

Bills of Attainder: A Study of Amendment by the Court

Raoul Berger

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Raoul Berger, *Bills of Attainder: A Study of Amendment by the Court*, 63 Cornell L. Rev. 355 (1978)
Available at: <http://scholarship.law.cornell.edu/clr/vol63/iss3/1>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL LAW REVIEW

Volume 63

March 1978

Number 3

BILLS OF ATTAINDER: A STUDY OF AMENDMENT BY THE COURT

Raoul Berger†

INTRODUCTION	356
I. THE FRAMERS' USE OF COMMON-LAW TERMS	360
A. <i>Common-Law Terms Were Carefully Chosen</i>	360
B. <i>Both Ex Post Facto Laws and Bills of Attainder Were Limited to Crimes</i>	365
C. <i>Fletcher v. Peck</i>	367
D. <i>The Impact of Federalism</i>	371
II. THE HISTORY OF ATTAINDER	372
A. <i>Criticism of a "Narrow Historical Definition"</i>	372
B. <i>The Bill of Attainder in England</i>	373
C. <i>The Bill of Attainder in America</i>	376
III. SEPARATION OF POWERS	379
A. <i>The Inapplicability of the "Contemporary Commentaries"</i>	381
B. <i>Delineating Legislative and Judicial Functions</i>	385
IV. THE PITFALLS OF THE "PUNISHMENT" TEST	390
A. <i>Test Oaths and Disqualifications</i>	390
B. <i>Punishment</i>	395
C. <i>Legitimate Classification Versus Legislative Adjudication</i>	399
CONCLUSION	403

† Member, Illinois and District of Columbia bars. A.B. 1932, University of Cincinnati; J.D. 1935, Northwestern University; LL.M. 1938, Harvard University; LL.D. 1975, University of Cincinnati.

INTRODUCTION

Few judicial doctrines represent so transparent a transformation of a constitutional phrase as the Supreme Court's expansion of the prohibition of "bills of attainder"¹ to include "bills of pains and penalties." As with its transmutation of due process,² the Court thereby has invaded the policymaking functions of the state and federal legislatures.³ To effectuate the intention of the Framers and to free legislative policymaking from unauthorized judicial interference, it is necessary to return to the common-law meaning of the phrase "bills of attainder," a meaning the Framers had in mind. That would also cut at the root the mass of doctrinal confusion in which the Court has enveloped the subject.

It is indisputable that at common law a bill of attainder was a legislative condemnation to death without trial for either treason or felony, accompanied by corruption of blood, *i.e.*, "the inheritable quality of [the traitor's] blood is extinguished and blotted out forever."⁴ This can be traced from Coke⁵ through Blackstone,⁶ Richard Wooddeson (Blackstone's successor at Cambridge),⁷ and the precedents of Parliament collected by John Hatsell.⁸ It was also recognized by Justice James Wilson, one of the leading Framers,⁹

¹ U.S. CONST. art. I, § 9, cl. 3 provides: "No Bill of Attainder or ex post facto Law shall be passed." A similar provision applies to the states: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ." *Id.* art. I, § 10, cl. 1.

² See generally R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 193-214, 249-82 (1977).

³ Speaking of the test-oath provisions struck down by the Court as bills of attainder in two post-Civil War cases (see text accompanying notes 235-49 *infra*), John Norton Pomeroy stated: "The provisions . . . may be of very doubtful policy . . . but they clearly are not bills of attainder." J. POMEROY, *AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 511, at 329 (7th ed. 1883). "[R]esentment against an injustice," Justice Frankfurter remarked, should not "displace controlling history in judicial construction of the Constitution." *United States v. Lovett*, 328 U.S. 303, 323 (1946) (concurring opinion).

⁴ 2 W. BLACKSTONE, *COMMENTARIES* *252, quoted in 2 J. WILSON, *WORKS* 621 (R. McCloskey ed. 1967). "The effect of this corruption of the blood was, that the party attainted lost all inheritable quality, and could neither receive nor transmit any property or other rights by inheritance." *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 387 (1867) (dissenting opinion, Miller, J.). See 4 W. BLACKSTONE, *supra* at *388.

⁵ See E. COKE, *COMMENTARY UPON LITTLETON* *391a-92b.

⁶ See 4 W. BLACKSTONE, *supra* note 4, at *380-81.

⁷ See 2 R. WOODDESON, *A SYSTEMATICAL VIEW OF THE LAWS OF ENGLAND* 621-26 (London 1792).

⁸ See 4 J. HATSELL, *PRECEDENTS OF PROCEEDINGS IN THE HOUSE OF COMMONS* 77-90, 217-24, 300-06 (London 1796).

⁹ See 2 J. WILSON, *supra* note 4, at 621, 698, 707.

and by Justice Story¹⁰ and Justice Chase.¹¹ The Court itself has acknowledged the undeniable.¹² The inseparable indicia of a bill of attainder were crime, death, and corruption of blood, "If," said Story, citing Wooddeson, "an act inflicts a *milder degree of punishment than death*, it is called a bill of pains and penalties,"¹³ a distinction also acknowledged by the Court.¹⁴ The simple test of a bill of attainder, therefore, was whether it carried the sting of death in its tail; almost invariably it was associated with the crimes of treason and felony. Of its nature the Founders were well aware.¹⁵

In developing its own doctrine the Court has charted a wayward course. Building in the aftermath of the Civil War on an incautious dictum of Chief Justice Marshall,¹⁶ the Court turned on two occasions to the bill of attainder clauses to strike down loyalty oaths as a condition to practicing certain professions.¹⁷ The five-to-four majority opinions of Justice Field were countered by "the powerful dissent"¹⁸ of Justice Miller; even Field's protege, John Norton Pomeroy, wrote that "the court has fallen into a grave error, and . . . the positions taken by the dissenting judges are entirely correct."¹⁹ These cases lay more or less dormant until 1941 when Justice Black's majority opinion resurrected them in *United States v. Lovett*.²⁰ For some time thereafter, the more restricted view of Justice Frankfurter's concurring opinion prevailed.²¹ In 1965, Chief Justice Warren abruptly returned to a "functional" approach

¹⁰ See 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1338, at 209 (Boston 1833).

¹¹ See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798).

¹² See *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. 2777, 2805 & n.35 (1977); *United States v. Brown*, 381 U.S. 437, 441 (1965); *United States v. Lovett*, 328 U.S. 303, 315, 317 n.6 (1946); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

¹³ 3 J. STORY, *supra* note 10, § 1338, at 209-10 (emphasis added) (citing 2 R. WOODDESON, *supra* note 7, at 621).

¹⁴ See cases cited in note 12 *supra*.

¹⁵ See notes 128-61 and accompanying text *infra*.

¹⁶ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 138 (1810). See notes 85-112 and accompanying text *infra*.

¹⁷ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 377-78 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322-23 (1867). A curious aspect of *Cummings* is that David Dudley Field, brother of Justice Field, was counsel for the defense. See *id.* at 282. In a 5-4 decision, such a circumstance may not be without weight.

¹⁸ *United States v. Lovett*, 328 U.S. 303, 327 n.2 (1946) (concurring opinion, Frankfurter, J.).

¹⁹ J. POMEROY, *supra* note 3, § 510, at 328. For details of the relationship between Field and Pomeroy, see H. GRAHAM, EVERYMAN'S CONSTITUTION 400-01 (1968).

²⁰ 328 U.S. 303 (1946).

²¹ See *id.* at 318.

in *United States v. Brown*,²² another five-to-four decision. Not surprisingly, the cases have engendered confusion,²³ particularly in the attempt to define what constitutes "punishment" for purposes of a bill of attainder,²⁴ yielding in the process some remarkable results.

Most recently, Chief Justice Burger invoked the bill of attainder clause in his dissenting opinion in *Nixon v. Administrator of General Services (Nixon II)*,²⁵ which upheld the statute that took custody of the Nixon papers in order to preserve some 42 million government documents and 880 tape recordings. Burger maintained that the act constituted "punishment" because it deprived Nixon of rights previously enjoyed and "implicitly condemns him as an unreliable custodian of his papers. Legislation which subjects a named individual to this humiliating treatment" constitutes a bill of attainder.²⁶ Burger's intimation that the congressional attempt to safeguard official documents unjustifiably "condemns [Nixon] as an unreliable custodian of his papers" must ring strangely in the ears of anyone who recalls the unexplained eighteen-minute erasure on one of the White House tapes and Nixon's resignation on the eve of impeachment for conspiracy to obstruct justice, followed by his acceptance of a pardon that, as President Ford said, acknowledged his guilt.²⁷ To compare Congress's salutary purpose with the bloody bill of attainder is indeed sanguinary hyperbole.²⁸ Nevertheless, Justice Brennan, caught in the toils of the Court's prior

²² 381 U.S. 437 (1965).

²³ The cases are summarized in Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212 (1966) [hereinafter cited as California Comment]. The distinction between "literal" and "functional" approaches was discussed in Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962) [hereinafter cited as Yale Comment]. Both Comments were cited by the Court in *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. 2777, 2804 n.33 (1977).

²⁴ See California Comment, *supra* note 23, at 238-42; Yale Comment, *supra* note 23, at 355-56.

²⁵ 97 S. Ct. 2777 (1977). See notes 231-34 and accompanying text *infra*.

²⁶ 97 S. Ct. at 2841 (dissenting opinion) (quoting *id.* at 2813 (concurring opinion, Stevens, J.)). Cf. Yale Comment, *supra* note 23, at 362 n.180 (legislative committee's publication of "empirical findings about specific persons or groups" might constitute bill of attainder, if publication inflicts "deprivations" upon parties concerned).

²⁷ N.Y. Times, Sept. 17, 1974, at 22, col. 2.

²⁸ In *Jones v. SEC*, 298 U.S. 1 (1936), Justice Cardozo stated that in attacking an SEC subpoena, the petitioner had likened the agency "with denunciatory fervor to the Star Chamber of the Stuarts. Historians may find hyperbole in the sanguinary simile." *Id.* at 33 (dissenting opinion).

pronouncements, labored mightily in his majority opinion to demonstrate that the act inflicted no "punishment" within the meaning of the precedents.²⁹

Burger could have avouched the paladin of civil liberties, Justice Black. In *Barenblatt v. United States*,³⁰ where the Court upheld the contempt conviction of a college teacher who had refused to acknowledge or deny his membership in the Communist Party before a House committee investigating Communist infiltration in the field of education, Justice Black argued in his dissenting opinion:

[E]ven assuming that the Federal Government can compel witnesses to testify as to Communist affiliations in order to subject them to ridicule and social and economic retaliation, I cannot agree that this is a legislative function. Such publicity is clearly punishment

. . . For the Constitution proscribes *all* bills of attainder by State or Nation³¹

Adjudication makes odd bedfellows.

Thirteen years before *Barenblatt*, Justice Black held for the majority in *Lovett* that a congressional provision barring payment of three named government employees out of appropriated funds fell "precisely within" the prohibition of bills of attainder.³² Ruefully contemplating this statement, Zechariah Chafee noted that "'precisely' is not quite the right word,"³³ but concluded hopefully: "History should be a teacher to enlighten us, not a jailer to shut us up The bill of attainder clause is not imprisoned by the past" ³⁴ This was an eloquent plea for judicial license to revise the Constitution; but I prefer Justice Miller's view, which is more consonant with the Framers' design: the task of the judge is to determine "what the law is," not "what, in [his] private judgment, it

²⁹ See 97 S. Ct. at 2803-11.

³⁰ 360 U.S. 109 (1959).

³¹ *Id.* at 159-60 (emphasis in original). During the Revolutionary War, Maryland, New Jersey, and Pennsylvania barred Loyalists from serving as teachers. C. VAN TYNE, *THE LOYALISTS IN THE AMERICAN REVOLUTION* 196-97 (1902). New Jersey emphasized that Loyalist instructors "may be greatly instrumental in tincturing the youthful mind with . . . a slavish submission to lawless rule." *Id.* at 197. The fawning subservience of the American Communist Party to Moscow, even to the detriment of the United States (see text accompanying note 302 *infra*), would seem to allow a similar inference.

³² 328 U.S. at 315.

³³ Z. CHAFEE, *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787*, at 152 (1956).

³⁴ *Id.* at 154.

ought to be."³⁵ For it was not given to judges to amend the Constitution; article V reserves that privilege to the people.³⁶

I

THE FRAMERS' USE OF COMMON-LAW TERMS

A. *Common-Law Terms Were Carefully Chosen*

"Bills of attainder" were words that, as Justice Frankfurter noted in his concurring opinion in *Lovett*, "were defined by history. Their meaning was so settled by history that definition was superfluous."³⁷ Frankfurter's view came under attack as a "literalist" approach;³⁸ and in *United States v. Brown*,³⁹ Chief Justice Warren rejected the "narrow historical reading (which would exclude bills of pains and penalties),"⁴⁰ adopting what has been called Marshall's "functional" approach,⁴¹ as if the choice were merely a matter of taste.⁴² "Functional" and "literal" are loaded terms, employed to invidiously contrast a modern, pragmatic approach with a hide-bound textualism that would insist on a "literal" reading of Genesis, when the issue really is whether the Court may displace the Framers' choices with its own preferences.⁴³ For the Framers employed words with full awareness of their significance and in order to accomplish definite objectives.⁴⁴ The Court was not given

³⁵ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 399 (1867) (dissenting opinion). Justice Holmes wrote: "I do not expect or think it desirable that the judges should undertake to renovate the law. That is not their province." O.W. HOLMES, COLLECTED LEGAL PAPERS 239 (1921).

³⁶ U.S. CONST. art. V. See R. BERGER, *supra* note 2, at 314-18, 353-54.

³⁷ 328 U.S. at 321. Frankfurter also noticed that "[t]he punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties" (*id.* at 323-24), and that "[i]t was this very special, narrowly restricted intervention by the legislature . . . that the Constitution prohibited" (*id.* at 322). Nevertheless, he could not bring himself to repudiate *Cummings*, but elected instead to dwell on the "punishment" test (*see id.* at 324)—overlooking, as he himself had recognized, that a man had to be "attainted of some crime" (*id.* at 322 (quoting T. FARRAR, MANUAL OF THE CONSTITUTION § 473, at 419 (Boston 1867))).

³⁸ Yale Comment, *supra* note 23, at 336.

³⁹ 381 U.S. 437 (1965).

⁴⁰ *Id.* at 447.

⁴¹ Yale Comment, *supra* note 23, at 333.

⁴² "The Court . . . often has looked beyond *mere* historical experience and has applied a functional test . . ." *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. at 2807 (emphasis added).

⁴³ See R. BERGER, *supra* note 2, at 318.

⁴⁴ As Chief Justice Marshall stated: "Men use a language calculated to express the idea they mean to convey." *Oneale v. Thornton*, 10 U.S. (6 Cranch) 53, 68 (1810).

a blank check to modernize the Constitution, still less to substitute its own views of policy for those of the Congress and state legislatures.

It has long been a canon of construction that when the Framers employed common-law terms, the common-law "definitions," as Justice Story stated, "are necessarily included, as much as if they stood in the text" of the Constitution.⁴⁵ This was an established rule of construction, as appears in Bacon's *Abridgment*: "If a Statute make use of a Word the Meaning of which is well known at the Common Law, the Word shall be understood in the same Sense it was understood at the Common Law."⁴⁶ Early expression of this canon was given by Justice Iredell, one of the first and most perceptive proponents of judicial review, and a leader in the North Carolina Ratification Convention:

This term of levying war is an English expression, borrowed from the statute of Edward III . . . Now, I must confess, as these able and learned framers of our constitution borrowed the [treason] act, in terms, from the British statute alone, an authority with which they were familiar, that they certainly at least meant that the English authorities and definition of those terms should be much respected.⁴⁷

The Supreme Court itself has articulated the reason behind this rule:

The statesmen and lawyers of the Convention . . . were born and brought up in the atmosphere of the common law, and thought and spoke in its vocabulary. . . . [W]hen they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of the common law, confident that they could be shortly and easily understood.⁴⁸

In the Convention itself, John Dickinson referred to Blackstone for the definition of *ex post facto* laws.⁴⁹ Madison noted in the Virginia Ratification Convention: "*Felony* is a word . . . to be found in the

⁴⁵ *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160 (1820).

⁴⁶ 4 M. BACON, A NEW ABRIDGMENT OF THE LAW *647 ("Statute," (1)(4)).

⁴⁷ *Fries' Case*, 9 F. Cas. 826, 911-12 (C.C.D. Pa. 1799) (No. 5,126) (charge to jury). "[A] sound and safe rule for the construction of statutes . . . is, if a statute make use of a word, the meaning of which is well known at common law, the word shall be understood in the statute, in the same sense it was understood at common law." *Mayo v. Wilson*, 1 N.H. 53, 55 (1817).

⁴⁸ *Ex parte Grossman*, 267 U.S. 87, 109 (1925).

⁴⁹ 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (1911), quoted in text accompanying note 73 *infra*.

British laws, and from thence adopted in the laws of these states."⁵⁰ Delegates to that convention pressed for assurances that "trial by jury" would carry with it the right of challenge, one of the most valuable attributes of jury trial at common law, and were assured that the use of the term was accompanied by all its common-law attributes.⁵¹ In short, common-law terms provided a familiar, almost indispensable shorthand if a constitution was not to be as prolix as a code.⁵²

So completely did the Framers assume that the terms they employed would be given their common-law meaning that they felt constrained to define treason narrowly in order to restrict its excessive common-law scope.⁵³ Even so, Chief Justice Marshall, like Justice Iredell, considering the meaning of "levying war," held that treason "is a technical term. . . . It is scarcely conceivable that the term was not employed by the framers of our constitution in the sense which had been affixed to it by those from whom we borrowed it."⁵⁴ Indeed, Marshall⁵⁵ and other early

⁵⁰ 3 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 531 (2d ed. Washington, D.C. 1836).

⁵¹ See *id.* at 546 (Pendleton); *id.* at 557-59 (Marshall); *id.* at 467-68 (Randolph). "The right of challenge," Justice Bushrod Washington declared, "was a privilege highly esteemed, and anxiously guarded, at the common law . . . [T]he common law rule must be pursued." United States v. Johns, 26 F. Cas. 616, 617 (C.C.D. Pa. 1806) (No. 15,481).

⁵² Cf. *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.) ("To have proscribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the [Constitution], and give it the properties of a legal code.").

⁵³ See U.S. CONST. art. III, § 3, cl. 1. A striking assumption that the common law would be applicable is disclosed by several state statutes that expressly provided for capital punishment "without benefit of clergy." See, e.g., Georgia, Act of May 4, 1782, § 1, Digest of the Laws of Georgia 82 (Marbury & Crawford 1802); Maryland, Session of Feb. 5-Apr. 20, 1777, ch. 20, § 2, 1 Laws of Maryland (Kilty 1799) (unpaginated), 1 Laws of Maryland 338 (Maxcy 1811); Massachusetts, Act of Feb. 1, 1777, § 2, Perpetual Laws of Massachusetts 357 (Thomas 1788), Perpetual Laws of Massachusetts 179 (Adams & Nourse 1789), reprinted in 5 Acts and Resolves of the Massachusetts Bay 615 (1886); New Hampshire, Act of Jan. 17, 1777, Perpetual Laws of New Hampshire 226 (Melcher 1789), reprinted in 4 Laws of New Hampshire 71 (1916); New York, Act of Oct. 22, 1779, 3d Sess., ch. 25, § 2, 1 Laws of New York 39 (Jones & Varick 1789), 1 Laws of New York 26 (Greenleaf 1792); North Carolina, Session of Apr. 8, 1777, ch. 3, § 2, Laws of North Carolina 284 (Iredell 1800), superseded by Session of Nov. 15, 1777, ch. 6, § 2, Laws of North Carolina 321 (Iredell 1800); Virginia, Session of Oct. 7, 1776, ch. 3, § 1, 9 Laws of Virginia 168 (Hening 1821). A similar statute was enacted by the First Congress. See Act of Apr. 30, 1790, ch. 9, § 31, 1 Stat. 112. "Benefit of clergy" was an exemption from capital punishment first afforded by the common law to the clergy and then to those laymen who could read. See 4 W. BLACKSTONE, *supra* note 4, at *365-74.

⁵⁴ United States v. Burr, 25 F. Cas. 55, 159 (C.C.D. Va. 1807) (No. 14,693).

⁵⁵ See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 168-69 (1803) (mandamus); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93-94 (1807) (habeas corpus); *Bank of the U.S. v.*

judges⁵⁶ repeatedly turned to the common law for the meaning of constitutional terms borrowed from it.

Highly conscious that they were forging "limits" on the powers delegated,⁵⁷ the Framers were fastidiously careful in choosing words to express those limits. James Wilson adverted in the Pennsylvania Ratification Convention to "the care that the Convention took in selecting their language."⁵⁸ Later, Chief Justice Taney observed: "Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood."⁵⁹ Two examples must suffice. The impeachment clause came to the floor of the Convention referring only to "Treason & bribery." George Mason said: "Treason as defined in the Constitution will not reach many great and dangerous offences. . . . Attempts to subvert the Constitution may not be Treason as above defined—As bills of attainder which have saved the British Constitution are forbidden, it is the more necessary to extend: the power of impeachments."⁶⁰ Mason therefore moved to add "or maladministration," but Madison objected that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate."⁶¹ Thereupon Mason proposed "other high crimes & misdemeanors,"⁶² the traditional impeachment catch-all which had a familiar "technical, limited" meaning.⁶³ For another example, consider Madison's question "whether it was not going too far to extend the jurisdiction of the Court generally to cases arising Under the Constitution, & whether it ought not to be limited to cases of

Deveaux, 9 U.S. (5 Cranch) 61, 88-90 (1809) (corporation); *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 184 (1809) (inferior courts); *M'Knight v. Craig's Adm'r*, 10 U.S. (6 Cranch) 183, 187 (1810) (scire facias); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 409-10 (1821) (writ of error).

⁵⁶ See, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 241 (1796) (Chase, J.) (bona fide); *Miller v. The Resolution*, 2 U.S. (2 Dall.) 1, 5 (Fed. Ct. App. 1781) (prize); *United States v. Johns*, 26 F. Cas. 616, 617 (C.C.D. Pa. 1806) (No. 15,481) (Bushrod Washington, J.) (right of challenge).

⁵⁷ See R. BERGER, *CONGRESS v. THE SUPREME COURT* 8-16 (1969).

⁵⁸ 2 J. ELLIOT, *supra* note 50, at 452. Justice Iredell stated that the Framers sought "to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798). Iredell led the struggle for adoption of the Constitution in the North Carolina Convention.

⁵⁹ *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 571 (1840). In 1826, Martin Van Buren declared in the Senate: "We know with what jealousy—with what watchfulness—with what scrupulous care its minutest provisions were examined, discussed, resisted, and supported, by those who opposed, and those who advocated its ratification." 2 CONG. DEB. 418 (1826).

⁶⁰ 2 M. FARRAND, *supra* note 49, at 550.

⁶¹ *Id.*

⁶² *Id.* See U.S. CONST. art. II, § 4.

⁶³ See R. BERGER, *IMPEACHMENT* 86-87, 106-07 (1973).

a Judiciary Nature."⁶⁴ His suggestion was rejected, "it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature,"⁶⁵ that is, to "cases and controversies."

Thus, the Framers exhibited a sure grasp of words that exactly expressed their aims and they rejected unnecessary verbiage.⁶⁶ That such men would employ "bills of attainder" to comprehend the quite different "bills of pains and penalties," both of which the colonists themselves had used as suited the occasion,⁶⁷ strains credulity, particularly when the fusion would invade state functions to an unknown extent.⁶⁸ To the contrary, express mention of attainders and omission of "pains and penalties" rule out the latter under the *expressio unius* rule, a rule to which the Framers and Ratifiers repeatedly referred.⁶⁹ The face of the Constitution itself reveals that the Framers attached to "attainder" its traditional meaning,

⁶⁴ 2 M. FARRAND, *supra* note 49, at 430.

⁶⁵ *Id.* Similarly, when the clause "and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State" (U.S. CONST. art. IV, § 3, cl. 2) was under discussion, Luther Martin's motion to add "But all such claims may be examined into & decided by the supreme Court of the U[nited] States" was met with Gouverneur Morris's reply that "this is unnecessary, as all suits to which the U[nited] S[tates] are parties—are already to be decided by the Supreme Court." 2 M. FARRAND, *supra* note 49, at 466. Although Martin urged that "it is proper in order to remove all doubts on this point," his amendatory motion failed. *Id.*

⁶⁶ See generally R. BERGER, *supra* note 63, at 74, 86.

⁶⁷ See text accompanying notes 151-61 *infra*.

⁶⁸ In the North Carolina Convention, James Iredell expressed his approval of "that jealousy and extreme caution with which gentlemen consider every power proposed to be given to this government." 4 J. ELLIOT, *supra* note 50, at 95.

⁶⁹ George Nicholas put it graphically in the Virginia Ratification Convention: "If I have one thousand acres of land, and I grant five hundred acres of it, must I declare that I retain the other five hundred? . . . After granting some powers, the rest must remain with the people." 3 *id.* at 444. In the Pennsylvania Convention, James Wilson declared that where "powers are particularly enumerated . . . the implied result is, that nothing more is intended to be given than what is so enumerated." 2 *id.* at 454. He stated further that "the powers are as minutely enumerated and defined as was possible." *Id.* at 481. There too, Thomas McKean, chief justice of the Pennsylvania Supreme Court, stated: "[T]he powers of Congress, being derived from the people in the mode pointed out by this Constitution, and being therein enumerated and *positively* granted, can be no other than what this positive grant conveys." *Id.* at 540 (emphasis in original).

For example, John Dickinson stated in the Federal Convention that "the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite." 2 M. FARRAND, *supra* note 49, at 448-49. George Mason, however, later moved to strike the *ex post facto* clause, because he considered it "not sufficiently clear that the prohibition meant by this phrase was limited to cases of a criminal nature—and no Legislature ever did or can altogether avoid them in Civil cases." *Id.* at 617. When Elbridge Gerry seconded the motion in an attempt to *extend* the prohibition to "Civil cases," the motion was unanimously defeated. *Id.*

and therefore took measures to temper it: "The Congress shall have Power to declare the Punishment of Treason, but no [judicial] Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."⁷⁰ Then, too, the Constitution coupled bills of attainder with *ex post facto* laws, thereby confirming that attainders were criminal⁷¹ and excluding judicial interference with retroactive civil penalties, as the following discussion will show.

B. *Both Ex Post Facto Laws and Bills of Attainder Were Limited to Crimes*

The Constitution's pairing of the attainder and *ex post facto* clauses is illuminating. The early Maryland, Massachusetts, and North Carolina constitutions had linked *ex post facto* with criminal laws.⁷² In the Convention, John Dickinson stated "that on examining Blackstone's Commentaries, he found that the terms 'ex post facto' related to criminal cases only; that they would not consequently restrain the States from retrospective laws in civil cases, and that some further provision for this purpose would be requisite."⁷³ Mark that the common law furnished the index of meaning, and that a departure from that meaning required an express provision, exactly as the Framers illustrated in explicitly restricting the scope of treason.⁷⁴ George Mason remarked that "no Legislature ever did or can altogether avoid [ex post facto laws] in Civil cases."⁷⁵ When Elbridge Gerry sought "to extend the prohibition to 'Civil cases,'" he was voted down by all the states.⁷⁶ Edmund Ran-

⁷⁰ U.S. CONST. art. III, § 3, cl. 2.

⁷¹ See note 77 and accompanying text *infra*.

⁷² Maryland: "[R]etropective laws, punishing facts committed before the existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no *ex post facto* law ought to be made." MD. CONST. of 1776, Declaration of Rights, art. XV, reprinted in 1 B. POORE, FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 818 (2d ed. 1878).

Massachusetts: "Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government." MASS. CONST. of 1780, pt. 2 (Declaration of Rights), art. XXIV, reprinted in 1 B. POORE, *supra* at 959.

The North Carolina provision was identical to Maryland's. See N.C. CONST. of 1776, Declaration of Rights, art. XXIV, reprinted in 2 B. POORE, *supra* at 1410.

For discussion of these provisions, see *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 391-92 (1798) (Chase, J.); *id.* at 396-97 (Paterson, J.).

⁷³ 2 M. FARRAND, *supra* note 49, at 448-49.

⁷⁴ See note 53 and accompanying text *supra*.

⁷⁵ 2 M. FARRAND, *supra* note 49, at 617.

⁷⁶ *Id.*

dolph, who had been a delegate to the Convention, explained in the Virginia Ratification Convention: "*Ex post facto* laws, if taken technically, relate solely to criminal cases The same clause provides that no bill of attainder shall be passed. It shows that the attention of the Convention was drawn to criminal matters alone."⁷⁷

In *Calder v. Bull*,⁷⁸ the Justices were unanimous in declaring that the *ex post facto* clause applied only to criminal laws. Justice Chase wrote:

The expressions "*ex post facto* laws," are technical, they had been in use long before the Revolution, and had acquired an appropriate meaning The celebrated and judicious Sir William Blackstone, in his Commentaries, considers an *ex post facto* law precisely in the same light I have done. His opinion is confirmed by his successor, Mr. Wooddeson, and by the author of the Federalist⁷⁹

Chase also quoted the provisions of the Maryland, Massachusetts, and North Carolina constitutions restricting the ban on *ex post facto* laws to criminal statutes.⁸⁰ He went on to make the significant observation: "If the prohibition to make no *ex post facto* law extends to all laws made after the fact," the prohibition "not to pass any law impairing the obligation of contracts, [was] improper and unnecessary."⁸¹ Thus, the impairment restriction applicable to the states, absent from the corresponding federal clause, was an *exception* to the rule that retroactivity was impermissible for criminal laws alone. Chase was echoed by Justice Paterson, who had been a prominent member of the Convention,⁸² and by Justice Iredell,

⁷⁷ 3 J. ELLIOT, *supra* note 50, at 477. Randolph repeated his view that "[t]he prohibition of bills of attainder [was] a sufficient proof that *ex post facto* laws related to criminal cases only, and that such was the idea of the Convention." *Id.* at 481. *See also* note 208 *infra*.

⁷⁸ 3 U.S. (3 Dall.) 386 (1798).

⁷⁹ *Id.* at 391.

⁸⁰ *Id.* at 391-92.

⁸¹ *Id.* at 393. Justice Washington later held that "retrospective laws, which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of [the Constitution]." *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829).

⁸² Paterson stated:

I had an ardent desire to have extended the provision in the constitution to retrospective laws in general. There is neither policy nor safety in such laws; and, therefore, I have always had a strong aversion against them. . . . But on full consideration, I am convinced, that *ex post facto* laws must be limited in the manner

who emphasized that "the true construction of the prohibition extends to criminal not to civil cases."⁸³ That the coupling of the attainder and ex post facto clauses sheds light on their respective meanings was also the view of Chief Justice Marshall,⁸⁴ but he was led to quite different conclusions.

C. *Fletcher v. Peck*

Marshall's dictum in *Fletcher v. Peck*⁸⁵ is the rock on which the Supreme Court has built its attainder doctrine,⁸⁶ but it is a mere stage property. *Fletcher* arose out of the Yazoo land scandal: the Georgia legislature had made a grant of 35 million acres to certain land companies; a successor legislature determined that the grant had been procured by fraud and bribery, and revoked the grant in 1796. The two central issues were whether this constituted an impairment of contract and whether Fletcher was a bona fide purchaser. Before passing to the attainder issue, it is worth noting that *Fletcher* was a queer case from which to derive a sweeping change in constitutional meaning. The Georgia legislation, Charles Warren wrote,

had been the subject of bitter controversy and violent attack for over fifteen years in the State of Georgia and in the Congress [F]rom 1803 to 1809, the efforts of the Yazoo claimants . . . to secure compensation for the lands purchased by them were opposed with vituperative violence and with success by John Randolph of Virginia. Finally [in May 1803], . . . a suit was arranged between a vendee and vendor of a parcel of these lands⁸⁷

Prior to the suit, in February 1803, the Yazoo Commissioners issued a report flatly stating that "the title of the claimants cannot be supported."⁸⁸ Notice of the legislative cloud on title was revealed by

already expressed; they must be taken in their technical, which is also their common and general acceptance, and are not to be understood in their literal sense.

3 U.S. (3 Dall.) at 397.

⁸³ *Id.* at 399. See generally J. POMEROY, *supra* note 3, §§ 513, 514.

⁸⁴ See notes 85-112 and accompanying text *infra*.

⁸⁵ 10 U.S. (6 Cranch) 87 (1810).

⁸⁶ See, e.g., *United States v. Brown*, 381 U.S. 437, 447 (1965); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322-23 (1867).

⁸⁷ 1 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 392-93 (1922) (footnote omitted).

⁸⁸ 28 AMERICAN STATE PAPERS (Public Lands, vol. 1) 134 (W. Lowrie & M. Clarke ed. 1832) (Report No. 74, Feb. 14, 1803), quoted in G. DUNNE, *JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT* 72 (1970).

the deed itself, dated May 14, 1803; it recited the earlier grant by the Georgia legislature and covenanted that title had been "in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature."⁸⁹ Notice is confirmed by the institution of suit on the heels of the transfer, "when the buyer turned around and attempted to set the transaction aside" on the ground that the Georgia repealer left Peck with "nothing to sell."⁹⁰ Justly does Gerald Dunne state that "the alleged infirmity . . . had been well known to the buyer before he bought."⁹¹

Randolph's blazing excoriation can hardly have escaped Marshall's notice, and he recorded his "reluctance . . . to decide the case at all, as it appeared manifestly made up"⁹²—*i.e.*, to obtain the relief that Congress steadily had denied. Under the circumstances, Marshall's holding is astonishing: "[T]he estate having passed into the hands of a purchaser . . . without notice, the state of Georgia was restrained . . . from passing a law whereby the estate of the plaintiff . . . could be constitutionally and legally impaired . . ."⁹³ But the "law" was passed in 1796, long before, not after, the estate "passed into the hands of" Fletcher, at which time he had notice of the revocation.⁹⁴ In passing, Marshall said:

This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?⁹⁵

It was, he held, not "allowable" by virtue of the impairment of contracts clause;⁹⁶ but that clause was not of a piece with the *criminal*

⁸⁹ 10 U.S. (6 Cranch) at 88.

⁹⁰ G. DUNNE, *supra* note 88, at 71.

⁹¹ *Id.*

⁹² 1 J.Q. ADAMS, MEMOIRS 546 (C. Adams ed. 1874), *quoted in* 1 C. WARREN, *supra* note 87, at 395. Justice Johnson baldly stamped the suit "a mere feigned case," and joined in the decision only because he was confident that "the respectable gentlemen who have been engaged for the parties . . . would never consent to impose a mere feigned case upon this court." 10 U.S. (6 Cranch) at 147-48 (concurring opinion).

⁹³ 10 U.S. (6 Cranch) at 139.

⁹⁴ Lord Mansfield held: "Whoever wants to be secure, when he takes a lease, should enquire after and examine the title deeds. . . . If one must suffer, it is he who has not used due diligence in looking into the title." *Keech v. Hall*, 1 Dougl. 21, 22, 99 Eng. Rep. 17, 18 (1778).

⁹⁵ 10 U.S. (6 Cranch) at 138-39.

⁹⁶ *Id.* at 136-38.

bill of attainder and ex post facto clauses. Instead, it was an exception to the Framers' refusal to prohibit retroactivity of all *civil* laws. Violation of that ban did not convert the 1796 statute into a criminal law. The Georgia legislature simply made a finding that there was fraud in the procurement of the grant, as a court would do if asked to set the contract aside; it attached no imprisonment or pecuniary penalties, the earmarks of criminal sanctions. The law "forfeited" the estate only if the buyer obtained better title than that of his seller, and that turned on the questionable finding that he had purchased without notice. These considerations vitiate the Marshall analogies to bills of attainder and ex post facto laws.

The remark on which later Courts have seized in developing their attainder doctrine was Marshall's statement: "A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."⁹⁷ Chief Justice Warren held in *United States v. Brown*:⁹⁸

This means, *of course*, that what were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause. The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.⁹⁹

No such purpose can be gathered from the history of the clause, for it was adopted without debate¹⁰⁰—presumably because all concerned were familiar with its common-law meaning.

⁹⁷ *Id.* at 138.

⁹⁸ 381 U.S. 437 (1965).

⁹⁹ *Id.* at 447 (emphasis added). Chief Justice Burger blew up Marshall's dictum to even more imposing proportions:

At common law, the bill [of attainder] was a death sentence imposed by legislative act. Anything less than death was not a bill of attainder, but was, rather, "a bill of pains and penalties." This restrictive definition was recognized tangentially in *Marbury v. Madison* . . . , but the Court soon thereafter rejected *conclusively* any notion that only a legislative death sentence or even incarceration imposed on named individuals fell within the prohibition. Chief Justice Marshall firmly settled the matter in 1810

Nixon v. Administrator of Gen. Servs., 97 S. Ct. 2777, 2837 (1977) (dissenting opinion) (emphasis added). Apparently, the attainder clause brings out a degree of judicial certitude that is inversely proportional to the facts. For example, Justice Black announced: "The Constitution in prohibiting bills of attainder *undoubtedly* included bills of pains and penalties . . ." *United States v. Lovett*, 328 U.S. 303, 317 n.6 (1946) (emphasis added).

¹⁰⁰ Chief Justice Warren himself acknowledged this in *Brown*. 381 U.S. at 441.

Although Marshall was "[n]ot erudite in the law"¹⁰¹ and was little given to historical research,¹⁰² he well knew that attainders were associated with death. In *Marbury v. Madison*,¹⁰³ he had stated: "The constitution declares 'that no bill of attainder or *ex post facto* law shall be passed.' If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavors to preserve?"¹⁰⁴ Chief Justice Burger dismisses this remark as "tangential" in his *Nixon II* dissent,¹⁰⁵ but it is little more tangential than the *Fletcher* dictum; moreover, it is reinforced by Marshall's subsequent dictum in *Ogden v. Saunders*:¹⁰⁶ "A bill of attainder can be *only for crimes* already committed"¹⁰⁷ The *Marbury-Ogden* remarks greatly weaken the inferences drawn from *Fletcher*. Moreover, Marshall himself was accustomed to turn to the common law for the meaning of common-law terms.¹⁰⁸ The Court had already noticed in *Calder v. Bull*¹⁰⁹ that Parliament passed "bills of attainder, or bills of pains and penalties; the first inflicting capital, and the other less punishment."¹¹⁰ Marshall nowhere explained why, or cited constitutional history to show that, the historical distinction had been abandoned.¹¹¹ According to Marshall himself, "an opinion which is . . . to establish a principle never before recognized, should be

¹⁰¹ Commager, *Chief Justice John Marshall*, T.V. GUIDE, Sept. 24-30, 1977, at 9.

¹⁰² G. WHITE, THE AMERICAN JUDICIAL TRADITION 5 (1976).

¹⁰³ 5 U.S. (1 Cranch) 137 (1803).

¹⁰⁴ *Id.* at 179.

¹⁰⁵ 97 S. Ct. at 2837, *quoted in* note 99 *supra*.

¹⁰⁶ 25 U.S. (12 Wheat.) 213 (1827).

¹⁰⁷ *Id.* at 335 (dissenting opinion) (emphasis added). Justice Thompson declared that bills of attainder and *ex post facto* laws "are confessedly restricted to retrospective laws, concerning crimes and penalties affecting the personal security of individuals." *Id.* at 303. Yet Justice Johnson stated: "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 arbitrary and tyrannical legislation over existing rights, whether of person or property." *Id.* at 286, *quoted in* *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. at 2837-38 (dissenting opinion, Burger, C.J.), and *Yale Comment, supra* note 23, at 333 n.24 (described as expressing "functional" approach). *But see* notes 78-83 and accompanying text *supra*.

¹⁰⁸ *See* cases cited in note 55 *supra*.

¹⁰⁹ 3 U.S. (3 Dall.) 386 (1798).

¹¹⁰ *Id.* at 389.

¹¹¹ After noting that Marshall's *Fletcher* dictum "is of course a statement that what were known at common law as bills of pains and penalties come within the constitutional prohibition of bills of attainder," the *Yale Comment* states: "The language of the Constitution does not compel such a conclusion; yet Marshall put it forth without argument." *Yale Comment, supra* note 23, at 333 (footnote omitted).

expressed in plain and explicit terms."¹¹² The *Fletcher* dictum thus appears to be little more than a historical oddity. Unsupported by either historical or analytical authority, it provided no sound basis for subsequent departures from the common-law meaning of attainder.

D. *The Impact of Federalism*

Attempts to build upon Marshall's dictum raise the most serious questions when directed toward the *state* attainder clause. In this context, the Founders' grudging grants of power to the federal newcomer, and their anxiety to reserve to the states all powers not granted (later made explicit in the tenth amendment),¹¹³ demand an even more exacting test of the view attributed to Marshall. "[W]ithin the State itself," Gouverneur Morris stated in the Convention, "a majority must rule, whatever may be the mischief done among themselves."¹¹⁴ Justice Johnson later declared that "[i]t may be called the ruling principle of the constitution, to interfere as little as possible between the citizen and his own state government; and hence, with a few safeguards . . . the States are left as they were, as to their own citizens, and as to all internal concerns."¹¹⁵ This faithfully reflects what leading Framers told the Ratifiers. Madison stated in *Federalist* No. 14:

[The federal government's] jurisdiction is limited to certain *enumerated* objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any. The subordinate governments, which can extend their care to all those other objects which can be separately provided for, will retain their due authority and activity.¹¹⁶

¹¹² *United States v. Burr*, 25 F. Cas. 55, 165 (C.C.D. Va. 1807) (No. 14,693). See also *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); notes 44 & 69 *supra*.

¹¹³ For a discussion of the overarching attachment to state sovereignty and the pervasive fear that it would be invaded, see R. BERGER, *supra* note 57, at 129-30, 132, 259-64. When it was proposed in the Virginia Convention that the resolution of ratification declare "that the powers granted by the proposed Constitution are the gift of the people . . . and every power not granted thereby remains with the people, and at their will," Madison stated: "This is obviously and self-evidently the case, without the declaration. . . . The delegation alone warrants the exercise of any power." 3 J. ELLIOT, *supra* note 50, at 620. Even more, the curtailment of state powers went no further than the Constitution's explicit provision: the prohibition of bills of attainder did not ban bills of pains and penalties.

¹¹⁴ 2 M. FARRAND, *supra* note 49, at 439.

¹¹⁵ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 280-81 (1827).

¹¹⁶ THE FEDERALIST NO. 14, at 82 (Mod. Lib. ed. 1937) (emphasis added).

His statement in No. 45 that the federal powers "are few and defined," and "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce,"¹¹⁷ doubtless reflected the popular impression of the proposed federal government. Little did the people consider that the Convention was bent on restructuring the states' control of domestic matters. That was disclaimed by Hamilton in the New York Convention: the "laws of the Union" would not "new-model the internal police of any state."¹¹⁸ Such assurances testify to a pervasive anxiety that the federal government might intrude into local concerns, and they are incompatible with an interpretation that would broaden "bills of attainder" beyond its established meaning to facilitate such intrusion.

Judicial respect for those fears is mirrored in early opinions. In *Ware v. Hylton*,¹¹⁹ Justice Wilson, whose vigorous participation in the Federal and Pennsylvania conventions gave him first-hand knowledge of the original design, stated that "in relation to the present constitution, [Virginia] still retains her sovereignty and independence as a State, except in the instances of express delegation to the federal government."¹²⁰ Justice Chase made a similar declaration in *Calder v. Bull*.¹²¹ The well-documented colonial attachment to local sovereignty, and the fear of centralized power, strongly indicate that the states would hardly have adopted the bill of attainder provision had they been told that it would curtail state powers across a broad internal spectrum remote from death penalties.

II

THE HISTORY OF ATTAINDER

A. Criticism of a "Narrow Historical Definition"

A student commentator writing in the *Yale Law Journal*, discontented with the Court's backsliding after *Lovett* into a "literalist,"

¹¹⁷ *Id.* No. 45, at 303.

¹¹⁸ 2 J. ELLIOT, *supra* note 50, at 267-68.

¹¹⁹ 3 U.S. (3 Dall.) 199 (1796).

¹²⁰ *Id.* at 281.

¹²¹ "It appears to me a self-evident proposition, that the several state legislatures retain all the powers of legislation delegated to them by the state constitutions, which are not expressly taken away by the constitution of the United States." 3 U.S. (3 Dall.) at 387. Chase stated further: "All the powers delegated by the people . . . to the federal government are defined, and no *constructive* powers can be exercised by it . . ." *Id.* (emphasis added). Thus, although the Court has the power to set aside state bills of attainder, it may not lay claim to a power to annul bills of pains and penalties.

historical approach,¹²² vigorously attacked Justice Frankfurter's position that the term "bill of attainder" was "defined by history."¹²³ This commentator argued that "the formulation of *any* narrow historical definition is impossible,"¹²⁴ that "the term lacks a narrowly restricted historical referent,"¹²⁵ and that "the variety of historical bills of attainder rendered the concept vague."¹²⁶ For proof he instanced:

Some pre-Constitution bills of attainder specifically named the parties attainted; others merely described the class of persons upon whom the penalties were to be levied. Most recited the acts of which the attainted parties were guilty; a few did not. The statutes prescribed a wide variety of sanctions, ranging from death and corruption of blood to such penalties as exile, deprivation of the right to vote, and the exclusion of the sons of the attainted parties from Parliament. . . . [S]ome 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.¹²⁷

This bill of particulars falls far short of making out the writer's case.

B. *The Bill of Attainder in England*

What set a bill of attainder apart was the death penalty and corruption of blood,¹²⁸ as the very etymology of attainder shows. Blackstone stated:

When sentence of death . . . is pronounced, the immediate inseparable consequence by the common law is *attainder*. . . . [T]he criminal is no longer fit to live . . . , but is to be exterminated as a monster He is then called *attaint*, *attinctus*, stained or blackened. . . .

The consequences of attainder are forfeiture and corruption of blood.¹²⁹

Without death and corruption of blood, it may be stated categorically, there was no attainder; these characteristics defined the

¹²² See Yale Comment, *supra* note 23, at 336.

¹²³ *Id.* at 341. See note 37 and accompanying text *supra*.

¹²⁴ Yale Comment, *supra* note 23, at 366 (emphasis in original).

¹²⁵ *Id.* at 342.

¹²⁶ *Id.*

¹²⁷ *Id.* at 341-42 (footnotes omitted).

¹²⁸ See notes 4-14 and accompanying text *supra*.

¹²⁹ 4 W. BLACKSTONE, *supra* note 4, at *380-81. See E. COKE, *supra* note 5, at *391b.

genus within which there were various species, just as the genus "bird" ranges from the eagle to the sparrow.

Consider chapter 6 of 21 Rich. 2 (1397-98), mistakenly included by the Yale Comment among bills of attainder.¹³⁰ Although chapter 3 adjudged certain persons guilty of high treason for seeking to compass the death of the king, and these persons were attainted,¹³¹ chapter 6 simply provided that the male issue of the persons *before attainted* shall be excluded from Parliament.¹³² Not a word suggests that the male issue were also attainted, in which case they would have been "exterminated," making exclusion from Parliament unnecessary. Thus, the statute on its face distinguishes between those who were attainted and those who were merely excluded from Parliament and not attainted. So too, the Yale Comment cites 11 Geo. 3, c. 55 (1770-71), "An Act to incapacitate John Burnett [and others] from voting at elections of members to serve in parliament"¹³³ Again no allusion to attainder or death. From the pages of the Yale Comment I have collected a group of English bills of attainder that were *labeled as such*, that is, as acts to attain, almost always for high treason.¹³⁴

Consider next the conditional attainder of those who had fled in the face of charges of treason or felony. "*Flight, in criminal*

¹³⁰ "Issue Male of Persons attainted, excluded from Parliament," 21 Rich. 2, c. 6 (1397-98), *cited in* Yale Comment, *supra* note 23, at 342 n.91.

¹³¹ 21 Rich. 2, c. 3 (1397-98).

¹³² *Id.* c. 6.

¹³³ See Yale Comment, *supra* note 23, at 342 n.90. *Cf.* N.Y. CONST. of 1777, art. XIII (provision for disenfranchisement), *reprinted in* 2 B. POORE, *supra* note 72, at 1335, *quoted in* text accompanying note 150 *infra*.

¹³⁴ Yale Comment, *supra* note 23, at 330 n.1: "An Acte conc[er]nyng the Attaynder of Thomas Fitzgerald Erle of Gildare," 26 Hen. 8, c. 25 (1534); "An Act to attain such of the Persons concerned in the late horrid Conspiracy to assassinate His Majesties Royal Person who are fled from Justice unlesse they render themselves to Justice and for continuing several others of the said Conspirators in Custody," 8 & 9 Will. 3, c. 5 (1696-97). Yale Comment, *supra* note 23, at 330 n.2: "An Acte for the Attaindors of divers Offenders in the late moste barbarous monstrous detestable and damnable Treasons," 3 Jac. 1, c. 2 (1605-06); "An Act for the Attainder of severall persons guilty of the horrid Murder of his late Sacred Majestie King Charles the first," 12 Car. 2, c. 30 (1660). Yale Comment, *supra* note 23, at 337 n.55: "An Act for the Attainder of Thomas Earle of Strafford of High Treason," 16 Car. 1, c. 38 (1640). Yale Comment, *supra* note 23, at 338 n.61: [Attainder of John Cade], 29 Hen. 6, c. 1 (1450) (untitled). Yale Comment, *supra* note 23, at 342 n.93: "An Act to Attaint James Duke of Monmouth of High-Treason," 1 Jac. 2, c. 2 (1685); "An Act to attaint Sir John Fenwick Baronett of High Treason," 8 & 9 Will. 3, c. 4 (1696-97).

To these may be added "An Acte for the Confirmation of Thattaynders of Charles Earle of Westmerlande Thomas Earle of Northumberland and others," 13 Eliz., c. 16 (1571); "The Bill of Attaynder of Mestres Katherin Hawarde late Quene of England, and divers other p[er]sonnes her complices," 33 Hen. 8, c. 21 (1541-42).

cases," Lord Mansfield held, "is itself a crime";¹³⁵ one who fails to surrender, Wooddeson explained, "consummates the new treason, against which the attainder is directed."¹³⁶ An early American case described this as a "mode of attainder."¹³⁷ Often such fugitives were called upon to surrender upon pain of attainder; a number of such "acts to attain" are cited in the Yale Comment. For example, there was "An Act to attain *Alexander Earl of Kellie* [and others] of High Treason," if they did not surrender by a given date "and submit to Justice," in which case they would be (legislatively) "adjudged attainted of the said High Treason . . . and . . . suffer and forfeit as a Person attainted"¹³⁸ Another form of conditional attainder involved banishment—for example, "An Act for banishing and disabling the Earl of Clarendon,"¹³⁹ who had been impeached by the Commons of treason and fled before trial to France. Unless he returned for trial by a certain date, he was forever banished, and if he then returned, "it shall . . . be taken to be Treason" and he "shall suffer the paines and penalties of Treason."¹⁴⁰ That the attainder was to take place upon a condition subsequent rather than immediately did not render it the less a bill of attainder.¹⁴¹ In short, if an act carried a death penalty and

¹³⁵ *Rex v. Wilkes*, 4 Burr. 2527, 2549, 98 Eng. Rep. 327, 339 (1770).

¹³⁶ 2 R. WOODDESON, *supra* note 7, at 625-26.

¹³⁷ *Republica v. Doan*, 1 U.S. (1 Dall.) 86, 90 (Pa. 1784).

¹³⁸ 19 Geo. 2, c. 26 (1745-46), discussed in Yale Comment, *supra* note 23, at 340.

¹³⁹ 19 & 20 Car. 2, c. 2 (1667-68), reprinted in 6 How. St. Tr. 391 (1816), discussed in *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 324 (1867), and Yale Comment, *supra* note 23, at 340.

¹⁴⁰ 19 & 20 Car. 2, c. 2 (1667-68). For other conditional bills of attainder, see Yale Comment, *supra* note 23, at 340 nn.75 & 77.

¹⁴¹ Wooddeson considered this a bill of pains and penalties (see 2 R. WOODDESON, *supra* note 7, at 638), but I venture to differ. There were banishments that were bills of pains and penalties—for example, "An Act to inflict Pains and Penalties on *Francis Lord Bishop of Rochester*," 9 Geo. 1, c. 17 (1722-23), reprinted in 16 How. St. Tr. 644 (1816). The Bishop was deprived of his offices and condemned to perpetual exile for treasonous conspiracy; if he returned and was "thereof lawfully convicted, [he] shall be adjudged guilty of Felony, and shall suffer and forfeit as in Cases of Felony." The condemnation omits words of attainder, and indicates that the subsequent judgment would be imposed in a judicial proceeding rather than by virtue of the act itself. On the other hand, the act recites that for the same "execrable Treason *Christopher Loyer* hath been indicted, tried, convicted and attainted." See "An Act to inflict Pains and Penalties on *John Plumket*," 9 Geo. 1, c. 15 (1722-23), reprinted in 16 How. St. Tr. 468 (1816), discussed in text accompanying notes 142-44 *infra*. Whether the person attainted is sentenced to death if he fails to return from flight, or is sentenced to death if he returns from involuntary exile, death and attainder remain inseparable. Pomeroy stated: "In the conditional attainder the guilt is formally declared and the punishment affixed, which can only be removed by the performance of some act." J. POMEROY, *supra* note 3, at 328.

attainted the victim, immediately or conditionally, it was a bill of attainder and for the most part so labeled.

From the historical fact that acts imposing penalties less than death and corruption of blood were deemed "bills of pains and penalties," there is no dissent in the English authorities. The Yale Comment cites "An Act to inflict Pains and Penalties on *John Plunket*,"¹⁴² who was involved in a conspiracy for insurrection, "[f]or which execrable Treason *Christopher Layer* hath been indicted, tried, convicted and attainted."¹⁴³ But Plunket was spared that fate; he was not attainted; instead he was imprisoned and forfeited his property. As in the case of the statute of Richard II,¹⁴⁴ the draftsmen distinguished between attainder and the lesser penalty of imprisonment. Likewise, 13 Car. 2, c. 15, stat. 1 (1661) was "An Act declaring the Paines Penalties and Forfeitures" imposed upon named persons, which were decreed without reference to attainder or corruption of blood. And there were statutes that disabled certain persons from voting or holding office,¹⁴⁵ which, although not captioned bills of pains and penalties, were such in fact. It bears repetition that the dividing line was between death and corruption of blood (almost always for high treason), and bills that imposed lesser penalties and were known as bills of pains and penalties. This line is distinctly drawn in the English authorities, and it is far from "vague."

C. *The Bill of Attainder in America*

In course of time bills of attainder fell into disuse in England, and that development was reflected in some early state constitutions. Maryland provided that "no law, to attaint particular persons of treason or felony, ought to be made in any case";¹⁴⁶ and Vermont declared that "[n]o person ought, in any case . . . , to be declared guilty of treason or felony by the Legislature,"¹⁴⁷ as did

¹⁴² 9 Geo. 1, c. 15 (1722-23), reprinted in 16 How. St. Tr. 468 (1816), cited in Yale Comment, *supra* note 23, at 342 n.84.

¹⁴³ 9 Geo. 1, c. 15 (1722-23).

¹⁴⁴ See text accompanying notes 130-32 *supra*.

¹⁴⁵ See, e.g., "An Act to incapacitate John Burnett [and others] from voting at elections of members to serve in parliament . . .," 11 Geo. 3, c. 55 (1770-71), cited in Yale Comment, *supra* note 23, at 342 n.90; "Issue Male of Persons attainted, excluded from Parliament," 21 Rich. 2, c. 6 (1397-98), cited in Yale Comment, *supra* note 23, at 342 n.91, discussed in text accompanying notes 130-32 *supra*.

¹⁴⁶ MD. CONST. of 1776, Declaration of Rights, art. XVI, reprinted in 1 B. POORE, *supra* note 72, at 818.

¹⁴⁷ VT. CONST. of 1786, ch. II (Plan or Frame of Government), § 17, reprinted in 2 B. POORE, *supra* note 72, at 1872.

Massachusetts.¹⁴⁸ These provisions exhibit the colonial understanding that attainders were associated with treason and felony. New York's constitution, however, permitted attainders for the duration of the war: "[N]o acts of attainder shall be passed by the legislature of this State for crimes, other than those committed before the termination of the present war; and . . . such acts shall not work a corruption of blood."¹⁴⁹ Attainder after the war was therefore forbidden. In a separate section, the New York constitution singled out disenfranchisement—now erroneously regarded as an act of attainder—for special treatment: "[N]o member of this State shall be disfranchised . . . unless by the law of the land, or the judgment of his peers."¹⁵⁰ By implication, preclusion of bills of attainder did not bar legislative disenfranchisement, since a special provision for that purpose was deemed necessary.

Notwithstanding the bitter hostility felt by the colonists toward the Loyalists, the colonial statutes were not unduly harsh. "Practically all the American precedents," the Supreme Court has stated, "are bills of pains and penalties."¹⁵¹ Pennsylvania, however, passed "An Act for the attainder of divers traitors"; it named persons who adhered to the enemy, and declared that if they failed to submit to trial, they shall "stand and be adjudged, and by the authority of this present act be convicted and attainted of high treason . . . , and shall suffer and forfeit as a person attaint of high treason by law ought to suffer and forfeit."¹⁵² For the most part, the statutes provided for *judicial* trial for treason, punishable by death.¹⁵³ Al-

¹⁴⁸ "No subject ought, in any case . . . , to be declared guilty of treason or felony by the legislature." MASS. CONST. of 1780, pt. 1 (Declaration of Rights), art. XXV, *reprinted in* 1 B. POORE, *supra* note 72, at 959. New Hampshire barred the legislature from making "any law that shall subject any person to a capital punishment . . . without trial by jury." N.H. CONST. of 1784, pt. 1 (Bill of Rights), art. XVI, *reprinted in* 2 B. POORE, *supra* note 72, at 1282.

¹⁴⁹ N.Y. CONST. of 1777, art. XLI, *reprinted in* 2 B. POORE, *supra* note 72, at 1339.

¹⁵⁰ N.Y. CONST. of 1777, art. XIII, *reprinted in* 2 B. POORE, *supra* note 72, at 1335.

¹⁵¹ *United States v. Lovett*, 328 U.S. 303, 317 n.6 (1946).

¹⁵² Act of Mar. 6, 1778, ch. 784, § 2, 1 *Laws of Pennsylvania* 750 (Dallas 1797), *reprinted in* 9 *Statutes at Large of Pennsylvania* 201 (1903).

¹⁵³ *See, e.g.*, Connecticut, "An Act for the punishment of High-Treason, and other atrocious Crimes against the State" (Oct. 1776), Acts and Laws of Connecticut 251 (Babcock 1786), Acts and Laws of Connecticut 419 (Hudson & Goodwin 1796); Delaware, Act of Feb. 22, 1777, "An Act to punish treasons and disaffected persons, and for the security of the government," ch. 1b, 2 *Laws of Delaware* 595 (S. & J. Adams 1797) (mitigated by Act of June 26, 1778, "An Act of free pardon and oblivion . . . ," ch. 29b, 2 *Laws of Delaware* 636 (S. & J. Adams 1797)); Georgia, Act of Mar. 1, 1778, "An act for attainting such persons as are therein mentioned of high treason, and for confiscating their estates . . . ," *Digest of the Laws of Georgia* 62 (Marbury & Crawford 1802); Maryland, "An Act to punish certain crimes and misdemeanors, and to prevent the growth of toryism," Session

though a Georgia statute declared certain Loyalists "attainted and adjudged guilty of high treason," the statute provided that if they were found within the state, they "shall be subject to arrest, imprisonment and trial for the crime of high treason, and shall on conviction thereof in any court of record . . . receive sentence, and judgment of death."¹⁵⁴ A number of statutes resorted to banishment and confiscation,¹⁵⁵ and several barred corruption of blood.¹⁵⁶ "[E]very state in the Union appears to have enacted bills of pains and penalties . . ."¹⁵⁷ Against this background the Framers prohibited bills of attainder alone.

of Feb. 5-Apr. 20, 1777, ch. 20, 1 Laws of Maryland (Kilty 1799) (unpaginated), 1 Laws of Maryland 338 (Maxcy 1811); Massachusetts, Act of Feb. 1, 1777, "An Act against Treason and Misprision of Treason, and for regulating Trials in such Cases, and for directing the Mode of executing Judgments against Persons attainted of Felony," Perpetual Laws of Massachusetts 357 (Thomas 1788), Perpetual Laws of Massachusetts 179 (Adams & Nourse 1789), *reprinted in* 5 Acts and Resolves of the Massachusetts Bay 615 (1886); North Carolina, "An Act declaring what Crimes and Practices against the State shall be Treason . . .," Session of Apr. 8, 1777, ch. 3, Laws of North Carolina 284 (Iredell 1800), *repealed by* Session of Nov. 15, 1777, ch. 6, Laws of North Carolina 321 (Iredell 1800); Rhode Island, "An Act for the Punishment of Persons who shall be found guilty of holding a traitorous Correspondence with the Ministry of *Great-Britain* . . .," Session of Oct. 31, 1775, Rhode Island Acts and Resolves 160; Virginia, "An act declaring what shall be Treason," Session of Oct. 7, 1776, ch. 3, 9 Laws of Virginia 168 (Hening 1821).

¹⁵⁴ Act of Mar. 1, 1778, §§ 1, 2, Digest of the Laws of Georgia 62 (Marbury & Crawford 1802).

¹⁵⁵ *See, e.g.*, Georgia, Act of May 4, 1782, "An act for inflicting penalties on, and confiscating the estates of such persons as are therein declared guilty of treason . . .," Digest of the Laws of Georgia 82 (Marbury & Crawford 1802) (named Loyalists "are hereby declared to be banished from this state forever," and if found therein, are to be transported to British dominions overseas; but upon return from transportation, "they hereby are declared to be guilty of felony, and shall on conviction of their having so returned . . . , suffer death"); Massachusetts, Act of Apr. 30, 1779, "An Act to confiscate the Estates of certain notorious Conspirators . . .," 2 Laws of Massachusetts 1053 (Manning & Loring 1801), *reprinted in* 5 Acts and Resolves of the Massachusetts Bay 966 (1886); Massachusetts, Act of May 10, 1777, "An act for securing this and the other United States against the danger to which they are exposed by the internal enemies thereof," *reprinted in* 5 Acts and Resolves of the Massachusetts Bay 648 (1886); New Hampshire, Act of Nov. 19, 1778, "An Act to prevent the return to this State of certain persons therein named, and of others who have left or shall leave this State . . . & have joined or shall join the Enemies thereof," *reprinted in* 4 Laws of New Hampshire 177 (1916); New Hampshire, Act of Nov. 28, 1778, "An Act to confiscate the estates of sundry persons therein named," Perpetual Laws of New Hampshire 85 (Melcher 1789), *reprinted in* 4 Laws of New Hampshire 191 (1916).

¹⁵⁶ *See, e.g.*, Massachusetts, Act of Feb. 1, 1777, § 21, Perpetual Laws of Massachusetts 357 (Thomas 1788), Perpetual Laws of Massachusetts 179 (Adams & Nourse 1789), *reprinted in* 5 Acts and Resolves of the Massachusetts Bay 615 (1886); Virginia, Session of Oct. 7, 1776, ch. 3, § 2, 9 Laws of Virginia 168 (Hening 1821).

¹⁵⁷ Corwin, *The Progress of Constitutional Theory Between the Declaration of Independence and the Meeting of the Philadelphia Convention*, 30 AM. HIST. REV. 511, 515 (1925). For a tabulation of the various state enactments, see C. VAN TYNE, *supra* note 31, at 318-41.

A New York enactment shows that the colonists were also familiar with the use of banishment in combination with a conditional form of attainder.¹⁵⁸ The act provided that fifty-nine named adherents to the British cause "are hereby severally declared to be, *Ipsa Facto*, convicted and attainted"; that they forfeited their estates and "are declared to be forever banished from this State," and if found therein, "are hereby adjudged and declared guilty of Felony, and shall suffer Death as in Cases of Felony."¹⁵⁹ Other states provided for the transportation of those adhering to the enemy, subject to *judicial* conviction of felony and sentence of death if they returned.¹⁶⁰ In sum, the sources confirm Justice Frankfurter's statement that the Framers "were familiar with [the bill of attainder's] nature; they had experienced its use; they knew what they wanted to prevent."¹⁶¹ There is not the slightest intimation that they meant to prohibit bills of pains and penalties. The ban on "pains and penalties" has been judicially spun from thin air.

III

SEPARATION OF POWERS

The view that the bill of attainder clause "was directed . . . to the preservation of the separation of powers" made its debut in 1962 in the Yale Comment,¹⁶² and was adopted by Chief Justice Warren in 1965 in *United States v. Brown*.¹⁶³ The bill of attainder clause, the Yale Comment asserted, was "looked to as a vital safeguard of the separation of powers";¹⁶⁴ it is an "implementation of [the Framers'] judgment" that the "legislature [is] a tribunal inappropriate to decide who comes within the purview of its general rules."¹⁶⁵ The Comment concluded:

¹⁵⁸ For a discussion of conditional attainder in the English precedents, see notes 135-41 and accompanying text *supra*.

¹⁵⁹ Act of Oct. 22, 1779, "An Act for the Forfeiture & Sale of the Estates of Persons who have adhered to the Enemies of this State . . .," 3d Sess., ch. 25, § 2, 1 Laws of New York 39 (Jones & Varick 1789), 1 Laws of New York 26 (Greenleaf 1792).

¹⁶⁰ See, e.g., Massachusetts, Act of May 10, 1777, reprinted in 5 Acts and Resolves of the Massachusetts Bay 648 (1886); New Hampshire, Act of Nov. 19, 1778, reprinted in 4 Laws of New Hampshire 177 (1916).

¹⁶¹ *United States v. Lovett*, 328 U.S. 303, 323 (1946) (concurring opinion). As already noted, however, Frankfurter did not give full effect to his logic. See note 37 *supra*.

¹⁶² Yale Comment, *supra* note 23, at 356.

¹⁶³ 381 U.S. 437, 442 (1965), quoted in text accompanying note 167 *infra*.

¹⁶⁴ Yale Comment, *supra* note 23, at 344.

¹⁶⁵ *Id.* at 346.

[A]n 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.¹⁶⁶

Seldom has a student commentator, or for that matter a grizzled veteran, enjoyed so immediate a triumph—adoption of his newly spun theory by the Chief Justice and a majority of the Court. Chief Justice Warren's opinion in *Brown* closely paraphrased the Yale commentator's position:

The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.¹⁶⁷

Whatever else a bill of attainder was, however, it was *not* a "trial by legislature" such as impeachment, but rather a condemnation without trial.¹⁶⁸

The attainder clauses were adopted by the Convention without debate; at no time were they associated by any speaker with the separation of powers. Then too, the separation of powers argument is altogether inapplicable to the states for, as Justice White pointed out, "[w]hether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate . . . is for the determination of the State."¹⁶⁹ Consequently, the Framers' adoption of identical federal and state "bill of attainder" clauses must have two different explanations, an anomaly that Chief Justice Warren made no attempt to explain. The simple explanation—William of Occam taught that the simple is to be preferred to the

¹⁶⁶ *Id.* at 348.

¹⁶⁷ 381 U.S. at 442.

¹⁶⁸ See T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 205 (5th ed. 1956).

¹⁶⁹ *United States v. Brown*, 381 U.S. at 473 (dissenting opinion) (quoting *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902)). See text accompanying note 114 *supra*. "There is nothing in the constitution of the United States which forbids the legislature of a State to exercise judicial functions." *Satterlee v. Matthewson*, 27 U.S. (2 Pet.) 380, 413 (1829) (Bushrod Washington, J.).

involved explanation—is that the clauses had nothing whatsoever to do with the separation of powers but were, as will appear, a part of the drive to ban retroactive criminal sanctions.¹⁷⁰

A. *The Inapplicability of the “Contemporary Commentaries”*

The “contemporary commentaries” cited by the Yale Comment consist for the most part of broad generalizations about the value of the separation of powers. From these it deduced that “[t]he bill of attainder prohibition was *therefore* looked to as a vital safeguard of the separation of powers.”¹⁷¹ Among the citations is Jefferson’s oft-quoted reference to the potential despotism of “173” legislators,¹⁷² which led Virginia toward a more distinct separation of powers. How little such generalizations decide concrete cases is exemplified by the fact that Jefferson himself recommended a bill of attainder: “In May, 1778, the General Assembly of Virginia, on the recommendation of a committee composed of Jefferson, Smith, and Tyler, passed an act in the form of a bill of attainder against Josiah Philips and a band of outlaws”¹⁷³ When this attainder later came under attack in the Virginia Ratification Convention by Edmund Randolph,¹⁷⁴ Patrick Henry rose to its defense, saying that “at a time when the war was at the most perilous stage,” Philips “committed the most cruel and shocking barbarities. . . . [T]he occasion warranted the measure.”¹⁷⁵ Jefferson himself wrote to William Wirt in 1814: “I remember the case, and took my part in it Mr. Henry, then Governor, communicated the case to me. We both thought the best proceeding would be by bill of attainder,

¹⁷⁰ See text accompanying notes 228-30 *infra*.

¹⁷¹ Yale Comment, *supra* note 23, at 344 (emphasis added).

¹⁷² All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. . . . 173 despots would surely be as oppressive as one. . . . An *elective despotism* was not the government we fought for, but one which should . . . be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.

T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 126 (Philadelphia 1788), *reprinted in* 3 WRITINGS OF THOMAS JEFFERSON 223-24 (P. Ford ed. 1894). See *United States v. Brown*, 381 U.S. at 446 n.20; Yale Comment, *supra* note 23, at 347-48.

¹⁷³ C. HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 89 (2d ed. 1959). See “An act to attain Josiah Philips and others, unless they render themselves to justice within a certain time,” Session of May 4, 1778, ch. 12, 9 Laws of Virginia 463 (Hening 1821). Jefferson’s draft of the bill is reprinted in 2 WRITINGS OF THOMAS JEFFERSON 149 (P. Ford ed. 1893).

¹⁷⁴ 3 J. ELLIOT, *supra* note 50, at 66-67.

¹⁷⁵ *Id.* at 140.

unless he delivered himself up for trial within a given time."¹⁷⁶ Presumably, Jefferson saw in the attainder no violation of the "distinct" separation of powers, regarding it rather as an existing attribute of legislative power.

A second, little more germane, contemporary commentary cited in the Yale Comment, is that of Madison in *Federalist* No. 44, which discussed the *state* attainder clause (which is unaffected by the separation of powers):

Bills of attainder, *ex-post-facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the State constitutions Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favor of personal security and private rights¹⁷⁷

The protection for "personal security and private rights"—later expanded by the Bill of Rights—is not to be confused with the separation of powers, which affords additional protection by diffusing power among three departments. Since their internal departmental structure was the exclusive province of the states, Madison's statement sheds no light on the separation of powers. Moreover, his reference to existing state provisions indicates familiarity with the Revolutionary practice whereby the states, upon the recommendation of the Continental Congress and Washington's approval, had promulgated numerous "bills of pains and penalties," confiscation and disenfranchisement measures.¹⁷⁸ It is grasping at straws to extract from Madison's allusion to "express" prohibitions of attainder an implied intention to censure the widely used "bills of pains and penalties."

To complete this review of historical sources, it remains to

¹⁷⁶ Letter from Thomas Jefferson to William Wirt (Aug. 14, 1814), *reprinted in* 9 WRITINGS OF THOMAS JEFFERSON 470 (P. Ford ed. 1898). *See also* text accompanying note 60 *supra*.

¹⁷⁷ THE FEDERALIST No. 44, at 291 (Mod. Lib. ed. 1937), *quoted in* Yale Comment, *supra* note 23, at 345. In *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213 (1827), Justice Trimble commented on this passage: "[T]he language of the authors of the Federalist proves that they, at least, understood that the protection of personal security and of private rights, from the despotic and iniquitous operation of retrospective legislation, was, itself, and alone, the grand principle intended to be established." *Id.* at 331 (emphasis added).

¹⁷⁸ *E.g.*, Act of Mar. 1, 1778, Digest of the Laws of Georgia 62 (Marbury & Crawford 1802). *See* note 194 and accompanying text *infra*.

examine the citation to Hamilton in *Cummings v. Missouri*,¹⁷⁹ drawn from his "Letters from Phocion."¹⁸⁰ Hamilton was concerned with "disqualification, disfranchisement and banishment by acts of legislature";¹⁸¹ he denounced those pretenders to "the spirit of Whiggism" who "are advocates for expelling a large number of their fellow-citizens unheard, untried; or if they cannot effect this, are for disfranchising them, in the face of the constitution, without the judgment of their peers, and contrary to the law of the land."¹⁸² In a passage quoted by the Court in *Cummings*, Hamilton urged: "Let us not forget that the constitution declares that trial by jury in all cases in which it has been formerly used, should remain inviolate forever, and that the legislature should at no time, erect any new jurisdiction which should not proceed, according to the course of the common law."¹⁸³

These were rousing but misleading statements. Like impeachment, bills of attainder and bills of pains and penalties were common-law exceptions to trial by jury, not "new jurisdiction." The express prohibition of bills of attainder demonstrates that such bills were regarded as an existing attribute of legislative power. Nor were attainders "contrary to the law of the land": they were expressly authorized by the New York constitution for the duration of the Revolutionary War.¹⁸⁴

In truth, Hamilton was not a disinterested witness. He had been counsel for the defense in *Rutgers v. Waddington*,¹⁸⁵ a suit

¹⁷⁹ 71 U.S. (4 Wall.) 277, 330-32 (1867). See also *United States v. Brown*, 381 U.S. at 444.

¹⁸⁰ Hamilton, *A Letter from Phocion to the Considerate Citizens of New-York On the Politics of the Day* (New York, Jan. 1784), reprinted in 3 PAPERS OF ALEXANDER HAMILTON 483 (H. Syrett ed. 1962) [hereinafter cited as HAMILTON PAPERS]; Hamilton, *A Second Letter from Phocion to the Considerate Citizens of New-York* (New York, Apr. 1784), reprinted in 3 HAMILTON PAPERS, *supra* at 530.

¹⁸¹ 3 HAMILTON PAPERS, *supra* note 180, at 485.

¹⁸² *Id.* at 484.

¹⁸³ *Id.* at 544, quoted in *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 331.

¹⁸⁴ See text accompanying note 149 *supra*. See also note 208 *infra*. Later, Chief Justice Kent held: "The constitution authorised the legislature to pass bills of attainder for crimes committed during the revolutionary war." *Jackson v. Stokes*, 3 John. 151, 153 (N.Y. 1808).

¹⁸⁵ New York City Mayor's Court, 1784. The opinion is reprinted in 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 393 (J. Goebel ed. 1964) [hereinafter cited as HAMILTON'S LAW PRACTICE]; SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, at 302 (R. Morris ed. 1935); 1 J. THAYER, CASES ON CONSTITUTIONAL LAW 63 (1895). For historical background and commentary, see 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 131-37 (1971); 1 HAMILTON'S LAW PRACTICE, *supra* at 282-393; SELECT CASES OF THE MAYOR'S COURT OF NEW YORK CITY 1674-1784, *supra* at 57-59; Reppy, *The Spectre of Attainder in New York* (pt. 1), 23 ST. JOHN'S L. REV. 1, 47-56 (1948).

against a wealthy Loyalist under New York's Trespass Act of 1783,¹⁸⁶ "[d]esigned for the relief of those patriots who had fled occupied territory" by giving them an action against persons who had used their property.¹⁸⁷ The decision went in part for Hamilton, and provoked violent criticism;¹⁸⁸ the New York General Assembly adopted a resolution denouncing the judgment as "subversive of all law and good order."¹⁸⁹ So completely out of touch with the anti-Loyalist sentiments of the Founders was he, that his views can hardly be regarded as expressive of their views. To the Founders, "[t]he presence of the Loyalists was a formidable menace to the cause of liberty."¹⁹⁰ The Loyalists "abhorred the republican government";¹⁹¹ many of them "were of great service to the British."¹⁹² The "ever-imminent danger of a Tory insurrection" lessened "the efficient fighting power of the patriots."¹⁹³ Confiscation had been recommended by the Continental Congress; it had resolved that "those who refused to protect their country should be excluded from its protection."¹⁹⁴ A Pennsylvania court held that a Connecticut Loyalist's enlistment in the British army "was not an offence against the State of *Connecticut* alone, but against all the States in the union," and that Connecticut's forfeiture act "was made in consequence of the recommendation of *Congress*."¹⁹⁵ Thus, Hamilton was denouncing acts undertaken in the face of a real

¹⁸⁶ Act of Mar. 17, 1783, "An Act for granting a more effectual Relief in Cases of certain Trespasses," 6th Sess., ch. 31, 1 LAWS OF NEW YORK 93 (Jones & Varick 1789), 1 LAWS OF NEW YORK 62 (Greenleaf 1792).

¹⁸⁷ 1 J. GOEBEL, *supra* note 185, at 132.

¹⁸⁸ *See id.* at 137; 1 HAMILTON'S LAW PRACTICE, *supra* note 185, at 312-14; Reppy, *supra* note 185, at 54-55.

¹⁸⁹ Resolution of Nov. 2, 1784, 8th Assembly, 1st Meeting, New York Assembly Journal 33, *quoted in* 1 HAMILTON'S LAW PRACTICE, *supra* note 185, at 312.

¹⁹⁰ Thompson, *Anti-Loyalist Legislation During the American Revolution* (pt. 1), 3 ILL. L. REV. 81, 84 (1908).

¹⁹¹ C. VAN TYNE, *supra* note 31, at 75.

¹⁹² *Id.* at 149.

¹⁹³ *Id.* at 162.

¹⁹⁴ Thompson, *supra* note 190, at 86.

Resolved, That it be earnestly recommended to the several states, as soon as may be, to confiscate and make sale of all the real and personal estate therein, of such of their inhabitants and other persons who have forfeited the same, and the right to the protection of their respective states, and to invest the money arising from the sales in continental loan office certificates, to be appropriated in such manner as the respective states shall hereafter direct.

Resolution of Nov. 27, 1777, 9 JOURNALS OF THE CONTINENTAL CONGRESS 971 (W. Ford ed. 1907). "Washington approved heartily of the confiscation acts, and thought the state of affairs demanded such severity." C. VAN TYNE, *supra* note 31, at 281.

¹⁹⁵ *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403 (Pa. C.P. 1788).

peril by a nascent nation struggling for life. As late as 1796, Justice Chase declared that the Loyalists had "elected to continue subjects of Great Britain . . . [They] contributed to carry on the war, and to enslave their former fellow-citizens."¹⁹⁶ He was joined by Justices Paterson and Iredell in affirming the right of confiscation.¹⁹⁷ One must recognize that, in the eyes of those who fought for independence, the Loyalists were "traitors" and often were branded as such by statute.¹⁹⁸

Hamilton's abiding contempt for democracy is well known; he yearned for a hereditary executive and a house of lords, preferring "the rich and well born" to "the mass of the people . . . [who] are turbulent and changing; they seldom judge or determine right."¹⁹⁹ His biographer, John C. Miller, observed:

No doubt, some of the zeal displayed by Hamilton in behalf of the Loyalists was owing to the fact that in many instances they were wealthy and conservative members of society to whom he looked for aid against the radicalism that seemed to threaten the established social order Consequently, . . . Hamilton increasingly felt a sense of kinship with the Loyalists, who, even though they had chosen the wrong side in the struggle, were closer to him in many other respects than were the radical patriots.²⁰⁰

Without derogating from the respect due to his writings in *The Federalist*, which expressed the consensus of the Convention, it is plain that on the treatment of the Loyalists he spoke as an attorney for the Tories, and one who was thoroughly out of sympathy with the goals of the Founders. Such statements are not entitled to credence on the issue of what the Founders intended by resort to common-law terms.

B. *Delineating Legislative and Judicial Functions*

To say in the federal context that it is "important to prevent the legislature from exercising the judicial function"²⁰¹ begs the question. Banishment, for example, was viewed as a legislative, not a judicial, function. Justice William Cushing declared in *Cooper v.*

¹⁹⁶ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 225 (1796).

¹⁹⁷ *See id.* at 247-49 (Paterson, J.); *id.* at 263-64 (Iredell, J.).

¹⁹⁸ *See* C. VAN TYNE, *supra* note 31, at 190-92, 268-69.

¹⁹⁹ I. M. FARRAND, *supra* note 49, at 299. *See id.* at 288-90.

²⁰⁰ J. MILLER, *ALEXANDER HAMILTON* 105 (1959).

²⁰¹ Yale Comment, *supra* note 23, at 348.

Telfair:²⁰² "The right to confiscate and banish . . . must belong to every government. It is not within the judicial power, . . . [it] belongs to the legislature."²⁰³ English history confirms this view. Banishment was not a legislative usurpation of "judicial power." History is apt to furnish a better guide than abstract conceptualization. Looking to the English practice, the Court has held that the investigatory power—whereby Parliament probed the very bowels of the executive branch—was an "attribute" of the legislative function and therefore was included in the grant of congressional powers.²⁰⁴ Similarly, Congress exercises Parliament's time-honored "contempt" power, a "judicial" function.²⁰⁵ Furthermore, Parliament undeniably exercised the power to enact bills of attainder and bills of pains and penalties, and these likewise were regarded by the Framers as "attributes" of the legislative power; otherwise the express prohibition of bills of attainder was unnecessary.²⁰⁶ In omitting mention of "bills of pains and penalties," the Founders, who repeatedly referred to the *expressio unius* rule,²⁰⁷ must be taken to have left this legislative "attribute" untouched.

The prohibition of bills of attainder must be regarded as an *exception* to the grant of "legislative" power. This was the view taken by Hamilton in *Federalist* No. 78: "By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder"²⁰⁸ The rule is, "all that is not clearly embraced

²⁰² 4 U.S. (4 Dall.) 14 (1800).

²⁰³ *Id.* at 20. "[T]he power of confiscation and banishment does not belong to the judicial authority, . . . it is a power . . . which is so inherent in the legislature that it cannot be divested or transferred, without an express provision of the constitution." *Id.* at 19 (Paterson, J.). See also note 272 and accompanying text *infra*.

²⁰⁴ *McGrain v. Daugherty*, 273 U.S. 135, 161, 174-75 (1927).

²⁰⁵ See R. BERGER, EXECUTIVE PRIVILEGE 309-10 (1974).

²⁰⁶ See note 208 *infra*. It is "a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that . . . the thing excepted would be within the general clause had the exception not been made." *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827) (Marshall, C.J.).

²⁰⁷ See note 69 and accompanying text *supra*.

²⁰⁸ THE FEDERALIST No. 78, at 505 (Mod. Lib. ed. 1937). In the Virginia Ratification Convention, Edmund Randolph stated:

The . . . restriction is, that no bill of attainder, or *ex post facto* law, shall be passed. This is a manifest exception to [a legislative] power. We know well that attainders and *ex post facto* laws have always been the engines of criminal jurisprudence. This is, therefore, an exception to the criminal jurisdiction vested in that body.

3 J. ELLIOT, *supra* note 50, at 464-65. In *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800), Justice Washington declined to hold that a Georgia bill of attainder passed in 1782 was "excepted from the legislative jurisdiction, by a necessary implication," where the Georgia

in the exception, remains within the scope of the principal provision."²⁰⁹ Consequently, the bill of attainder clause is not to be pressed beyond its familiar common-law meaning, the more so because, as Justice Chase observed with reference to the cognate *ex post facto* phrase, "[i]f the term . . . is to be construed to include and to prohibit the enacting any law after a fact, it will greatly restrict the power of the federal and state legislatures; and the consequences of such a construction may not be foreseen."²¹⁰ The expansive interpretation of the bill of attainder clause abundantly fulfills that prophecy.

Rebutting those who insisted on a "pure" separation of powers, Madison pointed out that under the British practice the "departments are by no means totally separate and distinct from each other";²¹¹ his review of the state constitutions led him to conclude that "there is not a single instance in which the several departments of power have been kept absolutely separate and distinct."²¹² There is no need to dwell on his examples, for the overlap is duplicated in the Federal Constitution.²¹³ Instead, consider a telling example of such admixture—the extent to which the judiciary was left under congressional control. "Every judiciary in the Union," Justice Johnson observed, "owes its existence to some legislative act; what is to prevent a repeal of that act?"²¹⁴ Congress is given plenary control over the jurisdiction of the "inferior" federal courts; the

constitution did not "expressly interdict" it. *Id.* at 18. An implied prohibition of bills of pains and penalties stands no higher.

²⁰⁹ *Hopkins v. United States*, 235 F. 95, 98 (8th Cir. 1916). "To expand the exception . . . would violate the cardinal rule of statutory construction which requires exceptions to be strictly construed." *Midland Coop. Wholesale v. Ickes*, 125 F.2d 618, 625-26 (8th Cir. 1942). *Accord*, *Hartford Elec. Light Co. v. FPC*, 131 F.2d 953, 962 (2d Cir. 1942). "[I]t is the general rule that a proviso should be strictly construed to the end that an exception does not devour the general policy which a law may embody." *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285, 288 (10th Cir. 1974).

²¹⁰ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 393 (1798).

²¹¹ THE FEDERALIST No. 47, at 314 (Mod. Lib. ed. 1937).

²¹² *Id.* at 316.

²¹³ In *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800), Justice Chase noted that "even in the constitution itself, we may trace repeated departures from the theoretical doctrine, that the legislative, executive, and judicial powers, should be kept separate and distinct." *Id.* at 18-19. Most recently, the Court rejected the "'archaic view of the separation of powers as requiring three airtight departments of government.'" *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. 2777, 2790 (1977) (quoting *Nixon v. Administrator of Gen. Servs.*, 408 F. Supp. 321, 342 (D.D.C. 1976)).

²¹⁴ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 280 (1827). "The forms of administering justice, and the duties and powers of courts as incident to the exercise of a branch of sovereign power, must ever be subject to legislative will . . ." *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 245 (1819).

jurisdiction it confers can be withdrawn.²¹⁵ The Supreme Court's appellate jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make."²¹⁶ Congressional control of the courts, extending to practice and procedure, is writ large in the Judiciary Act of 1789.²¹⁷ Congress also has the authority to govern the admissibility and effect of evidence offered in the federal courts;²¹⁸ it may withhold "consent" to the appointment of judges and Justices,²¹⁹ fix their salaries,²²⁰ and remove them for impeachable offenses.²²¹ Impeachment represents a most serious "intrusion" into the judicial department, and illustrates how far from airtight the separation of powers was conceived to be.

It is a mistake to attribute to the Framers present-day notions of the legislative and judicial functions,²²² for, as Justice Frankfurter stated, "the Constitution was framed in an era when dispensing justice was a well-established function of the legislature."²²³ Two most important aspects of the judicial function were left to Congress: it may sit in judgment on contempts of its mandates,²²⁴ and the Senate may try impeachment charges against the President, Justices, and judges.²²⁵ If "the 'bill of attainder' and the 'impeachment' were regarded as two alternative ways of accomplishing the same results,"²²⁶ why does the bill of attainder clause "implement" the separation of powers, while impeachment is a recognized exception to that principle?²²⁷ In truth, the wedding of the bill of

²¹⁵ See *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448-49 (1850).

²¹⁶ U.S. CONST. art. III, § 2, cl. 2.

²¹⁷ Ch. 20, 1 Stat. 73 (1789).

²¹⁸ *Fong Yue Ting v. United States*, 149 U.S. 698, 729 (1893).

²¹⁹ See U.S. CONST. art. II, § 2, cl. 2.

²²⁰ See *id.* art. III, § 1.

²²¹ See *id.* art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; *id.* art. II, § 4.

²²² "We must learn, not from modern theorists, but from contemporaries of the events we are studying . . ." Richardson & Sayles, *Parliaments and Great Councils in Medieval England* (pt. 1), 77 L.Q. Rev. 213, 224 (1961). It is a "historicist fallacy" to "appraise a former historical era by the criteria of values that have become important since." Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 673 (1960).

²²³ *United States v. Lovett*, 328 U.S. 303, 322 (1946) (concurring opinion). See generally C. HAINES, *supra* note 173, at 68-70. In *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 395 (1798), Justice Paterson noted that Connecticut's legislature had "from the beginning, exercised the power of granting new trials," and acted "as a court of judicature in certain exigencies."

²²⁴ See text accompanying note 205 *supra*.

²²⁵ See U.S. CONST. art. I, § 3, cl. 6; *id.* art. II, § 4.

²²⁶ Yale Comment, *supra* note 23, at 346 n.107.

²²⁷ Elias Boudinot, erstwhile president of the Continental Congress, said in the First

attainder clause to the separation of powers represents pure speculation, a current after-thought. Rather, "the mind of the Convention," as Chief Justice Marshall stated, "was directed to retroactive legislation. The thing forbidden is retroaction."²²⁸ Bills of attainder were prohibited, not out of concern for "separation" niceties but because they had come to be regarded as a barbarous relic; even in England, which lacked a formal separation doctrine, Wooddeson observed that they "have offended the general humanity of this nation."²²⁹ According to Justice Bushrod Washington, the Framers prohibited bills of attainder and *ex post facto* laws "because laws of this character are oppressive, unjust, and tyrannical The injustice and tyranny which characterizes *ex post facto* laws, consists altogether in their retrospective operation, which applies with equal force, although not exclusively, to bills of attainder."²³⁰

The argument that would justify the Court's reading of "bills of pains and penalties" into the attainder clause under cover of the separation of powers, it is safe to say, never occurred to the Founders; it is a twentieth-century attempt to bolster a departure from the incontestable meaning of a common-law term. The Court has thereby intruded into the congressional domain and progressively diminished state authority to deal with purely domestic concerns. I yield to no one in my faith in the continuing vitality of the separation of powers. But the threshold question is: What *are* the powers of the respective departments? No cry of "encroachment" is justified without a demonstration that the particular power in question was granted or withheld.

Thus, Chief Justice Burger's invocation of the separation of powers in his *Nixon II* dissent²³¹ lacked both practical and historical perspective. On the practical side, the Court noticed that "[o]f the estimated 42 million pages of documents and 880 tape recordings whose custody is at stake . . . , the appellant's claim of Presidential privilege could apply at most to the 200,000 items with which the

Congress that impeachment was one of the "exceptions to a principle"—*i.e.*, to the separation of powers. 1 ANNALS OF CONG. 527 (Gales & Seaton eds. 1834) (print bearing running title "History of Congress").

²²⁸ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 335-36 (1827) (dissenting opinion).

²²⁹ 2 R. WOODDESON, *supra* note 7, at 641. Of the punishment for treason, as imposed in England and the colonies, William Livingston is quoted as saying "none but a savage or a British subject can think of [it] without horror." C. VAN TYNE, *supra* note 31, at 270 n.2. See 4 W. BLACKSTONE, *supra* note 4, at *92-93, *376-77; note 268 and accompanying text *infra*.

²³⁰ *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 266 (1827).

²³¹ *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. 2777, 2821-31 (1977).

appellant was personally familiar."²³² But for that tiny fraction, the vast bulk poured into the White House from every branch of the Executive Department, the agencies, presidential commissions, and the like. Illustrative of the problem is a document that Nixon apparently took with him when he left office—his letter promising \$4.75 billion in reconstruction aid to Vietnam. The State Department advised a congressional subcommittee that the letter was not in its files but among Nixon's "Presidential papers," and that it "keeps rising to complicate the negotiations" with Vietnamese officials.²³³ The Court is therefore to be congratulated on its endorsement of Justice Story's opinion "that regardless of where legal title lies, 'from the nature of the public service, or the character of [the] documents, embracing historical, military, or diplomatic information, it may be the right, and even the duty, of the government, to give them publicity, even against the will of the writers.'"²³⁴

IV

THE PITFALLS OF THE "PUNISHMENT" TEST

In fashioning a "functional" analysis of bills of attainder, the Court has relied primarily on a broad conception of "punishment," drawing on the companion post-Civil War cases, *Cummings v. Missouri*²³⁵ and *Ex parte Garland*.²³⁶ These cases exhibit special deficiencies of analysis and therefore merit particular attention, because no chain of reasoning is stronger than its weakest link.

A. *Test Oaths and Disqualifications*

Cummings and *Garland* involved, respectively, state and federal expurgatory oaths. *Cummings* struck down a provision of the Missouri constitution requiring officeholders, lawyers, and clergymen in the state to swear that they had never adhered to or manifested sympathy for an enemy of the United States. *Garland* held invalid a federal statute that required a similar oath as a qualification for holding federal office or practicing law in the federal courts.

²³² *Id.* at 2793. "Most of the 42 million papers were prepared and seen by others and were widely circulated within the Government." *Id.* at 2798.

²³³ N.Y. Times, May 10, 1977, at 19, col. 4.

²³⁴ 97 S. Ct. at 2791 n.8 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 347 (D. Mass. 1841) (No. 4,901)).

²³⁵ 71 U.S. (4 Wall.) 277 (1867).

²³⁶ 71 U.S. (4 Wall.) 333 (1867).

Speaking for the Court in both cases, Justice Field noticed that test oaths were sprinkled throughout English history.²³⁷ Religious test oaths aimed at "Popish Recusants" were required for holding office, voting at elections, and practicing law.²³⁸ The refusal to take a "supremacy oath" acknowledging Queen Elizabeth's supremacy in all matters temporal and ecclesiastical disabled the refuser from holding office.²³⁹ Following in this tradition, a number of state constitutions required religious test oaths as a condition of holding office.²⁴⁰ The South Carolina constitution of 1778 provided that state officers must take a loyalty oath renouncing allegiance to George III.²⁴¹ Loyalty oaths were also required by a number of state statutes; refusal could be followed by banishment or disqualification to hold office.²⁴² A New York statute of 1779 required attorneys to certify their commitment to American independence.²⁴³ To my knowledge, no test-oath statute was ever identified or associated with a bill of attainder.

Field distinguished such precedents by noting that "they were always limited to an affirmation of present belief, or present disposition towards the government, and were never exacted with reference to particular instances of past misconduct."²⁴⁴ Chief Jus-

²³⁷ *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 320-21.

²³⁸ *E.g.*, "An Act for preventing Dangers which may happen from Popish Recusants," 25 Car. 2, c. 2 (1672); "An Act for the more effectually preserving of the Kings Person and Government by disabling Papists from sitting in either House of Parlyament," 30 Car. 2, c. 1, stat. 2 (1678); "An Act for the further Security of His Majesty's Person and the Succession of the Crown in the Protestant Line . . .," 13 & 14 Will. 3, c. 6 (1701).

²³⁹ "An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all foreign Powers repugnant to the same," 1 Eliz., c. 1 (1558-59).

²⁴⁰ *E.g.*, MD. CONST. of 1776, Declaration of Rights, art. XXXV, *reprinted in* 1 B. POORE, *supra* note 72, at 820; MASS. CONST. of 1780, pt. 2, ch. VI, art. I, *reprinted in* 1 B. POORE, *supra* note 72, at 970; PA. CONST. of 1776, Plan or Frame of Government, § 10, *reprinted in* 2 B. POORE, *supra* note 72, at 1543; VT. CONST. of 1777, ch. II, § 9, *reprinted in* 2 B. POORE, *supra* note 72, at 1861.

²⁴¹ S.C. CONST. of 1778, art. XXXVI, *reprinted in* 2 B. POORE, *supra* note 72, at 1626.

²⁴² *E.g.*, Delaware, Act of June 26, 1778, "An Act of free pardon and oblivion, and for other purposes therein mentioned," ch. 29b, 2 Laws of Delaware 636 (S. & J. Adams 1797); Massachusetts, Act of Feb. 3, 1778, "An act for prescribing and establishing an oath of fidelity and allegiance," *reprinted in* 5 Acts and Resolves of the Massachusetts Bay 770 (1886). The test-oath statutes are tabulated in C. VAN TYNE, *supra* note 31, at 318-26. Attorneys were named in a number of statutes.

²⁴³ Act of Oct. 9, 1779, "An Act making it necessary for the Attornies, Solicitors and Counsellors at Law, who have been licenced to plead or practice in any of the Courts of Law or Equity within the late Colony of New-York, to produce Certificates of their Attachment to the Liberties and Independence of America," 3d Sess., ch. 12, 1 Laws of New York 38 (Jones & Varick 1789), *reprinted in* 1 Laws of New York 155 (1886).

²⁴⁴ *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 318.

tice Warren regarded the validity of that distinction as doubtful in *United States v. Brown*:

A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations . . . that a given person or group was likely to cause trouble (usually, overthrow the government) and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.²⁴⁵

The fact is that the past-future labels can be substituted *ad libitum*, as the shifting decisions illustrate. To begin with *Cummings* and *Garland*, embittered rebels whose property in slaves had been destroyed, and who had demonstrated their recalcitrance by immediately enacting Black Codes aimed at perpetuating black serfdom, could reasonably be regarded as unfit to act as lawyers—instruments of the law—or as teachers of the young. A rebel's "past acts" provided a reasonable basis for evaluating "his disposition to support or to overturn the government, in whose functions he proposes to take part."²⁴⁶ This was the view of Justice Miller, who went on to say in his dissenting opinion in *Garland*: "That fidelity to the government under which he lives, a true and loyal attachment to it, and a sincere desire for its preservation, are among the most

²⁴⁵ 381 U.S. at 458-59. See Yale Comment, *supra* note 23, at 337-39. A legislature's judgment "based largely on past acts . . . that a given person . . . was likely to cause trouble" is sufficient to undercut *Cummings*. See American Communications Ass'n v. Douds, 339 U.S. 382, 413 (1950), *quoted in* text accompanying note 251 *infra*.

²⁴⁶ *Ex parte Garland*, 71 U.S. (4 Wall.) at 385 (dissenting opinion, Miller, J.).

The depth of southern recalcitrance may be judged by the declaration of Benjamin G. Harris, representative of Maryland, during the congressional debates on the fourteenth amendment:

The amendment of the Constitution now submitted to the country, and doubtfully reiterating the fact of negro citizenship . . . will hardly prove an annoyance. The States will still retain control and govern in their own way that portion of their population without leave asked of the United States.

Mr. Speaker, all the efforts made here or elsewhere to elevate the negro to an equality with the white man in the southern States, either civilly, socially, or politically, are perfectly idle. The negro must be kept in subordination to the white man . . .

CONG. GLOBE, 39th Cong., 1st Sess. 3173-74 (1866). In a debate on reconstruction legislation, Senator Garrett Davis of Kentucky stated: "The white race . . . will be the proprietors of the land, and the black its cultivators; such is their destiny." *Id.* at 935. If representatives of the border states could speak so unabashedly in Congress, it is safe to infer that their southern brethren were even more bent on thwarting emancipation, as indeed the Black Codes had already proved.

essential qualifications which should be required in a lawyer, seems to me to be too clear for argument."²⁴⁷ Field's position, Miller pointed out, was tantamount to holding that Congress was powerless "to prevent traitors practising in her courts."²⁴⁸ True it is that adherents of the Lost Cause could not honestly swear that they had not adhered to the enemy. But the English anti-Catholic oaths were virtually of the same order; few devout Catholics could sincerely take an oath to abjure a faith that to some meant more than life. To some—Catholic converts—even that Hobson's choice was not presented.²⁴⁹ The colonial banishment statutes likewise excluded Loyalist participation in American life altogether.

The issue rose again in *American Communications Association v. Douds*,²⁵⁰ where the Court upheld the constitutionality of section 9(h) of the National Labor Relations Act, which required union officers to submit affidavits denying that they were members or supporters of any organization that teaches overthrow of the government by force. Distinguishing *Cummings* and *Garland*, the Court argued that "in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case . . . there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct."²⁵¹ The fragility of this distinction is revealed by the Court's further statement: "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."²⁵² With Hamilton, I would decry "distinctions & reasonings too subtle."²⁵³ The Court never explains—except perhaps by its reference to "legislative intent"²⁵⁴—why something that constitutes "punishment" in one case is merely a reasonable inference as to potential future conduct in another.

Reasoning in *Cummings* that test oaths are bills of pains and penalties and therefore fall under the prohibition of bills of attain-

²⁴⁷ 71 U.S. (4 Wall.) at 385.

²⁴⁸ *Id.* at 392.

²⁴⁹ See "An Act for preventing Dangers which may happen from Popish Recusants," 25 Car. 2, c. 2, § 8 (1672).

²⁵⁰ 339 U.S. 382 (1950).

²⁵¹ *Id.* at 413 (emphasis in original).

²⁵² *Id.* at 413-14 (emphasis added).

²⁵³ 1 M. FARRAND, *supra* note 49, at 283.

²⁵⁴ The Court reiterated this point: "Here the intention is to forestall future dangerous acts . . ." 339 U.S. at 414.

der,²⁵⁵ Field ignored a massive stumbling block: clause 3 of article VI provides that "no *religious* Test shall ever be required as a Qualification to any Office or public Trust under the United States."²⁵⁶ This prohibition applies neither to the states, nor to nonreligious test oaths; moreover, the express exclusion demonstrates the Framers' view that test oaths were not embraced by the bill of attainder clause. Of these in turn.

As Justice Miller observed, this provision places "[n]o restraint . . . on the action of the States,"²⁵⁷ so that under the *expressio unius* rule so dear to the hearts of the Framers,²⁵⁸ the states remained free to require religious and other test oaths. Long before the Court discovered that the due process clause of the fourteenth amendment had picked up portions of the Bill of Rights, Justice Story stated that "the whole power over the subject of religion is left exclusively to the state governments."²⁵⁹ Even the federal ban had met with objections: "The exclusion of religious tests is by many thought dangerous and impolitic," said Henry Abbott in the North Carolina Convention.²⁶⁰ In the Massachusetts Convention, Theophilus Parsons noted the objection that "we may have in power unprincipled men, atheists and pagans."²⁶¹ Had the exclusion been extended to the states, let alone to nonreligious test oaths, such protests probably would have mounted in volume and intensity.²⁶² These facts furnish a solid basis for the statement of the Court in *Douds*: "It is obvious that not all oaths were abolished All that was forbidden was a 'religious Test.'"²⁶³

The express "religious Test" provision also precludes the inference that the Framers regarded test-oath statutes as bills of attainder,²⁶⁴ for that would render the oath provision surplusage. An

²⁵⁵ See 71 U.S. (4 Wall.) at 323-25.

²⁵⁶ U.S. CONST. art. VI, cl. 3 (emphasis added).

²⁵⁷ *Ex parte* Garland, 71 U.S. (4 Wall.) at 397 (dissenting opinion). In its original form, the "religious Test" provision applied to "any office or public trust under the authority of the United States," but the Convention's Committee of Style discarded the words "the authority of," presumably as superfluous. See 2 M. FARRAND, *supra* note 49, at 468, 579, 603.

²⁵⁸ See note 69 and accompanying text *supra*.

²⁵⁹ 3 J. STORY, *supra* note 10, § 1873, at 731, quoted in *Ex parte* Garland, 71 U.S. (4 Wall.) at 397 (dissenting opinion, Miller, J.). It has generally been overlooked that Madison's proposal to extend the first amendment's guarantee of free speech to the states was rejected by the First Congress. See R. BERGER, *supra* note 2, at 271-72.

²⁶⁰ 4 J. ELLIOT, *supra* note 50, at 192.

²⁶¹ 2 *id.* at 90.

²⁶² See generally notes 113-21 and accompanying text *supra*.

²⁶³ 339 U.S. at 414.

²⁶⁴ On April 10, 1788, Madison wrote to Edmund Randolph: "As to the religious test, I should conceive that it can imply at most nothing more than that without that exception,

aim of construction, as stated in Bacon's *Abridgment*, is to insure that "no Clause, Sentence or Word shall be superfluous, void or insignificant."²⁶⁵ Far from indulging in the superfluous, the Framers clearly manifested their aversion to redundancies—one example, already noted, is their rejection of Madison's attempt to clarify "cases and controversies" by adding "cases of a Judiciary Nature."²⁶⁶ Thus, in providing specially for the exclusion of religious test oaths, the Framers expressed their understanding that such oaths were not forbidden by the bill of attainder clause. The impact of article VI on the attainder clause has yet to be weighed by the Court.

B. *Punishment*

Field it was who introduced the "punishment" test of a bill of attainder, approaching it via Blackstone, who listed "a disability of holding offices or employments" as a punishment.²⁶⁷ But on the very same page Blackstone also listed the horrible punishment consequent on high treason.²⁶⁸ That disembowelment and quartering, and disability to hold office, are both "punishments" would not in Blackstone's eyes convert a "bill of pains and penalties" into a "bill of attainder," any more than today would we equate a felony with a misdemeanor because both are "punishable." Field stated further: "Disqualification from office may be punishment, as in cases of conviction upon impeachment."²⁶⁹ The Constitution on its face, however, distinguishes removal and disqualification from office, from indictment and conviction for the same offense.²⁷⁰ The former is remedial—it seeks to cleanse the office of an unfit person; the latter is punitive—its purpose is to penalize the commission of a crime. Field's use of the word "punishment," Justice Miller rightly remarked, "would make a great number of laws, partaking in no sense of a criminal character, laws for punishment,

a power would have been given to impose an oath involving a religious test as a qualification for office"—the bill of attainder clause apparently notwithstanding. 3 M. FARRAND, *supra* note 49, at 297.

²⁶⁵ 4 M. BACON, *supra* note 46, at *645 ("Statute," (1)(2)).

²⁶⁶ See text accompanying notes 64-65 *supra*. See also note 257 *supra*.

²⁶⁷ 4 W. BLACKSTONE, *supra* note 4, at *377, quoted in *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 321.

²⁶⁸ This included "being drawn or dragged to the place of execution; in high treason affecting the king's person or government, emboweling alive, beheading and quartering; and in murder, a public dissection." 4 W. BLACKSTONE, *supra* note 4, at *377.

²⁶⁹ *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 320.

²⁷⁰ See U.S. CONST. art. 1, § 3, cl. 7.

and therefore *ex post facto*.”²⁷¹ Moreover, Field overlooked a fact that casts doubt upon his reading of “punitive intent” into *Garland’s* statute: the act had been signed by Lincoln, whose attitude toward the defeated South was conciliatory rather than vengeful.

What distinguished the bill of attainder was not the *fact* of punishment, but its *nature*—death and corruption of blood. Bills of pains and penalties also inflicted punishment; as Justice Brennan recently noted, “‘pains and penalties’ historically consisted of a wide array of punishments: commonly included were imprisonment, banishment, and the punitive confiscation of property by the sovereign.”²⁷² The “punishment” test is therefore a judicial construct rather than the historical test. In departing from the latter, the Court has fashioned from “punishment” an accordion-like tool of shifting judicial fancy.

In practice, Field’s distinction between the legislative right to establish qualifications for the practice of a profession and punishment for “past” offenses has led the Court to teeter. In *Dent v. West Virginia*,²⁷³ a statute requiring minimum qualifications for the practice of medicine was attacked as a bill of attainder. Justice Field distinguished *Cummings* and *Garland* on the ground that they concerned requirements that were unrelated to the particular professions involved, whereas the *Dent* statute imposed qualifications related to the skillful practice of medicine.²⁷⁴ With Justice Miller, I cannot perceive why Congress could not equally require an affirmation of past loyalty as a qualification for the practice of law.²⁷⁵ There followed *Hawker v. New York*,²⁷⁶ where a statute barring a convicted felon from the practice of medicine was challenged as a bill of attainder because it imposed additional punishment

²⁷¹ *Ex parte Garland*, 71 U.S. (4 Wall.) at 394 (dissenting opinion).

²⁷² *Nixon v. Administrator of Gen. Servs.*, 97 S. Ct. 2777, 2806 (1977) (footnotes omitted). Justice Brennan added:

Our country’s own experience with bills of attainder resulted in the *addition* of another sanction to the list of impermissible legislative punishments: a legislative enactment barring designated individuals or groups from participation in specified employments or vocations, a mode of punishment commonly deployed against those legislatively branded as disloyal.

Id. (emphasis added). But added by whom? Certainly not by the Framers: Brennan cites only the Court’s own decisions in *Cummings*, *Lovett*, and *Brown*. Given that banishment and confiscation constituted only “bills of pains and penalties” (see text accompanying notes 142-45 *supra*), how does the milder exclusion from specified vocations become a “bill of attainder”? Solely by judicial amendment.

²⁷³ 129 U.S. 114 (1889).

²⁷⁴ *Id.* at 128.

²⁷⁵ See *Ex parte Garland*, 71 U.S. (4 Wall.) at 393 (dissenting opinion).

²⁷⁶ 170 U.S. 189 (1898).

for a *past* offense. Justice Brewer preferred the argument that this was a "qualification," brushing aside the "punishment" argument because "[t]he State is not seeking to further punish a criminal, but only to protect its citizens from physicians of bad character"²⁷⁷—a bare assertion rather than reasoned explanation of the "preference." Good character, Brewer held, may be required as a condition of practice, and the legislature "may take whatever, according to the experience of mankind, reasonably tends to prove the fact and make it a test."²⁷⁸ *Cummings* and *Garland* were distinguished because the past acts "had no bearing upon [the petitioners'] fitness to continue in their professions."²⁷⁹ But it is no less "a well recognized fact of human experience"²⁸⁰ that a person who has borne arms against his country or given aid to its enemies, to borrow from Justice Miller, "has exhibited a trait of character which . . . authorizes the court [and a fortiori the legislature] to declare him unfit to practise before it."²⁸¹ It may be urged that a once disloyal person may now be prepared loyally to serve the nation and its laws. The Court in *Hawker* rejected the analogous argument of Justice Harlan the Elder: "The offender may have become, after conviction, a new man in point of character, and so conducted himself as to win the respect of his fellow-men . . ."²⁸² For past conduct *can* leave an indelible stain on the good character that a state may require as a qualification for practicing a profession.

The deportation cases are also awkwardly accommodated with the Court's attainder doctrine. In *Fong Yue Ting v. United States*,²⁸³ the Court noted:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government . . . has determined that his continuing to reside here shall depend.²⁸⁴

²⁷⁷ *Id.* at 196.

²⁷⁸ *Id.* at 195.

²⁷⁹ *Id.* at 199 (quoting *Dent v. West Virginia*, 129 U.S. 114, 128 (1889)).

²⁸⁰ 170 U.S. at 196.

²⁸¹ *Ex parte Garland*, 71 U.S. (4 Wall.) at 393 (dissenting opinion).

²⁸² 170 U.S. at 204 (dissenting opinion).

²⁸³ 149 U.S. 698 (1893).

²⁸⁴ *Id.* at 730. See *Mahler v. Eby*, 264 U.S. 32, 39 (1924); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913).

In 1960, an alien of more than forty years' residence invoked the attainder doctrine in *Flemming v. Nestor*²⁸⁵ because he was deported in 1956 on the ground that he had been a member of the Communist Party in the 1930's. The Court held that deportation was not "punishment" but an exercise of Congress's plenary power over aliens.²⁸⁶ The power of Congress to regulate admission to the bar in federal courts is no less "plenary."²⁸⁷ When one compares the Communist stain that proved ineradicable after the lapse of twenty years with the disqualification held void in *Garland* that followed on the heels of disloyal conduct, one is struck afresh with the inadequacy of the Court's manipulation of "past" conduct.

Still another incongruity is exemplified by the Court's oscillating treatment of *Board of Governors v. Agnew*.²⁸⁸ There the challenged statute forbade any member or employee of a partnership primarily engaged in underwriting securities from serving as a director of a national bank, in order to avoid possible conflicts of interest. The Court, as Justice White later pointed out, "expressly recognized that the statute was directed to the 'probability or likelihood' that a bank director who was also a partner or employee of an underwriting firm 'may use his influence in the bank . . .'" in favor of the underwriter.²⁸⁹ This criterion was held applicable in *Douds'* labor union-Communist Party context: "Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by § 9(h) would be subject to 'tempting opportunities' to commit acts deemed harmful to the national economy."²⁹⁰ Subsequently, Chief Justice Warren attempted to distinguish *Agnew*,²⁹¹ but to borrow his own words, his were "distinctions without a difference."²⁹² Justice White's dissent in *Brown*, in which Justices

²⁸⁵ 363 U.S. 603 (1960).

²⁸⁶ *Id.* at 616.

²⁸⁷ See *Ex parte Garland*, 71 U.S. (4 Wall.) at 383-85 (dissenting opinion, Miller, J.).

²⁸⁸ 329 U.S. 441 (1947).

²⁸⁹ *United States v. Brown*, 381 U.S. at 465-66 (dissenting opinion, White, J.) (quoting *Board of Governors v. Agnew*, 329 U.S. at 447) (emphasis added by White, J.).

²⁹⁰ 329 U.S. at 392.

²⁹¹ See *United States v. Brown*, 381 U.S. at 453-55.

²⁹² *Id.* at 461. Justice White stated in his dissent:

In the *Douds* case the Court found in [the conflict-of-interest] statutes support for its conclusion that Congress could rationally draw inferences about probable conduct on the basis of political affiliations and beliefs, which it considered comparable to business affiliations. The majority in the case now before us likewise recognizes the pertinency of such statutes and, in its discussion of . . . *Agnew* . . . , strenuously—and unsuccessfully—attempts to distinguish them.

Clark, Harlan, and Stewart concurred, is closer to the mark: "If based upon 'its general knowledge of human psychology' Congress may make findings about a group including members and employees of underwriting firms which disqualify such persons from a certain office, why may not Congress on a similar basis make such a finding about members of the Communist Party?"²⁹³ Indeed, the evidence that the loyalties of American Communists are likely to run to Moscow rather than to their own government ranges far beyond conjecture as to "tempting opportunities."²⁹⁴

C. *Legitimate Classification Versus Legislative Adjudication*

It would be redundant to chart the Court's tacking in the Communist Party cases, which, to my mind, merely reflects the impact of changing personnel rather than the development of irrefragable doctrine. Instead, I shall examine a brave attempt to thrust aside the earlier cases such as *Douds*. Concurring and dissenting in that case, Justice Jackson argued that Congress, on the basis of empirical data it had gathered, "could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta."²⁹⁵ The Yale Comment recognizes that Congress may "assemble and evaluate empirical evidence as an aid in arriving at intelligent broad political judgments";²⁹⁶ but the vice of *Douds* was to apply "such a broad rule to a fairly specific group of persons."²⁹⁷ These views bear close analysis because they constitute a searching (and all too rare) probe into the factors at play, and because they are echoed in Chief Justice Warren's pronouncement in *Brown* that Congress must proceed "by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. . . . [T]he task of adjudication

Id. at 465. White went on to note a further inconsistency:

The legislative findings that sustained the legislation attacked in *Hawker* were simply that a substantial number of felons would be likely to abuse the practice of medicine because of their bad character. It is just such findings respecting the average propensities of a given class of persons to engage in particular conduct that the Court will not now permit under the Bill of Attainder Clause. Though the Court makes no attempt to distinguish the *Hawker*-type laws it apparently would save them

Id. at 469.

²⁹³ *Id.* at 467.

²⁹⁴ See, e.g., *American Communications Ass'n v. Douds*, 339 U.S. at 427 (concurring and dissenting opinion, Jackson, J.), quoted in text accompanying note 302 *infra*.

²⁹⁵ 339 U.S. at 424.

²⁹⁶ Yale Comment, *supra* note 23, at 349.

²⁹⁷ *Id.* at 350.

must be left to other tribunals.”²⁹⁸ The Yale Comment descants upon the theme: “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.”²⁹⁹ On the other hand, “the statute ‘No person afflicted with grand mal epilepsy shall drive an automobile’ is generally conceded to be permissible regulatory legislation. Yet it applies its restriction to a particular group of persons—grand mal epileptics.”³⁰⁰ This, however, is allegedly not a bill of attainder because

the judgment that grand mal epileptics are persons susceptible to fits . . . 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 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.³⁰¹

The distinction is delusory. No legislature is likely to pass a disabling statute by consulting a dictionary for “the very meaning of the words.” It would hear medical testimony as to the nature of the disease, why such “fits” should be treated differently from other “fits,” and whether the attacks are always unexpected; and it would gather statistical evidence of the correlation between automobile accidents and epilepsy, as compared with other pathological conditions. How does this “empirical judgment . . . at the general rule-making level”—a judgment derived from legislative investigations and hearings—differ from the legislative weighing process that precedes every enactment?

The evidence bearing on a conflict of interest between Communist Party membership and devotion to the interests of the United States was summarized in *Doubs* by Justice Jackson. To quote only one fragment:

²⁹⁸ 381 U.S. at 461.

²⁹⁹ Yale Comment, *supra* note 23, at 351.

³⁰⁰ *Id.* (footnotes omitted). Yet there is a problem with this type of statute: “The problem of distinguishing such statutes from bills of attainder has rarely been faced in either the case law or the literature.” *Id.* at n.129. Moreover, the Yale Comment considers the attempted distinctions inadequate. *See id.* Can it be that the “problem” is, rather, that the Court’s ill-founded attainder doctrine has been pushed too far, and can be solved only by a return to historical roots?

³⁰¹ *Id.* at 352.

The chain of command from the Kremlin to the American party . . . was unmistakably disclosed by the American Communist Party somersaulting in synchronism with shifts in the Kremlin's foreign policy. Before Munich, Soviet policy was anti-German—"anti-fascist"—and the Communists in this country were likewise. However, when Stalin concluded a nonaggression pact with Hitler and Nazi Germany and the Soviet Union became partners in the war, the Communists here did everything within their power to retard and embarrass the United States' policy of rendering aid short of war to victims of aggression by that evil partnership. When those partners again fell out and Russian policy once more became anti-German, the Communists in this country made an abrupt and fierce reversal and were unconscionable in their demands that American soldiers, whose equipment they had delayed and sabotaged, be sacrificed in a premature second front to spare Russia. American Communists, like Communists elsewhere in the world, placed Moscow's demand above every patriotic interest.³⁰²

No congressional investigation was necessary to uncover the Communist Party's slavish subservience to the Moscow party line; it could hardly escape the notice of any interested observer. Why is this not enough to support a legislative judgment that Communists should not occupy posts that might impinge on the national security?

Twelve years after adopting in *Brown* the Yale Comment's views, the Court sustained a statute applicable to only *one* individual—ex-President Nixon. The Court held in *Nixon II*: "[M]ere underinclusiveness is not fatal to the validity of a law under the Equal Protection Clause . . . , even if the law disadvantages an individual or identifiable members of a group 'For similar reasons' the mere specificity of a law does not call into play the Bill of Attainder Clause."³⁰³ In this there is no novelty. As Justice White pointed out in *Brown*, the Court "has long recognized in equal protection cases that a legislature may prefer to deal with only part of an evil. . . . '[I]f the class discriminated against is or reasonably might be considered to define those from whom the evil *mainly is to be feared*, it properly may be picked out.'"³⁰⁴ The novelty

³⁰² 339 U.S. at 427 (concurring and dissenting opinion). See generally S. VOROS, AMERICAN COMMISSAR (1961) ("inside story" by former official of American Communist Party).

³⁰³ 97 S. Ct. at 2804 n.33.

³⁰⁴ 381 U.S. at 474-75 (dissenting opinion) (quoting *Patsone v. Pennsylvania*, 232 U.S. 138, 144 (1914)) (emphasis added by White, J.). In *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955), Justice Douglas stated: "Evils in the same field may be of different

inheres rather in the claim that this constitutes adjudication.

The Yale Comment is correct, however, in pointing out that "courts have encountered endless conceptual difficulties in trying to decide whether given statutes are 'punitive.'"³⁰⁵ For example:

[I]t 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.³⁰⁶

That might also be said of statutes seeking to bar Communist Party members from crucial nerve centers. The Yale Comment goes on to say:

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, 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. . . . 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

dimensions and proportions, requiring different remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Justice Brennan held in *Nixon II*:

[Appellant] argues that *Brown* establishes that the Constitution is offended whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality. . . .

. . . His view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality.

97 S. Ct. at 2804. Brennan's comment that "the prohibition against bills of attainder . . . surely was not intended to serve as a variant of the Equal Protection Clause" (*id.*) is true, but for the reason that the latter first came into being 80 years after the attainder clause.

³⁰⁵ Yale Comment, *supra* note 23, at 355.

³⁰⁶ *Id.*

prevent legislative "punishment," but to prevent legislative trial.³⁰⁷

Yet the legislature was not bound to act "generally" rather than "specifically" in the areas of confiscation and banishment,³⁰⁸ and the Court stated in *Nixon II* that "the mere specificity of a law does not call into play the Bill of Attainder Clause,"³⁰⁹ and that Nixon "constituted a legitimate class of one."³¹⁰ If regard is given to the historical sources rather than to the shaky doctrine erected on Marshall's *Fletcher* dictum, only condemnation to death and disinheritance of the innocent heirs were withdrawn from the legislature. Such disinheritance was withdrawn from the courts as well in treason cases;³¹¹ but "legislative trial" survived against the Justices themselves in the shape of impeachment.³¹² The separation of powers, it is safe to say, was in no way associated by the Framers with the bill of attainder clause. But I would concur that the "punishment" test should be swept into the dustbin of history because it has only engendered casuistry and confusion.

CONCLUSION

In fine, I would urge a return to the common-law definition of a bill of attainder not only to simplify administration but because it is the Court's duty to give effect to the Framers' design and to desist from encroachment on the policymaking function of both the state and federal legislatures. It needs to be borne in mind, as John Norton Pomeroy pointed out, that *Cummings* and *Garland* represent

³⁰⁷ *Id.* at 356 (footnote omitted).

³⁰⁸ *See, e.g.,* *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14, 20 (1800) (Cushing, J.), *quoted in text* accompanying note 203 *supra*.

³⁰⁹ 97 S. Ct. at 2804 n.33.

³¹⁰ *Id.* at 2805.

³¹¹ *See* U.S. CONST. art. III, § 3, cl. 2, *quoted in text* accompanying note 70 *supra*.

³¹² The Yale Comment suggests that the provision limiting judgment in cases of impeachment to removal and disqualification (*see* U.S. CONST. art. I, § 3, cl. 7) may "be viewed as a grant to Congress of the power to pass one highly restricted kind of bill of attainder." Yale Comment, *supra* note 23, at 346 n.107. The clause, however, does not purport to "grant" the impeachment power, but rather to limit it to removal from office—in contrast to the English practice, whereby the House of Lords could also impose a death penalty. *See* R. BERGER, *supra* note 63, at 78-79. Furthermore, impeachment contemplates a trial (*see* U.S. CONST. art. I, § 3, cl. 6), whereas a bill of attainder does not. *See text* accompanying note 168 *supra*.

[a] ruling upon a question never before presented, made by a bare majority of the judges [in the face of a powerful dissent]; . . . neither in England nor in America would the law for the whole country be considered as definitively settled by such an adjudication; the question would still be treated as open to discussion.³¹³

The Court again split five-to-four in *United States v. Brown*, and once more, in my judgment, the dissenters, speaking through Justice White, were far more convincing than the majority. The "sharp division of the Court" in these decisions underlines the weakness of its bill of attainder doctrine.³¹⁴ And the recurring doctrinal shifts indicate that we are not dealing with eternal verities but with personal predilections that shift with changes in the Court's personnel.

³¹³ J. POMEROY, *supra* note 3, § 510, at 327-28.

³¹⁴ California Comment, *supra* note 23, at 232.