724] In the case of *American Communications Association v. Douds*,[725] a coalition of five justices[726] of the United States Supreme Court adjudged the membership clauses of section 9(h) to be constitutional. Three members of that coalition also expressly rejected a bill of attainder challenge.[727] Subsequently, Congress enacted a successor to the 1947 act, known as the Labor Management Reporting and Disclosure Act of 1959.[728] Section 504 of that act replaced section 9(h). The new provision stipulated that no person who is or was a member of the Communist Party or who had ever been convicted of or imprisoned for specified felonies could serve in a managerial position in any labor organization or as a labor relations consultant during or for five years after the termination of his membership in the Party or during or for five years after his conviction or after the end of his prison term.[729]

723. 61 Stat. 136 (1947) (currently codified at 29 U.S.C. §§ 141-188 (1970)).

724. 29 U.S.C. § 147(h) (1947) (superseded 1959). *See* note 352 and accompanying text *supra*.

725. 339 U.S. 382 (1950). *See* notes 349-359 and accompanying text *supra*.

726. *See* note 354 *supra*.

727. 339 U.S. at 413-14 (Vinson, C.J., joined by Burton and Reed, JJ.) *See* note 355 and accompanying text *supra*.

728. Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified at 29 U.S.C. §§ 401-525 (Supp. V 1975)).

729. 73 Stat. 536, 29 U.S.C. § 504 (1970). The relevant text reads:

> (a) No person who is or has been a member of the Communist Party or who has been convicted of, or served any part of a prison term resulting from his conviction of, robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury . . . or conspiracy to commit any such crimes, shall serve—
>
> (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization, or
>
> (2) as a labor relations consultant to a person engaged in an industry or activity affecting commerce, or as an officer, director, agent, or employee (other than

Archie Brown had been a member of the Communist Party since at least 1935. From 1959 to 1961, he was elected to and served successive one-year terms on the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union, located in San Francisco, California.[730] On May 24, 1961, Brown was indicted in federal district court for violating section 504.[731] A jury trial resulted in a judgment of guilty and a sentence of six months' imprisonment. Brown appealed his conviction and, in *Brown v. United States*,[732] the United States Court of Appeals for the Ninth Circuit, sitting en banc, reversed the judgment rendered in the trial court. A majority of the judges of the Ninth Circuit held that section 504 infringed both the freedom of association guaranteed by the First Amendment, in that it proscribed mere membership rather than knowing membership coupled with specific intent,[733] and the due process guarantees of the Fifth Amendment, in that it embodied the impermissible concept of guilt by association.[734] The majority distinguished *Douds* by contending that section 9(h) worked merely an indirect discouragement on Party affiliation, whereas section 504 effected a flat prohibition;[735] it never discussed the appellant's bill of attainder challenge.[736]

> as an employee performing exclusively clerical or custodial duties) of any group or association of employers dealing with any labor organization,
> during or for five years after the termination of his membership in the Communist Party, or for five years after such conviction or after the end of such imprisonment
> . . . .
> (b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

The provisions barring felons, with which the *Brown* case did not deal, have been upheld against attainder challenges. *See* Postma v. International Bhd. of Teamsters, Local 294, 337 F.2d 609, 611 (2d Cir. 1964); Wirtz v. Local 153, Glass Bottle Blowing Ass'n, 244 F. Supp. 745, 746 n.1 (W.D. Pa. 1965), *vacated on other grounds*, 372 F.2d 86 (3d Cir. 1966), *rev'd*, 389 U.S. 463 (1967). *See* note 625 *supra*.

730. Brown v. United States, 334 F.2d 488, 491 (9th Cir. 1964).

731. *Id.* The statute has its own penalty provisions. *See* note 729 *supra*.

732. 334 F.2d 488 (9th Cir. 1964).

733. *Id.* at 495. The majority cited in support of its thesis two decisions of the United States Supreme Court that had involved construction of the Smith Act. *See* note 638 *supra*.

734. *Id.* at 495-96 (citing Scales v. United States, 367 U.S. 203, 224-25, 226, 227 (1961)).

735. *Id.* at 494 (citing American Communications Ass'n v. Douds, 339 U.S. 382, 390 (1950)).

736. Nor did the other four opinions written in this case discuss the appellant's attainder challenge. The prevailing majority consisted of Judges Merrill (who wrote the main opinion), Browning, Duniway, Jertberg and Koelsch. Judge Duniway also penned a separate opinion in which he attempted to answer some of the objections raised by the dissenters. 334 F.2d at 497-501 (Duniway, J., concurring). There were three dissents. *Id.* at 501-05 (Hamley, J., dissenting); *id.* at 505 (Chambers, J., dissenting) and *id.* (Barnes, J., dissenting). Judge Hamley contended that the case should be reversed and remanded, not on constitutional grounds, but because the trial court judge had improperly arrogated to himself the decision on an issue of fact which should have been left up to the jury: whether or not the executive

Therefore, it was especially surprising that the United States Supreme Court chose to dispose of the issues raised by the government on appeal by referring exclusively to the proscriptions against bills of attainder contained in article one, section nine of the Constitution. Chief Justice Warren's majority opinion in *United States v. Brown*[737] was divided into four sections. The first two parts were essentially historical in nature. Part I was an extended recapitulation of the history and nature of attainders at common law and during the formative years of this nation. Chief Justice Warren, after considering all the various types of English bills of attainders and bills of pains and penalties, concluded that while history provided some definitional guidelines, it did not provide enough to be helpful; the "wide variation in form, purpose and effect" of common law attainders required a determination of the reasons for inclusion of the proscriptions against bills of attainder in the text of the Constitution.[738] According to the Court,

> The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.[739]

Implicit in this assertion about separation of powers was a corollary about procedural due process: trial by a legislature susceptible to the whims of its constituency was a poor substitute for the deliberations of "politically independent judges and juries."[740] Part II of Chief Justice Warren's opinion was a brief review of the Court's decisions in *Cum-*

board of Local 10 was, in fact, an "executive board," as that term is defined by the act of 1959. *Id.* at 502. Judge Barnes disagreed with the majority, because he believed that no constitutional challenge could be raised against a statute that only deprived Communists of union officerships rather than union jobs in general. *Id.* at 505. Finally, Judge Chambers argued that the act was a permissible application of Congress' power over interstate commerce; he asserted that, while a person may have the right to claim the Fifth Amendment privilege against self-incrimination, he has no corresponding right to retain his job after doing so. *Id.*

737. 381 U.S. 437 (1965). The majority opinion in this case was written by Chief Justice Warren, joined by Justices Black, Brennan, Douglas and Goldberg. Justice White, joined by three of his colleagues, dissented. *Id.* at 462-78 (White, J., dissenting, joined by Clark, Harlan & Stewart, JJ.). For a discussion of his dissent, see notes 768-787 and accompanying text *infra*.

738. 381 U.S. at 442.

739. *Id.*

740. *Id.* at 445. The Court also cited Macaulay's description of the attainder of Sir John Fenwick as an example of the evils inherent in trial by legislature. *Id.* at 445-46 n.19. *See* note 39 and accompanying text *supra*.

mings v. Missouri,[741] *Ex parte Garland*[742] and *United States v. Lovett*,[743] all of which were said to have been premised upon the separation of powers thesis.[744]

Part III is the crux of Chief Justice Warren's opinion. He began that section by stating that section 504 was a bill of attainder in light of judicial precedent because instead of disbarring persons who possess certain characteristics or commit certain acts that make such persons likely to foment political strikes, Congress designated a class of persons whom it excluded from union office.[745] In support of this contention, he cited the Court's previous decision in *Communist Party of the United States v. Subversive Activities Control Board*[746] for the proposition that if the act in question in that case had applied to the Party by name, it would have been a bill of attainder.[747] The Chief Justice noted that section 504 fit within that prohibited type of legislation because it imposed disabilities upon the members of a named organization.[748]

The Court then dealt with the solicitor general's argument that section 504 was no more than a conflict-of-interest statute regulating a certain class of positions. In support of this contention, the solicitor general offered the analogy of *Board of Governors v. Agnew*,[749] a case decided in 1947, in which the United States Supreme Court had construed the meaning of section 32 of the Banking Act of 1933.[750] That provision prohibited an officer or director of a firm issuing or underwriting securities from serving as a director or an employee of a bank belonging to the Federal Reserve System unless such a dual officership would not unduly influence either the investment policies of the member bank or the advice it would give to its customers. The majority of the Court distinguished section 504 of the Labor Management Report-

741. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

742. 71 U.S. (4 Wall.) 333 (1867). *See* notes 71-81 and accompanying text *supra*.

743. 328 U.S. 303 (1946). *See* notes 180-197 and accompanying text *supra*.

744. *See* 381 U.S. at 447-49.

745. *Id.* at 449-50.

746. 367 U.S. 1 (1961). *See* notes 366-372, 611-622 and 721 and accompanying text *supra*.

747. 381 U.S. at 451 (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 84-85 (1961)).

748. *Id.* at 452.

749. 329 U.S. 441 (1947).

750. 12 U.S.C. § 78 (1933) (amended 1935). No attainder challenge was raised in *Agnew*. Indeed, the case involved a matter of statutory interpretation: whether Eastman Dillon & Co. was "primarily engaged" in underwriting as that phrase is used in section 32. The Court construed the phrase to mean "principally" or "substantially engaged" in underwriting and really reached no constitutional issues. *See* Board of Governors v. Agnew, 329 U.S. 441, 447 (1947).

ing and Disclosure Act from section 32 of the Banking Act on several grounds. First, the former inflicted a deprivation upon a political minority thought to endanger national security, while the latter did not.[751] Moreover, section 504 incorporated a judgment of censure upon members of the Communist Party, whereas section 32 was said to rely upon a general principle of human psychology that a person concurrently holding the two designated positions might be tempted to engage in self-dealing.[752] Most importantly, however, Chief Justice Warren stated that section 32 estabished an objective standard of conduct insofar as it regulated the activities of those who held a position in a bank that could be used to influence investment policies and who were also in a position to benefit financially from investment in securities handled by an underwriter with which the bank dealt.[753] The Chief Justice claimed that in this situation Congress merely used a shorthand expression to legislate "with respect to general characteristics rather than with respect to a specific group of men. . . ."[754] The Court further pointed out that the escapability clause of section 32, while not essential to its constitutionality, militated against the conclusion that it, like section 504, embodied a censorial judgment upon a particular group of persons.[755] In contrast, the challenged provision in *Brown* did not merely utilize a shorthand expression because the implied substitution of the term "members of the Communist Party" for the term "persons likely to engender political strikes" was said to rest

> upon an empirical investigation by Congress of the acts, characteristics and propensities of Communist Party members. In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics. . . . Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, "it cannot automatically be inferred that all members share their evil purposes or participate in their illegal conduct."[756]

751. 381 U.S. at 453.

752. *Id.* at 454. Although Chief Justice Warren provided no attribution for this concept, it is clear that he borrowed it from Professor Wormuth's 1950 article on the subject. *See* notes 579-588 and accompanying text *supra*. This is so because one of his examples of legitimate legislative use of shorthand descriptions—an act prohibiting one subject to seizures from operating dangerous machinery—is very similar to an example offered by Wormuth. *Compare* 381 U.S. at 454 n.29 *with* Wormuth, *supra* note 12, at 609.

753. 381 U.S. at 454.

754. *Id.* at 454-55.

755. *Id.* at 455.

756. *Id.* at 455-56 (citing Schware v. Board of Bar Examiners, 353 U.S. 232, 246 (1957)).

Thus, the Court rebutted the argument that the term "Communist Party members" was semantically equivalent to the term "persons likely to engender political strikes" by pointing out that the two were demonstrably not coextensive because section 504 exempted from its coverage classes of persons who, though not affiliated with the Party, were nevertheless likely to foment political strikes. Therefore, Congress could not have intended to offer merely an alternative, shorthand descriptive label in section 504 but must have entertained a purpose of legislating against Communists *qua* Communists.

Finally, in Part IV, Chief Justice Warren dealt with the problem of punishment. The solicitor general argued that section 504 was preventive rather than retributive: "its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will be able in the future to bring about undesirable events."[757] In support of this contention, he relied on the holding of the Court in *American Communications Association v. Douds*,[758] which upheld the predecessor of section 504 on just such a theory. But the Court at first distinguished *Douds* by suggesting that the statute involved in that case attached sanctions to present membership,[759] whereas the statute involved in the present case imposed disabilities on both present members of the Communist Party and on anyone who had been a member within the five preceding years.[760] Nevertheless, as soon as the Chief Justice had thus distinguished *Douds*, he proceeded to undermine the premise it had advanced by stating that punishment need not be retaliatory or retributive but could also be preventive or prospective.[761] He supported his assertion by citing historical examples of attainders, statements in prior cases and the writing of various commentators.[762] In light of such authorities, the Chief Justice accused the Court in *Douds* of misreading the majority opinion in *United States v. Lovett*[763] by attempting to exempt legislation having a purely prospective effect from the constitutional prohibitions against bills of attainder.[764] Finally, the Court dismissed cursorily the contention that

The Court also cited Aptheker v. Secretary of State, 378 U.S. 500, 509-11 (1964); Schneidermann v. United States, 320 U.S. 118, 120 (1943).

757. 381 U.S. at 457.

758. 339 U.S. 382 (1950). *See* notes 349-355 and accompanying text *supra*.

759. *See* note 352 and accompanying text *supra*.

760. *See* note 729 and accompanying text *supra*.

761. 381 U.S. at 458.

762. *Id.* at 459-60. *See* notes 373-392 and accompanying text *supra*, for an analysis of this problem.

763. 328 U.S. 303 (1946).

764. 381 U.S. at 460.

section 504 did not attaint the respondent because it failed to designate Archie Brown by name; in light of precedent, that fact was said not to be enough to take the stature out of the classification of a bill of attainder.[765] Thus the Supreme Court affirmed the judgment of the Ninth Circuit.[766]

Justice White, writing for himself and three others, issued a scathing dissent.[767] He pointed out that the Court had previously distinguished regulatory from punitive enactments by relying on a multifold set of factors.[768] Now, the Court appeared to be placing "the burden of separating attainders from permissible regulation on an examination of the legislative findings implied by the nature of the class designated."[769] He then suggested that a close analysis of the majority opinion yielded a conclusion that could best be phrased in terms originally developed in the context of equal protection analysis, namely those of "overinclusiveness" and "underinclusiveness."[770] According to Justice White, the majority on the one hand argued that a statute is sufficiently general if it designates the characteristics of a group of persons that is likely to engage in legitimately prohibited conduct and, on the other hand, contended that a law designating the characteristic of membership in the Communist Party cannot be the basis for such a prohibition.[771] Therefore, "§ 504 is too narrow in specifying the particular class; but it is also too broad in treating all members of the class alike. On both counts—underinclusiveness and overinclusiveness—§ 504 is invalid as a bill of attainder. . . ."[772]

He then proceeded to catalogue the casualties caused by the majority opinion. First, *Douds* was "obviously overruled."[773] Second, Congress could no longer pass conflict-of-interest legislation because section 32 of the Banking Act of 1933 is both underinclusive, in that others besides directors or officers of underwriting firms may have

765. *Id.* at 461. For a discussion of this aspect of the opinion, *see* notes 1005-1017 and accompanying text *infra.*

766. *Id.* at 462.

767. *Id.* at 462-78 (White, J., dissenting, joined by Clark, Harlan & Stewart, JJ.).

768. *Id.* at 462-63. *See* note 515 and accompanying text *supra.*

769. *Id.* at 463.

770. *Id.* at 464. This terminology originated in an influential law review article published in 1949. *See* Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 348, 351 (1949).

771. 381 U.S. at 463-64.

772. *Id.* at 464. One other commentator also concludes that Chief Justice Warren's opinion relied on the overinclusiveness-underinclusiveness doctrine. *See Need For Clarification, supra* note 12, at 232, 237. In the author's opinion, both he and Justice White are simply mistaken. *See* note 798 and accompanying text *infra.*

773. 381 U.S. at 464-65. For other cases in agreement, *see* note 928 *infra.*

business interests creating divided loyalties and a consequent potential for self-dealing, and overinclusive, in that not all directors or officers of underwriting firms would be likely to violate their dual fiduciary responsibilities, and because the defects of section 32 are typical of conflict-of-interest statutes.[774] Third, statutes like those upheld in *Hawker v. New York*[775] and *DeVeau v. Braisted*[776] would also be of questionable validity because those enactments were equally deficient in that not all ex-felons possess bad characters and not all persons with bad characters are ex-felons.[777] Fourth, Justice White suggested that the majority's approving reference to *Communist Party of the United States v. Subversive Activities Control Board*[778] was inconsistent with its ultimate holding, because the statute upheld in that case also contained a provision disqualifying members of "Communist-action organizations" (like, according to the Board, the Communist Party) from holding union offices.[779] If that provision did not attaint, then neither could section 504.

As Justice White viewed it, there was an inherent difficulty in claiming that the challenged enactment in *Brown* was a bill of attainder "because it has disqualified all Communist Party members without providing for a judicial determination as to each member that he will call a political strike."[780] If the government were to follow this logic, then it could not, for instance, deny Communists positions in the Central Intelligence Agency unless each individual who was the subject of such a denial had his alleged disloyalty fully adjudicated. Justice White deemed such an approach to be absurd. Unless one accepted the general administrative determination that members of the Communist Party are likely to be security risks, then the government would be restrained from acting until it could actually apprehend a person in the act of calling for a political strike or committing treason.[781]

Because of these implications of the majority's ruling, Justice White felt compelled to "inquire whether the Court's reasoning does

774. *Id.* at 465-67.

775. 170 U.S. 189 (1898). *See* notes 551-563 and accompanying text *supra*.

776. 363 U.S. 144 (1960). *See* notes 658-661 and accompanying text *supra*.

777. 381 U.S. at 469.

778. 367 U.S. 1 (1961). *See* note 746 and accompanying text *supra*. For *Brown*'s effect on the continuing validity of this case, *see* notes 1006-1017 and accompanying text *infra*.

779. 50 U.S.C. § 784(a)(1)(E) (1950).

780. 381 U.S. at 471.

781. *Id.* at 471-72. But it should be noted that the majority said Congress retained the power to bar subversives from sensitive government positions so long as it did so by rules of general application. *Id.* at 461.

not contain some flaw that explains such perverse results."[782] He found several flaws. First, he argued that the bill of attainder clauses do not enshrine any hallowed dichotomy between judicial and legislative functions because Congress can and does enact private bills and punish persons for contempt and, at least on the state level, determinations of how the executive, legislative and judicial powers are to be allocated among the three branches of government are a matter of local discretion.[783] A second flaw was that the majority advanced too restrictive a view of the legislative process: *any* overinclusive and underinclusive statute was presumed to be punitive. But Justice White pointed out that the Court had often recognized that a legislature can choose to deal with only part of a perceived evil and thus that it may single out a group "for regulation without any punitive purpose even when not all members of the group would be likely to engage in feared conduct."[784] The mere fact that legislation is specific does not mean that it is punitive.

Finally, Justice White considered the issue of whether or not section 504 fitted within the traditional definition of a bill of attainder. He quoted his own language in *Kennedy v. Mendoza-Martinez*[785] on the subject of punishment, but instead of conducting the painstaking analysis called for by that language, he simply concluded that the purpose of Congress in enacting section 504 was to prevent political strikes, both because it did away with some of the impracticalities and inequities of section 9(h) of the Taft-Hartley Act[786] and because Congress had a ra-

782. *Id.* at 472.

783. *Id.* at 473. Justice White obscures the issue at this juncture. His remark about legislative contempt citations is a telling one. *See* notes 811-864 and accompanying text *infra*. But the example of private bills is misleading because such bills do not necessarily adjudicate and punish; they merely "affect" individuals, as he himself said. In support of his statement about the allocation of powers among the various branches of government, Justice White cited Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957); Carfer v. Caldwell, 200 U.S. 293, 297 (1906); Reetz v. Michigan, 188 U.S. 505, 507 (1903); Dryer v. Illinois, 187 U.S. 71, 84 (1902). Again the citations are misleading because the problem is not one of how the various functions of government are allocated initially, but rather one of whether or not the legislative branch is deliberately ignoring those allocations once they have been made. Even a governmental authority possessing legislative *and* executive powers can enact a bill of attainder, depending upon which of those powers it is exercising in a given case. *See* notes 115-121 and accompanying text *supra*.

784. 381 U.S. at 474.

785. 372 U.S. 144, 168-69 (1963), *quoted in* 381 U.S. at 476. *See* note 515 and accompanying text *supra*.

786. Labor Management Relations Act of 1947, ch. 120, § 9(h), 61 Stats. 136, 146, 29 U.S.C. § 159(h) (superseded 1959). *See* note 352 and accompanying text *supra*. Section 9(h) was said to be ineffective because it could only be enforced through the medium of a prosecution for perjury and such a prosecution presented difficult evidentiary problems. 381 U.S. at 477. Moreover, section 9(h) was said to be unfair "both because the disqualification was

tional basis for its belief that Communists would call political strikes.[787] On that theory, he concluded that section 504 was not a bill of attainder, but he left open the issue of whether it was a violation of First Amendment freedoms, as the Ninth Circuit had assumed.[788]

B. Some General Observations

Brown is a crucial decision for several reasons. First, there was the matter of timing. Between 1868 and 1965, the United States Supreme Court had invalidated only two enactments as bills of attainder. One was the West Virginian expurgatory oath held void in *Pierce v. Carskadon*,[789] which consisted of a two-sentence per curiam opinion of relatively little intrinsic importance. The other was *United States v. Lovett*,[790] which was an important but anomalous decision. Because it involved a statute imposing disabilities on three named individuals,[791] *Lovett* could be very easily distinguished on its facts from most other cases in which bill of attainder challenges were raised. Thus, the last time the Court had handed down an opinion invalidating a statute directed against a general class of unnamed persons was in *Cummings v. Missouri*[792] and *Ex parte Garland*.[793] One could be excused for concluding, circa 1965, that the proscriptions against bills of attainder contained in article one, sections nine and ten of the Constitution formed an often-glimpsed but little-used backwater of constitutional law that had once been heavily trafficked, but had since fallen into an enduring desuetude. *Brown* changed that; it breathed life back into the moribund corpus of the bill of attainder doctrine.

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visited on the whole union membership and because the taking of an oath was exacted of all union leaders, many of whom resented it." *Id.* Justice White's summary is accurate. Although the Court held that proof of membership proscribed by section 9(h) could be based on statements protected by the First Amendment, Killian v. United States, 368 U.S. 231, 253 (1961), it had also held that the National Labor Relations Board lacked independent jurisdiction to determine if an oath was executed falsely, so that any such determination had to be made by a court in a perjury prosecution, Amalgamated Meat Cutters v. NLRB, 352 U.S. 153, 156 (1956); Leedom v. International U. of Mine, Mill & Smelter Workers, 352 U.S. 145, 151 (1956). As a result, only eighteen such prosecutions were brought. EMERSON, *supra* note 638, at 171.

787. 381 U.S. at 477-78. This rational basis was said to consist of the Court's conclusion that the Communist Party is likely to cause political strikes. *See* American Communications Ass'n v. Douds, 339 U.S. 382, 391 (1950).

788. 381 U.S. at 478.

789. 83 U.S. (16 Wall.) 234, 239 (1872). *See* notes 438-439, 444 and accompanying text *supra*.

790. 328 U.S. 303 (1946). *See* notes 180-197 and accompanying text *supra*.

791. *See* note 182 *supra*.

792. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

793. 71 U.S. (4 Wall.) 333 (1867). *See* notes 71-81 and accompanying text *supra*.

Second, *Brown* was the first decision to strike down a modern example of anti-Communist, anti-subversive legislation. The one decision by a state court that had attempted a similar approach was promptly reversed on appeal.[794] Indeed, after decisions like *American Communications Association v. Douds*,[795] *Garner v. Board of Public Works*[796] and *Communist Party of the United States v. Subversive Activities Control Board*,[797] an impartial observer might have reasonably concluded that such legislation was, in general, impervious to bill of attainder challenges. *Brown* indicated that such a conclusion would be false.

Third, *Brown* raised the level of discourse about the bill of attainder clauses. Other decisions had allotted the subject minimal consideration. In the course of Chief Justice Vinson's plurality opinion in *Douds*, the attainder challenge was allotted two paragraphs amounting to less than one page out of a total of thirty. Justice Clark's seven-page majority opinion in *Garner* relegated discussion of the topic to three paragraphs comprising less than two pages. Similarly, Justice Frankfurter's one hundred and forty-four page opinion in the *Communist Party* case devoted a scant seven pages to the subject. If length of discussion and incompleteness of treatment are reliable indicators, these three opinions suggested that the Court did not believe that attainder arguments presented a constitutional challenge meriting as serious or as extended an analysis as would be accorded to a First Amendment claim, for example. *Brown* indicated otherwise. The Supreme Court could have followed the lead of the Ninth Circuit in this case and disposed of the issues raised by the government's appeal on First and Fifth Amendment grounds; instead, it elected to engage in a twenty-one page analysis of the bill of attainder doctrine. By this very fact, it reaffirmed a principle recognized in *Cummings* and *Garland*: that the proscriptions contained in article one, sections nine and ten of the Constitution impose serious restraints on the powers of federal and state legislatures, which courts are duty-bound to appraise in a meaningful and careful fashion.

Fourth, and most importantly, *Brown* appeared to augur a new direction in the Court's development of the bill of attainder doctrine. This is indicated by Justice White's dissent. In many ways, that dissent is itself problematical because Justice White deliberately misrepresented Chief Justice Warren's majority opinion by claiming that it re-

794. *See* notes 199-211 and accompanying text *supra*.

795. 339 U.S. 382 (1950). *See* notes 349-355 and accompanying text *supra*.

796. 341 U.S. 716 (1951). *See* notes 566-573 and accompanying text *supra*.

797. 367 U.S. 1 (1961). *See* notes 366-372, 611-622 and 721 and accompanying text *supra*.

lied on the concepts of underinclusiveness and overinclusiveness, when in fact the Chief Justice expressly disavowed such an intention.[798] In claiming that the majority's logic would prohibit Congress from enacting conflict-of-interest statutes, Justice White neglected the three differences the Chief Justice posited between such statutes and section 504.[799] Similarly, Justice White ignored the mass of supporting authority cited by the majority when he asserted that the doctrine of separation of powers could not be utilized to justify the presence of the bill of attainder clauses in the Constitution.[800] Moreover, after arguing that the majority should have analyzed the issue of punishment by adopting the methodology established in *Kennedy v. Mendoza-Martinez*,[801] the dissenters themselves eschewed such an approach, relying on inferences drawn from the differences between section 504 and its predecessor and the nature of the evidence presented by witnesses who testified before Congress.[802] But Justice White was accurate when he suggested that the majority opinion in *Brown* casts doubt upon the holdings in cases like

798. At one point in his opinion, Chief Justice Warren said that "[a]lthough it may be that underinclusiveness is a characteristic of most bills of attainder, we doubt that it is a necessary feature. We think it clear from [United States v. Lovett, 328 U.S. 303 (1946)] that [the rider to the appropriations bill involved in that case] would have been voided even if it could have been demonstrated that no one other than Lovett, Watson and Dodd possessed the characteristics Congress was trying to reach. The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated." United States v. Brown, 381 U.S. 437, 449 n.23 (1965). Similarly, the Court warned that its use of overbreadth analysis in ascertaining why section 504 did not utilize a legitimate shorthand expression was not meant to indicate that overbreadth is a necessary characteristic of an attainder. *Id.* at 456 n.31.

799. *See* notes 751-755 and accompanying text *supra*. Two subsequent cases upheld conflict-of-interest statutes by citing this language in the Chief Justice's opinion. *See* United States v. Nasser, 476 F.2d 1111, 1116 (7th Cir. 1973) (upheld 18 U.S.C. § 207(a) (1976), which bars former government employees from acting as agents or attorneys for another in a matter in which the employee participated personally and substantially while in government employ as this statute was applied to the case of an IRS attorney who accepted work as counsel for one who had been the subject of a tax investigation in which the attorney had taken part; the work accepted was the defense of a prosecution arising from that investigation); Fitzgerald v. Catherwood, 388 F.2d 400, 407 (2d Cir. 1968), *cert. denied*, 391 U.S. 934 (1968) (upheld N.Y. LAB. LAW §§ 723, 725 (McKinney 1973), making it unlawful for an officer of a labor organization to hold a financial interest in an employer whose workers are represented by that organization). *See also* United States v. McCarthy, 300 F. Supp. 716, 721 n.7 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 160 (2d Cir.), *appeal dismissed*, 398 U.S. 946 (1970) (upheld 29 U.S.C. §§ 432(a), 439(b) (1970), requiring the criminal prosecution of one who contemporaneously serves as both the officer of a labor union and a corporate labor relations consultant without disclosing these facts to the Secretary of Labor; dismissed the attainder challenge as "not weighty.")

800. *See* United States v. Brown, 381 U.S. 437, 443-46 (1965).

801. 372 U.S. 144, 168-69 (1963). *See* note 515 and accompanying text *supra*.

802. *See* notes 786-787 and accompanying text *supra*.

Hawker v. New York,[803] *Communist Party* and *Douds*, because the majority in *Brown* evinced a willingness to consider whether the means of classification used in an allegedly regulatory enactment are truly relevant to the end sought to be achieved. Yet Justice White's fears proved to be unwarranted. In the dozen years since *Brown* was decided, only two decisions have invalidated enactments as bills of attainder.[804] The remainder of this article will examine why the hopes raised by the *Brown* decision have remained largely unfulfilled.

V. Development of the Bill of Attainder Doctrine: Post-*Brown*

In this section of the article, various decisions rendered by state and lower federal courts from 1965 to the present will be examined. The range of topics considered will be similar to that covered in Section III,[805] except that the material dealt with under the topic heading of a legislative act will differ and the subsections under the heading of punishment concerning legislative purpose,[806] the civil/criminal distinction,[807] the rights/privileges distinction[808] and the punishment per se problem[809] will not be dealt with here because they have been fully analyzed earlier. The same is true for the judicial trial component of the definition of a bill of attainder.[810]

A. "A Legislative Act"

The material in this subsection will be dealt with under two different topic headings. The first topic is the bill of attainder doctrine as it applies to legislative contempt citations. The second is the various types of legislative acts that recent cases have suggested may be exempt from the proscriptions contained in article one, sections nine and ten of the Constitution.

803. 170 U.S. 189 (1898). *See* notes 551-563 and accompanying text *supra*.

804. *See* Blawis v. Bolin, 358 F. Supp. 349, 354 (D. Ariz. 1973) (see notes 1032-1046 and accompanying text *infra*); Dodge v. Nakai, 298 F. Supp. 26, 34 (D. Ariz. 1969) (see notes 115-121 and accompanying text *supra*). For a list of all the cases invalidating legislation as attainders decided since 1868, see note 98 *supra*.

805. *See* notes 99-722 and accompanying text *supra*.

806. *See* notes 177-290 and accompanying text *supra*.

807. *See* notes 291-338 and accompanying text *supra*.

808. *See* notes 393-478 and accompanying text *supra*.

809. *See* notes 479-524 and accompanying text *supra*.

810. *See* notes 623-722 and accompanying text *supra*.

1. Legislative Contempt Citations

At first glance, legislative contempt citations might seem to be obvious examples of bills of attainder. In issuing such citations the legislature punishes a specified individual, often without any judicial trial whatsoever.[811] No court, however, has accepted the proposition that legislative contempt citations are proscribed by article one, section nine or ten of the Constitution. In this section, the reasons underlying that consistent refusal will be explored.[812]

No majority opinion of the United States Supreme Court has ever considered whether a legislative contempt citation can be classified as a bill of attainder. However, one or two dissents have addressed the issue and certainly the most notable of these is Justice Black's dissenting opinion in *Barenblatt v. United States*.[813] On June 28, 1954, Lloyd Barenblatt, an instructor in psychology at Vassar College, was subpoenaed to testify before the House Un-American Activities Committee. When he appeared before Congress, he refused to answer a set of five questions relating to his membership in the Communist Party or one of its alleged affiliates, the Michigan Council of Arts, Sciences and Professions and his acquaintance with one Francis Crowley, alleged to be a Party member. Barenblatt declined to answer these queries because he contended that the committee had no power to inquire into his private affairs; he did not invoke the Fifth Amendment.[814] After a trial for and conviction of contempt of Congress and after four years of appeals,[815]

811. There are, of course, two major types of congressional contempt procedures, one of which *does* involve a full judicial trial. *See* notes 830-835, 844-849 and accompanying text *infra*. Judicial contempts will not be discussed in this section primarily because there is no direct case authority on the subject and what little indirect case authority exists suggests that such contempts may not be subject to the prohibitions contained in article one, sections nine and ten of the Constitution. *See* note 173 *supra*. In this connection, however, one court has dismissed as meritless an attainder challenge to 18 U.S.C. § 1826 (1976), which mandates confinement for contempts consisting of a witness' failure to testify before a grand jury after having been granted use immunity. *In re* Grand Jury Investigation, 542 F.2d 166, 169 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 755 (1977).

812. For a general discussion of how the constitutional proscriptions against bills of attainder limit the contempt power, *see* R. GOLDFARB, THE CONTEMPT POWER 222-24 (1963) [hereinafter cited as GOLDFARB].

813. 360 U.S. 109 (1959). *See id.* at 153-62 (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.).

814. *See id.* at 113-15.

815. Barenblatt's contempt conviction was originally upheld by a unanimous panel of the United States Court of Appeals for the District of Columbia. Barenblatt v. United States, 240 F.2d 875, 884 (D.C. Cir. 1957). Nevertheless, the United States Supreme Court vacated this judgment and remanded the case for further proceedings in light of its ruling in another decision that a conviction for contempt of Congress could not stand where the alleged contemnor was not adequately appraised of the pertinency of the questions that he had refused to answer. Barenblatt v. United States, 354 U.S. 930 (1957) (citing Watkins v. United States,

the United States Supreme Court finally considered the case on its merits. Justice Harlan's majority opinion[816] sought to balance the petitioner's First Amendment rights against the countervailing concerns of the government. After indicating that the committee had a legitimate purpose in ascertaining the extent of Communist infiltration into this nation's educational system, he concluded that "the balance between the individual and the governmental interests here at stake must be struck in favor of the latter."[817]

In his dissent, Justice Black disagreed. He believed that the purpose of the committee was "to try witnesses and punish them because they are or have been Communists or because they refuse to admit or deny Communist affiliation."[818] After reviewing the origins and record of the House Un-American Activities Committee, Justice Black identified a consistent pattern: the committee would subpoena witnesses suspected of being Communists or "fellow travelers," and insist that each witness divulge the names and addresses of all persons he or she had ever known to be either Communists or members of Communist-front organizations. The resultant compilation of names would then be released to the press and the victims of such a blacklist became pariahs in

354 U.S. 178, 214-15 (1957)). On remand, the court of appeals again upheld the petitioner's conviction. Barenblatt v. United States, 252 F.2d 129, 136 (D.C. Cir. 1958) (en banc). It was this ruling that the United States Supreme Court was reviewing.

816. Justice Harlan was joined by Justices Clark, Frankfurter, Stewart and Whittaker. There were two dissents. *See* 360 U.S. at 134-66 (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.); *id.* at 166 (Brennan, J., dissenting).

817. 360 U.S. at 134. The continuing validity of the majority decision in *Barenblatt* is not entirely certain. Two subsequent decisions involving contempts by witnesses who declined to respond to questions put to them by members of the House Un-American Activities Committee upheld convictions by relying expressly on *Barenblatt.* Braden v. United States, 365 U.S. 431, 435 (1961); Wilkinson v. United States, 365 U.S. 399, 414 (1961). But two other decisions involving state legislative investigating committees reversed contempt convictions by construing *Barenblatt* rather narrowly. *See* De Gregory v. New Hampshire, 383 U.S. 825, 828-29 (1966) (said the staleness of the allegedly subversive and Communist activities which constituted the subject matter of the state investigation precluded any compelling state interest that warranted invasion of associational privacy protected by the First Amendment); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, 549 (1963) (reversed the contempt conviction of witnesses who refused to produce records demanded by a state commission investigating "Communist infiltration" into the Miami branch of the NAACP; distinguished *Barenblatt* by saying that the nature and aims of the NAACP differed significantly from those of the Communist Party). *See generally* EMERSON, *supra* note 638, at 247-84; GOLDFARB, *supra* note 812, at 185-224.

818. 360 U.S. at 153 (Black, J., dissenting, joined by Warren, C.J., and Douglas, J.). *See also* Uphaus v. Wyman, 360 U.S. 72, 108 (1959) (Black, J., dissenting, joined by Douglas, J.) (asserted that contempt proceedings instituted against a witness who refused to cooperate with an investigating committee chaired by New Hampshire's attorney general amounted to a bill of attainder). For similar suggestions by commentators, see note 102 *supra.*

their communities.[819] The same tactic would also be utilized to subject critics of the committee to similar opprobium and ostracism. Justice Black argued that the questioning of Barenblatt conformed to this pattern. He had been a teaching fellow at the University of Michigan from 1947 to 1950, a period during which, according to the committee, Communists had had success in infiltrating into the state's educational institutions.[820] It therefore subpoenaed various persons employed by those institutions and when those persons claimed their Fifth Amendment right of silence, they were, for the most part, later dismissed from their positions.[821] Similarly, members of the committee called upon labor unions, including teachers' unions to amend their constitutions so as to deny membership to all persons belonging to the Communist Party. As a result, Party members were, in effect, foreclosed from seeking employment in the only kind of jobs for which their particular skills qualified them.[822] Justice Black asserted that it was not the function of a legislature to compel witnesses to testify in order to expose them "to ridicule and social and economic retaliation."[823] According to him, "if communism is to be made a crime, and communists are to be subjected to 'pains and penalties,' I would still hold this conviction bad, for the crime of communism, like all others, can be punished only by court and jury after a trial with all judicial safeguards,"[824] such as those enumerated in his opinion in *United States v. Lovett*.[825] He concluded that the sole purpose of the House Un-American Activities Committee was that of exposure and punishment and this amounted to an "encroachment on the judiciary which bodes ill for the liberties of the people of this land."[826]

Disregarding the rhetorical flourishes of this portion of Justice Black's dissenting opinion, it can be seen that his fundamental contention is indefensible. Lloyd Barenblatt was found guilty of *statutory* contempt of Congress. Federal law prescribes that any person subpoenaed to appear before Congress who willfully fails to answer a pertinent question put to him or her is guilty of a misdemeanor punishable by a fine ranging from one hundred to one thousand dollars and imprisonment for not less than one month or more than one year.[827]

819. 360 U.S. at 156-57.
820. *Id.* at 158 (citing H.R. REP. No. 57, 84th Cong., 1st Sess, 15 (1955)).
821. *Id.* at 158-59.
822. *Id.* at 159.
823. *Id.*
824. *Id.* at 160.
825. 328 U.S. 303, 315-16 (1946). *See* note 627 and accompanying text *supra*.
826. 360 U.S. at 162.
827. 2 U.S.C. § 192 (1976).

When a witness fails to comply with an order to respond, the committee must report that omission to the full House, if Congress is in session, or to the President of the Senate or the Speaker of the House, if it is not.[828] When Congress is in session, the house in question must vote on whether or not to certify the alleged contempt to the United States Attorney for the District of Columbia; when it is not, either the President of the Senate or the Speaker of the House must make an independent determination whether or not to effect such a certification.[829] Once the United States Attorney receives notice of certification, he can go before a federal grand jury and seek an indictment. If the alleged contemnor is indicted, then he is, of course, entitled to a full trial in district court.

It is readily apparent that this procedure does not constitute a bill of attainder. First, there is no legislative act inflicting punishment. The report by the committee and the certification by either the full house or its presiding officer do not impose punishment. They merely authorize the United States Attorney to seek an indictment if he, in his own discretion, concludes that such a measure is warranted.[830] Similarly, the federal grand jury is under no compulsion to indict, and, if it does, the government bears the burden of proving, *inter alia*, not only that the investigative committee in question had acted within the scope of its authorizing resolution[831] and in conformity to its own internal rules,[832]

828. *Id.* § 194. For a general discussion of statutory contempt and its attendant procedures, see J. HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 91-95 (Vintage ed. 1977) [hereinafter cited as HAMILTON].

829. This particular procedural schema is not explicitly detailed in the relevant statute. *See* note 828 *supra*. Instead, it has been established by various rulings of the United States Court of Appeals for the District of Columbia. *See* Sanders v. McClellan, 463 F.2d 894, 899 (D.C. Cir. 1972); Ansara v. Eastland, 442 F.2d 751, 754 (D.C. Cir. 1971); Wilson v. United States, 369 F.2d 198, 201-03 (D.C. Cir. 1966).

830. *See, e.g.*, United States v. Cox, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935 (1965); Deutsch v. Aderhold, 80 F.2d 677, 678 (5th Cir. 1935). Both these decisions reiterate the view that federal district attorneys retain the general authority to determine how to conduct prosecutions for violation of federal law. *See also* 28 U.S.C. § 516 (1970) (vesting the power to conduct federal criminal litigation in the Attorney General and his delegates).

831. *See, e.g.*, United States v. Rumely, 345 U.S. 41, 47-48 (1953) (invalidated contempt conviction because the subpoena issued by the House Select Committee on Lobbying Activities because the Court defined the term "lobbying" as used in the committee's authorizing resolution to encompass only representations made directly to Congress rather than to the community as a whole); Shelton v. United States, 327 F.2d 601, 605 (D.C. Cir. 1963), *cert. denied*, 393 U.S. 1024 (1968) (invalidated contempt conviction because the subpoena issued by the Senate Internal Security Subcommittee was beyond the scope of its authorizing resolution). *Cf.* Quinn v. United States, 349 U.S. 155, 161 (1955) (said contempt conviction may not be based on a refusal to respond to a line of inquiry involving matters in which Congress is forbidden to legislate).

832. Gojack v. United States, 384 U.S. 702, 708-09 (1966) (reversed a contempt convic-

but also that the questions to which the defendant refused to respond were pertinent[833] and that he was informed of the reasons why they were pertinent.[834] Thus, throughout this chain of events, no single legislative act inflicting punishment can be designated; at best, the certification can merely be said to authorize another federal agency to initiate action that may or may not result in the imposition of a sanction. But more importantly, such sanctions cannot be imposed until after a full trial in a court of law. At least in the area of statutory contempt, Congress is not arrogating to itself any judicial functions because it is the

tion where the House Un-American Activities Committee failed to follow its own Rule I, requiring that all major investigations must be authorized by a majority vote of the members of the committee); Yellin v. United States, 374 U.S. 109, 121 (1963) (reversed a contempt conviction where the House Un-American Activities Committee failed to follow its own Rule IV, requiring testimony to be taken in executive session whenever a majority of the members of the committee believe that public responses to proposed inquiries will impair the reputation of the witness). But where an investigating committee fails to follow parliamentary rules of order which are not also part of internal regulations, such a procedural defect is not material. *See* United States v. Bryan, 339 U.S. 323, 329-30 (1950) (held quorum of a subcommittee need not be present when a witness refuses to respond to a subpoena).

833. *See, e.g.*, Russell v. United States, 369 U.S. 749, 755 (1962); Hutcheson v. United States, 369 U.S. 599, 618-19 (1962); Deutch v. United States, 367 U.S. 456, 468 (1961); Braden v. United States, 365 U.S. 431, 433, 435-36 (1961); Wilkinson v. United States, 365 U.S. 399, 407-09, 413 (1961); McPhaul v. United States, 364 U.S. 372, 381-82 (1960); Sacher v. United States, 356 U.S. 576, 577 (1958); Watkins v. United States, 354 U.S. 178, 208 (1957); Sinclair v. United States, 279 U.S. 263, 292 (1929).

834. *See, e.g.*, Deutch v. United States, 367 U.S. 456, 468 (1961); Barenblatt v. United States, 360 U.S. 109, 117 (1959); Watkins v. United States, 354 U.S. 178, 214-15 (1957); Knowles v. United States, 280 F.2d 696, 700 (D.C. Cir. 1960); Watson v. United States, 280 F.2d 689, 690 (D.C. Cir. 1960). *Cf.* Bart v. United States, 349 U.S. 219, 223 (1955) (invalidated indictment for contempt of Congress because committee members failed to advise the petitioner of their position on his failure to respond to questions, claiming this omission negated any possibility that the accused harbored the requisite criminal intent). Moreover, the witness could always claim as a defense to indictment that he had invoked his Fifth Amendment privilege against self-incrimination. A federal district court first so held in this context in 1950. United States v. Yukio Abe, 95 F. Supp. 991, 992 (D. Hawaii 1950). Five years later, two decisions of the United States Supreme Court assumed *sub silentio* that the Fifth Amendment applies in legislative investigations. Empsak v. United States, 349 U.S. 190, 194 (1955); Quinn v. United States, 340 U.S. 155, 161-62 (1955). In the former decision, the Court held that if an answer would be incriminating, a witness cannot be deprived of his Fifth Amendment protections merely because he could refute any adverse influence arising from his answer at some subseqent prosecution, Empsak v. United States, 349 U.S. at 201; in the latter, it held a mere reference to the Fifth Amendment was sufficient to invoke the privilege against self-incrimination, Quinn v. United States, 349 U.S. at 165. Later decisions of the Court indicate that the Bill of Rights in general limits the investigative powers of Congress. Hutcheson v. United States, 369 U.S. 599, 610-11 (1962); Barenblatt v. United States, 360 U.S. at 111-12; Watkins v. United States, 354 U.S. at 188. For a general analysis of the pertinency requirement, *see* C. BECK, CONTEMPT OF CONGRESS 155-80 (1959). For a general analysis of the Fifth Amendment in this context, see GOLDFARB, *supra* note 812, at 230-57; HAMILTON, *supra* note 828, at 211-20.

task of the judiciary to carry out any ensuing adjudication of individuals. Thus, contrary to Justice Black's contention,[835] conviction for statutory contempt does not fit within the definition of a bill of pains and penalties.

But although Justice Black cites precedents involving legislative contempt citations,[836] his true concern was not with statutory procedure but with the House Un-American Activities Committee's establishment of an informal blacklist that exposed those included on it to obloquy and economic reprisals. Here, if one ignores a federal statute specifically saying that a witness cannot refuse to cooperate with a legislative investigation because his testimony "may tend to disgrace him or otherwise render him infamous,"[837] Justice Black seems to have a better argument. There is a legislative act involved in the creation of an informal blacklist. Although no bill was ever passed into law, the committee indexed and published the names of "Fifth Amendment Communists" and "fellow travelers" as a routine part of its operations; indeed, Justice Black pointed out that as of 1949 it had disseminated the names of 335,000 people who had allegedly signed "Communist" petitions.[838] These were not judicial acts: the legislature was not applying an existing rule of general application.[839] What was or was not a "Communist" petition was left entirely up to the committee itself. Similarly, whether a person's name should be included on a list of "Fifth Amendment Communists" (itself a new definition of the word "Communist") was a matter relegated to the discretion of the members of the committee, who could so classify persons like Lloyd Barenblatt, even though he had never invoked the Fifth Amendment. Similarly, such an argument satisfies the specificity and judicial trial components of a bill of attainder. The index consisted of individual names and the persons whose names were included on it received no prior hearing whatsoever.

835. *See* note 824 and accompanying text *supra*. The error inherent in Justice Black's thesis has been underscored by the Court. Seven years after *Barenblatt*, it noted that "[m]oreover, the Congress in enacting § 192, specifically indicated that it relied upon the courts to apply the exact standard of criminal jurisprudence to charges of contempt of Congress in order to assure that the Congressional investigative power, when enforced by penal sanctions, would not be abused." Gojack v. United States, 384 U.S. 702, 707 (1966).

836. *See* 360 U.S. at 154, 162 (citing Kilbourn v. Thompson, 103 U.S. 168 (1881)). *Kilbourn* involved Congress' self-help power of contempt rather than its statutory power. *See* notes 844-849 and accompanying text *infra*.

837. 2 U.S.C. § 193 (1976).

838. 360 U.S. at 158 (citing H.R. REP. No. 1950, 81st Cong., 2d Sess., 19 (1950)).

839. For the source of the definition of a judicial act, *see* notes 122, 130 and accompanying text *supra*.

The problem, then, is really one of punishment and it has two aspects. First, could the sanctions inflicted (public ridicule and loss of employment) be deemed punitive? Although ridicule is probably too subjective a phenomenon to be construed as punishment, loss of employment was a penal sanction both at common law and in modern case law.[840] To the extent that the blacklists imposed that sanction, they had penal repercussions. But this raises the second aspect of the problem: who were the authors of these sanctions? Certainly not the House Un-American Activities Committee; it had no inherent power to terminate union membership or dismiss state employees. The role of the committee in inflicting punishment was indirect at best. The sanctions were, in fact, imposed by state authorities and private organizations reacting to the committee's index. It was their actions that could have been and often were subjected to attainder challenges.[841] The acts of the House Un-American Activities Committee, therefore, could not constitute attainders unless, like Justice Black, one would be willing to add new and hitherto unexpected dimensions to the concept of causality underlying the bill of attainder doctrine. No decision of the United States Supreme Court has accepted such an expansive approach; as Ronald Goldfarb has suggested, such an extension of the prohibition of article one, section nine "is less likely to be the successful constitutional law from which any solution will derive in this perplexing conflict."[842] A majority of the Court seems to recognize this point: it *has* been stated that legislative investigating committees may not expose merely for the sake of exposure, but this assertion has been premised not on any expansive conceptualization of the bill of attainder doctrine but

840. For common law examples, *see* note 87 *supra*. The key modern decision would be Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), which deemed an expurgatory oath that operated to deprive persons of, *inter alia*, existing positions of employment, was a bill of attainder. *See* note 66 and accompanying text *supra*. *Accord*, Putty v. United States, 220 F.2d 473, 478 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955). *See* note 636 and accompanying text *supra*.

841. *See, e.g.*, Board of Educ. v. Cooper, 136 Cal. App. 2d 513, 525-26, 289 P.2d 80, 81-82 (1955) (provision of state's Dilworth Act mandating dismissal of teachers refusing to cooperate with legislative committees investigating subversion); Opinion of the Justices, 332 Mass. 785, 789, 127 N.E.2d 663, 666 (1955) (proposed statute requiring dismissal of teachers who refuse to answer questions put to them regarding their Communist affiliations); Faxon v. School Comm., 331 Mass. 531, 538, 120 N.E.2d 772, 776 (1954) (dismissal of teacher who invoked the Fifth Amendment before a United States Senate Committee investigating Communism); Weinstock v. Ladisky, 197 Misc. 859, 875, 98 N.Y.S.2d 85, 101 (1950) (amendment to union constitution banning fascists and subversives). None of these challenges were successful.

842. GOLDFARB, *supra* note 812, at 223.

rather on the First and Fifth Amendments.[843]

Nevertheless, the foregoing discussion takes into account only part of the problem. In addition to its statutory contempt power, Congress possesses an implied power of self-help, formally recognized by the United States Supreme Court since 1821.[844] This authority is narrowly circumscribed; as the Court stated in 1917:

> It is clear that it does not embrace punishment for contempt as punishment, since it rests only upon the right of self-preservation, that is, the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed.[845]

If a person engages in such acts or commits such a refusal, the legislature may have its sergeant-at-arms arrest him and imprison him for, at most, the duration of the session of Congress in which the contempt occurred.[846] The validity of such a detention may be tested after the fact either through a writ of habeas corpus[847] or a tort action for false

843. *See* Hutcheson v. United States, 369 U.S. 599, 614 (1962); Watkins v. United States, 354 U.S. 178, 200 (1957); Quinn v. United States, 349 U.S. 155, 161 (1955).

844. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228-35 (1821) (upheld contempt proceedings against one who allegedly attempted to bribe a member of the House of Representatives to gain his vote on a land claim pending in Congress). There are three other major decisions by the Court construing this self-help power of Congress: Jurney v. MacCracken, 294 U.S. 25 (1935); Marshall v. Gordon, 243 U.S. 521 (1917); Kilbourn v. Thompson, 103 U.S. 168 (1881). *Jurney* involved a congressional investigation into contracts of carriage of air and ocean mail made by the Postmaster General. In response to a subpoena duces tecum, the alleged contemnor, a lawyer for some of the private carriers, relied on the attorney-client privilege. While the committee was deliberating on this claim, directors of Western Air Express and Northwest Airways were allowed to remove relevant documents from the attorney's files so that when he finally did produce the requested documents, there were some crucial omissions. Jurney v. MacCracken, 294 U.S. at 144-46. The Court upheld the denial of a writ of habeas corpus. *Id.* at 152. In *Marshall*, a United States Attorney for the southern district of New York conducted a grand jury investigation leading to the indictment of certain members of the House of Representatives in connection with antitrust violations. One of the congressmen so affected initiated impeachment proceedings against the attorney; the latter wrote a letter to the press, claiming that the House Judiciary Committee was trying to frustrate the efforts of the grand jury. For this, he was held in contempt. Marshall v. Gordon, 243 U.S. at 530-31. The Court upheld the granting of a writ of habeas corpus. *Id.* at 548. *Kilbourn* arose from a congressional contempt citation against a witness who declined to answer questions or produce records relevant to a real estate partnership of which he was a member (and which was implicated in the failure of Jay Cooke's banking firm). Kilbourn v. Thompson, 103 U.S. at 170. The Court upheld a $20,000 award for false imprisonment against Congress' sergeant-at-arms. *Id.* at 200. *See generally* GOLDFARB *supra* note 812, at 25-45; HAMILTON, *supra* note 828, at 85-91.

845. Marshall v. Gordon, 243 U.S. 521, 532 (1917).

846. *Id.*; Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821).

847. *See* Jurney v. MacCracken, 294 U.S. 125, 143 (1935); Marshall v. Gordon, 243 U.S. 521, 532 (1917).

imprisonment against the sergeant-at-arms who executed the command of Congress.[848] In this nonstatutory variant of legislative contempt, Congress votes to imprison a person without any judicial trial beforehand, although it usually will, if feasible, afford him an opportunity to appear so that he may attempt to rebut the charge of misconduct leveled against him.[849] No case has ever discussed whether the proscription against bills of attainder applies to such an act of Congress, but the issue was raised in state and federal lawsuits arising from the arrest and incarceration of Father James E. Groppi by agents of the Wisconsin legislature.

On September 29, 1969, Groppi, a well-known civil rights activist, led a throng of people onto the floor of the assembly of the Wisconsin legislature while it was in session in order to protest against cuts in the state budget for certain welfare programs. The resultant disruption lasted nearly twelve hours and prevented the State Assembly from conducting any further business during that day.[850] Two days later, the Assembly passed a resolution finding Father Groppi guilty of contempt and ordering the sheriff of Dane County to detain him in jail for six months, or the duration of the 1969 regular session, whichever was shorter.[851] This action was taken in accordance with a provision of the Wisconsin constitution enabling the legislature to punish for contempt and disorderly conduct[852] and a statute enacted pursuant to that constitutional provision authorizing each house of the State Assembly to penalize as contempt "[d]isorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings."[853] At the time the resolution had passed, Groppi was already confined in jail, having been arrested on disorderly conduct charges; he had been given neither notice nor an opportunity to appear before the legislature to state his case.[854] He challenged the constitutionality of the resolution in habeas corpus proceedings intiated in both state and federal courts, alleging, *inter alia*, that the resolution was a bill of attainder. The Wisconsin Supreme Court dismissed this challenge by concluding that since no legislative act was being questioned, there could be neither a bill of

848. *See* Kilbourn v. Thompson, 103 U.S. 168, 170 (1881); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 204-05 (1821).

849. Groppi v. Leslie, 404 U.S. 496, 501 (1971); Jurney v. MacCracken, 294 U.S. 125, 143-44 (1935); Marshall v. Gordon, 243 U.S. 521, 532 (1917); Kilbourn v. Thompson, 103 U.S. 168, 173-74 (1881); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 209-11 (1821).

850. State *ex rel.* Groppi v. Leslie, 44 Wis.2d 282, 288, 171 N.W.2d 192, 194 (1969).

851. For the text of this resolution, *see* Groppi v. Leslie, 404 U.S. 496, 497-98 n.1 (1972).

852. WIS. CONST. art. IV, § 8 (West 1957).

853. WIS. STAT. ANN. § 13.26(1)(b) (West 1972).

854. Groppi v. Leslie, 404 U.S. 496, 498-99 (1972).

attainder nor a bill of pains and penalties.[855] One of the decisions in federal court made an inapposite reference to Justice Black's dissent in *Barenblatt*, but concluded that the bill of attainder doctrine had never been seriously considered as a defense to a legislative contempt citation.[856] This position was affirmed by other opinions in the same case.[857]

On a writ of certiorari, however, the United States Supreme Court reversed.[858] Chief Justice Burger's opinion for a unanimous court ignored Groppi's attainder contention but reversed the rulings of the lower federal courts on the theory that the action of the Wisconsin legislature violated the due process protections guaranteed by section one of the Fourteenth Amendment.[859] The Court claimed that Groppi should have been accorded both adequate notice and an opportunity to respond by way of defense or extenuation;[860] the hearing granted need not be lengthy or incorporate all the safeguards of a judicial trial but it could not be summarily dispensed with, at least in the circumstances of this case.[861]

The contempt citation directed against Groppi *would* satisfy all the definitional prerequisites of a bill of attainder, yet both the state and federal courts dismissed such a challenge. Why they chose to do so

855. State *ex rel.* Groppi v. Leslie, 44 Wis. 2d 282, 299, 171 N.W.2d 192, 200 (1969). It is difficult to divine what the court meant by this statement; it never specified why the resolution of the Assembly was not a legislative act. It may well be that the court believed that the legislature was acting in a constitutionally-prescribed judicial capacity and that a judicial act could therefore not be subject to the proscriptions against bills of attainder. The court, however, at one point said it was not analogizing the legislative contempt power and its judicial counterpart. *Id.* at 295, 171 N.W.2d at 197. But it then proceeded to draw a number of parallels between the two. *Id.* at 295-96, 171 N.W.2d at 197-98. Thus, there is some reason to believe that it assumed that the Assembly, in citing for contempt, was adopting the function of a court of law.

856. Groppi v. Froehlich, 311 F. Supp. 772, 781 (W.D. Wis. 1970).

857. Groppi v. Froehlich, 311 F. Supp. 765, 771 (W.D. Wis.), *aff'd sub nom.* Groppi v. Leslie, 436 F.2d 326, 330 (7th Cir. 1970). Groppi had originally sought a declaratory judgment that the Wisconsin statute in question was unconstitutional. This relief was denied. Groppi v. Froehlich, 311 F. Supp. at 772. He also sought a writ of habeas corpus in federal court and the district judge hearing his request concluded that the procedure utilized by the Assembly constituted a denial of due process. Groppi v. Froehlich, 311 F. Supp. 772, 781 (W.D. Wis. 1970). The judge therefore granted the desired writ. *Id.* at 782. A panel of the United States Court of Appeals for the Seventh Circuit reversed this last ruling, concluding that the interests of the citizenry (as represented by the Assembly) outweighed the interests of Father Groppi and the full court of appeals, sitting *en banc*, affirmed this conclusion. Groppi v. Leslie, 436 F.2d at 330-31, *aff'd*, 436 F.2d 331, 332 (7th Cir. 1971) (en banc).

858. Groppi v. Leslie, 404 U.S. 496, 507 (1972).

859. *Id.* at 499.

860. *Id.* at 502-03.

861. *Id.* at 504-05. The Court found it decisive that the resolution was enacted two days after the disorderly conduct in question occurred.

is easily ascertainable. This type of summary contempt procedure is usually applied only where the necessity of preserving order and decorum require it; it is a policing device that "should be limited to '[t]he least possible power adequate to the end proposed.' "[862] Any extension of the proscription against bills of attainder to such sanctions for contempt would, because of their very nature, destroy the power of the legislature to utilize them. In view of the perceived and probably legitimate[863] need for such a policing device, it can be argued that the attainder doctrine is too indiscriminate a safeguard to apply in these cases because its ultimate effect will be to eradicate all use of, rather than merely prevent, abuses of legislative contempt citations. The United States Supreme Court arguably accepted this contention in Groppi's case. Rather than utilizing the blunt tool presented by the prohibition of article one, section ten of the Constitution, it chose to rely on the finer protective mechanism afforded by the due process clause of the Fourteenth Amendment. Thus, Justice White was correct when, in his dissent in *United States v. Brown*,[864] he stated the area of legislative contempt citations presents one situation in which the doctrine of separation of powers would be undermined, because in this situation legislatures do adjudicate and impose punishment in individual cases. But

862. *Id* at 506 (quoting *In re* Oliver, 333 U.S. 257, 274 (1948); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

863. The legitimacy of this device has best been stated by Justice William Johnson:

> That a deliberating assembly, clothed with the majesty of the people, and charged with care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every quarter of this great nation; whose deliberations are required by public opinion to be conducted under the eye of the public and whose decision must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire; that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested. And accordingly, to avoid the pressure of these considerations, it has been argued, that the right of the representative Houses to exclude from their presence, and their absolute control within their own walls, carry with them the right to punish contempts committed within their presence. . . .

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 228-29 (1821). Yet in *Groppi* one might well ask if this summary contempt power was not superfluous. The state possessed two other statutory prohibitions which it sought to enforce: one is directed against disorderly conduct in public places. *See* WIS. STAT. ANN. § 947.01 (West 1975). Groppi was, in fact, promptly imprisoned for violating this statute, although his subsequent trial resulted in a hung jury. 404 U.S. at 498-99 & n.3. The other renders any person cited for contempt of the Assembly subject to prosecution for a misdemeanor after the adjournment of the legislature. *See* WIS. STAT. ANN. § 13.27(2) (West 1975). The Assembly invoked this sanction. 404 U.S. 497-98 n.1. The latter penalty is too remote to serve as a deterrent, but the former is not. Yet none of the courts in this case considered whether the availability of these criminal prohibitions in any way militated against the necessity for a summary contempt proceeding.

864. 381 U.S. 437, 473 (1965) (White, J., dissenting). *See* note 783 and accompanying text *supra*.

one should not extrapolate from this anomaly any general thesis that the attainder clauses in the Constitution were *not* meant to safeguard that doctrine, as does Justice White. The legislative contempt cases constitute the one narrow exception to the contrary general rule.

2. Purported Exceptions

This section will consist of analyses of three recent decisions rendered by lower federal courts. These cases are unimportant in and of themselves but are indicative of a type of strategy on which courts may rely to avoid classifying challenged enactments as bills of attainder. This strategy entails an identification of those types of legislative acts that are deemed exempt from the prohibitions contained in article one, sections nine or ten of the Constitution.

The first case is *Flood v. Margis*.[865] In that suit, the plaintiffs instituted an action in federal district court to challenge the refusal of the municipal board of Caledonia, Wisconsin, to renew their license to operate a mobile trailer park within the town's limits. The court dismissed an attainder contention by remarking that "[l]icensing is a function of the town board; regardless of how arbitrary its actions are alleged to have been, such actions cannot constitute a bill of attainder."[866]

The second decision is *Clay v. United States*.[867] This suit arose from Muhammad Ali's challenge to his 1-A classification by various Texas and Kentucky selective service boards and to their concomitant refusal to accord him either 1-O (conscientious objector exemption) or IV-D (ministerial exemption, sought because appellant alleged he was a minister of the Lost Found Church of Islam) status.[868] One of his contentions was that the "whole proceeding of his classification and induction into the military service constituted a prohibited bill of attainder."[869] After having been convicted for knowingly and willfully refusing to report for and submit to induction into the armed forces,[870] Ali raised this argument as a ground for reversal in his appeal to the United States Court of Appeals for the Fifth Circuit. That court rejected his contention in a rather suggestive fashion. It could have simply stated that the purpose of the selective service legislation was not to

865. 64 F.R.D. 59 (E.D. Wis. 1974).

866. *Id.* at 61.

867. 397 F.2d 901 (5th Cir. 1968), *vacated on other grounds sub nom.* Giordano v. United States, 394 U.S. 310 (1969).

868. *See* 397 F.2d at 905-06.

869. *Id.* at 921.

870. Ali was convicted of violating 50 U.S.C. app. § 462 (1970). He was sentenced to five years' imprisonment and fined $10,000. 397 F.2d at 906-07.

punish either the appellant in particular, or the members of either his religion or his race in general. But the court seemed to accept, at least for the sake of argument, that a penalty was being exacted, because it elected to dispose of the attainder challenge by scrutinizing the judicial trial aspect.[871] The Fifth Circuit held that proceedings before local draft boards are both non-judicial and non-criminal in nature[872] and it cited with approval an unpublished opinion of the United States Court of Appeals for the Sixth Circuit denying Ali pre-induction injunctive relief on the theory that Congress did not intend that draftees should be able to litigate the validity of their classifications in the courts. Such litigation would cause interminable delays, which would, in turn, "interfere with the orderly proceedings of the draft boards and prevent them from filling their quotas and supplying the armed forces with much needed personnel."[873] The Fifth Circuit adopted a similar position, arguing that judicial review prior to induction would constitute an "open invitation to a large volume of litigation, much of which we could expect would undoubtedly be based on frivolous grounds in an attempt to delay or evade military service."[874] It cited in support of its conclusion a 1944 ruling of the United States Supreme Court that emphasized the need for administrative efficiency in processing the claims of conscripts and declared that unhesitating obedience to orders made during that process was indispensable to the achievement of the goal of national defense.[875] Therefore, the Fifth Circuit concluded that the appellant could either challenge his classification as part of his defense to a criminal prosecution for failure to report or accept induction and thereafter test the validity of that classification by means of a writ of habeas corpus.[876] Consequently, the court rejected *sub silentio* Ali's attainder challenge.[877]

871. For a discussion of this aspect, *see* notes 623-722 and accompanying text *supra*.

872. 397 F.2d at 921.

873. Ali v. Breathlitt, Docket no. 17834 (6th Cir. 1967) (unpublished), *quoted in* 397 F.2d at 922.

874. 397 F.2d at 922.

875. *Id.* at 922-23 (citing Falbo v. United States, 320 U.S. 549, 554 (1944)).

876. *Id.* at 923 (citing Witmer v. United States, 348 U.S. 375, 377 (1955)). *Accord*, Dodez v. United States, 154 F.2d 637, 638 (6th Cir.), *rev'd on other grounds sub nom.* Gibson v. United States, 329 U.S. 338 (1946). *See* notes 643-645 and accompanying text *supra*.

877. Other decisions have also rejected attainder challenges against provisions of selective service legislation. *See* Dodez v. United States, 154 F.2d 637, 38 (6th Cir.), *rev'd on other grounds sub nom.* Gibson v. United States, 329 U.S. 338 (1946); United States v. Gosciniak, 142 F.2d 240, 240 (7th Cir. 1944); United States v. Olson, 253 F. 233, 234-35 (W.D. Wash. 1917). Only *Dodez* offered any explanation for its ruling. *See* notes 643-645 and accompanying text *supra*.

Finally, in *Gianatasio v. Whyte*,[878] an enlistee in the Connecticut Army National Guard challenged an order requiring him to report for two years of active duty in the United States Army for having engaged in "unsatisfactory participation" in unit drills. The appellant had, in fact, attended all national guard drills but he had ignored repeated orders to have his hair cut shorter. He claimed that his hairstyle was a necessary adjunct to his civilian job as a shoe salesman and did not measurably interfere with his ability to perform his duties as a reservist.[879] First Lieutenant Eamonn Whyte, the appellant's immediate commanding officer, disagreed on the ground that Gianatasio was violating army regulations. After failing to get satisfactory compliance with Whyte's orders to have the appellant's hair cut shorter, the Army placed Gianatasio on two years' active duty.[880] It did so pursuant to a term in the appellant's enlistment contract which stated that any person who joined the Army Reserve and failed to serve satisfactorily could be shifted to fully active status for the duration of the period specified therein.[881] Rather than being ordered to report to the local selective service board for induction, however, Gianatasio was ordered directly into active duty in accordance with a statute passed two years after he enlisted.[882] One of the appellant's constitutional objections, therefore, was that this order to active duty constituted punishment without judicial trial in violation of the precepts promulgated in *United States v. Brown*.[883] Judge Waterman's opinion for the United States Court of Appeals for the Second Circuit rejected this contention. His rationale advances so inimitable a theory that it merits quotation in full:

> Appellant overlooks the fact, however, that he agreed in his enlistment contract to immediate induction into the active service should he "fail to participate satisfactorily" in the National Guard. Even assuming that this contract agreement did not waive any procedural rights which might otherwise have existed without it, Gianatasio does not intimate that he has actually been injured by the lack of any of these procedures. He does not here contest the fact that his hair is longer than National Guard standards permit, nor does he allege that he would have made such a contention to the Guard in hearings which were not made available to him or were not fairly conducted. We have already held

878. 426 F.2d 908 (2d Cir.), *cert. denied*, 400 U.S. 941 (1970).

879. 426 F.2d at 909.

880. *Id.*

881. *Id.* at 910. *See* 50 U.S.C. app. § 456(c)(2)(D) (1970), which mandates the inclusion of such a provision in enlistment contracts.

882. 426 F.2d at 910. *See* Act of June 30, 1967, Pub. L. No. 90-40, § 6(1), 81 Stat. 105 (codified at 10 U.S.C. § 673a (1976)). Gianatasio had enlisted on July 14, 1965.

883. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

> that the military has wide discretion in regulating hair length. . . . Therefore, inasmuch as Gianatasio has failed to show or even allege that he might have substantive rights to protect, we fail to see how any hypothetical deprivation of procedural rights can harm him.[884]

These decisions are disturbing.[885] *Flood* suggests that licensing rulings fall outside the scope of the bill of attainder doctrine. In doing so, it ignores cases like *Dent v. West Virginia*[886] and *Hawker v. New York*,[887] in which the United States Supreme Court, when confronted with attainder challenges to statutory licensing schemes, made no such facile pronouncements, but instead engaged in relatively painstaking efforts to show why the enactments being questioned ought to be characterized as regulatory rather than punitive. Of course, those cases involved laws governing professional licensure, whereas the court in *Flood* was concerned with the denial of a permit to operate a trailer park. Nevertheless, the Wisconsin district court offered no reason for distinguishing the licensing decision of the town board of Caledonia from the qualificatory schemes established by West Virginia and New York. Indeed, its statement is an assertion about licensing in general and contains no implicit differentiation based upon the subject matter being licensed. Thus, the proposition espoused in *Flood* can be seen for what it is: a wholly unsubstantiated ipse dixit.

Similar problems arise in connection with the Fifth Circuit's decision in *Clay*. That ruling seems to suggest that if the government has a compelling interest (like national defense), which can be fulfilled only through the creation of some specialized bureaucracy with its own streamlined administrative procedure, then the due process safeguards afforded by the proscriptions against bills of attainder simply become expendable. And, in light of the court's discussion, this proposition would appear to hold true even if that bureaucracy was entrusted with

884. 426 F.2d at 911. In support of its conclusion about the military's wide discretion in regulating hair length, the court cited its own ruling in Raderman v. Kaine, 411 F.2d 1102, 1106 (2d Cir. 1969).

885. Other decisions have similar connotations. *See* Cody v. United States, 460 F.2d 34, 37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1973) (upheld 18 U.S.C. § 922(a)(6) (1976), which restricts ex-felons from purchasing firearms, against an attainder challenge, saying that the "legislature, in exercising its rule-making powers, may disqualify convicted felons from pursuing activities open to others without running afoul of the bill of attainder clause."); Whitehill v. Elkins, 258 F. Supp. 589, 596 (D. Md. 1966), *rev'd on other grounds*, 389 U.S. 54 (1967) (upheld expurgatory oath exacted from public employees against attainder challenge by claiming that "loyalty oaths, as conditions precedent for public employment, if otherwise valid, are not invalid as bills of attainder.")

886. 129 U.S. 114 (1889). *See* notes 541-548 and accompanying text *supra*.

887. 170 U.S. 189 (1898). *See* notes 551-563 and accompanying text *supra*.

the duty to punish rather than to regulate. The problem is that this thesis can't prove anything. If national defense is an example of a compelling interest, then so is internal security, which is, after all, a component of such defense. Consequently, since the need to further internal security is a vital one, legislation like section 504 of the Labor Management Reporting and Disclosure Act of 1959,[888] invalidated in *United States v. Brown*,[889] could be defended against an attainder challenge by relying on the logic of *Clay* and by claiming that the need to effectively prevent the occurrence of crippling industrial strikes necessitates the exclusion of members of the Communist Party from union officerships. Obviously, the United States Supreme Court in *Brown* did not do so; instead, it considered whether or not the means used to achieve the end sought by Congress were in fact relevant.[890] In *Clay*, the Fifth Circuit eschewed such an exacting scrutiny and simply denied pre-induction judicial hearings because it claimed to foresee definite abuses if such a procedural accommodation were allowed. Thus, on the basis of its own purportedly infallible prognostications, the court of appeals exempted from the purview of the proscription against bills of attainder that class of legislation intended to effectuate compelling goals, thereby overriding the obligation to afford the panoply of constitutional protections enumerated by Justice Black in *United States v. Lovett*.[891] Once this conclusion is accepted, the implicit consequence becomes obvious: application of the prohibitions against attainders in a given case will depend primarily on how the presiding judge defines the term "compelling state interest." The mere statement of this proposition reveals its inherent fallaciousness: the language of the Constitution expresses an absolute prohibition, not a conditional restriction to be balanced against some countervailing governmental interest.

Gianatasio is an even more unconscionable decision. Judge Waterman's opinion advances three distinct theses: a person who contracts with the government (1) may, by implication, waive the procedural rights protected by the bill of attainder clauses, (2) may not be able to raise an attainder challenge if he admits that he violated standards incorporated by reference into his contract, or if he admits that he is unable to allege full compliance with those standards at some hypothetical hearing that he was, in fact, never granted and (3) may not avail himself of an attainder defense to enforcement of a contract by

888. *See* note 729 *supra*.
889. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.
890. *See* note 756 and accompanying text *supra*.
891. 328 U.S. 303 (1946). *See* note 627 and accompanying text *supra*.

the state, if the contractual provision sought to be enforced is one over which the government possesses a wide discretion. One cannot help but feel that in his zeal to preserve the military's disciplinary authority, Judge Waterman has, in effect, eviscerated the safeguards afforded by the proscriptions contained in article one, section nine of the Constitution. His decision seems to exempt a class of enactments—those creating standardized contracts between the state and the individual—from the coverage of the bill of attainder clauses. The theory of implied waiver of constitutional rights is an innovative one that no other court has ever espoused in this context; indeed, decisions in the field of public employment rendered both before and after *Gianatasio* suggest that a person does not forfeit his constitutional rights when he assumes a position in public service.[892] Similarly, to say that a person is not entitled to a judicial hearing prior to punishment if he cannot first allege full compliance with the very standards that he claims are unconstitutional[893] would seem to flout the logic of *Lovett* and *Brown*, both of which emphasized the procedural due process aspects of the attainder doctrine.[894] Finally, Judge Waterman's dictum about "wide discretion" evokes the same difficulty implicit in *Clay*, namely, if an attainder challenge cannot be raised against official action undertaken in accordance with statutory authorization because that action is deemed to be discretionary, then the safeguards afforded by the prohibitions against attainders may be easily evaded by a simple exercise of semantic manipulation.

The common flaw in all of these decisions consists of the fallacy of overgeneralization. The key aspect in most attainder cases is distinguishing punishment from regulation. It is an ad hoc process; one cannot identify a class of enactments (*e.g.*, all licensing laws, all tax

892. *See* note 418 *supra*. However, as one commentator has pointed out, the exact extent of the constitutional rights retained by servicemen is presently uncertain and, when eventually clarified, will probably not entail any severe inhibitions on the power of the military to regulate hair length. *See* J. BISHOP, JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW 144-45 (1974). *Cf.* Kelley v. Johnson, 425 U.S. 238, 246-48 (1976) (Court upheld hair length regulations for state policemen, citing the organizational structure of the police force and the need to promote esprit de corps as a basis for its ruling).

893. Gianatasio claimed that the military regulations on appearance effected an unconstitutional deprivation of livelihood. The Second Circuit disagreed and upheld their validity. Gianatasio v. Whyte, 426 F.2d 908, 911 (2d Cir. 1970). *Accord*, Wallace v. Chafee, 451 F.2d 1374, 1380 (9th Cir. 1971), *cert. denied*, 409 U.S. 933 (1973); Agrati v. Laird, 440 F.2d 683, 684 (9th Cir. 1971); Anderson v. Laird, 437 F.2d 912, 914 (7th Cir.), *cert. denied*, 404 U.S. 865 (1971). None of these cases, however, dealt with attainder challenges.

894. *See* notes 627, 740 and accompanying text *supra*. However, later decisions of the Supreme Court do raise barriers to collateral constitutional challenges in criminal proceedings. *See* notes 1062-1112 and accompanying text *infra*.

legislation, all loyalty oaths) and say that such enactments can never be bills of attainder. In all cases, courts must consider a challenged law in context, analyzing the purpose for which it was enacted, the sanctions that it imposes, the method by which it was supposed to be administered, the method by which it is in fact administered and so on. A bill of attainder challenge thus raises issues which can be properly dealt with only by a discrete analysis of the legislation being questioned. *Clay, Gianatasio* and *Flood* are of interest because the courts in those cases eschewed this technique. They offered broad generalizations about how certain types of statutes are immune to attainder challenges and then disposed of specific claims on the basis of those generalities. Significantly, the courts utilizing this illegitimate decision-making technique did not rely on precedential rulings of the United States Supreme Court in attainder cases; instead they either engaged in the assertion of ipse dixits or relied on the language of unrelated decisions to bolster conclusions concerning the scope and applicability of the attainder clauses. Such a simplistic approach is understandably attractive; it is an easy task to define the characteristics of a type of enactment and then contend that the very presence of those characteristics negates the applicability of a specific constitutional prohibition. But the problem with this methodology is the same as that which arose in the decisions drawing the distinction between civil and criminal penalties[895] or those advancing the premise that deportation is not punishment per se.[896] All these rulings substitute the invocation of simplistic labels for the hard task of ratiocination. The bill of attainder problem is not (or, at least, should not be) susceptible to a facile resolution that consists of carving out exceptions to its coverage. To the extent that courts like those in *Flood, Clay* and *Gianatasio* do so, they misrepresent the very nature of the inquiry that they are being asked to make.

B. "Inflicting Punishment"

1. Prospectivity and Retrospectivity

In 1950, in the case of *American Communications Association v. Douds*,[897] three justices[898] of the United States Supreme Court upheld

895. *See* notes 295-338 and accompanying text *supra*.
896. *See* notes 479-524 and accompanying text *supra*.
897. 339 U.S. 382 (1950). *See* notes 349-359 and accompanying text *supra*.
898. The three were Chief Justice Vinson and Justices Reed and Burton. *See* note 354 *supra*.

the expurgatory oath created by section 9(h) of the Taft-Hartley Act[899] against an attainder challenge by claiming that no enactment which prohibited future conduct instead of punishing past actions could attaint.[900] This conclusion was accepted and applied in a number of lower federal and state court decisions.[901] As late as 1961, five justices of the United States Supreme Court reiterated the view that the prospectivity/retrospectivity distinction would be decisive in determining whether or not an attainder challenge lacked merit.[902] As has been argued earlier,[903] this purported dichotomy is a false one; it is not substantiated by prior rulings of the Supreme Court, nor is it supported by an analysis of bills of attainder at English common law. The purpose of this section is to examine what effect the majority opinion in *United States v. Brown*[904] had upon this aspect of the bill of attainder doctrine in general and upon the *Douds* case in particular.

It could be argued that *Douds* is completely distinguishable from *Brown*. The former case involved an oath provision, noncompliance with which directly affected a union rather than its officers.[905] Moreover, the oath was phrased in the present tense and thus, superficially at least,[906] did not appear to reach into the past. In addition, the oath itself had an implicit escapability feature in that an individual could resign his membership in a subversive organization or renounce his unsuitable beliefs and thus become immediately eligible to execute the prescribed affidavit. Also, the oath exacted by section 9(h) established a class of proscribed beliefs as well as a category of prohibited associations.[907] Finally, a false execution of the requisite affidavit was not punishable under the terms of section 9(h) itself, but instead could only be penalized through the medium of various independent criminal pro-

899. 61 Stat. 146, 29 U.S.C. § 159(h) (1947) (superseded 1959). *See* note 352 and accompanying text *supra*.

900. 339 U.S. at 413-14. *See* note 355 and accompanying text *supra*.

901. *See* note 361 and accompanying text *supra*.

902. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961). The five were Justices Clark, Frankfurter, Harlan, Stewart and Whittaker. *See* notes 366-368 and accompanying text *supra*.

903. *See* notes 372-393 and accompanying text *supra*.

904. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

905. The effect of noncompliance with the oath requirement was, *inter alia*, to deny the union in question the jurisdiction of the National Labor Relations Board in settling labor disputes. *See* note 352 and accompanying text *supra*.

906. As has been suggested earlier, the phrasing of the oath in the present tense only disguised its essential retrospective elements. *See* notes 358-359 and accompanying text *supra*.

907. *See* note 352 and accompanying text *supra*.

visions contained in Title eighteen of the United States Code.[908] *Brown*, however, involved an entirely different situation. The statute invalidated in that case—section 504 of the Labor Management Reporting and Disclosure Act of 1959[909]—created an absolute prohibition directly affecting only union officers and involved no oath-taking. Moreover, the prohibition reached not only present membership in the Communist Party (which was designated by name, just as it had been in former section 9(h)), but also membership at any juncture during the five preceding years. Thus, unlike the oath in *Douds*, the statute involved in *Brown* expressly proscribed past action. Similarly, under section 504, if an individual terminated his membership in the Party, he could not immediately be installed as a union officer but would have to wait five years until the putative taint of his past association had sufficiently dissipated. Moreover, the statute involved in *Brown*, unlike the one involved in *Douds*, reached only individual membership in the Communist Party and not individual beliefs. Finally, section 504, unlike former section 9(h), contained its own penalty provisions.[910] All these differences suggest that when Chief Justice Warren in *Brown* confronted the government's contention that section 504 did not impose punishment in view of the Court's prior holding in *Douds*, he could have dismissed that argument by deeming *Douds* inapposite to the case at bar.

Chief Justice Warren did not do so, however. It is true that he did differentiate former section 9(h) from section 504 by pointing out the retrospective elements of the latter provision.[911] But he then went on to state categorically that punishment is not limited to retribution; it may also serve rehabilitative, deterrent and preventive purposes.[912] The Chief Justice supported this assertion by pointing out that English and colonial bills of attainder often were enacted for the purpose of deterrence and thus "inflicted deprivations upon . . . [a] person or group in order to keep it from bringing about the feared event."[913] Also, judges had recognized the prospective effects of attainders as far back as

908. In deciding two post-*Brown* cases involving prosecutions arising from violations of former section 9(h), the United States Supreme Court deemed this feature to be crucial. *See* notes 1062-1112 and accompanying text *infra*.

909. 29 U.S.C. § 504 (1970). *See* note 729 *supra*.

910. *See* note 729 *supra*. The statute prescribed both a fine and imprisonment as penalties.

911. 381 U.S. at 457-58.

912. *Id.* at 458.

913. *Id.* at 459 (footnote omitted). For some examples, *see Ex parte* Law, 15 F. Cas. 3, 9-10 (S.D. Ga. 1866) (No. 8,126).

1798.[914] Thus, this historical exegesis led Chief Justice Warren to conclude that the Court in *Douds* "misread" the prior ruling in *United States v. Lovett*,[915] when it suggested that the doctrine of the later case applied only to retributive enactments.[916] He argued that *Lovett* had implicitly recognized that prospective legislation could attaint because it invalidated on attainder grounds a statute enacted for the purpose of purging from the government's employment rolls those persons who harbored subversive beliefs.[917] The effect of this portion of Chief Justice Warren's opinion on *Douds* is devastating. The sole basis for the attainder ruling in that latter case was the prospectivity/retrospectivity dichotomy. With that distinction invalidated, *Douds* is deprived of all its precedential value, at least with respect to its analysis of the bill of attainder doctrine. Indeed, this seems to have been Chief Justice Warren's intent; he did not need to reconsider the validity of *Douds* and the fact that he engaged in a special effort to do so suggests he and his colleagues desired to discredit that prior holding. Thus, one can agree with Justice White that, after *Brown*, *Douds* is "obviously overruled,"[918] and the decisions adopting its logic must also be deemed to retain questionable precedential value.[919] A number of other opinions have expressed similar suspicions about the continuing validity of *Douds*;[920] indeed, in the thirteen years since 1965 only two obscure decisions[921] by state courts have chosen to rely on the prospectiv-

914. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 399-400 (1798).

915. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra*.

916. 381 U.S. at 460.

917. *Id.* (citing United States v. Lovett, 328 U.S. 303, 313 (1946)).

918. *Id.* at 464-65 (White, J., dissenting, joined by Clark, Harlan & Stewart, JJ.).

919. This statement may not hold true in the case of Communist Party v. Subversive Activities Control Bd., 367 U.S. 1 (1961), because that case involved judicial trial and specificity issues. *See* notes 611-622, 721 and accompanying text *supra*. For a discussion of *Brown*'s possible effects on the continuing validity of this decision, *see* notes 1006-1017 and accompanying text *supra*.

920. *See* Bryson v. United States, 396 U.S. 64, 76 (1969) (Douglas, J., dissenting, joined by Black, J.) (called *Douds* part of a "discredited regime"); Dennis v. United States, 384 U.S. 855, 880-81 (1966) (Black, J., concurring in part and dissenting in part, joined by Douglas, J.,) (claimed no substantial differences exist between the statute upheld in *Douds* and the one struck down in *Brown* as an attainder), United States v. Miller, 367 F.2d 72, 80 n.20 (2d Cir. 1966), *cert. denied*, 386 U.S. 911 (1967) (found *Brown* to be inconsistent with *Douds*); Haskett v. Washington, 294 F. Supp. 912, 917 (D.D.C. 1968) (pointed out that the law invalidated in *Brown* was very similar to the one dealt with in *Douds*); Cooper v. Henslee, 257 Ark. 963, 981, 522 S.W.2d 391, 401 (1975) (Fogleman, J., concurring) (suggests *Brown* undercuts the continuing validity of *Douds*).

921. *See* King v. Swenson, 423 S.W.2d 699, 704 (Mo. 1968), *overruled on other grounds*, State v. Baker, 524 S.W.2d 122, 131 (Mo. 1975) (challenge to a state statute providing that the sentence of one convicted of committing a crime while incarcerated shall commence to run only after the expiration of the sentence for which the inmate is being held); College

ity/retrospectivity dichotomy and one of those based its ruling exclusively on the holding in a prior state court opinion appearing twelve years before *Brown*.[922] Thus, after Chief Justice Warren's opinion in *Brown*, it would have seemed that the prospectivity/retrospectivity issue was a defunct tangent of the bill of attainder doctrine. As a matter of fact, however, *Brown* may simply have deflected the controversy surrounding this issue to another plane, where courts are required to distinguish between bills of attainder and ex post facto laws.

The prohibitions against the enactment of ex post facto legislation appearing in article one, sections nine and ten of the Constitution[923] proscribe certain types of retroactive laws, namely, those which: (1) criminalize formerly innocent conduct committed before their enactment; (2) impose a severer punishment for the commission of a crime than that which existed at the time the criminal conduct in question was committed; (3) aggravate retrospectively the nature of a crime by, for example, transforming it from a misdemeanor into a felony; and (4) require lesser or different evidence to convict an accused offender than was necessary at the time the offense occurred.[924] Even so brief a summary discloses why bills of attainder and ex post facto laws are fundamentally dissimilar. The latter prohibition applies only to criminal laws[925] and concerns either a change in the nature of such a law or an alteration in the way prosecution for a violation of such a law is to be conducted. Ex post facto legislation is neither exclusively prospective in nature nor does it deprive its victims of a trial in a court of law. In contrast, as *Brown* pointed out, bills of attainder may impose either civil or criminal sanctions[926] and may be exclusively prospective; their distinctive feature is that they involve trial and punishment by the legislature rather than by the judiciary. Thus, although both these prohibitions limit how governments enforce criminal strictures rather than

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Barn, Inc. v. State, 60 Misc. 2d 715, 717, 303 N.Y.S.2d 894, 899 (1969) (challenge to a law requiring a license to sell liquor).

922. *See* College Barn, Inc. v. State, 60 Misc. 2d 715, 717, 303 N.Y.S.2d 894, 899 (1969) (citing Peters v. New York City Hous. Auth., 9 Misc. 2d 942, 950, 128 N.Y.S.2d 224, 230-31 (1953), *modified on other grounds*, 283 App. Div. 801, 128 N.Y.S.2d 712 (2d Dep't), *rev'd on other grounds*, 307 N.Y. 519, 121 N.E.2d 529 (1954)).

923. *See* note 2 *supra*.

924. This typology was first established by Justice Chase in Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798). *Accord*, Beazell v. Ohio, 269 U.S. 167, 169 (1925); Malloy v. South Carolina, 237 U.S. 180, 183-84 (1915); Gibson v. Mississippi, 162 U.S. 565, 589-90 (1896); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325-26 (1867).

925. *See* note 314 and accompanying text *supra*.

926. For a discussion of this subject, *see* notes 295-338 and accompanying text *supra*.

how they define criminal conduct,[927] the two are not identical and should not be confused with one another. Often, given enactments are subject to ex post facto and attainder challenges,[928] but in each case the two objections are separate and ought to be accorded independent consideration.

Nevertheless, language in a few cases suggests that as long as a questioned law does not operate retroactively, it cannot be attacked as being either a bill of attainder or an example of ex post facto legislation. Thus in *France v. State*,[929] ex post facto and attainder challenges to an Ohio statute[930] establishing a licensing scheme for physicians were jointly rejected with the observation that "neither the refusal to grant nor the revocation of the [physician's] certificate has any retroactive operation, nor imposes any new or additional punishment or disability for a past act. The statute, in all its provisions, has prospective operation only and does not purport to have a retroactive effect."[931] Similarly, in *Weinstock v. Ladisky*,[932] an amendment to section 107 of the constitution of the Brotherhood of Painters, Decorators and Paperhangers of America barring fascists and subversives from that union's ranks was deemed not to be a bill of attainder because that proscription "applies to legislative enactments passed after the commission of the offense which is to be punished. The defendant's Section 107 does not create a penalty for past conduct not then an offense or increase a penalty for past misconduct. . . . it operates prospectively, and only *in futuro*."[933] In *Moone v. Hand*,[934] the Kansas Supreme Court dealt with a challenge to the state's robbery statute[935] by concluding that it could not be "a bill of attainder or an *ex post facto* law, since it has been in effect for many years prior to . . . the date the petitioner was alleged to have committed the offense for which he was convicted."[936] Finally, in *Konigsberg v. State Bar of California*,[937] a case involving various constitutional objections to the practice of the California Commission of

927. *See* Rochin v. California, 342 U.S. 165, 168 (1952). On the interrelationship among the bill of attainder clauses and the Fifth and Sixth Amendments, *see* Ullmann v. United States, 350 U.S. 422, 451-52 n.5 (1956) (Douglas, J., dissenting).

928. For examples, *see* note 132 *supra*.

929. 57 Ohio St. 1, 47 N.E. 1041 (1897).

930. Act of Feb. 27, 1896, 92 Ohio Laws 44-49.

931. 57 Ohio St. at 20, 47 N.E. at 1043.

932. 197 Misc. 859, 98 N.Y.S.2d 85 (1950).

933. *Id.* at 875, 98 N.Y.S.2d at 101.

934. 187 Kan. 495, 357 P.2d 808 (1960).

935. KAN. STAT. § 21-5277 (1949) (repealed 1970).

936. 187 Kan. at 496, 357 P.2d at 809.

937. 366 U.S. 36 (1961).

Bar Examiners of questioning prospective applicants about their affiliations with the Community Party, the United States Supreme Court stated in a footnote that "[n]o more does the state's action bear any of the hallmarks of a bill of attainder or an ex post facto regulation . . . especially in light of the fact that the petitioner was explicitly warned in advance of the consequences of his refusal to answer."[938] All of these rulings are founded on the thoroughly erroneous premise that the factors which will dispose of an ex post facto objection will also suffice as a basis for rejecting a bill of attainder challenge. But the ex post facto and attainder clauses in the Constitution are directed against fundamentally dissimilar legislative abuses and must be defended against in significantly different ways by the state. None of the cases cited above appear to recognize this basic proposition. Nevertheless, the importance of these rulings can always be discounted; three obscure state cases decided over a period of sixty-three years and a footnote in a decision of the United States Supreme Court best remembered for its First Amendment analysis[939] do not augur any trend of enduring significance. Moreover, these decisions antedate *Brown*'s disavowal of the prospectivity/retrospectivity dichotomy, which, by analogy, would appear to undermine the viability of the technique utilized by the judges in these four cases.

Having confidently made that assertion, however, one will be stopped short by an extraordinary decision rendered by the United States Court of Appeals for the Ninth Circuit in *United States v. Campanale*,[940] decided in 1975. In that suit, the defendants had been convicted of various federal crimes, including conspiracy to commit racketeering.[941] The government had shown that the defendants, who were affiliated with the Meat and Provisions Drivers Local 626 and the Pronto Loading and Unloading Company, had intimidated meat packers into employing Pronto by threatening labor strikes; it had also shown that the defendants had engaged in acts of extortion against Pronto's competitors.[942] On appeal, the defendants contended that the

938. *Id.* at 47-48 n.9.

939. *See* EMERSON, *supra* note 638, at 178-81.

940. 518 F.2d 352 (9th Cir. 1975) *cert. denied*, 423 U.S. 1050 (1976).

941. *See* 18 U.S.C. § 1962(d) (1976). The defendants were also charged with receipt of money in violation of 29 U.S.C. § 186 (Supp. V 1975), attempting to obstruct interstate commerce by extortion in violation of 18 U.S.C. § 1951 (1976), picketing for personal profit in violation of 29 U.S.C. § 522 (Supp. V 1975), and obstruction of justice through injury to property in connection with grand jury testimony in violation of 18 U.S.C. § 1503 (1976). *See* 518 F.2d at 355.

942. 518 F.2d at 355.

federal antiracketeering statute,[943] which included the provision criminalizing conspiracy to commit racketeering, violated the prohibitions against ex post facto laws and bills of attainder contained in article one, section nine of the Constitution. The Ninth Circuit claimed, however, that both contentions could be jointly rejected because a provision of the challenged legislation required at least one act of racketeering activity after the effective date of the enactment before the government could initiate a prosecution.[944] In support of this thesis, the court of appeals quoted the following extract from the report submitted to the Senate prior to the passage of the antiracketeering law:

> One act in the pattern must be engaged in after the effective date of the legislation. This avoids the prohibition against ex post facto laws, and bills of attainder. Anyone who has engaged in the prohibited activities before the effective date of the legislation is on prior notice that only one further act may trigger the increased penalties and new remedies of this chapter.[945]

Here again, the basic problem reappears: both the court and the Senate failed to distinguish between the separate purposes of and the differing defenses that must be raised against challenges based on the ex post facto and attainder proscriptions. Indeed, the effect of *Campanale* is even more deleterious than that of the discredited passages in *Douds*. At least in the latter case, the United States Supreme Court stated that a statute having an exclusively prospective effect could not attaint. *Campanale*, however, indicates that a law having *some* prospective effect in a specific case cannot attaint because of that minimal element of prospectivity. In light of this logic, if a legislature employs careful draftsmen in framing its enactments, it may, with negligible effort, ensure that the constitutional prohibition against bills of attainder will never again be used to invalidate its handiwork. *Campanale* not only ignores the clear language of the Court's decision in *Brown*; it ignores the self-evident distinction between ex post facto laws and attainders as the clauses containing those prohibitions have

943. 18 U.S.C. §§ 1961-1968 (1976).

944. 518 F.2d at 364. *See* 18 U.S.C. § 1961(5) (1976). The ruling of the Ninth Circuit has been followed by at least one subsequent decision involving this same legislation. United States v. Brown, 555 F.2d 407, 417 (5th Cir. 1977). But the Fifth Circuit dealt solely with an ex post facto rather than an attainder challenge.

945. S. REPT. No. 91-617, 91st Cong., 1st Sess., 158 (1970), *quoted in* 518 F.2d at 364. It is worth noting that neither the Senate nor the Ninth Circuit needed to go to such extremes to avoid the prohibition against bills of attainder. The anti-racketeering statute requires the imposition of punishment only after a full judicial trial in which a defendant could, presumably, challenge the very validity of the law he was charged with violating. Thus one of the key definitional components of an attainder—trial by legislature—is absent. For a general analysis of this subject, *see* notes 623-722 and accompanying text *supra*.

been interpreted by the United States Supreme Court for over one hundred and eighty years.

2. Regulation v. Punishment

To understand how the Supreme Court in *United States v. Brown*[946] dealt with the issue of regulation, it is necessary to reconsider what was said in Part III of Chief Justice Warren's majority opinion in that case. He initially made a key distinction: Congress can enact rules of general application stipulating that persons who possess certain characteristics or who commit certain acts cannot hold union office, but in all cases it must entrust to the courts the task of determining who falls within that statutory description.[947] The vice of section 504 of the Labor Management Reporting and Disclosure Act of 1959[948] was that Congress excluded from union officerships all those who belonged to a particular organization—the Communist Party—and thus deprived the courts of the responsibility of adjudication. In support of this thesis, the Chief Justice cited language in the case of *Communist Party of the United States v. Subversive Activities Control Board*,[949] suggesting that had the Subversive Activities Control Act of 1950[950] referred to the Communist Party by name rather than to "Communist-action" or "Communist-front" organizations in general, it would have been classifiable as a bill of attainder.[951]

Taken out of context,[952] this is an alarming proposition. At this juncture in the majority's opinion, it appears that the regulation/punishment distinction[953] has become inextricably intertwined with the problem of specificity:[954] if a statute is too specific, it must be

946. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

947. *Id.* at 450.

948. 29 U.S.C. § 504 (1959). *See* note 729 *supra*.

949. 367 U.S. 1 (1961). *See* notes 366-372, 611-622 and 721 and accompanying text *supra*.

950. 64 Stat. 987, 50 U.S.C. §§ 781-826 (1950) (repealed in part 1968). For a detailed description of this act, *see* notes 612-618 and accompanying text *supra*.

951. 367 U.S. at 84-85, *quoted in* 381 U.S. at 451.

952. The term "context" at this point refers not only to section III but also to section IV of Chief Justice Warren's opinion. In that latter portion, he stated that bills of attainder could apply against large groups of unnamed but sufficiently well-described persons. For a full quotation of this subsequent passage, *see* note 1015 and accompanying text *infra*.

953. The term "regulation/punishment distinction" refers to the fact that the proscriptions against bills of attainder apply only to statutes enacted for punitive rather than for regulatory purposes. *See* notes 525-530 and accompanying text *supra*.

954. The term "specificity problem" refers to the controversy surrounding the issue of how specifically must an enactment refer to its intended victims before it can be classified as a bill of attainder. See notes 591-596 and accompanying text *supra*. For a fuller discussion of the specificity problem after *Brown*, *see* notes 990-1061 and accompanyng text *infra*.

punitive; if it is not, it must be regulatory. Such a simplistic approach is erroneous because courts have often found legislation directed against named individuals or groups to be enacted for nonpunitive purposes.[955] The problem in bill of attainder analysis is not merely one of *who* is affected by a given law but also one of *why* that law was enacted; indeed, this was the lesson in *United States v. Lovett*.[956] To accept Chief Justice Warren's implied thesis that too much specificity is, *ipso facto*, indicative of punishment "would cripple the very process of legislating. For any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality."[957] Moreover, this portion of the Chief Justice's opinion seems to undercut *Cummings v. Missouri*[958] itself. That case pointed out that courts should be concerned with "substance, not shadows" and thus should strike down as bills of attainder those enactments that inflict punishment without trial even though the person penalized is neither designated by name nor identified by reference to any specific organization to which he belongs.[959] To the extent that *Brown* places undue emphasis on the specificity problem as it applies to the regulation/punishment distinction, it would seem to undermine the logic of *Cummings*.

But, to his credit, Chief Justice Warren's initial statements should not be read out of context because he did not rely solely on the facile connection between specificity and punishment. Instead, he proceeded to distinguish section 504 from a typical conflict-of-interest statute like section 32 of the Banking Act of 1933.[960] In drawing that distinction, he identified three salient differences between the two enactments. On the one hand, section 504 reached members of a "political group thought to present a threat to the national security."[961] The Chief Justice pointed out that such persons were the typical targets of English and early

955. *See* note 592 *supra*.

956. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra*. *Lovett* was the case that established the legitimacy of the doctrine that courts could consider legislative debates and records in order to ascertain whether or not a law was enacted for a punitive purpose.

957. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 470 (1977) (footnote omitted). The Court also pointed out that the proscriptions against bills of attainder cannot serve as a variant of the equal protection clause, "invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not all other plausible individuals." *Id.* at 471.

958. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

959. See note 70 and accompanying text *supra*.

960. 12 U.S.C. § 78 (1933) (amended 1935). *See* notes 749-751 and accompanying text *supra*.

961. 381 U.S. at 453.

American bills of attainder.[962] On the other hand, section 32 incorporated "no judgment censuring or condemning any man or group of men,"[963] but rather contained an implied condemnation of all men. Congress recognized that persons with conflicting business loyalties could be tempted to engage in self-aggrandizement.[964] Moreover, the majority's opinion points out that section 32 constituted an exercise in rule-making rather than specification because Congress legislated with respect to general characteristics rather than with respect to any group of individuals.[965] The designation of "officers" and "directors" of underwriting houses in the Banking Act was said to be no more than a shorthand phrase to summarize the characteristics with which Congress was concerned.[966]

Unfortunately, here also the Chief Justice creates unnecessary problems for himself and his successors. His implied contention that bills of attainder apply only to political dissidents or others thought to endanger national security is simply wrong because both English and American history are replete with bills of attainder or bills of pains and penalties which did not oppress dissident political factions in any way.[967] The fact that section 32 of the Banking Act incorporated no judgment of censure is also immaterial; *Cummings* itself did away with

962. *Id.*

963. *Id.* at 453-54.

964. *Id.* at 454.

965. *Id.* at 454-55.

966. *Id.* at 454 n.29. There is some question whether this tripartite typology was intended to distinguish regulatory from punitive statutes in general or was instead intended only to differentiate conflict-of-interest laws from true attainders. The latter, more limited interpretation is probably the correct one. Significantly enough, this threefold typology has been expressly relied on in only two decisions, both of which involved conflict-of-interest statutes. *See* note 799 *supra*. The major post-*Brown* ruling in this respect is a decision by the United States Court of Appeals for the Second Circuit that a New York law prohibiting the officer of a labor union from holding a financial interest in a firm employing union members was not a bill of attainder. After reiterating *Brown*'s tripartite typology, the court claimed that it was a "reasonable judgment that a person who represents both the employers and the employees at a collective bargaining table 'might well be tempted' to use his position as a union officer to further his interests as an employer or that consciously or subconsciously he will be prevented from serving only the best interests of the union members." Fitzgerald v. Catherwood, 388 F.2d 400, 407 (2d Cir.), *cert. denied*, 391 U.S. 934 (1968). *Fitzgerald* is notable in two respects. First, unlike section 32 of the Banking Act, the New York statute lacked any significant escapability feature. *See* N.Y. LAB. LAW §§ 723, 725 (McKinney 1973). On the escapability feature of section 32, *see* United States v. Brown, 381 U.S. 437, 455 (1965). Second, the court of appeals in *Fitzgerald* said a reasonable legislative judgment in conflict-of-interest enactments could be based on conscious *and* subconscious tendencies implicit in human nature. By contrast, the Court in *Brown* appeared to consider only conscious proclivities to commit self-dealing, since it referred to deliberate, premeditated uses of influence for the purposes of self-aggrandizement. *See id.* at 454.

967. For English examples, *see* notes 11, 27 *supra*. For American examples, *see* note

the necessity that a modern attainder must evince all the formalistic features of its parliamentary predecessors.[968] Chief Justice Warren's third point of differentiation—that section 32 was general rather than specific—seems to do no more than repeat his earlier thesis that the punishment quotient of a statute corresponds directly with its degree of specificity. But, in fact, he is interpolating a new factor into his analysis at this juncture. While some statutes like section 32 of the Banking Act may appear to be very specific in their references, they are, nevertheless, not punitive in nature, but are rather examples of rule-making, wherein the legislature has merely used a shorthand phrase to indicate what is being regulated. Thus, the majority opinion in *Brown* cannot be construed to say that merely because an enactment imposes a sanction on specified individuals, it is, *ipso facto*, an attainder. Instead, the Court expressed a clear recognition that legislatures may burden named persons so long as they do so for purposes of legitimate regulation rather than for purposes of retribution. The motives underlying the imposition of a sanction, not the form in which that sanction has been drafted and enacted, will be decisive. Through this caveat, Chief Justice Warren nullifies some of the objections that could be leveled against his earlier linkage of specificity and punishment; thus, he expressly acknowledges that Congress can impose burdens on designated groups for nonpunitive purposes.[969]

A key problem remains. If a statute designates those against whom it operates with a high degree of specificity, how can it be determined whether the legislature is merely using a shorthand expression in order to regulate or is, in fact, inflicting sanctions for punitive purposes? Chief Justice Warren never clearly defines punishment. He says it can serve retributive, rehabilitative, deterrent or preventive purposes;[970] however, with respect to the hard judicial task of ascertaining what is or is not punitive these are empty adjectives.

1004 *infra*. This topic is covered in greater depth in connection with the discussion of *Brown* and the specificity problem. *See* notes 990-1004 and accompanying text *infra*.

968. *See* notes 70, 87-91 and accompanying text *supra*.

969. *See* 381 U.S. at 454 n.29. At this point, however, he repeated the thesis mentioned earlier, see note 947 and accompanying text *supra*, that a legislature can impose disabilities upon persons having certain characteristics so long as it allows the courts to be the arbiters of whether or not a given individual is indeed one of those persons. But this is simply wrong. There have been cases where the legislature has named the person whom it is imposing sanctions upon, leaving the judiciary no choice whatsoever in the matter. In a case involving one such statute, the United States Supreme Court stated "the Act's specificity—the fact that it refers to the appellant by name—does not automatically offend the Bill of Attainder Clause." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471-72 (1977).

970. 381 U.S. at 458. *See* notes 912-914 and accompanying text *supra*.

Yet the majority opinion does offer an approach to the problem. According to the Court, the purpose of Congress in enacting section 504 was to prevent persons likely to foment political strikes from obtaining powerful positions of union leadership.[971] Thus, in general, the legislature sought to exclude from the officerships of labor organizations all those persons having a proclivity to call strikes for political reasons. Congress could have used a shorthand expression like "political strikecallers" to indicate whom it meant to legislate against. Instead it utilized the label "members of the Communist Party." Chief Justice Warren quite rightly points out that the two phrases are not semantically equivalent since there is no demonstrable relationship between an individual's status as a Party member and his proclivity to call political strikes.[972] A person might be a founding member of the Communist Party of the United States of America but nevertheless still believe that the initiation of strikes in order to further Communist purposes would only weaken the solidarity of the proletariat; similarly, a person might be a member of the John Birch Society but nonetheless be committed to using the labor walkout as a means of furthering a political objective, like the end of *détente* between the United States and the Soviet Union. The problem with section 504, then, is that it incorporates a dysfunctional classificatory label: the end sought (preventing political strikes) is not achieved by the means used (barring only Communist Party members from union officerships). What Chief Justice Warren has done, in effect, is to restate and refine the rule of relevancy developed a century earlier in *Cummings v. Missouri*.[973] Thus, a legislature

971. *Id.* at 438-39.

972. *See, id.* at 455-56. One should not become confused about what the Court is doing at this point. Justice White and one other commentator claim that Chief Justice Warren at this juncture was interpolating an underinclusiveness/overinclusiveness criterion into the bill of attainder doctrine. *Id.* at 464 (White, J., dissenting, joined by Harlan, Clark and Stewart, JJ.); *Need for Clarification, supra* note 12, at 232, 237. *See* note 772 and accompanying text *supra*. However, the Chief Justice expressly denied this. 381 U.S. at 456 n.31. *See* note 798 *supra*. The problem is not whether a given classification is simultaneously overinclusive and underinclusive, but rather whether that classification is relevant to the legislative goal it purportedly furthers. If it is irrelevant, this in itself is an indication that the legislature's true motive was punitive, not regulatory. Thus, the overinclusiveness/underinclusiveness aspect is not the evil the majority opinion in *Brown* was inveighing against; it is instead only a *symptom* of the disease that the proscription against bills of attainder was intended to cure.

973. 71 U.S. (4 Wall.) 277 (1867). *See* notes 531-540 and accompanying text *supra*. Another possible interpretation exists. It could be argued *Brown* stands for the proposition that the state may not impose disabilities on the exercise of a constitutional right, in this case the First Amendment freedom of association, first enunciated by the Court seven years earlier. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958). Under this analysis, section 504 would attaint, regardless of its relevance, because it penalizes a class of

may disqualify persons from practicing a profession or serving in an office only if it does so on grounds relevant to one's fitness to engage in that profession or to one's capability of fulfilling the responsibilities of that office; if the disqualificatory basis is irrelevant to that end, then the legislature is presumably motivated by a punitive purpose. *Brown* further embellishes *Cummings* by holding that not only the underlying reasons for disqualification but also the means used to effectuate those reasons must be relevant. While it is certainly relevant to bar persons who will commit political strikes from union officerships, if the label used to identify those persons the legislature believes are likely to engage in such activity will not consistently further the admittedly legitimate objective sought, then any qualificatory scheme incorporating that label may be a bill of attainder.

At this juncture, it is useful to re-examine the cases of *Dent v. West Virginia*,[974] *Hawker v. New York*[975] and *Garner v. Board of Public Works*[976] in light of *Brown*. The statute in *Dent*, it will be remembered, compelled prospective doctors to acquire a certificate from the state board of health stipulating that the licentiate had either graduated from a reputable medical school, practiced continuously within the state for ten years or passed a standardized exam.[977] This statute would seem to satisfy the dual relevance test of *Brown*: not only was it relevant for the state to ensure that all persons practicing medicine within its borders would possess a minimum level of competence but also the means used to ensure that that level of competence would exist were consistent with the state's ultimate objective. West Virginia imposed apposite prerequisites: either the applicant had graduated from a college which the state board of health deemed sufficiently well-staffed and well-equipped to produce adequately-trained alumni, or he had practiced for a lengthy enough period within the state so that his competence could be assessed by questioning his neighbors and patients or he had passed an exam, presumably drafted in a way to measure impartially his iatric skills or lack of them.[978] These

associations protected by the Constitution. Indeed, one other decision has expressly advanced a similar thesis. *See* Steinberg v. United States, 163 F. Supp. 590, 592 (Ct. Cl. 1958). *See* notes 462-467 and accompanying text *supra*. To date, however, no other court has interpreted the *Brown* decision in this fashion.

974. 129 U.S. 114 (1889). *See* notes 541-548 and accompanying text *supra*.

975. 170 U.S. 189 (1898). *See* notes 551-563 and accompanying text *supra*.

976. 341 U.S. 716 (1951). *See* notes 566-573 and accompanying text *supra*.

977. *See* notes 542-543 and accompanying text *supra*.

978. Of course, the classifications utilized by the West Virginia legislature are, in many ways, underinclusive. But this is not decisive. The West Virginian law, for instance, recognized diplomas from *reputable* medical colleges rather than all such colleges; it barred per-

categories all consistently furthered the state's underlying regulatory aim and thus, under the logic of *Brown*, the West Virginia statute did not punish.

The same cannot be said for the New York law in *Hawker*, barring ex-felons from receiving licenses to practice medicine.[979] While the general objective of that statute was undoubtedly relevant in that the state had a vested interest in assuring that it licenses as doctors only those persons who had exhibited good moral character and were thus worthy of being entrusted with the lives of patients, the means used to effectuate that objective were improper. The term "ex-felons" is not the "semantic equivalent" of the term "persons with bad character." One individual may have been tried and convicted of the felony of burglary but only perpetrated the offense in order to stave off starvation. Another individual may have committed multiple murders for profit but may never have been charged with any crime. Hence the classificatory label used in *Hawker* was a dysfunctional one because it failed to serve the purposes purportedly furthered by the act of classifying in the first place. In light of *Brown*, then, use of that label is punitive. Whether or not the challenged enactment in *Hawker* was also a bill of attainder depends, of course, upon whether it met the three other definitional criteria implicit in that term.

A similar problem arises with respect to the resolution of the Los Angeles Board of Supervisors in *Garner*. That enactment barred all persons from public employment who failed to execute an oath denying advocacy of forcible overthrow of the government or membership in an organization espousing such a doctrine; the terms of the oath covered both present beliefs and associations as well as those which had occurred within the five preceding years.[980] Under the logic of *Brown*, this oath is punitive for several reasons. First, its underlying purpose is irrelevant. Even assuming subversives should be barred from "sensi-

sons who have practiced in the state for less than a decade or who have practiced out of state for over ten years. Yet these lacunae are arguably reasonable. The state could have claimed that it need not recognize diplomas from all institutions because some such institutions provided inadequate training, and their alumni were therefore not qualified to be licensed. Similarly, West Virginia could have contended that while any specific time span is by necessity, arbitrary, ten years of prior practice is a relevant requirement because only after such an extended period is a medical practice capable of being reviewed. As for the in-state practice requirement, it could be argued that the board of health had neither the time nor the resources to question patients who live out of state. Certainly, the West Virginian statute was susceptible to discriminatory application, but that would seem to be the proper subject of an equal protection or a due process challenge rather than an attainder objection.

979. *See* note 552 and accompanying text *supra*.

980. *See* notes 567-568 and accompanying text *supra*.

tive" positions of public employment, it does not follow that they must be excluded from *all* public employment. Whether or not one believes in the violent overthrow of the government is fundamentally irrelevant to one's fitness to perform the functions of a janitor, a motor pool mechanic, a zoo attendant or the third assistant clerk in the city's hall of records. The enactment in *Garner* however, made no such fine distinctions and thus its underlying purpose could not be construed as merely regulatory in nature. Furthermore, the means used by the Los Angeles Board of Supervisors to effect its allegedly relevant purposes were also irrelevant. Mere membership in a subversive organization or mere advocacy of radical anarchism as an abstract doctrine rather than as a pragmatic program of action does not automatically indicate unfitness to serve as a public employee. There is no semantic equivalence between the two descriptive classifications. In *Garner*, the municipal board did use a shorthand expression to define certain characteristics but that expression was dysfunctional because it operated against both the fit and the unfit, the deserving and the unworthy. A similar problem arises with respect to the retroactive element of the oath. It not only operated against the person who temporarily terminated his membership in a subversive organization for the sole purpose of exacting the prescribed affirmance, but it also applied against the person who, three or four years earlier, experienced a true and enduring conversion from revolutionism to republicanism. In all these respects, the oath in *Garner* worked far too *indiscriminate* an exclusion. Because it was a method not precisely fitted to the end it purported to achieve and because it established irrelevant disqualificatory categories, it satisfied the punishment criterion of an attainder, at least according to *Brown*.

If the majority opinion in *Brown* is construed literally, then *Hawker* and *Garner* may have been overruled *sub silentio*. Curiously enough, only Justice White in his dissent has been willing to admit that draconian possibility.[981] Post-*Brown* decisions have implicitly or explicitly relied on the logic of either *Hawker*[982] or *Garner*[983] to reject

981. *See* United States v. Brown, 381 U.S. 437, 468-69 (1965) (White, J., dissenting, joined by Harlan, Clark and Stewart, JJ.) (discussing *Hawker* only).

982. *See* Cody v. United States, 460 F.2d 34, 37 (8th Cir. 1972), *cert. denied*, 409 U.S. 1010 (1973) (challenge to 18 U.S.C. § 922(a)(6) (1976), restricting ex-felons from purchasing firearms; held, a legitimate exercise of rulemaking powers); United States v. Donofrio, 450 F.2d 1054, 1055-56 (5th Cir. 1972) (challenge to 18 U.S.C. § 1202(a)(1) (1976), barring ex-felons from possessing or transporting firearms in interstate commerce; held, *Brown* applies to punitive laws, not enactments like this which regulate the activities of persons with criminal records); Upshaw v. McNamara, 435 F.2d 1188, 1189-90 (1st Cir. 1970) (challenge to Massachusetts law denying ex-felons the right to apply for jobs as policemen; held, prior felony conviction could serve as a reasonable basis for a legislative judgment about eligibil-

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bill of attainder challenges to various types of legislation.[984]

ity); Green v. Board of Elections, 380 F.2d 445, 449-50 (2d Cir.), *cert. denied*, 389 U.S. 1048 (1967) (challenge to New York law denying those convicted of a felony in federal court the right to vote in state elections; held, reasonable regulation of the franchise rather than punishment); Mones v. Austin, 318 F. Supp. 653, 657-58 (S.D. Fla. 1970) (challenge to state statute barring those convicted of bookmaking from patronizing local racetracks; held, not punitive, but rather enacted for the purpose of regulating gambling activities); Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 244 F. Supp. 745, 746 n.1 (W.D. Pa. 1965), *vacated on other grounds*, 372 F.2d 86 (3d Cir. 1966), *rev'd*, 389 U.S. 463 (1968) (challenge to provision of the statute involved in *Brown* affecting ex-felons; held, *Brown* did not affect laws regulating felons); Hamilton v. Indiana *ex rel.* Van Natta, — Ind. App. —, 323 N.E.2d 659, 660-61 (1975) (challenge to state law suspending license of habitual traffic offenders; held, no punishment, only lawful regulation of the highways).

983. *See* Ohlson v. Phillips, 304 F. Supp. 1152, 1156 (D. Colo.), *aff'd per curiam*, 397 U.S. 317 (1969); Whitehill v. Elkins, 258 F. Supp. 589, 596-97 (D. Md. 1966), *rev'd on other grounds*, 389 U.S. 54 (1967). Both these decisions dismissed attainder challenges to oaths exacted from public employees by referring to the Court's decision in *Garner*. But the Colorado oath involved in *Ohlson* merely contained an affirmance to uphold the state and federal constitutions and to perform one's duties faithfully. 73 COLO. REV. STAT. §§ 22-61-103 to 61-105 (1973), *formerly* 63 COLO. REV. STAT. §§ 123-17-6 to 17-8 (1963). Thus, it differed completely from the negative, expurgatory oath involved in *Garner*. The same cannot be said for the statutory affirmance involved in *Whitehill*; it required a certification that the individual was "not engaged in one way or another to overthrow" either the federal or state governments. 8A MD. ANN. CODE art. 85A, § 13 (1957). Relying on *Garner* and two state cases that had previously upheld this oath against attainder challenges (Shub v. Simpson, 196 Md. 177, 195, 76 A.2d 332, 339-40 (1950), *appeal dismissed*, 340 U.S. 861 (1950); Hammond v. Frankfeld, 194 Md. 487, 491, 71 A.2d 482, 483 (1950)), the federal district court held that no loyalty oath, if otherwise valid, could ever be invalid as a bill of attainder. *See also* Keyishian v. Board of Regents, 255 F. Supp. 981, 987 (W.D.N.Y. 1966), *rev'd on other grounds*, 385 U.S. 589 (1967) (in upholding the Feinberg Law, *see* notes 203-204 and accompanying text *supra*, stated *Garner* left open the issue whether dismissal from state employment could ever constitute the punishment necessary for a bill of attainder).

984. There are other decisions relying explicitly or implicitly on the regulation/punishment distinction that do not conform to the models provided by either *Hawker* or *Garner*. *See* Monaco v. United States, 523 F.2d 935, 940 (9th Cir.), *cert denied*, 424 U.S. 911 (1975) (challenge to the Dual Compensation Act of 1964, 5 U.S.C. §§ 3501-3503 (1976), which limited certain civil service preferences given to veterans; held, Congress had no punitive purpose, only a motive to "straighten out. . . an inequity."); George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1975) (dismissed attainder challenge to 7 U.S.C. § 499h(b) (1976), by relying on the *Zwick* case (*see infra*)); Latham v. Tynan, 435 F.2d 1248, 1251-52 (2d Cir. 1970), *vacated on other grounds*, 404 U.S. 807 (1971) (challenge to Massachusetts law requiring uninsured motorist involved in an accident to a post a bond or forfeit his license; held, no penalty, just a condition of the use of the highways); Zwick v. Freeman, 373 F.2d 110, 119-20 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967) (challenge to 7 U.S.C. § 499h(b) (1976), requiring suspension of the license of an agricultural commodities merchant who goes bankrupt and receives court approval of a reorganization plan; held, proper exercise of governmental regulatory power rather than punishment); Williams v. Sills, 55 N.J. 178, 186, 260 A.2d 505, 509 (1970) (challenge to similar statute as was involved in *Latham*; held valid as a general regulation in furtherance of the public welfare). One might also consider the cases rejecting attainder challenges to conflict-of-interest laws. See note 799 *supra*.

A number of theories may be advanced to explain why this is so. First, Chief Justice Warren's confusing discussion of specificity might lead to the assumption that unless a statute names an individual or an organization, it cannot be said to inflict punishment. As has been suggested, this assumption is undermined if the language asserting such a proposition is read in the context of the section in which it appears. If, however, one does not engage in such a reading, then it is a simple task to presume that statutes directed against general classes of persons not designated either by name or with reference to their membership in a specified organization are regulatory in nature. Second, it is possible to distinguish *Brown* from cases like *Hawker* or *Garner* by claiming, on the one hand, that section 504 dealt with anti-Communist sanctions rather than access to professions, or, on the other hand, that section 504 involved no expurgatory oath. Third, it is possible to strike down irrelevant classifactory schemes by resorting to other techniques such as the doctrine of overbreadth; in a number of cases, the United States Supreme Court has, in fact, relied on that technique rather than on the bill of attainder doctrine.[985] Finally, and most importantly, the Court in *Brown* may simply have expected too much of judges. A literal application of the technique utilized in the majority opinion in that case would require a judge to second guess a legislature, to ascertain if a disqualificatory classification that the legislature believed to be relevant is in fact relevant. Many judges may simply be unable or unwilling to engage in such an epistemological analysis, both because of their

985. *See* Whitehill v. Elkins, 389 U.S. 54, 62 (1967); Keyishian v. Board of Regents, 385 U.S 589, 604 (1967). Lower federal courts in both these cases had considered and rejected attainder challenges. *See* notes 199, 983 *supra*. For other examples, *see* note 1226 *infra*. It may well be asked why the Court in these cases chose to rely on some other rationale to overrule the enactments in question rather than on the attainder analysis that it had so recently promulgated in *Brown*. Two responses to this question might be offered. First, the Court may have wished to base its findings of unconstitutionality on the narrowest grounds possible. The conclusion that a given statute is overbroad simply informs a legislature that it must employ more careful draftsmen in effectuating its goals. In contrast, the conclusion that a given statute is an attainder implies that the very goals sought by a legislature, as well as the means that are used to implement them, are improper. Therefore, abrogating an enactment on the basis of overbreadth may well be a technique that avoids undue confrontation and conflict between legislatures and the judiciary. Second, application of attainder analysis requires judges to scrutinize legislative purpose, *see* notes 177-230 and accompanying text *supra*, whereas application of overbreadth analysis entails primarily a consideration of the terms of the challenged enactment itself in order to determine if the strictures contained therein could have been drafted more narrowly. This rather limited focus in overbreadth cases may be decidedly preferable to the more wide-ranging scrutiny undertaken in attainder analysis, especially where evidence of legislative motive is incomplete, untrustworthy, inconclusive or simply non-existent. Thus, both these factors may explain why the Court in *Whitehill* and *Keyishian* invalidated anti-subversive legislation on the grounds of overbreadth rather than relying on the rationale of *Brown*.

limited time and resources and because they may believe that it is not the function of the judiciary to determine whether the legislature selected the proper classificatory option from the many available to it.

The first and second theories are, as has been indicated, premised upon either a misreading of *Brown*[986] or an uncritical acceptance of some of the erroneous assertions made in the course of the majority opinion.[987] The third theory is a *non sequitur* because the application of the proscription against bills of attainder should not depend upon the availability of alternative grounds to find a statute unconstitutional.[988] The fourth theory ignores what the Court in *Brown* did. Chief Justice Warren evinced no hesitation in second guessing Congress; indeed, he felt compelled to engage in such an analysis because Congress could not have been expected to correct its own abuses and because Congress was using the judiciary to inflict, at least in part, the penalties attendant to its irrelevant categorizations.[989] To adopt the position that courts

986. Chief Justice Warren's confusing specificity discussion becomes clearer once it is read in context with the remainder of section III of his opinion. *See* notes 960-969 and accompanying text *supra*. Similarly, the argument that *Brown* has no effect on loyalty oath cases ignores its devastating effect on American Communications Ass'n v. Douds, 339 U.S. 382 (1950), a suit involving an expurgatory oath. *See* notes 911-918 and accompanying text *supra*.

987. Namely, the theory that the proscriptions against bills of attainder apply only to laws directed against political dissidents. For a critique of this thesis, *see* notes 996-1004 and accompanying text *infra*.

988. *But see Punishment, supra* note 14, at 269. That commentator argued that attainder challenges should be "subrogated" to procedural due process claims. He also contended that the Court in Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), only relied on the proscription against attainders because it was writing at a time when the concept of due process had not yet been developed fully and thus was unavailable as a constitutional decisionmaking tool. That assessment appeared in 1959; it cannot explain the result in *Brown*, which was decided six years later. There, the Court eschewed a potentially decisive First Amendment analysis and instead relied solely on the ban against attainders in article one, section nine of the Constitution. The fact that it did so suggests that it is premature to treat the proscriptions against bills of attainder as dead letters of constitutional law, ready to be subsumed under due process or equal protection analysis.

989. The role of the judiciary was to punish those persons who committed willful violations of section 504; thus, that statute contained its own penalty provisions. *See* note 729 *supra*. This fact raises a problem the Court never dealt with directly. The government might have argued that, as applied to Archie Brown, section 504 did not attaint, because he suffered punishment (*i.e.*, a sentence of six months in prison) only after a full trial by jury in a court of law. The difficulty with this argument is that Brown received such a trial only because he decided to flout the law; had he not chosen to do so and instead surrendered voluntarily his union officership on the date section 504 became effective, he would have suffered a deprivation without trial, because of his status as a member of the Communist Party.

The Court's disposition of *Brown* suggests two possible interpretations. The first is that the majority, as a matter of policy, simply allowed the respondent to raise an attainder challenge even though, as to him, a trial preceded punishment; it did so because, as applied to

should not second guess the judgment of the legislature in establishing disqualificatory classifications is to ignore the mandate of the bill of attainder clauses themselves, which require courts to intervene when legislatures usurp the functions of judges and juries.

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other persons who did not wish to commit violations of the law, section 504 imposed a sanction without a hearing. This is not an uncommon technique; indeed, it forms the cornerstone of overbreadth claims, in which a plaintiff argues not that a statute infringes his First Amendment rights, but rather that it may be administered so as to impinge upon the rights of some other hypothetical individual. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973) (recognizing that application of overbreadth analysis requires a departure from traditional rules of standing and stating such an analysis is permissible only when a law is substantially overbroad). Although the Court in *Brown* specifically disclaimed any theory that a statute must also be overbroad before it can attaint, *see* note 798 *supra*, this disclaimer does not also signify a refusal to make the same departure from the strict rules of standing as is made in overbreadth analysis.

A second interpretation of the result in *Brown* is even more expansive. It is premised on the thesis that the majority concluded the punishment being inflicted without trial in the case of the respondent was not the sentence rendered by the federal district court, but rather the very establishment of a compulsory choice requiring either surrender of one's union officership or retention of it, a course of conduct carrying with it the possibility of a criminal prosecution. Chief Justice Warren's opinion is unclear on this subject; he would appear to construe the sanction imposed by section 504 as the disqualification from union office rather than the creation of a Hobson's choice for incumbent union officials. *See* United States v. Brown, 381 U.S. 437, 458 (1965). Indeed, if this second interpretation is accepted it might lead to problems with the judicial trial aspect of the bill of attainder doctrine itself. A number of decisions have rejected attainder challenges to criminal laws on the theory that punishment for a crime follows a full judicial trial. See notes 637-642 and accompanying text *supra*. Under the second interpretation of the result in *Brown*, the position taken in those cases might have to be reconsidered. All criminal laws, by their very nature, impose a choice: either a person foregoes committing the criminalized course of conduct or he does not, thereby subjecting himself to a potential prosecution by the government.

The proposed second reading of *Brown* would necessitate the conclusion that the state, by its very act of compelling persons to make such a choice, is inflicting punishment without trial. This is a radical conclusion. While it certainly may be argued that, where a deprivation is inflicted first and an opportunity to test the validity of that deprivation is only accorded after the fact, such a procedure does not afford those affected the full safeguards of a judicial trial, *see* notes 643-654 and accompanying text *supra*, this is quite different from arguing that a law mandating the selection of either the option of inaction or that of action coupled with potential criminal liability after a full adjudication in a court of law constitutes punishment without trial. Only one commentator has even remotely intimated that the general proposition supported by this second reading of *Brown* has merit. *See Punishment, supra* note 14, at 255. In this author's opinion, the first and narrower interpretation of *Brown* is the optimal one; the second reading would unduly fetter the power of legislatures to enact *any* criminal laws. It should be noted the problems raised in this footnote arise only if one assumes that Archie Brown had at least the opportunity to lodge constitutional objections to both his indictment and his prosecution for violation of section 504. This assumption would appear to be correct. *See* Brown v. United States, 334 F.2d 488, 492 (9th Cir. 1964). Had Brown not been allowed such an opportunity, a legitimate question might be raised as to whether or not he was granted an adequate trial at all, at least for the purposes of the bill of attainder doctrine. For a further consideration of this problem, *see* notes 1062-1112 and accompanying text *infra*.

C. "Upon a Designated Person or Class of Persons"

Two major specificity problems were created by the majority opinion in *United States v. Brown*.[990] The first of these can be dealt with summarily because it is premised upon a simple misapprehension of the nature and scope of the constitutional prohibitions against bills of attainder. In his discussion of parliamentary bills of attainder, Chief Justice Warren claimed that they were a device used for dealing with persons who had attempted or threatened to attempt overthrow of the government.[991] Later, he distinguished between section 504 of the Labor Management Reporting and Disclosure Act of 1959[992] and a typical conflict-of-interest statute by pointing out that the latter inflicted no deprivation upon members of a political group deemed dangerous to national security.[993] The net effect of these statements was to create unnecessary doubt concerning whether the attainder proscriptions apply against legislation penalizing those who are *not* political dissidents. One commentator, in attempting to distinguish "classification," as that term is used in the context of equal protection analysis, from "specificity," as that term is used in the context of the attainder doctrine,[994] has

990. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

991. *Id.* at 441.

992. 29 U.S.C. § 504 (1970). *See* note 720 *supra*.

993. 381 U.S. at 453-54. *See* notes 961-962 and accompanying text *supra*.

994. *See Need for Clarification, supra* note 12, at 234-37. The author of that comment identifies another ground for distinguishing classification from specificity other than the one referred to in the text. He says:

> In many classification problems, the class is *created* by the statute and has no meaningful significance or existence as a class or identifiable group outside the context of the particular statute. Thus, should Congress make it illegal to leave the country to evade the draft, it would create a class of persons—those who are eligible for the draft and who would leave the country for the illegal purpose—who would have no identity as a class but for the statute. A bill of attainder, on the other hand, inflicts its punishment on a class of persons who have group identity independent of the particular statute, as did the Communist Party members who were barred from union office by the statute invalidated in *Brown*.

Id. at 235 (emphasis in original).

This purported distinction is illusory. A number of enactments struck down as attainders operated against groups of persons identifiable as a class only because the statute being challenged so identified them. Thus, in Putty v. United States, 220 F.2d 473 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955), *see* notes 629-636 and accompanying text *supra*, the legislation being questioned created the class of all felons whose convictions were based on informations filed by Guamanian prosecutors between August 1, 1950 and August 27, 1954. Similarly, in Steinberg v. United States, 163 F. Supp. 590 (Ct. Cl. 1958), *see* notes 462-467 and accompanying text *supra*, the statute being attacked created the utterly novel class of all retired employees who asserted their Fifth Amendment privilege against self-incrimination in response to questions by judges, grand juries or legislative investigating committees concerning their former governmental service. Again, in Jones v. Slick, 56 So. 2d 459 (Fla. 1952), an ordinance enacted by the city council of North Miami Beach requiring the fining, imprisonment or dismissal of any municipal official deemed to be disobeying a council or-

understandably derived from *Brown* the following proposition:

> Bills of attainder in England were frequently products of political turmoil and unrest. Their victims were usually individuals who posed a threat to the security of the crown or to established political alliances in Parliament. English acts of attainder which identified their victims on some basis other than name generally did this by describing the adherence of the attainted to a person or persons engaged in activities deemed treasonable. This suggests that the specificity barred by the bill of attainder clause is identification in a statute of individuals because of their membership in groups or association with other individuals engaged in unpopular political activities.[995]

The problem with this thesis is that it *ignores* history. A number of parliamentary bills of attainder or bills of pains and penalties inflicted deprivations not upon members of political minorities but upon members of communities that allegedly tolerated voting fraud,[996] or those who married issue of the king without his consent[997] or those who enabled political prisoners to escape from royal jails, regardless of whether they were adherents to the cause for which such a prisoner had been incarcerated, or because they were common criminals doing a job for

der and judged guilty of disobedience by a two-thirds vote of the members of the council was struck down as an attainder, even though the class created lacked independent significance apart from the statute. *See id.* at 461-62. The decisions of the United States Supreme Court only underscore the point. In Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), *see* notes 54-70 and accompanying text *supra*, the challenged provisions of the state constitution inflicted deprivations upon the class of all persons who refused to execute an expurgatory oath; included in that class were groupings of independent significance (ex-Confederates and their sympathizers) and a collection of others who could or would not subscribe to the oath. *See* notes 587-588 and accompanying text *supra*. The heterogeneous class thus created had no meaningful existence apart from the provision of the state constitution in question. Similarly, in the *Brown* case itself, the class of those affected by section 504 did *not* consist of members of the Communist Party per se. Rather, it consisted of all those Party members who occupied or sought to occupy union offices *and* of certain felons possessing a similar position or entertaining a similar desire. The artificiality of this class was heightened by the retrospectivity requirement, which also barred *ex*-Communists and those felons whose convictions or whose sentences ended at a certain date. *See* note 729 *supra*. When the full class description contained in section 504 is considered, it becomes thoroughly absurd to allege that the grouping created by that statute had an independent identity. In fact, the class created by section 504 is one that would not even exist *but for* the statute itself. Thus, the proposed distinction advocated by the commentator quoted earlier is a fictive one, which is not substantiated by either the decisions of the United States Supreme Court or those rendered by lower state and federal courts.

995. *Need for Clarification, supra* note 12, at 235-36 (footnotes omitted).

996. *See, e.g.*, 1 & 2 Geo. 4, c. 47, § 1; 26 STATS. U.K. 358 (1821); 22 Geo. 3, c. 31, § 1; 14 STATS. U.K. 188 (1782); 11 Geo. 3, c. 55 § 2; 11 STATS. U.K. 314 (1771). For quotations from and descriptions of these bills, *see* note 11 *supra*.

997. 28 Hen. 8, c. 18; 2 STATS. U.K. 261 (1536). *See* note 27 *supra*.

money.[998] A similar situation is presented by a consideration of American attainder decisions. While all five rulings of the United States Supreme Court that have invalidated challenged enactments on attainder grounds involved laws directed against political factions,[999] not until *Brown* did the Court intimate that the prohibitions against attainders apply *only* to enactments entailing partisan political oppression. Indeed, in cases concerning attainder challenges to apolitical legislation, like that involved in *Dent v. West Virginia*,[1000] *Hawker v. New York*[1001] or *DeVeau v. Braisted*,[1002] the United States Supreme Court relied on no spurious distinction between attempts to attaint those who engage in "unpopular political activities" and those who do not, but instead relied on the genuine dichotomy between regulation and punishment. A glance at lower federal and state court decisions rendered since 1867 serves to emphasize this point. Of the nineteen[1003] decisions invalidating various enactments as bills of attainder, eight[1004] involved

998. *See, e.g.*, 9 Geo. 1, c. 15; 5 STATS. U.K. 448 (1722). *See* note 29 *supra*.

999. Three of those rulings involved enactments directed primarily against ex-Confederates and Confederate sympathizers. *See* Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872), *see* notes 438-439, 444 and accompanying text *supra*; *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867), *see* notes 71-81 and accompanying text *supra*; Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), *see* notes 54-70 and accompanying text *supra*. The fourth involved a statute penalizing three named persons deemed by Congress to be subversives. *See* United States v. Lovett, 328 U.S. 303 (1946), *see* notes 180-197 and accompanying text *supra*. The *Brown* case itself involved a statute which, at least in part, was directed against members of the Communist Party. *See* note 729 *supra*.

1000. 129 U.S. 114 (1889). *See* notes 541-548 and accompanying text *supra*.

1001. 170 U.S. 189 (1898). *See* notes 551-563 and accompanying text *supra*.

1002. 363 U.S. 144 (1960). *See* notes 565, 658-661 and accompanying text *supra*.

1003. *See* note 98 *supra*.

1004. *See* Putty v. United States, 220 F.2d 473 (9th Cir.), *cert. denied*, 350 U.S. 821 (1955) (statute retroactively validating prosecutorial informations against defendants accused of committing a felony who were subsequently convicted; *see* notes 629-636 and accompanying text *supra*); Davis v. Berry, 216 F. 413 (S.D. Iowa 1914), *rev'd on other grounds*, 242 U.S. 468 (1917) (law mandating vasectomies for idiots, drunkards, drug fiends, epileptics, syphilitics, moral degenerates and those convicted twice of felonies; *see* notes 458-461 and accompanying text *supra*); *In re* Yung Sing Hee, 36 F. 437 (C.C.D. Ore. 1888) (legislation construed to bar citizens of Chinese extraction who left the country for any reason from ever returning; *see* notes 485-490 and accompanying text *supra*); Steinberg v. United States, 163 F. Supp. 590 (Ct. Cl. 1958) (enactment terminating the annuity of a retired federal employee refusing to answer the questions put to him by a judge, grand jury or legislative investigating committee about his former governmental service; *see* notes 462-466 and accompanying text *supra*); Jones v. Slick, 56 So. 2d 459 (Fla. 1952) (ordinance requiring punishment of municipal officials who fail to obey orders of the city council; *see* note 994 *supra*); McNealy v. Gregory, 13 Fla. 417 (1870) (constitutional amendment retroactively invalidating all promissory notes, deeds or bills of sale given in exchange for slaves, *see* notes 108-114 and accompanying text *supra*); Commonwealth v. Jones, 73 Ky. (10 Bush) 725 (1874) (anti-duelling expurgatory oath exacted from public officials); Opinion to the House of Representatives, 80 R.I. 281, 96 A.2d 623 (1953) (proposed law disqualifying relatives of

legislation directed against apolitical categories of individuals, such as criminals, citizens of Chinese extraction, duellists or relatives of incumbent municipal officials. Thus, both the commentator quoted above and Chief Justice Warren in *Brown* misconstrue the nature of the proscription against bills of attainder when they claim that it applies only to legislative acts directed against unpopular or dangerous political factions.

The second aspect of the specificity problem raised by *Brown* is far more significant. As noted earlier,[1005] specificity as an element of the definition of a bill of attainder became problematic largely as a result of the United States Supreme Court's decision in *Communist Party of the United States v. Subversive Activities Control Board.*[1006] In that case, Justice Frankfurter, speaking for a majority of the Court found that the Subversive Activities Control Act of 1950[1007] did not attaint because it failed to designate the Communist Party by name. Instead, the enactment referred only to "Communist-action" and "Communist-front" organizations, as defined by Congress.[1008] The effect of the decision in *Brown* on the ruling in the *Communist Party* case is difficult to ascertain. On the one hand, Chief Justice Warren noted the language in the latter case stipulating that section three of the 1950 act, which defines "Communist-action" organizations,[1009] constituted rule-making rather than specification[1010] because the Communist Party fit within the definition of a "Communist-action" organization by virtue of the conduct in which it engaged and which it could abandon. On the other hand, he also noted that Justice Black, in his dissent, had vigorously rejected this thesis.[1011] The Chief Justice proceeded to cite the *Communist Party* case in support of the proposition that if a law disables members of an organization designated by name without any hearing, it is, in all likelihood, a bill of attainder.[1012] On the basis of this citation, the majority opinion in *Brown* was able to characterize

elected officials or agency heads from holding any appointive municipal office during the elected term of the official or the designated tenure of the agency head; *see* note 565 *supra*).

1005. *See* notes 611-614 and accompanying text *supra.*

1006. 367 U.S. 1 (1961). *See* notes 366-372, 611-622 and accompanying text *supra.*

1007. 64 Stat. 987, 50 U.S.C. §§ 781-850 (1950) (repealed in part 1968). For a detailed description of this act, *see* notes 612-618 and accompanying text *supra.*

1008. 367 U.S. at 86. *See* note 614 and accompanying text *supra.*

1009. For a paraphrasing of this definition, *see* note 615 and accompanying text *supra.*

1010. United States v. Brown, 381 U.S. 437, 451 (1965).

1011. *Id.* (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 146 (1961) (Black, J., dissenting)).

1012. *Id.* at 451-52 (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86-87 (1961)).

section 504 without any difficulty; it attainted because, by its very terms, it inflicted deprivations upon those belonging to a specific entity, the Communist Party.[1013] Thus, the majority in *Brown* appeared to accept the narrow thesis about specificity set forth by Justice Frankfurter in the Court's earlier decision.

Nevertheless, in Part IV of his opinion in *Brown*, Chief Justice Warren included language susceptible to a less limiting construction. In response to the contention that the statute depriving Communists of union officerships, unlike the legislation involved in *United States v. Lovett*,[1014] singled out no person by name, the Chief Justice replied:

> It is of course true that § 504 does not contain the words "Archie Brown," and that it inflicts its deprivation upon more than three people. However, the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference. It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people, sometimes by description rather than name. Moreover, the statutes voided in *Cummings* and *Garland* were of this nature. We cannot agree that the fact that § 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder.[1015]

Not only does this passage emphasize the point that statutory language describing rather than naming its victims can attaint, but it also refers to the decisions of *Cummings v. Missouri*[1016] and *Ex parte Garland*,[1017] rulings which contained no limiting language on the subject of specificity. These two factors support the construction that the majority in *Brown* did not merely reiterate without criticism the specificity doctrine announced four years earlier by Justice Frankfurter in the *Com-*

1013. *Id.* at 452. Of course, the citation to the *Communist Party* case at this juncture raises another problem. The Court in that earlier case linked specificity with the fact that the organizations affected by the Subversive Activities Control Act of 1950 were not being singled out irrevocably because of the past conduct of their constituents, but could, at all times, remove themselves unilaterally from the unfavorable classification created by the statute. *See* notes 614, 620-621 and accompanying text *supra*. But *Brown* teaches that any attempt to exempt a particular piece of legislation from the constitutional proscriptions against bills of attainder because of its lack of retributive effect will not be permitted. *See* notes 757-765 and accompanying text *supra*. Thus, to the extent that the specificity doctrine of the *Communist Party* case rests upon the prospectivity/retrospectivity distinction, it may well have been undermined by the Court's ruling in *Brown*. Nevertheless, no subsequent judicial decision has considered this aspect of the *Brown* case with respect to the problem of specificity, so this suggested interpretation of that case is purely speculative.

1014. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra*.

1015. United States v. Brown, 381 U.S. 437, 461 (1965) (footnotes omitted).

1016. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

1017. 71 U.S. (4 Wall.) 333 (1867). *See* notes 71-81 and accompanying text *supra*.

munist Party case; rather, the Court indicated a willingness to return to a more flexible, less particularized concept of specificity, one which incorporates a recognition that the victim of an attainder could be identified by name, by reference to his affiliation with another person or organization, or by reference to either the acts he had committed or was likely to commit or to the beliefs he had advocated or would be likely to advocate. On the other hand, the entire point of this excursus by Chief Justice Warren is that identification by reference to membership in a *named* organization constitutes a sufficient description. It could be argued that he was merely advancing the theory that if the challenged enactment did not designate its victims by name, then it had to refer specifically to the appellation of the entity with which they were affiliated. This second construction would entail the conclusion that *Brown* did indeed follow the doctrine of the *Communist Party* case.

A year later, in a dictum in the case of *South Carolina v. Katzenbach*,[1018] the Court seemed to endorse the latter construction of the language in *Brown* when it stated that the bill of attainder clauses could not be invoked by states but were intended "only as protections for individual persons and private groups, those who are particularly vulnerable to nonjudicial determinations of guilt."[1019] Consequently, a number of post-*Brown* decisions rendered by state and lower federal courts have relied, in whole or in part, on specificity grounds to reject attainder challenges. Thus, the United States Court of Appeals for the Second Circuit held that a federal law requiring the revocation of the license of any agricultural commodities dealer who goes bankrupt and wins subsequent court approval of a reorganization plan[1020] did not attaint because, *inter alia*, it did "not name or describe [the] petititoners or any group to which they belong."[1021] Similarly, a California district court of appeal upheld a statute suspending the license of any driver who refuses to submit to a sobriety test[1022] because, *inter alia*, the statute did "not apply to a certain individual nor to a narrowly defined

1018. 383 U.S. 301 (1966).

1019. *Id.* at 324.

1020. 7 U.S.C. § 499h(b) (1976).

1021. Zwick v. Freeman, 373 F.2d 110, 119 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). *Accord*, George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 994 (2d Cir.), *cert. denied*, 419 U.S. 830 (1975). *Cf.* United States v. Ilacqua, 562 F.2d 399, 404-05 (6th Cir. 1977) (challenge to 18 U.S.C. § 3575 (1976), authorizing imposition of an enhanced sentence against dangerous special offenders; held, statute does not attaint because it singles out no individual for punishment, but rather operates as a prohibition of general application).

1022. CAL. VEH. CODE § 13353 (West 1975).

group, but to *all* licensed drivers."[1023] An identical thesis was advanced by the Washington Supreme Court, which rejected the contention that a state law mandating the suspension of the licenses of all motorists deemed habitual traffic offenders[1024] could constitute a bill of attainder by remarking that "the act does not single out any individual or easily ascertainable members of a group, as the act applies to all users of the highways who come within the ambit of the definition of an habitual traffic offender."[1025] Similarly, the New Jersey Supreme Court concluded that an enactment requiring uninsured motorists involved in an accident to post bond or forfeit their licenses[1026] did not attaint because it punished no specified group.[1027] That court relied in part on its prior affirmance of a decision that had dismissed an attainder challenge to a statute stipulating that no records maintained by the State's Workmen's Compensation Division would be open to inspection or duplication by any organization intending to sell the information contained therein,[1028] by noting that the plaintiff had not been singled out for deprivation because the statute applied to all similarly situated information-gathering firms.[1029] Most recently, the Kansas Supreme Court rejected the argument that the state's criminal law prohibiting forcible sodomy[1030] attainted any group of individuals because, *inter alia*, that law identified no persons who were subject to punishment.[1031] In light of these decisions, one might legitimately wonder what degree of specificity is needed before a legislative act *will* be struck down as a bill of attainder.

1023. Westmoreland v. Chapman, 268 Cal. App. 2d 1, 5, 74 Cal. Rptr. 363, 366 (1968) (emphasis in original). *See* notes 697-709 and accompanying text *supra*.

1024. WASH. REV. CODE ANN. § 46.65.050 (West Supp. 1977).

1025. State v. Scheffel, 82 Wash. 2d 872, 881, 514 P.2d 1052, 1058 (1973). *See* notes 719, 720 *supra*.

1026. N.J. STAT. ANN. § 39:6-25(a), (b) (West 1973).

1027. Williams v. Sills, 55 N.J. 178, 186, 260 A.2d 505, 509 (1970).

1028. 1966 N.J. Laws, ch. 164.

1029. Accident Index Bureau, Inc. v. Male, 95 N.J.Super. 39, 49, 229 A.2d 812, 817 (1967), *aff'd per curiam*, 51 N.J. 107, 237 A.2d 880 (1968), *appeal dismissed*, 393 U.S. 530 (1968). This decision was also cited as controlling in the case of Oueilhe v. Lovell, 560 P.2d 1348, 1350 (Nev. 1977) (attainder challenge to a Las Vegas ordinance prohibiting the establishment of or advertising for a business that promotes wrestling matches between members of the opposite sex; held, the challenged enactment did not attaint because it did not purport to single out the appellant by name).

1030. KAN. STAT. ANN. § 21-3506 (1974).

1031. State v. Thompson, 221 Kan. 165, 173, 558 P.2d 1079, 1085 (1976). *See also* Marter v. State, 224 Ga. 569, 570-71, 163 S.E.2d 702, 704 (1968), *cert. denied*, 393 U.S. 1123 (1968) (upheld GA. CODE § 26-7101 (1963) (repealed 1968), barring the acts of "rogues and vagabonds," specifically, being present in a place where one has no right to be, with intent to steal; held, statute does not assess any penalty against "rogues and vagabonds as generally known and defined.")

The answer is provided by *Blawis v. Bolin*.[1032] That case involved a challenge to the Communist Control Act of 1954[1033] and its Arizonan counterpart.[1034] The federal act contained findings that the Communist Party was an "instrumentality of a conspiracy" to overthrow the government and thus constituted a "clear present and continuing danger to the security of the United States."[1035] In addition to stipulating that members of the Communist Party would be subject to the provisions and penalties of the Subversive Activities Control Act of 1950,[1036] the 1954 statute contained the following language:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States . . . by force or violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof; and whatever rights, privileges, and immunities which have heretofore been granted to said party or any subsidiary organization . . . or any political subdivision thereof, are terminated. . . .[1037]

The fact that the statute imposed disabilities on the Communist Party by name was sufficient to ensure that it would be subject to repeated attainder challenges.[1038] But although two of the three major cases construing this provision prior to 1973 did involve such challenges, no court had ever passed upon the question of whether this section of the Communist Control Act of 1954 was a bill of attainder.[1039]

1032. 358 F. Supp. 349 (D. Ariz. 1973).

1033. 50 U.S.C. §§ 841-844 (1970).

1034. ARIZ. REV. STAT. ANN. §§ 16-205, 16-206 (Supp. 1972-73) (amended 1975).

1035. 50 U.S.C. § 841 (1970). This section, construed in conjunction with the Smith Act (18 U.S.C. § 2385 (1976); see notes 638-639 and accompanying text *supra*), has been held not to be a bill of attainder. United States v. Silverman, 132 F. Supp. 820, 832 (D. Conn. 1955).

1036. 50 U.S.C. § 843(a) (1970).

1037. *Id.* § 842.

1038. In fact, a number of commentators had suggested that the act might be invalidated as an attainder. *See* EMERSON, *supra* note 638, at 150; *Bounds of Specification, supra* note 45, at 361; Note, *The Communist Control Act of 1954*, 64 YALE L.J. 712, 722-26 (1955).

1039. In one of these decisions, Salwen v. Rees, 16 N.J. 216, 108 A.2d 265 (1954), the New Jersey Supreme Court upheld a lower court ruling that a county clerk could rely on the act to deny Communists a place on the ballot. The high court, in its per curiam opinion, simply stated that the Communist Control Act was generally constitutional. *Id.* at 218, 108 A.2d at 266. The case of *In re* Claim of Albertson, 8 N.Y.2d 77, 168 N.E.2d 242, 202 N.Y.S.2d 5 (1960), presented a more difficult question. There, the state had terminated the liability of the Communist Party for tax assessments under New York's unemployment insurance program. *See* N.Y. LAB. LAW § 571 (McKinney 1973). An indirect effect of this act was to increase the Party's tax rate under the Federal Unemployment Tax Act, 26 U.S.C. §§ 3301-3308 (1961), from one percent to three percent. The New York Court of Appeals, applying the Communist Control Act, stated that while paying state unemployment insurance

In *Blawis*, the plaintiffs, prior to the 1972 general election, gathered signed petitions to establish the Communist Party of Arizona and presented them to various county recorders for certification pursuant to state law.[1040] The state refused to certify the Party, relying on the language of both the federal act and its state analogue.[1041] The federal district court in *Blawis* noted that these laws, unlike the Subversive

tax is no "privilege," the mere fact of payment accords the payor the status of an employer and that status was a benefit of which the Communist Party could be deprived. 8 N.Y.2d at 83, 168 N.E.2d at 244, 202 N.Y.S.2d at 8. The state court also held that the federal act did not attaint, relying on the findings by Congress that the Communist Party was an instrumentality of subversion that had to be regulated. *Id.* at 84-85, 168 N.E.2d at 244, 202 N.Y.S.2d at 9. On appeal, the United States Supreme Court reversed. Communist Party v. Catherwood, 367 U.S. 389, 395 (1961). It did not reach any constitutional issues, but simply held that the language of the federal act did not require the expansive interpretation of the terms "privilege" or "immunity" that had been advanced by the New York court. *Id.* at 393. The last case in this series was *Mitchell v. Donovan*. There, various candidates nominated by the Communist Party to run in the 1968 national elections instituted a suit to compel Minnesotan officials to place their names on the ballot in that state. A three-judge district court noted the possibility that the Communist Control Act (which the state officials had relied on) might be classifiable as a bill of attainder, but in view of the urgent relief requested, it declined to consider that issue. Mitchell v. Donovan, 290 F. Supp. 642, 645 (D. Minn. 1968). Nevertheless, it enjoined state officials from denying Communists a place on the ballot, finding a discernible injury to the petitioners if they were excluded and none to the state if they were not. *Id.* at 645-46. After the elections (in which the Party received all of 415 votes from the state of Minnesota), a second suit was lodged, requesting a declaratory judgment that the Communist Control Act, as applied by the state, was invalid. A three-judge district court dismissed this complaint, claiming no present case or controversy existed since there was no showing that the state would enforce the act in the future as it had done in the past. Mitchell v. Donovan, 300 F. Supp. 1145, 1150 (D. Minn. 1969). The petitioners appealed to the United States Supreme Court, basing their appeal on 28 U.S.C. § 1253 (1970), which authorizes direct appeals from the granting or denial of interlocutory or permanent injunctions by three-judge district courts. The Court, however, dismissed the appeal, pointing out that the petitioners had been denied a declaratory judgment, not an injunction. Mitchell v. Donovan, 398 U.S. 427, 430-31 (1969). Nevertheless, it remanded the case to the three-judge district court so that that court could issue a fresh order, which could then be appealed to the Eighth Circuit. *Id.* at 431-32. On remand, the suit was again dismissed, Mitchell v. Donovan, No. 3-68-Civ.-256 (D. Minn., July 28, 1970), but apparently no appeal was ever pursued.

1040. 358 F. Supp. at 350-51. The state statutes requiring certification may be located in ARIZ. REV. STAT. ANN. §§ 16-202 to 16-204 (Supp. 1972-73) (amended 1975).

1041. The respondents relied principally on the Arizonan statutes and secondarily on the federal act in case the state laws were deemed pre-empted under the supremacy clause. 358 F. Supp. at 351 n.2. Although there is a split of authority, the majority of courts have held that federal law is exclusively controlling in this area. *Compare* McSurely v. Ratliff, 282 F. Supp. 848, 851 (E.D. Ky. 1967), *appeal dismissed*, 390 U.S. 412 (1968); State v. Jenkins, 236 La. 300, 303, 107 So. 2d 648, 649 (1958) (both finding pre-emption) *with* State v. Diez, 97 So. 2d 105, 108 (Fla. 1957) (finding no pre-emption). At this juncture, the procedural history of *Blawis* should be noted. The petitioners had originally sought and failed to receive an injunction against the state officials prior to the 1972 general election. On appeal, the United States Supreme Court remanded the case with instructions that District Judge Copple make a determination on the prayer for a declaratory judgment. Brockington v.

Activities Control Act of 1950, had as their stated purpose the exclusion of the Communist Party from the political process. District Judge Copple noted the language in the *Communist Party* case[1042] indicating any attempt by a legislature to outlaw the Party by name would constitute a bill of attainder[1043] and found the Arizona laws did exactly that because they terminated "[f]undamental political rights of a stated class."[1044] The judge specifically predicated his conclusion that the state legislation attainted on the fact that it "is a punishment of a named group upon a legislative finding of guilt."[1045] This same analysis was incorporated by reference in that portion of the court's opinion invalidating the 1954 federal act.[1046] *Blawis* clearly indicates that after *Brown* the constitutional proscriptions against attainders apply only to statutes penalizing named individuals or entities. If the victims of the bill are not designated by name, then it is not likely to be classified as an attainder.

A legitimate question remains as to whether the purview of the constitutional bans against attainders should be so narrowly circumscribed. Defining the specificity component of a bill of attainder in a restrictive fashion perpetuates the doctrine that Justice Field in *Cummings v. Missouri*[1047] abjured: that the proscriptions of article one, sections nine and ten should not be undermined by an unwavering judicial insistence upon a particular format for bills of attainder because "[i]f the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."[1048] The import of the approach implicit in *Blawis* and *Brown* is that the attainder clauses are virtually dead letters of constitutional law because the legislature can avoid the proscriptions contained in them by carefully drafting its enactments. Such an approach, in effect, undoes what *Cummings* accomplished because it places a renewed emphasis on the very formalities that Justice Field and his colleagues decried.

At this point it may be asked whether the specificity requirement should even be a component of the attainder doctrine. As indicated

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Rhodes, 396 U.S. 41, 43-44 (1969). It is the decision on remand which is referred to in the text.

1042. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 84-85 (1961). This language was also quoted approvingly in United States v. Brown, 381 U.S. 437, 451 (1965).

1043. 358 F. Supp. at 353.

1044. *Id.* at 354.

1045. *Id.*

1046. *Id.* at 356-57.

1047. 71 U.S. (4 Wall.) 277 (1867).

1048. *Id.* at 325. *See* note 70 and accompanying text *supra*.

earlier,[1049] the Court in *Cummings* never announced such a requirement, and there exists no valid reason to suggest that it should have done otherwise. But to say that the specificity element serves no legitimate definitional purposes is not to say that it serves no purposes whatsoever. Courts may wish to take into account the specificity of a challenged enactment for two reasons. First, if a statute affects so many persons that it appears to be universal in its application within a given context, *e.g.*, a law imposing a general tax on earned income, or a law requiring all persons to obtain a license before operating a motor vehicle or a law requiring all citizens who return from abroad to submit to an inspection by customs agents, this should not mean that it cannot, *ipso facto*, be a bill of attainder. It would, however, constitute probative, though by no means decisive, evidence on which a court could rely in concluding that a challenged enactment is regulatory rather than punitive. It is readily apparent how the use of specificity analysis in this context differs from the way it is curently being used by the courts. Under the proposed approach, lack of specificity per se would not preclude any finding of an attainder; instead, it would be merely one factor among many in the judicial calculus utilized to ascertain whether a law was enacted for the purpose of punishment.[1050]

A second reason for considering specificity is its usefulness in resolving the issue of standing to sue. This assertion can best be illustrated by a consideration of the implications of *Hockett v. Administrator of Veterans Affairs*.[1051] Joyce Hockett, a black woman, had served in the United States Army from February 9, 1970 until December 1, 1972 when she was discharged under "other than honorable conditions."[1052] On February 12, 1973, she had applied for a nursing position in a veterans' hospital located in Cleveland, Ohio, but her application was denied, allegedly because of the nature of her military discharge.[1053] Consequently, she brought an action under the amended Title VII of the Civil Rights Act[1054] and an executive order barring

1049. *See* notes 604-607 and accompanying text *supra*.

1050. It should be noted that this approach is not identical to the one that Chief Justice Warren appeared to advance in the initial portion of Part III of his opinion in United States v. Brown, 381 U.S. 437 (1965). *See* notes 953-959 and accompanying text *supra*. The model proposed would only make specificity *a* criterion rather than *the* criterion for determining whether or not a law punishes.

1051. 385 F. Supp. 1106 (N.D. Ohio 1974).

1052. *Id.* at 1107.

1053. *Id.* at 1107-08.

1054. 42 U.S.C. §§ 2000e to 2000e-17 (Supp. V 1975).

discrimination in federal employment,[1055] alleging that the Veterans Administration was guilty of racial bias in hiring. The administration claimed that it had no record of any application filed by Hockett.[1056] The district court accepted the veracity of this contention, and found that this precluded any possibility of standing to sue under section 737(c) of the Civil Rights Act.[1057] The court also stated that Hockett lacked standing to raise her alternative claim, namely, that the hiring practices of the Veterans Administration, as reflected in its internal rules and regulations, constituted a bill of attainder. In reaching such a conclusion, it relied on the bipartite test established by the United States Supreme Court in *Association of Data Processing Service Organizations, Inc. v. Camp*.[1058] The elements of that test are (1) whether the plaintiff can allege that the challenged governmental action caused him injury in fact, economic or otherwise, and (2) whether the interest he seeks to protect arguably falls within the zone of interests protected by either the statute or the constitutional guarantee in question.[1059] The district court ruled that Hockett had suffered no injury in fact because of her failure to file a written job application.[1060]

Assuming that the *Data Processing* test is still the governing standard in resolving a standing issue,[1061] specificity will play an important

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1055. Executive Order No. 11590, 36 Fed. Reg. 7831 (April 23, 1971), *amending* Executive Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).

1056. 385 F. Supp. at 1108-09.

1057. The district court concluded that section 717(c), 42 U.S.C. § 2000e-16(c) (Supp. V 1975), applied only to applicants for employment. *See* 385 F. Supp. at 1112.

1058. 397 U.S. 150 (1970).

1059. *Id.* at 152-53.

1060. 385 F. Supp. at 1113.

1061. There is little question that the *Data Processing* test would apply in attainder cases. There is some question, however, about the current nature of that test in light of subsequent rulings of the United States Supreme Court. Thus, the injury in fact can be both indirect and aesthetic in nature so long as it is an *injury* rather than merely an *interest* in lodging a particular lawsuit. *See* United States v. SCRAP, 412 U.S. 669, 683-89 (1973); Sierra Club v. Morton, 405 U.S. 727, 738-41 (1972). Moreover, standing to sue can exist even where the interests allegedly infringed are solely statutory creations so that no injury in fact would exist without the presence of a particular law establishing some new legal right. O'Shea v. Littleton, 414 U.S. 488, 493 n.2 (1974); Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973). In contrast to these expansive interpretations, however; other language in opinions of the Court has implied a more restrictive concept of the injury in fact rule. Thus, the injury alleged must not only be present, O'Shea v. Littleton, 414 U.S. at 495-96, but it must also be concrete, *i.e.*, more than a mere generalized grievance. Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 220-21 (1974), United States v. Richardson, 418 U.S. 166, 177-78 (1974). More recently, the United States Supreme Court has held that not every allegation of injury in fact will suffice for standing purposes; only those wherein a plaintiff can claim that but for the action of the defendant, there was a substantial probability that he would have received a particular benefit will be accepted by courts. *See* Warth v. Seldin, 422 U.S. 490, 504 (1975). But it is unclear whether this new refinement applies in cases other

role in that analysis. If a challenged enactment is unspecific to the extent that it either is not clear whether it inflicts an injury on a particular plaintiff or is not apparent whether the interest that the plaintiff claims is being infringed falls within the class of those protected by the prohibitions against bills of attainder, then the plaintiff's suit must be dismissed for lack of standing to sue. Again, specificity analysis in this context is used in a fashion distinctive from the way it is used in *Brown* and *Blawis*. The analysis is not made in order to support a finding that a given statute does not attaint; rather, it is made in order to support a finding that a given plaintiff should not be allowed to raise an attainder challenge in a court of law.

The two uses of specificity analysis mentioned here are tangential, but at least they are *legitimate* purposes to which such analysis may be put. Certainly courts should not ignore a specificity problem where it exists, but to accord it decisive importance is to prevent the proscriptions contained in article one, sections nine and ten of the Constitution from serving as a meaningful check on legislative usurpations of judicial functions.

VI. Supreme Court Decisions After *Brown*

A. Collateral Constitutional Challenges: Two Rulings

In 1950, in the case of *American Communications Association v. Douds*,[1062] three justices[1063] of the United States Supreme Court held that section 9(h) of the Taft-Hartley Act[1064] was not a bill of attainder. That provision withdrew the jurisdiction of the National Labor Relations Board from unions whose officers declined to execute oaths disaffirming membership in a group advocating or advocacy of forcible overthrow of the government and disavowing affiliation with the Communist Party. Because of the impracticability of enforcing this oath requirement,[1065] it was replaced in 1959 by section 504 of the Labor Management Reporting and Disclosure Act,[1066] which, *inter alia*,

than those which, like *Warth*, involve alleged instances of exclusionary zoning. For recent overviews of standing requirements, see Note, *Warth v. Seldin: The Substantial Probability Test*, 3 HASTINGS CONST. L.Q. 485, 491-501 (1976); Note, *Recent Standing Cases and a Possible Alternative Approach*, 27 HASTINGS L.J. 213, 217-18, 222-27 (1975).

1062. 339 U.S. 382 (1950). *See* notes 349-359 and accompanying text *supra*.

1063. The three were Chief Justice Vinson, Justices Burton and Reed. *See* note 354 and accompanying text *supra*.

1064. 61 Stat. 146, 29 U.S.C. § 159(h) (1947) (superseded 1959). *See* note 352 and accompanying text *supra*.

1065. *See* note 786 *supra*.

1066. 29 U.S.C. § 504 (1970). *See* note 729 *supra*.

barred Communists from serving as union officers. In 1965, the United States Supreme Court in *United States v. Brown*,[1067] held that this replacement provision was an unconstitutional bill of attainder. Statements in the *Brown* case[1068] led many commentators to conclude that the precedential validity of *Douds* was questionable, to say the least.[1069]

The stage was thus set for the Supreme Court's ruling in *Dennis v. United States*,[1070] decided one year after *Brown*. That litigation involved the convictions of fourteen persons found guilty of conspiring to obtain fraudulently the services of the National Labor Relations Board on behalf of the International Union of Mine, Mill and Smelter Workers by executing falsely the oath required by former section 9(h) between August, 1949 and February, 1955.[1071] At the time the affidavits were signed, all the officers in question remained members of or affiliated with the Communist Party.[1072] Since section 9(h) lacked a penalty provision of its own,[1073] the convictions were based on indictments charging violations of the general federal conspiracy statute.[1074] These indictments were returned in 1956. After a decade of appeals and one retrial,[1075] six of the fourteen persons convicted finally petitioned the

1067. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

1068. *See* notes 911-917 and accompanying text *supra*.

1069. *See* notes 918-920 and accompanying text *supra*.

1070. 384 U.S. 855 (1966).

1071. *Id.* at 858-59. The government alleged that the union and the Communist Party had formulated a concerted plan to deceive the National Labor Relations Board. *See id.* at 859, 866 n.12.

1072. *Id.* at 859. A number of the union officers in question nominally resigned from the Party, but in fact remained closely "affiliated" with it. *Id.* at 859 n.3. "Affiliation" in the context of section 9(h) had been previously construed by the Court to be satisfied by proof of "a close working alliance or association between [the defendant] and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit." Killian v. United States, 368 U.S. 231, 255 (1961).

1073. *See* note 352 *supra*.

1074. 18 U.S.C. § 371 (1976):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

The majority held that a conspiracy to file false statements fit within the conspiracy-to-defraud clause of this statute. 384 U.S. at 864.

1075. The district court in this case had rejected a motion to dismiss the indictment and ordered the case to trial. United States v. Pezzati, 160 F. Supp. 787, 792 (D. Colo. 1958). After that trial resulted in a conviction, an appeal was taken and the United States Court of Appeals for the Tenth Circuit reversed the judgments on the ground that prejudicial hearsay had been erroneously admitted in evidence. Dennis v. United States, 302 F.2d 5, 10 (10th

Supreme Court for a writ of certiorari.[1076] One of the questions they presented for consideration was whether or not former section 9(h) of the Taft-Hartley Act was constitutional in light of the then-recent ruling in the *Brown* case. Justice Fortas' majority opinion[1077] refused to even reach the issue of the constitutionality of section 9(h). He noted that this was not a case in which the petitioners had flouted the law out of necessity; rather, they were indicted for a "cynical and fraudulent" conspiracy to circumvent the statute.[1078] Relying primarily on two cases decided in 1938, in which the Court had upheld the convictions of persons who had made false statements to secure benefits to which they were not entitled under certain federal relief acts,[1079] the majority concluded that:

> The governing principle is that a claim of unconstitutionality will not be heard to excuse a voluntary, deliberate and calculated course of fraud and deceit. One who elects such a course as a means of self-help may not escape the consequences by urging that his conduct be excused because the statute which he sought to evade is unconstitutional. This is a prosecution directed at petitioners' fraud. It is not an action to enforce the statute claimed to be unconstitutional.[1080]

Cir. 1962). A retrial resulted in new convictions, and each petitioner was fined $2000 and sentenced to three years in prison. This time, the Tenth Circuit affirmed the judgment. Dennis v. United States, 346 F.2d 10, 21 (10th Cir. 1965).

1076. Three questions were presented on certorari: (1) whether the indictment stated the offense of conspiracy to defraud the government, (2) the attainder issue discussed in the text and (3) whether reversible error was committed when the trial court denied petitioners' motions for production of transcripts of the grand jury testimony of prosecution witnesses. 384 U.S. at 858. The first question was answered in the affirmative. *See* note 1074 *supra*. But the third was decided so as to require reversal. *See* note 1083 *infra*.

1077. Justice Fortas was joined by Chief Justice Warren, and Justices Brennan, Clark, Harlan, Stewart and White. Justices Black and Douglas dissented in part. *See* notes 1084-1090 and accompanying text *infra*.

1078. 384 U.S. at 865.

1079. *Id.* at 866 (citing Kay v. United States, 303 U.S. 1, 6 (1938) (upheld conviction for making false statements in connection with a request for funds under the provisions of the Home Owners Loan Act of 1933); United States v. Kapp, 302 U.S. 214, 217-18 (1938) (upheld conviction for making a false claim for money under the Agricultural Adjustment Act of 1933)). *Cf.* United States v. Harding, 81 F.2d 563, 568 (D.C. Cir. 1936) (upheld conviction for conspiracy to influence approval of a substituted water irrigation system plan to be funded by the Federal Public Works Administration); Madden v. United States, 80 F.2d 672, 674 (1st Cir. 1935) (upheld conviction for forging a signature on an identity card used to secure employment on a project funded under the National Industrial Recovery Act of 1933); Langer v. United States, 76 F.2d 817, 824-25 (8th Cir. 1935) (upheld conviction for conspiracy to obstruct use of loans made by the Reconstruction Finance Corporation).

1080. 384 U.S. at 867. Justice Fortas' argument is ingenuous, to say the least. The only way violations of section 9(h) could be punished was by prosecutions under Title eighteen of the United States Code. Indeed, the National Labor Relations Board had no independent jurisdiction to determine if an affidavit was, in fact, executed falsely. *See* note 786 *supra*. So

Justice Fortas found it unnecessary to consider whether the petitioners defrauded the government of a lawful function because, at the time some of the allegedly fraudulent activity in question had occurred, the ruling in *Douds*, which gave the governmental function involved the Court's "fresh imprimatur," had just been rendered.[1081] Therefore, he stated that the petitioners had simply selected an inappropriate method of challenging an official action that they thought was unconstitutional.[1082] Having thus concluded that they lacked standing to raise the attainder issue, the Court reversed the petitioners' convictions on technical procedural grounds.[1083]

Justice Black, joined by Justice Douglas, issued a cogent opinion, concurring and dissenting in part. He pointed out that the government's indictment itself charged fraudulent interference with a proper governmental function[1084] and that, according to a number of prior decisions,[1085] an essential element of the crime of defrauding the government was proof of such an interference.[1086] If section 9(h) was indeed a bill of attainder, and Justice Black assumed that it was,[1087] then no

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these criminal prosecutions really did enforce section 9(h), in that they punished past lawbreakers and deterred future ones.

1081. *Id.* at 867. The alleged conspiracy was said to have commenced in June of 1949 and the first false affidavits were said to have been filed in August of that year. *Douds* was announced on May 8, 1950, but various false oaths were executed by the defendants during the five succeeding years. *See id.* at 865 n.11.

1082. *Id.* at 867.

1083. The majority ruled that, in light of the policy promoting the proper administration of criminal justice (as signified by the passage of the Jencks Act, 18 U.S.C. § 3500(b) (1976), which requires the government to produce the prior statements of a witness whom it called to testify on direct examination in court, with respect to all matters relating to that testimony), the prosecution's concession that there was no need to preserve the secrecy of the statements made by its witnesses before the grand jury in this case and the defendants' "particularized needs" (particularly the facts that the grand jury testimony occurred in 1956 and that the trial testimony with which the defendants sought to compare it was taken in 1963), the trial court erred in not compelling the government to furnish the defendants with the grand jury testimony of its key witnesses for the prosecution. *See* 384 U.S. at 870-75.

1084. 384 U.S. at 876 (Black, J., concurring in part and dissenting in part, joined by Douglas, J.).

1085. *See, e.g.*, United States v. Johnson, 383 U.S. 169, 172 (1966); Glasser v. United States, 315 U.S. 60, 66 (1942); Hammerschmidt v. United States, 265 U.S. 182, 188 (1924); Haas v. Henkel, 216 U.S. 462, 479 (1909). *See also* Goldstein, *Conspiracy to Defraud the United States*, 68 YALE L.J. 405, 414-41, 455-58 (1959).

1086. 384 U.S. at 876. The majority opinion admitted as much. *See id.* at 861.

1087. Justice Black concluded that "the differences between § 9(h) and § 504 upon which the Government relies are too slight, too insubstantial, and too vaporlike to justify the conclusion that one section is a bill of attainder and the other is not." 384 U.S. at 881. In fact, however, the differences were many and significant. *See* notes 905-910 and accompanying text *supra*. The key factor was that the majority in *Brown* expressly repudiated the logic announced in *Douds*. *See* notes 911-917 and accompanying text *supra*.

legitimate function of the government was being interfered with. Thus, he argued that the effect of the majority's decision was to enforce a bill of attainder by indirect means:

> Our government has not heretofore been thought of as one which sends its citizens to prison without giving them a chance to challenge validity [*sic*] of the laws which are the very foundation upon which criminal charges against them rest. Yet the Court refuses to allow petitioners to attack § 9(h) on the ground that "the claimed invalidity of § 9(h) would be no defense to the crime of conspiracy charged in this indictment. . . ." It is indeed a novel doctrine if the unconstitutionality of a law which forms the very nucleus of a criminal charge cannot be a defense to that charge. Certainly the Court does not deny that violation of the § 9(h) requirement for non-Communist oaths is an essential if not indeed the only ingredient of the crime for which the government seeks to place petitioners in jail. The indictment properly charged unlawful compliance with § 9(h) as an essential element, if indeed not the whole crime laid at petitioners' door. Congress has passed no law which requires the Court to refuse to consider petitioners' challenge to the constitutionality of § 9(h). Nor are there any prior cases of this Court which require us today to tell citizens that the courts of our land are not open for them to challenge bills of attainder under which they may be sent to prison. The holding is solely and exclusively a new court-made doctrine.[1088]

The 1938 decisions relied upon by the majority were said to support no such doctrine because they involved fraudulent efforts by individuals to obtain payments to which they had no legitimate entitlement.[1089] But Justice Black argued that if section 9(h) was unconstitutional, then by filing false affidavits the petitioners obtained nothing more for their union than that to which it was entitled, namely, the jurisdiction of the National Labor Relations Board.[1090] Thus, Justice Black and Justice Douglas concluded that the majority's decision placed the courts in the anomalous position of enforcing bills of attainder.[1091]

Three years later, the problem resurfaced in the case of *Bryson v. United States*.[1092] There, the petitioner had been indicted in 1951 for having falsely denied his affiliation with the Communist Party in an affidavit filed pursuant to section 9(h).[1093] The substantive offense charged in that indictment was not conspiracy but rather the knowing

1088. 384 U.S. at 877-78.
1089. *Id.* at 878.
1090. *Id.* at 878-79.
1091. *See id.* at 877.
1092. 396 U.S. 64 (1969).
1093. *Id.* at 67.

and willful making of a false statement in connection with a matter within the "jurisdiction" of a federal agency, in violation of section 1001 of Title eighteen of the United States Code.[1094] Bryson was convicted in 1955 and, twelve years later, he brought a collateral proceeding in federal district court requesting that his conviction be set aside and that his parole be discharged.[1095] The district court found, on the basis of *Brown*, that the government had no right to ask the question to which the petitioner responded falsely. The United States Court of Appeals for the Ninth Circuit reversed, claiming that the case was indistinguishable from *Dennis*.[1096] Justice Harlan, writing for seven members of the Supreme Court, agreed with the court of appeals. He noted that none of the elements of proof required for petitioner's conviction depended on the validity of section 9(h).[1097] The majority rejected the argument that if section 9(h) was unconstitutional, the false statement made in feigned compliance with its requirements was not a matter within the jurisdiction of the National Labor Relations Board, by holding that "[a] statutory basis for an agency's request for information provides jurisdiction enough to punish fraudulent statements under § 1001."[1098] Thus, regardless of whether *Douds* was valid precedent, "[o]ur legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood."[1099] Justice Douglas, joined by Justice Black, dissented. They suggested that the term "jurisdiction" as used in section 1001 should be construed re-

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1094. 18 U.S.C. § 1001 (1976):

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

1095. The original conviction had been upheld on direct review. Bryson v. United States, 238 F.2d 657, 665 (9th Cir.), *rehearing denied*, 243 F.2d 837 (9th Cir. 1956), *cert. denied*, 355 U.S. 817 (1957). A subsequent application for a reduction of the petitioner's sentence (a $10,000 fine and five years in prison) had also been rejected. Bryson v. United States, 265 F.2d 9, 14 (9th Cir.), *cert. denied*, 360 U.S. 919 (1959).

1096. United States v. Bryson, 403 F.2d 340, 340 (9th Cir. 1969). The district court's opinion was unreported.

1097. 396 U.S. at 68-69. Justice Harlan was joined by Chief Justice Burger and Justices Brennan, Marshall, Stewart and White.

1098. *Id.* at 71.

1099. *Id.* at 72.

strictively.[1100] Since there was no interference with a lawful function of the National Labor Relations Board because section 9(h) was presumably an attainder in light of *Brown*,[1101] there could be no jurisdiction for the Board to administer that function.[1102] The dissenters concluded that since section 9(h) was unconstitutional, the petitioner's union was entitled to receive the services of the National Labor Relations Board without having its officers first file an affidavit.[1103]

These two decisions are disturbing, because they deny the defendant in a criminal proceeding the opportunity to challenge collaterally the constitutionality of the law that forms the "nucleus" of the indictment. Presumably, all the justices in *Dennis* and *Bryson* would concur that section 9(h) was a bill of attainder.[1104] But because the petitioners sought review of convictions for, respectively, conspiracy to violate section 9(h) and the knowing and willful filing of a false affidavit as required by section 9(h), their ability to raise an attainder challenge was terminated. As Justice Black pointed out, this is new court-made doctrine; no precedent mandated the solutions reached in *Dennis* and *Bryson*.[1105] There was, however, contrary authority. In *United States v.*

1100. *Id.* at 74 (Douglas, J., dissenting, joined by Black, J.). The dissenters cited in support of this conclusion the case of Friedman v. United States, 374 F.2d 363, 367 (8th Cir. 1967), which held that lying to an FBI investigator was not "within the jurisdiction" of that agency within the meaning of section 1001. The majority noted this case and said it refused to either approve or disapprove of its holding. 396 U.S. at 71 n.10.

1101. Justice Douglas noted not only that the attainder decision in *Douds* represented only the views of three justices, but also that, in all probability, the Court's decision in *Brown* placed *Douds* within a "discredited regime" of decisions. 396 U.S. at 75-76.

1102. 396 U.S. at 74.

1103. *Id.* at 76.

1104. With the exception of Justice Fortas in *Dennis*, and Chief Justice Burger and Justice Marshall in *Bryson*, the majorities in both those cases had either joined Chief Justice Warren's opinion in *Brown* that discredited *Douds* or joined Justice White's dissent in *Brown*, which had concluded that *Douds* was "obviously overruled." United States v. Brown, 381 U.S. 437, 464-65 (1965) (White, J., dissenting, joined by Clark, Harlan, and Stewart, JJ.).

1105. Two state court decisions are the only ones that would appear to agree with the rulings in *Dennis* and *Bryson* in the context of cases involving attainder claims. *See* State v. Forichette, 279 Minn. 76, 80-81, 156 N.W.2d 93, 97-98 (1968) (challenge to regulations adopted by the Civil Service Commission of Minneapolis, which barred Nazis, Communists, anarchists and fascists from being considered for positions of public employment or from retaining positions that they already occupied; held, one convicted of perjury because of false statements made in an interview for a position of public employment could not raise a collateral attainder challenge to the law giving rise to the proceedings in which the false testimony was given); State v. Neal, 42 Mo. 119, 123-24 (1868) (challenge to test oath exacted from voters; held, in a criminal proceeding against one who perjured himself by falsely executing the oath, the perjury ordinance created a separate and distinct offense, and thus the indictment for that offense need not set forth the underlying oath, which was irrelevant in the case at bar).

Kuzma,[1106] which involved an indictment for conspiracy to violate the Smith Act,[1107] the federal district court rejected an attainder defense to that indictment by pointing out that the defendants in that case would be entitled to a full judicial trial at which all constitutional challenges could be raised, including those based on article one, section nine of the Constitution.[1108] It did so even though the substantive offense being tried was one of conspiracy.[1109] Because full judicial trial on *all* issues was available, there could be no attainder challenge.

The effect of *Bryson* and *Dennis*, however, is to limit the very scope of such a trial so that no constitutional objection to the law that a person is accused of conspiring to violate may be raised. In creating such a limitation, the Supreme Court restricted the definition of the "safeguards of a judicial trial," as that term is used within the context of the attainder doctrine, by foreclosing judicial consideration of constitutional issues in an entire class of cases. It thus becomes impossible to reconcile this confining notion of due process developed in *Bryson* and *Dennis* with the more expansive concept of that phrase that the bill of attainder clauses were intended to preserve.

More importantly, however, these two cases provide legislatures with a blueprint for drafting enforceable bills of attainder. After these decisions, all the legislature need do is pass proscriptions, violations of which are punishable through independent criminal statutes. Thereafter, regardless of whether the law containing those proscriptions is deemed to be unconstitutional,[1110] the proscriptions can still be enforced through prosecutions based on general criminal laws that do

1106. 141 F. Supp. 91 (E.D. Pa. 1954). *See* notes 637-641 and accompanying text *supra*.

1107. 18 U.S.C. § 2835 (1976). *See* note 638 *supra*.

1108. 141 F. Supp. at 94.

1109. The prosecution in *Kuzma*, like the one in *Dennis*, was based on an indictment charging violation of the general federal conspiracy statute, 18 U.S.C. § 371 (1976). *See* 141 F. Supp. at 92. For similar rulings in other Smith Act cases, *see* note 637 *supra*.

1110. Only two caveats are suggested by *Dennis* and *Bryson*. In the former case, Justice Fortas suggested that it might be possible to distinguish situations "where the constitutionality of a statute is challenged by those who of necessity violate its provisions and seek relief in the courts. . . ." Dennis v. United States, 384 U.S. 855, 865 (1966). But he never provided any further explication of that statement, so its exact meaning is, at present, indeterminable. In *Bryson*, Justice Harlan remarked that the majority "had no need to decide. . .whether jurisdiction would exist under § 1001 if at the time the request for information was made a court had already authoritatively determined that the statutory basis was invalid. Cf. *United States v. Kapp, supra*." Bryson v. United States, 396 U.S. 64, 71 n.11 (1970). But *Kapp* involved false statements made in connection with receipt of payments for shipments of hogs pursuant to provisions of the Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31, and the major provisions of that law had been held unconstitutional by the United States Supreme Court in 1936, United States v. Butler, 297 U.S. 1, 74 (1936), *two years* before *Kapp* was decided. *See* note 1079 *supra*. So the net effect of Justice Harlan's footnote seems

not, in and of themselves, attaint. Thus the crucial error of Congress in enacting the anti-Communist law invalidated in the *Brown* case was that it incorporated penalty provisions within the text of the law itself.[1111] Had section 504 been enforceable, as former section 9(h) had been, by the independent provisions of Title eighteen of the United States Code, *Bryson* and *Dennis* would permit a person to be convicted of the substantive crime of conspiring to or fraudulently attempting to violate the former provision. Of course, it could be argued that the Court may not have been announcing a general principle but may have merely desired to deny the petitioners in *Bryson* and *Dennis* the retroactive benefits of *Brown*. But this argument can be countered by the fact that *Bryson* has been followed by a number of decisions in contexts having nothing to do with either section 9(h) or attainder claims.[1112] Thus, these two cases do announce a general principle; unfortunately it is a principle that may be used to evade and undermine the very safeguards supposedly furthered by the constitutional proscriptions against bills of attainder.

B. The Nixon Case

1. The Case

The most recent disquisition of the United States Supreme Court on the bill of attainder doctrine arose from the extraordinary series of events concerning the disposition of the presidential papers of Richard M. Nixon. Immediately after Nixon resigned as President on August 9, 1974, governmental archivists began packing the forty-two million pages of documents and eight hundred and eighty tape recordings that had accumulated during his second term of office for shipment to California. These efforts were halted, however, when Leon Jaworski, the Watergate Special Prosecutor, advised President Gerald Ford of his office's continuing need for those materials.[1113] At this time, counsel for the White House solicited and received from the Attorney General an

to be that the timing of a judgment decreeing that the underlying "statutory basis" for a prosecution under section 1001 is invalid will be unimportant.

1111. *See* note 729 *supra*.

1112. *See* United States v. Knox, 396 U.S. 77, 79-80 (1970) (false statements made to the Internal Revenue Service in wagering tax forms); United States v. Protch, 481 F.2d 647, 648 (3d Cir. 1973) (false statement made to an Internal Revenue Service agent); United States v. McCarthy, 422 F.2d 160, 162 (2d Cir. 1970) (failure to disclose receipt by union officer of payments by an employer having union members on his work force); United States v. Gomez-Londono, 422 F. Supp. 519, 524 (E.D.N.Y. 1976) (false declaration to a customs agent).

1113. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 430-31 (1977).

opinion that the documents and recordings in question were Nixon's private property. Although this conclusion by the Attorney General was purportedly based on "the almost unvaried understanding of all three branches of Government since the beginning of the Republic,"[1114] he did note that public interest in these materials might justify subjecting the ex-President's rights of ownership "to certain limitations directly related to the character of the documents as records of government activity."[1115] As a result of this opinion, the White House entered into negotiations with Nixon's counsel regarding the future disposition of these archival materials. These negotiations culminated in the so-called "Nixon-Sampson Agreement," which was formally accepted by Arthur Sampson, the Administrator of the General Services Administration (GSA) on September 8, 1974. The agreement provided that all "Presidential historical materials"[1116] compiled during Nixon's second term of office would be placed on deposit pursuant to the Federal Records Act.[1117] The GSA would then ship these records to a federal facility located near Nixon's home in San Clemente, California. For the succeeding three years (five years, in the case of the tapes), Nixon, or those authorized by him, would have full access to those records and could reproduce them as he wished. If any such materials were sought by legal process, the GSA agreed to notify Nixon so that he could have the opportunity to claim any privilege to which he was entitled. After three years, he would be given *carte blanche* to remove and dispose of any or all of the documentary materials. The tapes, however, were to be given to the United States as of September 1, 1979, subject to the conditions that Nixon could destroy as many of them as he wished after that date, and that the government would effect the destruction of all tapes that remained in existence on September 1, 1984 or at the time of Nixon's death, whichever occurred first.[1118]

Nevertheless, the Watergate Special Prosecutor refused to permit implementation of the Nixon-Sampson Agreement. Therefore, on Oc-

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1114. 43 OP. ATT'Y GEN. 1-2 (Sept. 6, 1974), *quoted in* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 540 (1977) (Burger, C.J., dissenting). For a discussion of the ownership problem, *see* note 1187 *infra*.

1115. 43 OP. ATT'Y GEN. 226 (Sept. 6, 1974), *quoted in* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 431 (1977).

1116. Defined as: "including books, correspondence, documents, papers, pamphlets, works of art, models, pictures, photographs, plats, maps, films, motion pictures, sound recordings and other objects or materials having historical or commemorative value." 44 U.S.C. § 2101 (1970).

1117. 44 U.S.C. §§ 2101, 2107, 2108 (1970).

1118. For the text of this agreement, *see* Nixon v. Sampson, 389 F. Supp. 107, 160-62 (D.D.C. 1975) (App. A).

tober 17, 1974, a suit was lodged in a federal district court in the District of Columbia requesting that the court enforce its terms. This case of *Nixon v. Sampson*[1119] attracted various petitions for intervention. Several of these petitions were granted and a number of persons and groups, including Lillian Hellman, columnist Jack Anderson, and the Reporters' Committee for the Freedom of the Press, were allowed to participate in the lawsuit.[1120] Most of the intervenors sought access to the Presidential papers under the Freedom of Information Act.[1121] One intervenor, Watergate Special Prosecutor Leon Jaworski, claimed that the Nixon-Sampson Agreement conflicted with a separate pact entered into between his office and President Ford on November 9, 1974, whereby the former was guaranteed full access to the tapes and documents in question.[1122] The district court dismissed the argument that the November 9th compact violated Nixon's right to be free from unreasonable searches and seizures under the Fourth Amendment by concluding that the materials in question were not owned by Nixon but were instead the property of the United States government.[1123] The court also noted, however, that among all these documents and tapes were the personal papers and recordings of private conversations by then-President Nixon, which it found to be protected by the Fourth Amendment's guarantee of privacy.[1124] Therefore, the court issued de-

1119. 389 F. Supp. 107 (D.D.C. 1975).

1120. *See id.* at 114-15.

1121. 5 U.S.C. § 552 (Supp. V 1975). *See* 389 F. Supp. at 116-17. Judge Richey's opinion concluded that the presidential papers in question did not fit within the exemptions to the coverage of this act provided by subsection (a)(4), and thus were the proper subject of disclosure claims pursuant to subsection (a)(3). *See* 389 F. Supp. at 145-47.

1122. *See* 389 F. Supp. at 118. For the text of the November 9th agreement, *see id.* at 163-64 (App. B).

1123. *See id.* at 133-156. Judge Richey concluded that Nixon had no legitimate claim to the documents in question for seven different reasons: (1) according to various prior decisions, the papers of a public official were the property of the government, *id.* at 133-35; *see* note 1187 *infra*; (2) in order to uphold his claim of possession, Nixon had to show that the President was in a class apart from other public officials, and this he was unable to do, *id.* at 135-37; *see* Nixon v. Sirica, 487 F.2d 700, 711 (D.C. Cir. 1973); (3) acceptance of Nixon's claim of possession would undermine the continuity of the Office of the Presidency, 389 F. Supp. at 137-39; (4) no precedent supported Nixon's allegation of ownership, *id.* at 139-41; *see* note 1187 *infra*; (5) the prior practices of former Presidents did not support his allegation, *id.* at 141-43; (6) the Presidential Libraries Act of 1955, 44 U.S.C. §§ 2101, 2107, 2108 (1970), provided no corroboration for his contention, 389 F. Supp. at 143-44; and (7) the materials in question were subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552(a)(3) (Supp. V 1975), 389 F. Supp. at 145-47. In light of these factors and his conclusion that the November 9th agreement was not an impermissible general warrant, *id.* at 154, Judge Richey found that searches made pursuant to that agreement could not violate the Fourth Amendment, *see id.* at 155-56.

1124. 389 F. Supp. at 156-57.

tailed guidelines for segregating these more intimate records from the other official documents and for restricting prosecutorial access to the former class of materials. These guidelines replaced earlier decrees that had temporarily enjoined enforcement of the Nixon-Sampson Agreement, enjoined disclosure by the government of the contents of the presidential materials in custody and permitted Nixon, his counsel, members of the Watergate Special Prosecutor's office and the grand jury to gain access to these tapes and documents for specified purposes.[1125]

While these events transpired in the courts, Congress had not been inactive. On September 18, 1974, ten days after public announcement of the Nixon-Sampson Agreement, a bill was introduced in the United States Senate to abrogate that pact and provide for an alternative disposition of the materials in question. The House and Senate passed differing versions of this proposed legislation and settled on a compromise form in a joint conference. That compromise proposal was passed by both houses of Congress on December 9, 1974, and was signed into law by President Ford ten days later.[1126] The resultant enactment was known as the Presidential Recordings and Materials Preservation Act[1127] (Records Act). Title II of that law established a National Study Commission on Records and Documents of Federal Officials entrusted with the task of recommending improved ways to maintain archival collections of the papers of those who serve in public office.[1128]

But Title I related exclusively to the Nixon Presidency. Section 101(a) of that title directed the Administrator of the GSA to ignore all prior agreements and retain possession of and control over all taped conversations by then-President Nixon or any other federal employee occurring during the period between January 20, 1969, and August 9, 1974.[1129] Similarly, section 101(b) authorized the GSA to retain all documents and other "Presidential historical materials"[1130] accumulated during that same period.[1131] Under section 102(a) of the Records Act, none of these records could be destroyed except as may be provided by

1125. For the final guidelines issued by the court, *see id.* at 158. The earlier decrees had been promulgated between October 21 and November 7, 1974, in connection with Judge Richey's grant of temporary injunctive relief. For a summary of these decrees, *see* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 334-35 n.11 (D.D.C. 1976).

1126. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 433 (1977).

1127. Pub. L. No. 93-526, 88 Stat. 1695-98 (codified at 44 U.S.C. § 2107 note (1974)).

1128. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 433 (1977).

1129. *See id.* at 433-34.

1130. *See* note 1116 *supra.*

1131. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 434 (1977).

law;[1132] according to subsection (b), they would be made available in response to legal process but this availability was to be restricted by any legitimate defenses or privileges that either the government or an individual might raise.[1133] Section 102(c) ensured Nixon, or those designated by him, full access to the tapes and documents in custody upon those terms and conditions announced by the Administrator of the GSA under section 103[1134] and, according to subsection (d), similar access was granted to agencies and departments of the Executive Branch.[1135] Regulations promulgated pursuant to section 103 appeared in the Federal Register in 1975.[1136] Section 104 of Title I was another matter; pursuant to subsection (a), the Administrator of the GSA was authorized to establish regulations governing general *public* access to the records and tapes in question. In doing so, he had to take into account seven specified factors, including the need to disclose the full truth about the Watergate affair, the need to provide public access to materials of "general historical significance" unrelated to Watergate and the need to give Nixon sole custody of materials that did not fit within either of these aforementioned categories.[1137] Under subsection(b)(1), regulations developed in accordance with these directives had to be submitted to both houses of Congress; they would take effect within ninety legislative days unless either house adopted a resolution disapproving them.[1138] Three different sets of regulations had been devised by the GSA pursuant to section 104; all of them had been voted down by either the House or the Senate.[1139] Under section 105(a) of the

1132. *See id.*

1133. *See id.*

1134. *See id.*

1135. *See id.*

1136. *See* 40 Fed. Reg. 2669 (1975), *codified in* 41 C.F.R. §§ 105-163 (1976).

1137. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 435 (1977). The other factors were (a) the need to make the materials available for use in judicial proceedings, (b) the need to protect national security by preventing access to sensitive documents, (c) the need to protect individual rights to a fair trial and (d) the need to protect individual rights to assert any applicable privilege.

In a more recent decision, the Supreme Court has held that the common-law right of access to judicial records did not authorize release of the Watergate tapes from the custody of a federal district court due to the fact that the existence of the Records Act provided an "additional, unique element" because "Congress has created an administrative procedure for processing and releasing to the public, on terms meeting with congressional approval, all of petitioner's Presidential materials of historical interest; including recordings of the conversations at issue here." Nixon v. Warner Communications, Inc., 98 S. Ct. 1306, 1315 (1978).

1138. *See* Nixon v. Administrator of Gen. Servs. , 433 U.S. 425, 435 (1977).

1139. The Senate passed a resolution disapproving of the initial set. S. Res. 244, 94th Cong., 1st Sess., 121 CONG. REC. S15800-S15803 (daily ed. Sept. 11, 1975). It also rejected seven provisions of the second set submitted by the GSA. S. Res. 428, 94th Cong., 2d Sess.,

Records Act,[1140] the district court for the District of Columbia was vested with exclusive jurisdiction to try constitutional challenges to the act itself, challenges to the validity of GSA regulations made in accordance with it, disputed claims of title or custody and claims for renumeration arising from a judgment by the court that the Records Act had deprived an individual of private property without just compensation (as was permitted by section 105(c)).[1141]

On December 20, 1974, one day after the Records Act became law, Nixon initiated a suit challenging its constitutionality and requesting the convention of a three-judge district court. The United States Court of Appeals for the District of Columbia held that such a court could be convened, because section 105(a) of the Records Act did not override the independent provisions of Title twenty-eight of the United States Code.[1142] It also stayed the injunctive order issued by the district court in *Nixon v. Sampson*,[1143] pending a decision by the three-judge court as to whether the second suit under section 105(a) was to take priority over other cases on the docket.[1144] On this last issue, the three-judge court ruled in the affirmative and thus declined to request a dissolution

122 CONG. REC. S5240-S5291 (daily ed. April 8, 1976). The House disapproved six provisions of the third set. H.R. Res. 1505, 94th Cong., 2d Sess. (1976). Subsequently, however, the Administrator's fourth set of proposed regulations was approved and has become final. *See* 42 Fed. Reg. 63626 (1977).

1140. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 435-36 (1977).

1141. *See id.* at 436.

1142. *See* Nixon v. Richey, 513 F.2d 430, 441-42 (D.C. Cir. 1975). This decision reconsidered (and upheld) the conclusion of an earlier ruling by a panel of the District of Columbia Circuit that a three-judge court should be convened. Nixon v. Richey, 513 F.2d 427, 430 (D.C. Cir. 1975). The provisions in Title twenty-eight of the United States Code referred to by the court of appeals, 28 U.S.C. §§ 2281-82, 2284 (1970), were revamped soon after this case. Sections 2281 (permitting only a three-judge court to issue an interlocutory or permanent injunction against enforcement of a state statute on grounds of unconstitutionality) and 2282 (same, with respect to acts of Congress) were repealed. Act of August 12, 1976, Pub. L. No. 94-381, §§ 1, 2, 90 Stat. 1119. Section 2284 was amended to permit the convention of a three-judge court in challenges to state or federal legislative apportionment plans. Act of August 12, 1976, Pub. L. No. 94-381, § 3, 90 Stat. 1119.

1143. 389 F. Supp. 107 (D.D.C. 1975). *See* note 1125 and accompanying text *supra*.

1144. *See* Nixon v. Richey, 513 F.2d 430, 447-48 (D.C. Cir. 1975). The problem that the court of appeals confronted was that its initial decision to grant a writ of mandamus ordering the convention of a three-judge court was filed at 11 a.m. on January 31, 1975, but Judge Richey, who wrote the opinion in *Nixon v. Sampson* and who knew that the court of appeals was likely to issue a writ, nevertheless filed his final opinion at 2 p.m. that same day. *See id.* at 435. The court of appeals concluded that it would not deem this fact to be important, because, under the Records Act, an expedited procedure had been established, and because, in issuing a writ of mandamus, it had a "responsibility of protecting the affected litigant from possible harm." *Id.* at 437.

of the stay.[1145]

Among Nixon's many constitutional objections to the Records Act[1146] was the contention that it operated as a bill of pains and penalties. He argued that, in the wake of the political turbulence following the revelations about the Watergate affair, the disclosures during the House Judiciary Committee's impeachment hearings, and the issuance of President Ford's pardon, and in light of the evident frustration felt by many members of Congress who believed the full truth about Watergate and its ramifications was still being concealed from both them and the public, the Records Act had been drafted and passed in order to punish him for his alleged former malfeasances.[1147] Judge McGowan, writing for the three-judge court, disagreed. He refused to infer punitive motivations from the anger and frustration of congressmen and claimed that the legislative record was barren of any evidence to support such an inference.[1148] In determining the nature of the inquiry it had to make, the court indicated that it was necessary to apply the punishment/regulation dichotomy;[1149] therefore, the court was compelled to rely on some guidelines for ascertaining whether or not the Records Act was punitive. Judge McGowan located two useful guidelines: the first was the language in *Flemming v. Nestor*[1150] advising courts to determine whether a disability is imposed upon an individual in order to reach him rather than his status or his activities; the second was the statement in *Kennedy v. Mendoza-Martinez*[1151] setting forth a heptad of criteria for distinguishing punishment from regulation. Applying the former guideline, the court ruled that, on the basis of the underlying legislative record, the purpose of Congress was not to punish Nixon but rather to regulate future safekeeping of archival materials.[1152] Applying the latter guideline, the court determined that control of official papers had never been traditionally associated with punishment, that the Records Act incorporated no requirement of sci-

1145. *See* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 333-34 n.10 (D.D.C. 1976).

1146. He also raised contentions concerning separation of powers, executive privilege, the right of privacy and the First Amendment. These will not be discussed here. For considerations of these issues by the three-judge court and the United States Supreme Court, *see* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 335-71 (D.D.C. 1976), *aff'd*, 433 U.S. 425, 439-68 (1977).

1147. *See* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 372 (D.D.C. 1976).

1148. *Id.*

1149. *See id.*

1150. 363 U.S. 603, 614 (1960). *See* note 506 and accompanying text *supra*.

1151. 372 U.S. 144, 168-69 (1963). *See* note 515 and accompanying text *supra*.

1152. Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 373 (D.D.C. 1976).

enter, that in terms of Congress' regulatory purpose it had been drafted as narrowly as possible and that the burden imposed upon Nixon was not severe, unnecessary or merely punitive.[1153] This last assertion was supported by citations to those sections of the act giving Nixon access to the tapes and documents, ensuring him the opportunity to raise claims of privilege in defense to efforts to gain control of specific materials through legal process, providing that public access regulations be formulated so as to take Nixon's interest in privacy into account and stipulating that all constitutional challenges and compensatory claims would be given expedited treatment by the courts.[1154] Thus, Judge McGowan concluded that because the deprivation of control over an individual's own private papers was accompanied by so many statutory safeguards, it could not be said to have been inflicted with a punitive motivation and thus could not constitute an attainder.[1155]

The United States Supreme Court affirmed this ruling. The relevant portion of Justice Brennan's majority decision in *Nixon v. Administrator of General Services*[1156] began by carefully stating what the bill of attainder clauses in the Constitution are *not*. They did not serve as variants of the equal protection clause of the Fourteenth Amendment, invalidating every legislative act burdening some persons, but not others who were similarly situated;[1157] nor did they prohibit enactments directed against an individual or class merely because the number of persons affected by such enactments could have been designated with a greater degree of generality.[1158] In short, the proscriptions against bills of attainder do not limit "Congress to the choice of legislating for the universe, or legislating only benefits, or not legislating at all."[1159] Indeed, the Court stated that the Records Act was not automatically a bill of attainder merely because it refers to Nixon by name. While Title I of the Records Act dealt solely with Nixon's papers, Title II created a commission charged with the duty of recommending ways to preserve the records of all future federal officers. The chief reason Title I referred to Nixon alone was that other collections of presidential documents were already housed in functioning archives, whereas

1153. *Id.*

1154. *See id.* at 373-74. For discussion of the relevant provisions of the Records Act, *see* notes 1129-1141 and accompanying text *supra*.

1155. Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 374 (D.D.C. 1976).

1156. 433 U.S. 425 (1977). On that majority for this issue, *see* note 244 *supra*.

1157. *Id.* at 471. *See* note 957 *supra*.

1158. *Id.*

1159. *Id.*

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Nixon's were not, and, had they been left in his custody, it was plausible that he might destroy them.[1160] Consequently, Justice Brennan concluded that Nixon has a "legitimate class of one."[1161]

Having thus disposed of the issue of specificity, the Court went on to consider the issue of punishment. Justice Brennan identified three tests for determining punishment in the context of the bill of attainder doctrine. The first consisted of the "ready checklist of deprivations and disabilities so disproportionately severe and so inappropriate to nonpunitive ends that they unquestionably have been held to fall" within the constitutional proscriptions against attainders.[1162] Among these deprivations were those of death, banishment, incarceration, confiscation of property and exclusion from employment.[1163] Justice Brennan pointed out that Congress had imposed none of these forbidden disabilities; even if the records and tapes were Nixon's private property,[1164] section 105 of the Records Act entitled him to seek just compensation in the courts.[1165]

The second test of punishment arose from the deficiencies inherent in the first. Since Congress could easily devise new deprivations unknown at common law, the Court noted that it had often looked beyond the boundaries of historical experience and applied a

> functional test of the existence of punishment analyzing whether the law under challenge, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive purposes . . . Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decisionmakers.[1166]

In this case, nonpunitive purposes were readily apparent. Congress sought to: (a) avoid the possible destruction of records contemplated by the Nixon-Sampson Agreement because those records were necessary

1160. *Id.* at 472.

1161. *Id.*

1162. *Id.* at 473.

1163. *Id.* at 473-74.

1164. Earlier in the opinion, the majority had said: "We see no reason to engage in the debate whether appellant has legal title to the materials. . . . Such an inquiry is irrelevant for present purposes because § 105(c) assures appellant of just compensation if his economic interests are invaded, and, even if legal title is his, the materials are not thereby immune from regulation." *Id.* at 445 n.8.

1165. *Id.* at 475.

1166. *Id.* at 475-76. In a footnote, Justice Brennan pointed out that "*Brown* left undisturbed the requirement that one who complains of being attainted must establish that the legislature's action constituted punishment and not merely the legitimate regulation of conduct." *Id.* at 476 n.40.

to complete the investigation of and prosecution for crimes arising from the Watergate Affair and (b) ensure public access to those documents of the Nixon Presidency that were of "general historical significance."[1167] In light of Congress' duty to further the fair administration of justice, it had a legitimate purpose in preserving evidence relevant to an ongoing criminal proceeding; similarly, it had a valid objective in ensuring the competent and disinterested maintenance of "records of historical value to our national heritage."[1168]

The third test of punishment, derived directly from *United States v. Lovett*,[1169] is a judicial inquiry into whether or not the legislative record evinced a motive to punish. Here the record was said to be devoid of any such evidence. The relevant committee reports did not denigrate Nixon's character or condemn his behavior.[1170] Indeed, when Senator Sam Ervin, one of the Record Act's co-sponsors, had been confronted with the contention that it attainted, he had retorted,

> The bill does not contain a word to the effect that Mr. Nixon is guilty of any violation of the law. It does not inflict any punishment on him. So it has no more relation to a bill of attainder. . . . than my style of pulchritude is to be compared to that of the Queen of Sheba.[1171]

The Court distinguished this situation from the one in *Lovett*, where expressions of punitive motive by various members of Congress were clearly recorded.[1172] In addition, Justice Brennan noted that many features of the Records Act (most of which had been mentioned by Judge McGowan in his opinion for the three-judge district court)[1173] militated against interpreting it as a penal enactment.[1174] Finally, the majority dismissed Nixon's argument that Congress had less burdensome alternatives available to it, such as a civil suit in an appropriate court to request an injunction against destruction of the documents and tapes in question. Justice Brennan stated that this alternative was unfeasible for

1167. *Id.* at 476-77. Justice White concurred in the result reached by the majority on the attainder challenge, but said that he would question the validity of the Records Act if the rubric "general historical significance" could be used to withhold the return of purely private letters and diaries written by Nixon. *See id.* at 487-91 (White, J., concurring in part and concurring in the judgment).

1168. *Id.* at 478.

1169. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra.*

1170. *See* 433 U.S. at 479 (citing H.R. REP. No. 93-1507, 93d Cong., 2d Sess., 2 (1974); S. REP. No. 93-1181, 93d Cong., 2d Sess., 4 (1974)).

1171. 120 CONG. REC. 33959-60 (1974) (remarks of Sen. Ervin), *quoted in* 433 U.S. at 480.

1172. 433 U.S. at 480. *See* notes 186-189 and accompanying text *supra.*

1173. *See* note 1154 and accompanying text *supra.*

1174. 433 U.S. at 481.

several reasons: not only would a full judicial inquiry into the ex-President's character and reliability be unduly intrusive, but also Nixon had continued to insist adamantly that his private affairs were not subject to judicial scrutiny.[1175] Thus, the Court concluded that:

> To be sure, if the record were unambiguously to demonstrate that the Act represents the infliction of legislative punishment, the fact that the judicial alternative poses its own difficulties would be of no constitutional significance. But the record suggests the contrary, and the unique choice that Congress faced buttresses our conclusion that the Act cannot fairly be read to inflict legislative punishment as forbidden by the Constitution.[1176]

Justice Stevens, in his concurrence, accepted the majority's rejection of Nixon's attainder challenge but adopted a more cautious approach. The facts that the Records Act denied the ex-President the custody over his own papers, that it subjected him to the burden of prolonged litigation over the status of his own documents, that it constituted an invasion of his privacy and that it exposed him to general humiliation were all said to raise serious questions under the bill of attainder clause.[1177] But Justice Stevens stated that those questions were not controlling in this case because he agreed Nixon was indeed a legitimate class of one. Unlike any other President, he had resigned from office and accepted a full pardon.[1178] Thus, "[s]ince these facts provide a legitimate justification for the specificity of the statute, they also avoid the conclusion that this otherwise nonpunitive statute is made punitive by its specificity."[1179]

Chief Justice Burger's dissent raised some troubling points. After noting how decisions like *Cummings v. Missouri*,[1180] *United States v. Lovett*,[1181] and *United States v. Brown*[1182] had revolutionized the bill of attainder doctrine,[1183] he claimed that Title I of the Records Act fell within the proscription of article one, section nine of the Constitution for several reasons. First, the act provided no procedural due process safeguards by inflicting its deprivation without a hearing. The Chief Justice noted that no standards were supplied to the GSA in order to enable it to determine what is or is not of "general historical signifi-

1175. *Id.* at 483.
1176. *Id.*
1177. *Id.* at 484 (Stevens, J., concurring).
1178. *Id.* at 486.
1179. *Id.*
1180. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra.*
1181. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra.*
1182. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra.*
1183. 433 U.S. at 538 (Burger, C.J., dissenting).

cance";[1184] nor were there any time limits placed on its deliberations in formulating standards of its own.[1185] Moreover, Nixon was given no opportunity to be heard in the decisionmaking process undertaken by GSA officials and was thus burdened without any of the safeguards of a judicial trial.[1186] Second, Chief Justice Burger pointed out that Title I effected a substantial deprivation. Not only had presidential papers traditionally been deemed the private property of the former Chief Executive,[1187] but also the Presidential Libraries Act of 1955[1188] conferred vested rights upon an ex-Commander-in-Chief to have a presidential library at the site of his choice. The effect of the Records Act was to destroy Nixon's traditional right of ownership and to single him out for exclusion from the coverage of the 1955 statute.[1189] Third, the Chief

1184. *Id.* at 539 n.30.

1185. *Id.*

1186. *Id.*

1187. *Id.* at 539-40. There are three views on this subject. The first is expressed by the Chief Justice. In support of this contention he cites Folsom v. Marsh, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4,901). Yet in that case, Justice Story said that, notwithstanding the private aspect of such papers, because of "the nature of the public service, or the character of the documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers." *Id.* at 347. A different view was advocated by Judge Richey in *Nixon v. Sampson.* He said that "[i]t is a general principle of law that that which is generated, created, produced or kept by a public official in the administration and performance of the powers and duties of a public office belongs to the government and may not be considered the private property of the official." Nixon v. Sampson, 389 F. Supp. 107, 133 (D.D.C. 1975). He was able to cite a number of decisions in support of this contention. *See, e.g.*, Wilson v. United States, 221 U.S. 361, 380 (1912) ("Thus, in the case of public records and official documents made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction."); United States v. First Trust Co., 251 F.2d 686, 687 (8th Cir. 1958) ("[R]ecords of a government official executed in the discharge of his official duties . . . [are] public documents and ownership [is] in the United States."); Coleman v. Commonwealth, 66 Va. (25 Gratt.) 865, 881 (1874) ("Whenever a written record of the transactions of a public officer in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, . . . and when kept it becomes a public document—a public record belonging to the office and not the officer; is the property of the state and not the citizen, and is in no sense a private *memorandum*.") A compromise position appears to be advanced by both the majority of the Supreme Court, *see* note 1164 *supra*, and the Attorney General, *see* notes 1114-1115 and accompanying text *supra*, recognizing a private right of ownership, but subjecting that right to government regulation in the public interest. Indeed, this compromise very much resembles that advocated originally by Justice Story.

1188. Act of August 12, 1955, ch. 859, 69 Stat. 695, *amended by* Act of October 22, 1968, PUB. L. No. 90-620, § 2, 82 Stat. 1287-89, 44 U.S.C. §§ 2101, 2107, 2108 (1970).

1189. 433 U.S. at 540-41. The Chief Justice's characterization of the 1955 act is misleading. It does authorize the Administrator of the GSA to accept land and equipment offered as a gift to the government for use in establishing a presidential library, 44 U.S.C. § 2108(a) (1970), to cooperate with a university in setting up a presidential archive, *id.* § 2108(d), and

Justice noted that after *Brown*, punishment need no longer be merely retributive, but could also be preventive and deterrent;[1190] thus the majority opinion's vain search for a vindictive motive was largely irrelevant.[1191] Fourth, Title I, unlike Title II of the Records Act, effectuated no rule of general applicability but operated against a designated individual. Chief Justice Burger contended that the fact that this individual might constitute a legitimate class of one was irrelevant. As for the factors noted by Justice Stevens—Nixon's resignation and his acceptance of a pardon—the Chief Justice remarked that if Congress intended to punish him for these acts, then it had enacted an attainder.[1192] But if, as Justice Stevens suggested, it had merely inflicted its deprivations upon him because of his uniqueness, the act was still an attainder because mere uniqueness does not justify the abrogation of vested rights.[1193] Thus, Chief Justice Burger concluded, "[f]or nearly 200 years this Court has not viewed either a 'class' or a 'class of one' as 'legitimate' under the Bill of Attainder Clause."[1194]

2. *Analysis*

The opinion of the three-judge district court in the *Nixon* case presents few difficulties. Although that court made a notable but cursory attempt to apply the definitions of punishment set forth in *Flemming* and *Kennedy*, this digression was not the key feature of its analysis. Rather, it relied primarily on the technique applied in the *Lovett* case, namely, scrutiny of the legislative record in order to determine whether an enactment was passed for the purpose of punishment. As Judge McGowan himself pointed out,[1195] Congress probably did rely on the allegations of malfeasance levelled against Nixon in order to justify its extraordinary treatment of him. This reliance could indicate either a desire to penalize or a desire to regulate present and future preservation of vital historical materials. Based on the legislative history of the Records Act, the three-judge court simply chose the latter explanation.

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to accept gifts or bequests for the purpose of establishing such an archive, *id.* § 2108(g). But all these provisions stipulate that the Administrator *may* take such action *if* he considers it to be in the public interest. Thus, since the entire matter is left to the *discretion* of the chief of the GSA, it is rather difficult to conclude that the statute creates any "vested rights."

1190. 433 U.S. at 541-42 (citing United States v. Brown, 381 U.S. 437, 458 (1965)).

1191. *Id.* at 542.

1192. *Id.* at 543.

1193. *Id.* at 544.

1194. *Id.* at 545.

1195. *See* Nixon v. Administrator of Gen. Servs., 408 F. Supp. 321, 373 n.71 (D.D.C. 1976).

The opinion of the United States Supreme Court is more troublesome in that it raises as many questions as it answers. Despite all the disclaimers about the uniqueness of this case, the section of the majority opinion dealing with bills of attainder offers a general analysis that can, and undoubtedly will, be applied in other factual contexts. Justice Brennan's opinion considers only two aspects of the attainder doctrine: specificity and punishment. On the subject of specificity, the majority opinion in *Nixon* clarifies a few areas left rather murky by *Brown*. First, it indicated that merely because a statute operates against a named individual does not mean that it must be denominated as a bill of attainder. This holding rebuts any false conclusion that might have been derived from Part III of Chief Justice Warren's opinion in *Brown*,[1196] in which he appeared to state that if a law is drafted with too great a degree of specificity, it is presumptively penal. Indeed, *Nixon* makes a key point in this respect: the definition of a bill of attainder consists of four components and if a law embodies only one or two of them, it simply cannot attaint. Second, the majority opinion repudiated emphatically the suggestion first broached by Justice White in his dissent in *Brown*:[1197] that the concepts of overinclusiveness and underinclusiveness,—developed in the context of equal protection analysis—had been interpolated *sub silentio* into the bill of attainder doctrine. Justice Brennan clearly indicated that the proscriptions against attainders are not variants of the equal protection clause of the Fourteenth Amendment; furthermore, he allayed any fears that might have been raised by language in the *Brown* case when he declared that a legislature is not restricted to enacting only those laws drafted at a broad level of generality. When confronted with a problem susceptible to a statutory resolution, Congress, if it wishes, can effectuate that resolution in a piecemeal fashion. These are truisms, to be sure; but they merited reiteration, especially in light of the often misleading critique in which the dissent in *Brown* engaged. Nonetheless, Justice Brennan's remark that Richard Nixon was a "legitimate class of one" is disturbing; if the mere specificity of a statute will not cause it to be classified as an attainder, then the legitimacy of the legislative specification would appear to be irrelevant. But if the fact that Nixon was *sui generis* is a key feature of the majority opinion, then a new element, namely, the legitimacy of a classification *vis-à-vis* the subject being classified,

1196. *See* United States v. Brown, 381 U.S. 437, 451 (1965). *See* notes 946-969 and accompanying text *supra*, for an explanation of the confusing aspects of Chief Justice Warren's discussion in *Brown*.

1197. *See* United States v. Brown, 381 U.S. 437, 463-64 (1965) (White, J., dissenting). *See* notes 770-772 and accompanying text *supra*.

has been added to the bill of attainder doctrine. Justice Stevens' concurrence illustrates the problems arising with such an addition. He concluded that Title I of the Records Act did inflict punishment; and had it been directed against any other named person, Justice Stevens would have invalidated it as an attainder. But solely because it imposed its sanctions upon a unique person—a President who had resigned his office and accepted a pardon—it could not fall within the proscription of article one, section nine. As a result, Nixon alone could be denied the protections afforded by the bill of attainder clauses to which all other persons are entitled.

There are several problems with this thesis. One is the concept of uniqueness itself. Justice Stevens found Nixon to be *sui generis* because of his resignation and pardon; Justice Brennan reached the same conclusion because he believed (or, at least, found a plausible basis for the belief) that Nixon, unlike other former Presidents, could not be entrusted with the care and safekeeping of his own state papers. Thus, conduct and character are the bases for determining who may constitute a legitimate class of one; but if this is so, then *all* individuals may be deemed unique, because their characters and many aspects of their conduct differ from those of their fellow human beings. Therefore, any time a legislature enacts a law imposing sanctions upon a named individual, it is burdening the "legitimate class of one" to which that individual belongs. One interpretation of the majority opinion in *Nixon* is that because the person being burdened constitutes the class itself, the act of the legislature in singling him out for a deprivation cannot be specification within the meaning of the bill of attainder doctrine. Of course, if this is correct, then the Court in *Nixon* has completely redefined the concept of specificity by excluding from the coverage of the bill of attainder doctrine the very type of legislation against which it was originally directed: laws burdening named persons.

The other major problem with Justice Brennan's "legitimate class of one" remark is his choice of adjectives. For him, an individual constitutes a legitimate class of one if that individual is unique. But uniqueness is irrelevant to the bill of attainder doctrine and so is the *legitimacy* of the legislative classification recognizing that uniqueness. The problem in attainder analysis is not whether a given enactment imposing a sanction incorporates a legitimate classification in order to designate the victims of that sanction; rather, the problem is for what purpose that enactment was passed. Thus the fact that the classification consisting entirely of one person— Richard M. Nixon—is a legitimate classificatory act because of its subject's uniqueness is simply not ger-

mane; the legitimacy or illegitimacy of Congress' classification should not be a defense to a bill of attainder challenge. As Chief Justice Burger pointed out, legitimacy of classification is a concept *foreign* to attainder analysis. If *Nixon* stands for a contrary proposition, it has, in effect, added a new component to the definition of an attainder. But such an interpretation may be a misinterpretation of Justice Brennan's viewpoint because he proceeded to state that even if the specificity element were satisfied, there would still have to be a showing of punitive intent. Thus perhaps his "legitimate class of one" remark should best be relegated to the category of surplusage, in the hope that it will not be taken seriously by succeeding courts.

On the subject of punishment, the majority opinion in *Nixon* made a concerted effort to clarify this confused topic by presenting three independent tests for determining whether a statute is or is not punitive. The first of these tests consists of a list of those sanctions typically imposed by parliamentary bills of attainder; "[a] statutory enactment that imposed any of those sanctions on named or identifiable individuals would be immediately constitutionally suspect."[1198] This may hold true in cases involving draconian penalties like death, imprisonment or exile, but when a relatively milder sanction like confiscation of property or denial of employment is confronted, problems arise. Why should a law depriving identifiable individuals of private property be "immediately constitutionally suspect"? True, it exacts a disability, but that fact, in and of itself, is meaningless, because the legislature may have had a completely nonpunitive purpose for doing so. The majority opinion errs by divorcing the nature of the sanction from the motive for imposing it. Before a law can be invalidated as a bill of attainder, a court needs to know not only what type of deprivation was inflicted, but also why it was inflicted; the latter element is the decisive one. Yet by establishing the severity of the sanction as an independent test of punishment, the majority opinion in *Nixon* creates a criterion that completely excludes any account of the crucial issue of legislative purpose. Here, too, however, there appears to be a discrepancy between what Justice Brennan says and what he actually does. He stated that imposition of certain harsh sanctions will cause a law to be immediately "suspect." But merely because it is suspect does not necessarily mean it will be abrogated; that ultimate step may require proof of something more. Thus, what appears to be an independent test of punishment may be no more than one factor that must be coupled with scrutiny of legislative motive. This conclusion is borne out by a consid-

1198. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473 (1977).

eration of Justice Brennan's application of this first test. If the severity of the disability exacted is, in and of itself, a test of punishment, then the Records Act should have been constitutionally suspect because it effected a deprivation of what may well have been private property.[1199] But Justice Brennan claimed to find no punitive sanction because of the just compensation provision of section 105(c). The clear implication is that inclusion of such a provision negated any colorable contention about Congress' alleged motive to penalize. Thus, in practice, the severity-of-the-sanction test will require an analysis of legislative purpose.

The second test of punishment is a functional one. The Court asked whether the law enacted, viewed in terms of the type of burden imposed, could be said to further a nonpunitive objective. Among the precedents cited in support of this test were *Cummings v. Missouri*,[1200] *Hawker v. New York*,[1201] *United States v. Brown*[1202] and *Kennedy v. Mendoza-Martinez*.[1203] Although the Court cited *Kennedy*, it made no attempt to manipulate the seven criteria listed in that case.[1204] Instead, Justice Brennan simply applied the regulation/punishment distinction.

1199. *See* note 1187 *supra*.

1200. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

1201. 170 U.S. 189 (1898). *See* notes 551-563 and accompanying text *supra*.

1202. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

1203. 372 U.S. 144 (1963). *See* notes 509-515 and accompanying text *supra*.

1204. *See id.* at 168-69. *See* note 515 and accompanying text *supra*. This omission may corroborate the thesis that the tests laid down in *Kennedy* are, in fact, unworkable. See notes 588-589 and accompanying text *supra*. Even the three-judge district court dealt with only four of the seven criteria established in *Kennedy*. *See* note 1153 and accompanying text *supra*. Indeed, the most conscientious attempt by a court to apply the *Kennedy* criteria reveals the deficiencies inherent in those criteria. Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 518 F.2d 990 (5th Cir. 1975), *aff'd without considering the point*, 430 U.S. 442 (1977), involved the issue of whether or not the civil penalty provisions of the Occupational Safety and Health Act, 29 U.S.C. §§ 666(a)-(c) (1970), are really penal in nature and thus call for the constitutional protections of the Sixth Amendment. Chief Judge John R. Brown's opinion for the Fifth Circuit presented a lengthy analysis of the applicability of the seven *Kennedy* criteria to the facts in this case. *See* 518 F.2d at 1000-1011. His conclusion was that one factor (the presence of an affirmative disability or restraint) supported a finding of punishment, four (historical considerations, the scienter issue, whether or not the sanctioned behavior was already deemed criminal and whether or not the sanction itself is excessive) did not, one (promotion of retribution and deterrence) provided ammunition for both sides and one (whether or not there was a rationally assignable alternative purpose) could not be applied because it would place the judiciary in the uncomfortable position of second guessing the judgment of the legislature. But the basis for the court's holding that the provisions of section 666 are not punitive was not any weighing of these seven divergent factors but rather its finding that (a) Congress intended to effect civil sanctions in this section and (b) the references to these sanctions as "civil" in the text of the statute itself would be deemed conclusive. *Id.* at 1011. These findings are anomalous, to say the least: if there was indeed *conclusive* evidence of congressional intent, then the court in *Atlas Roofing* had no business analyzing these seven factors in the first place. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). *Atlas Roofing* is a graphic demonstration

Assuming Congress might have had a nonpunitive regulatory purpose in enacting the Records Act, he sought to corroborate that assumption by examining the legislative history of the act. That examination yielded two nonpenal congressional concerns: safeguarding materials needed in an ongoing criminal prosecution and preserving documents of historical importance. In carrying out this analysis, however, the Court ignored the relevancy test of *Cummings*[1205] and the refinements made upon it by *Brown*.[1206] It did not try to ascertain whether the means used by Congress to effectuate its objectives were, in fact, internally consistent with those objectives; rather, it deemed its task accomplished as soon as it had identified the objectives in question and assured itself that they were indeed legitimate. There was no effort to discover if the terms of the Records Act were drafted in such a way as to accomplish the purposes of preserving evidence and safeguarding materials of public interest. This omission may signify either that the Court deemed it self-evident that the provisions of the Records Act fulfilled the nonpunitive legislative purposes in question, or that the means-ends relevancy rule of *Brown*, which had been developed in a case involving exclusion from an office, did not apply in this factual context. Presumably, the former alternative is the more accurate one.

The third test of punishment is no test at all. It consists of the technique used in *United States v. Lovett*,[1207] namely, judicial scrutiny of the legislative record to determine motive. This technique had already been used by the Court in connection with the second criterion, the regulation/punishment distinction. But now Justice Brennan was elevating this judicial tool into a full-fledged "test of punishment." Having done so, it might be expected that Justice Brennan would not only have engaged in a detailed scrutiny similar to that undertaken by Justice Black in *Lovett*, but also that he would have defined the permissible scope of such scrutiny, something which was not done in *Lovett*.[1208] But Justice Brennan did neither of those things. He cited reports from the House and Senate and claimed to find that no committee member had cast aspersions upon Nixon. In addition, he cited Sam Ervin's assurance that Congress had no wish to punish the former President. Even assuming that such an assurance was entitled to decisive weight, the Court nevertheless overlooked an important issue. As

of the conceptual confusion attendant to judicial efforts to apply the tests for punishment set forth in *Kennedy*.

1205. *See* notes 531-539 and accompanying text *supra*.

1206. *See* notes 970-973 and accompanying text *supra*.

1207. 328 U.S. 303 (1946). *See* notes 180-198 and accompanying text *supra*.

1208. *See* notes 270-286 and accompanying text *supra*.

Chief Justice Burger pointed out, the majority made no attempt to gauge how *Brown* affects *Lovett*. The former case states punishment may be retributive, deterrent or preventive and thus it is no longer sufficient to say that the legislative record evinced no expressions of a purpose to punish a certain person for past conduct. Perhaps Congress enacted the Records Act not to penalize Nixon for his former misdeeds but rather to deter future Chief Executives from committing improper or illegal acts by use of the implicit threat that it might subject their state papers to similar confiscation. By redefining the possible purposes of punishment, *Brown* compels a wider scrutiny than that undertaken in *Lovett*; yet the majority in *Nixon* completely ignored the legacy of *Brown*, and instead contented itself with a cursory search for evidence of retributive expressions only.

In applying this third test, however, Justice Brennan considered two other aspects. One was the provisions of the Records Act itself; here, he merely repeated the conclusions of the three-judge district court.[1209] The second aspect was his suggestion that one way of divining whether or not a legislature sought to punish was to inquire into the existence of less burdensome alternatives by which it could have achieved its objectives. In the *Nixon* case this approach proved unavailing because a civil suit, the one other feasible alternative, was found to be equally burdensome and highly impractical. Yet this suggested approach in *Nixon* is a genuine innovation in the bill of attainder doctrine. *Brown* had indicated that courts should be willing to ask whether the legislature could have achieved its goals by more internally consistent means.[1210] But not until *Nixon* had a court suggested that punishment, within the meaning of the bill of attainder clauses, could be inferred from a legislative failure to adopt less *burdensome* alternatives.[1211] If the Court intends this technique to be applied persever-

1209. *See* note 1153 and accompanying text *supra*.

1210. *See* note 989 and accompanying text *supra*.

1211. The "less burdensome alternatives" or "less drastic means" test has been used by the Supreme Court to invalidate a wide variety of legislation, especially laws that impinge upon First Amendment freedoms or state enactments disrupting interstate commerce. *See, e.g.*, Great Atl. & Pac. Tea Co. v. Cottrell, 424 U.S. 366, 376-78 (1976) (Mississippi ordinance requiring reciprocal acceptance of its milk by other states as a condition to importation of milk from those states); Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (Arizona ordinance barring the shipment of uncrated local cantaloupes out of state); United States v. Robel, 389 U.S. 258, 268 (1967) (provision of the Subversive Activities Control Act of 1950 barring members of "Communist action" organizations from employment in defense facilities; *see* note 613 *supra*); Lamont v. Postmaster Gen., 381 U.S. 301, 310 (1965) (Brennan, J., joined by Goldberg & Harlan, JJ., concurring) (law prohibiting the delivery of "Communist political propaganda" through the mails unless the addressee so requests); Aptheker v. Secretary of State, 378 U.S. 500, 508 (1964) (provision of the Subversive Activities Control Act

ingly, then it has, in effect, placed its imprimatur on the second guessing of legislatures by judges. A committed implementation of the less-burdensome-alternatives analysis in the context of attainder challenges may well prove to be *the* major development in this area of the law since the decision in *Cummings* itself, provided, of course, that enough judges are willing to make such a commitment.[1212]

Thus, a close consideration of the *Nixon* case yields distinctly mixed conclusions. On the one hand, the majority's analysis of the issues of specificity and punishment is, in many respects, disappointingly superficial and occasionally confused. On the other hand, dicta in this opinion suggest a more expansive concept of the bill of attainder doctrine than any decision of the United States Supreme Court has heretofore advocated.

Conclusion

The history of the bill of attainder doctrine during the past century has been, with some notable exceptions, one of constant and consistent retreat from the broad principles announced in *Cummings v. Missouri*.[1213] Justice Field's opinion in that case offered an expansive redefinition of the criteria for determining whether or not a law at-

of 1950 prohibiting members of "Communist action" organizations from receiving passports); Shelton v. Tucker, 364 U.S. 479, 488 (1960) (Arkansas statute requiring teachers in public schools to file annual affidavits listing all their affiliations); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354-55 (1951) (municipal ordinance barring the sale of pasteurized milk unless it had been processed and bottled at an approved facility within a radius of five miles from the central square of Madison, Wisconsin). *See generally* Struve, *The Less-Restrictive-Alternative Principle and Economic Due Process*, 80 HARV. L. REV. 1463, 1471-78 (1967); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464, 468-70 (1969).

1212. One should not, however, ignore the rather radical suggestions made by Justice Stevens and Chief Justice Burger. The former intimated that invasion of privacy and humiliation may be punishment for the purposes of a bill of attainder. He made a similar suggestion about the fact that Nixon would be "subjected to the burden of prolonged litigation over the administration of the statute." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 484 (1977) (Stevens, J., concurring). No one else has ever suggested that merely because a person affected by a law finds it necessary to sue in order to contest how that law is being administered, he is thereby being punished; serious application of this thesis might lead to the conclusion that most, if not all, legislation must be punitive. Chief Justice Burger, in discussing the judicial trial aspect of the definition of an attainder bemoaned the fact that Nixon was not allowed to participate in the decisionmaking processes of the GSA. *Id.* at 539 n.30 (Burger, C.J., dissenting). Heretofore, "safeguards of a judicial trial" had only referred to the statutory provision of a trialtype hearing before any imposition of sanctions; according to the Chief Justice, it must now encompass provision of an opportunity for one affected by a law to participate in the administrative determination of how that law is to be enforced. Again, this is an unprecedented extension of the bill of attainder doctrine; it is also an impractical one.

1213. 71 U.S. (4 Wall.) 277 (1867). *See* notes 54-70 and accompanying text *supra*.

taints. One would have expected that because of this very expansiveness, many legislative acts would be invalidated as attainders. For a time this was true; of the twenty-three decisions since 1867[1214] that have struck down laws pursuant to the proscriptions of article one, sections nine and ten of the Constitution, twelve were rendered during the two decades following *Cummings*. But since that initial surge of activity, the bill of attainder clauses have remained largely dormant. In some respects, this dormancy is undoubtedly attributable to the increased sophistication of legislative draftsmen. For the most part, however, the responsibility for this inaction must be laid at the door of the courts. It is the judges who have developed multifarious ways to avoid striking down enactments as bills of attainder. By utilizing spurious distinctions,[1215] confusing two different constitutional prohibitions with one another,[1216] relying on the facile invocation of simplistic labels instead of the hard task of judicial ratiocination,[1217] extending key words and phrases like "regulation"[1218] or "safeguards of a judicial trial"[1219] to the point of meaninglessness and, in general, ignoring the implications of and often the explicit language in cases like *Cummings, United States v. Lovett*[1220] and *United States v. Brown*,[1221] judges have managed to undermine this historical safeguard of the Constitution. Consequently, a recent chronicle of the bill of attainder doctrine becomes little more than a list of the various escape clauses that judges have engrafted onto that doctrine. Indeed, often the most reliable escape clause has proven to be the simple *ipse dixit*. An astonishing number of decisions have rejected attainder challenges to various types of legislation without providing any meaningful rationale for doing so.[1222]

1214. *See* note 98 *supra*.

1215. Such as the distinctions between civil and criminal penalties and procedures, *see* notes 295-338 and accompanying text *supra*, prospectivity and retrospectivity, *see* notes 339-392, 897-921 and accompanying text *supra*, and rights and privileges, *see* notes 393-478 and accompanying text *supra*.

1216. *See* notes 923-945 and accompanying text *supra*.

1217. Examples are those cases relying on the "deportation-is-not-punishment" label, *see* notes 479-524 and accompanying text *supra*, and those cases finding purported exemptions to the bill of attainder doctrine, *see* notes 865-896 and accompanying text *supra*.

1218. *See* notes 525-590, 946-989 and accompanying text *supra*.

1219. *See* notes 623-722, 1062-1112 and accompanying text *supra*.

1220. 328 U.S. 303 (1946). *See* notes 180-198, 627 and accompanying text *supra*.

1221. 381 U.S. 437 (1965). *See* notes 728-766 and accompanying text *supra*.

1222. *See* Presser v. Illinois, 116 U.S. 252, 268 (1886) (law requiring armed militias to be organized only with the approval of the governor); *In re* Grand Jury Investigation, 542 F.2d 166, 169 (3d Cir. 1976), *cert. denied*, 97 S. Ct. 755 (1977) (federal statute providing for confinement for contempt in the case of a witness who declines to testify before a grand jury after having been granted use immunity); United States v. Lewis, 472 F.2d 252, 256 n.4 (3d Cir. 1973) (jury selection plan for the Western District of Pennsylvania which barred from

Why has this turn of events came about? To some extent, it may be the result of judicial self-restraint, of a profound reluctance on the part of judges to second guess the conclusions of legislatures. Or it may be attributable to the inherent imprecision of many of the terms that comprise the definition of a bill of attainder. Yet, it certainly is *not* the result of hesitancy on the part of legislatures to enact punitive laws. Indeed, the bill of attainder doctrine should have proven most useful in abrogating much of the anti-subversive legislation passed by state and federal governments since World War II. Nevertheless, only three cases utilized the proscriptions of article one, sections nine and ten to strike down such laws and one of those was reversed on appeal.[1223] It may

jury service persons facing pending prosecutions for crimes punishable by more than one year in prison); United States v. Gosciniak, 142 F.2d 240, 240 (7th Cir. 1944) (provisions of the 1940 Selective Service and Training Act barring admission of certain evidence in draft violation proceedings); United States v. McCarthy, 300 F. Supp. 716, 721 n.7 (S.D.N.Y. 1969), *aff'd*, 422 F.2d 160 (2d Cir.), *appeal dismissed*, 398 U.S. 946 (1970) (federal law requiring union officer to disclose payments made to him by one employing union members); MacQuarrie v. McLaughlin, 294 F. Supp. 176, 178 (D. Mass. 1967), *aff'd*, 394 U.S. 456 (1968) (Massachusetts law revoking the licenses of uninsured motorists who are involved in an accident and who fail to post a bond); American Broadcasting Co. v. United States, 110 F. Supp. 374, 390 (S.D.N.Y. 1953) (Federal Communications Commission order regulating lottery programs on television and radio); United States v. Olson, 253 F.233, 234-35 (W.D. Wash. 1917) (provisions of the Selective Service Act of 1917); Anderson v. Webb, 241 Ark. 233, 239, 406 S.W.2d 871, 874 (1966) (statute providing that fee tail may be dissolved by the grantor and all remaindermen upon the death of the life tenant); Jones v. Ellis, 182 Ga. 380, 384, 185 S.E. 510, 512 (1936) (mandamus filed by a school district to compel the county board of education to pay its proportionate share of funds for education); Arciero v. Hager, 397 S.W.2d 50, 53 (Ky. 1965) (law making an adopted child the equivalent of the natural child of the adopting parent for inheritance purposes and terminating its legal relationship to its natural parent); McDonough v. Director of Patuxent Institution, 229 Md. 626, 629, 183 A.2d 368, 371 (1962) (state's Defective Delinquent Law providing for commitment of juvenile delinquents); Mosher v. Bay Circuit Judge, 108 Mich. 503, 505, 66 N.W. 384, 385 (1896) (law permitting attachment to secure an unmatured claim); *In re* Platz, 60 Nev. 296, 309, 108 P.2d 858, 864 (1940) (law prohibiting an attorney who has had his license suspended from practicing for the duration of that suspension); Kelley v. State Bar, 148 Okla. 282, 298, 298 P. 623, 624 (1931) (rule requiring all licensed attorneys to pay an annual fee to the state bar or suffer a forfeiture of licenses); Thoren v. Builders' Bd., 533 P.2d 1388, 1390 (Ore. App. 1975) (state Builders' Licensing Act); Friedman v. American Sur. Co., 137 Tex. 149, 162, 151 S.W.2d 570, 577 (1941) (state unemployment act exacting a social security tax); State v. Eisenberg, 48 Wis. 2d 364, 380, 180 N.W.2d 529, 537 (1970), *cert. denied*, 402 U.S. 987 (1971) (law requiring an attorney to pay due respect to courts and judges); Christie v. Lueth, 265 Wis. 326, 332, 61 N.W.2d 338, 341 (1953) (resolution setting up a special committee to investigate the petitioner); *In re* King's Estate, 261 Wis. 266, 272, 52 N.W.2d 885, 888 (1952) (statute which says realty may be added to the properties, the title of which may be adjudicated in county courts if necessary to the settlement of an estate, as applied to the realty of a married couple, one of whom killed his spouse and then committed suicide).

1223. *See* United States v. Brown, 381 U.S. 437 (1965), *see* notes 728-766 and accompanying text *supra*; Blawis v. Bolin, 358 F. Supp. 349 (D. Ariz. 1973), *see* notes 1032-1046 and accompanying text *supra*; Thompson v. Wallin, 196 Misc. 686, 93 N.Y.S.2d 274 (1949), *rev'd sub nom.* L'Hommedieu v. Board of Regents, 276 App. Div. 494, 95 N.Y.S.2d 443 (3d

well be, as has been suggested,[1224] that courts consider the bill of attainder doctrine to be an outmoded device. Indeed, both before and after its decision in *Brown*, the United States Supreme Court relied primarily on other techniques, such as vagueness[1225] or overbreadth analysis,[1226] to strike down anti-subversive or anti-Communist legislation. But these alternative devices have their own limits: vagueness analysis is of little use with a well-drafted statute and the scope of the overbreadth doctrine has been sharply curtailed in recent years.[1227]

Thus, it may well be appropriate to dust off the bill of attainder clauses and put them to a renewed use whenever a legislature appears to have arrogated to itself the functions of judge and jury. Putting these clauses to such a use, however, will require the judiciary to interpret the proscriptions contained therein in the more expansive manner suggested by *Cummings, Brown* and *Nixon v. Administrator of General Services*.[1228] As Professor Zachariah Chafee has warned:

> It is all very pleasant to say that the remedy for bad laws lies with the people at the polls, but what Senators or Represenatives were ever defeated because they ever voted for a sedition law?. . . . If legislators are determined not to be guardians of the liberties of the people and if judges refuse to interfere when legislators take those liberties away, what is the use of putting guarantees of fundamental rights into the Constitution except, perhaps, to furnish political orators with noble words to quote while they tell us Americans to thank God that we are not as other men are?[1229]

The answer, of course, is that it is of no use at all.

Dep't), *aff'd*, 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub nom.* Adler v. Board of Educ., 342 U.S. 485 (1952), *see* notes 199-211 and accompanying text, *supra*.

1224. *See* note 988 *supra*.

1225. *See, e.g.*, Baggett v. Bullitt, 377 U.S. 360, 373-74 (1964) (expurgatory oath exacted from the public employees of the state of Washington); Cramp v. Board of Pub. Instruction, 368 U.S. 278, 286-87 (1961) (expurgatory oath extracted from the public employees of the state of Florida).

1226. *See, e.g.*, United States v. Robel, 389 U.S. 258, 266 (1967) (federal law barring members of "Communist action" organizations from employment in defense facilities); Whitehill v. Elkins, 389 U.S. 54, 62 (1967) (expurgatory oath exacted from the public employees of the state of Maryland); Keyishian v. Board of Regents, 385 U.S. 589, 604 (1967) (New York's Feinberg Law, *see* notes 203-204 and accompanying text *supra*); Elfbrandt v. Russell, 384 U.S. 11, 17 (1966) (expurgatory oath exacted from the public employees of the state of Arizona); Wieman v. Updegraff, 344 U.S. 183, 190-91 (1952) (expurgatory oath exacted from the public employees of the state of Oklahoma).

1227. *See* Broadrick v. Oklahoma, 413 U.S. 601, 613-15 (1973). *See* note 989 *supra*.

1228. 433 U.S. 425 (1977). *See* notes 1113-1212 and accompanying text *supra*.

1229. CHAFEE, *supra* note 7, at 161.