NOTE

New York Legislature Attaints Con Ed: New Significance for the Protection From Bills of Attainder

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INTRODUCTION

Lawmaking tyrants for half a millennium have fiendishly employed the notorious bill of attainder to inflict swift, ignoble death or fierce punishment on enemies of the Crown, pretenders to the Throne, Catholics, Tories, Rebels, Communists, and the electric company.[1] The Supreme Court describes a bill of attainder as a law that legislatively determines guilt and punishes an identifiable individual without the protections of a judicial trial.[2] Two clauses of the Constitution prohibit bills of attainder.[3] Courts and commentators suggest various explanations for the primary purpose of banning bills of attainder. The

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[1] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (stating that bills of attainder may affect individual's life, confiscate his property, or both); THE FEDERALIST NO. 47, at 373-74 (James Madison) (Hamilton ed. 1880) (warning that "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands... may justly be pronounced the very definition of tyranny"); Jane Welsh, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 83-84 (1983) (describing typical historical bill of attainder as proclaiming condemnation of death directed against particular individual or group); Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 330-32 & nn.1, 2, 4-6 & 8-10 (1962) [hereinafter *Bill of Attainder*] (collecting bills of attainder from 16th, 17th, 18th, 19th, and 20th centuries). For examples of bills of attainder targeting the groups mentioned, see An Act to punish certain Crimes and Misdemeanors, and to prevent the Growth of Toryism, 1 Laws of Maryland 453 (Kilty 1799) (targeting Tories); An Act for the Attainder of Thomas Fitzgerald, Earl of Kildare, 1534, 26 Hen. 8, c.6 (priv.) (targeting pretender to throne); United States v. Brown, 381 U.S. 437, 440 (1965) (finding bill of attainder in law prohibiting members of Communist Party from serving as officers or high-ranking employees of labor unions); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1872) (mem.) (finding bill of attainder in statute conditioning access to courts on oath swearing no disloyalty to Union); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 328 (1866) (finding bill of attainder in statute requiring seekers of certain professions to swear they had never been disloyal to Union); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866) (finding bill of attainder in federal statute requiring lawyers to swear they had not been disloyal to Union); Consol. Edison Co. v. Pataki, 292 F.3d 338, 343 (2d Cir. 2002), *cert. denied*, 123 S.Ct. 619 (2002) (striking down statute targeting electric company).

[2] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

[3] Congress shall pass "[n]o Bill of Attainder or ex post facto Law." U.S. CONST. art. I, § 9, cl. 3. "No State shall... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10, cl. 1. Because they are effectively interchangeable, I will refer to each clause individually as simply the "Bill of Attainder Clause" and to both clauses together as the "Bill of Attainder Clauses."

ban either ensures due process, safeguards the rights of the politically disfavored, maintains the separation of the branches of federal power, or encompasses all of these goals.[4] But the Constitution's Bill of Attainder Clauses, which embody this collection of vital principles, have not been a central feature of constitutional law.[5] *Consolidated Edison Co. v. Pataki* ("*Con Ed*") provides an avenue by which the Bill of Attainder Clauses could more prominently protect constitutional rights.[6]

With *Con Ed*, the Court of Appeals for the Second Circuit invalidated a New York statute, finding that it constituted a bill of attainder.[7] This case is notable because it marks the first time a federal appeals court has held that the Constitution protects corporations from attainders.[8] The decision is also the first successful attainder claim in a regulatory context before an appellate court, after a string of recent defeats for telecommunications companies.[9] One may therefore ask whether *Con Ed* breathes new life into bill of attainder jurisprudence, revitalizing it — or

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[4] *See* Immigration and Naturalization Servs. v. Chadha, 462 U.S. 919, 960-62 (1983) (Powell, J., concurring) (asserting that Bill of Attainder Clauses' purpose is to ensure separate allocation of governmental power); *Brown*, 381 U.S. at 446 (recognizing that bill of attainder ban implements separation of powers); *Cummings*, 71 U.S. (4 Wall.) at 325 (holding that bill of attainder is found where targeted party is not protected by judicial due process); Thomas A. Buckley, SBC Communications, Inc. v. FCC: *Does Section 271 of the Telecommunications Act of 1996 Constitute a Bill of Attainder Against the Bell Operating Companies?*, 6 COMM LAW CONSPECTUS 225, 238 (1998) (suggesting that bill of attainder ban protects politically disfavored individuals); Thomas B. Griffith, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 493 (1984) (finding Bill of Attainder Clauses to further many purposes simultaneously); Welsh, *supra* note 1, at 81-83 (emphasizing due process importance of bill of attainder ban); Recent Case, *Fifth Circuit Holds that the Special Provisions of the Telecommunications Act of 1996 Are Not a Bill of Attainder*, 112 HARV. L. REV. 1385, 1388 (1999) [hereinafter *Special Provisions*] (arguing that bill of attainder proscription primarily protects political pariahs).

[5] *See, e.g.*, PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING, 107-08, 113 (4th ed. 2000) (devoting three sentences to Bill of Attainder Clauses in 1600-page constitutional law casebook); Michelle L. Farmer, Case Comment: *Supplemental Extradition Treaty Struck Down as Bill of Attainder*, 16 SUFFOLK TRANSNAT'L L. REV. 668, 673 (1993) (noting rarity of legislation being struck down as bill of attainder); Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 92-93 (1991) (calling striking down of statute as bill of attainder highly unusual).

[6] *See* Consol. Edison v. Pataki, 292 F.3d 338 (2d Cir. 2002), *cert. denied*, 123 S.Ct. 619 (2002).

[7] *Id.* at 355.

[8] *Id.* at 347.

[9] *See* BellSouth Corp. v. Fed. Communications Comm'n, 162 F.3d 678, 683-84 (D.C. Cir. 1998); SBC Communications, Inc. v. Fed. Communications Comm'n, 154 F.3d 226, 233 (5th Cir. 1998); BellSouth Corp. v. Fed. Communications Comm'n, 144 F.3d 58, 67 (D.C. Cir. 1998).

rewriting it — to protect state regulated corporations.[10]

This Note argues that *Con Ed* continues the pattern of nebulous analysis found in the line of prior bill of attainder decisions, and fails to deliver decisive guidance for future attainder jurisprudence. Part I of this Note discusses the irregular progress of bill of attainder jurisprudence in this country. Part II recounts the details of *Con Ed.* Finally, Part III demonstrates that *Con Ed's* holding is correct, despite the fact that its analysis deviates from precedent. This deviation, however, helps to doom the case to mere footnote status in the bill of attainder pantheon, undercutting the impact it might have had on corporate constitutional rights.

I. BACKGROUND

The jurisprudence surrounding bills of attainder reveals a struggle between two approaches: functionalism and historical literalism.[11] The functional approach interprets the Bill of Attainder Clauses in light of the evil the Constitution's framers hoped to prevent.[12] Specifically, the chief concern of those employing the functional approach is to ensure due process of law.[13] This function underlying the bill of attainder proscription is paramount in the functionalist analysis.[14] In contrast, the literal approach aims to restrict the class of forbidden statutes to the clauses' historical definition.[15] At its narrowest, the literal approach says that a bill of attainder will explicitly punish the past acts of a political outsider.[16] Neither approach has displaced the other; the law today

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[10] *See Consol. Edison*, 292 F.3d 338; *N.Y. Law Barring Charges on Nuclear-Plant Shutdown Ruled Unconstitutional*, ANDREWS UTIL. INDUS. LITIG. REP. 4 (2002) (reporting *Con Ed* decision).

[11] *See generally Bill of Attainder*, *supra* note 1.

[12] *See id.* at 333 (explaining that functionalists seek to prevent legislative punishment of any kind).

[13] *See* McGautha v. California, 402 U.S. 183, 253 n.3 (1971) (Brennan, J., dissenting) (describing passage of bill of attainder as example of clear violation of due process); United States v. Brown, 381 U.S. 437, 449 n.23 (1965) (stating that vice of attainder is legislature appropriating role of judiciary); United States v. Lovett, 328 U.S. 303, 316 (1946) (noting importance of safeguards of judicial trial in bill of attainder context); *Consol. Edison*, 292 F.3d. at 346 (explaining that Bill of Attainder Clauses bar trial by legislature).

[14] *See* cases cited *supra* note 13.

[15] *Bill of Attainder*, *supra* note 1, at 336.

[16] *See Lovett*, 328 U.S. at 322-23 (Frankfurter, J., concurring) (requiring bill of attainder to specify offense and declare guilt); Buckley, *supra* note 4, at 238 (maintaining that bills of attainder can only apply to politically unpopular groups); Griffith, *supra* note 4, at 493 (suggesting that courts should strike down only those statutes that target political activity).

draws from each school in varying degrees.[17] Today's mixed influences result from a history that vacillated between the functionalist and literalist approaches.[18]

A. Early Bill of Attainder Cases: The Functionalist Approach

In 1810, Chief Justice Marshall fired the first shot for the functionalist camp in *Fletcher v. Peck*.[19] This case is noted mostly for explicating natural law and the Constitution's Contract Clause.[20] In dictum, Chief Justice Marshall addressed the Bill of Attainder Clauses.[21] He explained that a bill of attainder does not denote only its historical definition, a legislated punishment of death aimed at a named individual.[22] To the Constitution's framers and to Chief Justice Marshall, bills of attainder also encompassed what English lawmakers had called bills of pains and penalties.[23] These were legislative punishments less than death.[24] Chief Justice Marshall declined to restrict the clauses to proscribe only a historically limited Parliamentary definition of bills of attainder.[25] The decision thereby signaled respect for the perceived *function* of the attainder clauses — forbidding punishment by the legislature.[26] Practically, *Fletcher* allowed courts to protect individuals more broadly under the Bill of Attainder Clauses.[27]

Cummings v. Missouri and *Ex parte Garland*, two 1866 cases decided on the same day, were the Supreme Court's earliest cases finding bills of attainder.[28] Reversing the Missouri Supreme Court, *Cummings* invalidated a Missouri statute requiring anyone seeking employment in certain professions to swear that he had been loyal to the Union during the Civil War.[29] *Garland* involved a similar federal statute for lawyers

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[17] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468-83 (1977) (devising three-part test combining historical analysis with concern for legislative usurpation).

[18] *Cf. Bill of Attainder*, *supra* note 1, *passim* (detailing shifts in emphasis over time between functionalist and literalist approaches).

[19] 10 U.S. (6 Cranch) 87 (1810).

[20] *See* BREST, *supra* note 5, at 104-07 (excerpting and exploring significance of *Fletcher*).

[21] *Fletcher*, 10 U.S. (6 Cranch) at 138.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Bill of Attainder*, *supra* note 1, at 333.

[27] *Id.*

[28] Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1866).

[29] *Cummings*, 71 U.S. (4 Wall.) at 316-17, 332.

wishing to appear before a federal court.[30] The Court struck down both statutes as impermissible bills of attainder.[31] It held that more than simply regulating these occupations, the laws punished certain individuals without a judicial trial.[32]

These cases revealed another important strand in attainder thinking: separation of powers.[33] Commentators suggest that the attainder clauses assign certain duties — determining guilt, then punishing — to the judiciary.[34] The offense of an attainder, therefore, does not depend on the degree of punishment, the under-inclusiveness of the burdened group, or the denial of a fundamental right.[35] Rather, the offense is in the lack of judicial procedure.[36] Under this view, a legislature may devise general laws punishing certain behaviors, but is forbidden from deciding exactly to whom those laws apply.[37] *Cummings* and *Garland* crucially emphasized the function the Bill of Attainder Clauses serve — separating judicial and legislative powers to ensure that punished individuals received due process in the courts.[38]

Hawker v. New York tempered the *Cummings* Court's broad functionalist approach.[39] *Hawker* involved a physician whom the state had previously convicted of performing an abortion, which was a felony.[40] Subsequently, the state legislature passed a law forbidding

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[30] *Garland*, 71 U.S. (4 Wall.) at 374.

[31] *Cummings*, 71 U.S. (4 Wall.) at 325; *Garland*, 71 U.S. (4 Wall.) at 377.

[32] *Cummings*, 71 U.S. (4 Wall.) at 323; Griffith, *supra* note 4, at 480.

[33] See Glenn Willett Clark, *How the Superfund Congress Crafted a Bill of Attainder: Misappropriation of the Judicial Power of the United States — of Unbounded Civil Liabilities, Retroactive Taxes, and Legislative Adjudication*, 4 SETON HALL CONST. L.J. 3, 31-32 (1993) (arguing that separation of powers is crucial impetus for proscription of bills of attainder); Griffith, *supra* note 4, at 481 (noting *Cummings'* significance); Welsh, *supra* note 1, at 88, 91 (tying separation of powers to John Locke and Thomas Paine, and noting Court's recognition of principle in *Cummings*).

[34] Welsh, *supra* note 1, at 78.

[35] *Id.* at 91.

[36] Griffith, *supra* note 4, at 481.

[37] *Bill of Attainder*, *supra* note 1, at 343-56.

[38] Cummings v. Missouri, 71 U.S. (4 Wall.) 227, 325, 331-32 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377-78 (1866).

[39] Hawker v. New York, 170 U.S. 189 (1898). The Supreme Court heard a similar case nine years earlier. Dent v. West Virginia, 129 U.S. 114 (1889). In *Dent*, the plaintiff practiced medicine in West Virginia without meeting the state's statutory requirement. *Id.* at 114. The state required any doctor either to have graduated from a reputable medical school, practiced in the state for 10 years, or passed a state examination for a license. *Id.* at 114-16. Dent had done none of these, and the state convicted him of illegally practicing medicine. *Id.* at 114.

[40] *Hawker*, 170 U.S. at 189.

convicted felons from practicing medicine.[41] After his release from prison, Hawker began examining patients again.[42] The state convicted him of illegally practicing medicine and fined him $250.[43]

The plaintiff in *Hawker* challenged the state statute as a bill of attainder.[44] The legislature arguably had judged the character of a group (i.e., felons) and, without judicial process, deprived it of the right to practice medicine.[45] But the Court upheld the statute, ruling that unlike the employment bars in *Cummings* and *Garland*, this was a legitimate regulation.[46] The plaintiff's deprivation reasonably related to the activity regulated.[47] In *Cummings* and *Garland*, by contrast, siding with the Confederacy bore no relation to practicing law or teaching.[48] Thus the Court still allowed legislatures to judge individuals or groups within reasonable bounds, rather than prohibit them from such adjudication entirely.[49]

B. Mid-Twentieth-Century Cases: The Emerging Literalist Approach

The next major bill of attainder decision appeared nearly fifty years after *Hawker* in *United States v. Lovett*.[50] *Lovett* began shifting the Court's bill of attainder analysis, with the majority following the functionalist precedent and an influential concurrence emphasizing historical literalism.[51] In *Lovett*, Congress had attached to an appropriations bill a section that denied further wages to three named government employees.[52] Congress had determined that the three men were Communists and subversives.[53] To obtain their compensation, Lovett

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[41] *Id.* at 190.

[42] *Id.*

[43] *Id.*

[44] *Id.* at 191.

[45] *Id. See also Dent*, 129 U.S. at 123 (denying claim that legislature judged character of unlicensed physicians and deprived them of right to practice medicine).

[46] *Hawker*, 170 U.S. at 193; *see also Dent*, 129 U.S. at 122, 128.

[47] *Bill of Attainder*, *supra* note 1, at 335.

[48] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377-78 (1866).

[49] Along these lines, one commentator has suggested that in making these judgments a legislature is permitted to legislatively notice a fact to the same degree a court would judicially notice one. *Bill of Attainder*, *supra* note 1, at 354.

[50] 328 U.S. 303 (1946).

[51] *Bill of Attainder*, *supra* note 1, at 336.

[52] *Lovett*, 328 U.S. at 305.

[53] *Id.* The government agencies employing the three men were fully satisfied with their work and wanted to continue employing them. *Id.* at 304-05. The men continued to work, but the agencies could no longer lawfully pay them. *Id.* at 305.

and the other two men challenged the statute as a violation of the structural separation of powers, the Fifth Amendment's Takings Clause, and the Bill of Attainder Clause.[54] The Court of Claims held in favor of Lovett, but only two of the five judges concluded that the bill constituted an attainder.[55]

The Supreme Court rejected the government's argument that the section was only a routine disbursement bill, and affirmed the judgment of the Court of Claims, holding that the plaintiffs were the objects of an unconstitutional bill of attainder.[56] The high court pointed to a House subcommittee report stating that the three men had engaged in subversive activity and were unfit for government employment.[57] Despite the fact that the bill did not explicitly declare guilt, its evident intent was to punish three particular men.[58] The Court held that any legislative act that punishes individuals without a judicial trial is a bill of attainder and, therefore, invalid.[59] The majority continued in the tradition of *Cummings*, looking to keep separate the legislative and judicial powers.[60] Like *Cummings*, the Court required no explicit declaration of guilt and punishment.[61]

Justice Frankfurter concurred with the judgment but disagreed with the majority's bill of attainder analysis.[62] For a time, the rationale behind this concurrence became the new bill of attainder standard.[63] Justice Frankfurter explained that historical limits narrowly define the Constitution's attainder clauses.[64] To Justice Frankfurter, the distinguishing characteristic of a bill of attainder was that the legislature, rather than the judiciary, assesses guilt and imposes punishment.[65] Because a court should not casually find a statute unconstitutional, the statute must exhibit this characteristic very clearly.[66] To violate the attainder clauses, therefore, a statute had to explicitly specify the

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[54] *Id.* at 306.
[55] *Id.* at 307.
[56] *Id.* at 313-18.
[57] *Id.* at 311.
[58] *Id.* at 316.
[59] *Id.* at 315.
[60] *Id.* at 316-17.
[61] *Id.* at 315-16.
[62] *Id.* at 318, 321 (Frankfurter, J., concurring).
[63] *Bill of Attainder*, *supra* note 1, at 336.
[64] *Lovett*, 328 U.S. at 321 (Frankfurter, J., concurring).
[65] *Id.* at 321-22 (Frankfurter, J., concurring).
[66] *Id.* at 325 (Frankfurter, J., concurring).

individual's offense and declare his guilt.[67] *Lovett*'s statute did neither.[68] Justice Frankfurter, therefore, found that a punitive intent was not evident to the high degree of certainty the Constitution required.[69] In subsequent years, courts declined to follow Justice Frankfurter's literalist requirement that the challenged statute must recite the targeted individual's offense.[70] But inspired by his historical reading of the attainder clauses, the next decade's decisions did introduce other literalist tenets.[71]

The Supreme Court uniformly denied all attainder challenges in the 1950s.[72] This was a result of the Court adopting new strict requirements following Justice Frankfurter's literalist lead.[73] *American Communications Ass'n v. Douds* serves as an example.[74] This case involved a bill of attainder challenge to a section of the 1947 Labor Management Relations Act.[75] The section denied certain privileges to labor unions unless their officers swore nonallegiance to the Communist Party.[76] The district court dismissed the union's complaint, and the Supreme Court affirmed.[77] The Court explained that an attainder required post facto punishment, punishment for a past action.[78] The challenged statute, in contrast, aimed at preventing current beliefs and loyalties from ripening into future conduct.[79]

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[67] *Id.* at 323 (Frankfurter, J., concurring).

[68] *Id.* at 325 (Frankfurter, J., concurring).

[69] *Id.* (Frankfurter, J., concurring).

[70] *Bill of Attainder*, *supra* note 1, at 336-37.

[71] *Id.* at 337.

[72] *See* Barenblatt v. United States, 360 U.S. 109, 136 (1959) (Black, J., dissenting); Uphaus v. Wyman, 360 U.S. 72, 108 (1959) (Brennan, J., dissenting); Peters v. Hobby, 349 U.S. 331, 352 (1955) (Douglas, J., concurring); Barsky v. Bd. of Regents, 347 U.S. 442, 459 (1954) (Black, J., dissenting); Linehan v. Waterfront Comm'n, 347 U.S. 439, 441 (1954) (Douglas, J., dissenting); Bailey v. Richardson, 341 U.S. 918 (1951) (mem.); Garner v. Bd. of Pub. Works, 341 U.S. 716, 722 (1951); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 143-44 (1951) (Black, J., concurring); Am. Communications Ass'n v. Douds, 339 U.S. 382, 414 (1950).

[73] *See Bill of Attainder*, *supra* note 1, at 337.

[74] *Douds*, 339 U.S. at 382.

[75] *Id.* at 385-86, 412. This Note is concerned with the attainder portion of *Douds*, but the opinion largely focused on a First Amendment claim, which the Court denied. *Id.* at 387-412.

[76] *Id.* at 385-86.

[77] *Id.* at 386, 415.

[78] *Id.* at 413.

[79] *Id.*

Similarly, the Court held that an attainder must apply to an inescapable class.[80] If a member of a targeted class could avoid punishment by altering his behavior, there was no attainder.[81] Because the union officers in *Douds* could escape the statutory burden by changing their political affiliation, the law was not an attainder in the historical sense.[82] The Court distinguished *Cummings* and *Garland*, cases in which the invalidated statutes punished former Confederate sympathizers, a status which could not be undone.[83]

The Court veered in a functional direction again in *United States v. Brown*.[84] *Brown* was a 1965 decision that struck down a law forbidding Communist Party members from holding prominent positions in labor unions.[85] The appellee was a San Francisco longshoreman and an avowed Communist.[86] The longshoremen's union elected him to its board in 1959, 1960, and 1961.[87] In 1961, the government charged him with violating Section 509 of the Labor-Management Reporting and Disclosure Act of 1959, which prohibited the presence of Communists on labor union boards.[88] The Ninth Circuit did not address a bill of attainder argument, but held that the statute violated the First and Fifth Amendments.[89] The Supreme Court did not reach these issues, as it

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[80] *Id.* at 414.

[81] *Id. See Bill of Attainder, supra* note 1, at 339-40 (exploring inescapable class requirement).

[82] *Douds*, 339 U.S. at 414.

[83] *Id. See* Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 327 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 377 (1866). The requirements of post facto punishment and an inescapable class persisted in the 1961 case of *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1. The Communist Party challenged an order by the Board requiring the Party and other similar groups to register with the Attorney General as a Communist-action organization. *Id.* at 4-19. The Circuit Court for the District of Columbia upheld the order, and the Supreme Court affirmed. *Id.* at 22, 115. The Court held that the order was not a bill of attainder because it regulated current behavior, not past action. *Id.* at 86-87. Moreover, the order allowed the Party to escape punishment simply by registering itself. *Id.* at 86-88. To the Court, these two factors meant that the statute did not impermissibly specify an identifiable group. *Id.* at 88. Like *Douds*, the Court culled the requirements from an interpretation of how bills of attainder had historically looked. *Id.* at 86-88. Commentators of the day objected to the Court's reliance on the post facto and inescapable class criteria, arguing that neither history nor precedent supported them. *See Bill of Attainder, supra* note 1, at 336-43 (pointing to English bills of attainder from pre-constitutional era that did not satisfy Justice Frankfurter's conditions).

[84] 381 U.S. 437 (1965).

[85] *Id.* at 440.

[86] *Id.*

[87] *Id.*

[88] *Id.*; 29 U.S.C. § 504 (2000).

[89] *Id.*

affirmed on the basis of the Bill of Attainder Clause.[90]

The Court's five-member majority anchored its holding on the challenged statute's explicit naming of the Communist Party as its target.[91] While the *Douds* statute addressed activities, this statute aimed squarely at a particular organization.[92] Chief Justice Warren re-emphasized the attainder clauses' protection of the separation of powers, a return to the *Lovett* majority's approach.[93] The Court flatly rejected any suggestion of a post facto, retributive, or inescapability requirement.[94] The *Brown* Court found the statute punitive, rather than merely regulatory, because it legislatively judged and punished a particular group of individuals.[95] If a law condemns, declared the Court, it must condemn all.[96]

C. *The Modern Era:* Nixon v. Administrator of General Services' *Three-Element Analysis*

Twelve years after *Brown*, the Court decided *Nixon v. Administrator of General Services*.[97] The former President challenged a statute that explicitly named him as its object and applied to him alone.[98] The statute was Congress' effort to abrogate an agreement between Nixon and the General Services Administration.[99] This agreement allowed Nixon to destroy certain presidential documents under specified conditions.[100] The statute required Nixon to relinquish his presidential materials and prohibited the materials' destruction.[101] The District Court for the District of Columbia upheld the statute over several constitutional claims, including violation of the Bill of Attainder Clause.[102] The Supreme Court affirmed.[103]

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[90] *Id.*
[91] *Id.* at 451.
[92] *Id.*
[93] *Id.* at 442, 461.
[94] *Id.* at 457-58.
[95] *Id.* at 455.
[96] *Id.* at 454.
[97] *Nixon*, 433 U.S. 425 (1977).
[98] *Id.* at 429.
[99] *Id.* at 431-32.
[100] *Id.*
[101] *Id.* at 433-34.
[102] *Id.* at 439.
[103] *Id.* at 483.

Addressing the bill of attainder challenge, the Supreme Court found that the singling out of Richard Nixon was legitimate, for only his materials demanded immediate attention.[104] In so holding, the *Nixon* Court recognized that specificity was not necessarily the singular hallmark of an attainder.[105] Rather, to find an attainder the Court required not only a specifically named target, but also that the legislature punish that target.[106]

The *Nixon* Court's three-part examination of punishment supplanted the looser, functional approach of cases such as *Cummings*, *Lovett*, and *Brown*.[107] It also replaced the literalist readings for which Justice Frankfurter's *Lovett* concurrence was the blueprint.[108] First, the Court in *Nixon* assessed the punishments found in historical attainders and compared them with the burden on the plaintiff.[109] Second, it analyzed whether the challenged law reasonably furthered any nonpunitive legislative purposes when viewed in terms of the type and severity of burdens imposed.[110] *Nixon*'s final test for punishment was to determine whether the legislative record revealed a congressional intent to punish.[111] The statute passed all three tests.[112] As a result, the Court upheld the statute.[113]

Selective Service System v. Minnesota Public Interest Research Group illustrates the Supreme Court's application of the *Nixon* framework.[114] This case involved the requirement that all male citizens between the ages of eighteen and twenty-six register with the Selective Service for the military draft.[115] Specifically, the Court upheld a federal law denying financial aid to college students unless they affirmed that they had

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[104] *Id.* at 472.

[105] *Id.* at 471-72.

[106] *Id.* at 472-73.

[107] *See, e.g.*, Consol. Edison Co. v. Pataki, 292 F.3d 338 (2d Cir. 2002) (applying *Nixon*'s analysis).

[108] *See, e.g., id.*

[109] 433 U.S. at 473-75. The Court cited death, imprisonment, confiscation of property, and barring designated individuals or groups from participation in specified employments as common examples. *Id.* at 474.

[110] *Id.* at 475-76.

[111] *Id.* at 478. The Court goes on to mention a final consideration, the existence of less burdensome alternatives. *Id.* at 482. It finds such alternatives, but the factor is given nearly zero weight. *Id.* at 482-83.

[112] *Id.* at 484.

[113] *Id.*

[114] Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 851 (1984).

[115] *Id.* at 843.

registered with the Selective Service.[116] The Supreme Court accepted the plaintiff's appeal directly from the Minnesota District Court, which had found that the statute violated the bill of attainder prohibition.[117]

In reversing, the Supreme Court first reached back to *Douds* to resurrect the literalist inescapable class principle.[118] Using this rubric, the statute did not satisfy the specificity element.[119] Under the statute in *Selective Service*, if a student was ineligible for financial aid because he had not registered for the draft, he could escape his ineligible status simply by registering late.[120] Therefore, because the class was escapable, Congress had not targeted any group with the requisite specificity.[121]

As in *Nixon*, the Court next considered punishment.[122] The burden on students did not resemble any punishment in the historical sense.[123] Congress used reasonable means to achieve a nonpunitive goal — encouraging draft registration by motivating a group consisting largely of persons required to register.[124] Finally, the Court found no evidence of a punitive intent in the legislative history.[125] Therefore there was no bill of attainder.[126]

The *Nixon* test remains the precedent to which lower courts must look for guidance.[127] The *Nixon* Court did not purport to change the existing law, as indeed none of the cases discussed above did, despite the pendulum swings in ideology expressed from one era to the next. The Second Circuit's recent holding in *Consolidated Edison Co. v. Pataki* dutifully pays respect to *Nixon* as controlling precedent, but like the courts before it, also modifies its approach to the issues without entirely acknowledging — possibly without entirely recognizing — that it is

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[116] *Id.* at 843-44, 846.

[117] *Id.* at 846.

[118] *Id.* at 851; *see* Am. Communication Ass'n v. Douds, 339 U.S. 382, 414 (1950) (requiring statute to target inescapable class to qualify as bill of attainder); *see also* Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 86-88 (1961) (same).

[119] *Selective Serv. Sys.*, 468 U.S. at 851.

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 853.

[124] *Id.* at 854.

[125] *Id.* at 854-56.

[126] *Id.* at 856.

[127] *See, e.g., id.* at 842, 854-56 (applying *Nixon* test); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9, 242 (1995) (citing *Nixon* for law regarding bills of attainder); SeaRiver Maritime Fin. Holdings, Inc. v. Mineta, 309 F.3d 662, 668-78 (9th Cir. 2002) (applying *Nixon* test).

doing so.[128]

II. *CONSOLIDATED EDISON CO. V. PATAKI*

Con Ed is one of a recent group of cases challenging statutes that regulate industries such as communications, weapons, and power.[129] *Con Ed* is unique among the group because the corporation's challenge was successful where others had failed, and the court found a bill of attainder.[130] The decision's chief innovation was its holding that the Bill of Attainder Clauses protect corporations.[131] This section recounts the facts, holding, and rationale of *Con Ed*, with an eye toward later exploring the further ramifications of the case.

A. Factual History of Con Ed

Con Ed, a public electrical utility company serving New York City, operated the Indian Point 2 Nuclear Generating Facility (the "Facility") as one of its power plants.[132] Con Ed installed the Facility's generators in the early 1970s.[133] Late in that decade, the generators' manufacturer learned of a potential defect in the type of generators used in Con Ed's Facility.[134] The manufacturer notified Con Ed of the defect, but Con Ed did not replace the generators.[135] In February 2000, one generator failed.[136] This forced Con Ed to take the Facility offline to replace the defective generator.[137] The Facility was nonoperational for about eleven months.[138] During this time, Con Ed had to purchase electricity from

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[128] *Consol. Edison*, 292 F.3d 338 (2d Cir. 2002), *cert. denied*, 123 S.Ct. 619 (2002).

[129] *See* Navegar, Inc. v. United States, 192 F.3d 1050, 1052 (D.C. Cir. 1999) (upholding statute burdening single manufacturer of specified type of gun); BellSouth Corp. v. Fed. Communications Comm'n, 162 F.3d 678, 680 (D.C. Cir. 1998) (upholding statute specifically burdening Baby Bell telephone companies); SBC Communications, Inc. v. Fed. Communications Comm'n, 154 F.3d 226, 229 (5th Cir. 1998), *cert. denied*, 525 U.S. 1113 (1999) (same); BellSouth Corp. v. Fed. Communications Comm'n, 144 F.3d 58, 60 (D.C. Cir. 1998) (same).

[130] *Consol. Edison*, 292 F.3d at 345.

[131] *Id.* at 346-49.

[132] *Id.* at 343.

[133] *Id.*

[134] *Id.*

[135] *Id.* Con Ed eventually bought replacement generators in 1985, but did not install any of them until 2000. *Id.*

[136] *Id.*

[137] *Id.* Although the Facility used four of the generators known to be susceptible to failure, Con Ed appears to have replaced only the damaged one. *Id.*

[138] *Id.*

other sources.[139]

Con Ed had an agreement with the New York State Public Service Commission that allowed the utility to pass certain costs along to ratepayers.[140] Pursuant to that agreement, Con Ed increased its rates to externalize the costs associated with the outage.[141] Con Ed anticipated recovering about $250 million from its customers.[142]

In August 2000, New York Governor Pataki signed into law Chapter 190 of the Laws of 2000 ("Chapter 190"), the subject of this lawsuit.[143] Chapter 190 barred Con Ed from increasing its customers' rates to pay for the costs of the February 2000 outage.[144] The chapter's first section

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[139] *Id.*

[140] N.Y. PUB. SERV. LAW § 66(12)(k) (McKinney 2001); *Consol. Edison*, 292 F.3d at 343. The agreement required the PSC to review costs and rate increases for prudence and reasonableness. § 66(12)(k); *Consol. Edison*, 292 F.3d at 343. The PSC initiated a review for prudence and reasonableness in March of 2000. *Id.* at 344. The review was not yet complete when the court delivered its decision. *Id.*

[141] *Consol. Edison*, 292 F.3d at 344.

[142] *Id.* at 344-45.

[143] 2000 N.Y. Laws 190; *Consol. Edison*, 292 F.3d at 344. Chapter 190 reads as follows:

> § 1. Declaration of legislative findings. The operator of a nuclear generating facility has a high duty of care to protect the health, safety, and economic interests of its customers. Rate regulation of nuclear operators should discourage the taking of risks with regard to potential threats to public health and safety.
>
> By continuing to operate steam generators known to be defective, and thereby increasing the risk of a radioactive release and/or an expensive plant outage, the Consolidated Edison Company failed to exercise reasonable care on behalf of the health, safety, and economic interests of its customers. Therefore it would not be in the public interest for the company to recover from ratepayers any costs resulting from the February 15, 2000, outage at the Indian Point 2 Nuclear Facility.
>
> § 2. With respect to the February 15, 2000, outage at the Indian Point 2 Nuclear Facility, the New York state public service commission shall prohibit the Consolidated Edison Company from recovering from its ratepayers any costs associated with replacing the power from such facility. Such prohibition shall apply to any such costs incurred until the conclusion of such outage, or incurred at any time until all defective steam generation equipment at the facility has been replaced, whichever occurs later. Such prohibition shall apply to automatic adjustment mechanisms as well as base rates or any other rate recovery mechanism. The commission shall order the company to refund any such costs which have been recovered from ratepayers.
>
> § 3. This act shall take effect immediately.

[144] 2000 N.Y. Laws 190 § 2.

specifically named Con Ed and the February 2000 outage.[145] This section concluded that the public interest did not allow Con Ed to recover from ratepayers any costs resulting from the outage.[146] The second section prohibited any such recovery and ordered the refund of any previously recovered costs.[147]

B. Procedural History of Con Ed

Soon after Chapter 190's enactment, Con Ed challenged its validity on five different constitutional grounds.[148] The district court found in favor of Con Ed on two of the five grounds.[149] The court first held that the statute was not rationally related to a legitimate state interest, thereby violating the Equal Protection Clause.[150] The district court also held that Chapter 190 constituted an impermissible bill of attainder.[151] The court enjoined the state from enforcing the statute.[152]

The Second Circuit affirmed the district court's holding.[153] The appellate court did not address Con Ed's other constitutional claims, but it held that Chapter 190 was a bill of attainder, prohibited by the U.S. Constitution.[154] The three-judge panel upheld the injunction against the state.[155]

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[145] *Id.* § 1.

[146] *Id.*

[147] *Id.* § 2.

[148] *Consol. Edison*, 292 F.3d at 345. Con Ed alleged that the statute violated the Bill of Attainder Clause of Article I, Section 10, the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fourteenth Amendment, the Supremacy Clause, and the Contracts Clause of Article 1, Section 10. *Id.*; *see also* Consol. Edison v. Pataki, 117 F. Supp. 2d 257, 262 (N.D.N.Y. 2000) (challenging validity of Indian Point Law on five constitutional grounds).

[149] *Consol. Edison*, 117 F. Supp. 2d at 270.

[150] *Id.* at 263-65.

[151] *Id.* at 270.

[152] *Id.*.

[153] *Consol. Edison*, 292 F.3d at 345.

[154] *Id.* at 345 & n.2 (expressing skepticism of district court's finding regarding Equal Protection Clause). The court notes that there are two bill of attainder clauses in the Constitution: Article I, Section 9, which applies to Congress, and Section 10, which applies to the states. U.S. CONST. art. I, § 9, cl. 3; U.S. CONST. art. I, § 10, cl. 1. Section 10 operates in this case. *See Consol. Edison*, 292 F.3d at 345.

[155] *Consol. Edison*, 292 F.3d at 355.

C. *Rationale and Result of* Con Ed

The court recognized the three *Nixon* requirements for determining that a statute is a bill of attainder: (1) the statute must determine guilt and inflict punishment; (2) upon an identifiable individual; (3) without the protections of a judicial trial.[156] The circuit court first determined that the absence of judicial process was incontrovertible.[157] The court observed that the state legislature enacted Chapter 190 using purely legislative processes, with no protections akin to those present in a trial.[158] This left three remaining questions for the court: (1) is Con Ed an individual protected from bills of attainder; (2) does Chapter 190 determine guilt; and (3) does Chapter 190 inflict punishment?[159] The following sections examine the court's analysis of these three questions individually.

1. Is Con Ed an Individual Protected From Bills of Attainder?

Bills of attainder target identifiable individuals.[160] Striking down Chapter 190 required the court to consider the statute's target, a corporation, the same as an individual.[161] In its treatment of this issue, the court began by noting that no appellate court had squarely answered the question of whether a corporation is an individual for bill of attainder purposes.[162] Although the Supreme Court had suggested an affirmative answer, it had not definitively decided the issue.[163] To determine whether this right applied to corporations, the *Con Ed* court relied on a distinction between two types of constitutional guarantees.[164] The first type are purely personal guarantees, which only natural persons may assert.[165] The second type guarantees those rights that are

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[156] *Id.* at 346 (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977)).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] Selective Serv. Sys. v. Minn. Pub. Interest Group, 468 U.S. 841, 847 (1984); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977); United States v. Lovett, 328 U.S. 303, 315 (1946).

[161] *Consol. Edison*, 292 F.3d at 347-49.

[162] *Id.* at 347.

[163] *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995) (implying that if statute targeting corporation meets specificity and punishment requirements, it is bill of attainder).

[164] *Consol. Edison*, 292 F.3d at 347 (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778-79 n.14 (1978)).

[165] *Id.*

not limited to the protection of natural persons and extend to legal entities, such as corporations.[166] The court identified the guarantee embodied in the bill of attainder protection as one of this second type.[167]

The Second Circuit based its conclusion on the attainder clauses' close relation to procedural due process, a right which corporations may also claim.[168] The court also noted that bills of attainder have historically targeted corporations as well as natural persons.[169] Moreover, punitive confiscation of property may injure a corporation in the same way it injures an individual, namely, by reducing its wealth.[170] The nature, history, and purpose of the right led the court to hold that a corporation is an individual for the purposes of the Bill of Attainder Clauses.[171] The court concluded that corporations such as Con Ed do enjoy protection from bills of attainder.[172]

2. Does Chapter 190 Determine Guilt?

Having resolved that the Constitution protects Con Ed from bills of attainder, the Second Circuit next determined whether Chapter 190 was such a bill.[173] The court's first requirement was that the legislature determine Con Ed's guilt.[174] Although the *Nixon* Court enumerated guilt and punishment as two facets of a single element, the Second Circuit separated its analyses of the two.[175]

The court stated that a bill of attainder defines past conduct as wrongdoing, then punishes that past conduct.[176] The court pointed to the statute's focus on Con Ed's failure to exercise reasonable care as evidence that the legislature considered Con Ed guilty of wrongdoing.[177] Chapter 190 defined Con Ed's conduct surrounding the 2000 outage as negligent and used this finding as a basis for burdening Con Ed.[178] The

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[166] *Id.*

[167] *Id.*

[168] *Id.* at 347.

[169] *Id.* at 348 (citing 1821 English statute).

[170] *Id.* at 348-49.

[171] *Id.* at 346-49.

[172] *Id.* at 349.

[173] *Id.*

[174] *Id.*

[175] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472-82 (1977); *Consol. Edison*, 292 F.3d at 349-50.

[176] *Consol. Edison*, 292 F.3d at 349-50 (citing *Nixon*, 433 U.S. at 472-73; United States v. Lovett, 328 U.S. 303, 317 (1946); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 325 (1866)).

[177] 2000 N.Y. Laws 190 § 1; *Consol. Edison*, 292 F.3d at 349.

[178] 2000 N.Y. Laws 190 §§ 1-2; *Consol. Edison*, 292 F.3d at 349.

legislature's emphasis on a particular instance of Con Ed's past negligence gave Chapter 190 a retrospective, post facto focus.[179] The court found this retrospective focus essential to its conclusion that Chapter 190 determined Con Ed's guilt.[180]

3. Does Chapter 190 Impose Punishment?

The third element of the court's bill of attainder analysis, punishment, contained three factors: (1) the historical meaning of legislative punishment; (2) furtherance of any nonpunitive legislative purposes; and (3) evidence in the legislative record of an intent to punish.[181] As the Court in *Nixon* explained, historic bills of attainder commonly punished individuals by confiscating their property.[182] Here the legislature denied Con Ed $250 million that the utility company would have obtained from its ratepayers.[183] The circuit court was not certain whether this deprivation of property qualified as punishment in the traditional sense.[184] It noted that a deprivation is not necessarily the same as a confiscation.[185] It found history not a dispositive factor, however, and moved on.[186]

The second prong of the examination for a punishment asked whether the statute furthered any nonpunitive purpose.[187] The court identified two possible nonpunitive purposes, but ultimately found that the statute advanced neither.[188] One possible purpose behind Chapter 190 was

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[179] *Consol. Edison*, 292 F.3d at 349.

[180] *Id.*

[181] *Id.* at 350 (citing Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 852 (1984), and *Nixon*, 433 U.S. at 473, 475-76, 478).

[182] *Nixon*, 433 U.S. at 474.

[183] *Consol. Edison*, 292 F.3d at 344-45. Chapter 190 also required Con Ed to refund any money already paid by customers. 2000 N.Y. Laws 190 § 2; *Consol. Edison*, 292 F.3d at 344. This appears to be even closer to a traditional confiscation, but it is unclear if any refunds were necessary, and the court does not address the question. *Id.* at 344-45.

[184] *Consol. Edison*, 292 F.3d at 351.

[185] *Id.* Confiscation and deprivation are not identical for the purposes of the Takings Clause of the Fifth Amendment. *Id.* (citing Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 310, 313-14 (1989)).

[186] *Id.* Requiring the statute to fit exactly within a narrow historical category of punishment would render the Bill of Attainder Clauses unable to respond to new developments and allow legislatures to devise new punishments to avoid the attainder prohibition. *Id.* (citing *Nixon*, 433 U.S. at 475); *see also Bill of Attainder*, *supra* note 1, at 336-37 & 337 n.54 (discounting Justice Frankfurter's declaration of guilt requirement for similar reasons).

[187] *Consol. Edison*, 292 F.3d at 351.

[188] *Id.* at 351-52.

legislative cost-allocation between Con Ed and its customers.[189] Another was the regulatory function of deterring future negligence by Con Ed and other utilities to enhance economic efficiency.[190]

In assessing Chapter 190's purposes, the Second Circuit considered the character of the burdens imposed on Con Ed.[191] If Con Ed had replaced the generator in the course of ordinary scheduled maintenance, it could have passed along that cost to the ratepayers.[192] The replacement cost before the generator's failure would have been substantially the same as the replacement cost after it failed.[193] Thus, even the legislature's legitimate purposes did not justify forcing Con Ed to absorb the costs, simply because the costs arose after a failure, rather than before.[194]

As the final element of its punishment inquiry, the Second Circuit turned to evidence of legislative intent to punish.[195] According to the record, the bill's sponsor stated that Con Ed had "done a terrible thing" and that this law was going to punish it.[196] The court recognized the sponsor's statements as strong evidence of an intent to punish.[197] Therefore, the court found every element of its punishment inquiry satisfied.[198]

Based on the foregoing analysis, the Second Circuit held that Chapter 190 determined Con Ed's guilt and punished it without judicial process.[199] The statute constituted a bill of attainder prohibited by the Constitution.[200] Therefore the Second Circuit invalidated Chapter 190, and affirmed the permanent injunction against the statute's enforcement.[201]

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[189] *Id.* at 352.

[190] *Id.*

[191] *Id.* at 351, 353 (citing *Nixon*, 433 U.S. at 475, 482).

[192] *Id.* at 353.

[193] *Id.* at 353-54.

[194] *Id.* The court further suggested that the legislature could have employed less burdensome alternatives. *Id.* at 354. The legislature could have served its legitimate purposes by attempting to separate whatever additional costs Con Ed incurred by the unplanned nature of the outage. *Id.* Doing so would have made the legislature's solution proportional to the problem it sought to correct. *Id.*

[195] *Id.*

[196] *Id.* at 355 (quoting A. 10096, N.Y. Senate Debate Transcript, at 3906-07 (2000) (statement of Sen. Velella)).

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.* at 355-56.

III. ANALYSIS

The Second Circuit's invalidation of Chapter 190 was a rare finding of a bill of attainder.[202] The court's willingness to apply attainder protection to a corporation is a significant development that may influence future legislation.[203] The court arrived at its result largely by faithfully following *Nixon*'s established guidelines.[204] The particulars of the case, however, obliged the court to draw from precedent outside of *Nixon*.[205] The unique facts also led the court to incorporate unnecessarily a relic of some prior cases, the post facto requirement.[206] The Second Circuit's analysis demonstrates that bill of attainder jurisprudence did not calcify with *Nixon*, and that literalist tenets continue to intermingle with functionalist.[207] This hybridization of analytical approaches produces predictably schizophrenic results. The court advanced bill of attainder jurisprudence significantly, but clouded its ideological underpinnings, providing no clear direction for future decisions. This uncertainty is especially unwelcome in light of the increase in attainder claims likely to arise from corporations' newly confirmed standing. It is useful, therefore, to disentangle from the Second Circuit's decision the strands of thought from the two historic approaches to bills of attainder.

A. Due Process Requires That Corporations Enjoy Protection From Bills of Attainder

Con Ed's justification for protecting corporations from bills of attainder correctly rests on the proposition that the clauses' purpose is to ensure judicial due process.[208] The Constitution forbids bills of attainder as part of its effort to establish the judiciary, with its guaranteed procedural protections, as the entity responsible for deciding guilt and punishing the guilty.[209] But commentators as well as courts have disagreed as to

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[202] *Id.* at 348, 355.

[203] *See Special Provisions, supra* note 4, at 1389-90 (arguing that Fifth Circuit's failure to hold that attainder protection does not apply to corporations will have negative impact on particularized economic legislation).

[204] *See Consol. Edison*, 292 F.3d at 346-55 (listing and applying *Nixon* factors).

[205] *Id.* at 346-49.

[206] *Id.* at 349.

[207] *See* discussion *infra* Part III.C.

[208] *See Consol. Edison*, 292 F.3d at 347-48 (describing historical function of clause as ensuring procedural protections of judicial process for private individuals and corporations).

[209] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468-69 (1977); United States v. Brown, 381 U.S. 437, 442, 445 (1965); United States v. Lovett, 328 U.S. 303, 316-17 (1946); Cummings

whether that proposition is accurate.[210] Commentators argue that the *Nixon* framework employed in *Con Ed* ignores the clauses' substantive value of protecting political groups in favor of procedural protection of judicial process.[211] These commentators contend that the clauses' purpose was to protect a targeted group's political freedoms, not its mere economic rights.[212] They conclude that corporations, which are economic entities, not political outsiders, should not enjoy protection from bills of attainder.[213]

From their earliest days, however, bills of attainder punished by confiscating property.[214] Corporations, whose owners are economically hurt when the company loses property, are as susceptible to this fate as natural persons.[215] Therefore the key to an attainder is not the character of the bill's target, but that the target is punished without the protections of a judicial trial.[216] This notion of judicial due process for all legal entities before they are punished anchors *Con Ed*'s holding that protection from bills of attainder is a constitutional right that corporations should fully enjoy.[217]

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v. Missouri, 71 U.S. (4 Wall.) 277, 323 (1866); *Consol. Edison*, 292 F.3d at 347-48.

[210] *See, e.g.*, Myrie v. N.J. Dep't of Corrs., 267 F.3d 251, 255 (3d Cir. 2001) (declaring bills of attainder only exist when punishment is of criminal, not civil, nature); Griffith, *supra* note 4, at 492 (suggesting that when analyzing bill of attainder challenges, courts are most concerned with maintaining separation of legislative and judicial powers); Welsh, *supra* note 1, at 102-04, 108 (arguing for due process emphasis); *Special Provisions*, *supra* note 4, at 1385 (arguing that Bill of Attainder Clauses protect political freedoms).

[211] Griffith, *supra* note 4, at 490.

[212] *Special Provisions*, *supra* note 4, at 1385.

[213] *See* Buckley, *supra* note 4, at 238; *Special Provisions*, *supra* note 4, at 1385, 1388.

[214] *Nixon*, 433 U.S. at 474 & n.38.

[215] Consol. Edison Co. v. Pataki, 292 F.3d 338, 348 (2d Cir. 2002); *see* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 590 (1990) (recounting corporations' historical use of Bill of Rights protections to defend tangible property against economic regulation); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1870-71 (2003) (describing natural entity paradigm of corporate existence, under which Supreme Court justified according corporations Fourteenth Amendment protections).

[216] *Nixon*, 433 U.S. at 472. Further support that due process is the purpose of the Bill of Attainder Clauses is often given by referring to the separation of powers doctrine. *See* United States v. Brown, 381 U.S. 437, 443-45 (1965); *supra* notes 33-34 and accompanying text. The Bill of Attainder Clauses help to define the separate roles of the legislative and judicial branches, which in turn promote judicial due process. *See Brown*, 381 U.S. at 443-45. But *Con Ed* involves a state statute, and the Constitution does not require any particular organization of a state's government. *See* Mayor of Philadelphia v. Educ. Equal. League, 415 U.S. 605, 615 n.13 (1974); Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937); Dreyer v. Illinois, 187 U.S. 71, 84 (1902). Therefore the argument is less meaningful in the context of *Con Ed*. *See Consol. Edison*, 292 F.3d at 346, n.4.

[217] *Consol. Edison*, 292 F.3d at 347-48; *see* First Nat'l Bank of Boston v. Bellotti, 435 U.S.

Cases show that the law can deny a corporation certain constitutional rights based on its status as a corporation.[218] The law may deny or diminish a corporation's rights partly because of the character of the particular constitutional provision from which the rights arise.[219] This disparity in rights is also due partly to the character of corporations as state-created entities and their resulting special relationship with the state.[220]

The Fifth Amendment right to avoid compelled self-incrimination, for example, does not extend to corporations.[221] A corporation owes its existence to the state and receives certain privileges from the state.[222] The state retains the right to ascertain whether the corporation exercises its privileges lawfully.[223] Therefore, because of the special public interest in regulating corporate conduct, a corporation cannot refuse to produce reasonably requested documents, even if they would prove incriminating.[224]

In contrast, a corporation does enjoy the Fourth Amendment immunity against unreasonable searches and seizures.[225] The Fourth Amendment's protection manifests one of the Constitution's several due process guarantees.[226] There exists no reason for a state, in looking after a corporation's behavior, to deny it due process of law.[227] For this reason, human beings and corporations alike enjoy this immunity.[228]

These illustrations show that a state may not selectively abrogate constitutional rights for a corporation simply because the corporation exists by the state's consent.[229] Where the law denies a corporation a

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765, 780 & n.15 (1978) (asserting that corporations are guaranteed same Fourteenth Amendment protections as natural persons); Tara J. Radin, *700 Families to Feed: The Challenge of Corporate Citizenship*, 36 VAND. J. TRANSNAT'L L. 619, 652-53 (2003) (comparing rights accorded to corporations and to human persons).

[218] *First Nat'l Bank of Boston*, 435 U.S. at 778 n.14.

[219] *Id.*

[220] Hale v. Henkel, 201 U.S. 43, 75 (1906).

[221] United States v. Morton Salt Co., 338 U.S. 632, 652 (1950); Wilson v. United States, 221 U.S. 361, 382-85 (1911); *Hale*, 201 U.S. at 75-76.

[222] *Hale*, 201 U.S. at 74-75.

[223] *Id.* at 75.

[224] *Id.*

[225] Marshall v. Barlow's, Inc., 436 U.S. 307, 327 (1978); *Hale*, 201 U.S. at 76.

[226] City of West Covina v. Perkins, 525 U.S. 234, 240 (1999); *see also* Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that Fourth Amendment and substantive due process are analyzed under different standards, though provisions are closely related).

[227] *Hale*, 201 U.S. at 76.

[228] *Id.*

[229] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 778 n.14 (1978).

constitutional right, it must be due to the nature of the right itself.[230] The law must afford to all a right granted to ensure due process.[231] The Bill of Attainder Clauses are essentially a guarantee of judicial due process.[232] Therefore they must protect a corporation as fully as a natural person.[233] The Second Circuit was correct to reach this conclusion. Not all aspects of the decision, however, are as well justified.

B. Con Ed's *Post Facto Requirement Deviates From Supreme Court Precedent*

Without acknowledging the change it effected, the Second Circuit added a novel requirement to finding a bill of attainder, one not dictated by *Nixon* or *Selective Service*. At first glance, *Con Ed* seems to have applied the *Nixon* blueprint with precision.[234] The court asked whether Chapter 190 determined Con Ed's guilt and punished it.[235] It examined whether Con Ed was an individual qualifying for protection from attainder.[236] It asked whether the protections of a judicial trial were absent in legislating Con Ed's fate.[237] *Nixon* demands each of these inquiries.[238] The Second Circuit did, however, add an element not separately delineated by *Nixon* — whether the statute determined guilt based on past conduct.[239] Neither *Nixon* nor its successor, *Selective Service*, treated this as a separate factor.[240] *Nixon* addressed the question in a footnote.[241] *Selective Service* discussed the issue as a significant part of its specificity analysis.[242] But neither case went so far as to claim a post facto requirement.[243] In other words, the Supreme Court does not require

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[230] *Id.*; United States v. White, 322 U.S. 694, 698-701 (1944); Wilson v. United States, 221 U.S. 361, 381-82 (1911).

[231] W. & S. Life Ins. Co. v. Bd. of Equalization, 451 U.S. 648, 660 n.12 (1981); *Hale*, 201 U.S. at 76.

[232] United States v. Brown, 381 U.S. 437, 449 n.23 (1965); Coniston Corp. v. Vill. of Hoffman Estates, 844 F.2d 461, 468-69 (7th Cir. 1988).

[233] *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 881 n.9 (1985) (noting that corporation is person within meaning of Fourteenth Amendment); Helicopteros Nacionales de Colom. v. Hall, 466 U.S. 408, 413-19 (1984) (applying procedural due process to corporation).

[234] Consol. Edison v. Pataki, 292 F.3d 338, 346-55 (2d Cir. 2002).

[235] *Id.* at 349-55.

[236] *Id.* at 346-49.

[237] *Id.* at 346.

[238] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468-82 (1977).

[239] *Consol. Edison*, 292 F.3d at 349.

[240] Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 850-51 (1984); *Nixon*, 433 U.S. at 476 & n.40.

[241] *Nixon*, 433 U.S. at 476 n.40.

[242] *Selective Serv.*, 468 U.S. at 850-51.

[243] *Id.* at 850-51; *Nixon*, 433 U.S. at 476 & n.40.

that a statute focus on past acts to qualify as a bill of attainder.[244]

In this respect, the Second Circuit has re-introduced the requirement that the challenged statute have a post facto or retrospective focus.[245] The facts of *Con Ed* did invite greater than usual emphasis on the retrospective determination of guilt.[246] Chapter 190 explicitly stated that Con Ed failed to exercise reasonable care in the events causing the 2000 outage.[247] Clearly, the statute focused on this past act, a fact that the court could not ignore.[248] Still, the Second Circuit overstated the law when it asserted that a retrospective focus is an indispensable element of a bill of attainder.[249]

As discussed in Part I, *United States v. Brown* struck down a statute targeting Communist labor union officers.[250] In that case the Supreme Court clearly established that bills of attainder are not limited to instances of retribution for past acts.[251] The *Nixon* Court agreed with *Brown*'s interpretation.[252] According to *Brown*, history reveals numerous bills of attainder enacted for preventive, rather than retributive, purposes.[253] A legislature would judge the character of a group or individual, possibly on the basis of his beliefs or associations.[254] It would then legislate with the purpose of forestalling predictable future misbehavior.[255] Legislation such as this, which did not punish a past act, historically constituted a bill of attainder.[256] The *Brown* Court framed its rejection of a retributive requirement in terms of correcting a misreading by the *Douds* Court.[257] This is the closest to an outright denunciation of prior analysis in any major bill of attainder decision.[258] This status would

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[244] *See Selective Serv.*, 468 U.S. at 850-51; *Nixon*, 433 U.S. at 476 & n.40.

[245] *Consol. Edison*, 292 F.3d at 349.

[246] *See id.*

[247] 2000 N.Y. Laws 190 § 2.

[248] *Id.*; *Consol. Edison*, 292 F.3d at 349.

[249] *Consol. Edison*, 292 F.3d at 349; *see Selective Serv.*, 468 U.S. at 847 (explaining that focus on past acts is just one way statute may constitute bill of attainder); *Nixon*, 433 U.S. at 476 n.40 (noting that bills of attainder need not punish past events, but may instead prevent future misconduct); United States v. Brown, 381 U.S. 437, 458-59 (1965) (asserting that bill of attainder ban is not restricted to instances of retribution).

[250] *Brown*, 381 U.S. at 440.

[251] *Id.* at 458.

[252] *Nixon*, 433 U.S. at 476 n.40.

[253] *Brown*, 381 U.S. at 458.

[254] *Id.* at 458-59.

[255] *Id.*

[256] *Nixon*, 433 U.S. at 476, n.40; *Brown*, 381 U.S. at 458.

[257] *Brown*, 381 U.S. at 460.

[258] *See id.*

seem to imbue *Brown*'s analysis with special significance.[259]

Yet despite *Brown* and *Nixon*'s explicit statements that bills of attainder need not punish past acts, courts continued to look for such retrospective focus.[260] *Nixon* itself did so, and finding none, held that the statute did not impermissibly punish the former president.[261] *Selective Service* looked for a focus on past activity and found instead that the statute aimed at present activity.[262] The Court concluded that the targeted group was therefore escapable, and the statute was not a bill of attainder.[263] One might argue, therefore, that *Con Ed* was correct to claim that a statute's retrospective focus is indispensable to finding a bill of attainder.[264] The assertion may have contradicted the precedents' stated requirements, but not the substance of courts' actual analyses.[265]

This counterargument finds some authority in *SeaRiver Maritime Financial Holdings Inc. v. Mineta*.[266] This recent Ninth Circuit bill of attainder case also looked for a retrospective focus in the challenged statute.[267] The *SeaRiver* case involved the *Exxon Valdez* oil tanker.[268] The vessel's owner challenged a federal statute that prohibited certain oil tankers from entering Prince William Sound, the site of the *Valdez*'s major 1989 oil spill.[269] Congress specified the targeted vessels in such a way as to affect only the *Valdez*.[270] The Ninth Circuit held that the statute was not a bill of attainder because it furthered nonpunitive legislative purposes.[271] The *SeaRiver* court looked for a focus on past conduct as part of its specificity analysis.[272] If *SeaRiver* was correct, one might therefore conclude that *Con Ed* was likewise correct to look for a focus on past conduct in its own analysis.[273]

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[259] *But see id.* at 457-58, 458 n.32 (choosing to read around *Douds'* inescapability and post facto requirements, rather than overrule case).

[260] *See* Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 847-48 (1984); *Nixon*, 433 U.S. at 476, n.40; Consol. Edison Co. v. Pataki, 292 F.3d 338, 349 (2d Cir. 2002).

[261] *Nixon*, 433 U.S. at 476-77.

[262] *Selective Serv.*, 468 U.S. at 847.

[263] *Id.* at 847-49.

[264] *Consol. Edison*, 292 F.3d at 349.

[265] *See id.*

[266] SeaRiver Maritime Fin. Holdings v. Mineta, 309 F.3d 662, 670-71 (9th Cir. 2002).

[267] *Id.* at 670-71.

[268] *Id.* at 666.

[269] Oil Pollution Act of 1990 § 5007, 33 U.S.C. § 2737 (2000); *SeaRiver*, 309 F.3d at 666.

[270] *SeaRiver*, 309 F.3d at 667.

[271] *Id.* at 674-75.

[272] *See id.* at 670-71.

[273] *See* Consol. Edison Co. v. Pataki, 292 F.3d 338, 349 (2d Cir. 2002).

An important distinction exists, however, confirming that *Con Ed* deviates from precedent.[274] While *SeaRiver* and *Selective Service* included retrospective focus in their considerations of specificity, *Con Ed* does so in its analysis of guilt and punishment.[275] This discrepancy is significant for two reasons. First, it shows that *Con Ed* does not carefully follow controlling precedent.[276] The Supreme Court established a test with certain elements, each element containing certain factors.[277] If the Second Circuit considers retrospective focus to be one of these required factors, it ought to address the factor as part of the element to which it properly belongs.[278]

Second, and more significantly, the court's failure to follow precedent may have affected the outcome of the case.[279] Recall that the challenged statute specifically named Con Ed as its target.[280] Therefore, once the court established that a corporation is an individual for bill of attainder purposes, the statute easily satisfied the specificity element.[281] This freed the post facto factor for use in the more contentious elements, guilt and punishment.[282] Because the statute plainly exhibited a post facto focus, the strength of this factor buttressed the less clear aspects of the guilt and punishment elements.[283] Had *Con Ed*, like *SeaRiver*, kept the post facto discussion to its specificity analysis, the guilt and punishment elements would have been much harder to satisfy.[284] Thus the Second Circuit's deviation from precedent allowed it to find a bill of attainder that

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[274] *Compare SeaRiver*, 309 F.3d at 670-71, *with Consol. Edison*, 292 F.3d at 349.

[275] Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 847-48 (1984); *SeaRiver*, 309 F.3d at 670-71; *Consol. Edison*, 292 F.3d at 349.

[276] *Compare Selective Serv.*, 468 U.S. at 847-48, *with Consol. Edison*, 292 F.3d at 349 (discussing retrospective focus in different parts of analyses).

[277] *See Selective Serv.*, 468 U.S. at 846-47 (applying *Nixon* factors); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977) (establishing factors for finding bill of attainder).

[278] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 443 (2000) (reiterating that even when interpreting Constitution, departure from precedent must be supported by special justification); *see also* United States v. Int'l Bus. Machs. Corp., 517 U.S. 843, 856 (1996); Payne v. Tennessee, 501 U.S. 808, 828 (1991).

[279] *See infra* notes 280-284 and accompanying text.

[280] 2000 N.Y. Laws 190; *Consol. Edison*, 292 F.3d at 344.

[281] *Consol. Edison*, 292 F.3d at 346.

[282] *See id.* at 349.

[283] *See* 2000 N.Y. Laws 190 § 2 (referring to outage of 2000 as reason for introducing bill); *Consol. Edison*, 292 F.3d at 349-54. The court's holding that Chapter 190 did not further a nonpunitive goal received the most discussion, suggesting that this factor was less obvious than others. *Id.* at 351-54.

[284] *See Consol. Edison*, 292 F.3d at 349-54; SeaRiver Maritime Fin. Holdings v. Mineta, 309 F.3d 662, 670-71 (9th Cir. 2002) (considering whether statute focused on target's past acts).

otherwise might not have been justified.[285]

C. Con Ed's *Influence Is Limited by Its Unique Facts and Its Compromise Between Functional and Literal Approaches*

Critics argue that *Con Ed's* deviation from precedent will give rise to unwarranted bill of attainder invalidations of otherwise legitimate particularized regulatory legislation.[286] They predict that if courts widely follow *Con Ed*, Congress and state legislatures will be unable effectively to regulate industries such as power and communications.[287] Under *Con Ed*, they argue, lawmakers cannot narrowly tailor their laws to particular situations, as is sometimes necessary when legislating for a regulated industry.[288]

The answer to this argument is that *Con Ed*'s extension of the attainder clauses is sharply limited for two reasons. First, *Con Ed*'s challenged statute was uniquely offensive to the Bill of Attainder Clauses.[289] Second, *Con Ed*'s literalist post facto requirement curtails the decision's expansive functionalist due process aspect.[290]

The first point reflects the fact that Chapter 190 revealed extraordinary legislative impudence.[291] The statute burdened a specific company because of actions that the legislature alone deemed wrongful.[292] Moreover, the statute came about in circumstances that nullified otherwise reasonable rationales.[293] Legal mechanisms were already in place for policing the conduct of utility companies like Con Ed.[294] The

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[285] *See Consol. Edison*, 292 F.3d at 349-54.

[286] *Special Provisions*, *supra* note 4, at 1390.

[287] *Id.*

[288] *Id.*; *see, e.g.*, Violent Crime Control and Law Enforcement Act of 1994 § 110102, 18 U.S.C. §§ 921-922 (2000) (prohibiting certain weapons made by particular manufacturer); Telecommunications Act of 1996 §§ 271, 274, 47 U.S.C. §§ 271, 274 (2000) (limiting ability of Bell telephone companies to provide long distance services and electronic publishing services); *see also* Navegar Inc. v. United States, 192 F.3d 1050, 1052 (D.C. Cir. 1999) (upholding Violent Crime Control and Law Enforcement Act § 110102); BellSouth Corp. v. Fed. Communications Comm'n, 144 F.3d 58, 60 (D.C. Cir. 1998) (upholding Telecommunications Act § 274); BellSouth Corp. v. Fed. Communications Comm'n, 162 F.3d 678, 680 (D.C. Cir. 1998) (upholding Telecommunications Act § 271).

[289] *See* Consol. Edison Co. v. Pataki, 292 F.3d 338, 344 (2d Cir. 2002) (characterizing Chapter 190 as rare and exceptionally narrow).

[290] *See id.* at 349 (declaring post facto focus indispensable to bill of attainder).

[291] 2000 N.Y. Laws 190; *see Consol. Edison*, 292 F.3d at 344.

[292] 2000 N.Y. Laws 190.

[293] *See Consol. Edison*, 292 F.3d at 352-53.

[294] *See id.*

court leaned on both factors to support its finding of an attainder.[295] The test explicated in the *Nixon* case requires a court to accept any legitimate legislative purpose as proof that a bill's encumbrance does not punish.[296] Add to this the specificity requirement, seldom so clearly satisfied as in Chapter 190, and it becomes clear that only the rare statute will be in a position to run afoul of *Con Ed*.[297] Any statute written with either a legitimate purpose or an indefinite target will not be an attainder.[298] Courts' deference to legislatures and the scarcity of statutes comparable to Chapter 190 mean that one cannot properly see *Con Ed* as a hindrance to legitimately effective legislation.[299]

The second factor limiting *Con Ed*'s influence is the inclusion of a strict post facto requirement.[300] This requirement, whether applied to the specificity or the punishment element, cabins the expansive effect of the court's concern for protecting due process.[301] Due process concerns prompted the Second Circuit to include corporations under the Bill of Attainder Clauses' umbrella of protection.[302] But by declaring a retrospective focus indispensable, the court simultaneously narrowed the range of situations in which a corporation may find relief.[303] The functionalist approach expands protection, while literalism restricts the scope.[304] *Con Ed* invoked both functionalist and literalist lines of thought,

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[295] *Id.* at 351-54.

[296] Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 475-76 (1977).

[297] *See Consol. Edison*, 292 F.3d at 355 (conceding scarcity of legislation similar to Chapter 190).

[298] *See, e.g.*, SeaRiver Maritime Fin. Holdings v. Mineta, 309 F.3d 662, 678 (9th Cir. 2002) (upholding specific statute with legitimate purpose).

[299] *See* United States v. Brown, 381 U.S. 437, 462 (1965) (citing reluctance of Court to strike down act of Congress); *Consol. Edison*, 292 F.3d at 355 (noting heavy presumption of legitimacy accorded legislative decisions).

[300] *See Consol. Edison*, 292 F.3d at 349 (declaring retrospective focus to be indispensable element of bill of attainder).

[301] *See id.*

[302] *Id.* at 347-48.

[303] *See id.* at 349.

[304] This push-and-pull effect becomes clear when considering the basic relationship between the functional and literal schools of thought. *See Bill of Attainder*, *supra* note 1 *passim* (explaining bill of attainder jurisprudence in terms of literalist and functionalist thinking). A purely functional, purely due process analysis of attainder questions can be over-inclusive in its protection: persons burdened by legislation because of their identity, without judicial process, could claim attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 329 (1866); *Ex parte* Garland, 71 U.S. (4 Wall.) 333, 374 (1866). This was essentially the situation in *Cummings* and *Garland*, where those with specified characteristics lost the right to practice certain occupations. *Cummings*, 71 U.S. (4 Wall.) at 329; *Garland*, 71 U.S. (4 Wall.) at 374. In cases where the challenged legislation is desirable, courts narrow the clauses' scope by some form of historical literalism. A court may require the burden to be a

historically recognizable punishment. *See* Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 473-75 (1977). It may require the bill's targeted class to be inescapable. *See* Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 847-51 (1984). It may require the bill to have a retrospective focus. *See* Am. Communications Ass'n v. Douds, 339 U.S. 382, 413-14 (1950).

Con Ed exemplifies the fact that both strains of analysis must co-exist to prevent the attainder clauses from meaning too much, or nothing at all. *Cf. Bill of Attainder, supra* note 1, at 366 (lamenting imbalance in bill of attainder doctrine after several years of mostly literalist analysis). This case expands the scope of the clauses' protection to include corporations, which are entitled to due judicial process. *Consol. Edison*, 292 F.3d at 347-48. The court then shuts the door to rampant overextension by invoking a literalist requirement — the statute must exhibit a retrospective focus — which Chapter 190 satisfied. *Id.* at 349. Had the court been inclined to find Chapter 190 constitutional, it might have cited *Cummings*, *Garland*, or *Brown* for the proposition that bills of attainder only exist when targeting political minorities, and therefore cannot apply to a corporation like Con Ed. *See Brown*, 381 U.S. 437, 440 (invalidating statute targeting Communist Party during Cold War); *Cummings*, 71 U.S. (4 Wall.) at 330 (invalidating statute targeting former Confederate sympathizers just after Civil War); *Garland*, 71 U.S. (4 Wall.) at 381 (same). Instead, the *Con Ed* decision reinforces the attainder clauses' due process utility, while its post facto requirement maintains fidelity to historically-minded literalists. *See Consol. Edison*, 292 F.3d at 347-49.

In this way, functionalism tends to expand the protection from bills of attainder, while literalism tends to narrow it. *Cf. Bill of Attainder, supra* note 1, at 340-43 (discussing limiting nature of literalist notions). Literalist ideas appear in cases in ways that fit the desired outcome, so the decision's secondary effects will not ripple too far. *Cf. id.* at 333-36 (discussing origin and effects of functionalist interpretation). Explaining the inconsistency of their application may be as simple as *Selective Service's* observation that each bill of attainder case has turned on its own highly particularized context. *Selective Serv.*, 468 U.S. at 852 (quoting Fleming v. Nestor, 363 U.S. 603, 616 (1960)).

On the other hand, a court might apply this principle to fashion a working model, or set of models, to reconcile *Con Ed* and prior cases by varying the analytical requirements depending on the bill's target. Under this approach, a bill punishing a specified political outsider could be a bill of attainder, whether its focus was retrospective or prospective. A bill punishing a non-outsider (such as Con Ed) could be a bill of attainder only if it adduced guilt based on the target's past conduct. This dual channel approach accepts that there are at least two purposes served by the Bill of Attainder Clauses. The functionalist purpose is furthered by protecting the judicial due process rights of all targets. The traditional literalist purpose is simultaneously acknowledged by providing a lower threshold for protecting the politically disfavored. The distinction between the bill's targets also recognizes that a politically favored target often has some opportunity to defend itself through legislative allies, even if it has no true "day in court." This approach may help to harmonize the caselaw, but at least two problems are readily apparent. First, it would require deciding which entities are "political outsiders," a distinction that will not always be clear. Second, the text of the Constitution hardly appears to require this kind of disparate treatment; nothing in the text implies that there are two types of bill of attainder, one for outsiders and one for insiders. Of course, constitutional rights are regularly protected differently according to the character of the individual concerned, as in the differing treatment for suspect classes in equal protection doctrine. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 442 (1985) (holding that mental retardation is not suspect or quasi-suspect classification); Loving v. Virginia, 388 U.S. 1, 11 (1967) (striking down antimiscegenation law because it classified based on race, a suspect class). Creating this entirely new distinction, however, simply to reconcile *Con Ed* with precedent

which leaves subsequent courts free to emphasize whichever one they prefer. As a result, one cannot say *Con Ed* controls the outcome of any bill of attainder case that may follow.

CONCLUSION

Bill of attainder doctrine has shifted focus often, considering the relatively few cases heard on the matter over the course of the last 200 years.[305] *Con Ed* displays how the current approach draws selectively from its predecessors to create a compromise between the literalist and functionalist approaches.[306] *Con Ed* unwisely restores the historically rationalized post facto requirement, but bases its key advancement on the attainder clauses' due process function.[307] The Second Circuit deviates from Supreme Court precedent to reach a correct conclusion.[308] This technique is more palatable considering the limited impact *Con Ed* will have on bill of attainder jurisprudence.[309] *Con Ed*'s lasting significance is not the post facto requirement it imposes.[310] Its true legacy is that it protects corporations from egregiously unjust legislation while still permitting lawmakers to regulate with precision when needed.[311] Courts in a position to follow *Con Ed* must parse the case carefully, adhering only where proper.[312] To proceed otherwise risks perpetuating an erroneous restriction on the Bill of Attainder Clauses' intended purpose.

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ultimately only weakens the decision's value by restricting the scope of the newfound corporate protection from attainders.

[305] *See supra* Part I.

[306] *See supra* Part III.

[307] *See Consol. Edison*, 292 F.3d at 347-49.

[308] *See supra* Part III.A-B.

[309] *See supra* Part III.C.

[310] *See Consol. Edison*, 292 F.3d at 349.

[311] *See id.* at 349, 352-54.

[312] *Cf.* SeaRiver Maritime Fin. Holdings v. Mineta, 309 F.3d 662, 668 n.3, 678 (9th Cir. 2002) (accepting *Con Ed*'s holding that corporations are protected from bills of attainder, while upholding statute against attainder challenge).

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