Are State Marriage Amendments Bills of Attainder?: A Case Study of Utah's Amendment Three

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I. INTRODUCTION

On Election Day, November 2, 2004, Utah, along with ten other states, amended its state constitution in response to what many view as a concerted effort to redefine marriage. Although the debate over marriage tends to evoke strong feelings on all sides, every marriage amendment on the November ballots passed; in some states the marriage amendments passed by overwhelming margins. Opponents of these marriage amendments will likely challenge them as violating the Federal Constitution on the grounds of equal protection. Somewhat unexpectedly, the Federal Constitution’s Bill of Attainder Clause is emerging as alternate grounds for challenging


3. “More than 20 million Americans voted on the measures, which triumphed overall by a 2-to-1 ratio. In the four Southern states, the amendments received at least three-quarters of the votes, including 86 percent in Mississippi; the closest outcome besides Oregon [where the marriage amendment passed with 57 percent of the vote] was in Michigan, where the ban got 59 percent.” Associated Press, Voters Pass All 11 Bans on Gay Marriages (Nov. 3, 2004), available at http://www.msnbc.msn.com/id/6383353/index.html.

4. Prior challenges to acts relating to gay rights have been challenged on equal protection grounds. See, e.g., Romer v. Evans, 517 U.S. 620 (1996) (finding that a Colorado constitutional amendment prohibiting state agencies from treating sexual orientation as a protected status violated the Equal Protection Clause of the Fourteenth Amendment of the Federal Constitution).

5. U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . . .”).
such amendments. While much recent legal commentary exists regarding the debate about same-sex marriage, few commentators have addressed the controversy using a bill of attainder analysis.

The Bill of Attainder Clause is a relatively obscure constitutional provision, even among students of the Constitution. According to contemporary Supreme Court Attainder Clause jurisprudence, the clause protects both individuals and groups from legislative enactments that single out an affected person or class and impose punishments without allowing for judicial relief. The recent enactment of marriage amendments barring states from recognizing same-sex unions as marriages raises the question of whether states have singled out homosexuals for punishment without judicial relief in violation of the Attainder Clause. Although the ample commentary surrounding the broader, ongoing marriage debate does include some bill of attainder analysis in connection with gay rights, none of the existing commentary directly analyzes the question of whether state constitutional prohibitions of same-sex marriage constitute unlawful bills of attainder under the Federal Constitution.

6. The Nebraska Marriage Amendment is currently being challenged as a bill of attainder under the Federal Constitution. See Citizens for Equal Prot., Inc., v. Bruning, 290 F. Supp. 2d 1004, 1008–11 (D. Neb. 2003) (holding that the plaintiffs had stated a claim that the state amendment was an unlawful bill of attainder, thus defeating the defense’s motion to dismiss and moving the case toward a trial on the merits).


11. Amar, supra note 8; Stasser, supra note 8.
This Comment fills this gap in the Attainder Clause literature by analyzing Utah’s Marriage Amendment on bill of attainder grounds, thereby providing a framework for analyzing similar enactments. The Attainder Clause analysis below reveals that Utah’s Marriage Amendment (“Amendment Three”) is not a bill of attainder because it does not single out a group or individual for punishment within the meaning of the Attainder Clause. Furthermore, because Amendment Three operates in a generally applicable, regulatory fashion, it falls well within the scope of proper legislative power. Therefore, invalidating a marriage amendment that operates in the same or similar fashion as Amendment Three under the Bill of Attainder Clause would seriously threaten the legislative and political process by allowing any group or individual who dislikes a particular political outcome to challenge it successfully as a bill of attainder.

Part II provides a brief review of the case law under the Bill of Attainder Clause and outlines the current Supreme Court doctrine under the clause. Part III analyzes Amendment Three according to current Attainder Clause doctrine and concludes that the amendment does not constitute an unlawful bill of attainder. This Part also addresses additional doctrinal implications associated with this conclusion, namely, that in order to find that the amendment is a bill of attainder a court will have to adopt a constitutional test that has virtually no rational limitation. Part IV offers a brief conclusion.

II. THE ATTAINDER CLAUSE: DEVELOPMENT AND CURRENT DOCTRINE

A. The Historical Approach to Attainder Analysis

Historically, a bill of attainder was a very specific device used in the sixteenth, seventeenth, and eighteenth centuries, whereby Parliament sentenced a person or a group of persons to death for attempting or threatening to attempt an overthrow of the government.\footnote{12. United States v. Brown, 381 U.S. 437, 441 (1965) (“In addition to the death sentence, attainder generally carried with it a ‘corruption of blood,’ which meant that the attained party’s heirs could not inherit his property.”). For a more complete historical review of bills of attainder, see CHAFEE, supra note 9, at 90–144.} Bills of pains and penalties functioned essentially the same as bills of attainder; however, the punishment inflicted on the offender was something short of death. Typical punishments under
bills of pains and penalties included banishment, disenfranchisement, and exclusion of the offender’s sons from serving in the Parliament.  

A historical approach to the Attainder Clause construes the clause as a narrow, specific, and formulaic proscription that is unlikely to have an enduring impact on modern legislation. Under the historical approach, an act does not violate the Attainder Clause unless it contains all the features of a historical bill of attainder. Accordingly, the act must (1) specify by name or adequate description the person or class being attainted; (2) specify the offense for which the punishment is imposed; (3) declare the guilt of the attainted party; and (4) impose punishment in a traditional historical form (death, banishment, imprisonment) without a judicial trial.

In effect, historic bills of attainder and bills of pains and penalties constituted a “trial by legislature” because the legislature or Parliament assumed full judicial and legislative power in enacting and adjudicating the bills; the legislature made the rule, adjudged and declared the guilt of the party or group, and then measured and affixed the punishment. The offender was not entitled to judicial relief of any sort.


14. This historical view was first asserted by Justice Frankfurter in his concurring opinion in United States v. Lovett, 328 U.S. 303, 318–30 (1946) (Frankfurter, J., concurring); see also Jane Welsh, Note, The Bill of Attainder Clause: An Unqualified Guarantee of Process, 50 BROOK. L. REV. 77, 96–97 (1983) (stating that the historical approach to the Attainder Clause “has a narrow and explicit historical meaning and can be recognized by several immutable characteristics: a specified offense for a specified individual, a declaration of the guilt of that individual, ex post facto application, and a clear decree of punishment”); Note, Beyond Process: A Substantive Rationale for the Bill of Attainder Clause, 70 VA. L. REV. 475, 497 (1984) [hereinafter Beyond Process] (“The use of . . . [a] historical definition[] as a touchstone creates a proscription that is easy for courts to enforce but equally easy for Congress to avoid,” and if such an interpretation “is somehow ‘correct,’ the results that would flow from it would serve no real purpose.”).

15. Lovett, 328 U.S. at 323 (Frankfurter, J., concurring).

When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchial England and was employed in the colonies. They were familiar with its nature; they had experienced its use; they knew what they wanted to prevent. It was not a law unfair in general, even unfair because affecting merely particular individuals, that they outlawed by the explicitness of their prohibition of bills of attainder. “Upon this point a page of history is worth a volume of logic.”

Id. (quoting N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).
During the Federal Convention of 1787, the prohibitions against bills of attainder were unanimously approved without debate.\textsuperscript{18} Thus, the Federal Constitution prohibits the federal government as well as state governments from enacting any bills of attainder.\textsuperscript{19}

One reason bills of attainder are so offensive is because a single branch of government uses both judicial and legislative power when enacting them. By prohibiting the use of such bills, the Framers gave practical expression to the principle that government powers must be separated among the independent branches in order to strike a balance of powers and prevent abuses. The legislature was to enact generally applicable rules that courts were to apply to specific individuals and situations.\textsuperscript{20} One reason for this limitation on legislative power is the assumption that the “Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons.”\textsuperscript{21}

These general propositions regarding the division of power suggest that an expansive view of the Attainder Clause would ensure against the possibility of legislative abuses. However, the principle of separation of powers is one of balance. If the judiciary invalidates an enactment on the basis that it is something akin to a historic bill of attainder, the balance of power may be jeopardized by unduly restricting the legislative role of establishing generally applicable rules and preventing Congress from fulfilling its proper and intended

\textsuperscript{18} Id. at 441. For the actual Convention discussions surrounding the prohibition of attainders, see JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787, Debates of August 22, reprinted in LYNN D. WARDLE, READINGS ON ORIGINS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA ch. 16, at 61 (2001).

\textsuperscript{19} U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”); id. art. I, § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder . . . .”).

\textsuperscript{20} See Brown, 381 U.S. at 446 (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)) (“It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”).

\textsuperscript{21} Id. at 445.

Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a [case or matter], especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode.

Id. (quoting 1 COOLEY, CONSTITUTIONAL LIMITATIONS 536–37 (8th ed. 1927)).
function.\textsuperscript{22} Indeed, while the Attainder Clause operates to support the separation of powers doctrine, the clause is not “the chief means of implementing” that doctrine.\textsuperscript{23} Therefore, any approach to the Attainder Clause must be carefully tailored to prevent legislative abuses without crippling genuine legislative activities, particularly when the issues involved are highly charged political controversies.\textsuperscript{24} The legislative and amendment processes are designed to enable the representative body or the electorate to resolve politically charged issues by establishing general policies.\textsuperscript{25} A proper construction of the Bill of Attainder Clause ought, therefore, to leave these general rulemaking processes in tact. In order to do so a court must remember that Bills of Attainder have typically arisen after a political controversy has been resolved and the majority in power seeks to slip in a left jab after the round is over in order to punish a political opponent.

The Supreme Court’s efforts to tailor such an approach have been somewhat haphazard. The only relevant pronouncement by the Court prior to the Civil War was that the Constitution’s prohibition

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22. & \text{Id. at } 475 \text{ (White, J., dissenting) ("[T]he Court’s [expansive interpretation] cuts too broadly and invalidates legitimate legislative activity."). In his dissent, Justice White argues that even “conflict-of-interest” statutes and imposition of qualifications for certain avocations for the benefit of society may be invalidated by the } Brown \text{ majority’s overly expansive conception of the Attainder Clause. Id. at } 465–72 \text{ (White, J., dissenting). These comments emphasize the need for an Attainder Clause approach that provides meaningful protection in modern society and has rational limitations that enable the legislature to operate within its sphere of general rule making.} \\
23. & \text{Id. at } 472 \text{ (White, J., dissenting).} \\
24. & \text{See Kevin J. Worthen, } Who Decides and What Difference Does It Make?: Defining Marriage in “Our Democratic, Federal Republic,” 18 BYU J. Pub. L. 273, 292 (2004). Worthen argues that “[n]on-textual value judgments made by governmental actors who are not elected representatives of the sovereign people run the risk of creating one kind of tyranny ‘our’ system was designed to prevent—extraneous creation and imposition of values.” When moral issues are being decided on a societal level, deference to the people’s judgment is particularly important.} \\
[1] & \text{In our system, the ultimate sovereign who must remain responsible for whatever acts the government takes is the people. While there are filters through which the people’s judgment must pass before it is properly implemented in our system, in the long run, it is [the people’s] judgment, not that of the judiciary, which should control.} \\
Id. at 306. \\
25. & \text{Id.}
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of bills of attainder applied equally to bills of pains and penalties.\textsuperscript{26} It was not until 1866 that the Court ventured upon its first direct analysis of the Attainder Clause,\textsuperscript{27} when in a single term the Court decided two similar Attainder Clause cases.\textsuperscript{28} From this point forward, the Court’s case law and the academic commentary concerning the Attainder Clause describe what is known as the functional approach to the Bill of Attainder Clause.

The functional approach stands in contrast to a purely historical approach to the clause, which would confine the Attainder Clause’s operation entirely to its historical roots.\textsuperscript{29} Whereas a historical approach essentially renders the Attainder Clause meaningless because legislatures may easily avoid the formulaic proscription with mere technicalities,\textsuperscript{30} the functional approach provides meaningful protection that may not be easily circumvented by legislative maneuvering. On the other end of the doctrinal spectrum is an approach to the clause that can be termed an ultra-functional approach. This approach views the Attainder Clause as an illimitable protection by advocating for broad doctrinal conceptions that would make legislating in many areas virtually impossible.\textsuperscript{31} Presently, the United States Supreme Court has not adopted either the historical or ultra-functional approaches; rather, it has opted for the constitutionally moderate functional approach.

\begin{footnotes}
\item[26] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810) (“A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.”). By implication, then, bills of pains and penalties were bills of attainder under the Constitution and therefore prohibited.
\item[27] Throughout this Comment, both attainder clauses are referred to in the singular form, as the analysis of one would apply equally to the other.
\item[28] See Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867). Cummings invalidated a state constitutional provision that required members of several vocations to take an oath affirning past, present, and future allegiance to the Union. Members of the Confederacy were unable to take the oath due to past sympathies or activities in opposition to the Union during the Civil War. In Ex parte Garland, the Court invalidated, as a bill of attainder, a piece of federal legislation that required attorneys wishing to practice law before the federal bench to take a loyalty oath similar to the oath considered in Cummings.
\item[29] See supra note 14.
\item[30] Beyond Process, supra note 14, at 497 (“The use of . . . [a] historical definition[] as a touchstone creates a proscription that is easy for courts to enforce but equally easy for Congress to avoid . . . [, and if such an] interpretation[] is somehow ‘correct,’ the results that would flow from it would serve no real purpose.”).
\item[31] This view of the clause was advocated but rejected in United States v. Brown, 381 U.S. 437, 461 (1965); see also Amar, supra note 8, at 203 (outlining a broad conception of the Attainder Clause); Strasser, supra note 8, at 227 (arguing for a similar approach to the clause).
\end{footnotes}
B. The Development of the Functional Approach

The functional approach provides a meaningful and useful middle-ground interpretation of the Attainder Clause. This approach, while developed haphazardly in the Court’s case law, effectively addresses the legitimate Due Process and Separation of Powers concerns associated with legislatively imposed punishment on ascertainable groups or individuals without unnecessarily and inappropriately restricting the legislative and political processes. The Supreme Court’s current version of the functional approach, established in *Nixon v. Administrator of General Services*, has two key elements of analysis—specificity and punishment. The Nixon standard developed through a long series of cases that, taken together, provide the analytical framework for modern attainder cases.

1. The Cummings and Garland beginnings

In the aftermath of the Civil War, the Court considered the constitutionality of loyalty oaths designed to prevent confederate sympathizers from enjoying the privileges they had enjoyed prior to the war. In *Cummings v. Missouri* and *Ex parte Garland*, the Court refused to be bound by the historical confines of the Attainder Clause and held that the oaths in question constituted unlawful bills of attainder. These cases established the early contours of the functional approach by requiring consideration of three factors in an Attainder Clause analysis: (1) specificity—whether the act in question operates against an easily ascertainable group or individual; (2) punishment—whether the act inflicts punishment upon the offenders

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32. See *Beyond Process*, supra note 14, at 493, which argues that a functional approach serves the meaningful purposes of preventing “legislatively imposed punishment of identifiable groups or individuals” and providing “absolute protection against retroactive punishment of political activity, regardless of . . . the state’s interest in regulation. This protection avoids the chill caused by the unknowable risk of subsequent legislative penalty, without affecting the state’s right to act prospectively when its interests outweigh any burden” placed on an ascertainable class by the prospective, generally applicable rules the legislature enacts. *Id.*


35. 71 U.S. (4 Wall.) 277 (1867).

for past acts by depriving them of previously enjoyed civil or political rights; and (3) regulation—whether the state’s power to regulate the ordinary avocations of life is being used to inflict punishment or to establish general rules for the regulation of societal institutions.37

In addressing the specificity of the acts in question, the Court held that where an act creates a target class based on past, irreversible conduct, the act satisfies the test and resembles a bill of attainder.38 Also, the Court rejected the idea that punishment under the Attainder Clause was confined to only its historical meaning (i.e., death, banishment, imprisonment etc.), and held that “[t]he deprivation of any rights, civil or political, previously enjoyed, may be punishment.”39 With regards to Cummings and Garland, the Court held that the oaths inflicted punishment because their effect was to perpetually exclude the target classes from engaging in professions they had previously enjoyed as a consequence of their past involvement with the Confederacy.40 Finally, the Court evaluated whether the loyalty oaths were a valid expression of the state’s power to regulate societal institutions. Here the Court laid down the rule that the Attainder Clause is offended whenever the police “power [is] made . . . [into] an instrument for the infliction of punishment” by setting a qualification that “reach[es] the person, not the calling.”41 This final distinction serves as a helpful analytical tool in determining whether an act is punitive or regulatory in nature.

Although these early pronouncements by the Court are clarified and refined in subsequent Court decisions, the three general inquiries of specificity, punishment, and regulation remain integral to current functional approach Attainder Clause analysis.

37. See id. at 374–99, Cummings, 71 U.S. (4 Wall.) at 316–32.
38. Cummings, 71 U.S. (4 Wall.) at 323–25 (holding that the act was sufficiently specific because it operated against the class of individuals that sympathized with the Confederacy during the Civil War); Garland, 71 U.S. (4 Wall.) at 377 (“The statute is directed against parties who have offended in any of the particulars embraced by these clauses.”).
39. Cummings, 71 U.S. (4 Wall.), at 320; see also Garland, 71 U.S. (4 Wall.) at 377 (“[E]xclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.”).
41. Cummings, 71 U.S. (4 Wall.), at 319–20; see also Garland, 71 U.S. (4 Wall.) at 379–80 (“The legislature may undoubtedly . . . prescribe qualifications for the pursuit of any of the ordinary avocations of life[, but where this power is] exercised as a means for the infliction of punishment [the act violates the Attainder Clause].”).
2. The contribution of Dent and Hawker

In *Dent v. West Virginia* and *Hawker v. New York*, the Supreme Court began to see that the principles established in *Cummings* and *Garland*, without further refining, were “not amenable to rational limitation.” Therefore, the Court carved out an important limitation to the Attainder Clause doctrine: legislatures may establish qualifications that tend to preserve and strengthen important societal institutions.

*Dent* and *Hawker* dealt with, respectively, the state’s ability (1) to establish new educational requirements for medical doctors and (2) to prevent convicted felons from practicing medicine. The statutes in *Dent* and *Hawker* functioned in essentially the same fashion as the acts invalidated in *Cummings* and *Garland* in that each act prevented a specific group from engaging in ordinary avocations of life on account of past conduct. The group in *Dent* was barred from the profession for failing (in the past) to meet the educational requirements and the group in *Hawker* was barred from the profession for committing (in the past) a felony.

The Court in *Dent* and *Hawker* was thus confronted with the prospect of invalidating meaningful regulation of societal institutions based on previous Attainder Clause decisions or further developing Attainder Clause doctrine and finding the statutes constitutional. The Court elected to follow the later course by holding that the acts in *Dent* and *Hawker* were sufficiently related to the excluded group’s fitness for the avocation and therefore did not constitute punishment. Thus, the Court found that the state’s power was not being used to inflict punishment; rather, the power was being used to preserve confidence in the institution or practice of medicine, an

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42. 129 U.S. 114 (1889).
43. 170 U.S. 189 (1898).
44. Beyond Process, supra note 14, at 482. The author explains that “the Court’s functional analysis, though not formalistic [like the rejected historic approach], was not amenable to rational limitation. Consequently, when *Hawker* and *Dent* arose, the Court had to choose between striking down” valid regulatory acts or limiting the breadth of the functional approach.
47. See Beyond Process, supra note 14, at 482.
institution of “high importance” to society. In so holding, the Court established an important exception to the line of reasoning in *Cummings* and *Garland*, which proves crucial in appropriately limiting current Attainder Clause doctrine.

The Court’s further development of its Attainder Clause doctrine in *Dent* and *Hawker* created a meaningful, “rational limitation” on the functional approach. This limitation gives effect to the separation of powers rationale for the Attainder Clause. According to the reasoning underlying the Court’s decisions in *Dent* and *Hawker*, the legislature may establish meaningful qualifications in the form of generally applicable rules for those societal institutions that are of high importance to society, while the judiciary retains control over those instances when a qualification is arbitrarily directed at the person instead of “the calling” in order to inflict punishment.

C. Current Attainder Clause Doctrine

The precedents described above, combined with several Court decisions in the intervening years, presently constitute the Court’s

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49. *Id.* at 195 (quoting Eastman v. State, 10 N.E. 97, 98 (Ind. 1887)) (“[I]t is, no one can doubt, of high importance to the community that health, limb, and life should not be left to the treatment of ignorant pretenders and charlatans.”). Apparently, because the medical profession affected society so profoundly and was of such high importance, the Court was more deferential to the state’s power to establish meaningful qualifications in order to preserve trust, confidence, and esteem for the medical profession. *Id.* at 192–95. Thus, the greater the importance of the regulated profession or institution, the greater the deference to the state as to “[t]he nature and extent of the qualifications.” *Id.* at 195 (quoting *Dent*, 129 U.S. at 122).

50. *Beyond Process*, supra note 14, at 482.

51. See supra notes 20–21 and accompanying text.


53. In *United States v. Lovett*, 328 U.S. 303 (1946) (invalidating an act cutting off compensation to three named government employees that the legislature deemed to be disloyal because of their affiliation with the Communist Party), the Court reaffirmed the rules set forth in *Cumings* and *Garland* but failed to recognize the contribution of *Dent* and *Hawker*. This failure, and the Court’s decisions in *American Communications Ass’n v. Douds*, 339 U.S. 382 (1950) (upholding an act that conditioned official recognition of labor unions on the filing of affidavits affirming that the union officers were not members of the Communist Party and did not believe in the overthrow of the government), and *United States v. Brown*, 381 U.S. 437 (1965) (striking down a statute that made it a crime for members of the Communist Party to serve as officers of labor unions), put the Attainder Clause doctrine on uncertain grounds because its contours were left unclear. The lack of clarity and certainty arose because each case rested on different footing, leaving in doubt what degree of latitude the legislature possessed in regulating societal institutions. For more information regarding this period of uncertainty, see *Beyond Process*, supra note 14, at 483–88; Welsh, supra note 14, at
controlling Attainder Clause doctrine. The Court’s current analytical framework for attainder cases successfully addresses the bill of attainder question by requiring consideration of the key elements of specificity and punishment, while incorporating into the analysis of what constitutes punishment the question of whether an act is regulatory in nature. By incorporating the question of regulation into the punishment analysis, the attainder clause doctrine takes into account the important Dent and Hawker exception. Furthermore, current doctrine ensures that the Attainder Clause remains a viable and meaningful constitutional protection without introducing into the constitutional framework a doctrine does not have rational limitations.

In Nixon v. Administrator of General Services,54 the Court consolidated prior Attainder Clause precedent into a comprehensive analytical framework. The Nixon framework requires a two-step analysis. First, a court must evaluate the specificity of the act in question. When an act is too specifically targeted at a group or individual it may violate the Attainder Clause. Specificity, however, does not automatically implicate a bill of attainder concern.55 If a person can avoid the burden inflicted by a particular enactment, the act fails the specificity requirement. Second, a court must decide whether the burdens imposed by an act constitute punishment within the meaning of the Attainder Clause. A burden constitutes punishment if (1) the act imposes punishment in any of the historical forms, including death, imprisonment, banishment, corruption of blood, and perpetual exclusion from professions; (2) the act furthers no legitimate nonpunitive legislative purpose; or (3) the congressional record evinces an unmistakable intent to punish the targeted individual or group.56

The Nixon framework was applied and expanded somewhat in Selective Service System v. Minnesota Public Interest Research Group.57 In this case, the Court sought to determine whether a law cutting off financial aid to students who failed to register for the selective service

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93–99 (“The effort on the part of the Brown Court to clarify the bill of attainder doctrine was not, however, entirely successful.”); and Hennessy, supra note 33, at 647–51.


55. Id. at 472 (“[E]ven if the specificity element . . . [is satisfied], the Bill of Attainder Clause would not automatically be implicated.”).

56. See id. at 473–84.

violated the Attainder Clause. The Court declined to find that the Nixon specificity requirement was satisfied because the barrier established by Congress was not an “absolute barrier” to receiving financial aid on account of past conduct. The Court held that the act did not contain the requisite specificity because the affected class of nonregistrants could penetrate the barrier and obtain the desired benefits by satisfying the requirements established by Congress. Thus, the Minnesota Public Interest Research Group decision provided specificity with a new life in the form of a rational limitation. If the targeted class is not defined by past, irreversible conduct, the specificity requirement is not satisfied. Had the act specified that anyone who had failed to register by a specific date was forever barred from receiving financial aid regardless of future conduct, the specificity requirement as articulated by the Court would have been satisfied.

The Court next applied each of the Nixon tests for punishment. First, the Court held that the burden imposed by the act did not constitute punishment in the form of a “legislative bar to participation by individuals or groups in specific employments or professions” because the bar was not absolute—the nonregistrants “carried the keys of their prison in their own pockets.” In simpler terms, the Court held that the nonregistrants had not been punished because they could avoid the adverse consequences provided for in the act by simply complying with the requirements. The Court found that the legislation furthered the nonpunitive goal of “improving compliance with the registration requirement” and the

58. Id. at 844.
59. Id. at 850.
60. Id. at 850–51 (“Cummings and Garland, dealt with absolute barriers to entry into certain professions for those who could not file the required loyalty oaths; no one who had served the Confederacy could possibly comply, for his status was irreversible.”).
61. In Nixon, the Court had held that the specificity requirement was not satisfied because former president Richard Nixon constituted a “legitimate class of one.” Nixon v. Adm’t of Gen. Servs., 433 U.S. 425, 472 (1977). This holding virtually eliminated the significance of the specificity requirement. The Minnesota Public Interest case, however, reasserted the possibility that an act may actually be considered too specific if it creates a class based on past, irreversible conduct.
63. Id. The Court held that “[a] statute that leaves open perpetually the possibility of qualifying for [the desired benefit] does not fall within the historical meaning of forbidden legislative punishment.” Id.
64. Id. at 854.
legislative history of the act did not demonstrate an unmistakable punitive motive.65

The bill of attainder analysis as articulated by the Court in Minnesota Public Interest Research Group is the clearest example of the current Attainder Clause Doctrine. Given that it is the Court’s clearest and most recent Attainder Clause precedent, it is not unreasonable to assume that an examining court would address a bill of attainder question in a similar manner.

III. AMENDMENT THREE, A BILL OF ATTAINDER?

In the coming years, courts will likely be called upon to apply the current Attainder Clause doctrine to the recent flurry of marriage amendments.66 In order to assist courts in their examinations, this Part analyzes whether Utah’s Amendment Three constitutes an unlawful bill of attainder under the Federal Constitution. The following analysis shows that Amendment Three is not a bill of attainder because it does not single out a specific class for punishment. Rather, the amendment operates in a generally applicable, regulatory manner and resolves a heated political debate. Likewise, other amendments that track Amendment Three’s generality and serve a similar regulatory function are not bills of attainder.

A. The Amendment

Effective January 1, 2005, Amendment Three to the Utah Constitution reads as follows: “(1) Marriage consists only of the legal union between a man and a woman; (2) No other domestic union, however denominated, may be recognized as a marriage or given the same or substantially equivalent legal effect.”67 The amendment’s two parts play distinct roles.

65. Id. at 855–56 (“Congress sought not to punish anyone, but to promote compliance with the draft registration requirement and fairness in the allocation of scarce federal resources.”).

66. In Citizens for Equal Prot., Inc. v. Bruning, 290 F. Supp. 2d 1004, 1009 (2003), the Federal District Court for the District of Nebraska was called upon to apply the Attainder Clause doctrine to Nebraska’s marriage amendment. The court found that the amendment constituted a bill of attainder. Consequently, other courts will likely hear Attainder Clause challenges of other amendments.

The first part defines marriage as the union of a man and a woman. This part of the amendment incited relatively little controversy during the debate leading up to its passage. The actual effect of this constitutional definition of marriage is hard to assess because the laws in Utah, and in the United States generally, have not abandoned this basic definition of marriage.

The second part of the amendment singles out marriage between a man and a woman for favored treatment over other domestic unions—homosexual, polygamous, or otherwise. It achieves this result by prohibiting the state from recognizing alternative domestic arrangements “as a marriage” or giving such relationships the “same or substantially equivalent” legal effect.

The state may still afford some benefits to individuals engaged in nontraditional sexual relationships; however, these benefits, taken together, cannot constitute official recognition. Nor can this package of benefits be the same or substantially equivalent to the benefits conferred on monogamous, heterosexual marriages. When the state makes benefits available to nontraditional unions, the courts are left to determine two questions: first, whether the particular package of benefits constitutes official recognition by the state within the meaning of the amendment; and second, whether the package is the same or substantially equivalent set of benefits conferred upon the traditional marriage institution.

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68. See, e.g., Deborah Bulkeley, *Nuptial Amendment Supported Strongly*, DESERET MORNING NEWS, Sept. 13, 2004, at A01 (indicating widespread agreement in the electorate over the first sentence of the amendment and somewhat less agreement over the second sentence).


70. See UTAH CONST. art. I, § 29.

71. While it is indeed speculative to say just exactly how the amendment will operate, these views of the amendment are consistent with preelection analysis. See UTAH VOTER INFORMATION PAMPHLET, GENERAL ELECTION NOVEMBER 2, 2004, at 35 (“The Amendment prohibits a domestic union from being given [the] same or similar rights, benefits, and obligations [given to traditional marriages]. The scope of that prohibition may be more precisely defined by Utah courts as they interpret the provision in the context of lawsuits that may arise.”); see also, Yes! For Marriage, *The True Legal Effect of Amendment Three: Why the Critics Are Wrong*, at 7 (on file with author) (expressing the view that the amendment would not prevent the legislature from extending some benefits to nontraditional unions).
B. Doctrinal Analysis of the Amendment

Evaluating Amendment Three using current Attainder Clause doctrine requires a determination of whether: (1) it is sufficiently specific to invoke an Attainder Clause analysis, and (2) whether it imposes punishment. As will be seen, Utah’s Amendment Three survives Attainder Clause analysis under the functional approach because it lacks the specificity required and it does not inflict punishment in any of the historically accepted forms, it furthers a legitimate nonpunitive purpose, and the legislative history of the amendment does not evince an intent to punish.

1. Amendment Three lacks the specificity required to be a bill of attainder

Amendment Three lacks the specificity that attainder analysis typically requires in finding a certain act to constitute a bill of attainder. The language and effect of Amendment Three do not single out a specific group of nontraditional unions. According to the United States Supreme Court, an enactment is sufficiently specific if it applies to a named or easily ascertainable individual or class.72 The mere specificity of a law, however, does not “call into play the Bill of Attainder Clause;”73 rather, the affected class must be defined by past conduct that makes their ineligibility for a particular benefit “irreversible.”74 If the members of the affected class can obtain the desired benefits through future conduct the specificity requirement is not met.75

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75. Id. at 850–51. The Court commented:
   Cummings and Garland dealt with absolute barriers to entry into certain professions for those who could not file the required loyalty oaths; no one who had served the Confederacy could possibly comply, for his status was irreversible. By contrast [the requirements of the act limiting Title IV education loan benefits to those who register for the draft is] far from irreversible. . . . “Far from attaching to . . . past and ineradicable actions,” ineligibility for Title IV benefits “is made to turn upon continuously contemporaneous fact” which a student who wants public assistance can correct.
   Id. (quoting Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 87 (1961)); see also supra note 53 and accompanying text.
The language of Amendment Three does not name or reference any specific individual or class. It does, however, use the words “no other domestic union.” While this phrase is similar to others that have become associated with the same-sex marriage movement, it encompasses far more than same-sex relationships. Most notably in Utah, polygamous unions fall within this definition. Unlike other marriage amendments, Amendment Three’s language does not specifically target same-sex couples by overtly referencing titles and phrases that connote a particular group. At most, the amendment designates by implication and not overt reference a class of all nontraditional domestic arrangements, one of which is same-sex couples.

To find the specificity required by the Attainder Clause, one may also determine whether there is a sufficient description of the

76. Utah Const. art. I, § 29.
77. Other arrangements logically brought within the amendment’s reference to “any other domestic union” include incestuous marriage, marriage with minors or animals, or marriage to multiple partners of the same sex. See George W. Dent Jr., Traditional Marriage Still Worth Defending, 18 BYU J. Pub. L. 419 (2004) (listing other nontraditional unions that would fall within the language used in the amendment). While Utah does not presently allow these nontraditional alternatives to be recognized as marriages, the recognition of same-sex unions as marriages logically opens the door for other non-traditional unions to gain similar recognition. Therefore, the amendment’s language was drafted to encompass more than just same-sex unions. Id.
78. The arguments proffered for recognizing same-sex unions as marriages are the same arguments that support all other kinds of marriages, unions, and arrangements. This reality is particularly true in the case of polygamy in Utah. For more on this subject see Dent, supra note 77, at 419 (arguing that the arguments for the recognition of same-sex marriage are the same for polygamy, incestuous marriages, and other nontraditional arrangements), and Cassiah M. Ward, I Now Pronounce You Husband and Wives: Lawrence v. Texas and the Practice of Polygamy in Modern America, 11 WM. & MARY J. WOMEN & L. 131 (2004) (analyzing the legality of polygamy in light of the Supreme Court’s reasoning in Lawrence v. Texas, 539 U.S. 558 (2003)). Furthermore, the debates surrounding the passage of the joint resolution to submit the amendment to the Utah electorate for approval reveals that effect of the act on polygamous unions was a concern of at least one of the representatives who spoke on the house floor. H.J.R. 25, 2004 Gen. Leg. Sess. (Utah 2004) (containing Representative Hansen’s questions to the bill’s sponsor, which suggest the need to include in the amendment wording that would cover polygamous unions).
79. Cf. United States v. Brown, 381 U.S. 437, 455 (1965) (holding that the overt reference to the Communist Party was not a semantically equivalent phrase by which Congress could designate a list of undesirable characteristics which it would have been entitled to regulated).
80. Other marriage amendments, such as Nebraska’s amendment, specifically name “civil unions” and “domestic partners” as the target of the amendment, which led a district court to find that the specificity requirement was satisfied. See Citizens for Equal Prot., Inc. v. Bruning, 290 F. Supp. 2d 1004, 1009 (D. Neb. 2003).
targeted class and whether that class is populated based on past irreversible conduct. If there is a class of individuals singled out because of past, irreversible conduct, the specificity requirement is satisfied.81 Here the examination becomes somewhat more difficult. The recent set of state marriage amendments, including Amendment Three, were passed in response to recent court decisions82 which many view as threatening traditional societal norms, and most of the attention was focused on same-sex marriages, not other nontraditional arrangements. For instance, the majority of the debate surrounding Amendment Three centered on the propriety of recognizing or banning same-sex marriages.83 Nonetheless, the specificity required under an Attainder Clause analysis does not exist unless the act makes a specific designation or description of the targeted class based on past irreversible conduct, which makes it impossible for the affected class to obtain the benefits in question.84

Selective Services System v. Minnesota Public Interest Research Group85 again provides a helpful example of how this rule operates. In considering the case of nonregistrants for the draft, the Supreme Court held that because the barrier established by the act was not absolute, the specificity requirement was not met regardless of the fact that Congress targeted a specific class for past behavior.86 While sexual orientation and draft registration are very different topics by nature, the principle of singling out a class of persons described by past, irreversible conduct so that the class can never obtain the benefits in question is central to the very meaning of a bill of attainder.87 The Minnesota Public Interest case stands for the proposition that an act does not satisfy the specificity requirement unless an absolute barrier is erected as a consequence of past conduct.

81. See supra note 60 and accompanying text.
83. The newspaper columns leading up to Election Day illustrate that the debate really centered on same-sex marriages and not other nontraditional unions. See, e.g., Deborah Bulkeley, Group Flays Gay Nuptial Proposal, DESERET MORNING NEWS, Sept. 2, 2004, at B4 (discussing the entire debate surrounding the amendment in terms of gay marriage); Rebecca Walsh, Huntsman Proposes New Partner Rights, SALT LAKE TRIB., Aug. 25, 2004, at B1.
85. Id.
86. Id. at 848–51.
that is irreversible. Amendment Three does not create an absolute barrier and no past conduct disqualifies anyone from the benefits associated with traditional marriages.

Contrary to traditional and contemporary bills of attainder, Amendment Three neither describes nor references any past conduct. The absence of any tie between past conduct and future ineligibility makes the amendment even less specific than the act in Minnesota Public Interest Research Group, which specifically tied the ineligibility to past behavior. Furthermore, Amendment Three provides for the affected individuals ample opportunity to obtain the benefits in question. A member of the affected class may obtain the benefits of marriage by choosing to marry one adult person of the opposite sex, by petitioning the legislature to make available another set of benefits allowed under the amendment, or by foregoing the benefits entirely by entering into a nontraditional arrangement and receiving whatever benefits are available to such unions.

It has been argued that homosexuality is either an irreversible condition or extremely difficult to change, and that therefore the specificity requirement is satisfied because a person cannot easily obtain the benefits in question. This argument, however, misconstrues the specificity requirement by focusing on the irreversibility of homosexual tendencies and behaviors. The true Attainder Clause inquiry is whether the barrier established between the affected class and the benefits is absolute, not whether the behavior underlying the controversy is irreversible. When one considers the practical effect of the amendment, it may well be said that the barrier is burdensome because it may require a homosexual to choose between changing sexual preferences and receiving marriage benefits, yet the barrier is not absolute, so the specificity requirement is not met.

89. See Strasser, supra note 8, at 251; Amar, supra note 8, at 218.
91. The alternatives described may not be the ideal set of options one would desire, but the Attainder Clause does not provide a vehicle for invalidating any act that a particular group or individual dislikes. It is highly likely that many of the nonregistrants for the draft felt disgruntled by effect of the act and were forced to either forego financial aid or comply and receive the aid benefits. With every piece of controversial legislation there will be those who dislike its effects. This does not mean the group has been singled out or punished within the meaning of the Attainder Clause. See Nixon v. Adm’r of Gen. Servs., 433 U.S. 425, 470 (1977).
A broad reading of Amendment Three’s language may suggest that it describes and specifies a class of nontraditional domestic unions, yet this mere specification, without more, does not meet the requirements of the Bill of Attainder Clause. In sum, the Amendment does not satisfy the specificity requirement because the plain language of the amendment does not specify an individual or class, and the class created by the broad descriptive language of the amendment is not absolutely barred from obtaining benefits associated with marriage. Moreover, the amendment establishes the framework in which the benefits sought may be obtained by individuals and provides guidance for how the state may prospectively afford benefits to other domestic unions. Other marriage amendments, however, likely do satisfy the specificity requirement by specifically naming the targeted class by using phrases like “Civil Union” or “Domestic Partnerships.” 92 However, upon review of the case law in this area, specificity, or lack thereof, would not likely prove fatal to a particular act depending on whether the act is viewed as inflicting punishment or as merely performing a regulatory function.

2. Amendment Three does not result in legislative punishment

In establishing the framework for the dispensing of particular benefits associated with marriage, Amendment Three does not inflict punishment on any individual or class because it is generally applicable, it increases support for traditional marriage and the attendant societal benefits, and it was not enacted with the unmistakable intent to inflict punishment.

Current Attainder Clause doctrine requires a court to engage in three separate inquiries to determine whether an act imposes punishment. First, the court looks to whether the act falls within the expanded historical meaning of legislative punishment. Second, the court examines the act’s legitimate nonpunitive purposes in light of the type and severity of the burdens it imposes. Here the court focuses on the state’s interest in regulating the institution as

92. See, e.g., NEB. CONST. art. I, § 29 (“Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”); see also MarriageWatch.org, State Marriage Amendments, http://marriagelaw.cua.edu/Law/marriageamendments.cfm (last visited Apr. 28, 2005) (providing the specific language used in current and pending marriage amendments).
described earlier in the Dent and Hawker cases. Finally, the court determines whether the legislature evinces an unmistakable, specific intent to punish the targeted class. The overarching consideration of the three inquiries is whether the targeted class is being deprived of any previously enjoyed right as a consequence of the past conduct.

a. Amendment Three does not fit the historical meaning of legislative punishment. Historically, the forms of punishment associated with bills of attainder included death, imprisonment, banishment, corruption of blood, or punitive confiscation of property. Clearly, Amendment Three does not impose any of the above-named punishments on any individual or class. In addition to the historical punishments associated with bills of attainder, prevailing Attainder Clause doctrine expands the meaning of punishment to include perpetual exclusion from an ordinary avocation of life on account of past conduct as a punishment.

Deriving their argument from the ordinary avocation of life line of reasoning, proponents of same-sex marriage have argued that barring same-sex couples from receiving official marriage recognition constitutes a perpetual bar and is therefore punishment for bill of attainder purposes. However, Amendment Three differs from the perpetual exclusion cases (Cummings and Garland) in two essential aspects. First, Utah did not create the amendment to address past conduct; rather, it is in response to potential future events. Both Cummings and Garland involved laws imposing punishment for past conduct. Second, Amendment Three does not create a perpetual bar to those currently engaged in nontraditional unions. Whereas the two above-named cases both permanently disqualified individuals from certain occupations, Amendment Three does not disqualify anyone from obtaining the benefits of marriage in the future for having engaged in a nontraditional domestic unions in the past. Just

93. Minn. Pub. Interest Research Group, 468 U.S. at 850; see also supra note 55 and accompanying text.


95. Minn. Pub. Interest Research Group, 468 U.S. at 852 (“In our own country, the list of punishments forbidden by the Bill of Attainder Clause has expanded to include legislative bars to participation by individuals or groups in specific employments or professions.”).

96. Strasser, supra note 8, at 244–46 (implying that the Federal Defense of Marriage Act, which prohibits the extension of benefits to same-sex partners, constitutes punishment in the form of perpetual exclusion on account of past conduct).
as in *Minnesota Public Interest Research Group*, the bar established is not absolute and is by no means perpetual because full benefits are obtainable through compliance with state constitutional requirements, notwithstanding past conduct.97

On the other hand, the counterargument asserts that the Attainder Clause would invalidate any enactment “that singles out persons for disfavored treatment based on their status.”98 Even assuming the correctness of this general view of the Attainder Clause, Amendment Three would not violate its principles because, as described above, the amendment does not single out same-sex relationships.99 Furthermore, the amendment does not disfavor anyone based on his or her status; it merely provides a particular social relationship with favored treatment by establishing general requirements that must be met before particular benefits may be obtained. While acts that provide persons with favored treatment may potentially raise constitutionality concerns under other clauses of the Constitution,100 the amendment simply reaffirms that monogamous, heterosexual unions are entitled to marriage benefits. Nowhere does the amendment invoke the status of any person or group. Simply put, the amendment does not single out homosexuals, lesbians, or bisexuals for disfavored treatment because of their sexual

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98. *Amar*, supra note 8, at 217. Professor Amar’s article is written in response to the Supreme Court’s decision in *Romer v. Evans*, 517 U.S. 620 (1996), wherein the Court employed unclear reasoning (awkward language) in invalidating an amendment to the Colorado state constitution. The amendment prevented state agencies from treating sexual orientation as a protected status for discrimination purposes. The contours of professor Amar’s arguments are essentially as follows: The Constitution’s nonattainder principle, as he calls it, prevents all legislation that singles out persons for disfavored treatment based on their status. A person’s sexual orientation is a societal status and therefore any law that punishes or stigmatizes based on sexual orientation violates the nonattainder principle. See *Amar*, supra note 8, at 217–19.

99. *Amar*, supra note 8, at 219 (“Under the nonattainder principle, there is a right not to be singled out by name in a law” that disfavors persons based on their status as homosexuals, lesbians, or bisexuals.). Amendment Three does not name any nontraditional relationship or orientation, nor does it single out one particular group because its language broadly encompasses the entire range of nontraditional relationships. See *Utah Const.* art. I, § 29.

100. See *Amar*, supra note 8, at 213 (“A law naming persons and singling them out for distinctive treatment is suspicious. Not all such law are unconstitutional, however. For example, a law giving Akhil Reed Amar a special benefit would probably not violate the nonattainder principle, although at some point special privilege laws could raise questions under the Title of Nobility Clauses and more generally equal protection and republican government principles.”).
preferences and, therefore, does not impose punishment within the meaning of the first Attainder Clause punishment test.

b. Amendment Three reasonably furthers legitimate nonpunitive purposes. Secondly, if it cannot be shown that a measure reasonably furthers legitimate nonpunitive goals, the enactment is considered punitive rather than regulatory in nature.101 The inclusion of this particular test for punishment has led some commentators to complain that the test is merely a variant of the equal protection doctrine and unnecessarily obscures constitutional lines.102 However, this test properly invites consideration of the state’s authority and power to regulate the regular avocations of life, thus ensuring that the Attainder Clause doctrine does not inappropriately inhibit the legislature from performing its proper rule-making function.103 Therefore, this test requires first an assessment of whether favoring the traditional institution of marriage between a man and a woman is itself a legitimate, nonpunitive goal, and then an assessment of whether this goal is “reasonably furthered” by the enactment.104 Once this is determined, it is possible to examine whether the means chosen to achieve this end are nonpunitive.

Amendment Three and similar marriage amendments aim to achieve multiple goals, any one of which may be considered a legitimate, nonpunitive purpose. From the academic literature, the list of goals includes inter alia the following: expressing societal norms, benefiting children, encouraging heterosexuality, socializing adults, promoting human flourishing, promoting gender and class equality, bolstering liberal democracy, bolstering state support for the marriage institution, and preserving religious freedom.105 Because

102. See, e.g., Welsh, supra note 14, at 99.
103. See supra note 22 and accompanying text. Through this prong of the punishment test, the entire contribution of the Dent and Hawker cases is preserved in current Attainder Clause doctrine. Without engaging in this critical inquiry, a court risks reverting back to a doctrinal approach that would invalidate a wide array of enactments, such as the acts considered in Dent and Hawker, which establish basic requirements for professional activities. See supra notes 44–45 and accompanying text.
it is beyond the scope of this Comment to enter into a detailed analysis of each of these goals,\textsuperscript{106} this Comment consolidates these specific goals, for analytical purposes, into the general goal of preserving and increasing confidence in heterosexual, monogamous marriage. Attainder Clause case law provides helpful examples in assessing whether favoring traditional marriage by preserving a particular set of benefits for marriages between a man and a woman is a legitimate, nonpunitive goal.

In previous Supreme Court bill of attainder decisions, the legitimate nonpunitive goals that have withstood attainder challenges and appropriate mechanisms to reach these goals included: (1) preservation of confidence in the medical profession by establishing education requirements and preventing convicted felons from practicing medicine;\textsuperscript{107} (2) prevention of future economic harm posed by political strikes orchestrated by labor union leaders by establishing requirements designed to prevent certain individuals from serving in union leadership;\textsuperscript{108} (3) preservation of evidence for use at a single criminal trial by requiring production of confidential documents;\textsuperscript{109} (4) preservation of national monuments and records of historical value by preventing destruction of documents of historical significance;\textsuperscript{110} (5) encouraging compliance with the national draft requirement by conditioning federal benefits upon compliance with draft requirements;\textsuperscript{111} and (6) ensuring fairness in the allocation of scarce federal resources by restricting receipt of resources upon compliance with national draft requirements.\textsuperscript{112}

The items listed above obviously differ substantially from each other and from the goal of preserving traditional marriage benefits

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{106} Certainly the legitimacy of each of these goals would be comprehensively developed during the litigation surrounding an Attainder Clause challenge.
\item \textsuperscript{107} See Hawker v. New York, 170 U.S. 189 (1898) (upholding a statute barring convicted felons from practicing medicine); Dent v. West Virginia, 129 U.S. 114 (1889) (upholding a provision establishing educational requirements for the practice of medicine in order to prevent nongraduates of medical schools from joining the profession).
\item \textsuperscript{108} Am. Communications Ass’n v. Douds, 339 U.S. 382, 413 (1950) (upholding a statute that precluded members of the Communist Party from acting as officers of labor organizations).
\item \textsuperscript{110} Id. at 477–78.
\item \textsuperscript{112} Id. at 855–86.
\end{enumerate}
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for heterosexual monogamous unions. However, when one considers the existing and expanding body of scientific information demonstrating the benefits to children\textsuperscript{113} and society\textsuperscript{114} flowing from

\textsuperscript{113} See, e.g., ELEANOR MACCOBY, THE TWO SEXES, (1998) (summarizing the scientific literature about how mothers excel in providing children with emotional security and in reading the physical and emotional cues of infants, and how mothers provide unique counsel as their daughters confront physical, emotional, and social challenges associated with puberty and adolescence); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 38 (1994) (“If we were asked to design a system for making sure that children’s basic needs were met, we would probably come up with something quite similar to the two-parent ideal. Such a design, in theory, would not only ensure that children had access to the time and money of two adults, it also would provide a system of checks and balances that promoted quality parenting. The fact that both parents have a biological connection to the child would increase the likelihood that the parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child.”); DAVID POPENOE, LIFE WITHOUT FATHER, (1996) (suggesting that a father’s pheromones influence the biological development of his daughters, that a strong monogamous heterosexual marriage provides role models for girls of what to look for in a man, and gives girls confidence to resist the sexual entreaties of their boyfriends); KYLE PRUETT, FATHERNEED 204 (2000) (demonstrating that children hunger for their biological parents); Bruce J. Ellis et al., Does Father Absence Place Daughters at Special Risk for Early Sexual Activity and Teenage Pregnancy?, 74 CHILD DEVELOPMENT, 801, 801–21 (2003) (illustrating that girls who grow up apart from their biological father were much more likely to experience early puberty and teen pregnancy than girls who spent their entire childhood in an intact family).

\textsuperscript{114} In addition to the host of societal difficulties brought on by a decrease in child welfare as described in the previous note, the official recognition of nontraditional unions will likely lead to greater use of gender-neutral terms like “partners” combined with social and cultural pressure to neuter thinking and behavior as it relates to marriage. However, couples are less likely to divorce when the wife concentrates on childrearing and the husband concentrates on breadwinning. See E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 31 (2002). Additionally, when the concept of marriage is disconnected from procreation, societies experience lower birthrates, which have been linked to increased social, political, and economic strains on society. Official recognition of nontraditional unions furthers the disconnect between marriage and procreation. The replacement fertility rate is 2.1 children per woman. “Countries which have legalized same-sex marriage experience some of the lowest birthrates in the world. For example, the Netherlands, Sweden, and Canada have birthrates that hover around 1.6 children per woman.” Richard G. Wilkins, Social Scientific Evidence Related to Same Sex Marriage, at 3 (on file with author). For national fertility rates, see CIA, The World Factbook: Sweden, http://www.cia.gov/cia/publications/factbook/geos/sw.html (last visited Apr. 28, 2005) and for more regarding the growing disconnect between marriage and procreation see The National Marriage Project, The State of Our Unions 2003, available at http://marriage.rutgers.edu/Publications/SOOU/SOOU2003.pdf. See also, Patrick F. Fagan and Grace Smith, The Transatlantic Divide on Marriage: Dutch Data and the U.S. Debate on Same-Sex Unions, WebMemo #577, http://www.heritage.org/Research/Family/wm577.cfm. (last visited Apr. 28, 2005) (demonstrating that since legal recognition of same-sex marriage in the Netherlands in 1998, there has been a steady increase in the number of single-parent families, a steady decrease in the portion of the population that is married, and a
intact, traditional marriages, the stated goal is clearly a legitimate, nonpunitive interest. Furthermore, because knowledge about the potential future societal effects that may be associated with nontraditional unions is limited or unreliable, diluting public confidence in heterosexual monogamous relationships through modification of the existing system for dispensing marital benefits is unwise.

When comparing the goals the Supreme Court has held to be legitimate, nonpunitive goals with the state’s interest in maintaining or increasing its support of heterosexual, monogamous marriage, the legitimacy of the latter stands out. The medical profession cares for life and limb—traditional marriage is the ideal place for the creation of life. If preserving confidence in the medical profession is a legitimate legislative goal, then it follows that preserving confidence in the institution of traditional marriage is likewise a legitimate goal.

If preserving a limited number of evidentiary documents for a single trial was deemed a legitimate state interest, surely favoring the ideal place for raising children is at least an equally legitimate interest. Indeed, preserving and strengthening traditional marriage

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115. Wilkins, supra note 114, at 2 (explaining that although some research on the effect of same-sex couple parenting has asserted that there are no adverse effects on children, an independent review of the research indicates serious methodological and other problems with each study reviewed) (citing Steven Nock 2001, Affidavit to the Ontario Superior Court of Justice regarding Hedy Halpern et al.).

116. See supra notes 101–14 and accompanying text.

117. See Hawker v. New York, 170 U.S. 189 (1898); Dent v. West Virginia, 129 U.S. 114 (1899); supra note 114; see also Alvaré, supra note 7, at 18 n.47 (2004) (describing the central role the family in society and providing information on current birth rates, most of which still occur within traditional marriages).


119. See supra note 113; see also, Dent, supra note 77, at 428–33, 434–35 (arguing that traditional marriage is instrumental in the socialization of current and future leaders of society and the inculcation of respect for civil authority and duty towards community among the citizenry); The Heritage Foundation, Family and Society Database, http://www.heritage.org/research/features/familydatabase/results.cfm?Key=463 (last visited Apr. 28, 2005) (providing the findings of various studies regarding children born out of wedlock). But see, Bernstein, supra note 7, at 211–12 (2003) (arguing that the detriments caused by state-sponsored marriage are greater than the benefits created by the institution, which should thus be abandoned).
appears at least as legitimate a goal as any of the other goals the
Supreme Court has found to be legitimate, nonpunitive goals under
an Attainder Clause analysis.120

Once the legitimacy of the goal is established, one must evaluate
whether the means used to further the goal are nonpunitive.121 A
measure for furthering a legitimate state interest is nonpunitive if it is
designed to reach the calling or institution rather than the persons
affected by the enactment.122

On this point, again, a great deal can be gleaned from past
Supreme Court Attainder Clause decisions. From the legitimate
goals and methods for furthering those goals listed above,123 several
principles stand out. First, restricting entrance into a profession tends
to preserve confidence in the institution.124 Second, prevention of

120. Of course, there are those who disagree that strengthening traditional marriage will
benefit children and society. See, e.g., Strasser, supra note 8, at 251–59 (arguing that
preservation of traditional marriage in the way described is not a legitimate state interest).
However, this is the case with virtually every hotly contested social or moral issue that
confronts society. The polarity associated with this type of debate should not prevent open
consideration of scientific research as well as history in resolving the issue. The Author believes
it is possible for an extreme, unfettered passion for absolute equality of ideas, lifestyles, and
actions to prove detrimental to society. For more on the dangers of extreme equality, see
BARRON DE MONTESQUIEU, THE SPIRIT OF LAWS, bk. VIII, para. 2 (1751) (“The principle of
democracy is corrupted not only when the spirit of equality is extinct, but likewise when [the
people] fall into a spirit of extreme equality . . . .”), available at


122. Id. at 848 (quoting Cummings v. Missouri, 71 U.S. (4 Wall.) 271, 279 (1867)); see
supra, note 40 and accompanying text.

123. See supra notes 107–12 and accompanying text.

124. See Hawker v. New York, 170 U.S. 189, 199 (1898) (holding that requirements
that create a bar to entry are “intended to secure . . . that the community might trust with
confidence those receiving a license under the authority of the state”). Obviously, receiving a
license to practice medicine naturally requires more learning and capacity than obtaining a
marriage license and the degree of trust associated with the recipients of a marriage license is
not, and need not be, as high. But by requiring that applicants for a marriage license be of
opposite sexes, the state ensures, at a minimum, the possibility that the union may produce
offspring. The overriding principle being that the state may establish qualifications in the
conferring of licenses in order to foster the interests of the state. But see Goodridge v. Dep’t of
that the state’s interest in “providing a ‘favorable setting for procreation’” did not pass a
rational basis test). Procreation certainly does occur outside the confines of traditional
marriages and even some heterosexual couples are physically unable to bear children, but these
facts do not diminish the interest the state has in promoting the ideal place for procreation to
occur by favoring traditional marriages. Harking back to the medical profession analogy, the
mere fact that a person has some ability to offer medical services to the public does not mean
future harm may be a legitimate goal.125 Third, benefits may be conditioned on compliance with basic requirements.126 Fourth, restriction of benefits in order to encourage behavior may be a permissible means to further a legitimate goal.127 Amendment Three operates well within these accepted boundaries. Initially, the amendment operates to exclude other nontraditional unions from entrance into the marriage arena, thereby preserving confidence in the institution. Next, while future societal drawbacks potentially caused by officially recognizing nontraditional unions are uncertain, the potential harms that may result from diluting confidence in the traditional heterosexual, monogamous marriage are more concrete.128 Amendment Three seeks to prevent these future societal harms by restricting entrance into the marriage arena. Moreover, the benefits associated with traditional marriage are conditioned on compliance with the basic requirement that a person enter this legal institution jointly with an adult person of the opposite sex. Finally, conditioning benefits on compliance with the “adult person of the opposite sex” requirement encourages and supports future heterosexual marriages.

In effect, Amendment Three singles out traditional marriage for favored treatment.129 Singling out an institution for favored treatment tends to strengthen the institution—both philosophically and practically. On a philosophical level, the law plays a role in expressing “social values and in encouraging social norms to move in

that that person’s services meet the ideal the state seeks to promote. Likewise, it matters little that alternative methods of procreation exist and occur; the state may still favor the ideal setting for procreation.

125. Am. Commc’ns Ass’n v. Douds, 339 U.S. 382, 413 (1950) (upholding a statute that precluded members of the Communist Party from acting as officers of labor organizations on the basis that the act sought to prevent future economic harm).


127. Id.

128. See supra notes 113–14 (citing sources upon which one can base the conclusion that at least some harm will result to children and society if traditional marriage is supplanted, even partially, by nontraditional unions).

129. It is important to recall that singling out an individual for favored treatment is far different than singling a person out for disfavored treatment. See INS v. Chadha, 462 U.S. 919 (1983); see also supra Part II. By analogy, singling out traditional marriage for favored treatment should not raise constitutional bill of attainder concerns.

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particular directions.\textsuperscript{130} By integrating a long-standing and overwhelmingly accepted norm into the state’s governing document, a powerful message is conveyed and preserved for future generations. On a more practical level, by overtly favoring traditional marriage, government and society in general are more likely to move in that direction. This movement occurs by the adoption of further measures that strengthen traditional marriage and families.\textsuperscript{131} On each level, a legislature would be furthering the legitimate goal of preserving and increasing confidence in the traditional institution of marriage.

The result of the preferential treatment provided to traditional marriage will likely be its strengthening as an institution. With the strengthening of traditional marriage, it is likely that the concomitant benefits will be preserved—thereby providing the legitimate, nonpunitive purpose for Amendment Three.

c. Amendment Three lacks an unmistakable legislative intent to punish. The final test for determining whether an act is punishment for attainder purposes requires the review of the legislative history of the act to determine whether the legislature possessed motivation or intent to punish the targeted class.\textsuperscript{132} The evidence of legislative intent to punish must be “unmistakable” before a court may strike down an enactment.\textsuperscript{133} Several reasons support the conclusion that Amendment Three does not satisfy this motivational test for punishment.

First, this test is geared toward evaluating congressional intent to punish and does not apply neatly, if at all, to enactments by the electorate. When reviewing a legislative act, the congressional record provides a fairly reliable source for determining the intent of the legislature. No such record exists for determining the intent of the electorate. It is virtually impossible to determine the “unmistakable”\textsuperscript{134} intent of the entire electorate. It is likely that there were many reasons for which voters voted for and against the amendment—some likely had no reason at all. The simple fact that

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the enactment under review is a state constitutional amendment rather than an ordinary statute makes a search for unmistakable intent very difficult and nearly impossible logistically. The only state constitutional amendment invalidated as a bill of attainder was the amendment considered in Cummings.135 However, at the time of the Cummings decision this test for finding punishment was not a part of the Attainder Clause analysis. Since there has been no Attainder Clause challenge to a state constitutional amendment wherein current Attainder Clause doctrine has been applied, it is difficult to predict just how a court would find unmistakable intent on the part of the legislative body—the electorate—enacting the law. A review of the debates surrounding the passage of the joint resolution to submit the amendment to the electorate for approval is the closest approximation to an examination of the legislative intent. A review of these debates shows that the members of the Utah House and Senate passed the resolution in order to preserve and strengthen the institution of marriage and ensure that the electorate was given an opportunity to decide the issue.136 None of the language in support of the resolution suggests any punitive motive, let alone an unmistakable punitive motive.137 Additional reasons support the conclusion that in the passage of Amendment Three no unmistakable intent to punish a target class existed. One such reason is that Amendment Three served as a resolution to a hotly contested political debate. When this is the case, deferring to the voice of the people is wise.138 If this amendment had

135. Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 316–17 (1867) (invalidating an amendment to the Missouri state constitution that required attorneys and others to take an oath of loyalty wherein the individuals had to affirm that they had never aided the Confederacy during the Civil War).

136. H.J.R. 25, 2004 Gen. Leg. Sess. (Utah 2004) (containing the House and Senate floor debates over the resolution). In the debates the delegates in favor of the bill repeatedly expressed a feeling of toleration and concern for the welfare homosexuals in the state. Id. The prevailing motivation among the delegates seemed to be a desire to ensure that the electorate, not the judiciary, had the opportunity to decide what policy should govern the institution of marriage. See id.

137. Id.

been a secondary response to a previously resolved political controversy, like the circumstances surrounding the amendment in *Cummings*,¹³⁹ perhaps the intent of the electorate would be easier to determine. But, because Amendment Three represents the people’s first opportunity to express their views on the controversy, punitive intent is very difficult to clearly discern, especially so as to be unmistakable.

Indeed, the amendment process was created specifically to allow the people to resolve hotly contested moral issues by allowing the electorate to establish general policies to govern society rather than leaving these questions in the hands of the government.

[1] In our system, the ultimate sovereign who must remain responsible for whatever acts the government takes is the people. While there are filters through which the people’s judgment must pass before it is properly implemented in our system, in the long run, it is their judgment, not that of the judiciary, which should control.¹⁴⁰

Amendment Three’s history does not reveal an unmistakable intent on the part of the electorate to punish anyone. Rather, it reveals that the amendment process accomplished its intended purpose. Specifically, Amendment Three’s history demonstrates that the amendment process facilitated the resolution of an important social question by the electorate.

Considering the foregoing analysis of Amendment Three according to current Attainder Clause doctrine, the following conclusions result: First, Amendment Three does not reach the level of specificity required to implicate Attainder Clause concerns because of its broad, general language and its general applicability to all nontraditional domestic unions. Second, Amendment Three does not punish any person or group in any of the historical forms of punishment; it merely singles out an important societal institution for favored treatment. Third, the purpose of strengthening traditional marriage in order to increase the benefits to children and society is a legitimate state interest that is reasonably furthered by the

¹³⁹. The amendment in *Cummings* was enacted just after the resolution of the Civil War and was designed to inflict punishment on the already defeated Confederate sympathizers. *Cummings*, 71 U.S. (4 Wall.) at 316–17.

¹⁴⁰. Worthen, *supra* note 24, at 306 (citing *The Federalist* No. 31 (Alexander Hamilton)).
amendment. And finally, the amendment was not enacted with an unmistakable punitive intent. Based upon these conclusions, Amendment Three does not fall within the Supreme Court’s current doctrinal conception of what constitutes a bill of attainder.

C. Consideration of Doctrinal Implications

Deciding whether Amendment Three and other marriage amendments are bills of attainder will likely have important doctrinal implications in the constitutional system. In arriving at a decision in an Attainder Clause challenge to a marriage amendment, a court must be sensitive to the doctrinal implications of its decision. Specifically, a court must be sensitive to the effect its Attainder Clause construction will have on the separation of powers and the political process. A construction of the Attainder Clause that is too broad has the potential to severely hamper the legislature’s ability to establish generally applicable rules and may potentially cripple the political process. The purpose of the Bill of Attainder Clause is not to prevent the legislature or electorate from resolving a political debate—it is to prevent postresolution punishment of political opponents. Keeping this general purpose in mind while deciding Attainder Clause cases will guide a court in balancing the important constitutional interests impacted by its decision.

The resolution of a political controversy to the dissatisfaction of one side is not punishment for attainder analysis purposes and should not raise Attainder Clause concerns. If this were the case, legislatures could not resolve the majority of political controversies by subsequent legislation without punishing the opponents of the measure and raising bill of attainder concerns. No matter the issue, the class or group that finds itself on the losing side of the political debate will suffer either an actual disability or a curtailment of its ability to obtain a desired outcome or benefit. This cannot and for

141. See United States v. Lovett, 328 U.S. 303, 327–30 (1946) (Frankfurter, J., concurring) (arguing that the Court can minimize or avoid future constitutional conflicts by careful construction of constitutional provisions and citing supporting cases).
142. See supra note 22.
143. See supra note 24.
144. Beyond Process, supra note 14, at 498 (arguing that the Attainder Clause was intended as a substantive protection for groups and individuals that engage in political activities and should not be construed so as to have no rational limitation).
doctrinal purposes should not be construed as punishment. The Nixon Court explained: “By arguing that an individual or defined group is attainted whenever he or it is compelled to bear burdens which the individual or group dislikes, . . . the anchor that ties the bill of attainder clause to realistic conceptions of classification and punishment [is removed].” If a court considers a dissatisfied political group as having been singled out and punished (i.e. attainted) by legislation unfavorable to their cause, the very legislative process will be crippled. The legislature would potentially confront an Attainder Clause challenge to virtually every law that a political minority opposes. Therefore, Congress and the legislatures of every state would be limited “to the choice of legislating for the universe, or legislating only benefits, or not legislating at all.”

The holdings in Cummings and Garland further illustrate this important point. In Cummings, after the Civil War had ended, Missouri singled out the Confederate sympathizers and barred them from holding positions of trust that prior to the war they were free to hold. Likewise in Ex parte Garland, the Congress barred Confederate attorneys who had been admitted to the bar prior to the war from practicing law in federal courts as a consequence of their allegiance to the Confederacy during the war. In both cases the Court found that the acts were unlawful bills of attainder because they singled out political opponents and prescribed punishments as a direct consequence of having taken an opposing political position. These examples highlight the fact that the initial resolution of a political controversy does not constitute punishment; rather, it is the left jab after the round is over that raises bill of attainder concern.

146. Id.
147. Id. For an illustration of this crippling effect, see Citizens for Equal Prot., Inc., v. Bruning, 290 F. Supp. 2d 1004, 1008–11 (D. Neb. 2003) (holding that the plaintiffs had stated a claim that the state amendment was an unlawful bill of attainder, thus defeating the defense’s motion to dismiss). In this case, the court held that an entity advocating for gay rights had been punished because the amendment made it more difficult for the entity to obtain a desired political outcome in Nebraska. Id. The court’s reasoning, if adopted widely, would make an attainder challenge available for every disgruntled political group in the country and the legislative process would be severely impeded.
151. See id. at 388–99; Cummings, 71 U.S. (4 Wall.) at 323–25.
The practical result of Amendment Three is that it resolves the political issue of same-sex marriage in Utah and as such cannot be said to be punishment, notwithstanding the fact that some may “dislike” the effect of the law.\textsuperscript{152} Suppose, however, that the Utah legislature enacts further legislation that makes any lawyer who worked to defeat Amendment Three or who voted against Amendment Three ineligible to renew his or her license to practice law in the state. This exclusion would constitute punishment as a consequence of past political activity and would violate the Attainder Clause.\textsuperscript{153}

In summary, the decision whether marriage amendments are bills of attainder not only implicates important social and moral policies but also raises important concerns regarding the construction of the Attainder Clause. These concerns about preserving the legislative and political processes may be adequately addressed by keeping in mind that the purpose of the Attainder Clause is to prevent the victorious party from punishing political opponents after having won the political battle.

IV. CONCLUSION

The Supreme Court has consistently adhered to the general view that the Bill of Attainder Clause is an important, presently functional constitutional provision designed to protect individuals and groups from being singled out for legislative punishment. Current Supreme Court doctrine under the Attainder Clause requires consideration of the enactment’s specificity and the existence of punishment. Whether an act inflicts punishment is determined by engaging in a three-pronged analysis that brings into consideration a multitude of factors. Considering Amendment Three in light of these factors leads to the conclusion that it is not a bill of attainder because it lacks the requisite specificity and does not inflict punishment under any prong of the test.

Furthermore, Amendment Three represents the electorate’s decision on what general policy will apply with regard to the meaning of marriage in contemporary society. Simply resolving a political controversy and establishing a generally applicable policy

\textsuperscript{152} Nixon, 433 U.S. at 470.

\textsuperscript{153} See Beyond Process, supra note 14, at 498–502.
cannot, under a thorough attainder analysis, and should not, for doctrinal reasons, be consider a bill of attainder.

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