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CONSTITUTIONAL LAW—THE TELECOMMUNICATIONS ACT OF 1996: WHEN LEGISLATIVE REGULATION BECOMES UNCONSTITUTIONAL PUNISHMENT

Karey P. Pond

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INTRODUCTION

In 1974, the United States Department of Justice brought a landmark antitrust suit against the American Telephone & Telegraph Company ("AT&T").[1] It alleged that AT&T, or the Bell System, participated in a conspiracy to use its local service monopolies to disadvantage competitors in the long distance service and telecommunications equipment markets.[2] Eventually the case was settled under terms that came to be known as the AT&T Consent Decree or Modified Final Judgment ("Consent Decree").[3] The Consent Decree did not constitute evidence or an admission of the antitrust violations; however, it required AT&T to divest itself of twenty-two subsidiaries known as the Bell Operating Companies ("BOCs").[4] The BOCs were then grouped into seven regional Bell Operating Companies ("RBOCs").[5] While the BOCs maintained

1. *See* United States v. AT&T, 461 F. Supp. 1314, 1317-18 (D.D.C. 1978) (alleging violations of the Sherman Antitrust Act, 15 U.S.C. § 2, by AT&T, Western Electric Co., and Bell Telephone Laboratories, Inc.); *see also* United States v. AT&T, 427 F. Supp. 57, 58 (D.D.C. 1976) (noting that Western Electric Co. was a wholly owned subsidiary of AT&T and that Bell Telephone Laboratories, Inc. was jointly owned by AT&T and Western Electric); United States v. AT&T, No. 74-1698, 1976 WL 1321, at *1 (D.D.C. Oct. 1, 1976) (alleging that AT&T conspired with an additional twenty-three named telephone companies, of which AT&T owned some or all of the voting shares).

2. *See AT&T*, 461 F. Supp. at 1317-18 (including allegations of denying access to local monopolies, making unlawful rate adjustments, and refusing to allow competitors' telephone customers to use their own terminal equipment or connect to the AT&T network).

3. *See* United States v. AT&T, 552 F. Supp. 131, 222-34 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). Although commonly referred to as a "modified" decree, in actuality the court vacated a 1956 decree that resulted from a 1949 antitrust suit brought against AT&T. *See id.* at 143. For a discussion of the procedural history of the 1949 action see *id.* at 135-39. The government brought the 1974 suit in part because of the inadequacies of the 1956 decree in preventing AT&T from creating barriers to free competition. *See id.* at 139 n.18. The "modification" allowed the court to issue orders of compliance, modify or construe the decree, and punish violations of the decree. *See id.* at 143.

4. *See AT&T*, 552 F. Supp. at 143. The BOCs are companies that operate facilities that allow customers to complete local calls and obtain access to long distance and international networks. *See id.* at 139 n.19.

5. *See id.* at 142 n.41.

their ability to operate in local service markets, they were prohibited from operating in the long-distance service[6] and telecommunications equipment markets.[7]

The Consent Decree soon became too controversial for the district court to enforce.[8] In part to address the AT&T problem, Congress enacted the Telecommunications Act[9] in 1996 to establish a statutory scheme whereby the BOCs' entry into lines of business would be regulated by the Federal Communications Commission ("FCC"). However, a new controversy has arisen. Although the Act rescinded the Consent Decree,[10] it also contained a section entitled "Special Provisions Concerning Bell Operating Companies," which placed limits on the BOCs ability to enter the long-distance market.[11] In 1997, SBC Communications, Inc., an RBOC, filed suit against the United States and the FCC alleging that the Special Provisions were invalid as an unconstitutional bill of attainder.[12] Another RBOC made the same claim in the District of Columbia.[13]

Both circuit courts held that the Special Provisions section of

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6. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 230 n.3 (5th Cir. 1998); *see also AT&T*, 552 F. Supp. at 227. The BOCs were permitted to operate within a geographically defined "local access and transport area" or "LATA." However, when a long distance call was made, the BOC was required to direct the call to an interexchange carrier which carried the calls between LATAs or "interLATA." *See SBC Communications, Inc.*, 154 F.3d at 230 n.3.

7. *See AT&T*, 552 F. Supp. at 224. The BOCs were prohibited from manufacturing or marketing telecommunications products or customer premises equipment, as well as providing directory advertising services and information services. *See id.* at 143.

8. *See SBC Communications, Inc.*, 154 F.3d at 231 n.5 (noting that District Court Judge Harold H. Greene, who handled and monitored the AT&T matter, was often referred to by journalists and other critics as the "telecommunication's czar" because of his potential influence and power over the industry). See *infra* note 182 and accompanying text for a discussion of the controversy.

9. Telecommunications Act of 1996, Pub. L. No. 104-104, § 1(a), 110 Stat. 56 (codified in scattered sections of 47 U.S.C.). See *infra* Parts II.A and II.B for a discussion of the Telecommunications Act, its history and its effects.

10. Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(a)(1), 110 Stat. 143; *see also* United States v. Western Elec. Co., 1996 WL 255904 (D.D.C. Apr. 11, 1996) (terminating the Consent Decree, as of the date the Telecommunication Act was signed into law, February 8, 1996).

11. *See* 47 U.S.C. § 271(a) (1994 & Supp. III 1997) (providing that "[n]either a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section"); *see also id.* § 271(c) (requiring the BOC to meet specified requirements); *id.* § 271(d) (providing procedures whereby a BOC may apply for authorization to provide such services). See *infra* Part II.B for a discussion of the Telecommunications Act and its effects.

12. *See SBC Communications, Inc.*, 154 F.3d at 233. See *infra* Part II.A for a definition of bill of attainder.

13. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 60 (D.C. Cir. 1998).

the Telecommunications Act was not unconstitutional as a bill of attainder. This Note examines these findings and considers whether they are consistent with the bill of attainder prohibition in the United States Constitution. Part I of this Note examines the history of the attainder prohibition and its role in the separation of powers between the judicial and legislative branches of government and discusses the meaning and scope of the Bill of Attainder Clause as interpreted by Supreme Court decisions. Next, Part II outlines the history and purpose of the Special Provisions section of the Telecommunications Act of 1996 and the requirements it imposes on the BOCs. Part III examines the Fifth and District of Columbia Circuit Courts' application of the Bill of Attainder Clause to the Special Provisions. Finally, Part IV evaluates the Telecommunications Act's Special Provisions section and concludes that it is unconstitutional as a bill of attainder because it constitutes legislation that operates with specificity and inflicts punishment on the BOCs.

I. HISTORICAL BACKGROUND

A. *What is a Bill of Attainder?*

A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."[14] In light of the bill of attainder's infamous tradition, the framers of the Constitution were determined to include a prohibition against bills of attainder enacted by either Congress[15] or the states.[16]

The British Parliament first enacted bills of attainder in the fourteenth century.[17] The initial purpose of the bills was to ensure that the estates of dead traitors would escheat to the Crown.[18] The

14. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977). *See, e.g.*, United States v. Brown, 381 U.S. 437, 445 (1965); United States v. Lovett, 328 U.S. 303, 315-16 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866).

15. *See* U.S. CONST. art. I, § 9, cl. 3 (stating that "[n]o Bill of Attainder or ex post facto Law shall be passed"). The presence of the prohibitions against bills of attainder and ex post facto laws in the same constitutional provision has been explained by the fact that legislative punishment of an individual (a bill of attainder) was often imposed retroactively (ex post facto). *See* ZECHARIA CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, 92-93 (1956).

16. *See* U.S. CONST. art. I, § 10, cl. 1 (stating that "[n]o State shall . . . pass any Bill of Attainder, ex post facto Law").

17. *See* Note, *Bills of Attainder and the Supreme Court in 1960*--Flemming v. Nestor, 1961 WASH. U. L.Q. 402, 403.

18. *See* Michael P. Lehmann, *The Bill of Attainder Doctrine: A Survey of the De-*

person to whom the bill of attainder applied was deemed attainted with "the corruption of blood."[19] This meant that the person could not inherit or transfer his wealth to his descendants.[20] The "conviction" was legislatively determined and could occur regardless of whether the condemned behavior was previously prohibited by law.[21]

Bills of attainder were usually enacted "in times of rebellion, or gross subserviency to the [C]rown, or of violent political excitements."[22] However, bills of attainder were not reserved for those perceived as traitors or threats to the Crown, but were often generally applied to other categories of individuals such as the poor.[23] Indeed, while some bills of attainder singled out named individuals for punishment, other bills punished many individuals by designating a broad range of characteristics that applied to those individuals.[24]

While the bills usually imposed capital punishment, sometimes the punishment was less than death and the bill was called a bill of pains and penalties.[25] Punishment under a bill of pains and penalties could include banishment, deprivation of an avocation or office, or disfranchisement.[26]

Although the Constitutional Convention ultimately denounced the use of bills of attainder, American bills of attainder were commonplace before 1787 as a means of eliminating the presence of Tories in the colonies.[27] The bills, not unlike their English prede-

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cisional Law, 5 HASTINGS CONST. L.Q. 767, 772 (1978) (citing CHAFEE, *supra* note 15, at 102).

19. 4 WILLIAM BLACKSTONE, COMMENTARIES 381.

20. *Cf.* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327 (1867) (holding that a deprivation of the right to practice an avocation constitutes punishment in the Bill of Attainder context in accordance with the history of bills of attainder in England).

21. *See id.*

22. *Id.* at 323 (quoting Justice Story).

23. *See Ex parte* Law, 15 F. Cas. 3, 10 (D.C.S.D. Ga. 1866) (No. 8126) (citing an English bill of attainder that disfranchised all voters who fell below a certain yearly rental income).

24. *See Cummings*, 71 U.S. (4 Wall.) at 323-24 (referring to an English bill against the Earl of Kildare and others, which stated that "'all such persons which be or heretofore have been comforters, abettors, partakers, confederates, or adherents unto the said late earl . . . in his or their false and traitorous acts and purposes, shall in likewise stand, and be attainted, adjudged, and convicted of high treason'") (citation omitted).

25. *See Ex parte* Law, 15 F. Cas. at 9-10.

26. *See id.* Disfranchisement is "the taking away of the elective franchise (that is, the right of voting in public elections) from any citizen or class of citizens." BLACK'S LAW DICTIONARY 468 (6th. ed. 1990).

27. *See* United States v. Brown, 381 U.S. 437, 442 (1965); *see also* Flemming v. Nestor, 363 U.S. 603, 634 (1960) (Douglas, J., dissenting). Americans who favored the

cessors, banished British sympathizers as traitors, confiscated their property, and disqualified them from political offices and other professions.[28] The framers of the U.S. Constitution ultimately sought to end this practice of legislative punishment.

B. *The Separation of Powers Doctrine*

Given the history of bills of attainder in England and in the colonies under the Articles of Confederation, the framers of the U.S. Constitution sought to ensure that the bill of attainder device would not be abused by the legislative branches of the federal or state governments of the United States.[29] Alexander Hamilton and James Madison were among those who advocated for a provision in the Constitution banning bills of attainder.[30] Madison wrote that bills of attainder:

> are contrary to the first principles of the social compact, and to every principle of sound legislation. . . . Our own experience has taught us . . . that additional fences against these dangers ought not to be omitted. Very properly therefore have [sic] the Convention added this constitutional bulwark in favor of personal security and private rights . . . .[31]

Hamilton shared a similar sentiment:

> [N]othing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. . . . If the legislature can disfranchise any number of citizens at pleasure by general descriptions, . . . [t]he name of liberty applied to such a government, would be a mockery of common

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British side in the American Revolutionary War were known as Tories. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2414 (1993).

28. *See* Garner v. Board of Pub. Works, 341 U.S. 716, 735 (1951) (Douglas, J., dissenting); *see also* James Westfall Thompson, *Anti-Loyalist Legislation During the American Revolution*, 3 ILL. L. REV. 81, 147 (1908). *See, e.g.*, *Brown*, 381 U.S. at 442 n.15.

29. *See* United States v. Lovett, 328 U.S. 303, 318 (1946) ("[O]ur ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder.").

30. *See generally* THE FEDERALIST NO. 44 (James Madison), NOS. 78, 84 (Alexander Hamilton).

31. THE FEDERALIST NO. 44, at 227 (James Madison) (Garry Wills ed., 1982).

sense.[32]

Referring to the bill of attainder, Hamilton declared that the power to punish must be kept separate from the legislature.[33] Otherwise, unchecked power could present the considerable danger that "all the reservations of particular rights or privileges would amount to nothing" and there would be "no liberty."[34] Hamilton further explained that it is the province of the courts to invalidate bills of attainder when they are created because "limitations of this kind can be preserved in practice no other way than through the medium of courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void."[35]

As early as 1810, the Supreme Court addressed the importance of the separation of powers issue involved in the Bill of Attainder Clause in *Fletcher v. Peck*.[36] The Court found that not only did the framers intend to guard against "sudden and strong passions" that could influence the legislature to deprive individuals of property, but the restrictions placed on that power, including the Bill of Attainder Clause, were "founded in [that] sentiment."[37] The Court reasoned that "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."[38] Consequently, the Supreme Court has examined the constitutionality of legislation that has been alleged to single out individuals or groups for punishment under the Bill of Attainder Clause.

C. *Supreme Court Interpretation*

The United States Supreme Court has had few opportunities to interpret the Bill of Attainder Clause and thus draw the line between permissible legislation and legislative punishment. However,

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32. JOHN C. HAMILTON, HISTORY OF THE REPUBLIC OF THE UNITED STATES 34 (1859).

33. THE FEDERALIST NO. 78, at 394 (Alexander Hamilton) (Garry Wills ed., 1982).

34. *Id.*

35. *Id.*; *see also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803) (holding that it is the province of the judiciary to declare void legislative acts that are contrary to the Constitution).

36. 10 U.S. (6 Cranch) 87 (1810); *see also* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 286 (1827) (noting that the general intent of the Bill of Attainder Clause was to be "a general provision against arbitrary and tyrannical legislation over existing rights").

37. *Fletcher*, 10 U.S. (6 Cranch) at 138.

38. *Id.* at 136.

the Court has established a two-part test which must be satisfied for legislation to constitute a proscribed bill of attainder. First, the act must operate with specificity.[39] Second, the act must inflict punishment without the benefit of a judicial proceeding.[40]

1. Specificity

In England, it was not necessary for a bill of attainder to specifically refer to an individual for that individual to be attainted. Often the bills referred to one person by name and any other person who acted similarly, such as in rebellion against the Crown.[41] As a result, bills of attainder generally were directed at individuals, but could target whole classes of individuals.[42]

In the United States, however, the Bill of Attainder Clause has been invoked when "specifically designated persons or groups"[43] have been punished by a legislative act.[44] The Bill of Attainder Clause thus protects those individuals or private groups that would otherwise be "vulnerable to nonjudicial determinations of guilt."[45] Acts that have narrowly targeted named individuals[46] or have affected a broad group, such as ex-Confederates,[47] are examples of acts that the Supreme Court has identified as acts that target individuals or groups and meet the specificity requirements. Still, the specificity requirement remains to be defined in some areas, such as

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39. *See* United States v. Lovett, 328 U.S. 303, 321-23 (1946); SBC Communications, Inc. v. FCC, 154 F.3d 226, 233 (5th Cir. 1998).

40. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977).

41. *See Ex parte* Law, 15 F. Cas. 3, 8-9 (D.C.S.D. Ga. 1866) (No. 8126) (citing English bills of attainder). See *supra* notes 18, 20, 22 and accompanying text for discussion of the English origins of the bill of attainder.

42. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); see also *supra* note 24 discussing bills directed at an individual.

43. United States v. Brown, 381 U.S. 437, 447 (1965).

44. *See, e.g.,* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 513 (1989) (Stevens, J., concurring) (private citizens); *Lovett*, 328 U.S. at 315 (individuals); *Cummings*, 71 U.S. (4 Wall.) at 324 (individuals or a class of individuals).

45. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) (holding that a state cannot raise a Bill of Attainder claim for its citizens because the Clause only applies to citizens, and a state is not the *parens patriae* of its citizens).

46. *See Lovett*, 328 U.S. at 315 (finding that an appropriations bill that named three government employees, including Lovett and two others, for subversive activities and withdrew their salaries met the specificity requirement).

47. *See Cummings*, 71 U.S. (4 Wall.) at 322. The Court found that an act that targeted anyone "who has ever been in armed hostility to the United States . . . or to the government of this State; or has ever given aid, comfort, countenance, or support to persons engaged in any such hostility; or has ever . . . adhered to the enemies, foreign or domestic" was specific. *See id.* at 279 (emphasis omitted).

where a legislative act singles out a corporation for punishment.[48]

The mere fact that an individual or group has been defined in a legislative act does not mean that the Bill of Attainder Clause is implicated.[49] Congress may legislate regarding any person or group who commits certain acts or possesses certain general characteristics so long as it sets forth generally applicable rules and leaves to the courts the role of deciding who has committed those acts or possesses those characteristics.[50] On the other hand, when the legislature specifically designates an individual or group and punishes that individual or group, the law will be struck down. For example, in *United States v. Brown*,[51] the Supreme Court invalidated a law that forbade members of the Communist Party from holding positions as officers in labor unions as a means of limiting political strikes.[52] Because the statute "designate[d] in no uncertain terms the persons who possess[ed] the feared characteristic[ ] . . . [i.e.] members of the Communist Party,"[53] the statute met the specificity requirement of the Bill of Attainder Clause. By contrast, the Supreme Court dealt with another statute targeting the Communist Party a few years earlier, but found it to be constitutional since the act described the Communist Party by its activities without specifically naming it.[54]

In addition to evaluating the terms of a statute to determine whether an act operates with sufficient generality to avoid a challenge under the Bill of Attainder Clause, the Court has also considered whether the effect of an act can be avoided by the individual or group that it designates. For example, in *Communist Party of the United States v. Subversive Activities Control Board*,[55] the Court found that the statute in question operated with insufficient specificity to constitute a bill of attainder because it was entirely possible for an individual to avoid falling within the statute's broad defini-

48. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 234 n.11 (5th Cir. 1998) (suggesting that the Supreme Court has indicated in dicta that the Bill of Attainder Clause applies to corporations).

49. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471-72 (1977).

50. *See* United States v. Brown, 381 U.S. 437, 450, 454 n.29 (1965) (stating that the legislature can use shorthand phrases in place of a list of general characteristics, but the substitution must be a semantically equivalent one). See the U.S. CONST. art. I, § 8 for the list of Congress's enumerated powers.

51. 381 U.S. 437 (1965).

52. *See Brown*, 381 U.S. at 437.

53. *Id.* at 450.

54. *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

55. 367 U.S. 1 (1961).

tion by altering his activities.[56] Similarly, a statute that prohibited nonregistrants of the draft from obtaining educational financial aid was upheld in *Selective Service System v. Minnesota Public Interest Research Group*.[57] The statute allowed a thirty-day grace period in which nonregistrants could comply with registration requirements and again become eligible for aid.[58] As a result, the Court found that the individuals could avoid the act's operation and were not sufficiently specified by the act.[59] The Court thus found that a statute may designate a specific group without violating the Bill of Attainder Clause if the group is broadly defined or if its members can avoid the act by altering their activities.

Even when a statute mentions an individual by name, that alone may not be sufficient to satisfy the specificity requirement nor automatically invalidate an act as a bill of attainder.[60] In *Nixon v. Administrator of General Services*,[61] a congressional act required former President Nixon to relinquish an estimated 42 million pages of documents and 880 tape recordings in order to preserve them and make them available for judicial proceedings.[62] However, the Court found that designating Nixon by name alone did not satisfy the specificity requirement.[63] The Court reasoned that while the first section of the act dealt only with former President Nixon, the second section focused on creating a commission to study the feasibility of preserving materials of all future presidents and federal officials for their historical value.[64] Furthermore, the Court noted that presidential papers of other former presidents were already preserved in libraries and therefore did not need to be obtained.[65] The Court concluded that Nixon was classified as "a legitimate class of one,"[66] and, therefore, Congress could single him out in legisla-

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56. *See id.* at 88.

57. 468 U.S. 841, 859 (1984).

58. *See id.* at 849.

59. *See id.*

60. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 471 (1977); *Selective Serv. Sys.*, 468 U.S. at 851. *But see* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 353 (1962) (suggesting that singling out a person or specified group for the imposition of burdens is in itself indicative of punishment).

61. 443 U.S. 425 (1977).

62. *See id.* at 430.

63. *See id.* at 471-72.

64. *See id.* at 472.

65. *See id.* The Court also noted that there was "an imminent danger that the tape recordings would be destroyed," impliedly by Nixon himself. *Id.*

66. *Id.*

tion without implicating the Bill of Attainder Clause.[67]

When a legislative act operates with sufficient specificity to bring it within the Bill of Attainder Clause, the second prong of the bill of attainder test must be considered. This second prong requires that the specific individual or group targeted must have legislative punishment imposed upon it.

2. What Is Legislative Punishment?

In a broad sense, punishment may be defined as "any fine, penalty, or confinement inflicted upon a person by the authority of the law and the judgment and sentence of a court, for some crime or offense committed by him, or for his omission of a duty enjoined by law."[68] Punishment operates "to reprimand the wrongdoer [and] to deter others,"[69] but may serve other goals including retribution, rehabilitation, or prevention.[70] Regardless of the intended goal, punishment imposed upon a specified individual or group by the legislature without the benefit of a judicial trial violates the Bill of Attainder Clause. Thus, to constitute a bill of attainder, a legislative act must "inflict punishment"[71] in addition to meeting the specificity requirement.[72]

Since most legislation has adverse effects on individuals or groups, it is not enough that "the [a]ct imposes burdensome consequences"[73] to constitute punishment. Accordingly, the Supreme Court has formulated a three-part test to determine whether legis-

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67. *See id.* at 484. The Court reached this result, in part, to avoid bill of attainder challenges "whenever a law imposes undesired consequences on an individual or on a class that is not defined at a proper level of generality." *Id.* at 469-70. The Supreme Court indicated that the bill of attainder would not be implicated simply because a legislative act has a negative effect on an individual or group since the Bill of Attainder Clause "was not intended to serve as a variant of the equal protection doctrine." *Id.* at 471; *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) (stating that Congress usually acts by laws of general application, but that private bills are common and permissible so long as they do not violate the Bill of Attainder Clause).

68. BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

69. Flemming v. Nestor, 363 U.S. 603, 630 (1960) (Douglas, J., dissenting) (citing Trop v. Dulles, 356 U.S. 86, 96 (1958)).

70. *See* United States v. Brown, 381 U.S. 437, 458 (1965). One important purpose of criminal punishment is achieved through incapacitation—to "depriv[e] the party of the power to do future mischief." 4 WILLIAM BLACKSTONE, COMMENTARIES 11-12.

71. *Brown*, 381 U.S. at 456-60. *See, e.g.*, United States v. Lovett, 328 U.S. 303, 315 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 320 (1867).

72. See *supra* Part I.C.1 for a discussion of the specificity requirement.

73. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 472 (1977).

lative punishment exists in the bill of attainder context.[74] First, the "historical test" examines whether the deprivation is the kind of punishment traditionally prohibited by the Clause.[75] Next, the "functional test" examines whether the act, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[76] Finally, the third consideration is the "motivational test," which examines "whether the legislative record evinces a congressional intent to punish."[77] However, whether each part of the test establishes a requirement for punishment, or whether satisfaction of any one of the three parts is determinative of punishment by itself has not been clearly articulated.[78]

a. The historical test

Under the historical test, the Supreme Court has considered the nature of the first laws deemed to be bills of attainder.[79] This inquiry examines the nature of bills of attainder in England and in the colonies to determine what traditionally constituted punishment.[80] Such punishments have included execution, imprisonment, banishment, the confiscation of property, and bars to employment in particular fields.[81] Even if punishment was less than death, the act was termed a bill of pains and penalties and was still prohibited by the Bill of Attainder Clause.[82]

An example of one of the first bill of attainder laws was a law enacted by the State of Missouri when it ratified its constitution in 1865. The constitution contained a provision that worked to exclude ex-Confederates from political offices and other professions,

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74. *See id.* at 474-78. *See, e.g.*, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984).

75. *See Nixon*, 433 U.S. at 474.

76. *Id.* at 475-76.

77. *Id.* at 478; *see also* United States v. Lovett, 328 U.S. 303, 308-14 (1946).

78. See *supra* notes 75-77 for a discussion of the three-part test to determine whether legislative punishment exists and *infra* Part IV.C for a discussion of the three-part test's limitations.

79. *See, e.g., Selective Serv. Sys.*, 468 U.S. at 847-48; Hawker v. New York, 170 U.S. 189, 191 (1898).

80. *See Nixon*, 433 U.S. at 473-75.

81. *See id.* at 474. See *supra* note 26 and accompanying text for other examples of punishments.

82. *See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1867); *see also Ex parte* Law, 15 F. Cas. 3, 11 (D.C.S.D. Ga. 1866) (No. 8126); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (stating that "[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both").

including those of attorney, priest, or other clergy.[83] In *Cummings v. Missouri*,[84] the Supreme Court invalidated the state's constitutional provision as a bill of attainder.[85] The provision required candidates and those already holding the statutorily defined positions to take "test oath[s]"[86] professing their loyalty to the United States and swearing that they had never sympathized with or engaged in the rebellion.[87] Any person defined by the statute had the choice of taking the oath or losing his position.[88]

In *Cummings*, a Missouri priest had not taken the oath, was convicted of teaching and preaching, and was ultimately fined and imprisoned.[89] The Court noted that while it was not uncommon or unreasonable for England and France to require test oaths for office in the past, those oaths were always limited to affirmations of present beliefs.[90] Missouri, however, had enacted a "retrospective" oath that punished individuals for past acts which had "no possible relation to their fitness for those pursuits."[91] The Court acknowledged that Missouri had a legitimate interest in determining the qualifications of its offices, but an exclusion from office could not be based on an individual's past actions if there was no such relation to the individual's fitness to hold office.[92]

Thus, in one of the first significant cases regarding the Bill of Attainder Clause, the Supreme Court broadly defined what constituted punishment, holding that "[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact."[93] Such deprivations may include:

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83. *See Cummings*, 71 U.S. (4 Wall.) at 317 (noting that the Constitution referred specifically to any "office of honor [or] trust").

84. 71 U.S. (4 Wall.) 277 (1867).

85. *See id.* at 316, 332.

86. A test oath is "[a]n oath required to be taken as a criterion of the fitness of the person to fill a public or political office; but particularly an oath of fidelity and allegiance (past or present) to the established government." BLACK'S LAW DICTIONARY 1477 (6th. ed. 1990).

87. *See Cummings*, 71 U.S. (4 Wall.) at 316-17.

88. *See id.* at 317.

89. *See id.* at 316.

90. *See id.* at 318. An oath requirement is valid if it requires a party to swear to have not committed a prohibited act since the passage of that act. By contrast, a retrospective oath requires a pledge that the prohibited act was never committed and "would affect every hour of his past life." *Ex parte* Law, 15 F. Cas. 3, 14 (D.C.S.D. Ga. 1866) (No. 8126).

91. *Cummings*, 71 U.S. (4 Wall.) at 318-19.

92. *See id.* at 319.

93. *Id.* at 320.

> Disqualification from office . . . as in cases of conviction upon impeachment. . . . [or] [d]isqualification from the pursuits of a lawful avocation . . . .
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> . . . .
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> . . . [I]n the pursuit of happiness all avocations, all honors, all positions, are . . . rights . . . all equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise [sic] defined.[94]

The *Cummings* Court did not focus on whether the state could prescribe avocation qualifications, but instead focused on whether the qualifications imposed punishment, and thus constituted a bill of attainder.[95]

In *Ex parte* Garland,[96] a similar case decided in the same term, the Court examined a congressional act that exacted an oath from those who would practice law in the Supreme Court, any circuit and district courts, and the Court of Claims.[97] The Court struck down the law on the same grounds as in *Cummings*.[98] However, even at this early date, the punishment requirement was debated.[99] The dissents in both *Cummings* and *Garland* argued that legislatures have the power to establish qualification standards for political offices and the legal profession.[100] Therefore, the oaths were not con-

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94. *Id.* at 320-22.

95. *See id.* at 318-19.

96. 71 U.S. (4 Wall.) 333 (1867).

97. *See id.* at 374-75.

98. *See id.* at 380.

99. *See id.* at 382 (Miller, J., dissenting). Justice Miller was joined by four others in a dissent that applied to both *Cummings* and *Garland*. Referring to *Garland*, but "speak[ing] to principles equally applicable [to *Cummings*]," Justice Miller noted that the act could not constitute a bill of attainder because it did not "attaint the blood" of its target, rendering him unable to inherit or will his possessions; establish a conviction and sentence passed by legislative measure; exist absent a previous law requiring punishment for the "offense"; and it did not result from an investigation or determination of guilt made in the absence of the "offender" or without recognized rules of evidence. *See id.* at 383, 387-88 (Miller, J., dissenting). Significantly, the dissenters maintained that the legislative acts did not designate a person or group of persons with sufficient specificity and did not inflict punishment. *See id.* at 389-90 (Miller, J., dissenting). Rather, the acts were proper in that they served to protect the public from the future harms of ex-Confederates and the required oaths were considered "prospective in nature." *Id.* at 391 (Miller, J., dissenting). Furthermore, the dissenters argued that the mere fact that a qualification is not attainable by everyone does not make it punishment. *See id.* at 395 (Miller, J., dissenting). The act did not deprive the attorney of "an absolute right," but of "a privilege conferred by law on a person who complies with the prescribed conditions," and which depends on the continued possession of good moral character and skill. *See id.* at 384 (Miller, J., dissenting).

100. See *supra* 99 for these arguments.

trary to the Constitution.[101] Later cases would find the dissents' arguments to be valid justifications for upholding state statutes challenged, inter alia, as bills of attainder.[102]

Another type of statutory punishment that the Supreme Court has deemed to constitute punishment in a historical sense is where a regulation effectively forecloses the possibility of engaging in a particular occupation. In *United States v. Lovett*,[103] the statute at issue was an appropriations bill that provided that three individuals, who had been working for the government, would lose their compensation unless reappointed by the President.[104] The act did not expressly prohibit the named individuals from working for the government because they were thought to be "subversives";[105] according to the Court, however, it was sufficient that the act had such an effect.[106] Because the so-called "appropriations bill" affected the individuals by creating a "'perpetual exclusion' from a chosen vocation," it was found to be legislative punishment.[107]

In part because the historical test for legislative punishment by itself provides a narrow view of what constitutes punishment, and because the Supreme Court was aware of the risk of creative legislation that effectively punishes, the Court developed the second test for legislative punishment: the functional test.

b. The functional test: drawing the line between nonpunitive goals and punishment

The functional test is another means of determining whether a legislative act is punitive. This test attempts to distinguish between a permissive legislative regulation as opposed to a nonpermissive punitive action based on "the type and severity of the burdens im-

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101. See *supra* 99 for discussion of the *Cummings* and *Garland* cases.

102. *See, e.g.*, Hawker v. New York, 170 U.S. 189, 196-99 (1898); Dent v. West Virginia, 129 U.S. 114, 125-28 (1889). See *infra* Part I.C.2.b.i for a discussion of whether a legislative act is punitive under the functional test.

103. 328 U.S. 303 (1946).

104. *See id.* at 305 & n.1. Section 304 of the Urgent Deficiency Appropriations Act provided: "No part of any appropriation, allocation, or fund . . . shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett . . . ." *Id.*

105. *See id.* at 311 n.3 (defining subversive activity as "conduct intentionally destructive of or inimical to the Government of the United States").

106. *See id.* at 316-17. The act was labeled as an appropriations measure, but it named and withdrew the salaries of three United States government workers because Congress believed them guilty of subversive activities. *See id.* at 311-12.

107. *See id.* at 316 (quoting *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1867)).

posed."[108] Through its decisions, the Supreme Court has indicated that certain kinds of legislation that appear to be punitive are in fact furthering nonpunitive goals such as developing qualification standards and preventing future harms.

i. Preventing future harms

The Constitution provides Congress with an extensive list of powers that has been interpreted and limited in scope by the Supreme Court.[109] However, constitutional limits on state and federal power have not prohibited Congress or the states from legislating in the area of businesses and occupations.[110] For example, a state may legitimately prescribe qualifications for a profession, such as the medical profession, if those qualifications are related to the profession and reasonably attainable.[111] When West Virginia required its physicians to graduate from medical schools before licensure, and prohibited unlicensed doctors from continuing their practice, the statute was challenged under the Fourteenth Amendment.[112] But the Court held that a due process claim would not stand where a "deprivation . . . is . . . imposed by the State for the protection of society."[113]

Soon after, a similar New York statute was challenged as a bill of attainder in *Hawker v. New York*.[114] The statute made it a crime for those with past felony convictions to practice as physicians.[115] The Court rejected the argument that the statute constituted legislative punishment by depriving convicted felons of the opportunity to practice medicine because of their past conduct.[116] Instead, the Court was persuaded that the character of a physician was a factor necessary to determine if he was qualified; therefore, the legislation

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108. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 475 (1977).

109. *See* U.S. CONST. art. I, § 8. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995) (commerce clause); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (taxing power).

110. *See* Nebbia v. New York, 291 U.S. 502, 527-28 nn.25-27 (1934) (providing examples of various business regulations that have been within Congress's powers).

111. *See* Dent v. West Virginia, 129 U.S. 114, 122 (1889).

112. *See id.* at 121 (citing U.S. CONST. amend. XIV, § 1 which reads: "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law").

113. *Id.* at 122. The Court reasoned that "[t]he power of the State to provide for the general welfare of its people authorizes it to prescribe all such regulations as, in its judgment, will secure . . . them against the consequences of ignorance and incapacity as well as of deception and fraud." *Id.*

114. 170 U.S. 189 (1898).

115. *See id.* at 190.

116. *See id.* at 191-92.

was a permissible exercise of state power to regulate a matter of public health.[117] In a later case, the Court stated that:

> The question in each case where unpleasant consequences are brought to bear upon an individual for prior conduct, is whether the legislative aim was to punish that individual for past activity [and is therefore prohibited], or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession [and is therefore allowed].[118]

With the precedent provided by *Hawker* and *Dent*,[119] a statute could limit the availability of some professions to certain individuals through the use of qualification standards even though legislative exclusions of individuals from chosen occupations had been historically regarded as unconstitutional punishment under *Cummings*.[120] The legislature could now assert the need to establish employment restrictions in the interest of protecting society from potential harms and avoid the Bill of Attainder Clause.

However, as a result of *Hawker* and *Dent*, it became increasingly difficult to determine whether a qualification standard constituted punishment, or whether it was a legitimate legislative act created with the "intention . . . to forestall future dangerous acts."[121] In some cases, qualification standards were permitted if the legislature was operating on the rational understanding that certain individuals, with particular political or business affiliations, posed a harm to the national economy[122] or other governmental interest.[123]

In *American Communications Ass'n v. Douds*,[124] the Court found that an act that limited the ability of communists to hold offices in labor unions was not a bill of attainder. While the act provided that no labor union petitions would be considered by the National Labor Relations Board unless officers filed an affidavit with the Board swearing that they were not members of the Com-

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117. *See id.* at 193-94.

118. De Veau v. Braisted, 363 U.S. 144, 160 (1960).

119. See *supra* 111-113 and accompanying text for a discussion of *Dent*.

120. See *supra* Part I.C.2.a for a discussion of the historical test regarding bills of attainder.

121. American Communications Ass'n v. Douds, 339 U.S. 382, 414 (1950).

122. *See id.* at 392.

123. *See De Veau*, 363 U.S. at 158-59 (sustaining a state law prohibiting ex-convicts from holding positions in labor organizations that represent employment).

124. 339 U.S. 382 (1950).

munist Party,[125] the act was deemed constitutional because it was within Congress's power to eliminate the risk of political strikes in labor unions that could potentially harm commerce. The Court found that Congress made a rational determination that union officers who belonged to the Communist Party were more likely to use their power to bring about political strikes,[126] therefore concluding that the legislation was reasonably related to its goal.[127]

The Court pointed out that this case was distinct from the other bill of attainder questions it had faced since the individuals were not being punished for past actions, but were only subject to a possible loss of position because of a "substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct."[128] Even though the conclusion was based on the Communist Party's history of conduct, the Court found that the conclusion was not altered because the act was "intended to prevent future action rather than to punish past action."[129]

Although the Court upheld the statute in *Douds*, in *United States v. Brown*,[130] the Court held that a congressional amendment to the same statute that made it a crime for a recent Communist Party member to be a union officer, as opposed to merely hindering the effectiveness of a labor union with Communist officers, constituted a bill of attainder.[131] Later cases also questioned the *Douds* decision, although the case was never formally overturned.[132]

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125. *See id.* at 385-86.

126. *See id.* at 391.

127. *See id.* at 390-91. In dissent, Justice Black argued that "[N]ever before has this Court held that the Government could for any reason attaint persons for their political beliefs or affiliations. It does so today." *Id.* at 449 (Black, J., dissenting).

128. *Id.* at 413 (citing United States v. Lovett, 328 U.S. 303 (1946) and Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867), where those subject to the oaths of loyalty could never hold the positions because the question of their past loyalty would never change).

129. *See Douds*, 339 U.S. at 413. The Court further emphasized that the members were not being punished for past conduct since if they were to remove themselves from the activities of the Communist Party, they would again become eligible for union office. *See id.* at 414.

130. 381 U.S. 437 (1965).

131. *See id.* at 438-40.

132. *See* Bryson v. United States, 396 U.S. 64, 76 (1969). The petitioner in *Bryson* sought to have a conviction under the statute in question in *Douds* overturned after *Brown* was decided. *See id.* at 65-66. However, the conviction was based on his filing a fraudulent affidavit and the Court found that where the defendant has acted fraudulently, the constitutionality of the underlying statute was irrelevant. *See id.* at 68. In dissent, Justice Douglas stated, "Whatever may be said technically about any remaining vitality of the *Douds* case, it obviously belongs to a discredited regime, though, like

Nevertheless, the year after *Douds* was decided, the Supreme Court reiterated the notion that merely because Congress has considered past conduct of an individual or group when drafting legislation, it does not follow that Congress is punishing; even past (dis)loyalty may reasonably relate to the "present and future [public] trust."[133] As a result, the Court upheld a California statute that required political candidates in Los Angeles to take an oath that they had never advocated, taught, or affiliated with any organization that advocated the overthrow of the government.[134] The Court found that the limitation did not constitute punishment because it merely established qualification standards that were reasonably related to public employment.[135]

Similarly, other cases allowed the legislature to prevent perceived future harms by enacting statutes that barred aliens from certain occupations even though the Constitution generally disallowed such action under the Fourteenth Amendment.[136] In addition, proscriptions against certain lines of business were also allowed, despite bill of attainder claims, to guard against the "tempting opportunities" to commit harmful acts with which individuals might be presented.[137] For instance, a statute may legitimately be designed to deal with "the probability or likelihood" that a bank director would be tempted to use his influence at the bank to involve the bank or its customers in securities when the bank director was also an employee of a securities firm.[138] Another statute, which prohibited ex-felons from holding labor union positions, was found to be a legitimate guard against the probability that ex-felons in union positions would lead to corrupt practices by the union.[139] Thus, the Supreme Court has suggested that legislative

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Plessy v. Ferguson . . . it has never been officially overruled." *Id.* at 76 (Douglas, J. dissenting).

133. Garner v. Board of Pub. Works, 341 U.S. 716, 720 (1951).

134. *See id.*

135. *See id.* at 720, 722 (distinguishing *Cummings* and *Garland* as cases where the legislation was not intended to provide standards or qualifications for employment).

136. *See* Ohio v. Deckebach, 274 U.S. 392 (1927) (upholding an ordinance prohibiting licensure of aliens to maintain billiard halls); *see also* Truax v. Raich, 239 U.S. 33 (1915) (striking down a statute that prohibited employers from employing aliens in more than twenty percent of their workforce); Pearl Assurance Co. v. Harrington, 38 F. Supp. 411 (D. Mass.), *aff'd per curiam*, 313 U.S. 549 (1941).

137. Board of Governors v. Agnew, 329 U.S. 441, 449 (1947).

138. American Communications Ass'n v. Douds, 339 U.S. 382, 392 (1950) (citing *Board of Governors*, 329 U.S. at 447, which held that section 32 of the Banking Act of 1933 was not unconstitutional even though it prohibited partnership members in securities firms from simultaneously serving as bank directors).

139. *See* De Veau v. Braisted, 363 U.S. 144, 147 (1960) (finding state statute

punishment might not exist where Congress acted reasonably to prevent future harms.

ii. Other non punitive legislation

Additional Supreme Court opinions have emphasized other nonpunitive legislative goals when finding that a bill of attainder did not exist. For instance, in *Selective Service System v. Minnesota Public Interest Research Group*,[140] the Court found that the act in question served the purpose of encouraging males to register for the draft and more fairly allocating federal aid to those "willing to meet their responsibilities to the United States."[141] The Court has also upheld statutes requiring deportation, since deportation does not constitute punishment.[142] Rather, deportation is deemed to be a legitimate exercise of congressional power "to fix the conditions under which aliens are to be permitted to enter and remain in this country."[143] A provision of the Social Security Act was likewise upheld despite a claim that the termination of benefits to deported aliens constituted punishment without a judicial trial.[144] The sanction was deemed to be a "mere denial of a noncontractual governmental benefit."[145] The provision served the purpose of providing better administration of the Social Security Act because there was "[n]o affirmative disability or restraint . . . imposed."[146] Accordingly, the provision did not constitute unconstitutional punishment.[147] In *Nixon*, the Act under scrutiny also did not fail the functional test because Congress had a legitimate interest in securing potential evidence for a criminal trial and preserving historical

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prohibiting ex-felons from working as labor union representatives to be constitutional given the evidence that waterfront crime was "largely due to . . . [t]he presence on the waterfront of convicted felons in many influential positions").

140. 468 U.S. 841 (1984). See also *supra* 57-58 and accompanying text for a discussion of *Selective Serv. Sys. v. Minnesota Public Interest Research Group*.

141. *See id.* at 854.

142. *See* Flemming v. Nestor, 363 U.S. 603, 616 (1960); Galvan v. Press, 347 U.S. 522, 530-31 (1954); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893).

143. *Flemming*, 363 U.S. at 616 (citing *Fong Yue Ting*, 149 U.S. at 709, which defined deportation as "the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed"); *see also Galvan*, 347 U.S. at 531.

144. *See Flemming*, 363 U.S. at 613. In *Flemming*, the statute denied benefits to those who had engaged in subversive activities. *See id.* at 618 & n.10. Nestor was deported for being a Communist, and then was denied benefits under the Social Security Act. *See id.* at 605.

145. *Id.* at 617.

146. *Id.*

147. *See id.*

documents.[148]

When determining if punishment exists, the Court has considered other factors besides the presence of a nonpunitive goal, such as whether the deprivation in question is absolute or offers a means of avoiding its effect. In *American Communications Ass'n v. Douds*,[149] for example, the challenged statute required affirmations by union officers that they were not Communist Party members, but did not absolutely forbid them from holding union office if they did not make the affirmation.[150] Rather, the Act only made it more difficult for the union to remain effective if it chose to retain officers who did not comply with the statute, by limiting review by the National Labor Relations Board to only those unions with affirmations on file.[151] As a result, the legislation did not impose punishment.[152] In another case dealing with the Communist Party, the Supreme Court again refused to find a bill of attainder since the legislative sanctions were escapable.[153] Because members of the party could discontinue their practices within the group, thereby not being subject to the Act, the Court held the Act did not punish party members.[154] The Supreme Court later appeared to back away from the escapability of a statute as indicative of whether the legislation constituted punishment.[155] However, when the issue arose again, the Court returned to its position that the presence of an escape route was evidence that the statute was nonpunitive and therefore not a bill of attainder.[156]

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148. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 477-78 (1977). See *supra* Part I.C.2.b for a discussion of the functional test.

149. 339 U.S. 382 (1950). See *supra* 124-129 and accompanying text for a discussion of *Douds*.

150. *See id.* at 414 (stating that "there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit").

151. *See id.* at 390.

152. *See id.* at 413-14.

153. *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 88 (1961) (upholding the Subversive Activities Control Act of 1950 which required associations engaging in communist activities to register with the Board).

154. *See id.*

155. *See* United States v. Brown, 381 U.S. 437, 457 n.32 (1965) (stating that neither *Communist Party* nor *Douds* require "inescapability as an absolute prerequisite to a finding of attainder . . . [and that] an absolute rule would have flown in the face of explicit precedent, Cummings v. State of Missouri . . . as well as the historical background of the . . . prohibition").

156. *See* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 853 (1984). The Court found that "[a] statute that leaves open perpetually the possibility of qualifying for aid does not fall within the historical meaning of . . . punish-

Even when legislation involves some asserted legitimate goal, the restrictions may still constitute punishment.[157] Consequently, legislation does not avoid bill of attainder status merely by asserting a nonpunitive goal. Neither does the severity of the effects of an act determine whether it qualifies as punishment.[158] As a result, "each case has turned on its own highly particularized context."[159] However, in determining whether a statute is penal, a controlling factor is the "evident purpose of the legislature."[160] Thus, the motivational test has been developed to ascertain the legislature's purpose for enacting questionable legislation.

c. *The motivational test: legislative intent*

The Supreme Court has required a high standard of evidence to indicate a punitive legislative intent since "[j]udicial inquiries into Congressional motives are at best a hazardous matter, and when that inquiry seeks to go behind objective manifestations it becomes a dubious affair indeed."[161] Thus, the Court has been hesitant to strike down congressional enactments as bills of attainder without "unmistakable evidence of punitive intent."[162] Generally, the Court has been unwilling to find such strong evidence of intent.[163]

In *Nixon*, the Court found that the legislative record did not

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ment." *Id.* The Court distinguished *Cummings* and *Garland* on the grounds that in those cases one's status as an ex-Confederate was "irreversible." *Id.* at 851. In *Selective Serv. Sys.*, however, applicants could simply register for the draft to avoid the legislation's negative effects. *See id.*

157. *See Brown*, 381 U.S. at 458-60. The *Brown* Court criticized the Court in *Douds* for concluding that if an act is not purely retributive, it does not constitute punishment. *See id.* at 460.

158. *See* Flemming v. Nestor, 363 U.S. 603, 616 n.9 (1960).

159. *Id.* at 616.

160. Trop v. Dulles, 356 U.S. 86, 96 (1958).

161. *Flemming*, 363 U.S. at 617 (requiring "only the clearest proof" to establish punitive intent). *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 478-82 (1977); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 128 (1810) (stating that "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers").

162. *See* Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 856 n.15 (1984) (quoting *Flemming*, 363 U.S. at 619).

163. *See Flemming*, 363 U.S. at 618-19 (finding no bill of attainder where a denial of social security benefits to deported aliens was not based solely on the deportations, but on the grounds for the deportations); *see also Nixon*, 433 U.S. at 478. *But see Flemming*, 363 U.S. at 633 (Douglas, J., dissenting) (stating that the aim of the act was clearly to legislatively take away property on the grounds of "act[ing] in a certain way or embrac[ing] a certain ideology").

suggest punitive intent toward former President Nixon.[164] In refusing to strike down the legislation that forced Nixon to relinquish his presidential papers, the Court considered the transcripts of Senate and House Committee Reports and found that the reports failed to show punitive intent.[165] The reports instead reaffirmed the nonpunitive legislative purpose of securing presidential documents.[166]

When discerning punitive intent, the Court has considered the extent to which other less burdensome alternatives were available to achieve the same nonpunitive objectives, but were nevertheless rejected by the legislature.[167] However, even when other measures are possible, the Court usually gives deference to Congress's chosen means of regulating, so long as the decision was "rational and fairminded."[168]

Despite the obstacles to proving punitive legislative intent, there have been cases where the high evidentiary standard was met.[169] In *United States v. Lovett*,[170] for example, the Supreme Court found the requisite intent and struck down a congressional act upon evidence that included the language of the act and the circumstances of its passage.[171] The evidence in that case showed that the legislature virtually conducted its own trial of the specified individuals with a predetermined sentence.[172] In 1938, the House had created a Committee on Un-American Activities which conducted investigations and compiled lists of people whom it believed were involved in subversive activities, focusing particularly on those working for the government.[173] The head of the committee, Con-

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164. *See Nixon*, 433 U.S. at 478. The "[r]eports thus cast no aspersions on appellant's personal conduct and contain no condemnation of his behavior as meriting the infliction of punishment." *Id.* at 479.

165. *See id.* at 478-80.

166. *See id.* at 478-79.

167. *See id.* at 482-83.

168. *See id.* Nixon argued that a judicial alternative whereby the Attorney General could bring a suit if he believed that historical presidential materials fell into the hands of an unreliable custodian would achieve the same ends without implicating the Bill of Attainder Clause. *See id.* at 483. Given the former President's objections to judicial efforts to recover the documents, the Court concluded that the Congress "might well have decided that the carefully tailored law . . . would be less objectionable [to Nixon] than the alternative that he . . . appear[ed] to endorse." *Id.*

169. *See, e.g.,* United States v. Lovett, 328 U.S. 303 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867).

170. 328 U.S. 303 (1946).

171. *Id.* at 308-13.

172. *See id.*

173. *See id.* at 308.

gressman Dies, told the House that thirty-nine individuals, including the three who eventually brought a claim, were not suited to "hold a Government position" and suggested a refusal by Congress to "appropriate money for their salaries."[174] Eventually, the Appropriations Committee determined that the three employees were subversives and a bill was passed to eliminate their salaries.[175] The evidence was undeniable that Congress had decided the guilt of the individuals and constructed legislation that would in effect punish them for their subversive activities.[176] As such, the Court found that the act constituted a bill of attainder.[177] Since *Lovett*, no other bill of attainder challenge has succeeded on a finding of punitive legislative intent. In fact, no other bill of attainder challenge has been successful.

In summary, for a finding of a bill of attainder, the Supreme Court requires that an act specifically target an individual for punishment. Whether an act punishes an individual in the bill of attainder context depends on whether the act creates a restriction historically regarded as punishment, has a punitive effect, or was enacted with the intent to punish.

Recently, Congress enacted the Telecommunications Act of 1996,[178] which contains a provision that singles out the BOCs and restricts their ability to enter the long distance and telecommunications equipment markets. The BOCs have challenged the constitutionality of the Act, in part as a bill of attainder, because it specifically mentions the BOCs by name and places limits on their ability to enter lines of employment. The BOCs allege that the restrictions qualify as legislative punishment prohibited by the Bill of Attainder Clause.

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174. *Id.* at 309.

175. *See id.* at 309-12.

176. *See id.* at 309. An examination of the congressional debates revealed that members referred to the seriousness of the "charges" or "indictments," and discussed the "guilt" of the individuals. *See id.* Later, an Appropriations Committee held hearings in which the Dies Committee presented evidence against the employees, who although present, were without counsel. *See id.* at 310-11.

177. *See id.* at 316.

178. *See infra* note 179.

II. THE TELECOMMUNICATIONS ACT OF 1996[179]

A. *The History and Purpose of the Act*

The District Court for the District of Columbia initially imposed a divestiture plan on the BOCs as part of an antitrust settlement between AT&T and the United States, in the form of a consent decree.[180] The purpose of the Consent Decree's restrictions was to "sever the relationship between this local monopoly and the other, competitive segments of AT&T, and [to] . . . thus ensure . . . that the practices which allegedly have lain heavy on the telecommunications industry will not recur."[181] However, the complexities of the AT&T divestiture and technological advances in the telecommunications industry demanded that the district court monitor and repeatedly alter the requirements of the Consent Decree.[182] With controversy over the increasing need for judicial oversight of the mandates of the Consent Decree, Congress attempted to draft legislation that would resolve the inadequacies of the Consent Decree.[183] The ultimate solution was the Telecommunications Act of 1996.

An uncodified section of the Act eliminated the prohibitions imposed by the Consent Decree,[184] then reimposed restrictions in a section entitled "Special Provisions Concerning Bell Operating Companies" ("Special Provisions").[185] In effect, the Act "change[d] the administrator and specifie[d] the rules by which Judge Greene's long-running restrictions [could] be lifted."[186] When the Act was passed, Congress made it clear that its general purpose was to replace telecommunications monopolies and regula-

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179. Telecommunications Act of 1996, Pub. L. No. 104-104, § 1(a), 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

180. United States v. AT&T, 552 F. Supp. 131, 223 (D.D.C. 1982).

181. *See id.*; see also *supra* notes 3-4, 6-7 and accompanying text for a discussion of this consent decree.

182. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 231 (5th Cir. 1998).

183. *See id.* The court noted that in his role with the Consent Decree, Judge Greene had significant power to determine telecommunications policy and that prominent law reviews, newspapers, and business publications had named him the "telecommunication's czar." *Id.* at 231 & n.5. Congress was concerned that this could be considered a grant of "judicial nobility" in conflict with the Constitution, primarily, U.S. CONST. art. I, § 9, cl. 8. *Id.* at 231 & n.6.

184. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 601, 110 Stat. 143.

185. 47 U.S.C. §§ 271-276 (Supp. III 1997).

186. *SBC Communications, Inc.*, 154 F.3d at 232.

tions with competitive markets.[187] This would establish a "de-regulatory national policy framework."[188] As such, the Act would promote competition with the intended results being lower prices, greater options, and higher quality service for telecommunications customers.[189] To achieve its goals, however, the Special Provisions section placed a number of restrictions on the BOCs.

B. *The Effect of the Act Provisions*[190]

Among the general provisions of the Act is a requirement that the RBOCs, as well as other telecommunications carriers, offer nondiscriminatory access and interconnection to local competitors[191] and "negotiate in good faith with such entities."[192] In addition, the Act sets forth a Special Provisions section that addresses the BOCs specifically and establishes criteria that the BOCs must meet to demonstrate that they have allowed for competition in an area of service before they are permitted to enter a particular market.[193] The long distance market is one such market.[194]

Since the Act only requires that the BOCs meet the enumerated requirements, the Act does not exclude the BOCs from the long distance market entirely, but rather demands that the following requirements be met before they may offer long distance services.[195] First, a BOC must show that there is already a facilities-based competitor present in the market.[196] To do so, the BOC must

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187. *See* Bell Atlantic—New Jersey, Inc. v. Tate, 962 F. Supp. 608, 612 (D.N.J. 1997).

188. H.R. CONF. REP. NO. 104-458, at 113 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 124.

189. *See* H.R. REP. NO. 104-204, at 47-48 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 11.

190. *See* 47 U.S.C. §§ 271-276 (Supp. III 1997).

191. *See id.* § 251; *see also* Norman B. Beecher, *The Telecommunications Act of 1996: Tackling the Twists and Turns of Technology*, 26 COLO. LAW. 11 (1997) (discussing the ambiguities raised by the terms of the Act and their implications).

192. *Tate*, 962 F. Supp. at 613; *see also* 47 U.S.C. §§ 251(c)(1), 252 (Supp. III 1997).

193. *See* 47 U.S.C. §§ 271-276 (Supp. III 1997).

194. *See id.* § 271.

195. *See id.* § 271(a).

196. *See id.* § 271(c)(1)(A). A facilities-based competitor is defined as a provider of telephone exchange service to residential and business subscribers. *See id.* The Telecommunications Act further defines telephone exchange service as:

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equip-

have "entered into one or more binding agreements . . . approved under . . . [the Act, whereby] the [BOC] is providing access and interconnection to its [own] network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . ."[197] Furthermore, the Act entails a "competitive checklist" that the access and interconnection service provided by the BOC must comply with.[198]

Additionally, the BOCs may not manufacture or otherwise provide telecommunications or customer premises equipment unless already authorized by the FCC to provide long distance services, and even then they may do so only through a separate affiliate.[199] The Act further provides that the BOCs may not provide electronic publishing unless it is done through a separate affiliate.[200] Finally, the Special Provisions limit the BOCs from participating in alarm monitoring services. The alarm monitoring market is off limits to the BOCs until February 8, 2001, unless the BOC was already engaged in those services before November 30, 1995.[201] As for the electronic publishing market, the BOCs could not enter without meeting the statutory requirements until February 8, 2000.[202] Any BOC seeking to enter a market before the specified time was required to submit an application with the FCC certifying that it fulfilled the requirements under the Act.[203] Subsequently, the FCC could accept or deny the application.[204]

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ment, or other facilities . . . by which a subscriber can originate and terminate a telecommunications service.

Id. § 153(47).

197. *Id.* § 271(c)(1)(A).

198. *See id.* § 271(c)(2)(B)(i)-(xiv).

199. *See id.* § 273(a). The BOC is permitted to collaborate with a manufacturer of customer premises or telecommunications equipment during the design and development of such equipment. *See id.* § 273(b)(1). The BOC is also permitted to engage in research activities regarding the manufacturing of such equipment or enter royalty agreements with other manufacturers. *See id.* § 273(b)(2)(A)-(B). A separate affiliate is defined as "a corporation under common ownership or control with a Bell operating company that does not own or control a [BOC] and is not owned or controlled by a [BOC] . . . ." *Id.* § 274(i)(9).

200. *See id.* § 274(a). Electronic publishing includes "the dissemination, provision, publication, or sale [of] . . . news (including sports); entertainment (other than interactive games); business, financial, legal, consumer, or credit materials; editorials, columns, or features; advertising; photos or images; archival or research material; legal notices or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other like or similar information." *Id.* § 274(h)(1).

201. *See id.* § 275(a)(1)-(2).

202. *See id.* § 274(g)(2).

203. *See id.* § 271(d)(1).

204. *See id.* § 271(d)(3).

In 1997, the FCC denied two BOC applications for entry into restricted markets. The two companies that were denied entry, SBC Communications, Inc. and BellSouth Corp., ultimately challenged the restrictions imposed by the Special Provisions as a bill of attainder.[205]

III. THE SPECIAL PROVISIONS BEFORE THE FIFTH AND DISTRICT OF COLUMBIA CIRCUITS

In the Fifth Circuit, the Special Provisions[206] of the Telecommunications Act of 1996 were challenged as a bill of attainder by SBC Communications, Inc., ("SBC Communications"), an RBOC, and its subsidiaries.[207] SBC Communications brought the suit after the FCC, which is authorized to evaluate competition in restricted markets before BOCs may enter, denied its application to enter an Oklahoma long distance market.[208] The FCC contended that the statutory criteria under the Act had not been met.[209] In the district court, the Special Provisions were found to be unconstitutional and severable from the Act,[210] but the Fifth Circuit reversed the decision.[211]

Earlier in 1998, the United States Court of Appeals for the District of Columbia considered a similar bill of attainder challenge.[212] BellSouth Corporation ("BellSouth"),[213] like SBC Communications, had filed an application with the FCC that was denied.[214] BellSouth sought to enter the electronic publishing market, whereas SBC Communications sought to enter the long distance market.[215] Subsequently, BellSouth challenged the constitutionality of the Act's provision that focused on the electronic publishing market, specifically, § 274.[216] This section prohibits a BOC from providing electronic publishing unless the BOC acts

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205. *See, e.g.*, SBC Communications, Inc. v. FCC, 154 F.3d 266 (5th Cir. 1998); BellSouth Corp. v. FCC, 144 F.3d 58 (D.C. Cir. 1998).

206. 47 U.S.C. §§ 271-276 (Supp. III 1997). See *supra* Part II.B for a discussion of the Special Provisions section of the Telecommunications Act of 1996.

207. *See SBC Communications, Inc.*, 154 F.3d at 233.

208. *See id.*

209. *See id.* See *supra* Part II.B for a discussion of the statutory criteria.

210. *See SBC Communications, Inc.*, 154 F.3d at 233.

211. *See id.* at 247.

212. BellSouth Corp. v. FCC, 144 F.3d 58, 61 (D.C. Cir. 1998).

213. Although BellSouth is not a BOC, as an RBOC and sole shareholder of two BOCs, it had standing to bring a claim. *See id.* at 62.

214. *See id.* at 60 n.1.

215. *See id.* at 60-61.

216. *See id.*

in conjunction with a separate affiliate or joint venture.[217] Initially, the Consent Decree prohibited the BOCs from entering the "information services" market, which included electronic publishing.[218] However, in 1991, upon motion by the Department of Justice, the district court lifted these restrictions.[219] Ultimately, the Telecommunications Act reimposed some of the restrictions that had been lifted.[220]

In both cases the RBOCs alleged that the Special Provisions were unconstitutional because they singled out the BOCs and inflicted punishment by imposing restrictions on lines of business: long distance service and electronic publishing.[221] Both circuit courts nonetheless held that the Special Provisions were constitutional.[222]

A. *The Fifth Circuit Majority Opinion: A Prophylactic Measure*

In *SBC Communications, Inc. v. FCC*,[223] the United States Court of Appeals for the Fifth Circuit determined that the Special Provisions of the Telecommunications Act of 1996 did not constitute a bill of attainder.[224] The court assumed that even if the Bill of Attainder Clause was applicable to corporations, and that the Act met the specificity requirement, the terms of the Special Provisions nevertheless did not constitute punishment within the scope of the Clause.[225] To determine whether the Special Provisions constituted punishment, the court first examined the history of bills of attainder. Upon examining the historical meaning of punishment, the court determined that the *Cummings* and *Garland* cases did not stand for an absolute constitutional prohibition on bars to employment.[226] Rather, the four-vote dissents in those cases indicated that the Supreme Court came close to holding that bars to employment would be permissible if the prohibition was intended to prevent fu-

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217. 47 U.S.C. § 274(a) (1994 & Supp. III 1997).

218. *See BellSouth Corp.*, 144 F.3d at 60.

219. *See id.* (citing United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991), *aff'd*, 993 F.2d 1572 (D.C. Cir. 1993)).

220. *See id.* at 61.

221. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 233 (5th. Cir. 1998) (long distance services); *BellSouth Corp.*, 144 F.3d at 60 (electronic publishing).

222. *See SBC Communications, Inc.*, 154 F.3d at 234; *BellSouth Corp.*, 144 F.3d at 67.

223. 154 F.3d 226 (5th Cir. 1998).

224. *See id.* at 234-35.

225. *See id.* at 235.

226. *See id.* at 236-37. See *supra* Part I.C.2.a for a discussion of the Supreme Court's holdings in *Cummings* and *Garland*.

ture harmful acts.[227]

The court focused on the regulatory role of Congress, arguing that cases like *Dent* and *Hawker* eventually developed the "existence of a 'prophylactic' exception to the Bill of Attainder Clause."[228] Using language in Justice Frankfurter's dissent in *Lovett* for support, the majority found that "'[p]unishment presupposes . . . an act for which retribution is exacted.'"[229] The court described subsequent attainder cases addressed by the Supreme Court as the "Frankfurtian phase," whereby every attainder challenge was rejected at least in part because of the "prophylactic exception."[230] The court found the prophylactic exception to be consistent with the modern rule that "legislation [that] has a legitimately nonpunitive function, purpose, and structure . . . does not constitute punishment . . . even where it imposes the historically punitive sanction of barring designated individuals from engaging in certain professions."[231]

The court also found that the cases following the Frankfurtian phase suggested a trend toward a broader reading of the Bill of Attainder Clause; however, it concluded that even in the *Brown* case, the "exception" was preserved in dicta.[232] Consequently, the court found that whether a particular punishment has been historically regarded as implicating the Bill of Attainder Clause was not conclusive of whether punishment existed for purposes of the Clause.[233] The court found that so long as an act "seeks to achieve legitimate and nonpunitive ends and [is] not clearly the product of punitive intent," it is not punishment.[234]

The court found that the Special Provisions were not historically punitive since they did not permanently bar the BOCs from a

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227. *See id.* at 237.

228. *Id.* at 237-38. See *supra* Part I.C.2.b.ii regarding other nonpunitive legislation.

229. *See id.* at 238 (quoting United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., dissenting)).

230. *See id.* at 238-39 (citing Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86-88 (1961); Flemming v. Nestor, 363 U.S. 603, 617 (1960); De Veau v. Braisted, 363 U.S. 144, 160 (1960); Garner v. Board of Pub. Works, 341 U.S. 716, 722-23 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 413-14 (1950)). The court acknowledged that some of these cases were based in part on a strict historical interpretation of the bill of attainder, but that all maintained the "prophylactic exception" developed by Frankfurter. *See id.* at 239.

231. *Id.* at 241.

232. *See id.* at 239-42.

233. *See id.* at 241.

234. *Id.* at 242 (quoting Dehainaut v. Pena, 32 F.3d 1066, 1071 (7th Cir. 1994)).

line of employment.[235] Although the Fifth Circuit acknowledged that the requirements imposed were difficult for the BOCs to satisfy, it stated that compliance was not impossible.[236] Furthermore, the court determined that the prophylactic exception was satisfied by the presence of the nonpunitive goal advanced by the Special Provisions, namely, "ensur[ing] fair competition in the markets for local service, long distance, telecommunications equipment, and information services."[237] The requirements would legitimately operate to decrease the risk that the BOCs would practice anticompetitive behavior.[238]

According to the majority, the third test for punishment, the motivational test, was also not met.[239] The statutory language of the Special Provisions did not suggest punitive intent.[240] The court did not find the requisite "smoking gun" evidence in the legislative history to suggest that Congress intended to punish the BOCs for past conduct.[241] Instead, the court found only "isolated references in congressional debate to the Bell System's questionable business practices prior to the [Consent Decree], which were [only] offered as evidence of the general potential for abuse of local market power."[242]

Finally, the court was persuaded that the Special Provisions could not have been intended to be punitive in light of the role that the BOCs played in their enactment.[243] Considerable lobbying occurred by the BOCs to open the markets immediately if possible, or restrictively if necessary, in order to avoid the harsher Consent Decree terms.[244] The ultimate resolution, the Special Provisions, was "a hard-fought compromise."[245] The court found that "a legislative quid pro quo on this level simply cannot be punitive for attainder

235. *See id.* at 242-43.

236. *See id.* at 243 n.27.

237. *Id.* at 243 (noting that even the requirements imposed by the Consent Decree were not meant to be punitive).

238. *See id.* at 243-44.

239. *See id.*

240. *See id.* at 243.

241. *See id.*

242. *Id.*

243. *See id.* at 244.

244. *See id.* at 244 n.28.

245. *Id.* at 244 (noting that the information services restriction was only partially reimposed under § 274; the BOCs were immediately free to offer incidental out-of-region long distance service; and that the Act's ultimate goal was to remove all restrictions).

purposes."[246]

B. *Judge Smith's Dissenting Opinion*

The dissent in *SBC Communications* argued that the majority created the prophylactic exception on its own.[247] While the dissent agreed that the Special Provisions specifically targeted the BOCs, it found that this section also constituted an unconstitutional bill of attainder because it punished the BOCs.[248]

First, the dissent contended that the Act fell within the scope of historical punishment.[249] Since the post-Civil War era, and as recently as the Supreme Court's latest finding of unconstitutionality on attainder grounds, the Court has held and reiterated that the Bill of Attainder Clause prohibits bars to various lines of employment.[250] Because the historical punishment test was met, the dissent suggested that the court need not examine the issue any further.[251] Inquiries into the legislative purpose would only be necessary if the historical test was not met.[252]

The dissent determined that the retributive nature of an act alone is not dispositive in determining whether an act constitutes punishment.[253] The fact that the provisions have preventive goals does not mean that the result is not unconstitutional punishment.[254] In any event, the fact that Congress singled out the BOCs to the exclusion of other companies undermined Congress's asserted goal of keeping the market anti-competitive, and instead indicated that Congress made a judgment that the BOCs were likely to commit antitrust violations and therefore inflicted punishment to prevent that possibility.[255] The dissent, reasoning that an act may punish

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246. *Id.*

247. *See id.* at 249 (Smith, J., dissenting). The dissent refers to the majority opinion as "stitching together a patchwork of concurrences and dissents and by brushing aside binding Supreme Court majority opinions as 'aberrant' and 'unsensible'" and "announc[ing] the discovery of a heretofore unrecognized exception." *Id.* at 247, 249 (Smith, J., dissenting).

248. *See id.* at 248-51 (Smith, J., dissenting).

249. *See id.* at 248 (Smith, J., dissenting).

250. *See id.* (Smith, J., dissenting).

251. *See id.* at 250 (Smith, J., dissenting). See *infra* Part III.D for a discussion of Judge Sentelle's dissent in *BellSouth Corp. v. FCC*, 144 F.3d 58 (D.C. Cir. 1998).

252. *See id.* at 250 (Smith, J., dissenting) (citing Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 853-54 (1984); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 475-76 (1977)).

253. *See id.* at 250-51 (Smith, J., dissenting).

254. *See id.* (Smith, J., dissenting).

255. *See id.* at 251 (Smith, J., dissenting).

even if it is avoidable, also rejected the theory that since Congress afforded the BOCs a means of complying with the Act, the bar from employment was nonpunitive.[256] Consequently, the "prophylactic exception" is a "chimera" because legislation punishing individuals who are likely to do wrong constitutes a bill of attainder, even though it is prophylactic.[257]

Lastly, the dissent argued that the separation of powers principle underlying the Bill of Attainder Clause would be undermined unless the Special Provisions of the Act were considered a bill of attainder, since the legislature would be performing a judicial role by imposing punishment on the BOCs.[258] According to the dissent, it is irrelevant whether the BOCs played a role in enacting the bill given the significance of this doctrine.[259]

C. *The District of Columbia Circuit Majority Opinion*

Like the Fifth Circuit, the United States Court of Appeals for the District of Columbia also held that there was no bill of attainder violation.[260] First, the court assumed BellSouth had standing as a corporation to bring a bill of attainder claim.[261] However, unlike the Fifth Circuit, the court in *BellSouth* addressed the specificity requirement.[262] The court found that this requirement was met since the BOCs were specifically mentioned by name in the Special Provisions.[263] The court went on to conclude, however, that the Act did not punish the BOCs.[264]

As in *SBC Communications*, the court rejected the BOC's assertion that the restrictions constituted punishment historically forbidden by the Bill of Attainder Clause.[265] The court reasoned that the bill of attainder cases finding legislative bars from employment to be punishment were unique and could be separated into two

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256. *See id.* at 248-49 (Smith, J., dissenting) ("[T]he Bill of Attainder Clause cannot be avoided simply by inserting into the statute a means of escape.").

257. *See id.* at 251 (Smith, J., dissenting).

258. *See id.* at 252 (Smith, J., dissenting).

259. *See id.* at 253 (Smith, J., dissenting). The dissent analogized the consent of the BOCs to consent to subject-matter jurisdiction. The legislation is unenforceable irrespective of consent simply because it is a bill of attainder and Congress lacks the power to create it. *See id.* (Smith, J., dissenting).

260. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 63-67 (D.C. Cir. 1998).

261. *See id.* at 63.

262. *See id.*

263. *See id.*

264. *See id.* at 64-67.

265. *See id.* at 64.

groups.[266] First were the cases that dealt with ex-Confederates: *Cummings* and *Garland*; and second were the cases that involved Communists.[267] The common theme was that all four bills singled out specific classes of persons based on their political beliefs.[268] According to the court, business restrictions such as those imposed by § 274 of the Special Provisions could not constitute punishment in a historical sense because the BOCs are not analogous to ex-Confederates or members of the Communist Party, who were singled out for their political beliefs.[269]

Furthermore, any claim of historical punishment was undermined by the fact that § 274 did not create a complete bar from electronic publishing.[270] Rather, it only required BellSouth to restructure its method of entering the market by using a separate affiliate.[271] The court found that such restructuring is not a sufficient restriction to rise to the level of a traditional restraint on employment.[272]

According to the *BellSouth* court, the second prong of the punishment test, the functional test, was the most important, because it operates to prevent Congress from devising methods of legislative punishment that have not been deemed to be punishment in a historical sense.[273] In addition, the functional test allows a court to conclude that an act, despite a historic classification as punishment, is not violative of the Bill of Attainder Clause given its nonpunitive goals.[274]

The court determined that § 274, despite its specificity, was "a rather conventional response to commonly perceived risks of anticompetitive behavior."[275] In fact, the court could find no authority

266. *See id.*

267. *See id.*

268. *See id.* at 64-65; *see also* Tim Sloan, *Creating Better Incentives Through Regulation: Section 271 of the Communications Act of 1934 and the Promotion of Local Exchange Competition*, 50 FED. COMM. L.J. 309, 321 (1998) (noting that the Bill of Attainder Clause seems "intended to protect individuals and groups from being singled out for punishment because of their beliefs or political affiliations"); Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475 (1984) (arguing for a restructuring of the Bill of Attainder inquiry to recognize the Clause's purpose of protecting against punishment based on one's political activity or belief).

269. *See BellSouth Corp.*, 144 F.3d at 65.

270. *See id.*

271. *See id.*

272. *See id.*

273. *See id.*

274. *See id.*

275. *Id.*

that required it to consider specificity as part of its punishment analysis.[276] In addition, the court found that BellSouth's assertion of punitive purpose was undermined by § 274's location in a larger act with a nonpunitive goal of promoting a competitive telecommunications market.[277]

The court also rejected the view that Congress did not have a rational reason for imposing § 274 other than to punish.[278] Instead, it was likely that Congress, looking at the same evidence that compelled the district court to lift the information services ban, had concluded that the BOCs' ability to monopolize the electronic publishing market had to be limited.[279] The court also gave weight to the fact that the Special Provisions section was not as severe as the restrictions formerly placed on the BOCs by the Consent Decree in concluding that the Act did not have a punitive purpose.[280] The court contended that it was not applying a rational basis test to the attainder claim to determine congressional purpose.[281] Instead, the court required a rationalization that was "not merely reasonable, but nonpunitive."[282] The court was also not persuaded by the argument that § 274 was punitive in nature because it did not apply equally to all local exchange carriers.[283] The court reasoned that the singling out of the BOCs from all carriers could have been Congress's response to the BOCs' pervasiveness in the local service markets, which created a greater risk of anticompetitive behavior.[284]

Finally, the court briefly dealt with the third punishment test and found that it also was not met.[285] In order for the legislative intent test to be satisfied, BellSouth needed to show "unmistakable

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276. *See id.* at 64.

277. *See id.* at 66.

278. *See id.*

279. *See id.*

280. *See id.* at 66 (noting that section 274 only applies to electronic publishing and terminates in five years, whereas the Decree was broader and could last indefinitely, and that the Special Provisions only require restructuring of the BOCs before entering the markets, not an absolute exclusion from the markets).

281. *See id.* at 66-67.

282. *Id.* Under the rational basis test, the most lenient standard of review, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

283. *See BellSouth Corp.*, 144 F.3d at 67.

284. *See id.*

285. *See id.*

evidence of punitive intent."[286] According to the court, the "few scattered remarks referring to anticompetitive abuses allegedly committed by the BOCs in the past" could not establish the requisite legislative intent.[287]

D. *Judge Sentelle's Dissenting Opinion*

Like the Fifth Circuit dissent, the dissent in *BellSouth* found that the Special Provisions' § 274 constituted legislative punishment and therefore was unconstitutional as a bill of attainder.[288]

The dissent first argued that little more than specificity is needed to constitute punishment.[289] Still, even if specificity alone was not enough to create a bill of attainder, the dissent argued that a preliminary finding of historical punishment in addition to the specificity of the Act should be sufficient to conclude that the Act is unconstitutional.[290] The dissent found that, in accordance with Supreme Court precedent, legislative bars from employment constituted prohibited legislative punishment under the historical test.[291]

Addressing the second prong of the punishment test, which determines whether a nonpunitive legislative purpose exists, the dissent again took into account the specificity of the Act, since according to Judge Sentelle, specificity is indicative of a punitive purpose.[292] In fact, if it were not for the unique holding in *Nixon*, where the former President was found to constitute a legitimate class of one, it would be unnecessary to engage in a punishment analysis in this case because the mere "imposition of a burden solely on a class of individuals defined by name rather than by characteristic . . . on its face bespeaks an intent to punish . . . ."[293] According to Judge Sentelle, since the BOCs were specifically named in the Act, to the exclusion of other similarly situated companies, it could be inferred that the Act was designed to punish the BOCs for

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286. *Id.* (quoting Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 855-56 n.15 (1984) (quoting Flemming v. Nestor, 363 U.S. 603, 619 (1960))).

287. *Id.*

288. *See id.* at 71-74 (Sentelle, J., dissenting).

289. *See id.* at 72 (Sentelle, J., dissenting).

290. *See id.* at 71-73 (Sentelle, J., dissenting).

291. *See id.* at 72 (Sentelle, J., dissenting). The court determined that legislative bars to employment were the most common kind of statute struck down by the Supreme Court as bills of attainder. *See id.* at 72-73 (Sentelle, J., dissenting).

292. *See id.* at 73 (Sentelle, J., dissenting).

293. *Id.* at 72 (Sentelle, J., dissenting).

their past behavior.[294] As a result, the Act failed the second prong of the test despite the existence of any asserted nonpunitive goal.[295] Instead of naming the BOCs, Judge Sentelle suggested that Congress should have defined its focus in general terms to include "the characteristics of local exchange carriers that create the risks of anticompetitive behavior."[296] The Act also constituted punishment regarding the information services provisions because it presented a reimposition of restrictions that had already been lifted under the regime of the Consent Decree.[297]

Finally, the *BellSouth* dissent considered the motivational factor, which it regarded as the "least important" factor.[298] Nevertheless, the dissent took a broad approach to determine legislative intent and found that the legislative record suggested that Congress acted with the requisite intent to punish the BOCs.[299] Although remarks made during the Telecommunications Act's enactment were not alone evidence of punitive intent,[300] a congressional motive to punish could be discerned when the remarks were considered in light of the Act's specificity and its "timing and apparent triggering."[301] Both the *SBC Communications* and *BellSouth* dissents contained strong arguments that viewed the restrictions imposed by the Special Provisions as unconstitutional under the Bill of Attainder Clause. Ultimately, however, both the Fifth Circuit and the District of Columbia Circuit held that the Special Provisions and § 274 of those provisions are not violative of the Bill of Attainder Clause.

IV. THE SPECIAL PROVISIONS CONSTITUTE A BILL OF ATTAINDER

There are three potential obstacles to finding that the Special Provisions section of the Telecommunications Act of 1996 constitutes an unconstitutional bill of attainder: (1) corporate standing,

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294. *See id.* at 73 (Sentelle, J., dissenting).

295. *See id.* (Sentelle, J., dissenting).

296. *Id.* (Sentelle, J., dissenting). It should be noted that the Special Provisions do not apply to other local exchange carriers such as GTE Corporation and Southern New England Telephone, even though GTE was subject to a less restrictive consent decree prior to the Act. *See id.* at 67 & n.9.

297. *See id.* at 73 (Sentelle, J., dissenting); SBC Communications, Inc. v. FCC, 154 F.3d 226, 232 (5th Cir. 1998).

298. *See BellSouth Corp.*, 144 F.3d at 73 (Sentelle, J., dissenting).

299. *See id.* (Sentelle, J., dissenting).

300. *See id.* (Sentelle, J., dissenting).

301. *Id.* (Sentelle, J., dissenting).

(2) specificity, and (3) punishment. The first two are easily satisfied. Indeed, the only serious issue is whether the Special Provisions section constitutes punishment in the Bill of Attainder context.

A. *A Corporation Has the Required Standing to Invoke the Bill of Attainder Clause*

The Supreme Court has never ruled on whether a corporation has standing to assert a Bill of Attainder claim.[302] However, it is likely that a corporation would have the requisite standing.[303] Not only does recent dicta suggest that the Bill of Attainder Clause's protections would extend to corporations,[304] but the Supreme Court has consistently included corporations within the scope of other constitutional protections.[305]

A corporation is "an artificial being, invisible, intangible, and existing only in contemplation of law."[306] Thus, whether a corporation is entitled to the protection of a constitutional guarantee depends on the nature of the guarantee at issue.[307] Specifically, purely personal guarantees are unavailable to a corporation because the "'historic function' of . . . [such] guarantee[s] has been limited to the protection of individuals."[308] Whether a guarantee is "purely personal" turns on "the nature, history, and purpose of the

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302. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 234 n.11 (5th Cir. 1998).

303. *See id.*; BellSouth Corp. v. FCC, 144 F.3d 58, 63 (D.C. Cir. 1998).

304. *See SBC Communications, Inc.*, 154 F.3d at 234 & n.11 (citing Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995), which suggested that the Bill of Attainder Clause is implicated when laws affect "a single individual or firm"); *see also* George Campbell Painting Corp. v. Reid, 392 U.S. 286, 290 (1968) (Douglas, J., dissenting) (stating that when a law "blacklists this family corporation," it has the same effect as a bill of attainder).

305. Indeed, as early as 1819 the Supreme Court recognized that corporations have constitutionally protected contract rights and that corporate franchises can only be forfeited by trial and judgement. *See, e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819). For a list of other cases in which the Court has allowed corporations to assert constitutional protections see *infra* note 312.

The Court has also criticized the British Parliament for operating on the theory that it was "omnipotent," and could therefore exercise "extraordinary power" to create and destroy corporations. *See* Farrington v. Tennessee, 95 U.S. 679, 684 (1877). The Special Provisions do not threaten to destroy the BOCs; however, if allowed, they would constitute an unchecked legislative power that could lead to more serious deprivations with the potential to destroy corporations in the future.

306. *Woodward*, 17 U.S. (4 Wheat.) at 636.

307. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

308. *Id.* at 778 n.14 (citing United States v. White, 322 U.S. 694, 698-701 (1944)).

particular constitutional provision."[309]

However, in *First National Bank of Boston v. Bellotti*,[310] the Supreme Court stated that this analysis does not leave the government "free to define the rights of [corporations] without constitutional limit. Otherwise, corporations could be denied the protection of all constitutional guarantees . . . ."[311] Consequently, many constitutional guarantees have been afforded to corporations.[312]

At least two Supreme Court Justices have suggested that a constitutional provision may apply to a corporation notwithstanding an extensive history as a prohibition applicable to individuals. In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*,[313] the Supreme Court held that the Eighth Amendment prohibition against excessive fines does not apply between private parties, and declined to consider whether the constitutional provision is also applicable to corporations.[314] However, Justices O'Connor and Stevens, concurring in part and dissenting in part, addressed the corporate standing issue and found that a corporation could invoke the Excessive Fines Clause of the Eighth Amendment.[315] Their opinion indicates that if the Supreme Court were to consider the applicability of a constitutional provision to a corporation, more than the mere historical fact that a constitutional provision has been used primarily for individual protection may be required to find that the provision is a "purely personal" guarantee.

Justices O'Connor and Stevens discussed the history of the Excessive Fines Clause at length (which parallels the history of the Bill of Attainder Clause) as a limitation on the government's ability to

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309. *Id.*

310. 435 U.S. 765 (1978).

311. *Id.* at 778 n.14.

312. *See, e.g.*, Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 (1985) (equal protection); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (due process); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) (searches and seizures); United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) (double jeopardy); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (freedom of speech). *But see, e.g.*, George Campbell Painting Corp. v. Reid, 392 U.S. 286, 288-89 (1968) (Douglas, J., dissenting) (finding that the Fifth Amendment privilege against self-incrimination cannot be invoked by a corporation (quoting United States v. White, 322 U.S. 694, 698-99 (1944))); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950) (finding no right to privacy).

313. 492 U.S. 257 (1989).

314. *See id.* at 276 n.22.

315. *See id.* at 284-85 (O'Connor, J., concurring in part and dissenting in part).

punish and deter the conduct of *individuals*.[316] Still, Justices O'Connor and Stevens maintained that a corporation should be entitled to claim the constitutional protection at issue in part because a corporate entity would be capable of paying an excessive monetary fine (as opposed to, for example, remaining silent under the Fifth Amendment).[317]

Likewise, in the Bill of Attainder context, a corporation would be capable of being punished, at least where the punishment consists of a fine or ban from a line of employment. Additional Supreme Court decisions regarding the applicability of constitutional provisions to corporations also suggests that the Court is not concerned with who or what the provisions historically applied to.[318] Rather, the Court is concerned with the historical *purpose* of the provision and whether corporate protection serves that purpose.[319]

Furthermore, because the Bill of Attainder Clause is a "safeguard against legislative exercise of the judicial function[,] or more simply—trial by legislature," and corporations are subject to criminal law, it is only natural that the prohibition against legislative punishments be applicable to corporations.[320] Thus, whether the Bill of Attainder Clause provides a protection that is historically personal in nature is beyond the scope of this Note, it is likely that the Clause would be applicable to corporations and could be invoked by the BOCs.

B. *The Special Provisions Operate with Unprecedented Specificity*

The first prong of the Bill of Atainder inquiry requires that an act operate with specificity.[321] Undoubtedly, the Telecommunications Act of 1996 singles out the BOCs. It does so in two ways.

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316. *See id.* at 286-97 (O'Connor, J., concurring in part and dissenting in part) (discussing the history of the Excessive Fines Clause).

317. *See id.* at 285 (O'Connor, J., concurring in part and dissenting in part).

318. *See, e.g.,* Pacific Gas and Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 8 (1986) (emphasizing that "[c]orporations . . . like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas'" that the First Amendment is designed to protect, and thus, are entitled to First Amendment protection (quoting First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978))).

319. *See id.*

320. *See* SBC Communications, Inc. v. FCC, 981 F. Supp. 996, 1003 n.4 (N.D. Tex. 1997) (quoting United States v. Brown, 381 U.S. 437, 442 (1965) (alteration in original)), *rev'd*, 154 F.3d 226 (5th Cir. 1998).

321. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468-72 (1977).

First, the statutory language of the Act targets the BOCs by naming them generally.[322] The relevant sections are entitled: "Special Provisions Concerning Bell Operating Companies."[323] The Act also targets the BOCs with specificity by naming each company individually.[324] Such specificity is virtually unprecedented.[325]

Still, the specific naming of an individual or entity by an act alone does not necessarily satisfy the specificity requirement.[326] In *Nixon*, the Court provided that the Bill of Attainder Clause "was not intended to serve as a variant of the equal protection doctrine, invalidating every Act . . . that legislatively burdens some persons or groups but not all other plausible individuals."[327] As such, a legislative act could single out an individual if the "focus of the enactment can be fairly and rationally understood" as requiring such specificity.[328]

In *Nixon*, the nature of the act demonstrated that *only* former President Nixon possessed materials that were the focus of the legislation.[329] However, in the case of the Telecommunications Act of 1996, numerous other corporations also pose a risk of anticompetitive behaviors yet are not included in the terms of the Act's Special

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322. *See* 47 U.S.C. §§ 271-276 (Supp. III 1997).

323. *Id.*

324. *See id.* § 153. This section provides that:

> The term 'Bell operating company' (A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, US West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company . . . .

Id. § 153(4).

325. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 71 (D.C. Cir. 1998) (Sentelle, J., dissenting).

326. *See Nixon*, 433 U.S. at 471-72. *See generally* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 349-54 (1962) (arguing that when empirical evidence is necessary to decide whether a broad rule applies to specific persons, then such a decision cannot be mandated through legislation; however, when the judgment is definitional, more specific legislation is permissible).

327. *Nixon*, 433 U.S. at 471 (footnote omitted).

328. *Id.* at 472.

329. *See id.* See *supra* Part I.C.1 for a discussion of *Nixon*.

Provisions section.[330]

Accordingly, given the likelihood that the Bill of Attainder Clause is available to corporations and that the Act operates with unprecedented specificity, the primary obstacle to the BOCs' claim that the Telecommunications Act's Special Provisions section is a bill of attainder depends on the definition of punishment.

C. *The Three-Part Test for Punishment and Its Limitations*

The Supreme Court has articulated a three-part punishment analysis for bill of attainder purposes.[331] The first test asks whether the legislation in question has been historically regarded as punishment.[332] The second test considers whether the legislation is "punitive."[333] The third test examines whether the legislature intended to punish a specified group or individual.[334] However, in part because the Bill of Attainder Clause has rarely been litigated, and in part because the significance of each prong has never been sufficiently articulated, the meaning of punishment in the bill of attainder context remains unclear.

1. The Historical Test

For bill of attainder purposes, the Supreme Court has repeatedly examined whether an alleged punishment is punishment in a historical sense.[335] Legislative acts that impose death, banishment, imprisonment, or bans on various lines of employment historically have been prohibited by the Bill of Attainder Clause.[336] The limitations on the BOCs entering long distance and communications equipment markets basically exclude the BOCs from lines of business and therefore should be considered historically prohibited.[337]

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330. *See* SBC Communications, Inc. v. FCC, 981 F. Supp. 996, 1001 (N.D. Tex. 1997) (noting that there are hundreds of local exchange carriers and several sizeable local companies that are wholly unaffiliated with the BOCs), *rev'd*, 154 F.3d 226 (5th Cir. 1998).

331. See *supra* Part I.C.2 for a discussion of the development and requirement of each prong of the test.

332. See *supra* Part I.C.2.a for a discussion of the first test.

333. See *supra* Part I.C.2.b for a discussion of the second test.

334. See *supra* Part I.C.2.c for a discussion of the third test.

335. *See, e.g.*, Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 852 (1984); Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 473 (1977).

336. *See, e.g., Nixon*, 433 U.S. at 474-75 (citing United States v. Brown, 381 U.S. 437 (1965); United States v. Lovett, 328 U.S. 303 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867)).

337. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 251 (5th Cir. 1998)

The historical test may be regarded as a preliminary bill of attainder inquiry. When satisfied, the test provides an immediate red flag that an act of Congress is inflicting punishment. The test is effective because it defines punishment in terms of the methods by which the legislature, both here and in England, had traditionally condemned individuals or groups for their past actions. Legislated banishment, imprisonment, and bans from lines of employment have traditionally constituted unconstitutional legislative punishment.

However, this inquiry is not effective solely because the particular *type* of punishment has been historically regarded as contrary to the Bill of Attainder Clause. Rather, the test is effective because it is a simplified means of determining if the underlying objective of the bill of attainder prohibition, the separation of the legislative and judicial branches of government, is compromised. This fundamental separation of powers objective has been asserted from the time of Hamilton and has persisted in the relevant Supreme Court decisions.[338] Given the significance of the separation of powers doctrine, the historical inquiry should not be easily dismissed. However, both the *SBC Communications* and *BellSouth* majorities have disregarded the importance of the historical test.[339] The framers would not have intended for the definition of punishment to be interpreted so narrowly.[340] The historical punishment test is an effective means of ensuring that the legislature has not infringed upon the judiciary's duties.[341]

Still, the historical test is not determinative of punishment. First, the historical test is under-inclusive. An act may constitute punishment even though it has not been historically regarded as such because a creative legislature can always draft legislation that falls outside the category of traditional historical punishments, yet

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(Smith, J., dissenting); BellSouth Corp. v. FCC, 144 F.3d 58, 64 (D.C. Cir. 1998) (Sentelle, J., dissenting).

338. *See SBC Communications, Inc.*, 154 F.3d at 245-46; *see also* THE FEDERALIST NO. 78 (Alexander Hamilton), NO. 44 (James Madison). *See, e.g.*, *Brown*, 381 U.S. at 443-46.

339. See *supra* Parts III.A and III.C, respectively, for a discussion of how these majorities have avoided the historical test.

340. *See Brown*, 381 U.S. at 442 (stating that "[w]hile history thus provides some guidelines . . . the proper scope of the Bill of Attainder Clause and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate").

341. *See id.* at 442, 443-46 ("[T]he Bill of Attainder Clause was intended . . . as . . . a general safeguard against legislative exercise of the judicial function or more simply-trial by legislature.").

nonetheless punishes a specified individual or group.[342] In the words of Madison, the people of America "have seen with regret and with indignation, that sudden changes and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprizing [sic] and influential speculators; and snares to the more industrious and less informed part of the community."[343] As a result, the historical punishment test alone cannot address the risk of legislative infringements on the judiciary.

Secondly, the historical test can only be one step of the punishment analysis since a restriction that is historically regarded as punishment is not automatically violative of the Bill of Attainder Clause. For example, in *Hawker v. New York*[344] and *Dent v. West Virginia*,[345] the Supreme Court held that qualification standards that operate to exclude certain individuals from certain occupations do not constitute legislative punishment when the qualifications are reasonably related to the occupations.[346] To limit the risk of creative punishment and avoid narrowing legislative regulatory powers, the Court has defined the Bill of Attainder more broadly than just the historical sense.[347]

Years after *Hawker* and *Dent*, the Supreme Court developed a test of punishment that might better identify when a legislative act constitutes punishment: the functional test.[348] For the Bill of Attainder Clause to remain effective as an additional check to secure the balance of powers between the legislature and the judiciary, the "functional test" for punishment must also be considered.

2. The Not-So-Functional Functional Test

Virtually every bill of attainder case that has come before the Supreme Court has ultimately, if not explicitly, attempted to make a distinction between permissible preventive regulation and uncon-

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342. *See SBC Communications, Inc.*, 154 F.3d at 250 (Smith, J., dissenting).

343. THE FEDERALIST NO. 44, at 227 (James Madison) (Garry Wills ed., 1982).

344. 170 U.S. 189 (1898).

345. 129 U.S. 114 (1889).

346. See *supra* Part I.C.2.b.i for a discussion of *Hawker* and *Dent*.

347. *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (stating that a bill of attainder "affect[s] the life of an individual, or may confiscate his property, or may do both"); *see also* United States v. Brown, 381 U.S. 437, 447 (1965) (stating that the Bill of Attainder Clause should be "read in light of the evil the Framers had sought to bar").

348. See *infra* note 352 and accompanying text for a description of the functional test.

stitutional legislative punishment.[349] However, members of the Court have disagreed as to the nature of the distinction. For example, Justice Frankfurter opined that punishment, for purposes of the Bill of Attainder Clause, requires an act to be wholly retributive to be unconstitutional.[350] The *Brown* Court, on the other hand, stated that punishment could have additional purposes aside from retribution, such as deterrence or rehabilitation, and still fall within the scope of the Bill of Attainder Clause.[351]

The functional test is an attempt to determine whether challenged legislation can reasonably be said to further nonpunitive purposes when viewed in terms of the type and severity of the burdens imposed.[352] Of the three tests for punishment, this test most effectively addresses the issue at the core of a bill of attainder claim—whether the legislative act is punitive. This test does not attempt to ascertain whether Congress has a good reason to punish, since the separation of powers doctrine clearly prohibits Congress from legislating punishment.[353] Once it has been determined that Congress has punished, the inquiry should end.

The majorities in *SBC Communications* and *BellSouth* suggested that legislative punishment is permissible so long as Congress legislates within the "prophylactic exception."[354] According to their reasoning, if Congress attempted to prevent a future harm through the use of an employment ban, the ban would be allowed regardless of its specificity. However, the prevention of future harms does not provide an *exception* to the rule that specific legislative punishment is unconstitutional. If cases like *Hawker* and *Dent* represent an exception, then specific legislation that punishes would be permissible so long as it is also preventive. This result poses two problems.

First, the majorities' conclusions undermine the separation of

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349. *See, e.g., Brown*, 381 U.S. at 458-60; United States v. Lovett, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring).

350. *See Lovett*, 328 U.S. at 324.

351. *See Brown*, 381 U.S. at 458-60.

352. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 475-76 (1977); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); Trop v. Dulles, 356 U.S. 86, 96-97 (1958); Hawker v. New York, 170 U.S. 189, 193-94 (1898); Dent v. West Virginia, 129 U.S. 114, 128 (1889); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319-20 (1867).

353. *See Brown*, 381 U.S. at 447. See *supra* Part I.B for a discussion of the separation of powers doctrine.

354. See *supra* Part III.A and III.C, respectively, for a discussion of the courts' application of the "prophylactic exception."

powers doctrine because the legislature, instead of the courts, would be making a determination of guilt and imposing punishment.[355] Secondly, in *United States v. Brown*,[356] the Court held that the assertion of a legitimate governmental interest alone does not remove an act from the reach of the Bill of Attainder Clause.[357] Because punishment often has the dual function of retribution *and* prevention, preventive aspects of a legislative act cannot save it from bill of attainder status.[358] The Court stressed the significance of the specificity of an act, regardless of whether it purports to prevent future harms, because Congress could otherwise avoid the Bill of Attainder Clause by simply asserting a preventive goal.[359] The legislature can always hypothecate an acceptable basis for legislation. Indeed, *SBC Communications* is a prime example of where "the punishment comes cloaked in the mantle of prophylactic economic regulation."[360]

Congress cannot single out an individual or group when it creates a standard of conduct to meet preventive goals if the legislation operates to punish that individual or group.[361] Still, Congress may achieve preventive goals if in enacting legislation it relies upon the "general knowledge of human psychology" and reaches all men.[362] Therefore, the mere prevention of future harms is not an exception to otherwise unconstitutional legislative punishment. The goal of preventing future harms has only been an acceptable explanation for an alleged bill of attainder when an act operates with a generally applicable definition.[363] This can only be done by Congress when the rule applied is a "rule of universal application."[364]

Rather than establishing an exception to the Bill of Attainder

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355. See *supra* Part I.B for a discussion of the separation of powers doctrine in the context of the Bill of Attainder Clause. *See also Brown*, 381 U.S. 437 at 442-46.

356. 381 U.S. 437 (1965).

357. *See id.* at 458-61.

358. *See id.*

359. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 250 (5th. Cir. 1998) (Smith, J., dissenting).

360. *Id.* at 253 (Smith, J., dissenting).

361. *See Brown*, 381 U.S. at 447.

362. *Id.* at 454.

363. *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 88 (1961) (determining that the language of the act described "a class of activity" and not the Communist Party itself or its members); Hawker v. New York, 170 U.S. 189, 197 (1898) (finding that the description of "ex-felons" was permissible because it was in the legislature's power "to prescribe a rule of general application based upon a state of things which is ordinarily evidence of the ultimate fact sought to be established").

364. *Hawker*, 170 U.S. at 197.

Clause, *Hawker* and *Dent* exemplify the Court's first attempts to distinguish between legislation that punishes and permissible preventive regulation. In those cases, the Court concluded that absent other evidence, reasonable qualification standards do not constitute punishment and thus are not unconstitutional.[365]

3. The Legislative Purpose

The third test for punishment is the legislative intent test.[366] This test correctly assumes that a legislatively created restriction or requirement is more likely to constitute punishment if the legislature's purpose was to punish. However, the effectiveness of the third test for determining whether a statute punishes is questionable.[367] An analysis of congressional motive in the case of the BOCs is a good example of why the effectiveness is questionable. The legislative history of the Act does not include remarks indicating that the Special Provisions section was established to punish the BOCs, but rather, indicates that the legislature acted with a nonpunitive goal.[368] The days of obvious improper legislative intent, such as in *Lovett*,[369] may be long gone. To the extent that the American public is allowed an inside view of its legislatures and is kept abreast of the passage of new laws, it is unlikely that we would see the kind of remarks today that the majority requires in order to find a bill of attainder. Theoretically, Congress could mask the punitive nature of an act by avoiding negative remarks and articulating popular preventive goals. Consequently, a determination of legislative intent should not be based solely on the absence of congressional remarks. If legislative intent is to be inquired into, weight should also be given to the circumstances surrounding the enactment of a law, such as its timing and effect.[370]

D. *A Proposed Test for Punishment Under the Bill of Attainder Clause*

Neither the historical test nor the legislative purpose test by

365. See *supra* Part I.C.2.b.i for a discussion of *Hawker* and *Dent*.

366. *See, e.g.*, Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 478 (1977).

367. *See, e.g.*, Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 890 (D.C. Cir. 1992) ("At its best, legislative history is an undependable guide to the meaning of a statute.").

368. See *supra* Parts III.A and III.C for a discussion of how the *SBC Communications* and *BellSouth* courts interpreted the legislative history of the act.

369. See *supra* notes 103-104 and accompanying text for a discussion of *Lovett*.

370. *See* BellSouth Corp. v. FCC, 144 F.3d 58, 73 (D.C. Cir. 1998) (Sentelle, J., dissenting).

itself is sufficient to evaluate whether a legislative act constitutes a bill of attainder.[371] Moreover, the functional test for punishment has proven inadequate.[372] Each test attempts to ascertain whether an act constitutes "punishment" when in fact that term has remained elusive.[373]

Because the legislature's intent may not be clear, and because historical punishments may be deemed necessary to prevent future harms, it is necessary to define punishment in terms of the primary aim of an act. If the primary aim of an act is its asserted preventive purpose, it does not constitute punishment in the bill of attainder context.[374] Consequently, factors taken into account under the usual three-part punishment test remain relevant to determine the primary aim of an act. These factors may include whether an act historically constitutes punishment and whether evidence of the legislature's punitive intent exists.

However, the most significant factor to gauge when an act has both punitive and preventive aspects is the specificity of the act.[375] When an individual or group is adversely affected by an act, but does not constitute a "legitimate class of one," a court should determine whether the terms of the act are sufficiently general so as to create an objective standard that does not condemn a particular group based on past acts.[376]

In the BOCs' case, the fact that Congress specifically targeted the BOCs by name is indicative of the punitive nature of the Act.[377] Unless an individual or entity constitutes a legitimate class of one, as in the case of former President Nixon, there can be no legitimate reason for singling it out.[378] Therefore, any proposed reason to tar-

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371. See *supra* Parts IV.C.1 and IV.C.3 for a discussion of the historical and legislative purpose tests.

372. See *supra* Part IV.C.2 for a discussion of the functional test.

373. See Carol S. Steiker, *Foreword: The Limits of the Preventive State*, 88 J. CRIM. L. & CRIMINOLOGY 771 (1998), for a criticism of the Supreme Court for failing to make a clear distinction between prevention and punishment under the Ex Post Facto and Double Jeopardy Clauses.

374. *See* Flemming v. Nestor, 363 U.S. 603, 614 (1960).

375. See Note, *supra* 60, arguing for a finding of bill of attainder based on specificity alone.

376. See *supra* Part I.C.1 for a discussion of the specificity requirement in light of *Nixon*. See also *infra* note 378 for a comment on *Nixon*.

377. *See* SBC Communications, Inc. v. FCC, 154 F.3d 226, 251 (5th Cir. 1998) (Smith, J., dissenting); BellSouth Corp. v. FCC, 144 F.3d 53, 73 (D.C. Cir. 1998) (Sentelle, J., dissenting). See *supra* Part IV.B for a discussion of the specificity of the Telecommunications Act.

378. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 472 (1977). Moreover, laws are already in place that prohibit anti-competitive practices. Specifically, the

get an individual or defined group should also apply to others similarly situated.[379] In this case, Congress has asserted that there is a legitimate concern for keeping communications markets competitive.[380] However, the BOCs are not the only local service providers.[381] If the free market goal truly underlies the Special Provisions, Congress would have also intended it to apply to those other providers. Because other providers were not included within the scope of the Act, it can be inferred that the intent of Congress must have gone beyond preventive measures. More likely, Congress considered the past conduct of the BOCs, determined that their behavior was not properly restricted by the courts, and restricted the BOCs from the possibility of carrying on the behavior again by prohibiting them from entering various markets.

Although the absence of a means of escape has sometimes been considered a criterion for a punitive act,[382] the lack of a means of escape is not determinative of punishment.[383] Nevertheless, it is one indicator of how specifically an act operates. If one cannot evade the operation of a legislatively enacted employment bar, then it is more likely to be specific. On the other hand, if an escape route does exist, it may be evidence that the statute is not legislating with regard to a specific group or individual, but is instead focusing on a general characteristic.[384] In this case, however, the Act does not focus on one general characteristic, but rather, it clearly

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Sherman Antitrust Act, 15 U.S.C. § 2 (1994), provides that monopolizing or conspiring to monopolize any part of trade or commerce between the states is a felony punishable by a fine not exceeding $10 million if committed by a corporation. *See also* United States v. AT&T, 461 F. Supp. 1314, 1321-22 (D.D.C. 1978) (finding AT&T subject to the Sherman Antitrust Act notwithstanding the fact that the telecommunications industry is a regulated industry (quoting Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 456 (1945))).

379. *See* United States v. Brown, 381 U.S. 437, 449 n.23, 450 (1965).

380. See *supra* Parts III.A and III.C for a discussion of the lower courts' treatment of congressional intent.

381. *See* SBC Communications, Inc. v. FCC, 981 F. Supp. 996, 1001 (N.D. Tex. 1997) (noting that there are hundreds of local exchange carriers and several sizeable local companies that are wholly unaffiliated with the BOCs), *rev'd*, 154 F.3d 226 (5th Cir. 1998).

382. See *supra* Part I.C.2.b.ii for a discussion of non-punitive legislation.

383. *See Brown*, 381 U.S. at 456-57 & n.32. Even assuming that the presence of a means of escape is significant independent of specificity, it is arguable that the BOCs do not have a means of escape. Nothing can change the fact that the BOCs are subject to the Act. The only ways for them to enter the restricted lines of business are to comply with its terms or wait it out. In either case, a potential financial gain is forfeited. *See SBC Communications, Inc.*, 154 F.3d at 243 n.27. It is in the BOCs' best "economic and business interest" to meet the criteria. *Id.*

384. *See Brown,* 381 U.S. at 454-55.

specifies the BOCs by name.[385]

The majority in *SBC Communications* determined that the Special Provisions section does not constitute a prohibited bar against employment because the restrictions are only for a limited time and compliance is possible.[386] However, a requirement of a "perpetual bar" is not the current state of the law.[387] In *United States v. Brown*,[388] the Supreme Court rejected the notion that inescapability is a prerequisite for the Bill of Attainder Clause.[389] Had Congress acted to imprison an individual for five years, there would be no question that the action would be a bill of attainder even though the restriction has a definite end. Similarly, if an individual was allowed to perform community service to avoid the sentence, it would still be legislative punishment. Indeed, "[the Constitution] intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding."[390] Consequently, the BOCs should not be denied the protection of the Bill of Attainder Clause simply because Congress has left the BOCs with an escape, albeit an "onerous" one.[391]

The second significant factor to consider when determining the primary aim of a legislative act addresses the requirement that a bill of attainder must be punishment without the benefit of a judicial trial.[392] As explained above, a case where legislative proceedings parallel adjudicative judicial proceedings would be rare today.[393]

Still, a court can and should consider the extent to which a past act or political affiliation can be associated with an individual or group targeted by questionable legislation.[394] When such a relationship is present, it can be inferred that Congress constructed the

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385. See *supra* Part IV.B for a discussion of the specificity requirement.

386. *See SBC Communications, Inc.*, 154 F.3d at 242-43.

387. *See id.* at 248-49 (Smith J., dissenting).

388. 381 U.S. 437 (1965).

389. *See id.* at 457 n.32. See also *supra* note 155 and accompanying text for a discussion of *Brown*.

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

391. *See SBC Communications, Inc.*, 154 F.3d at 243 n.27. See *supra* note 383 for the proposition that the BOCs do not have a means of escape.

392. *See* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 468 (1977).

393. See *supra* Part IV.C.3 for an analysis of congressional motive in theory and application.

394. See *supra* note 268 and accompanying text for a discussion of legislation that singled out individuals or groups based on their political beliefs.

legislation with either a real or perceived reason to punish the person or group. The closer the relationship, and thus the stronger the inference, the more likely it is that Congress instituted punishment by legislative action. In the BOCs' case, there is no political affiliation to consider; however, the relationship of the BOCs to AT&T and the federal government's unsuccessful antitrust suits create an inference of punishment.

CONCLUSION

In conclusion, the Special Provisions section of the Telecommunications Act of 1996 should be considered unconstitutional. First, the target of the Special Provisions has been singled out through the use of specific, not general terms, as evidenced by the language of the Act. Second, the weight of factors consistent with Supreme Court precedent suggests that the Special Provisions constitute punishment because the primary aim of that section is not to create an objective standard meant to achieve preventive goals. Rather, the specificity of the Special Provisions section and the circumstances surrounding its enactment support the conclusion that Congress's primary aim was to designate a group of corporations for punishment for alleged antitrust violations that were never adequately resolved judicially.

Karey P. Pond