NOTES AND COMMENTS

THE BOUNDS OF LEGISLATIVE SPECIFICATION: A SUGGESTED APPROACH TO THE BILL OF ATTAINDER CLAUSE

> Whereas the pretended Prince of Wales hath . . . (being bred up and instructed to introduce the *Romish* Superstition and *French* Government into these your Majesty's Kingdoms) openly and traitorously, with Design to dethrone your Majesty, assumed the Name and Title of James the Third . . . To the End therefore that your Majesty's good and loyal People of England, assembled in Parliament, may in the most solemn Manner express their utmost Resentment of so great an indignity . . . and that the said Traitor may be brought more certainly and speedily to condign Punishment . . . be it enacted . . . That the said pretended Prince of Wales stand and be convicted and attainted of High Treason. . . .
>
> . . . 1700
>
> The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. . . . Therefore the Communist Party should be outlawed.
>
> . . . 1954

COMMON in sixteenth, seventeenth, and eighteenth century England were so-called "bills of attainder," parliamentary acts sentencing to death, without a conviction in the ordinary course of judicial trial, named or described [1] persons or groups.[2] In addition to the death sentence, it was usual to decree that there

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1. See, *e.g.*, the Act for the Attainder of Thomas Fitzgerald, Earl of Kildare 1534, 26 Hen. 8, c. 6 (priv.):

> . . . And Further be it enacted by the auctorite aforesaid, that all suche persons whiche be or hereafter have ben conffortours abbetours partakers confederates or adherents unto the said Erle in his said false and trayterous acts and purpos shall in lyke wise stonde and be atteynted adjugged and convycted of High Treason . . . And be it further enacted . . . that the same atteynder juggement and convyccion ageynst the said conffortours abettours . . . confederates and adherents shalbe as astronge and effectuall in the lawe ageynst them and every of them as though they and every of them had be specially singulerly and particulerly named by their propre names and surnames in this said Acte.

See also An Act to attaint persons concerned in the late horrid conspiracy . . ., 1696, 8 Will. 3, c. 5 (pub.).

2. See statutes cited *supra* note 1; see also 25 Hen. 8, c. 12 (pub.) (1533); An act for the attainder of divers offenders in the late most barbarous, monstrous, detestable and damnable treasons, 1605, 3 Jac. 1, c. 2 (pub.); an Act for the attainder of several persons guilty of the horrid murder of his late sacred Majesty King Charles the First, 1660, 12 Car. 2, c. 30 (pub.); 19 Geo. 2, c. 26 (pub.) (1746); An act to incapacitate . . . (69 names) from voting at elections of members to serve in parliament. . . . 1770, 11 Geo. 3, c. 55 (pub.).

was a "corruption of blood"[3] which prevented the attainted party's heirs from inheriting his property.[4] Also common were "bills of pains and penalties," which prescribed, after the fashion of bills of attainder, sanctions less than capital.[5] Both sorts of statute were almost always directed at persons who had attempted,[6] or threatened to attempt,[7] to overthrow the government. The framers of the United States Constitution did not, however, have to scan the Statutes of the Realm in order to appreciate the evils of attainder: our own pre-Constitution experience provided them with ample firsthand knowledge. The Revolutionary era was marked by violent anti-Loyalist sentiments, which found expression in the statute books of all the thirteen colonies.[8] This wave of anti-Tory legislation included numerous bills of attainder[9] and bills of pains and penalties.[10] In 1789, having grown wary of such legislative excesses, the framers—unanimously, and without debate[11]—moved to insure that they should never recur:

> No Bill of Attainder or ex post facto law shall be passed [by the Congress].[12]

3. Corruption of blood was outlawed by the United States Constitution. U.S. CONST. art. III, § 3.

4. See *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 387 (1866); CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION 96 (1956).

5. See, *e.g.*, 13 Car. 2 St. I, c. 15 (pub.) (1661); an Act to inflict pains and penalties on John Plunket, 1722, 9 Geo. 1, c. 15 (pub.). See 2 WOODDESON, VINERIAN LECTURES 638 (1792); STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 210 (4th ed. 1873); COOLEY, CONSTITUTIONAL LIMITATIONS 315-16 (6th ed. 1890).

The bill of attainder clause has been construed to outlaw bills and pains and penalties. See notes 22 & 31 *infra* and accompanying text.

6. See, *e.g.*, 29 Hen. 6, c. 1 (pub.) (1450); 13 Eliz., c. 16 (pub.) (1570); An act for the attainder of divers offenders in the late most barbarous, monstrous, detestable and damnable Treasons, 1605, 3 Jac. 1, c. 2 (pub.); An Act for continuing the imprisonment . . . for the late horrid conspiracy to assassinate the person of his sacred Majesty, 1699; 10 & 11 Will. 3, c. 13 (pub.); An Act for the Attainder of the pretended Prince of Wales of High Treason, 1701, 13 Will. 3, c. 3 (pub.); An Act to inflict pains and penalties on John Plunket, 1722, 9 Geo. 1, c. 15 (pub.).

7. See notes 64-66 *infra* and accompanying text.

8. VAN TYNE, THE LOYALISTS IN THE AMERICAN REVOLUTION, apps. B and C (1902). See also Thompson, *Anti-Loyalist Legislation During the American Revolution* (pts. 1 & 2), 3 ILL. L. REV. 81, 147 (1908); Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV. 1 (1948).

9. See, *e.g.*, Attainder Act of Oct. 22, 1779, 1 Laws of New York, third session, c. XXV; Attainder Act of May 12, 1784, 1 Laws of New York, seventh session, c. LXIV; James' Claim, 1 U.S. (1 Dall.) 47 (1780); Respublica v. Gordon, 1 U.S. (1 Dall.) 232 (1788); Inglis v. Sailor's Snug Harbour, 28 U.S. (3 Pet.) 99 (1830). See also authorities cited note 8 *supra*.

10. See, *eg.*, Act of Disenfranchisement of May 12, 1784, 1, Laws of New York, Seventh Session, c. LXVI; Cooper v. Telfair, 4 U.S. (4 Dall.) 14 (1800). See generally authorities cited note 8 *supra*.

11. MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 449 (Hunt & Scott eds. 1920).

12. U.S. CONST. art. I, § 9.

> No State shall . . . pass any Bill of Attainder, ex post facto law, or Law impairing the Obligation of Contracts . . .[13]

These clauses, limiting the extent to which legislatures can specify the individuals or groups to which their legislation is to apply, number among the few specific safeguards of liberty which appear in the original body of the Constitution, and also represent one of the few explicit limitations upon both federal and state action. Although throughout our history there have been sporadic attempts to legislate against particular persons or groups,[14] until recently the bill of attainder prohibition was seldom invoked. However, the recent spate of legislation specifically directed at the members of the Communist Party[15] has forced the Supreme Court to reexamine the scope and purpose of the clauses.

From the early days of the Constitution through the decision of *United States v. Lovett*[16] in 1946, the Court treated the bill of attainder clause as a blanket prohibition of all forms of legislative punishment[17] of specific groups. Since the decision in *American Communications Ass'n v. Douds*[18] in 1950, however, the Court has espoused the view that the historical roots of the bill

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13. U.S. CONST. art. I, § 10.

14. See, *e.g.*, notes 8-10 *supra* and 66 & 77 *infra* and accompanying text (Tories); notes 25-37 *infra* and accompanying text (post-Civil War); Davis v. Beason, 133 U.S. 333 (1890) (Mormons); New York *ex rel.* Bryant v. Zimmerman, 278 U.S. 63 (1928) (Ku Klux Klan).

15. Congress has declared the Communist Party to be unentitled to "any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States," and there are on the books specific provisions restricting the Party's use of the nation's mails and air waves, and denying it certain income tax deductions. Communist Control Act § 3, 68 Stat. 776 (1954), 50 U.S.C. § 842 (1958); Subversive Activities Control Act §§ 10, 11(a), 64 Stat. 996 (1950), 50 U.S.C. §§ 789-90 (1958).

The individual members of the party cannot hold any non-elective government office, work in defense facilities or for a labor union, represent either employer or employee in National Labor Relations Act proceedings, or get a passport. Subversive Activities Control Act §§ 5(a)(1)(B), 5(a)(1)(D), 64 Stat. 992 (1950), 50 U.S.C. §§ 784(a)(1)(B), 784(a)(1)(D) (1958); Communist Control Act §§ 6, 13A(h), 68 Stat. 777, 779 (1954), 50 U.S.C. §§ 784(a)(1)(E), 792a(h) (1958); Subversive Activities Control Act § 6(a), 64 Stat. 993 (1950), 50 U.S.C. § 785(a) (1958).

Further, an alien who is a member of the Party is automatically ineligible for admission (or naturalization) and, even if already admitted, is subject to deportation, at which time his social security benefits will be terminated. Immigration and Nationality Act § 212(a)(28)(c), 66 Stat. 184 (1952), 8 U.S.C. § 1182(28)(c) (1958); Immigration and Nationality Act § 313(a)(2), 66 Stat. 240 (1952), 8 U.S.C. § 1424(a)(2) (1958); Immigration and Nationality Act § 241(a)(6)(C), 66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6)(C) (1958); Social Security Act Amendments of 1954 § 107, 68 Stat. 1083, 42 U.S.C. § 402(n) (1958).

16. 328 U.S. 303 (1946).

17. The view that in order to be a bill of attainder, a statute must inflict "punishment," is criticized below. See notes 137-41 *infra* and accompanying text. However, since all the case law speaks in these terms, this Comment, in describing the contrasting approaches to the constitutional provision, will, for the time being, also speak in terms of "punishment."

18. 339 U.S. 382 (1950).

of attainder proscription limit its scope to a narrowly restricted and technically defined class of legislative acts.

THE FUNCTIONAL TRADITION

> If the [bill of attainder] inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.[19]

This "functional" view [20]—interpreting the bill of attainder clause not in the light of what "bills of attainder" were, but rather in the light of the kinds of evils they produced—was first suggested in 1810 in *Fletcher v. Peck*.[21] Chief Justice Marshall, speaking for the Court, stated in dictum that "a bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."[22] This is of course a statement that what were known at common law as bills of pains and penalties [23] come within the constitutional prohibition of bills of attainder. The language of the Constitution does not compel such a conclusion; yet Marshall put it forth without argument. It seems quite clear that he arrived at this result because he viewed the constitutional provision not as a prohibition of an historically defined entity—"the bill of attainder"—but rather as a general proscription of legislative punishment, regardless of the type of sanction imposed.[24]

The functional approach became law in the landmark post-Civil War cases of *Cummings v. Missouri* [25] and *Ex parte Garland*.[26] At issue in *Cummings* were certain amendments to the Missouri constitution of 1865 which provided that no one could vote, hold office, teach, or hold property in trust for a re-

19. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866).

20. The word "functional" is sometimes used to mean "result-oriented." This is not the meaning here intended, for of course the "literalist" position is as result-oriented as the position here described. Rather, "functional" is used to designate that approach which interprets a constitutional provision in light of the sort of evil against which it was directed. It thus might perhaps better be termed "historical functionalism."

21. 10 U.S. (6 Cranch.) 87 (1810).

22. *Id.* at 138 (dictum).

23. See note 5 *supra* and accompanying text.

24. The functional view also found expression in *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 212 (1827), a bankruptcy case which construed the obligation of contracts clause:

> By classing bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts together, the general intent becomes very apparent; it is *a general provision against abitrary and tyrannical legislation over existing rights, whether of person or property.*

Id. at 286 (emphasis supplied).

25. 71 U.S. (4 Wall.) 277 (1866).

26. 71 U.S. (4 Wall.) 333 (1866). Although *Cummings* and *Garland* and *Pierce v. Carskadon*, note 43 *infra*, were the only cases to reach the Supreme Court, several post-Civil War oath provisions were invalidated as bills of attainder. See *In re* Shorter, 22 Fed. Cas. 16 (No. 12811) (D. Ala. 1865); *Ex parte* Law, 15 Fed. Cas. 3 (No. 8126) (S.D. Ga. 1866); Green v. Shumway, 39 N.Y. 418 (1868); Davis v. Pierse, 7 Minn. 13 (1862). *But see Ex parte* Hunter, 2 W. Va. 122 (1867).

ligious organization, unless he first took an elaborate oath to the effect that he had taken no part in the rebellion and would continue in his loyalty to the United States and the State of Missouri.[27] *Garland* involved the constitutionality of a federal statute which required attorneys to take an oath, similar to the one involved in *Cummings*,[28] as a condition of admission to practice in the federal courts. The Court invalidated both requirements as bills of attainder on the ground that they were legislative acts inflicting punishment upon a specific group—those who could not truthfully take the oath—without a judicial trial.[29] Over the dissent of Justice Miller,[30] the cases adopted Marshall's dictum that the bill of attainder proscription covers bills of pains and penalties.[31] Rejecting Miller's literalist tenets,[32] the majority held irrelevant the facts that the act was in form a civil statute [33] and that it lacked the "declaration of guilt" which Justice Miller [34]—and, eighty years later, Mr. Justice Frankfurter [35]—claimed was essential. The Court specifically refused to read into the bill of attainder clause the restricted definition of "punishment" advocated by counsel for Missouri, and implied that *any* deprivation could constitute "punishment" sufficient to render an act a bill of attainder.[36]

In 1872 the Court, in a one sentence memorandum opinion in *Pierce v. Carskadon*, struck down as a bill of attainder a West Virginia statute conditioning access to the courts upon the taking of an oath similar to those involved in *Cummings* and *Garland*.[37] However, seventeen years later, in *Dent v. West Virginia*,[38] the Court upheld another West Virginia statute— this one requiring physicians to obtain a license in order to practice. Appellant had argued that because the granting of a license was conditioned upon graduating from medical school, practicing for ten years, or passing a special examina-

27. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 280-81 (1866).

28. *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 334-5 (1866).

29. 71 U.S. at 323, 377.

30. *Id.* at 386-90.

31. *Id.* at 323.

32. See note 49 *infra*.

33. 71 U.S. at 278.

34. *Id.* at 390.

35. United States v. Lovett, 328 U.S. 303, 322-23 (1946). See notes 42-45 *infra* and accompanying text.

36. See notes 148, 152-53 *infra* and accompanying text.

Although the oaths contained both denials of past acts and pledges of future conduct, the Court spoke almost exclusively of the former provisions. Indeed, at one point the Court's language suggests the requirement of post facto punishment, discussed and criticized (on the ground of pre-Constitution history and not of precedent) *infra* at notes 56-67 and accompanying text. 71 U.S. at 321-22; see text accompanying note 155 *infra*. However, the force of this dictum is greatly weakened by the fact that the Court apparently struck down both oaths *in toto*, without distinguishing the provisions relating to the future from those pertaining to the past.

37. Pierce v. Carskadon, 83 U.S. (16 Wall.) 234 (1872). See also Drehman v. Stifle, 75 U.S. (8 Wall.) 595 (1869); Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874); Presser v. Illinois, 116 U.S. 252 (1886).

38. 129 U.S. 114 (1889).

tion, the act constituted a legislative infliction of punishment upon those unable to achieve one of the qualifications. The bill of attainder argument was also rejected in *Hawker v. New York*,[39] which involved the constitutionality of a New York statute barring convicted felons from the practice of medicine. In both cases, the Court accepted the *Cummings-Garland* doctrine that the bill of attainder clause prohibits legislative punishment in any guise,[40] but held that because the deprivation imposed by the statutes was reasonably related to the activities regulated thereby, the statutes did not impose punishment at all.[41] Despite the finding of no bill of attainder, however, the absence of any reference to allegedly historical bonds suggests that *Dent* and *Hawker* can be placed in the pre-*Douds* stream of functional interpretation.

The bill of attainder clause lay fallow until the 1946 case of *United States v. Lovett*,[42] which involved the constitutionality of section 304 of the Urgent Deficiency Appropriation Act of 1943 [43] prohibiting payment of further compensation to Lovett and two other named federal employees. The Court, *per* Mr. Justice Black, found in the legislative history of section 304 a punitive intent [44] on the part of Congress, and, on the authority of *Cummings* and *Garland*, invalidated the section as a bill of attainder.[45]

Since *Lovett* the Supreme Court has not condemned any statute as a bill of attainder, although the issue has been raised at least twelve times.[46] The func-

39. 170 U.S. 189 (1898).

40. Dent v. West Virginia, 129 U.S. 114, 125-28 (1889); Hawker v. New York, 170 U.S. 189, 198 (1898).

41. Dent v. West Virginia, 129 U.S. 114, 128 (1889). Hawker v. New York, 170 U.S. 189, 193-94 (1898). See note 129 *infra*.

A similar rationalization for the modern requirement of *post facto* punishment (notes 56-67 *infra* and accompanying text) is also available, for it could be argued that sanctions designed to alter future conduct cannot constitute "punishment" within the traditional functional definition of bill of attainder. The requirement of post facto punishment is treated as a product of "literalism," however, because of the method by which it was derived.

The modern case law, particularly the influential *Lovett* concurrence, has strongly suggested that all the modern requirements, including that of *post facto* punishment, have been imposed by the demands of history. This was not the approach of *Dent* and *Hawker*. This is not to say, of course, that *Dent* and *Hawker* could not have verbalized their conclusions in terms of the demands of history, nor that the cases creating the requirement of *post facto* punishment could not have justified their conclusion by a "literalist" hypothesis and a redefinition of punishment.

42. 328 U.S. 303 (1946).

43. 57 Stat. 450 (1943).

44. See note 140 *infra*.

45. 328 U.S. 303, at 315-16. Although *Lovett* has never been distinguished on the ground that the persons at whom it was aimed were actually named, that fact may be one of the reasons a majority of the Court agreed that it was a bill of attainder.

46. American Communications Ass'n v. Douds, 339 U.S. 382, 413 (1950); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143 (1951); Garner v. Board of Public Works, 341 U.S. 716, 722 (1951); Bailey v. Richardson, 341 U.S. 918 (1951); Linehan v. Waterfront Commission, 347 U.S. 439, 441 (1954); Barsky v. Board of Regents, 347 U.S. 442, 459 (1954); Peters v. Hobby, 349 U.S. 331, 352 (1955); Uphaus v. Wyman, 360 U.S. 72, 108 (1959); Barenblatt v. United States, 360 U.S. 109, 160 (1959); DeVeau v. Braisted,

tional approach, for which Mr. Justice Black remains the chief spokesman, has been relegated to the ranks of the dissenting opinion.[47]

THE ADVENT OF LITERALISM

The decisions handed down since 1949 reject the traditional view that the bill of attainder clause is a broad policy judgment condemning all forms of legislative punishment, and adopt instead the position that the prohibition embraces only a narrowly restricted, historically defined class of legislative acts.

> This position cannot be sustained; attainder is scarcely known in American law. . . . Bills of attainder had acquired an established and technical signification long before the framing and adoption of the Constitution of the United States, and was well understood by the men who framed that instrument. . . .[48]

The historical lineage of this "literalist"—or strict historical—approach dates back at least as far as *Cummings* and *Garland,* where Justice Miller, dissenting from the holding of the Court in both cases and purportedly using history as his guide, drafted a list of "essential elements of bills of attainder."[49] The approach made its modern debut in Mr. Justice Frankfurter's concurrence in *United States v. Lovett,*[50] an opinion which has subsequently achieved such status that it is now cited as authority.[51] One of the grounds for Mr. Justice Frankfurter's unwillingness to concur in the majority's finding that the statute in issue was a bill of attainder was the absence of a recital of the acts of which Lovett, Watson, and Dodd were guilty.[52] This requirement of a "declaration of guilt" would of course permit a legislature, merely by omitting its ground of condemnation, to avoid having invalidated as a bill of attainder a statute im-

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363 U.S. 144, 160 (1960); Flemming v. Nestor, 363 U.S. 603, 612-21 (1960); Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 82-8 (1961).

47. See, *e.g.,* American Communications Ass'n v. Douds, *supra* note 46; Garner v. Board of Public Works, *supra* note 46; Barsky v. Board of Regents, *supra* note 46; Uphaus v. Wyman, *supra* note 46; Barenblatt v. United States, *supra* note 46; Flemming v. Nestor, *supra* note 46; Communist Party v. Subversive Activities Control Bd., *supra* note 46.

48. Green v. Shumway, 39 N.Y. 418, 430-31 (1868) (Mason, J., dissenting).

49. 71 U.S. at 386-90.

50. 328 U.S. 303, 318 (1946). It might be argued that Dent v. West Virginia, 129 U.S. 114 (1889), and Hawker v. New York, 170 U.S. 189 (1898), are precursors of the literalist approach. Such a conclusion would seem to stem from a concentration upon results rather than method and is not accepted by this Comment. Note 41 *supra.*

51. See National Maritime Union v. Herzog, 78 F. Supp. 146, 164 (D.D.C. 1948), *aff'd,* 334 U.S. 854 (1948).

52. All bills of attainder specify the offense for which the attainted person was deemed guilty. . . . There was always a declaration of guilt. . . . § 304 lack[s] the essential declaration of guilt. . . .

328 U.S. at 322-23.

> Congress omitted from § 304 any condemnation for which the presumed punishment was a sanction. Thereby it negatived the *essential notion* of a bill of attainder.

Id. at 326 (emphasis supplied).

prisoning named parties.[53] The requirement accords with neither precedent[54] nor history;[55] it has not been accepted by a majority of the Court. Other literalist tenets first suggested in the *Lovett* concurrence, however, *have* become law, and have been reaffirmed several times.

The Requirement of Post Facto Punishment

In his concurrence in *Lovett,* Mr. Justice Frankfurter stressed the fact that the legislation which the majority held to be a bill of attainder did not purport to inflict punishment for a *past* act.[56] This suggestion was adopted by the majority in *American Communications Ass'n v. Douds,*[57] a case involving the constitutionality of section 9(h) of the Taft-Hartley Act,[58] which conditioned recognition of a labor union upon the filing of affidavits by its officers that they were not members of the Communist Party. In rejecting petitioner's claim that the statute was a legislative imposition of punishment upon members of the Communist Party and therefore a bill of attainder, the Court distinguished *Cummings, Garland* and *Lovett* on the ground that in those decisions

> . . . the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss 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.[59]

The principle that in order to be invalidated as a bill of attainder a piece of legislation must be designed primarily to punish past acts rather than to prevent future action was recently reaffirmed in *Communist Party of the United*

53. Mr. Justice Frankfurter admits this danger. See *id.* at 326. But, he argues, other constitutional safeguards provide sufficient protection from such legislative action. *But see* note 195 *infra.*

54. The requirement is of course out of line with the functional approach taken by the early decisions. See notes 19-47 *supra* and accompanying text. There is also explicit language in the *Cummings* opinion which strongly suggests that the absence of a declaration of guilt is a mere formal technicality and should not be dispositive. 71 U.S. at 324-25.

55. See an Act for the Attainder of *Thomas* Earl of *Strafford* of High Treason, 1640, 16 Car. 1, c. i (priv.); 12 Car. 1, c. 1 (1641); 2 WOODDESON, *op. cit. supra* note 5, at 629-33.

56. 328 U.S. at 322-25.

57. 339 U.S. 382 (1950).

58. Ch. 120, 61 Stat. 146 (1947), *repealed,* 73 Stat. 525 (1959). *But see* Communist Control Act § 6, 68 Stat. 777 (1954), 50 U.S.C. § 784(a)(1)(E) (1958).

59. 339 U.S. at 413-14. *Accord:* Albertson v. Millard, 106 F. Supp. 635, 644-45 (E.D. Mich. 1952); Weinstock v. Ladisky, 197 Misc. 859, 875, 98 N.Y.S.2d 85, 100-01 (Sup. Ct. 1950); Dworken v. Collopy, 91 N.E.2d 564, 570 (Ohio C.P. 1950); Huntamer v. Coe, 40 Wash. 2d 767, 776, 246 P.2d 489, 494 (1952); Peters v. New York City Housing Authority, 9 Misc. 2d 942, 950, 128 N.Y.S.2d 224, 235 (Sup. Ct. 1953), *rev'd on other grounds* 307 N.Y. 519, 121 N.E.2d 529 (1954); Board of Education v. Cooper, 289 P.2d 80, 87 (Cal. Dist. Ct. App. 1955).

States v. Subversive Activities Control Board.[60] It is, however, a principle belied by the history from which its proponents contend it was culled. It is true that *most* of the English bills of attainder were passed by way of retribution for past deeds;[61] indeed, some of them, notably that attainting Oliver Cromwell,[62] were enacted after the death of the person attainted.[63] But this was not always the case; some English bills of attainder were passed in order to prevent certain types of future conduct on the part of the person or group attainted. An example is furnished by the "Act for the Attainder of the pretended Prince of Wales of High Treason" of 1700.[64] There the announced intention of Parliament in passing the attainder was "that the said traitor may be brought more certainly and speedily to condign Punishment." That one of the reasons for their wanting him speedily executed was fear of his possible future revolutionary actions may be demonstrated by the second section of the Act, which declared anyone corresponding with the Prince or his followers to be guilty of treason.[65]

The historical inaccuracy of the requirement of post facto punishment is further demonstrated by the many colonial bills of attainder, which were enacted in order to prevent effective resistence to the Revolution by the Tories.[66] Undoubtedly the attainder of the Tories (and that of the Prince of

60. 367 U.S. 1, 86-87 (1961).

61. See, *e.g.*, Attainder of John Cade, 1450, 29 Hen. 6, c. 1; The convictions of T. Earl of Westmorland, and fifty-seven others attainted of treason, 1570, 13 Eliz., c. 16 (pub.).

62. An Act for the Attainder of several Persons guilty of the horrid Murder of his late Sacred Majesty King Charles the First, 1660, 12 Car. 2, c. 30 (pub.).

63. The post morten attainder was more than an empty gesture, for it added the deprivation of corruption of blood. See note 4 *supra*.

64. 13 Will. 3, c. 3 (pub.).

65. Statute quoted note 187 *infra*.

> ... 9 Hen. 4 an act of parliament was made, that all the Irish people should depart the realm, and go into Ireland before the Feast of the Nativity of the Blessed Lady, upon pain of death ....

Case of Proclamations, 12 Co. Rep. 75-76, 77 Eng. Rep. 1354 (K.B. 1610). See also Professor Chafee's account of the attainder of Thomas Haxley. CHAFEE, *op. cit. supra* note 4, at 102-03.

> If the ousted adviser were left at liberty, he could readily turn his resentment into coercion or rebellion and make a magnificent comback to the utter ruin of those who had driven him from his high place.

Id. at 103-04.

66. Widespread Tory resistance to the Revolution led, understandably, to fear on the part of the Revolutionists. See Thompson, *supra* note 8, at 81-84. This fear crystallized in many sorts of anti-Loyalist legislation, among which were numerous bills of attainder and bills of pains and penalties. See notes 9 & 10 *supra;* see generally authorities cited note 8 *supra*.

The prophylactic purpose of much of this legislation is aptly summed up by the *title* of a 1777 Maryland act: "An Act to punish certain crimes and misdemeanors, and to prevent the growth of toryism." 1 Laws of Maryland 453 (Kilty 1799).

The fact that many of the statutes were repealed as soon as the war—and therefore the Tory danger—was ended lends credence to the view that their purpose was not primarily retribution for past misdeeds. See Thompson, *supra* note 8, at 170-71.

See also STORY, *op. cit. supra* note 10, at 211 n.1.

Wales) was motivated in part by a desire for retribution for past acts, but the same can be said—as *Douds* essentially admitted [67]—of much of today's anti-Communist legislation. Nonetheless, these historical examples demonstrate that the primary purpose of some pre-Constitution bills of attainder was to prevent certain types of future action on the part of the individuals attainted.

The Requirement of the Inescapable Class

In holding that section 9(h) of the Taft-Hartley Act was not a bill of attainder, the *Douds* majority established another requirement—that of the inescapable class.[68]

> [T]here 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.[69]

The requirement of the inescapable class also was reaffirmed in *Communist Party of the United States v. Subversive Activities Control Board*,[70] which upheld an order of the Board requiring the Communist Party to register as a "Communist-action organization" under section 7 of the Subversive Activities Control Act.[71] Although the Court refused to pass upon the constitutionality of those sections of the act which spell out the *consequences* of such registration, and restricted itself to a consideration of the validity of the registration provision alone,[72] it indulged in language broad enough to lay a foundation for holding that no section of the act is a bill of attainder:

> So long as the incidence of legislation is such that the persons who engage in the regulated conduct, be they many or few, can escape regulation merely by altering the course of their own activities, there can be no complaint of an attainder.[73]

At one level, it may be questioned whether a member of the Communist Party is presented with a live option by legislation like section 9(h) of the Taft-Hartley Act. Further, those who claim to be following the dictates of history again are defeated by their own premises, for the doctrine that there can be no finding of attainder if the members of the class at which the statute is directed cannot escape the prescribed deprivation—like the requirement of post facto punishment—cannot be sustained historically. As the opinion of Judge Nicholas in the early Kentucky case of *Doe ex. dem. Gaines v. Buford* stated:

> A British act of parliament might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should

67. See text accompanying note 59 *supra*.
68. This requirement too was originally suggested in the *Lovett* concurrence. 328 U.S. at 327.
69. 339 U.S. at 414.
70. 367 U.S. 1 (1961).
71. See notes 183-87 *infra* and accompanying text.
72. 367 U.S. at 82.
73. *Id.* at 88.

> be deemed to be, and treated, as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder. . . .[74]

It was common for English acts of attainder to permit members of the specified class to escape the attainder. Frequently they could do so by surrendering by a specified day:

> An Act to attaint Alexander Earl of Kellie, William Viscount of Strathallan, Alexander Lord Pitsligo . . . of High Treason, if they shall not render themselves to one of His Majesty's Justices of the Peace, on or before the twelfth Day of July in the Year of Our Lord one thousand seven hundred and forty-six, and submit to Justice.[75]

The choice between attainder and surrender was not the Hobson's choice it initially appears to be. For by granting the attainted party the option of "submitting to Justice," Parliament gave him the opportunity to be tried by a court, under the existing statutory law and with all the safeguards of a judicial trial. If, on the other hand, he elected not to surrender, he could make no defense to Parliament's *ad hoc* determination of guilt.

Moreover, the attainder conditioned upon surrender is not the only form of conditional attainder to be found in the Statutes of the Realm. The bill against the Earl of Clarendon, passed during the reign of Charles the Second, perpetually banished the Earl; it further provided, however, that if he returned to England, he would then be made to suffer the pains and penalties of treason.[76] The conditional form is characteristic also of some colonial bills of attainder.[77]

In *Cummings v. Missouri* the Court observed that bills of attainder "may inflict punishment absolutely, or may inflict it conditionally."[78] Thus in establishing the requirement of the inescapable class, *Douds* and *Communist Party* disregarded explicit precedent as well as pre-Constitution history. The literalists claim to derive their definition of attainder from history; yet history belies their conclusions as to both the requirement of the inescapable class and the requirement of punishment for past acts.

The Impossibility of Narrow Historical Definition

In his *Lovett* concurrence, Mr. Justice Frankfurter argued that the Constitution is an amalgam of flexible and inflexible mandates:

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74. 31 Ky. (1 Dana) 481, 510 (1833) (separate opinion, 2 judges participating).

75. 1746, 19 Geo. 2, c. 26 (pub.). Also of this form are, *e.g.*, an Act of Banishing and Disenabling the Earl of Clarendon, 1667, 19 Car. 2, c. 10 (pub.); An act to attaint such of the persons concerned in the late horrid conspiracy to assassinate his Majesty's royal person, 1696, 8 Will. 3, c. 5 (pub.); An Act for the Attainder of Henry Viscount Bolingbroke, 1714, 1 Geo. 1 Stat. 2, c. 16 (pub.); An Act for the attainder of James Duke of Ormonde, 1714, 1 Geo. 1 Stat. 2, c. 17 (pub.); An Act for the attainder of George Earl of Marischall, 1715, 1 Geo. 1 Stat. 2, c. 42 (pub.).

76. An Act for banishing and disenabling the Earl of Clarendon, 1667, 19 Car. 2, c. 10 (pub.), printed in 6 Howell's State Trials, p. 391, cited 71 U.S. at 324.

77. See, *e.g.*, An Act to Attaint Josiah Philips, 1778, 9 Laws of Virginia 463 (Hening 1821); Pemberton's Lessee v. Hicks, 3 U.S. (3 Dall.) 479 (1798).

78. 71 U.S. at 324.

> Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (*e.g.*, "due process," "equal protection of the laws," "just compensation"), and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For the second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.[79]

Even granting the general soundness of the flexible-inflexible dichotomy—a distinction to which neither the Court in general,[80] nor Mr. Justice Frankfurter in particular,[81] has consistently adhered—it would appear that Mr. Justice Frankfurter erred in its application when he concluded that "[t]he prohibition of bills of attainder falls of course among these very specific constitutional provisions."[82] For "bill of attainder"—like "due process"—is not specifically defined by history. The terms "bill of attainder" and "bill of pains and penalties" (which, Mr. Justice Frankfurter agrees,[83] fall within the constitutional prohibition) covered many types of statutes. Some pre-Constitution bills of at-

79. 328 U.S. at 321. See also Rochin v. California, 342 U.S. 165, 169-70 (1952).

80. For example, the word "writings," as it appears in the copyright clause, is on its face as inflexible as any which appears in the Constitution.

> The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries . . . .

U.S. CONST. art. I, § 8. See dissent of Justices Douglas and Black in Mazer v. Stein, 347 U.S. 201, 219 (1954).

Yet "writings" has been construed to cover, *inter alia*, maps [Amsterdam v. Triangle Publications, Inc., 189 F.2d 104 (3d Cir. 1951) (dictum)], paintings [Leigh v. Gerber, 86 F. Supp. 320 (S.D.N.Y. 1949)], photographs [Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)], and lamp bases shaped like "male and female dancing figures" (Mazer v. Stein, *supra* at 202). There are sound policy considerations underlying this broad interpretation, but the fact remains that the copyright clause provides a beautiful example of the flexible interpretation of an inflexible constitutional term.

Further, the copyright provision deals with rights as between private parties, whereas the bill of attainder clause protects the rights of the individual against the state. Thus, it would seem that the broader interpretation ought to be accorded the latter. For in this age of extremely broad interpretation of those constitutional provisions permissive of government action [See, *e.g.*, Berman v. Parker, 348 U.S. 26 (1954); Wickard v. Filburn, 317 U.S. 111 (1942).] the tethering of constitutional *restrictions* on government action to allegedly historical requirements will have as its inevitable result a situation which "may justly be pronounced the very definition of tyranny."

81. Mr. Justice Frankfurter joined in the opinion of the Court in Mazer v. Stein, note 80 *supra*.

82. 328 U.S. at 321.

83. *Id.* at 323-24.

tainder specifically named the parties attainted;[84] others merely described the class of persons upon whom the penalties were to be levied.[85] Most recited the acts of which the attainted parties were guilty;[86] a few did not.[87] The statutes prescribed a wide variety of sanctions, ranging from death and corruption of blood[88] to such penalties as exile.[89] deprivation of the right to vote,[90] and the exclusion of the sons of the attainted parties from Parliament.[91] As noted above, some bills of attainder punished for past deeds; others were passed primarily to prevent future conduct. And some provided an escape from the class of those attainted, while others did not.[92]

It thus comes as no surprise that those who have relied upon the history of attainder have been contradicted by that history. The search for a narrow historical definition of "bill of attainder" was from the beginning destined to be abortive, for the term lacks a narrowly restricted historical referent. It is true that many historical bills of attainder do meet the requirements propounded by the recent cases.[93] The literalists have not misread particular statutes; their error is rather one of over-extrapolation, of assuming that what is true of some bills of attainder must be true of all.

If the meaning of "bill of attainder" had been "settled by history," definition of the term in the Constitution would indeed have been superflous.[94] But its meaning was not settled; the variety of historical bills of attainder rendered the concept vague. Thus it would seem that if the framers had intended the constitutional provision to apply to only a rigidly defined class of statutes, they would have given the term specific content. But their writings give us no such definition; on the contrary, they demonstrate that the bill of attainder clause was intended to be a broad implementation of the separation of powers, a

84. *E.g.*, An Act to inflict pains and penalties on John Plunket, 1722, 9 Geo. 1, c. 15 (pub.); An Act to attaint Alexander, Earl of Kellie, (and others), 1746, 19 Geo. 2, c. 26 (pub.).

85. Note 1 *supra.*

86. *E.g.*, 25 Hen. 8, c. 12 (pub.) (1533); An Act for the attainder of several persons guilty of the horrid murder of his late sacred Majesty King Charles the First, 1660, 12 Car. 2, c. 30 (pub.).

87. Note 55 *supra. But see* note 52 *supra* and accompanying text.

88. See note 4 *supra* and accompanying text.

89. See, *e.g.*, An Act to inflict pains and penalties on Francis Lord Bishop of Rochester, 1722, 9 Geo. 1, c. 17 (pub.); Proceedings Against Hugh and Hugh Le Despencer, 1 State Trials 23 (1320).

90. See, *e.g.*, An Act to incapacitate John Burnett, *et al.*, from voting at elections of members to serve in parliament . . ., 1770, 11 Geo. 3, c. 55 (pub.).

91. See The Sons of the persons before attainted excluded from Parliament, 1397, 21 Rich. 2, c. 6 (pub.).

92. See notes 61-66, 75-77 *supra* and accompanying text.

93. See notes 61-62 *supra* and accompanying text. Also, most pre-Constitution bills of attainder fulfilled the requirement of the inescapable class. See, *e.g.*, An Act to attaint James Duke of Monmouth of high-treason, 1685, 1 Jac. 2, c. 2 (pub.); An Act to attaint Sir John Fenwick baronet of high treason, 1696, 8 Will. 3, c. 4 (pub.).

94. See text accompanying note 79 *supra.*

general safeguard against the combination of the legislative and adjudicatory powers, or more simply—trial by legislature.

BILLS OF ATTAINDER AND THE SEPARATION OF POWERS

One of the ways in which the founding fathers sought to avoid tyranny was by building into the Constitution the doctrine of separation of powers. This means that each branch—executive, judicial, and legislative—has specific functions which are not to be encroached upon by the others. The doctrine thus attempts to assure that no single body can alone effectuate the total policy of government. A given policy can, in theory, be effectuated only by a combination of legislative enactment, judicial application, and executive implementation. For example, article III's grant of power limits the judiciary to the adjudication of "cases and controversies" within the federal sphere of authority.[95] It is of course impossible to define with precision those areas in which courts can under no circumstances act. At the outer limit such restrictions may be obvious, but in general the case and controversy limitation must be viewed as a broad judgment that a variety of types of problems are in varying degrees inappropriate for judicial resolution.[96]

The section proscribing bills of attainder, on the other hand, establishes that there are certain types of decision that are in varying degrees [97] inappropriate for *legislative* resolution, although specific definition of those limitations again appears impossible. Writings contemporary with the drafting of the Constitution express great concern lest the legislature assume the power to implement the total policy of government without the participation of the other branches, and support the thesis that the bill of attainder clause should be viewed as a limitation on legislatures fully as broad, and as necessary to the effective separation of powers, as that which has been imposed upon courts by article III.

Early formulations of the doctrine of separation of powers, notably that of Montesquieu, demonstrate that it was in large part founded upon a belief that fractionalization of the various functions of government would serve to safeguard the liberties of the citizenry:

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95. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority,—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2. See notes 110-13 *infra* and accompanying text.

96. *Cf.* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

97. See notes 123-25 *infra* and accompanying text.

> Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[98]

The statutes of Revolutionary America bore ample witness to the dangers of the combined exercise of the legislative and adjudicatory functions.[99] Montesquieu's thought is clearly reflected in the writings of James Madison:

> The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.[100]

A careful reading of Federalists 47, 48, 49 and 51 reveals that usurpation on the part of the *legislature* was what worried Madison and Hamilton most. As Madison noted:

> In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger. . . . But in a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.[101]

The bill of attainder prohibition was therefore looked to as a vital safeguard of the separation of powers:

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98. MONTESQUIEU, THE SPIRIT OF LAWS 154 (6th ed. 1792) (translated by Nugent). See generally Sharp, *The Classical American Doctrine of "The Separation of Powers,"* 2 U. CHI. L. REV. 385 (1935).

99. See notes 8-10, 66 and 77 *supra* and accompanying text.

> The thoughtful reader will not fail to discover, in the acts of the American States during the Revolutionary period, sufficient reason for this constitutional provision, even if the still more monitory history of the English attainders had not been so freshly remembered.

COOLEY, *op. cit. supra* note 5, at 316.

100. THE FEDERALIST No. 47, *The Meaning of the Maxim, which Requires a Separation of the Departments of Power, Examined and Ascertained,* at 373-74 (Hamilton ed. 1880) (Madison).

101. *Id.*, No. 48, *The Same Subject Continued, With a View to the Means of Giving Efficacy in Practice to that Maxim,* at 383-84.

> The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.

Id., No. 48 at 384 (Madison).

> Bills of attainder, [and] *ex post facto* laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Our own experience has taught us . . . that additional fences against these dangers ought not to be omitted. . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with 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.[102]

The danger of attainder to which Madison had alluded were subsequently spelled out more explicitly by Story:

> In such cases, the legislature assumes judicial magistracy, pronouncing upon 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 conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power 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.[103]

Thus the dual rationale of the separation of powers—fear of overconcentration of power in any one branch, and a feeling that the methods of selection and institutional trappings render the various departments suited for different jobs[104]—is reflected in the bill of attainder clause. Not only was there a general fear of legislative power on the part of the founding fathers, but there was also a specific realization that the legislative branch of government is more susceptible than the judiciary to such influences as passion, prejudice, personal solicitation, and political motives,[105] and that it is not bound to respect all the

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102. *Id.*, No. 44, *The Same View* [Powers proposed to be Vested in the Union] *Continued and Concluded*, at 351 (Madison).

103. STORY, *op. cit. supra* note 5, at 210.

> In these instances the legislature assumes judicial magistracy, weighing the enormity of the charge, and the proof adduced in support of it, and then deciding the political necessity and moral fitness of the penal judgment.

2 WOODDESON, *op. cit. supra* note 5, at 621-22.

104. Compare Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957).

105. Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was opened, performed the functions both of judge and jury. They were not restrained, as a judge is restrained, by the sense of responsibility. . . . They were not selected, as a jury is selected, in a manner which enables the culprit to exclude his personal and political enemies.

> The arbiters of his fate came in and went out as they chose. They heard a fragment here and there. . . . 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; another might obtain a frigate for his brother. . . . 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.

safeguards placed upon judicial trials.[106] The bill of attainder clause is an implementation of their judgment that these factors render the legislature a tribunal inappropriate to decide who comes within the purview of its general rules:

> Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode.[107]

A third justification for a system of separation of powers—one which was not explicitly suggested by the founding fathers—is rooted in the desirability of legislative disclosure of its purposes. When one branch may both enact and apply, it may more easily veil its real motive and even its true target. For instance, if Congress wanted to punish Catholics, it could merely enact a statute calling for the punishment of all litterbugs, and—by selective enforcement and veiled adjudication—punish only those litterbugs who are also Catholics. If, however, the statute could be applied only by another branch, Congress could not achieve its desired purpose without articulating it at least clearly enough for the other branches to implement it. Thus separating policy

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MACAULAY, HISTORY OF ENGLAND ch. 22 (1st ed. 1855), quoted in CHAFEE, *op. cit. supra* note 4, at 135.

See Pound, *Justice According to Law II*, 14 COLUM. L. REV. 1, 7-12 (1914).

It is therefore proposed that the founding fathers would not have agreed with Professors Bickel and Wellington that:

> . . . Congress cannot normally be expected also to be aware that some of the means chosen to achieve immediate ends impinge in not easily apparent fashion on values of permanent significance. *Were this not so the Constitution . . . could be left to the care of Congress alone.*

Bickel & Wellington, *supra* note 104, at 27 (emphasis added).

106. See Comment, 63 YALE L.J. 844, 859-60 (1954). See Professor Chafee's description of how Parliament enacted attainders. CHAFEE, *op. cit. supra* note 4, at 112, 132.

107. COOLEY, *op. cit. supra* note 5, at 314. See also 1 WATSON, CONSTITUTION 733-39 (1910).

Historically, the "bill of attainder" and the "impeachment" were regarded as two alternative ways of accomplishing the same results. See, *e.g.*, CHAFEE, *op. cit. supra* note 4, at 98-144; ADAMS, CONSTITUTIONAL HISTORY OF ENGLAND 228 (Rev. ed. 1934).

To insure that the bill of attainder clause's prohibition of legislative adjudication would not be evaded by the device of calling the proscribed action an "impeachment," the legislature's traditional impeachment power was severely narrowed. Congress was forbidden to impeach anyone other than a government official; and even then the sanction was limited to removal and disqualification from office.

> Judgement in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States....

U.S. CONST. art. I, § 3. This clause may therefore be viewed as a grant to Congress of the power to pass one highly restricted kind of bill of attainder. See CHAFEE, *op. cit supra* note 4, at 143-44.

making from application has the additional virtue of requiring relatively clear and candid articulation of the legislative purpose. By requiring the legislature to expose its purpose for observation, the political processes are given a fuller opportunity to react to it.[108] And the judiciary is better able to judge the validity of the purpose and to assure that it violates no constitutional restrictions.[109]

Thus the bill of attainder clause (coupled with the prohibition of ex post facto laws) can be viewed as serving a function analogous to article III's restriction on judicial action.[110] Roughly, article III, by limiting federal courts to cases and controversies, tells them, at least in theory, two things. First, they —unlike the legislature—may not create broad rules; they must content themselves with applying the law, either statutory or constitutional,[111] to the particular disputes before them.[112] And second, because they are restricted to adjudicating the rights of the litigants before them, they can act only retrospectively.[113] On the other hand, the prohibition of ex post facto laws (and notions rooted in due process and the obligation of contracts clause) [114] tell the legislature that in general it can act only prospectively. The bill of attainder clause, it is submitted, is a broad prohibition completing the legislative analogue of article III. For it tells legislatures that they may not apply their mandates to specific parties; they instead must leave the job of application to other tribunals.

Article III has been construed to prevent federal courts from encroaching on the prospective rulemaking power granted the legislature by article I; and similarly the section proscribing bills of attainder and ex post facto laws should be construed to prevent legislatures from encroaching on the power granted exclusively to courts by article III—the power to apply the law to particular individuals. Thus article III, when viewed against the background of the bill of attainder and ex post facto prohibitions, should be construed at once as a limitation on, and a grant of exclusive authority to, the federal courts: they can decide *only* cases and controversies, and *only* they can decide cases and controversies. As Jefferson noted:

> One hundred and seventy-three despots would surely be as oppressive as one . . . . For this reason, the convention which passed the ordinance of

108. *Cf.* Note, 70 YALE L.J. 1192, 1199 (1961).

109. *Cf.* Robinson v. California, 369 U.S. 824 (1962).

110. It is not suggested that the founding fathers explicitly regarded Article III and the bill of attainder clause as analogous provisions. Article III is brought in only as a convenient analogy, a helpful tool for suggesting the broad way in which this Comment proposes that the bill of attainder clause should be interpreted.

111. In adjudicating the constitutionality of a federal or state statute, a court "applies" the "supreme law"—the Constitution—to the statute in question to determine whether or not the statute is "law" at all. See Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

112. See ARNOLD, THE SYMBOLS OF GOVERNMENT 178 (1935).

113. *Cf.* Comment, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907 (1962).

114. *Cf.*. Calabresi, *Retroactivity: Paramount Powers and Contractual Changes*, 71 YALE L.J. 1191 (1962).

> government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no one person should exercise the powers of more than one of them at the same time. . . . If . . . the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case, they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. *They have accordingly, in many instances decided rights, which should have been left to judicial controversy.* . . .[115]

Or, to put it another way, the bill of attainder and ex post facto law prohibitions, when viewed against the background of articles I and III, may be construed as a limitation on, and a grant of exclusive authority to, Congress: *only* it can enact broad prospective rules without reference to particular persons, and it can enact *only* broad prospective rules without reference to particular persons. As Chief Justice Marshall observed in *Fletcher v. Peck:*

> It is the peculiar province of the legislature, to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.[116]

Thus an analysis of the pre-Constitution bills of attainder and contemporary commentaries indicates that the prohibition of bills of attainder is not a technical provision meant to apply only to a rigidly defined class of statutes. The commentaries emphasize the evident—but oft neglected—fact that separation of powers cannot be implemented unless each of the branches sought to be separated is effectively limited to its proper sphere of activity. Emphasis has most frequently been placed on the necessity of limiting courts to the adjudication of cases and controversies;[117] and to be sure this is important. But it is at least as important to prevent the legislature from exercising the judicial function. In fact, the founding fathers were more concerned with legislative than judicial usurpation; the bill of attainder prohibition would seem to be their way of implementing this concern. It should be broadly construed in this spirit.

Trial by Legislature

It would seem, then, that section 9(h) of the Taft-Hartley Act, which was upheld in the *Douds* case,[118] should have been held a bill of attainder. Congress can decree that persons who, because of their disloyalty, are likely to obstruct the flow of commerce shall not be officers of labor unions. But when Congress refuses to content itself with enacting this general rule, and goes on to say *who*—be it Gus Hall or all members of the Communist Party—is to be subjected to the prescribed deprivations, it oversteps its bounds.

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115. Jefferson, Notes on the State of Virginia 195 (1784), quoted in The Federalist No. 48, *op. cit. supra* note 100, at 385-86.

116. 10 U.S. (6 Cranch.) 87, 136 (1810).

117. See, *e.g.*, Bickel & Wellington, *supra* note 104.

118. See notes 57-59, 69 *supra* and accompanying text.

But the Court found no bill of attainder. In upholding the statute the majority concluded that:

> It is sufficient to say that Congress had a great mass of material before it which tended to show that Communists and others prescribed by the statute had infiltrated union organizations not to support and further trade union objectives . . . but to make them a device by which commerce and industry might be disrupted when the dictates of political policy required such action.[119]

Mr. Justice Frankfurter, concurring, agreed that this sort of judgment— if made reasonably—is one properly within the legislative province:

> It must suffice for me to say that the judgment of Congress that trade unions which are guided by officers who are committed by ties of membership to the Communist Party must forego the advantages of the Labor Management Relations Act is *reasonably related* to the accomplishment of the purposes which Congress constitutionally had a right to pursue.[120]

Justice Jackson's concurrence also reiterates this theme.[121] He carefully reviewed the empirical data examined by Congress and decided that:

> Congress could rationally conclude that, behind its political party façade, the Communist Party is a conspiratorial and revolutionary junta. . . .[122]

To use "reasonableness" as a criterion for determining the validity of an application of a broad policy judgment to a particular group, however, is to employ a wholly inapposite test. The "reasonableness test" was originally devised in a wholly distinct constitutional context. It was designed to define the scope of judicial review of broad legislative policy judgments.[123] Of course a legislature can—indeed, our political system insists upon it—assemble and evaluate empirical evidence as an aid in arriving at intelligent broad political judgments. The reasonableness test was created to insure that courts would not

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119. 339 U.S. at 389.

> Substantial amounts of evidence were presented to various committees of Congress . . . that Communist leaders of labor unions had in the past and would continue in the future to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government.

Id. at 388.

120. *Id.* at 418 (emphasis added).

121. If the statute before us required labor union officers to forswear membership in the Republican Party, the Democratic Party or the Socialist Party, I suppose all agree that it would be unconstitutional. But why, if it is valid as to the Communist Party?

> The answer, for me, is in the decisive differences between the Communist Party and every other party of any importance in the long experience of the United States with party government.

Id. at 422.

122. *Id.* at 424.

123. See, *e.g.*, Holden v. Hardy, 169 U.S. 366 (1898); Lochner v. New York, 198 U.S. 45, 56 (1905); Nebbia v. New York, 291 U.S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1936). *Cf.* Muller v. Oregon, 208 U.S. 412 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 488 (1921) (Brandeis, J., dissenting). See Bickel & Wellington, *supra* note 104, at 29.

trespass upon what is properly the legislative province—the promulgation of the *rules* by which our society is governed.

Thus, the due process standard of reasonableness would permit Congress to conclude that disloyal persons are more likely than not to obstruct commerce and that therefore they should not be officers of labor unions. But the *Douds* case presented a wholly different problem. The issue there was not the propriety of a general legislative rule, but the validity of the application by Congress of such a broad rule to a fairly specific group of persons. As to this problem the implications of our traditional separation of powers are quite different. For when broad rules are applied to specific persons, in criminal or civil trials (the antithesis of rule-making proceedings), our society demands proof "beyond a reasonable doubt" or, at least, proof by a preponderance of the evidence, not mere reasonableness or rationality. Moreover, the proof offered must be subjected to all the truth-finding pressures of the adversary system.

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

This continuum has been tacitly recognized by the courts in their review of the decisions of administrative agencies. Insofar as an administrative decision constitutes broad "rulemaking," courts hold the agency to no more than the legislative standard of reasonableness.[124] But when an administrative decision applies a broad rule to particular persons, the proceeding is labelled "adjudicatory" and the agency is required to accord the individual in question most of the safeguards of the judicial process.[125]

Of course the recognition of such a continuum yields no easy answer to where rulemaking ends and adjudication begins. But as with all such legal

124. [C]ourts . . . almost always (theoretically always) refrain from substituting judgment as to the content of a legislative rule. . . . A legislative rule is valid and is as binding upon a court as a statute if it is (a) within the granted power, (b) issued pursuant to proper procedure, and (c) reasonable.

DAVIS, ADMINISTRATIVE LAW TREATISE § 5.03 (1958).

125. Hannah v. Larche, 363 U.S. 420, 442 (1960). See Administrative Procedure Act § 5 (Adjudication), 60 Stat. 239 (1946), 5 U.S.C. § 1005 (1958). Compare *id.* § 4 (Rule Making), 60 Stat. 238 (1946), 5 U.S.C. § 1004 (1958).

> In absence of statutory requirement of hearing, and in absence of a dispute of *adjudicative facts*, the case law ordinarily does not require either a speech-making hearing or a trial-type hearing for *rule making*.

DAVIS, *op. cit. supra* note 124, § 6.12 (emphasis added).

constructs, mere verbalization does not purport to solve all problems of application. The extreme cases—which are relatively easy to identify—establish guidelines for application of the continuum to the more difficult middle areas. As a given determination partakes more of "adjudication" and less of "rule-making," more in the way of certainty—and thus, in most cases, more in the way of judicial safeguards—is required by the Constitution.

Thus Congress may enact a law providing that no one possessing a given characteristic (*e.g.*, racial intolerance) shall work for the Civil Rights Division, but it may not provide that John Kasper, or the members of the Ku Klux Klan, be so restricted.[126] For in order to arrive at the conclusion that Kasper or the Klan members are racially intolerant, it is necessary to gather and evaluate empirical data pertaining to these men. The bill of attainder clause is an implementation of the belief that the legislature is a tribunal unsuited to conducting such an investigation. It demands that whenever an individual is "tried" to see whether he comes within the purview of a broad mandate, he be tried in the proceeding best adapted to safeguard his rights and dispassionately seek the truth—a trial before an adjudicatory body.

But this need not imply that a legislature may never phrase a statute so that it applies a restriction to a specific group of persons. For there are times when, even in the absence of a judicial hearing, application can be certain. For example, the statute "No person afflicted with grand mal epilepsy[127] shall drive an automobile" is generally conceded to be permissible regulatory legislation.[128] Yet it applies its restriction to a particular group of persons—grand mal epileptics. Further, in passing this law the legislature has proceeded along lines arguably similar to those outlined in connection with the Ku Klux Klan statute. Starting with the proposition that persons possessing characteristic x (the propensity to have uncontrollable fits), when placed in situation y (in an automobile on a highway) may well cause z (an accident), the legislature has determined that persons having characteristic x shall refrain from driving (or pay a penalty). But, it might be argued, the legislature has also *applied* this general rule: it has determined that a specific group of persons—grand mal epileptics (a class of persons which, like the members of the Klan, could be listed at the time of the passage of the statute)—have characteristic x and therefore must suffer deprivation y (or y').[129]

126. As to the claim that government employment is a "privilege" and that therefore its deprivation cannot constitute a bill of attainder, see notes 150-66 *infra* and accompanying text.

127. See DONNELLY, GOLDSTEIN & SCHWARTZ, CRIMINAL LAW 585-86 (1962).

128. See Wormuth, *Legislative Disqualifications as Bills of Attainder*, 4 VAND. L. REV. 603, 609 (1951).

129. The problem of distinguishing such statutes from bills of attainder has rarely been faced in either the case law or the literature. However, two possible distinctions have been suggested. Professor Wormuth has argued that the epileptic statute is not a bill of attainder because it does not involve a "censorial judgment" on the part of the legislature. That is, the legislature has not inquired into the "character," "culpability" or "guilt" of the epileptics. Wormuth, *supra* note 128, at 608-10 (1951). See FREUND, ADMINISTRATIVE POWERS OVER

A return to the rationale underlying the bill of attainder clause, however, discloses that the statute does not possess the evils of a bill of attainder. For the legislature has not "tried" the class of persons called grand mal epileptics at all. Starting with the principle that persons who are subject to uncontrollable fits should not be allowed on the road, the legislature has, it is true, specified a class of persons who are to be so restricted. But the judgment that grand mal epileptics are persons susceptible to fits (possess characteristic x), requires no "trial" of the persons involved, no collection and evaluation of empirical data concerning them. That "grand mal epileptics" are "persons susceptible to fits" follows from the very meaning of the words involved. The judgment is tautological; empirical evidence about the persons is totally irrelevant to the decision. The only empirical judgment made by this legislature —that people subject to fits, if allowed to drive, are likely to cause accidents— was made earlier, at the general rule-making level.

The bill of attainder clause was adopted to keep the legislature from making judgments the framers considered the legislative branch unable to make in a calm, unbiased fashion; it would be nonsense to say that the legislature is subject to pressures which render it incapable of making fairly the definitional judgment—if it can be termed a "judgment"—that grant mal epileptics are subject to fits. The legislative process is fully as capable of insuring fairness and certainty in applying its broad rule to grand mal epileptics as any tribunal would be. No evidence is relevant; no case or controversy exists; no trial is needed.[130]

PERSONS AND PROPERTY 100 (1928). The "censorial judgment" test would appear to be but a variant of the traditional "punitive intent" test and subject to the same difficulties. See notes 137-41 *infra* and accompanying text. The statute "John Jones, because he is an epileptic, shall not drive," is a bill of attainder, despite the lack of any normative judgment as to Jones. A second possible ground of distinction which has been suggested by the cases and the literature is that the epileptic statute is not a bill of attainder because it enacts a "reasonable qualification" for driving. See, *e.g.*, Dent v. West Virginia, 129 U.S. 114 (1889); Hawker v. New York, 170 U.S. 189 (1898); Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 720-24 (1951); Linehan v. Waterfront Comm'n of New York Harbor, 347 U.S. 439 (1954). See generally Comment, 63 YALE L.J. 844, 850-55 (1954). But this attempted distinction also fails, for it does not greatly strain the Ku Klux Klan statute to couch *it* in terms of a "qualification." Just as an epileptic is not qualified to be on the roads because of the likelihood of his causing an accident, so, it can be argued, a member of the Klan is not qualified to work for the Civil Rights Division (or a given rebel is not qualified to live in England) because of *his* propensities.

130. Only when the legislature decrees that "John Jones, because he is subject to fits, shall henceforth not be permitted to drive" does it usurp the function of the judiciary by "trying" a specific individual in order to determine whether or not he comes within the general rule it has laid down. For the determination that John Jones falls within the class of persons subject to fits does *not* follow from the meaning of "John Jones"; this judgment cannot be made without mustering empirical evidence about John Jones.

Quaere: Is there a definite line between "tautological" and "judicially noticeable" judgments? Or does repeated empirical experience lead us to incorporate additional elements into our "definitions" of various terms? " 'Bachelors' are not married" is clearly a nonempirical

Even a statute specifically *naming* the party to whom its deprivations are to attach need not, in every case, be a bill of attainder. A legislature might determine, for example, that persons whose last names exceed twenty letters shall not be permitted to list their names in the telephone directory.[131] It might implement this broad judgment by specifically enacting that "John Kensington-Heidelburg-Coyle shall not be permitted to list his name in the telephone directory." Suspect though it may be on other constitutional grounds, such a statute would probably not be a bill of attainder. For the judgment that John Kensington-Heidelburg-Coyle's last name exceeds twenty letters is, again, definitional. No trial was necessary; the erection of judicial safeguards would be of slight importance.[132]

Perhaps even the statute "No woman with syphilis may marry" is permissible, even though the legislature has applied its broad judgment—that no one likely to bear syphilitic children shall marry—to a specific class: women with syphilis. The judgment that syphilitic women are likely to bear syphilitic children is, to be sure, not definitional. Rather, it is based upon empirical observation of the children of syphilitics. But it is probably a permissible judgment for the legislature to make, because it is based upon a universally accepted empirical generalization which is capable of certain verification. Were the proposition to become relevant during a judicial proceeding, it would probable be labelled "judicially noticeable."[133] This means that no evidence would

observation. "'Grand mal epileptics' are likely to have fits" begins to look more like "'Syphilitics' are likely to bear diseased children." This Comment proposes, however, that the "epileptics" statement *is* tautological in the sense that the term "grand mal epileptics" was *created* to refer to persons subject to fits, whereas "syphilitics" was clearly not created to refer to persons likely to bear syphilitic children. In any case the line is not a clear one. This fact can, however, make little difference to the analysis presented in this Comment, for it is proposed that *both* definitional and judicially noticeable propositions are permissible legislative inferences. See notes 133-36 *infra* and accompanying text.

131. Such a judgment is not beyond the realm of possibility. Compare the celebrated case of AAAAAAAAAAAAAAAAAAAAAAA, Inc. v. Southwestern Bell Tel. Co., 373 P.2d 31 (Okla. Sup. Ct. 1962).

132. The consideration urged at notes 108-09 *supra* and accompanying text would, however, even in cases where there is no chance of legislative non-objectivity or error, militate against permitting the legislature to specify the objects of its mandates.

133. [W]e have here an important extension of judicial notice to the new field of facts 'capable of accurate and ready demonstration,' . . . In this realm fall most of the facts, theories, and conclusions which have come to be established and accepted by the specialists in the areas of natural science. . . .

McCORMICK, EVIDENCE § 325, at 691-92 (1954). See State v. Schriber, 185 Ore. 615, 205 P.2d 149 (1949) (judicially noticeable that Bang's disease is an infectious and contagious disease of cattle).

Also judicially noticeable are facts "so certainly known as to make [them] indisputable among reasonable men." McCORMICK, *op. cit. supra* § 324. Under the test proposed by this Comment, these facts too would be "legislatively noticeable."

To the extent that the proposition that the children of syphilitics are likely to have syphilis is controversial and *not* judicially noticeable, reliance upon it by a legislature would be inappropriate, and reliance upon it here is misplaced.

have to be adduced to support it. It is thus regarded as so certain that, even in a judicial context, it would be accepted as true without going through the customary channels of the adversary process. Since it is difficult to perceive wherein it is a judgment any less certain if made by a legislature, it would seem to be irrelevant which department makes it. The only danger in permitting legislatures to make applications of rules based upon such "judicially noticeable" propositions is that the test might be so loosely construed that it would serve as little more of a check than the inappropriate "reasonableness" test. If the right to judicial application of rules is to be preserved, the test of "judicial notice" must be construed as strictly here as it has been in a courtroom context.

Thus, when empirical evidence is irrelevant to the issue of whether a general legislative mandate applies to a particular person or group—as when the judgment is definitional or so universally acknowledged to be certain as to be "judicially noticeable"—a more specific legislative judgment is permissible, or, in other words, the legislature may apply its own rules. For a judicial hearing is not needed fairly to make such determinations. But as soon as empirical evidence becomes relevant to deciding that a broad rule applies to specific persons, the application of the rule must be left to that type of proceeding the founding fathers determined was best able fairly to execute it—a judicial trial.[134] The *Douds* opinions rightly recognized that Congress needed much empirical evidence to determine that members of the Communist Party are persons who, because of their disloyalty, are likely to obstruct the flow of commerce.[135] For neither "disloyal" nor "likely to obstruct commerce" follows from the meaning of "member of the Communist Party," nor is the proposition that Communists possess these characteristics judicially noticeable.[136] In enacting section 9(h), Congress "tried" the class of members of the Communist Party. In so doing they overstepped their jurisdiction: "No bill of attainder shall be passed."

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134. There would seem to be no theoretical objection to having such focused adjudication performed by an administrative agency, *provided that* the agency is set up in such a way that (1) it must respect the safeguards put upon judicial trials, and (2) it is isolated from the pressures, noted at notes *supra* 101-07 and accompanying text, which render the legislature incapable of fairly deciding to whom the rule is to apply. (*Quaere:* would this require lifetime tenure?) Such a scheme would both avoid the danger of overconcentration of power in the hands of the legislature and force the legislature clearly to define the objects of its legislation. See notes 112-13 *supra* and accompanying text. See Subversive Activities Control Act §§ 12-13, 64 Stat. 997-1001 (1950), 50 U.S.C. §§ 791-92 (1958).

135. See notes 119-22 *supra* and accompanying text.

136. *But cf.* Matter of Albertson (Lubin), 8 N.Y.2d 77, 84-85, 168 N.E.2d 242 (1960), *rev'd sub. nom.* Communist Party v. Catherwood, 367 U.S. 389 (1961), apparently judicially noticing facts about the Communist Party *because* Congress had stated them in the form of legislation! (Needless to say, this holding does not imply that the facts are judicially noticeable in the sense that it is permissible for *Congress* to use them in narrowing the ambit of its rules.)

The Requirement of Punishment

It has long been the law of the land—concurred in by literalist [137] and functionalist [138] alike—that if a statute is to be held a bill of attainder, it must inflict "punishment." This requirement has been thought to be essential to distinguishing bills of attainder from regulations such as the epileptic statute considered above. But the validity of this sort of permissible regulatory legislation can be established on grounds wholly unrelated to the concept of punishment.[139] Further, courts have encountered endless conceptual difficulties in trying to decide whether given statutes are "punitive."[140]

Even leaving aside the difficulties inherent in ascertaining punitive intent, the "punishment" test seems to furnish at best an inexact, emotive distinction. For it is difficult to see in what sense a typical bill of attainder calling for the banishment of a number of notorious rebels inflicts "punishment" any more than does a statute providing that no grand mal epileptic shall drive an automobile. In each case the legislature has moved to prevent a given group of individuals from causing an undesirable situation, by keeping that group from a position in which they will be capable of bringing about the feared events. The "legislative intent"—insofar as that phrase is meaningful—in the two cases is probably identical.

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137. See, *e.g.*, Flemming v. Nestor, 363 U.S. 603, 613 (1960).

138. See, *e.g.*, Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866); Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 146 (1961) (Black, J., dissenting); DOUGLAS, AN ALMANAC OF LIBERTY 103 (1954). *But see* Flemming v. Nestor, 363 U.S. 603, 626 (1960) (Black, J. dissenting). See note 17 *supra*.

139. Note 130 *supra* and accompanying text.

It would appear that the requirement of punishment has been thought to follow logically from the fact that the bill of attainder clause was designed to keep separate the legislative and judicial functions. See Comment, 64 YALE L.J. 712, 723 (1955).

> Recognizing the danger of political retaliation prompted by a strong executive or a popular legislature, our Constitution allotted to the judiciary, less sensitive to transitory whims and passions and more disciplined with the traditions of impartiality and objectivity, the power to deal directly with narrow groups and individuals. The legislature cannot punish; that the judiciary must do.

Note, 34 IND. L.J. 231, 237 (1959). But no such inference need be made; a desire to separate the legislature and the judiciary implies nothing about "punishment."

140. There have been a few decisions to the effect that certain deprivations—regardless of the intent with which they are inflicted—can *never* be "punishment." See notes 142, 150-51 *infra* and accompanying text. However, it has generally been stated that "punitive intent" on the part of the legislature is the key to determining whether or not a prescribed deprivation is "punishment." See, *e.g.*, Trop v. Dulles, 356 U.S. 86, 94 (1958); Flemming v. Nestor, 363 U.S. 603, 613-14 (1960); Wormuth, *supra* note 128, at 608-10. Where such intent does not appear on the face of the statute, it has been sought in the thicket of legislative history. See, *e.g.*, Trop v. Dulles, *supra* at 94-95 (1958); Flemming v. Nestor, *supra* at 618-21 (1960); *id.* at 638-40 (Brennan, J., dissenting). Comment, 64 YALE L.J. 712, 725 (1955); Note, 34 IND. L.J. 231, 249 (1959). *But see* Starkweather v. Blair, 245 Minn. 371, 379-80, 71 N.W.2d 869, 875-76 (1955). And if neither the words of the statute nor the legislative history reveal such punitive intent, it has been argued with no small degree of circularity that a court may infer "hidden intent" from the fact that the effect of the statute is "to punish." Note, 34 IND. L.J. 231, 250 (1959).

The breakdown of the "punishment" test is more clearly illustrated by contrasting the statutes "No one afflicted with a contagious disease shall teach school" and "John Jones, because he has a contagious disease, shall not teach school." Even outspoken adherents of the punishment test admit that the latter is a bill of attainder,[141] yet it is no more "punitive" than the former. For both the deprivation inflicted and the purpose underlying its infliction are identical. The second statute offends the bill of attainder prohibition not because of any "punitive intent," but because the legislature has taken unto itself the power to apply its general mandate to a specific individual. Thus, in pursuing the phantom "punitive intent," the courts have been focusing on the wrong issue. The bill of attainder clause was directed not to the intent of the legislature, but to the preservation of the separation of powers. It was adopted not to prevent legislative "punishment," but to prevent legislative trial.

The Form of Deprivation

Threading the case law are holdings to the effect that the nature of the deprivation inflicted can alone determine that an act is not a bill of attainder, regardless of the fact that the deprivation is inflicted upon a specific group, and regardless of the intent with which the statute was enacted. Typical is the line of cases holding that laws providing for the deportation of alien Communists are not bills of attainder (or ex post facto laws), because deportation of aliens is simply "not a punishment."[142]

The view that the nature of the deprivation inflicted can be dispositive of whether an act is constitutional makes no sense in a bill of attainder context. Not even those who claim to draw their definition from history can rely upon such reasoning, for the bills of attainder (and bills of pains and penalties) of Revolutionary America and pre-1789 England prescribed a great variety of deprivations.[143] Indeed, banishment numbered among the more common sanctions.[144]

141. Mr. Justice Jackson confuses the two. He says: "I have sometimes wondered why I must file papers showing I did not steal my car before I can get a license for it." 339 U.S. at 435 . . . This is very different from an act which says: "Robert H. Jackson for want of qualification is hereby forbidden to own or operate an automobile." Wormuth, *supra* note 128, at 610 n.37.

142. *E.g.*, Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893); Bugajewitz v. Adams, 228 U.S. 585, 591 (1913); Mahler v. Eby, 264 U.S. 32, 39 (1924); Harisiades v. Shaughnessy, 342 U.S. 580, 594-95 (1952); Quattrone v. Nicolls, 210 F.2d 513, 518 (1st Cir. 1954), *cert. denied*, 347 U.S. 976 (1954). See also Turner v. Williams, 194 U.S. 279 (1904); Marcello v. Bonds, 349 U.S. 302 (1955). *Cf.* Galvan v. Press, 347 U.S. 522, 531 (1954).

However, expatriation of a citizen *has* been held to be "punishment." Klapprott v. United States, 335 U.S. 601 (1949); Trop v. Dulles, 356 U.S. 86 (1958); *In re* Yung Sing Hee, 36 Fed. 437 (D. Ore. 1888); *cf.* Perez v. Brownell, 356 U.S. 44 (1958).

143. See notes 88-91 *supra* and accompanying text.

144. See, *e.g.*, Proceedings Against Hugh and Hugh Le Despencer 1 State Trials 23 (1320); An act to inflict pains and penalties on Francis lord bishop of Rochester, 1722, 9

Also, early precedent—notably *Fletcher v. Peck*[145] and *Cummings v. Missouri*[146]—stands for the view that the bill of attainder clause is not to be restricted to statutes inflicting any rigidly defined class of deprivations. *Fletcher* specifically rejected the argument that the bill of attainder clause applied only to statutes inflicting capital sanctions,[147] while *Cummings* explicitly repudiated another attempt to narrow the reach of the bill of attainder clause on the basis of the type of sanction imposed:

> We do not agree with the counsel of Missouri that "to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all." The learned counsel . . . . does not include under liberty freedom from outrage on the feelings as well as restraints on the person. He does not include under property those estates which one may acquire in professions, though they are often the source of the highest emoluments and honors.[148]

Of course these cases accept the view, criticized above, that if an act is to be held a bill of attainder, it must inflict "punishment." What is noted here, however, is that they imply that legislative intent, and *not* the form or severity of the deprivation, is dispositive of whether or not punishment has been inflicted, and therefore of whether there has been an attainder.

Even more important, however, is the fact that an examination of the rationale underlying the bill of attainder clause makes clear that the type of deprivation imposed by a statute is irrelevant to whether or not that statute falls within the constitutional provision. For the bill of attainder clause is not a limitation upon the size or sort of sanctions which the legislature can prescribe;[149] it is rather a command that the legislature shall never, regardless

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Geo. 1, c. 17 (Pub.); An act for banishing and disenabling the earl of Claredon, 1667, 19 Car. 2, c. 10 (Pub.).

It has been stated that the modern sanction of deportation is not equivalent to the traditional sanction of banishment. Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). But this does not appear to be a meaningful distinction. See Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of The Power to Expel*, 69 YALE L.J. 262 (1959). See also Navasky, *Deportation as Punishment*, 27 U. OF KAN. CITY L. REV. 213 (1959); Comment, 51 YALE L.J. 1358, 1363-64 (1942).

But even if banishment and deportation did differ in any meaningful way, and the latter lacked historical counterparts, the rationale underlying the bill of attainder clause implies that an act subjecting specific persons to deportation would still offend the constitutional provision. For the form of the deprivation imposed is irrelevant to whether or not the statute imposing it is a bill of attainder.

See the description of the proposed deportation of Harry Bridges, in Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L.J. 760, 783-84 n.112 (1962).

145. 10 U.S. (6 Cranch.) 87 (1810). See notes 21-24 *supra* and accompanying text.

146. 71 U.S. (4 Wall.) 277 (1866). See notes 25-36 *supra* and accompanying text.

147. Note 22 *supra* and accompanying text.

148. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866). *But cf.* Brown v. Wilemon, 139 F.2d 730, 732 (5th Cir. 1944).

149. Of course other parts of the Constitution *do* set limits on the severity and form of deprivations: for instance, the prohibitions against cruel and unusual punishments and of corruption of blood. U.S. CONST. amend. VIII; U.S. CONST. art. III, § 3.

of the type of deprivation the rule imposes, try persons to see if they come within the rule.

"Mere Denials of Privilege"

There is a considerable body of state authority to the effect that a statute merely "denying a privilege" to a specific group of persons cannot be a bill of attainder. This reasoning has been applied most often in cases involving statutes denying a specific person or group the opportunity to vote [150] or to hold public office.[151]

Until very recently, the Supreme Court had consistently rejected this doctrine. The *Cummings* opinion stated that a statute depriving "any rights, civil or political" could be a bill of attainder.[152] The use of the word "rights" suggests an endorsement of the view that a denial of a privilege cannot be a punishment. A closer reading, however, discloses that the word "right" was used by the Court to encompass what other courts have called "privileges," and that therefore the case stands for a repudiation of any dichotomy between the two:

> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness *all avocations, all honors, all positions,* are alike open to every one . . . . Any deprivation or suspension of any of *these rights* for past conduct is punishment. . . . [153]

This was no inadvertant pronouncement, for among the deprivations inflicted upon those unable to take the oath at issue in *Cummings* were denials of the vote and the opportunity to hold office.[154] And in the *Lovett* case,[155] denial of compensation for federal employment was held to be a deprivation sufficient to invalidate the statute as a bill of attainder, despite widespread state authority to the effect that government employment is a privilege.[156]

Since *Lovett,* however, suggestions of the doctrine that denial of a privilege cannot constitute punishment have crept into the opinions of the Supreme Court. In *Douds* [157] the Court observed that the deprivation imposed by sec-

150. *E.g.,* Anderson v. Baker, 23 Md. 531 (1865); Blair v. Ridgely, 41 Mo. 63 (1867); Randolph v. Good, 3 W. Va. 551 (1869); Wooley v. Watkins, 2 Idaho 590, 22 Pac. 102 (1889); Shepherd v. Grimmett, 3 Idaho 403, 31 Pac. 793 (1892); *cf.* Boyd v. Mills, 53 Kan. 594, 37 Pac. 16 (1894).

151. *E.g.,* State *ex rel.* Wingate v. Woodson, 41 Mo. 227 (1867); Crampton v. O'Mara, 193 Ind. 551, 139 N.E. 360 (1923), *appeal dismissed,* 267 U.S. 575 (1925); *cf.* City of Detroit v. AASER, 332 Mich. 237, 51 N.W.2d 228, *appeal dismissed,* 344 U.S. 805 (1952).

152. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1866).

153. *Id.* at 321-22 (emphasis added). See note 36 *supra.*

154. Note 27 *supra* and accompanying text.

155. United States v. Lovett, 328 U.S. 303 (1946). See notes 42-45 *supra* and accompanying text. *But cf.* Helvering v. Mitchell, 303 U.S. 391 (1938).

156. See note 151 *supra.*

157. American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

tion 9(h) of the Taft-Hartley Act—the preclusion of recognition by the National Labor Relations Board—would have the effect of imposing restrictions which would not exist if the Board had not been established.[158] The Court reasoned that it therefore was not "free to treat § 9(h) as if it merely withdraws a privilege gratuitously granted by the Government. . . ."[159] From this statement it is not unreasonable to infer that if the Court had felt that section 9(h) did "merely withdraw such a privilege," it might have held the deprivation inflicted insufficient to invalidate the statute. And in *Flemming v. Nestor*,[160] a 1960 case involving a statute[161] terminating the old-age Social Security payments of aliens who had been deported for being members of the Communist Party,[162] the doctrine was more strongly suggested. In holding that the statute was not a bill of attainder, the Court intimated that one reason underlying its finding was that the deprivation imposed by the statute was that of a "mere privilege":

> Here the sanction is the mere denial of a noncontractual governmental benefit. No affirmative disability or restraint is imposed, and certainly nothing approaching the "infamous punishment" of imprisonment . . . .[163]

Thus the doctrine that a statute "merely denying a privilege" cannot be a bill of attainder is threatening to establish itself, like the requirement of post facto punishment and the requirement of the inescapable class, as a technical limitation upon the reach of the bill of attainder clause. Indeed, a recent district court decision, in upholding a federal statute against the charge that it was a bill of attainder, rested squarely upon the right-privilege dichotomy.[164]

Certain pre-1789 bills of attainder often inflicted deprivations which look very much like "mere denials of privilege"; there were statutes depriving the specified party the vote,[165] and denying to their sons the opportunity of sitting

158. *Id.* at 389-90.

159. *Id.* at 390.

160. 363 U.S. 603 (1960).

161. Social Security Act Amendments of 1954 § 107, 68 Stat. 1083 (1954), 42 U.S.C. § 402(n) (1958).

162. Immigration and Nationality Act § 241(a)(6)(C), 66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6)(C) (1958).

163. 363 U.S. at 617. It is not suggested that this was the sole ground of decision, for the case also discussed "punitive intent" at length. See *id.* at 612-21. *But see* notes 137-41 *supra* and accompanying text.

164. Thompson v. Whittier, 185 F. Supp. 306, 310-12 (D.D.C. 1960). *But see* Steinberg v. United States, 163 F. Supp. 590, 592 (Ct. Cl. 1958).

165. See note 97 *supra* and accompanying text. See also An Act for the preventing of bribery and corruption in the election of members to serve in parliament for the borough of Cricklade, in the county of Wilts, 1782, 22 Geo. 3, c. 31 (Pub.); An Act to exclude the Bourough of Grampound, in the County of Cornwall, from sending Burgesses to serve in Parliament..., 1821, 1 & 2 Geo. 4, c. 47 (Pub.).

Yet the area of disenfranchisement is the prime bastion of the privilege doctrine. See note 159 *supra* and accompanying text.

Murphy v. Ramsey, 114 U.S. 15 (1885), a case involving an ex post facto law issue, strongly suggested that disenfranchisement can be a punishment. *Id.* at 42.

in Parliament.[166] Again, however, the fundamental reason that the right-privilege dichotomy must be rejected is that it does not accord with the rationale underlying the bill of attainder clause. For the clause is a blanket prohibition of legislative exercise of the adjudicating function.

ANTI-COMMUNIST LEGISLATION AND THE BILL OF ATTAINDER CLAUSE

The similarity between our age and past "ages of attainder" is startling. English acts of attainder were almost always directed at persons or groups who had attempted, or seemed likely to attempt, to overthrow the government.[167] Indeed, Parliament frequently cited as justification for its action the fact that the person or group attainted was "under the domination of a foreign power."[168] And the passage of bills of attainder in Revolutionary America was similarly elicited by widespread fear of another "foreign-dominated" group, the Tories. John Adams' confession, "I fear there is a chain of toryism extending from Canada through New York and New Jersey into Pennsylvania,"[169] can sound unfamiliar to no child of the era of the John Birch Society.

But mere historical similarity does not a bill of attainder make. The anti-Communist legislation presently on the books takes many forms. In order for any or all of these statutes to be bills of attainder, Congress must not only have laid down the general rule that persons dangerous to the nation's security shall be restricted in certain ways, but must also have usurped the function of the judiciary by itself applying that rule to specific persons.

The statutory provision which most clearly violates the bill of attainder clause is that section of the Immigration and Nationality Act of 1952 which provides that aliens who are members of the Communist Party shall be taken into custody and deported.[170] While the bill of attainder clause does not prevent Congress from enacting a statute calling for the deportation of all persons found by a court to be disloyal, or dangerous to America's security, it does demand that the application of this rule be left to the judicial branch. But Congress has usurped this function by making the empirical determination that specific persons—alien Communists—come within the class of persons dangerous to the nation's security. Since the claim that "deportation is not a

166. See note 92 *supra* and accompanying text. *But see* French v. Senate, 146 Cal. 604, 80 Pac. 1031 (1905).

167. See notes 6-7 *supra* and accompanying text.

168. *E.g.*, an Act to inflict pains and penalties on John Plunkett, 1722, 9 Geo. 1, c. 15 (Pub.); an Act for the further limitation of the crown, and better securing the rights and liberties of the subject, 1700, 12 & 13 Will. 3, c. 3; an Act for restraining popish recusants to some certain places of abode, 1593, 35 Eliz., c. 2 (Pub.). For an interesting parallel, see Professor Chafee's description of the "Popish Plot." CHAFEE, *op. cit. supra* note 4, at 122-23.

169. 9 ADAMS, THE LIFE AND WORKS OF JOHN ADAMS 408 (1854).

170. Any alien . . . shall . . . be deported who is or at any time has been, after entry, a member of [the Communist Party of the United States] . . . .

66 Stat. 205 (1952), 8 U.S.C. § 1251(a)(6)(C) (1958).

punishment" makes no sense in a bill of attainder context,[171] the constitutional prohibition of trial by legislature has been violated.

The Communist Control Act of 1954

The Communist Control Act[172] also specifically names the Communist Party as the object of its restrictions. Section 3 provides:

> The Communist Party of the United States . . [is] 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 . . . are hereby terminated. . . .[173]

There has apparently been an empirical determination that the Communist Party comes within the class of organizations which endanger the national security and must therefore be restricted. Indeed, Congress, in a classic example of the "declaration of guilt" which Mr. Justice Frankfurter considers essential,[174] admitted as much:

> The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States . . . . Therefore the Communist Party should be outlawed.[175]

This is precisely the sort of "trial by legislature" the bill of attainder clause was designed to prevent.

Of course, the deprivations imposed by section 3 attach to the group *qua* group, rather than directly to the individual members. But even leaving aside the fact that restrictions placed upon a group constitute indirect restrictions upon the actions of its members, this distinction cannot make any difference *vis-a-vis* the bill of attainder clause. For regardless of whether individual or collective action is restricted by the statute, the fact remains that Congress has disregarded the separation of powers by applying its own general rules.[176]

The Court's opinion in *Communist Party v. Catherwood*,[177] holding that the act does not require exclusion of Communist parties from state unemployment compensation systems, suggests that the "rights, privileges, and immunities" clause of section 3 may be construed so narrowly as to inflict essentially no deprivations upon the Communist Party. However, it can be

171. See notes 142-49 *supra* and accompanying text.

172. 68 Stat. 775-80 (1954), as amended, 50 U.S.C. §§ 781-857 (1958).

173. Communist Control Act § 3, 68 Stat. 776 (1954), 50 U.S.C. § 842 (1958).

174. Notes 52-55 *supra* and accompanying text.

175. Communist Control Act § 2, 68 Stat. 775-76 (1954), 50 U.S.C. § 841 (1958).

176. A statute providing that United States Steel must surrender all its assets to the government is a bill of attainder, despite the fact that the deprivation falls upon the "group *qua* group." Compare Grosjean v. American Press Co., 297 U.S. 233 (1936). See Comment, 64 YALE L.J. 712, 724 n.74 (1955).

177. 367 U.S. 389 (1961).

argued that section 2 [178]—the "declaration of guilt"—even standing alone, constitutes a bill of attainder. For although on its face it attaches no consequences to the announced empirical finding, it is bound to elicit community reaction which may well ultimately result in the infliction of severe deprivations upon Communists.[179] Such a view was suggested in 1794 by James Madison when, in a debate over a congressional resolution which did no more than declare certain persons to have been involved in an insurrection, he observed:

> It is in vain to say that this indiscriminate censure is no punishment. If it falls on classes, or individuals, it will be a severe punishment. . . . Is not this proposition, if voted, a vote of attainder?[180]

The Smith Act of 1940

At the other end of the anti-Communist spectrum stands the Smith Act:

> It shall be unlawful for any person—
> (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any Government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purpose thereof.[181]

Under the analysis suggested in this Comment, the Smith Act is not a bill of attainder. In enacting it Congress contented itself with promulgating a rule of general applicability—that those who knowingly belong to a group which advocates the violent overthrow of the government shall go to jail; it did not take the further step of applying this general rule by specifying what persons or groups were to be so deprived. This job was left to the courts; one prosecuted under the Smith Act is entitled to a jury trial on the question of the disloyalty of the group to which he belongs, in addition to his membership in that group.[182]

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178. Text accompanying note 175 *supra*.

179. See note 187 *infra*.

180. 4 Annals of Congress 934 (1794).

The reasoning outlined in the text can with little difficulty be extended to imply that it is unconstitutional for legislative committees to make and release to the public empirical findings about specific persons or groups, if the effect of such release will be to inflict deprivations upon the parties concerned. Of course, such findings are generally not released in the form of a statute, and to that extent differ from the historical bill of attainder. But functionally this can make little difference for—regardless of how the finding is announced—the legislature has disregarded the separation of powers by "trying" particular persons. *Cf.* CHAFEE, *op. cit. supra* note 4, at 159-60.

The passage of "private bills" also represents a breakdown of the separation of powers. Usually, however, no one would suffer injury sufficient to give standing to challenge this sort of legislative exercise of the adjudicating function, even if it be admitted that a statute which does not impose a deprivation can be a bill of attainder.

181. Smith Act § 2(a) (3), 54 Stat. 671 (1940), as amended, 18 U.S.C. § 2385 (1958).

182. See Scales v. United States, 367 U.S. 203 (1961).

The Subversive Activities Control Act of 1950

Situated—both chronologically and along the continuum—between the Communist Control Act and the Smith Act is that part of the Internal Security Act known as the Subversive Activities Control Act.[183] Section 3 defines a "Communist-action organization" as:

> [A]ny organization in the United States . . . which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarly to advance the objectives of such world Communist movement . . .[184]

Under section 7, every organization coming within this definition is required to file with the Attorney General a registration statement, which is to include, *inter alia,* the names and addresses of all its members.[185] From such registration (or a final order of the Subversive Activities Control Board requiring registration) [186] flow many severe deprivations.[187]

183. 64 Stat. 987 (1950); 50 U.S.C. §§ 781-98 (1958).

184. Subversive Activities Control Act § 3, 64 Stat. 989 (1950), 50 U.S.C. § 782 (1958).

185. *Id.* § 7, 64 Stat. at 994 (1950), 50 U.S.C. § 786 (1958).

186. *Id.* § 12(e), 64 Stat. at 997 (1950), 50 U.S.C. § 791(e) (1958).

187. Members of an organization designated a "Communist-action organization" are deprived of certain income tax exemptions. Subversive Activities Control Act § 11(a), 64 Stat. 996 (1950), 50 U.S.C. § 790(a) (1958). Further, such persons and organizations are denied access to the National Labor Relations Board either as an employer or as the representative of any employee. Communist Control Act §§ 6, 13A(h), 68 Stat. 777, 779-80 (1954), 50 U.S.C. §§ 784(a)(1)(E), 792a(h) (1958). Also, "Communist-action organizations" cannot send mail or broadcast over radio or television without announcing that the information is being "disseminated by a Communist organization." Subversive Activities Control Act § 10, 64 Stat. 996 (1950), 50 U.S.C. § 789 (1958). (The use of restrictions upon the opportunity to communicate, as a means of containing a threat to the national security, is far from novel; in its attainder of the Prince of Wales, Parliament decreed:

> And for preventing traiterous correspondence between your Majesty's subjects and the said pretended prince of Wales, or his adherents; be it further enacted . . . That if any of the Subjects of the Crown of *England* . . . shall . . . hold, entertain, or keep any intelligence or correspondence in person, or by letters, messages, or otherwise, with the said pretended prince of Wales, or with any person or persons employed by him, knowing such person to be so employed . . . such person so offending, being lawfully convicted, shall be taken, deemed, and adjudged to be guilty of high treason, and shall suffer and forfeit as in cases of high treason.

An act for the Attainder of the pretended Prince of Wales of High Treason ,1701, 13 Will. 3, c. 3 (pub.). (Of course this section of the act is not a bill of attainder.)

Registration under § 7 of the Subversive Activities Control Act also inflicts deprivations directly upon the individual members of a Communist-action organization. They are forbidden to "hold any non-elective office or employment under the United States," "engage in any employment in any defense facility," or "hold office or employment with any labor organization . . . or to represent any employer in any matter or proceeding arising or pending" under the National Labor Relations Act. Subversive Activities Control Act §§ 5(a)(1)(B), 5(a)(1)(D), 64 Stat. 992 (1950), 50 U.S.C. §§ 784(a)(1)(B), 784(a)(1)(d) (1958); Communist Control Act § 6, 68 Stat. 777 (1954), 50 U.S.C. § 784(a)(1)(E) (1958). Members are also ineligible for passports. Subversive Activities Control Act § 6(a), 64 Stat. 993 (1950), 50 U.S.C. § 785 (1958).

The Subversive Activities Control Act presents a difficult problem, because it does not neatly fit into either the category "rulemaking" or the category "adjudication." The analysis suggested in this Comment would approach this problem by first determining what sort of judgment Congress has made in enacting the statute.[188] It has not made a very broad judgment: "Any organization which operates primarily to aid an enemy of the United States in its efforts to defeat the United States shall . . ." Nor has it specifically applied a judgment to a particular person or group: "The Communist Party of the United States shall . . ."[189] Its judgment lies somewhere between these extremes. Thus neither the test of "reasonableness" nor the test of "certainty" should be applied to decide the validity of the enactment. It can, however, be forcefully argued that Congress has, in narrowing the breadth of its rule, made significant and not wholly uncontroversial empirical findings concerning the existence, government, aims, and power of the World Communist movement. In answer it might be urged that the enacted definition is not so far removed from the broad rulemaking level as to deny Congress the use of such uncertain empirical data.[190]

Further, the list of members' names is to be kept open for public inspection. Subversive Activities Control Act § 9(b), 54 Stat. 996 (1950), 50 U.S.C. § 788(b) (1958). Thus the chances of additional deprivations, inflicted by the community, are increased. For example, Communist lawyers and doctors are faced with the possibility of exclusion from their professions, while teachers and actors who are past or present members of the Party are confronted with serious problems in obtaining employment. See Konigsberg v. State Bar of California, 366 U.S. 36 (1961); Barsky v. Board of Regents, 347 U.S. 442 (1954); Adler v. Board of Educ., 342 U.S. 485 (1952); Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry*, 6 STAN. L. REV. 438 (1954).

188. Courts have used legislative history as an aid to determining whether or not a statute is a bill of attainder. Note 140 *supra*. This procedure has been endorsed by commentators. See Note, 34 IND. L. REV. 231, 249 (1959); Comment, 64 YALE L.J. 712, 725 (1955). The analysis presented in this Comment does not draw upon legislative history. For although legislative history may be an indispensable aid so long as the issue is couched in terms of "punitive intent," it does not appear to be the most reliable indicator of whether or not a statute singles out specific parties to whom the statute is to apply.

Even if it could be demonstrated that the legislative debates consisted largely of the examination of evidence concerning a specific group, that fact alone would not demonstrate that the final form of the statute specifically applies the general rule involved to that group. To determine whether a given statute not only sets forth a general rule that persons with characteristic x shall be subjected to deprivation y, but also incorporates an empirical judgment that a specific list of persons possess characteristic x, courts must turn to the statute itself.

189. The argument that the full panoply of statutes, read together, permits of no conclusion other than that the Communist Party comes within the language of § 3 has been rejected by the Court. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 110-15 (1961).

190. The ultimate inquiry must be: were the empirical underpinnings of the narrowing of the rule certain enough considering the specificity of the application? A more "absolute" test would no doubt be easier to apply to the difficult middle areas between pure rulemaking and pure adjudication. *Cf.* Black, *Mr. Justice Black, The Supreme Court, and the Bill of Rights*, Harper's Magazine, Feb. 1961. However, it is probably the case that the

The issue was rendered moot in 1954 when, in section 4 of the Communist Control Act,[191] Congress took the step it had refrained from taking four years earlier:

> Whoever knowingly and willfully becomes or remains a member of . . . the Communist Party . . . with knowledge of the purpose or objective of such organization shall be subject to all the provisions and penalties of the [Subversive Activities Control Act,] as a member of a "Communist-action" organization.[192]

The Court has held that section 2 of the 1954 Act [193]—the "declaration of guilt"—is a mere statement of congressional purpose and cannot be read back into the Subversive Activities Control Act.[194] But this section, section 4—which explicitly refers to the 1950 Act—admits of no such interpretation. When the restrictions placed upon the members of "Communist-action organizations" by the 1950 Act are coupled with this 1954 declaration that members of the Communist Party are to be treated as members of a "Communist-action organization," there emerges the very model of a modern bill of attainder. Congress has not contented itself with its former generalization that members of organizations which possess certain characteristics shall be subject to certain restrictions; it has gone on to apply this rule specifically to the Communist Party. The separation of powers has broken down; Congress has passed a bill of attainder.[195]

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continuum here proposed cannot be translated into "absolute" terms. Because there is no sharp distinction between "broad rules" and "specifications thereof," a rule like "a legislature can *never* specify the persons who are to be subject to its broad rule, unless it does so by means of definitions or judicially noticeable propositions," cannot be utilized without degenerating into the sort of inquiry set forth at the beginning of this footnote. The continuum, as the text demonstrates, is not difficult to apply to most legislation; as to the middle areas, it can do no more than suggest the approach.

191. See notes 172-80 *supra* and accompanying text.

192. Communist Control Act § 4(a), 68 Stat. 776 (1954), 50 U.S.C. § 843 (1958).

193. Text accompanying note 175 *supra*.

194. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 115 (1961).

195. It has been suggested by adherents of the literalist approach that an attempt to determine the meaning and scope of the bill of attainder clause is something of a waste of time, because the more general standard of "due process" affords sufficient protection against the evils to which the bill of attainder clause is directed.

> Congress omitted from § 304 any condemnation for which the presumed punishment was a sanction. Thereby it negatived the essential notion of a bill of attainder. It may be said that such a view of a bill of attainder offers Congress too easy a mode of evading the prohibition of the Constitution. Congress need merely omit its ground of condemnation and legislate the penalty! But the prohibition against a "Bill of Attainder" is only one of the safeguards of liberty in the arsenal of the Constitution. There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens.

United States v. Lovett, 328 U.S. 303, 326 (1946) (Frankfurter, J., concurring). See also Note, 26 ORE. L. REV. 78, 109-13 (1947).

This sort of attack can be answered simply by pointing out that although it is arguable that the concept of "due process" *should* encompass a prohibition of legislative adjudication, (but *caveat:* the separation of powers as we know it is primarily an American phenomenon),

CONCLUSION

Of late the Supreme Court, claiming it is bound by the chains of history, has limited the bill of attainder clause to a degree to which it has never before been limited. But the allegedly historical assumptions of the Court do not stand up to the test of history, for pre-Constitution bills of attainder were so varied in form and effect that the formulation of *any* narrow historical definition is impossible.

Indeed, writings contemporary with the adoption of the Constitution indicate that the clause was intended as a broad implementation of the separation of powers—that it was designed to limit the legislature in much the same way as the case and controversy requirement of article III limits the judiciary. This broad purpose should dominate future judicial constructions of the constitutional provision.

This Comment has analyzed only legislation directed at members of the Communist Party. This emphasis results not from design or sympathy, but from necessity. For it is the Communists who are the targets of today's bills of attainder. This is not surprising, for such bills have always been directed at those thought to present a threat to the security of the sovereign. Yesterday it

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the recent cases demonstrate that the Court's definition does not extend that far. For such flagrant instances of legislative adjudication as § 9(h) of the Taft-Hartley Act have been upheld not only against the charge that they are bills of attainder, but also against attacks grounded in the due process clause. See cases cited note 46 *supra*. To suggest that one constitutional provision is useless because another provision, if its present interpretation were altered, might perform the same function is nothing short of absurd.

Bills of attainder are often at the same time ex post facto laws; this no doubt is one reason the two prohibitions were united in one constitutional clause. But the proscription of ex post facto laws does not, as has at times been suggested, render the bill of attainder prohibition superfluous, for frequently bills of attainder were—and are—not ex post facto laws. For one thing, parliamentary bills of attainder often were findings that the person attainted was guilty of a crime *previously defined* by the statutes. Secondly, bills of attainder were sometimes passed not primarily to punish past acts at all, but rather to prevent future conduct. Notes 56-67 *supra* and accompanying text. The classes of "bills of attainder" and "ex post facto laws" are thus overlapping but not coextensive; the framers were fully justified in treating the two prohibitions separately. Note 11 *supra*. It is also worth noting that while there is in the case law authority for the proposition that the prohibition of ex post facto laws is limited to criminal statutes—as is the Sixth Amendment's guaranty of trial by jury—the authority concerning the bill of attainder clause explicitly rejects such limitation. Compare Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), and Mahler v. Eby, 264 U.S. 32, 39 (1924), with Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), and United States v. Lovett, 328 U.S. 303 (1946).

So long as the bill of attainder clause is regarded as a proscription of a specific form of parliamentary statute, it can be convincingly argued that it is a safeguard of little independent value in today's world. However, once it is realized that the term "bill of attainder" has no specific historical referent, and that the constitutional provision is a prohibition of legislative adjudication in any guise, it becomes clear that it is a safeguard which is, especially today, independently vital. If the courts are led to read the bill of attainder clause out of the Constitution as anachronistic surplusage, we shall have lost the right to be judged by persons other than those who enact the law.

was the Prince of Wales;[196] today it is the Communists. As Story wisely observed:

> Bills of this sort have most usually been passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods, in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others.
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> * * *
>
> This is not surprising, when we consider that coolness, caution, and a strict regard for the rights and liberties of others, are the accompaniments of conscious security and strength, and are not to be looked for in times of great danger, when the people regard their all as being staked upon the issue of a doubtful contest, and when it is of the utmost importance to their cause, that by every possible means they force doubtful parties to take sides with them, and lessen the power, number, and means of offense of those opposed.[197]

It is easy to understand why Congress has not been willing to entrust to other tribunals the power to determine who is to come within the purview of its rules. But the fact that something is understandable does not make it constitutional.

We live in an age of anxiety. But so did the framers of our Constitution. We would do well to heed their warning that, in calm and anxious ages alike, the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[198]

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196. Act for the Attainder of the pretended Prince of Wales, 1701, 13 Will. 3, c. 3 (pub.). See notes 64-65 *supra* and accompanying text.

197. STORY, *op. cit. supra* note 5, at 210-11.

198. THE FEDERALIST No. 47, *op. cit. supra* note 100, at 373-74 (Madison).