

BUT WE WERE BORN FREE: THE RACIAL AND SEXUAL QUOTA AS A CONSTITUTIONAL BILL OF ATTAINDER

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"The white race is the cancer of human history"

*Susan Sontag*¹

"Negroes are Anti-Semitic Because They're Anti-White"

*James Baldwin*²

"You guys have been practicing discrimination for years. Now it is our turn."

*Thurgood Marshall*³

I. INTRODUCTION

Benjamin Disraeli remarked in debate on the floor of the House of Commons early in 1845 that Sir Robert Peel, the chief of the Conservative Party, had "caught the Whigs bathing and walked away with their clothes."⁴ We Americans saw a similar reversal of roles during the 1970's as neo-

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1. N. PODHORETZ, *BREAKING RANKS: A POLITICAL MEMOIR* 341 (1979).

2. N.Y. Times, April 9, 1967, § 6 (Magazine), at 26.

3. W. DOUGLAS, *THE COURT YEARS 1939-1975: THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* 34 (1980).

4. W. MONYPENNY, *THE LIFE OF BENJAMIN DISRAELI, EARL OF BEACONSFIELD, 1837-1846* at 314 (1912) (quoting from a contemporary report in *The Times*).

conservative thinkers argued in Rousseauistic terms for the removal of artificial barriers to achievement⁵ while old-line liberals rushed to subscribe their names beneath the *ancien regime* notion of hereditary entitlement by quota;⁶ or, as then President Carter phrased it in speaking to his cabinet, an explicit policy to "get rid of all those [subordinates] who are incompetent, except minorities and women."⁷

Quota schemes were not solely political anomalies; a substantial number of Americans doubted whether such schemes were constitutional when weighed in the balance against the standards of the equal protection and due process clauses. This Article will demonstrate that federal and state administrative directives purporting to legitimize racial and sexual quotas are, in reality, constitutionally prohibited bills of attainder:

Article I, section 9, clause 3 of the Constitution prohibits the Legislature from enacting a bill of attainder, which is a legislative determination of guilt and imposition of punishment upon a specified group or specified individuals without the safeguards of a judicial trial. [citations omitted] Strictly speaking, an act is a bill of attainder when the punish-

5. See, e.g., J. KEMP, *AN AMERICAN RENAISSANCE: A STRATEGY FOR THE 1980's* at 2, 36 (1979).

6. See, e.g., THE 1980 DEMOCRATIC NATIONAL PLATFORM 3. "The Democratic Party pledges itself to . . . [i]mplement vigorously all set-aside provisions for minority business. . . . [W]e support affirmative action goals to overturn patterns of discrimination in education and employment." *Id.* at 11.

Both critics of and apologists for quota schemes agree that quota schemes have a distinct flavor of the Old World. Compare *Fullilove v. Klutznick*, 448 U.S. 448, 532-33 (1981) (Stevens, J., dissenting):

History teaches us that the costs associated with the sovereign's grant of exclusive privileges often encompass more than the high prices and shoddy workmanship that are familiar handmaidens of monopoly; then engender animosity and discontent as well. The economic consequences of using noble birth as a basis for classification in 18th century France though disastrous, were nothing as compared with the terror that was engendered in the name of "egalite" and "fraternite." Grants of privilege on the basis of characteristics acquired at birth are far from an unmixed blessing.

with Cruz, 'Realpolitik' and affirmative action, A.B.A. J. 1036 (Sept. 1980): ("There is nothing new about affirmative action, as there was nothing new about Imperial Chancellor Otto von Bismarck's *realpolitik*. . . . [A]ffirmative action is as old as *realpolitik*." (author is the Director of Review and Appeals for the United States Equal Employment Opportunity Commission). Compare also C. FRIEDRICH, *THE AGE OF BAROQUE: 1610-1660* at 13 (1952) (quoting Francis Bacon's classic statement of the zero-sum basis of Mercantilism: "The increase of any estate must be upon the foreigner, for whatsoever is somewhere gotten is somewhere lost.") with Bell, *Correspondence*, 26 EMORY L.J. 400, 401 (1977) ("Nor is it likely that serious correction of black disadvantage can be achieved without loss of some advantage enjoyed by whites. . . ."). See also G. SQUIBB, *FOUNDERS' KIN: PRIVILEGE AND PEDIGREE* 3 (1972) ("That a substantial proportion or even a majority of the members of a college or school might owe their positions to the accident of family connections was accepted with little question as a fact of [English] academic life for half a millennium.").

7. J. CALIFANO, JR., *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* 430-31 (1981).

ment is death, and a bill of pains and penalties when the punishment is less severe, but both kinds of punishment have been held to fall within the scope of the constitutional prohibition.⁸

Because directives purporting to legitimize quota schemes are bills of attainder, those injured by quotas have actions in tort against the offending government officials and against the offending employers.⁹

For simplicity and brevity, this Article considers only the employment racial and sexual quotas approved by the "Affirmative Action Guidelines"¹⁰ of the United States Equal Employment Opportunity Commission [hereinafter EEOC]. Nevertheless, the patterns and doctrines elucidated in this specific context apply to all legislative or administrative fostering of racial and sexual quota schemes.

II. FACTS

During the decade of the 1970's, anti-discrimination law shifted in the minds of some federal and state administrators from a "color-blind" to a "color-conscious" model. In the minds of these individuals, the duty to

8. *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 371 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977). Compare *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968) ("This Court's decisions have defined a bill of attainder as a legislative Act which [1] inflicts punishment [2] on named individuals or members of an easily ascertainable group [3] without a judicial trial.") with BLACK'S LAW DICTIONARY 162 (4th ed. 1968):

"Bills of attainder," as they are technically called, are such special acts of the legislature as inflict capital punishment upon persons supposed to be guilty of high offenses, such as treason and felonies, without any conviction in the ordinary course of judicial proceedings. If an act inflicts a milder degree of punishment than death, it is called a "Bill of Pains and Penalties," but both are included in the prohibition in the Federal Constitution.

9. See *Davis v. Passman*, 442 U.S. 228 (1979); *Butz v. Economou*, 438 U.S. 478 (1978); *Bivins v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (for a discussion of the theory of actions against federal officials for constitutional torts). See also 42 U.S.C. § 1983 (1976 & Supp. IV 1980) (actions brought against state officials).

Those hurt by quota schemes may also maintain actions against employers and potential employers for constitutional torts because those defendants are willing participants in joint action with federal or state governments. See, e.g., *Geneva Towers Tenants Org. v. Federated Mtg. Investors*, 504 F.2d 483, 487 (9th Cir. 1974) ("The standards utilized to find federal action for purposes of the Fifth Amendment are identical to those employed to detect state action subject to the strictures of the Fourteenth Amendment."); *Dennis v. Sparks*, 101 S. Ct. 183, 186 (1980):

As the Court of Appeals correctly understood our cases to hold, to act "under color of" state law for § 1983 purposes does not require that the defendant be an officer of the State. It is enough that he is a willful participant in joint action with the State or its agents. Private persons, jointly engaged with state officials in the challenged action, are acting "under color" of law for purposes of § 1983 actions. [citations omitted].

See also *infra* note 105.

10. 29 C.F.R. 1608 (1981).

avoid discrimination on the basis of race or sex became the duty to make choices grounded precisely upon the basis of race or sex.¹¹

Acting in conjunction with other federal agencies, the EEOC on December 22, 1977, first proposed and then, on January 12, 1979, adopted "Affirmative Action Guidelines" which purported to permit employers to impose employment "plans" which include "goals and timetables or other appropriate employment tools which recognize the race, sex, or national origin of applicants or employees."¹²

Three major sources will be relied upon to illustrate the positions taken by apologists for quota schemes. First, John Hart Ely's 1974 article, *The Constitutionality of Reverse Racial Discrimination*,¹³ is cited because of Ely's reputation as a legal scholar. If a principled legal argument exists in defense of quota schemes, one can expect to hear it from Ely. Second, Daniel C. Maguire's 1980 book,¹⁴ *A New American Justice: Ending the White Male Monopolies*, is used to introduce a non-legal perspective. Third, observations by the EEOC Commissioners are discussed because these observations, presumptively, disclose the motives which led the Commissioners of the EEOC as they devised their endorsement of quota schemes.

That quota schemes fence out white male workers is obvious and, in fact, conceded by the EEOC Commissioners and by other apologists for quota schemes: "[T]ak[ing] blackness into account and weigh[ing] it positively when we allocate opportunities . . . must mean denying opportunities to some people solely because they were born White."¹⁵

Apologists for quota schemes use three arguments to justify this fencing out. First, apologists point to the slowness and expense of attempting to

11. Compare, e.g., *United Steelworkers v. Weber*, 443 U.S. 193, 239 (1979) (Rehnquist, J., dissenting):

There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual.

with e.g., Statement by Eleanor Holmes Norton, Chair, EEOC, Announcing the Issuance by EEOC of Proposed Guidelines on Remedial and/or Affirmative Action, Dec. 21, 1977, at 1 ("The fact that we find it necessary to issue these Guidelines means that we have reached an important plateau in the development of antidiscrimination law.") (on file with the author) [hereinafter cited as Norton Statement].

12. 29 C.F.R. § 1608.4(c) (1981).

13. 41 U. CHI. L. REV. 723 (1974).

14. Professor Maguire teaches ethics at Marquette University.

15. See *supra* note 13 at 723. See also Leach, *Affirmative Action and Guideposts to Remedial Relief*, 21 How. L.J. 529, 534 (1978) ("In practice today it is often the 'innocent' Anglo-male who perceives himself as a sacrifice. Of course his past privileges and expectations would have economic value, and they are not relinquished willingly or with pleasure.") (author is an EEOC Commissioner).

impose nondiscrimination duties through case-by-case litigation.¹⁶ Second, apologists argue that economic inequality among ethnic groups risks the eventual destruction of the United States in a violent social meltdown.¹⁷ Third, apologists attempt to finesse the issue of merit simply by denying that employers use merit criteria in making employment decisions.¹⁸

Apologists originally attempted to shield quota schemes from equal protection challenges through the application of a "we/they" analysis. One defender of the quota faith argued:

I shall argue that reverse racial discrimination can be constitutional, but for reasons quite different from those in the conventional account. . . . "[S]pecial scrutiny" is not appropriate when White people have decided to favor Black people at the expense of White people. . . . [T]he principle I propose is a neutral one: regardless of whether it is wise or unwise, it is not "suspect" in a constitutional sense for a majority, any majority, to discriminate against itself.¹⁹

Though this argument was grounded in some judicial authority,²⁰ by the end of the 1970's, apologists for quota schemes ceased to offer it in justification. Perhaps the advent of quota schemes at the behest of narrowly constituted administrative agencies convinced apologists to abandon this argument. For example, the composition of the EEOC which finally approved the "Affirmative Action Guidelines" was one black female, one white female, one hispanic male, one black male, and one white male. The "Affirmative Action

16. See, e.g., Norton Statement, *supra* note 11, at 2 ("The guidelines will help employers because they will be encouraged to proceed to voluntarily do what is required by the law instead of awaiting the slow and costly process of case-by-case litigation.").

17. See, e.g., D. MAGUIRE, *A NEW AMERICAN JUSTICE: ENDING THE WHITE MALE MONOPOLIES* 112 (1980) ("If this alienation [among blacks] becomes mobilized, the dominant white society may wish, in the ensuing terror, that all we had to deal with was a moderate program of preferential affirmative action."); Bell, *Britain, Blacks, and Busing* (Book Review), 79 MICH. L. REV. 835, 846 (1981) ("[T]here is not unlimited time in which to decide whether a sensible as well as a moral approach to race relations can be effected. 'The fire next time' will not always be a future event.").

18. Interview with Eleanor Holmes Norton, New York City Human Rights Commission, reprinted in *Some People Derive Their Energy from Struggle*, 2 CIV. LIB. REV. 90, 97 (Winter 1975) ("I knew damn well that merit didn't determine who succeeded and who didn't when it came to race. . . .") [hereinafter cited as Norton Interview]; D. MAGUIRE, *A NEW AMERICAN JUSTICE: ENDING THE WHITE MALE MONOPOLIES* 172 (1980) ("In fact the old buddy system always prevailed.").

19. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. at 727.

20. See *Strauder v. West Virginia*, 100 U.S. 303, 308 (1879) (quoted in Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 740 (1974)):

If in those States where the colored people constitute a majority of the entire population a law should be enacted excluding all white men from jury service, thus denying to them the privilege of participating equally with the blacks in the administration of justice, we apprehend no one would be heard to claim it would not be a denial to white men of the equal protection of the laws.

Guidelines" passed this body by a vote of 4-0; the white male not present.²¹ One apologist for quota schemes anticipated an analogous legislative action and found it wanting when weighed in the scales of his equal protection analysis:

I would have thought the point too obvious to warrant mention, but it has so often been put to me as an "embarrassing question" that perhaps I'd better answer it. Of course, it works both ways: A law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature.²²

In sum, apologists argue that all of the above considerations justify fencing out white males.

III. LAW

A bill of attainder is a legislative imposition of punishment upon a specified group or specified individuals without judicial safeguards.²³ Little known companion provisions of the United States Constitution prohibit the use of bills of attainder by either the federal or the state governments: "No Bill of Attainder or ex post facto law shall be passed . . ."²⁴ "No State shall pass any Bills of Attainder . . ."²⁵

Parliament habitually resorted to bills of attainder in the sixteenth, seventeenth, and eighteenth centuries as a means of striking at those people believed to be a danger to the state.²⁶ The anti-Loyalist legislation passed by each of the original thirteen states during and after the American Revolution included bills of attainder as well.²⁷ Against this background of legislative trials, the Constitutional Convention adopted provisions outlawing bills of attainder unanimously and without debate.²⁸

The original purpose in adopting the twin bill of attainder prohibitions was to ban the practice of legislative trials:

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule making. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules

21. Interview with and letter from John Schmelzer, Assistant to the Acting Chairman, EEOC (Aug. 24, 1981) (on file with author).

22. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. at 739 n.58.

23. E.g., *Nixon v. Administrator of General Services*, 408 F. Supp. 321, 371 (D.D.C. 1976), *aff'd*, 433 U.S. 425 (1977).

24. U.S. CONST. art. I, § 9.

25. U.S. CONST. art. I, § 10.

26. Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 331 (1962).

27. *Id.* at 331.

28. *Id.*

to individuals in society would seem to be the duty of other departments."²⁹

Experience taught the Framers that legislative trials produced invidiously motivated statutes, merely designed to savage some individual or group temporarily out of favor.³⁰ This mistreatment of specific individuals under the pretext of legislation was an evil for two reasons. First, it was unfair to the subject of any given bill of attainder that he be harmed by the State without being allowed the opportunity to develop a defense. Second, and perhaps more importantly, the bill of attainder is a two-edged sword. The very politician urging passage of today's invidiously motivated statute might well become the target of tomorrow's bill of attainder as the wheel of political popularity revolves; as the following passage demonstrates:

My Lords, I understand but little of Latin, but a good deal of English, and not a little of the English history, from which I have learnt the mischiefs of such kind of prosecutions as these, and the ill fate of the prosecutors. I shall go no farther back than the latter end of Queen Elizabeth's reign. At which time the Earl of Essex was run down by Sir Walter Raleigh, and your Lordships well know what became of Sir Walter Raleigh. My Lord Bacon, he ran down Sir Walter Raleigh, and your Lordships know what became of my Lord Bacon. The Duke of Buckingham, he ran down my Lord Bacon, and your Lordships know what happened to the Duke of Buckingham. Sir Thomas Wentworth, afterwards Earl of Strafford, ran down the Duke of Buckingham, and you all know what became of him. Sir Harry Vane, he ran down the Earl of Strafford, and your Lordships know what became of Sir Harry Vane. Chancellor Hyde, he ran down Sir Harry Vane, and your Lordships know what became of the Chancellor. Sir Thomas Osborne, now Earl of Danby, ran down Chancellor Hyde; but what will become of the Earl of Danby, your Lordships best can tell. But let me see that man that dare run the Earl of Danby down, and we shall soon see what will become of him.³¹

The 20th Century's unfortunately extensive experience with schemes which fence out religious, racial, and national groups suggests an additional purpose underlying the twin bill of attainder clauses. Wholesale attempts to fence out segments of the population doubtless gives those urging such schemes some immediate psychological satisfaction. Nevertheless, such schemes ultimately hurt even their proponents because wholesale fencing out excludes talented people from participation in some or all areas of national life.³²

29. *United States v. Brown*, 381 U.S. 437, 446 (1965) (quoting *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810)).

30. See *supra* note 26.

31. Z. CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* at 127 (1956) (remarks of the Earl of Carnarvon to the House of Lords in 1678 during the debate regarding the attainder of Thomas Osborne).

32. See, e.g., T. SOWELL, *ETHNIC AMERICA: A HISTORY* 133-34 (1981) (footnotes omitted);

English practice drew a technical distinction between bills of attainder and bills of pains and penalties by limiting the term bill of attainder to legislative trials which imposed the punishment of death:

[At common law] . . . technically bills of attainder were limited to legislative condemnation which put the named person to death. Whenever the punishment was imprisonment or confiscation or banishment, as for the New York Tories, there was strictly no 'attainder' and hence the legislation was called an act of pains and penalties. However, nobody has ever doubted that such an act is embraced in the constitutional prohibition of bills of attainder. Indeed, every statute nullified by the Supreme Court under this clause involves some punishment milder than death.³³

The skills and organizational abilities of the Chinese have made them valuable additions to many poor countries, while their affluence has made them political targets. . . . Various Latin-American nations have alternately encouraged and restricted Chinese immigration. As late as 1966, the government of the Solomon Islands debated deporting them all. There have been massacres of Chinese in Indonesia and Mexico. Currently, a quota system in Malaysia is restricting the access of the Chinese minority to desirable jobs or other economic opportunities in favor of native Malaysians.

Sowell, *Man and Capital*, The N.Y. Times Book Review, Oct. 18, 1981, at 13.

[H]uman capital in the third world is severely impeded in many ways by political policies.

For example, political persecutions of highly entrepreneurial minorities—the Chinese in Southeast Asia, the East Indians in Africa, the Ibos in Nigeria—deprive many poor nations of desperately needed economic talents. *Id.* at 38.

The states of the infant American Confederation yielded to similar temptation by legislative savaging of Loyalists. See *supra* text accompanying notes 26-28. Fortunately for our country's future development we had to satisfy a still powerful Mother Country. "[T]he Definitive Treaty of Peace and Friendship Between His Britannic Majesty, and the United States of America," which was signed on September 3, 1783, contained in Article V a promise that Congress would recommend to the states that they would restore all confiscated estates, rights, and properties. LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 157-64 (1786), reprinted in Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV. 1, 34 (1948). Furthermore, Article VI provided:

That there shall be no future Confiscations made, nor any prosecutions commenced against any Person or Persons, for or by Reason of that Part which he or they may have taken in the present War; and that no Person shall, on that Account, suffer any future loss or Damage, either in his Person, Liberty or Property; and that those who may be in confinement on such charges, at the time of the Ratification of the Treaty in America, shall be immediately set at liberty, and the Prosecutions so commenced be discontinued.

LAWS OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FORCE AGAINST THE LOYALISTS 161-62 (1786), reprinted in Reppy, *The Spectre of Attainder in New York*, 23 ST. JOHN'S L. REV. at 35. See also *Republica v. Gordon*, 1 U.S. (1 Dall.) 232, 233 (1788):

But now, the Chief Justice delivered the opinion of the court, that any proceedings against Mr. Gordon, the defendant, would contravene an express article in the treaty of peace and amity, entered into between the United States of America and Great Britain, for which reason, they could not sustain the suggestion filed by the attorney-general. And the defendant was accordingly discharged.

33. Z. CHAFFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787* at 97 (1956).

Thus, from the first, the United States Supreme Court always gave the term "bill of attainder" a more generalized meaning than did the English practice. "Chief Justice Marshall, speaking for the Court in *Fletcher v. Peck*,^[34] stated that 'a bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.'"³⁵

In fact, those Supreme Court cases striking down legislative action invariably involved legislative attempts to hinder specified individuals or groups in the pursuit of their occupations. The Court in *United States v. Brown*³⁶ invalidated, as a bill of attainder, a federal statute which made it a criminal offense for a member of the Communist Party to serve as a labor union officer or employee.³⁷ In *United States v. Lovett*,³⁸ the Court invalidated as a bill of attainder, a federal statute which forbade the paying of a salary or other compensation to certain named federal officials.³⁹ In *Pierce v. Car-skadon*,⁴⁰ the Court struck down a West Virginia statute limiting access to the courts to those swearing they had taken no part in the rebellion against the Union.⁴¹ The Court in *Ex parte Garland*⁴² invalidated, as a bill of attainder, a federal statute which conditioned admission to practice before the federal courts upon each lawyer swearing that he had taken no part in the rebellion of the southern states.⁴³ In *Cummings v. Missouri*,⁴⁴ the Court struck down, as a bill of attainder, a Missouri constitutional provision which forbade voting, holding office, teaching, preaching or holding property in trust unless the actor would swear that he had taken no part in the rebellion of the southern states and that he would continue to be loyal to the federal and state governments.⁴⁵

These cases share two facts. First, the legislature attempted to hinder identified groups or identified individuals in the pursuit of their occupations. Second, the legislature imposed this punishment in the aftermath of violent political excitement.⁴⁶ The presence of these two facts created the inference that an unconstitutional bill of attainder existed. Blending these two facts, the Court reasoned in *Cummings v. Missouri*⁴⁷ that:

34. 10 U.S. (6 Cranch) 87 (1810).

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

36. 381 U.S. 437 (1965).

37. *Id.* at 439.

38. 328 U.S. 303 (1946).

39. *Id.* at 315-18.

40. 83 U.S. (16 Wall.) 234 (1872).

41. *Id.* at 239.

42. 71 U.S. (4 Wall.) 333 (1867).

43. *Id.* at 377.

44. 71 U.S. (4 Wall.) 277 (1867).

45. *Id.* at 323-25 (Cummings was a Roman Catholic priest).

46. See *supra* notes 36-44 (These cases arose either in or near the immediate aftermath of the American Civil War or near or at the time of the post-World War II McCarthyite witch hunt).

47. 71 U.S. (4 Wall.) 277 (1867).

The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of all these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct, [in this particular case, participation in the rebellion] is punishment, and can be in no otherwise defined.⁴⁸

The EEOC's "Affirmative Action Guidelines" present the same facts which were present in the earlier bill of attainder cases. First, apologists concede that hindering white males in the pursuit of their occupations is a part of the definition of any racial or sexual quota scheme.⁴⁹ Second, quota schemes such as those fostered by the "Affirmative Action Guidelines" grew out of the proverbially violent political excitement of the late 1960's.⁵⁰

The focus of the bill of attainder clauses is distinct from that of the equal protection or due process clauses. Though each provision is ultimately concerned with procedural fairness, the equal protection and due process clauses look to the rationality of state or federal legislative classifications once these classifications are adopted.⁵¹ By contrast, the bill of attainder clauses look directly at the motive of the legislature in adopting a challenged classification:

The Court may make the same assumption [looking to statements by legislators] in a very limited and well-defined class of cases where the very nature of the constitutional question requires an inquiry into legislative purpose. The principal class of cases is readily apparent—those in which statutes have been challenged as bills of attainder. This Court's decisions have defined a bill of attainder as a legislative Act which inflicts punishment on named individuals or members of an easily ascertainable group without a judicial trial. In determining whether a particular statute is a bill of attainder, the analysis necessarily requires an inquiry into whether the three definitional elements—specificity in identification, punishment, and lack of a judicial trial—are contained in the statute. The inquiry into whether the challenged statute contains the necessary element of punishment has on occasion led the Court to examine the legislative motive in enacting the statute.⁵²

The bill of attainder clauses, like other constitutional limits on the legislature, limit agencies created by the legislatures, such as the EEOC, as well

48. *Id.* at 321-22.

49. *See supra* note 15.

50. *See generally* M. VIORST, *FIRE IN THE STREETS* (1980); C. SMITH, *LONG TIME GONE* 28 (1982) ("the times were so spiteful.") (Former Attorney General Ramsey Clark).

51. *See, e.g.,* *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education*, 347 U.S. 483 (1954).

52. *United States v. O'Brien*, 391 U.S. at 383-84, 384 n.30. *See also supra* notes 36-44.

as the legislatures themselves.⁵³ Indeed, the policy argument is stronger in the case of agencies than in the case of legislative bodies. This is so because agencies, such as the EEOC, tend to have an extremely narrow composition which makes them particularly liable "to trample on the rights and liberties of others [when] stimulated by ambition, or personal resentment, and vindictive malice."⁵⁴ As one knowledgeable observer of the Washington scene stated:

I believe the severest threat to governing for all the people comes from the penetration of the executive and legislative branches by narrow interest groups. It is true that many of the Great Society programs deliberately set out to develop constituency groups for poor people, children, and medical research.

But what is pernicious as we enter the 1980's is that we have institutionalized, in law and in bureaucracy, single-interest organizations that can accede only in the narrow interest and are incapable of adjudicating in the national interest.⁵⁵

IV. ANALYSIS

A. Constitutional Considerations

United States v. Brown,⁵⁶ the most recent Supreme Court opinion striking down legislative action as a bill of attainder, distilled the cases and established three elements necessary for the finding of a bill of attainder; (1) the infliction of punishment, (2) on named individuals or members of an easily ascertainable class, (3) without a judicial trial:

53. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 669 n.5 (1974) (fifth amendment due process clause) ("[T]here cannot exist under the American flag any governmental authority untrammelled by the requirements of due process of law as guaranteed by the Constitution of the United States.") (quoting *Mora v. Mejias*, 206 F.2d 377, 382 (1st Cir. 1953)); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 256 (1974) (fourteenth amendment equal protection clause) ("What would be unconstitutional if done directly by the State can no more readily be accomplished by a county at the State's direction."). Cf. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1824) ([C]ongress may certainly delegate to others, powers which the legislature may rightfully exercise itself.).

54. Brief for Appellant, *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867), reprinted in 18 L. Ed. 356, 357 (1901) ("With very few exceptions, the advocates of such laws were stimulated by ambition, or personal resentment, and vindictive malice."). Compare Norton Interview, *supra* note 18, at 91:

There is something terribly complex about the pathology that comes out of slavery, segregation, and discrimination. Otherwise, you know, I'd be rich today. My family has been in this country as long as the oldest WASP's, and if length of stay, talent, and determination were enough my folks should be on top of the world.

See *supra* text accompanying note 21 (detailing the make-up of the EEOC which approved the "Affirmative Action Guidelines").

55. J. CALIFANO, JR., *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* 451 (1981).

56. 381 U.S. 437 (1965).

[W]hat were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause [T]he Bill of Attainder Clause [is] to be read in light of the evil the Framers . . . sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups.⁵⁷

Two of the three elements *Brown* formulated for an unconstitutional bill of attainder can be satisfied immediately by the EEOC's "Affirmative Action Guidelines." First, the EEOC's "Affirmative Action Guidelines" are "legislative," that is to say, nonjudicial. Indeed, the lack of courtroom like procedures and protections in the "Guidelines" seems to be what the EEOC likes best about them: "[t]he lawfulness of remedial and affirmative action does not depend upon employers admitting or others proving that there was an actual violation of the law. The focus is on 'reasonable belief' that they might be found in violation."⁵⁸ Second, the EEOC's "Affirmative Action Guidelines" affect unfavorably a "specifically designated class of persons," white males. This element, also, is apparently conceded by the EEOC:

Such . . . action by employers is still a relatively new phenomenon in American life. Thus, it is inevitable that when employers begin to take such action to change their employment systems, it may sometimes be misperceived as constituting 'discrimination in reverse.' This occasionally results in complaints filed by those who have benefited from the previous employment systems.⁵⁹

The EEOC drafted its "Affirmative Action Guidelines" in terms to permit the exclusion of some workers on the basis of "race, sex, and national origin."⁶⁰ At common law, legislative imposition of disability on the immutable characteristic of ancestry was a telltale sign of a bill of attainder.

Bills of attainder . . . or acts of attainder as they were called after they were passed into statutes, were laws which declared certain persons attainted, and their blood corrupted so that it lost all heritable quality. Whether it declared other punishment or not, it was an act of attainder if it declared this

This, however, while it was the chief, was not the only peculiarity of bills of attainder which was intended to be included within the constitu-

57. *Id.* at 447.

58. Norton Statement, *supra* note 11, at 7. Compare Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 193 (1950) (Reed, J., dissenting).

Surely the Government need not await an employee's conviction of a crime involving disloyalty before separating him from public service. Governments cannot be indifferent to manifestations of subversion. As soon as these are significant enough reasonably to cause concern as to the likelihood of action, the duty to protect the state compels the exertion of governmental power. Not to move would brand government with a dangerous weakness of will.

Id.

59. Norton Statement, *supra* note 11, at 3. See also *supra* note 15.

60. 29 C.F.R. § 1608.4(c) (1981).

tional restriction.⁶¹

However, are the agency's "Affirmative Action Guidelines" "punishment" as *United States v. Brown*⁶² uses the term? To answer that crucial question, one needs to apply each of the three bill of attainder "punishment" tests recently formulated by the Supreme Court in *Nixon v. Administrator of General Services*.⁶³ Application of each of these tests demonstrates that the EEOC's "Affirmative Action Guidelines" purporting to legitimize quota schemes are, in fact, punishment.

In formulating the first test, the Court in *Nixon* specifically added the condition that "a legislative enactment barring designated individuals or groups from participation in specified employments or vocations . . . [to] a ready checklist of deprivations so disproportionately severe and inappropriate to nonpunitive ends . . . [as to] be immediately constitutionally suspect."⁶⁴ Both the analysis employed by the Court in *Cummings v. Missouri*⁶⁵ and the admission of one of the apologists for quota schemes demonstrate that the alleged temporary nature of quota schemes⁶⁶ fails to insulate them from judicial invalidation as bills of attainder:

[I]n the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone. . . . Any deprivation or suspension of these rights for past conduct is punishment and can be in no otherwise defined.⁶⁷

We would not allow a state university to favor applicants because they are White, not even an iota, whether it called the adjustment a quota, affirmative action, or anything else.⁶⁸

Application of the Court's second *Nixon* punishment test compels a similar answer. Here, the Court considered "whether the law under challenge, viewed in terms of the type and severity of the burdens imposed, reasonably can be said to further nonpunitive legislative purposes."⁶⁹

Even apologists admit that the burden imposed on white males by quota schemes is severe: [T]ak[ing] blackness into account and weigh[ing] it positively when we allocate opportunities . . . mean[s] denying opportunities to some people solely because they were born white.⁷⁰ The two ostensi-

61. *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 387 (1866) (Miller, J., dissenting).

62. 381 U.S. 437 (1965).

63. 433 U.S. 425, 473-84 (1977).

64. *Id.* at 473-74.

65. 71 U.S. (4 Wall.) 277, 321-22 (1867).

66. *E.g.*, *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979); *Valentine v. Smith*, 654 F.2d 503, 511 (8th Cir.), *cert. denied*, 102 S. Ct. 972 (1981).

67. *Cummings v. Missouri*, 71 U.S. (4 Wall.) at 321-22.

68. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

69. *Nixon v. Administrator of General Services*, 433 U.S. 425, 475-76 (1977).

70. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974). See also *supra* note 15.

bly nonpunitive purposes offered successively by the EEOC cannot sustain the "Affirmative Action Guidelines" against constitutional challenge under the bill of attainder clause. Initially, the EEOC Chair candidly admitted that her agency desired to adopt its "Affirmative Action Guidelines" to prevent white male workers from attempting to vindicate their Title VII rights:

[W]hen employers . . . change their employment systems, it may sometimes be misperceived as "discrimination in reverse." This occasionally results in complaints filed by those who have benefited from the previous employment systems [U]nfortunately, there is a risk that even these few cases will have a chilling effect on future efforts by employers to take voluntary action.⁷¹

Obviously, depriving white male workers of the ability to vindicate their Title VII rights could hardly qualify as a "nonpunitive legislative purpose." Thus, by the time the EEOC wrote the Statement of Purpose for its final "Affirmative Action Guidelines," it shifted ground to argue that it was merely "carry[ing] out the Congressional intent embodied in Title VII."⁷² But this ritual assertion begs the question, which is whether the agency is attempting to carry out congressional intent with procedures which are constitutional. The Supreme Court's language in *Buckley v. Valeo*,⁷³ a recent appointments clause case, indicated that the EEOC's ritual assertion that its "Affirmative Action Guidelines" carry out Congressional intent gave the agency no talismanic immunity from bill of attainder clause challenges:

[T]he claim that Congress may provide for this manner of appointment under the Necessary and Proper Clause of Art I stands on no better footing than the claim it may provide for such manner of appointment because of its substantive authority to regulate federal elections. Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments clause by clear implication prohibits it from doing so.⁷⁴

Thus, when evaluated in light of the above asserted purposes, the EEOC's "Affirmative Action Guidelines" embody a punitive, invidiously motivated administrative policy. In short, the "Guidelines" constitute a bill of attainder.

The *Nixon* Court's third "test of punishment is strictly a motivational one: inquiring whether the legislative record evinces a congressional intent

71. Norton Statement, *supra* note 11, at 3.

72. 29 C.F.R. § 1608.1(c) (1981).

73. 424 U.S. 1 (1976).

74. *Id.* at 135 (emphasis added).

to punish."⁷⁵ Examination of the apologists' trilogy of ritual justifications for quota schemes indicates that the EEOC's intent was to impose punishment on white male workers.

Apologists first argue that case-by-case litigation is difficult, expensive, and slow. In the words of the EEOC Chair: "[t]he '[G]uidelines' will help employers because they will be encouraged to proceed to voluntarily do what is required by the law instead of awaiting the slow and costly process of case-by-case litigation."⁷⁶ While sharing the EEOC Chair's distaste for ordinary courtroom procedures, another apologist focused upon different beneficiaries:

If the government would even pretend to justice, it may not go forward with managerial grit, inviting individual victims to consume themselves in litigation. . . . The burden of initiative here is thoroughly misplaced. . . . To tell individual victims of group discrimination to go out and litigate is unhelpful and unjust.⁷⁷

While apologists' rationales are interesting, they fail to confront the simple fact that the very desire to sidestep ordinary judicial procedure is historically one of the indicia of a bill of attainder:

First passed in 1459, such bills were employed more particularly during the reigns of the Tudor kings, as a species of extrajudicial procedure, for the direct punishment of political offences. Dispensing with the ordinary judicial forms and precedents, they took away from the accused whatever advantages he might have gained from the courts of law; such evidence only was admitted as might be necessary to secure conviction; indeed, in many cases bills of attainder were passed without any evidence being produced at all.⁷⁸

The problem with the bills of attainder, like so many provisions of our Constitution, is that they preselect procedures which, in the opinion of the apologists, are difficult, expensive, and slow. This preselection precludes the apologists from imposing their desire for "quick fix" quota schemes on the rest of us. As Justice Thurgood Marshall recently wrote in the context of automobile searches by police, "[o]f course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?"⁷⁹

Second, apologists argue the need to avoid the violent destruction of the United States in a race war.

The primary resort of American blacks has not been to violence for social

75. *Nixon v. Administrator of General Services*, 433 U.S. at 478.

76. Norton Statement, *supra* note 11, at 2.

77. D. MAGUIRE, *A NEW AMERICAN JUSTICE: ENDING THE WHITE MALE MONOPOLIES* 93 (1980).

78. *ENCYCLOPEDIA BRITANNICA Attainder* 879 (11th ed. 1910-11).

79. *United States v. Ross*, 102 S. Ct. 2157, 2181 n.13 (1982).

change. Appeals to conscience, to the courts, and to the national government have been most typical up to now. There are indications that an impatience with these means is building and a new rage is being born. If this alienation becomes mobilized, the dominant white society may wish, in the ensuing terror, that all we had to deal with was a moderate program of preferential affirmative action.⁸⁰

But again, the very use of the plea that the government ought to impose a burden against a specified group because the country is in danger of social meltdown is an indicia of a bill of attainder.

In advancing their second argument, apologists for quota schemes walk in the footsteps of earlier proponents of bills of attainder. Most notable among those were the McCarthyites, who attempted to justify bills of attainder by the argument that an international Communist conspiracy presented an extraordinary danger to the continued existence of the United States. "In the background of the statute here challenged lies the House of Representatives' feeling in the late thirties that many 'subversives' were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged."⁸¹

Agatha Christie's detective Miss Marple said, regarding a murderer, that "human nature is always interesting. . . . And it's curious to see how certain types always tend to act in exactly the same way."⁸² Time out of mind, those urging bills of attainder have sounded the cry that the nation is in danger of losing its very existence: "The ground for the [passage of a bill of attainder] was, that the safety of the kingdom depended upon the death, or other punishment of the offender."⁸³ In arguing social meltdown, the apologists for quota schemes echo proponents of earlier bills of attainder.

Third, when confronted with the assertion that race or sex is unrelated to fitness or capacity, apologists typically attempted to justify quota schemes on the basis that merit was never used as a factor in distributing opportunities.

[T]here never was a litmus test. The old adage, "[I]t's not what you

80. See *supra* note 77, at 112.

81. *United States v. Lovett*, 328 U.S. 303, 308 (1946). See also *Barsky v. Board of Regents*, 347 U.S. 442, 474 (1954) (Douglas, J., dissenting). Justice Douglas dissented from a decision upholding a state administrative board's suspension of a physician for his refusal to produce papers of an organization of which he was chairman which were subpoenaed by the House Committee on Un-American Activities stating:

Neither the security of the State nor the well-being of her citizens justifies this infringement of fundamental rights. . . . When a doctor cannot save lives in America because he is opposed to Franco in Spain, it is time to call a halt and look critically at the neurosis that has possessed us.

Id.

82. *THE TUESDAY CLUB MURDERS* 153 (1967).

83. *Brief for Appellant, Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798)), reprinted in 18 L.Ed. 356, 357 (1867).

know but who you know . . . " was none too cynical. An enormous amount of subjectivity enters into all hiring and admissions. . . .

In fact the old buddy system always prevailed.⁸⁴ I knew damn well that merit didn't determine who succeeded and who didn't when it came to race. . . .⁸⁵

Use of this species of linguistic safety mechanism to repel all criticism discloses the apologists' punitive motives, because it lays bare their methodological dependence on Marxism, a 19th Century ideology revolving endlessly about the cold, dark star of revenge.⁸⁶

Paul Johnson, writing in his 1977 book, *Enemies of Society*, masterfully dissected the apologists' methodology and its Marxist origins.

As usual, we find the key to the strategy was forged by Marx. Seek-

84. See *supra* note 77, at 172.

85. Norton Interview, *supra* note 18, at 97.

86. See, e.g., *Victory of the Counterrevolution in Vienna*, NEUE RHEINISCHE ZEITUNG, Nov. 7, 1848 (reprinted in MARX ON REVOLUTION 41-42 (S. Padover ed. 1971):

The fruitless butcheries since the days of June and October, the tedious invocations of the martyrs since February and March, the cannibalism of the counterrevolution itself, will convince the nations that there is only one way to shorten, to simplify, to concentrate, the murderous death pains of the old society and the bloody birth pains of the new society: only one way—revolutionary terrorism.

Norman Cohn in his splendid study *THE PURSUIT OF THE MILLENNIUM: REVOLUTIONARY MESSIANISM IN MEDIEVAL AND REFORMATION EUROPE AND ITS BEARING ON MODERN TOTALITARIAN MOVEMENTS* 311-12 (1961) attributes the vengeful quality of Marx's thought to his mind having been steeped in apocalyptic religious phantasy:

Marx passed on to present-day Communism . . . not the fruit of his long years of study in the fields of economics and sociology but a quasi-apocalyptic phantasy which as a young man, unquestioningly and almost unconsciously, he assimilated from a crowd of obscure writers and journalists. Capitalism as a perfect hell in which an ever smaller number of enormously wealthy men ruthlessly exploit and tyrannise over an ever larger mass of pauperised workers - capitalism as a monstrous realm whose masters have both the cruelty and the hypocrisy of Antichrist - capitalism as Babylon, now about to go under in a sea of blood and fire so that the way shall be cleared for the egalitarian Millennium - this vision was very familiar to the radical intelligentsia of France and Germany around 1840. . . . [I]t was a vision which already in the sixteenth century had inspired Thomas Müntzer and John of Leyden; and there were those around 1840 - the lapsed priest Lamennais, the itinerant tailor Weitling - who still, like medieval *prophetae*, presented it in terms which were explicitly religious. By secularising this vision and incorporating it into an all-embracing philosophy of history, Marx ensured its survival down to the present century - but in circumstances quite different from anything he expected.

Of course, the marriage of rage and the left antedate's Marx's "codification" of leftist beliefs. See, e.g., the remarks of the French novelist and Bonapartist Henri Beyle (Stendhal):

Madame la maréchale de Rochefort once remarked to Duclos, the celebrated philosopher: "Why, what have I to do with *your* paradise? A bit of bread and cheese, and the first wench you pick off the streets—and there you are, happy as a sandboy!"

Patient reader, do you admit of no higher dream of bliss? Would you not rather aspire to the impassioned, unreasoning despair of a Rousseau or a Byron?

ROME, NAPLES AND FLORENCE 325 (trans. 1959).

ing to make his ideology proof against the assaults of reason, logic, or empirical demonstration, he built into it a safety device which in effect transforms it into a closed system, invulnerable on its own term to any falsification—the true mark, as we have seen, of a pseudo-science. The safety device consists in arguing that, since class is the determining factor in society, it also determines procedures and criteria:

The ideas of the ruling class are in every epoch the ruling ideas: i.e. the class which is the ruling *material* force of society, is at the same time its ruling *intellectual* force. The class which has the material means of production at its disposal, has control at the same time over the means of mental production, so that thereby, generally speaking, the ideas of those who lack the means of mental production are subject to it. There is, therefore, no such thing as science, reason, logic; what we suppose to be objective, and therefore valid, disciplines are in fact bourgeois science, bourgeois reason and bourgeois logic. And so forth: like most of Marx's pivotal ideas, it is capable of almost indefinite extension by analogy. Marx set up this protective device to defend his dialectical materialism from bourgeois critics. It automatically invalidated their arguments, rather as, in science fiction, mysterious "force-fields" are used to repel enemy rockets. But of course it is also capable of aggressive use, to destroy the certitudes of true science and replace them with ideologically convenient fantasies.⁸⁷

"Ideas," runs the currently popular maxim, "have consequences."⁸⁸ Revenge is at the heart of Marxism, and Marxist methodology is at the heart of quota schemes.⁸⁹ It is thus no accident that even the judges, when they attempt to

87. 194-95 (1977). The quote Johnson sets out is from F. ENGELS & K. MARX, *THE GERMAN IDEOLOGY* 39 (1947). *Compare*

But don't wrangle with us so long as you apply to our intended abolition of bourgeois property, the standard of your bourgeois notions of freedom, culture, law, etc. Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class.

F. ENGELS & K. MARX, *ON THE COMMUNIST MANIFESTO* 28 (centennial ed. 1948).

88. The phrase is the title of Richard Weaver's 1948 book.

89. See *supra* note 86 and accompanying text. See also comments of Eleanor Holmes Norton during EEOC Meeting of December 14, 1977 which approved the "Proposed Uniform Guidelines" for comment, reprinted in Blumrosen, *The Bottom Line in Equal Employment Guidelines: Administering a Polycentric Problem*, 33 AD. L. REV. 323, 332 n.25 (1981) ("[M]y frustration is that the whites will still do disproportionately better [on validated tests]. . ."); Norton Interview, *supra* note 18, at 91 ("There is something terribly complex about the pathology that comes out of slavery, segregation, and discrimination. Otherwise, you know, I'd be rich today."); Norton, *For Sadie and Maud*, 25 RUTGERS L. REV. 21, 22-23 (1970) ("the white oppressor. . . ." "the enemy. . . .") (author is Chair of EEOC which proposed and adopted "Affirmative Action Guidelines").

Additionally, some apologists are mired in a savage contempt for America, a contempt which, of course, extends to themselves. *Compare* Norton, *For Sadie and Maud*, 25 RUTGERS L. REV. 21, 23 (1970) ("We are perhaps the only group that has come to these shores who has ever

defend quota schemes, find their words echoing the words of Shigalyov, a *lumpen intelligentsia* Marxist terrorist of the 1840's caught forever between the pages of Fyoder Dostoyevsky's, *The Possessed*.

[I]t would be impossible to arrange an affirmative-action program in a racially neutral way and have it successful. To ask that this be so is to demand the impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently.⁹⁰

In addition, I should like to state beforehand that my system is not yet complete. (Again laughter.) "I'm afraid I got rather muddled up in my own data, and my conclusion is in direct contradiction to the original idea with which I start. Starting from unlimited freedom, I arrived at unlimited despotism. I will add, however, that there can be no other solu-

acquired the chance consciously to avoid total Americanization with its inherent, its rank faults.") with VAN WYCK BROOKS, *NEW ENGLAND: INDIAN SUMMER* 455 n.18 (rev. ed. 1950) (quoting J.J. CHAPMAN, *MEMORIES & MILESTONES* (story of author's 19th century college classmate)): "I had a classmate at college who had never been far from South Boston, and one evening while dancing at the Dorchester assembly he slipped and fell to the ground. He arose at once with great aplomb, remarking, coldly, 'These cursed American floors.'"

In a handful of recent cases challenging quota schemes, courts recite the truism that quotas are not invalid under the fourteenth amendment "merely because some innocent persons bear the brunt of the racial preference." *E.g.*, *Valentine v. Smith*, 654 F.2d at 511. But analysis of this truism, too, discloses the punitive motive in the hearts of those devising quota schemes. This is so because in those situations where government is legitimately requiring some sacrifice for the common good, for example, military service, condemnation of property, or service on a jury, government also compensates the party who is asked to make the sacrifice.

Of course, counsel will want further to develop evidence of punitive intent. Articles by and articles about any of the EEOC Commissioners responsible for the "Affirmative Action Guidelines" should be isolated by computer and traditional research methods.

Because the focus of the bill of attainder clauses is directly upon the motive of those adopting the challenged classifications, *see supra* text accompanying notes 51-52, counsel will want to explore the state of mind of the EEOC Commissioners through transcripts of their on-the-record meetings and through interrogatories and depositions. *Cf.* *Herbert v. Lando*, 441 U.S. 153, 160 (1979) (no first amendment restrictions on the sources from which a public figure-plaintiff may obtain information with which to prove elements of defamation);

New York Times [Co. v. Sullivan], 376 U.S. 254 (1964)] and its progeny made it essential to proving liability that the plaintiff focus on the conduct and state of mind of the defendant. To be liable, the alleged defamer of public officials or of public figures must know or have reason to suspect that his publication is false. . . . Inevitably, unless liability is to be completely foreclosed, the thoughts and editorial processes of the alleged defamer would be open to examination.

It is also untenable to conclude from our cases that, although proof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred, plaintiffs may not inquire directly from the defendants whether they knew or had reason to suspect that their damaging publication was in error.

90. *Regents of the University of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., separate opinion) (cited with approval in *Fullilove v. Klutznick*, 100 S. Ct. 2758, 2797 (1980) (Marshall, J., concurring)).

tion to the social formula than mine."⁹¹

In sum, consideration of each of the apologists' justifications for quota schemes strongly suggests, and consideration of the three justifications together conclusively demonstrates, that the motives behind the EEOC's enactment of the "Affirmative Action Guidelines" were punitive. Additionally, an analysis of two policy considerations show that quota schemes hurt all Americans.

B. Policy Considerations

1. Introduction

A century ago Mathew Nunan, the Sheriff of the City and County of San Francisco, cut off the queue of Ho Ah Kow, a Chinese prisoner in his keeping.⁹² Ho Ah Kow sued Mathew Nunan in tort. Mathew Nunan entered a plea of justification, pointing to an ordinance which required him to cut the hair of all criminal prisoners "to an uniform length of one inch from the scalp."⁹³ Ho Ah Kow demurred to Mathew Nunan's plea of justification, arguing that a desire to savage Chinese men such as himself lurked beneath the facially neutral terms of the supervisors' ordinance. In ruling for Ho Ah Kow, California Circuit Justice Steven Field wrote that "we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men"⁹⁴

Though policy considerations are never at the heart of a constitutional decision,⁹⁵ two important policy considerations, "matters of public notoriety and general cognizance,"⁹⁶ counsel the abolition of all racial and sexual quota schemes.

91. 404 (trans. D. Magarshack, 1965).

92. *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 253 (C.C.D. Cal. 1879).

93. *Id.* at 253.

94. *Id.* at 255.

95. *But see* Brief for Appellant (NAACP), *Brown v. Board of Education*, 347 U.S. 483 (1954), reprinted in A. BLAUSTEIN & C. FERGUSON, JR., *DESEGREGATION AND THE LAW: THE MEANING AND EFFECT OF THE SCHOOL DESEGREGATION CASES* 11 (1962) [hereinafter cited as A. BLAUSTEIN] ("Survival of our country in the present international situation is inevitably tied to the resolution of this domestic issue."); Brief for Amicus Curiae (United States), *Brown v. Board of Education*, 347 U.S. 483 (1954), reprinted in A. BLAUSTEIN, at 12:

It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed . . . [for] discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.

96. *See supra* note 92, at 255.

2. Productivity

Upon learning of the breakdown of American helicopters in the Iranian desert during the attempt to rescue the hostages, the owner of a Brooklyn household appliance repair shop said, "What do you expect? The United States can't even produce a good toaster anymore. Now nothing works."⁹⁷ Or, as media figure Jeff Wald stated, that "our technology, our products aren't as good anymore. Helen [popular singer Helen Reddy, Wald's spouse] and I have five cars; all of them are foreign. We have 19 TV sets; 18 are foreign and the American one breaks down all the time. We need someone addressing these issues."⁹⁸

The decade which saw a bacteria-like proliferation of quota schemes also saw American productivity sicken. The growth of the nation's productivity, as measured in nonfarm business, declined from an annual rate of 2.77% in the 1967-68 period to 1.89% in the 1968-73 period, finally sinking to 0.64% in the period from 1973 through 1979.⁹⁹ This troublesome development produced voluminous literature in which some analysts attempted to excuse quota schemes from responsibility, reasoning that quota schemes had introduced too few people into the employment market to affect overall productivity.¹⁰⁰ This conclusion is far too facile, however. It is obvious that quota schemes affect productivity adversely and that they do so for two reasons.

First, the use of race and sex as a criterion selects people for positions who simply are not as capable as those chosen on merit alone. Apologists admit this conclusion as a matter of logic; as Professor Maguire stated, "[e]xpenditures will increase; inexperienced hands will at least temporarily slow production"¹⁰¹

Second, a singleminded focus upon what one analyst gingerly labeled changes in the "quality"¹⁰² of new members of the work force assures that the explanation for the drop in productivity will remain "largely a mystery"¹⁰³ because such a narrow focus refuses to consider the effect of quota schemes upon those fenced out, white males. Theologians recognize the licitness of "occult compensation," the act of expropriating secretly what one is

97. Harris, *Will it be America's fate to die of a broken part?*, Des Moines Register, Feb. 28, 1982, at C1, col. 3 (reprinted from Chicago Tribune).

98. Will, *Jerriatrics and Other Silliness*, The Washington Post, Feb. 17, 1980, at C7, col. 6.

99. See, e.g., M. Baily, *Productivity and the Services of Capital and Labor*, 1 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 1, 2-5 (1981).

100. *Id.* at 13-15.

101. D. MAGUIRE, *A NEW AMERICAN JUSTICE: ENDING THE MALE MONOPOLIES* 104 (1980). See also J. CALIFANO, JR., *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* 430-31 (1981) (quoting President Carter's directive to "get rid of all those [subordinates] who are incompetent, except minorities and women.").

102. M. Baily, *supra* note 99, at 11-15.

103. *Id.* at vii (editors' summary).

owed in strict justice by another who will not satisfy his obligation.¹⁰⁴ Any worker familiar with the violent political upheavals of the 1960's and 1970's will recognize the ideas contained in the trilogy of quotations which begin this Article. Any worker who knew that time period, also knows that these words are the tip of an enormous iceberg of rage. Any worker who knew also knows that this rage, rather than any artfully drafted Statement of Purpose, is at the heart of quota schemes which fence some workers out. One would expect any worker with this knowledge who is himself fenced out to engage in occult compensation, taking from his "Equal Opportunity/Affirmative Action Employer" the very commodity his employer, with the connivance of the government,¹⁰⁵ has taken from him, time. Recall that ideas have consequences, and as the old maxim, "good enough for government work," is melted down in millions of brains and reminted by millions of mouths as "good enough for affirmative action," millions of hands do less and less. As Franz Kafka, himself a member of a nation of many ethnic groups, once said: "The farther inundation reaches, the shallower and dirtier the waters get. The revolution evaporates, and only the mud of a new bureaucracy remains. The handcuffs of a tortured mankind are made of red tape."¹⁰⁶

3. *The Two-Party System*

One year before he was driven from office bent double beneath the lash of an enraged electorate,¹⁰⁷ President Carter personally committed the Democratic Party to racial quota schemes with the brief of his Department of Justice in *United Steelworkers v. Weber*.¹⁰⁸ Polls suggested that the Demo-

104. 4 *New Catholic Encyclopedia Compensation, Occult* 89 (1967):

The act of appropriating secretly what is owed to one in strict justice by another who will not satisfy his obligation. It amounts, in fact, to the secret collection of a debt. Moral theologians are agreed that it is licit under certain conditions; otherwise an individual would be without means to defend himself against flagrant violations of his property rights and the unjust oppressor would be protected in his iniquity by the moral law.

105. See Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363, 385 (1966) ("True, there would be a difference in the position of the government [in a "private" quota scheme] with respect to the non-Negro worker—but it is the difference between hitting someone and holding him while someone else does the hitting.").

106. J. WECHSBERG, *PRAGUE: THE MYSTICAL CITY* 196 (1971) (quoting from G. JANOUCH, *CONVERSATIONS WITH KAFKA*).

107. M. YOURCENAR, *THE ABYSS* 74 (1976) ("[A]t daybreak Hilzonda saw him pass on the square, stripped of his theatrical trappings and naked to the waist, bent double under the whip.") (The image is a description of the fall of John of Leyden, a revolutionary messianic "king" of Munster in the 1530's.). In 1980 President Carter lost all but six states and the District of Columbia. *Massive Shift to the Right: Story of the '80 Elections*, U.S. NEWS & WORLD REP. Nov. 17, 1980, at 26.

108. 443 U.S. 193 (1979). J. CALIFANO, JR., *GOVERNING AMERICA: AN INSIDER'S REPORT FROM THE WHITE HOUSE AND THE CABINET* 232-35 (1981) (tells the story of President Carter's

cratic Party's dramatic defeat in 1980 was caused, in part, by public outrage at its support of quota schemes.

[W]hat is interesting is the source of those Republican gains that everyone finds are coming.

They are coming among men more than women; from union families more than nonunion; from middle-income groups (\$15,000 to \$40,000) more than those at either extreme of the income scale; from high school and college graduates more than those at the bottom or very top (graduate degrees) of the education ladder. They are coming, in short, in what has to be the heart of any majority-party coalition these days.¹⁰⁹

Leading Democrats recognize that quota schemes are bad both for their party and for the country. Ben J. Wattenberg, Chairman of the Coalition for a Democratic Majority, writing in the *Los Angeles Times*, put it this way:

In [1930 through 1960], liberal Democrats pushed the notion of meritocracy, while wealthy, aristocratic Republicans were sitting on the boards of trustees of Ivy League colleges, where quota admission policies discriminated against Jews, among others. Those notions of meritocracy led directly to federal civil-rights laws, which demanded an end to discrimination against blacks—law which struck body blows against racism.

. . . .

For Democrats to recover from their November [1980] debacle, they must admit they were moving down the wrong path, or at least, that they allowed themselves to be seen moving down the wrong path. They must get back on the right path . . . all else follows; money, grass roots, candidates and victory if and when the Republicans stumble, as all human enterprises ultimately do, usually sooner than later.¹¹⁰

Nevertheless, the Democratic Party is unable to abandon its support of quota schemes for fear of offending a handful of its constituent groups.

Like other patterns discussed in this Article, this is an old story. In its inability to abandon support for quota schemes for fear of angering some of its constituents,¹¹¹ the Democratic Party mimics its own performance re-

original conversion to faith in quota schemes after *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)).

109. Broder, *Democrats on Ice?* The Washington Post, June 28, 1981, at D7, col. 4. See also Broder, *Democrats Back from the Dead*, The Washington Post, Aug. 23, 1981, at C7, col. 1: "A compilation by The National Journal of the mid-year reports to the Federal Election Commission show that in the first six months of 1981, the three major GOP campaign committees collected \$43.3 million and their Democratic counterparts, \$3.5 million. That is a 12-to-1 ratio."

110. Reagan's 'new' ideas invented by Democrats, Des Moines Register, Jan. 25, 1981, at 1C-2C, col. 3. See also Gelman, *Wanted: A Liberal Agenda*, NEWSWEEK, March 30, 1981, at 78-79 ("Morton Kondrake, Executive Editor of the New Republic, continues to search for a sort of American middle ground, 'something between the kooky right and affirmative action for gays'").

111. Compare G. TREVELYAN, THE EARLY HISTORY OF CHARLES JAMES FOX 345 (1880) (quoting from a 1771 letter of William Pitt the Elder):

garding state segregation in the American Southeast in the 1940's and 1950's. Just as *Brown v. Board of Education*¹¹² freed the Democratic Party from a segment of itself,¹¹³ a judicial invalidation of quota schemes as bills of attainder would free this party from that part of itself which holds it hostage to quota schemes which millions of Americans believe are only a new racism.¹¹⁴

V. CONCLUSION

This Article urges a new application of the bill of attainder clause on the basis of both constitutional and policy grounds. The application urged here is, in a certain sense, a departure from the past.¹¹⁵ But departures from the past are inherent in the use of a written Constitution by successive generations of Americans. As Zechariah Chafee earlier wrote of the bill of attainder clause: "The Constitution . . . is the skeleton of a living nation. The bones of a mature man are the bones which came from his mother when he was born, and yet they are not the same bones. All the Constitution grows while the life of a great community changes."¹¹⁶

Prince Klemens von Metternich, the architect of a century of peace among the clashing nationalities of Europe, stated that, "[n]ecessity always produces new forms."¹¹⁷ Though this saying is true, "necessity" does not breed these new forms over night nor does she breed them by parthenogenesis. The dry bones of the constitutional prohibition against bills of attainder will come to life and speak only when we lawyers bring them out of their grave, putting spirit into them.

These wretches called ministers will be sick enough of their folly "not forgetting iniquity) before the whole business is over. They have brought themselves . . . where ordinary inability never arrives, and nothing but first-rate geniuses in incapacity can reach; a situation wherein there is nothing they can do which is not a fault.

112. 347 U.S. 483 (1954).

113. See Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 525 (1980) ("[F]or those whites who sought an end to [segregation] on moral grounds or for . . . pragmatic reasons . . . , *Brown* appeared to be a welcome break with the past.").

114. See, e.g., Alexander & Alexander, *The New Racism: An Analysis of the Use of Racial and Ethnic Criteria in Decision-Making*, 9 SAN DIEGO L. REV. 190 (1972).

115. See *supra* text accompanying notes 53-55 (discussion demonstrating that the bill of attainder clauses, like other constitutional limits on the legislatures, bind agencies created by the legislatures as well as the legislatures themselves).

116. Z. CHAFEE, JR., *THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1789* at 154 (1956).

117. 1 MEMOIRS OF PRINCE METTERNICH: 1773-1815 at 173 (ed. R. Metternich, trans. A. Napier, 1970).