

quires Congress to proceed by general rulemaking rather than by deciding individual cases.” *Id.* at 485–86 (Stevens, J., concurring). Just so. And absent that *Nixon* decision, the theory advanced by *Brown* and echoed by Justice Stevens would in my view be an adequate basis for striking down the present legislation.

Nixon, of course, is a unique case. It involved a disgraced President of the United States who had, as Justice Stevens pointed out, “resigned his office under unique circumstances and accepted a pardon for any offenses committed while in office,” thereby “plac[ing] himself in a different class from all other Presidents.” *Id.* at 486. Despite my respect for the Supreme Court, I must say that this case may well be evidence of the classic statement that hard cases make bad law. The majority circumvented the apparent status of the statute, singling out one President by name, with an unconvincing analysis holding that the burden placed upon him was not a punishment. Chief Justice Burger’s dissent, 433 U.S. at 536–45, noted the anomalous character of the decision legitimating a “‘class of one’ . . . under the Bill of Attainder Clause.” *Id.* at 545. Without that decision, the analysis suggested by Justice Stevens would impel if not compel a decision that the statute before us runs afoul of that clause. The legislative imposition of a burden solely on a class of individuals defined by name rather than by characteristic (although not a class of one as in the case of *Nixon*) on its face bespeaks an intent to punish rather than to merely regulate. But still, the *Nixon* decision is a Supreme Court decision, and whether a good one or a bad one, it binds us. Because of that decision, and its convoluted analysis holding nonpunitive the unprecedented burdening of a “class of one,” we must undertake a more careful analysis of “punishment” under the three-part test of *Selective Service System*, 468 U.S. 841.

In what appears to have been an attempt to cabin its reasoning in *Nixon*, the Court in *Selective Service System* announced a three-part test to determine whether a statute imposes “punishment” for purposes of the Bill of Attainder Clause:

(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record evinces a congressional intent to punish.

Id., (internal punctuation omitted). This test leads inexorably to a conclusion that the statute before us is a bill of attainder. As to the first part of the test, even the majority must recognize that “legislative bars to participation by individuals or groups in specific employments or professions,” *id.*, have constituted the most common sort of statutes struck down by the Court as unconstitutional bills of attainder. *Nixon* simply does not change this fact. The Court in *Nixon* distinguished the statute before it as nonpunitive—not only did the statute fail to inflict any harm previously held to be “forbidden deprivations,” but its provision for “‘just compensation’ . . . undercut[] even a colorable contention that the Government has punitively confiscated appellant’s property . . .” 433 U.S. at 475. Here, given the history of treating line-of-business restrictions as punishment, such an easy escape is not available.

Under *Selective Service*, we probably need go no further; nevertheless, analysis under the additional parts of that test support the conclusion that this statute is unconstitutional. The second prong asks “whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes.” 468 U.S. at 852 (internal punctuation omitted). In my view, it cannot. The majority concludes that it can, stating: “apart from its specific targeting aspect, we find that § 274 has the earmarks of a rather conventional response to commonly perceived risks of anticompetitive behavior.” Maj. Op. at 13. While the latter portion of this statement may be true, I do not see how we can analyze the statute in terms “apart from its specific targeting aspect.” The statute does not address the characteristics of local exchange carriers that create risks of anticompetitive behavior. If it did, it would speak of those

characteristics, which might well be shared by, for example, GTE or Sprint. See *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 476 (7th Cir. 1984) (noting that even small LECs may have the “ability to abuse a monopoly position”). Then, whether or not a particular carrier possessed the relevant characteristics and therefore should be restricted would be subject to judicial determination. By naming the companies rather than describing the characteristics creating the risks, it seems apparent that Congress aimed, not at protecting present and future markets from potential abuse of monopoly power, but at punishing those named companies’ *past* anti-competitive behavior. I agree with today’s majority that the second factor “appears to be the most important of the three.” Maj. Op. at 13. I cannot, however, agree with the majority that it cuts against the characterization of section 274 as a bill of attainder.

I further conclude that the third factor, which I deem the least important, also supports classifying the statute as a bill of attainder. That factor requires us to examine “whether the legislative record evinces a congressional intent to punish.” *Selective Service*, 468 U.S. at 852 (internal punctuation omitted). In my view it does. As the majority notes, “scattered remarks” in the legislative history “refer[] to anticompetitive abuses allegedly committed by the BOCs in the past. . . .” Maj. Op. at 17. While I find the very existence of the scattered remarks to be indicative of the punitive intent behind the statute, I do not find them conclusive. We have noted before that “[a]t its best, legislative history is an undependable guide to the meaning of a statute.” *Gersman v. Group Health Ass’n, Inc.*, 975 F.2d 886, 890 (D.C. Cir. 1992). I suggest that it is no more dependable in ascertaining the motive behind the statute.

More instructive on congressional motivation than the scattered remarks is the timing and apparent triggering of the enactment. As the majority notes in its discussion of factor two, Congress passed section 274 after the judiciary removed the information services prohibition from the modified final judgment. Maj. Op. at 14–15. The reinstatement of that ban

following its judicial removal to me bespeaks, indeed shouts, a motive on the part of the Article I branch to *reimpose* a burden on the parties before the court which the Article III branch found no longer appropriate. While I have no quarrel with the legitimacy of a congressional motive to correct what it sees as an improper application of legal protection against *future* conduct, when Congress defined the burdened class by name rather than by characteristic or future action, I can discern no other motive than an intent to react to (read “punish”) the past conduct of those named persons. This, I suggest, violates the principle underlying Article I, section 9, clause 3, given short shrift by the majority.

That is, the prohibition against bills of attainder and *ex post facto* laws is an essential part of the Constitution’s structural separation of powers among the three branches of government. As the majority’s analysis suggests, that clause was designed to prevent punishment “without the benefit of a judicial trial.” Maj. Op. at 7. By way of comparison, in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Supreme Court struck down as unconstitutional a congressional enactment “to the extent that it require[d] federal courts to reopen final judgments entered before its enactment.” *Id.* at 240. While the statute before us does not literally run afoul of that prohibition, it partakes of the same sort of violation of separation of powers safeguards. That is, it does not simply regulate or prohibit future conduct or create a ban on the entry into a line of business based on risks of future anticompetitive behavior, but rather, it singles out for such a ban, such a burden, named entities. It is one thing for the legislature to attempt to protect competition by defining a standard against which the conduct of individuals can be measured. It is quite another for it to simply list the names of individuals who Congress perceives as having uncontrollable monopolistic tendencies. This short-circuits the factfinding and due process protections of trial in an Article III court, and therefore runs afoul of the structural provisions embodied in the Constitution’s Bill of Attainder Clause.

I would say in closing that the majority's discussion of the lightness of the burden, typified by the ways in which a BOC might restructure in order to get around it, goes only to the weight of the punishment, not its character as punishment. Thus, that part of the majority's reasoning does nothing to convince me that the statute can survive constitutional scrutiny.