# STATE CONSTITUTIONAL RESTRICTIONS ON SPECIAL LEGISLATION AS STRUCTURAL RESTRAINTS

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ABSTRACT

*State constitutional restrictions on special legislation are common to nearly every state constitution. Modern interpretations of these provisions appear to protect individual rights to equal treatment. This article argues that these interpretations are wrong or, at least, the case law is largely misunderstood. Rather, an examination of these provisions' history and texts reveals that these provisions solve important structural problems that arise within state legislatures and shift a great deal of governmental power from the legislative chamber to the judiciary and executive branches. This understanding reveals that most special-legislation doctrine implements a concern for legislative evasion, rather than a concern for individual rights. It also reveals a number of doctrinal reforms that would make future case law more consistent with the text of these provisions.*

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## INTRODUCTION

Nearly every state constitution in the United States contains a restraint on the legislature's authority to enact special laws. These provisions restrict the legislature's ability to identify objects (persons, places or things) in legislation. In addition, courts have interpreted these provisions to restrict the legislature's classification authority. The classification restriction has had significant impacts on state policymaking. It has been used to strike down policy innovations dealing with questions of national importance like tort reform,[1] bank failure,[2] and employment discrimination.[3] And examples of unconstitutional special laws can be found across the country on subjects more important to state politics: a statute requiring collective bargaining for public employees in Pennsylvania,[4] a statute empowering landowners to block annexation in Indiana,[5] a statute providing for the availability of the death penalty in Colorado,[6] and a statute allowing the creation of an inter-island ferry in Hawaii.[7]

Unfortunately, special-legislation provisions are often misunderstood and misapplied.[8] This is due, in part, to the overwhelming attention the academy,

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* Associate Professor of Law, University of Nebraska College of Law. Many thanks to my colleagues for valuable comments on the paper, as well as to the editors of the *Notre Dame Journal of Legislation* for their assistance and patience. Financial support from the College of Law and a McCollum Research Grant are gratefully acknowledged.

1. Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) (striking down a statutory cap on compensatory damages for noneconomic injuries in personal injury actions).

2. Haman v. Marsh, 467 N.W.2d 836 (Neb. 1991) (striking down a statute providing payment to defrauded investors of industrial loan companies).

3. Williams v. Blue Cross Blue Shield of North Carolina, 581 S.E.2d 415 (N.C. 2003) (statute providing county with authority to write anti-discrimination law).

4. Pennsylvania Turnpike Com'n v. Com., 899 A.2d 1085 (Pa. 2006).

5. South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003).

6. People v. Canister, 110 P.3d 380 (Colo. 2005).

7. Sierra Club. v. Hawaii Dept. of Transp., 202 P.3d 1226 (Haw. 2009).

8. Attention within the legal academy to special-legislation provisions has been somewhat sparse, contributing to the confusion surrounding these provisions. Since 1841, only a handful of significant law-review articles have been principally devoted to these provisions. The most significant law-review treatments of special legislation include, at least, the following articles: *Special Legislation*, 25 AM. JURIST & L. MAG. 317 (1841); *Law Reform - Private and Local Legislation*, 1 U. L. REV. 340 (1893); CHARLES BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS (1894); Lyman H. Cloe & Sumner Marcus, *Special and Local Legislation*, 24 KY. L. J. 351 (1935); Frank E. Horack, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109 (1936); Frank

law students, and lawyers pay to federal constitutional law.[9] There is no restriction on special legislation found in the federal constitution. But, given our familiarity with federal constitutional law, it is somewhat tempting to reconcile state special-legislation provisions under the nearest federal constitutional source of classification doctrine, equal-protection jurisprudence. Taken as such, special-legislation provisions appear to be a source of modern *Lochner*-esque rights to equality.[10] After all, most successful special-legislation challenges deal with legislation that would not pose a problem under federal equal-protection jurisprudence.

State constitutions may, of course, answer questions of individual rights in ways that are different from the answers found in the federal constitution.[11] However, these provisions do not answer individual-rights questions. Rather, the history and text of these provisions reveals that they were adopted to solve a set of structural[12] problems related to individualized treatment in the legislative process.

While some courts and commentators have identified parts of a structural rationale,[13] no one that I have found has fully developed it and performed a critical assessment of the doctrine in light of it. This article provides that assessment. It uses a fully developed structural rationale to generate a textually and historically sound understanding of these provisions. This understanding, in turn, reveals a number of doctrinal reforms and possible innovations.

The article proceeds in four parts. Part one lays the necessary groundwork, establishing the need for the reexamination that follows in subsequent parts.

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E. Horack & Matthew E. Welsh, *Special Legislation: Another Twilight Zone—Part III*, 12 IND. L.J. 183 (1936); Robert M. Ireland, The *Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271 (2004); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012); Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411 (2011).

9. *See* Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 813 & 822 (2010).

10. *See, e.g.*, Donald Marritz, *Making Equality Matter (Again): The Prohibition against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161 (1993); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1984).

11. Indeed, "[a] state constitution is a fit place for the people of a state to record their moral values, their definition of justice, their hopes for the common good. A state constitution defines a way of life." A.E. Dick Howard, The Renaissance of State Constitutional Law, 1 EMERGING ISSUES ST. CONST. L. 1, 14 (1998).

12. I use the term "structural" to identify process-based concerns and concerns relating to the distribution of governmental power. The main reason for using the term is to differentiate these rationales from those that are associated with individual rights. *See also* Jon Laramore, *Indiana Constitutional Developments*, 37 IND. L. REV. 929, 929 (2003) (stating that the term "structural provisions" refers to all of those parts of the constitution that "describe and regulate the elements of . . . government").

13. Only one recent commentator, a historian, has dug into the history of these provisions and collected the evidence of structural concerns. Ireland, *supra* note 8. But he does not translate them into a structural understanding of these provisions and use that understanding to inform the interpretation and implementation of these provisions. *See also*, Friedman, *supra* note 8 (articulating, briefly, a structural rationale).

Part two begins this reexamination by studying the history and the text of these provisions. It concludes that these provisions have a structural rationale, not an individual-rights rationale. Part three uses this structural rationale to create a two-step understanding of special-legislation provisions. The first step involves the proper interpretation to give the text. The second step involves the supporting doctrine necessary to implement the text.[14] Part four addresses three sundry aspects of this article's reconstructed special-legislation doctrine.

Doctrinally, my analysis has two impacts. First, it brings a coherent explanation to some states' classification tests. That is, some states are doing it right or partially right, even though they have not explained their approach in structural terms. In other states, however, these provisions are used to protect individual rights. In those states, I argue that the doctrine should be narrowed to a textually supported structural inquiry.[15]

A number of broader consequences attend this article's analysis. First, the coherence it brings to special-legislation doctrine's apparently haphazard classification tests should provide guidance to legislators and constituents who often chalk special-legislation cases up to judicial activism.[16] This guidance should also bring more efficiency to the legislative process. In the current state of confusion, special-legislation arguments often enter political debate. Without a clear understanding of what these provisions do, this debate can waste legislative time and be used to derail judgments that are the legislature's to make.[17] Finally, this article demonstrates how this important area of state constitutional law compliments the array of federal restraints that apply to state legislatures[18] and reveals structural problems that attend some federal

14. I use the term "implementing doctrine" in the same sense as Professor Fallon uses the term "implementation." RICHARD H. FALLON, IMPLEMENTING THE CONSTITUTION 37-42 (2001). In a nutshell, the term is meant to encompass a broader notion of the judicial role than that conveyed by the term "interpretation."

15. In the alternative, courts could expand the doctrine beyond the text by using some other interpretational approach. *See* Friedman, *supra* note 8.

16. *See, e.g.*, Barkley Clark, *State Control of Local Government in Kansas: Special Legislation and Home Rule*, 20 U. KAN. L. REV. 631 (1971). *Compare* Gourley v. Neb. Methodist Health Sys., Inc. 663 N.W.2d 43 (Neb. 2003) (allowing damages cap), *with* Grace v. Howlett, 283 N.E.2d 474 (Ill. 1972)(striking a similar damages cap).

17. In Nebraska, for example, lawmakers were called into a special session in December 2011 to consider legislation to re-route the TransCanada XL Pipeline. *See generally*, LB1 (2011, 1st Special Session), *available at* http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=15149. Their concern was the danger such a pipeline (or, perhaps, that pipeline) would pose to groundwater supplies in the state. Concerns about special-legislation challenges arose to complicate matters, though the ultimate legislation was arguably special nonetheless. See § 3(3) (providing an exemption for TransCanada XL) *available at* http://nebraskalegislature.gov/FloorDocs/102/PDF/Slip/LB1_S1.pdf. The exemption that was arguably special was struck in 2012, when the criteria grandfathering in TransCanada were no longer sufficient to identify it. The replacement criteria continue to pose the same problem, perhaps to the same degree. See LB 1161 (2012), *available at* http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=16138; sections 4 & 6, http://nebraskalegislature.gov/FloorDocs/102/PDF/Slip/LB1161.pdf. I use a rough version of the TransCanada situation and the resulting legislation as a hypothetical throughout this article.

18. For example, in 2006 Maryland enacted the Fair Share Health Care Fund Act, requiring "employers with 10,000 or more Maryland employees to spend at least 8%of their total payrolls on employees' health insurance costs or pay the amount their spending falls short to the State of

legislation.[19]

## I. GROUNDWORK

Three points lay the groundwork for the remainder of the article. Section A discusses why this article analyzes special-legislation provisions of state constitutions at an interstate level. The principal reason is their common heritage and texts. Section B introduces that common heritage and describes their common texts. Section C demonstrates how current doctrine appears unmoored from the text it purports to implement and, often, appears haphazard. This, in turn, establishes the need for further examination, which I undertake in the next part.

### *A. Justifying an Interstate Analysis*

Examining state constitutional provisions at an interstate level must be justified before this article can proceed. This is because one of the main problems that I see in special-legislation provisions is doctrinal disarray.[20] However, different state constitutions would be expected to generate different doctrines. Thus, interstate doctrinal inconsistencies on matters of state constitutional law are not problematic, unless there is some reason to expect doctrinal consistency. Moreover, the solution I develop to understanding this

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Maryland." Retail Industry Leaders Ass'n v. Fielder, 457 F.3d 180, 183 (4th Cir. 2007). At the time of its enactment, it only applied to Wal-mart. The ensuing litigation focused on the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and federal preemption under ERISA. Federal preemption ultimately eliminated the statute. *Id.* But short of preemption, the law arguably would not violate federal constitutional law, including the Equal Protection Clause and the dormant Commerce Clause doctrine. However, Maryland's law was also subject to a state constitutional restraints on special legislation. *See* MD. CONST. art. 3, § 33. If Maryland's effort were within federal constraints, the restrictions on "special" legislation may have invalidated the law. The plaintiffs in that litigation claimed that it doomed the law because it singled out Wal-mart. *See id.* at 185 (noting the challenge).

19. The most well-known example of a special law enacted by Congress that would violate most special-legislation provisions is the Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005). *See* Adam M Samaha, *Undue Process: Congressional Referral and Judicial Resistance in the Schiavo Controversy*, 22 CONST. COMMENT. 505 (2005) (concluding that equal-protection likely would not have been successful, especially given the history of private bills in Congress). *See also* Steven G. Calabresi, The *Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush,* 100 NW. U. L. REV. 151 (2006).

Earmarks are another example of legislation that would raise problems under special-legislation provisions. *See* Haman v. Marsh, 467 N.W.2d 836 (Neb. 1991). Congress also uses special legislation to provide immigration relief and to allow claims against the government. *See, e.g.*, A Bill for the Relief of Adrian Rodriguez, H.R. 1107, 112th Cong. (1st Sess. 2011) (claim against government); A Bill for the Relief of Aluisa Zace and Ledia, H.R. 731, 112th Cong. (1st Sess. 2011) (providing these individuals with permanent resident status). The use of special laws (i.e. private bills) for immigration is subject to a vigorous debate. *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 428-33 (2010). For a larger account of private bills in Congress, see *The Constitutionality of Private Acts of Congress,* 49 YALE L.J. 712 (1939); Floyd D. Shimomura, *History of Claims against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment,* 45 LA. L. REV. 625 (1984).

20. This disarray also exists at an intra-state level, which poses no problem to this article's analysis.

disarray (and rejecting some of the cases within it) is offered to all states with these sorts of provisions. If these state constitutional provisions differ from state to state, my offer holds little promise to any particular state.

Special-legislation provisions are not, however, different enough to account for the doctrinal disarray that I detect. And, given the similarities that exist among states, this article is helpful to nearly all states with these provisions. As I explain in more depth below, the constitutional texts are quite similar and almost all of them were adopted within the same era of constitutional change. Thirty states have provisions nearly identical to the one I have selected to reproduce here, many of which were borrowed from one another or influenced by earlier adoptions.[21] The remaining states with these provisions have texts that are often very similar in relevant respects. Overall, then, these provisions are similar enough textually and historically to generate an expectation of consistency, and addressing them at an interstate level is appropriate.

This article is also concerned with the structural problems that led to the adoption of these provisions. That aspect of these provisions does not differ from state to state, either because the state encountered these structural problems and adopted this solution or because the state borrowed the solution from states that had encountered these problems.[22]

Some states, however, may have a peculiar textual or historical basis for taking a more rights-based approach to these provisions.[23] Even then, the analysis here serves as a basic rationale, to which peculiar rationales can be added. Such additions may expand the interpretation or doctrine presented here, but those additions do not displace the underlying basic structural rationale of these provisions.

### *B. The History and Text of Special-Legislation Provisions*

The primary issue facing constitution-makers in the nineteenth century was how best to secure a republican form of government in light of emerging

21. For example, Kansas borrowed its constitutional text from Ohio. Clark, *supra* note 16, at 632. Constitutional borrowing (and the resulting uniformity) was a function of both the common constitutional agenda of the era in which these were adopted, as well as constitutional drafters' "belief in the progress of constitutional knowledge," that led them to look to the most recent constitutional drafting as the best thinking, often to the exclusion of the federal constitution. G. A. TARR, UNDERSTANDING STATE CONSTITUTIONS 98 (1998).

22. Borrowing can be said to extend to existing constitutional doctrine that the judiciary had developed in the state from which the provision was adopted, and, more generally, it can be understood as an adoption of the constitutional thinking of other states. *See* TARR, *supra* note 21, at 199-201 & 205-08 (explaining the relevance of other state's constitutions).

23. *See* ROBERT WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009) (explaining interpretation of state constitutions). While I think the text of these provisions cannot bear the weight of an egalitarian-centered individual-rights doctrine, some states have texts that may do so. *But see*, Austintown Twp. Bd. of Trs. v. Tracy, 667 N.E.2d 1174 (Ohio 1996) (rejecting notion that uniformity clause of special legislation provision provided courts with authority to review classifications for arbitrariness and interpreting the text "uniform throughout the state" as requiring only statewide geographic application).

concentrations of political power and increased governmental involvement in economic issues. Their decisions were highly influenced by the political movements of the time, including Jacksonian democracy and Populism. As a result, popular rule emerged as a common issue, resulting in broader distributions of voting rights, enhanced political responsiveness through elections of most state officeholders, and the recognition that "there was a good common to society as a whole, which government was obligated to pursue."[24] Recognizing this common good, "[n]ineteenth-century constitution-makers believed that powerful minorities, rather than tyrannical majorities, posed the most serious threat to liberty, and so they included numerous provisions designed to protect the many against the special privileges and advantages of the wealthy or well-connected few."[25]

The aversion to special privilege was a consequence of a larger story reflected in the struggle constitution-makers experienced in defining the proper role of government in economic development. In the early parts of the nineteenth century, many states experienced an enthusiasm for state-sponsored economic development that caused problems. Special charters and state financing (lending the state's credit, subscriptions of stock, etc.) were typical in the early 1800s. In 1837, nine states defaulted on their debts, which triggered a range of constitutional responses restricting such practices. In many instances, special corporate charter authority was replaced with a mandate to pass general corporation laws to "secure economic development without special privilege."[26]

Enthusiasm for economic promotion emerged again after the Civil War. Assistance to private enterprises was, in some instances, kept in check by earlier constitutional restraints that limited special charters and restricted state financing. But the promotion of private enterprises persisted. After the economic collapse of 1873, states again reacted with more restrictions on such aid. The late 1800s also saw states reacting to corporate (often railroad) political power.[27]

All of this contributed to the main thrust of nineteenth century constitution making: limiting and distributing state power. In the eighteenth century, legislatures operated with plenary authority, constrained by a few individual rights provisions found in state constitutions' declarations of rights. The events of the nineteenth century, however, caused the legislative branch to fall into disfavor. As Binney noted in 1894, the constitutional changes adopted in this era reflected a "belief that legislatures are by nature utterly careless of the public welfare, if not hopelessly corrupt."[28]

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24. TARR, *supra note 21*, at 100.

25. *Id.*

26. *Id.* at 111-12; Robert F Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195 (1984). For an example of provisions mandating "general" corporation laws and prohibiting "special law[s]" for creating corporations or amending their charters, see NEB. CONST. art. XII, § 1.

27. TARR, *supra note 21*, at 115-16.

28. BINNEY, *supra* note 8, at 9.

The set of constitutional provisions to which Binney refers "impose[d] increasingly stringent procedural and substantive restrictions on state legislatures and transfer[ed] powers from state legislatures to other officials or to the people directly."[29] Procedural checks on legislatures that were typical of this era included requirements mandating that bills be referred to committees, be read three times, have descriptive titles, have a single subject, and not be amended so as to change their original purpose.[30] Another procedural check was to limit the frequency and length of legislative sessions, "giv[ing] legislators less opportunity to do harm."[31] Substantive checks limited the involvement of the state in private enterprise (extensions of credit or subscriptions of stock) and involved further prohibitions on special corporation acts.[32] The concern for special treatment of powerful interests also manifested itself through rights provisions prohibiting grants of "special" or "exclusive" privileges.[33]

Restrictions on special and local laws were adopted along with these provisions, reflecting a common concern for the special treatment of powerful interests.[34] After they were adopted by a few states, "the interstate borrowing of provisions virtually guaranteed [their] appearance in others as well."[35] Because of this interstate borrowing, special-legislation provisions do not differ dramatically from state to state. A common example is Nebraska's:

The Legislature shall not pass local or special laws in any of the following cases, that is to say:

> [1]For granting divorces.
>
> [2]Changing the names of persons or places.
>
> [3]Laying out, opening altering and working roads or highways.
>
> [4]Vacating roads, Town plats, streets, alleys, and public grounds.
>
> [5]Locating or changing County seats.
>
> [6]Regulating County and Township offices.
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> [7]Regulating the practice of Courts of Justice.

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29. TARR, *supra note 21*, at 117.

30. *Id.* at 119.

31. *Id.* at 120.

32. *Id.*

33. Williams, *supra* note 26, at 1206-08.

34. TARR, *supra note 21*, at 119-20.

35. *Id.* at 120. For example, Nebraska borrowed its special-legislation provision in 1871 from the Illinois Constitution of 1870, art. IV, sec. 22, which borrowed its from Indiana and Iowa. Ireland, *supra* note 8, at 296.

[8]Regulating the jurisdiction and duties of Justices of the Peace, Police Magistrates and Constables.

[9]Providing for changes of venue in civil and criminal cases.

[10]Incorporating Cities, Towns and Villages, or changing or amending the charter of any Town, City, or Village.

[11]Providing for the election of Officers in Townships, incorporated Towns or Cities.

[12]Summoning or empaneling Grand or Petit Juries.

[13]Providing for the bonding of cities, towns, precincts, school districts or other municipalities.

[14]Providing for the management of Public Schools.

[15]The opening and conducting of any election, or designating the place of voting.

[16]The sale or mortgage of real estate belonging to minors, or others under disability.

[17]The protection of game or fish.

[18]Chartering or licensing ferries, or toll bridges, remitting fines, penalties or forfeitures, creating, increasing and decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed.

[19]Changing the law of descent.

[20]Granting to any corporation, association, or individual, the right to lay down railroad tracks, or amending existing charters for such purpose.

[21]Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever;

. . . . [36]

36. This ellipsis replaces a clause that was added to the Nebraska Constitution by amendment in 1964: "Provided, that notwithstanding any other provisions of this Constitution, the Legislature shall have authority to separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto." NEB. CONST. art. III sec. 18 (amended 1964).

> In all other cases where a general law can be made applicable, no special law shall be enacted.[37]

This provision appears within the legislative article of Nebraska's constitution, rather than in its bill of rights. The list of enumerated cases restricts the legislative approach that can be taken with regard to particular subjects, absolutely prohibiting "local or special laws" in that list of cases. In its final clause, it states a preference that requires the use of "general" laws over "special" laws when a general law "can be made applicable."

This sort of provision is found in the legislative articles of approximately 30 other state constitutions.[38] The list of enumerated subjects varies from state to state, but in almost all states, the prohibition is on "special" or "local" laws. In a number of states, the term "private" is included within the listing.[39] In other states, a process is created for the passage of local or special laws.[40]

Some states take a slightly different approach. They omit the list of enumerated subjects. These states restrict special laws by imposing a requirement that closely matches the final clause of the Nebraska provision quoted above. That is, these states restrict the use of a special law when a general law can be made applicable.[41]

### *C. Special-Legislation Doctrine: A Doctrine Unmoored*

Special-legislation doctrine is difficult to reconcile with the constitutional text and the history sketched above. Even though the text of special-legislation provisions is strikingly similar in 31 states and similar in relevant part in others,

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This amendment came in response to a judicial decision striking down legislation that classified installment sales differently than other loans. *See* Davis v. General Motors Acceptance Corp., 127 N.W.2d 907 (Neb. 1964). This constitutional response is some evidence of the electorate's disagreement with classification doctrine, at least with regard to that particular subject.

37. NEB. CONST. art. III, § 18.

38. ALA. CONST. art. IV, § 104; ARIZ. CONST. art. 4, pt. 2 § 19; ARK. art. 5, § 24; COLO. CONST. art. 5, § 25; DEL. CONST. art. 2, § 19; FLA. CONST. art. 3, § 11; IDAHO CONST. art. 3, § 19; IND. CONST. art. 4, §§ 22-23; IOWA CONST. art. 3, § 30; KY. CONST. §59; LA. CONST. art. 3, § 12; MD. CONST. art. 3, § 33; MINN. CONST. art. 12, §§ 1-2; MISS. CONST. art. 4, §§ 87-90; MO. CONST. art. 3 §§ 40-42; NEV. CONST. art. 4, §§ 20-21; N.J. CONST. art. 4, § 7; N.M. CONST. art. 4, § 24; N.Y. CONST. art. 3 § 17; N.C. CONST. art 2, § 24; OKLA. CONST. art. 5 § 46; OR. CONST. art. 4, § 23; PA. CONST. art. 3, § 32; S.C. CONST. art. 3, § 34; S.D. CONST. art 3, § 23; TEX. CONST. art 3, § 56; VA. CONST. art. 4, § 14; W. VA. CONST. art. 6, § 39; WASH. CONST. art. 2, § 28; WIS. CONST. art. 4, § 31; WYO. CONST. art. 3, § 27.

39. *E.g.* ALA. CONST. art. IV, § 104; MISS. CONST. art. 4, § 90; N.J. CONST. art. 4, § 7; N.C. CONST. art 2, § 24; N.Y. CONST. art. 3 § 17; S.D. CONST. art 3, § 23; VA. CONST. art. 4, § 14; WASH. CONST. art. 2, § 28; WIS. CONST. art. 4, § 31. *See also* UTAH CONST. art. 6, § 26 ("No private or special law shall be enacted where a general law can be applicable."); MISS. CONST. art. 4, § 89 (providing for a standing committee on "local and private legislation"); N.Y. CONST. art. 3, § 15 (providing a single subject rule for "private or local" bills); ME. CONST. art. 4, pt. 3, § 13 (providing a direction to provide general laws for "all matters usually appertaining to special or private legislation").

40. *E.g.*, FLA. CONST. art. 3, § 10; PA. CONST. art. 3 § 7; OKLA. CONST. art 5, § 32; LA. CONST. art. 3, § 13; GA. CONST. art. 3, § 5.

41. ALASKA CONST art. 2, § 19; ILL. CONST. art. 4, § 13; UTAH CONST. art. 6 § 26; CAL. CONST. art. 4, § 16; MONT. CONST. art. 5, § 12; NAT'L. MUN. LEAGUE, MODEL STATE CONSTITUTION 55 (6th ed. 1968).

and even though these provisions were all adopted in the same era of constitutional change, there is little agreement on what the terms "special", "local"[42], and "general" mean. Obviously, these terms are of utmost importance to understanding these provisions.[43] After all, the restrictions—outright prohibitions in enumerated cases, general-law preferences, or both[44]—only apply to special laws.

These terms have, apparently, never been altogether clear.[45] Chauncey Binney was one of the first commentators to try to define them. In 1894, he synthesized the reported cases and came up with the following definitions:

> (I) A general law is one which applies to and operates uniformly upon all members of any class of persons, places, or things, requiring legislation peculiar to itself in the matter covered by the law.
>
> (II) A special law is one which relates either to particular persons, places or things, or to persons, places or things which, though not

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42. While this article addresses the meaning of the terms "special" and "general", it does not address many aspects of the term "local." Modern courts have refused to give the term "local" much independent meaning, often lumping it together with "special." I believe this is a mistake because the term local may reflect significant concerns with geographic uniformity, legislative interference with matters of local concern, legislative classifications of local governments, or all three. *See, e.g.*, Schrader v. Florida Keys Aqueduct Authority, 840 So.2d 1050 (Fla. 2003) (allowing environmental enabling at for local governments in one county because of discrete problems there and a state purpose—the protection of state resources). Delving into all of these will require another article, but a few words can be offered here.

The third concern—the extent to which state legislatures can classify local governments--illustrates a large area of overlap between the terms "special" and "local" and explains why many courts do not use the term "local" in cases involving legislation dealing with local governments. For courts that keep the terms separate, it explains why they use the same inquiries developed in "special" legislation cases under the banner of "local" legislation. So while this article limits its coverage to the term "special", much of what it says about classification doctrine is relevant to those considering what limits the legislature may have with regard to those kinds of "local" legislation. *See* Clark, *supra* note 16 (focusing mainly on the classification doctrine largely at issue in this article).

The other concerns that attend "local" legislation could also shape classification doctrine in different ways than in the case of other special laws. For instance, restrictions on local legislation may drive lawmaking to cities under home rule provisions. *See id.* This phenomenon does not necessarily occur with special legislation.

Finally, the text could require a much different analysis than that attending special laws. For instance, some state constitutional provisions on special and local legislation do not include the term "local" in their general preference clauses. See, e.g., Neb. Const. art. III, § 18. Thus, "local" laws would only be prohibited on enumerated subjects, with no restriction placed on their use with regard to other subjects.

43. This subject has received little attention, but it is the key to understanding special-legislation provisions. Charles Binney was the first to try to restate the definitions in 1894, BINNEY, *supra* note 8, at 21-46, and many commentators since have either relied on his definitions or glossed over the text in favor of addressing the doctrine. Luce, in 1935, adopted Binney's account. ROBERT LUCE, LEGISLATIVE PROBLEMS 535-36 (1935); Ireland, in 2004, employed a formal definition, but cited Luce. Ireland, *supra* note 8, at 271.

44. *See infra* Part IV.C, where I discuss what these restrictions entail in more detail.

45. The 1968 Model Constitution, complete with commentary, provides only this: "The distinction between general and special laws may be far from clear in any given case." NAT'L. MUN. LEAGUE, MODEL STATE CONSTITUTION 56 (6th ed. 1968).

> particularized, are separated, by any method of selection, from the whole class to which the law might, but for such limitation, be applicable.[46]

These definitions are fine, as far as they go. But they don't go very far.

Everyone agrees that the term "special" refers, at least, to those laws that identify objects or, as Binney put it, "relate[] . . . to particular persons, places or things."[47] Everyone also agrees that general laws can employ classifications. After all, all laws classify in one way or another, as Binney's text indicates.[48] The question that Binney was struggling with in his definitions is the extent to which these provisions place a restriction on legislative classifications.[49]

All Binney could muster from the cases was an observation that a general law involves a class that "requir[es] legislation peculiar to itself in the matter,"[50] which in modern language roughly means that the legislation utilizes or creates a legitimate classification. Binney's account of a special law simply states the converse point, reporting that a special law involves an illegitimate classification or, as he puts it, relates to a class "separated, by any method of selection, from the whole class to which the law . . . [might] be applicable."[51] From there, he reports the various classification tests that he is trying to generalize.[52] Those tests are what made, and continue to make, special-legislation doctrine confusing. They are difficult to rationalize under a coherent textual theory, other than somehow getting at the difference between special and general laws.[53]

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46. BINNEY, *supra* note 8, at 25–26.

47. *Id.* at 26.

48. Id. at 25–26. For example, a criminal statute providing penalties for driving under the influence of alcohol applies throughout the state, but it treats those who fulfill the criteria for criminal liability differently than those who do not.

Chief Justice Rehnquist made a similar remark about classification review under the Equal Protection Clause: "The Equal Protection Clause is itself a classic paradox, and makes sense only in the context of a recently fought Civil War. It creates a requirement of equal treatment to be applied to the process of legislation—legislation whose very purpose is to draw lines in such a way that different people are treated differently. The problem presented is one of sorting the legislative distinctions which are acceptable from those which involve invidiously unequal treatment." Trimble v. Gordon, 430 U.S. 762, 779 (1977).

49. *See* BINNEY, *supra* note 8, at 25–26. One possibility is that they do not impose such a restriction. That is, it could be that these provisions only prevent the legislature from naming objects in legislation. But nearly all courts have decided that these terms include some limit on legislative classifications that is judicially enforceable.

It also cannot be the case that all laws employing classifications are special. If all classifications create a special law, then all classifications are prohibited in those enumerated subject areas and viewed with some suspicion in every other area. The problem with this interpretation is that every law creates or uses a classification. Under this view, the text would amount to an outright prohibition on law in enumerated cases, and a preference for no law beyond that.

50. *Id.* at 26.

51. *Id.*

52. *See id.*

53. Interestingly enough, and also the source of great confusion, some courts have said these tests determine whether "'a general law can be made applicable.'" South Bend v. Kimsey, 781 N.E.2d 683, 693 (Ind. 2003) (quoting IN. CONST. art. IV, § 23). One test arising under that language does resemble

Courts generally employ two tests. One is geared at "closed classes" and one is geared at arbitrarily defined classes. The simpler of the two tests, with the least variation among states that employ it, deals with closed classes. A closed class is one to which no objects will be added in the future.[54] The closed-class test has been used to strike down legislation that, for example, ties the classification to historical facts.[55] The most common examples involve laws related to local governments that apply to cities with a population within a certain range. Such classifications become closed when the legislation limits the population determination to a particular year or a particular census.[56]

An interesting example of this test is found in a bank-bailout case entitled *Haman v. Marsh*.[57] In 1983, three state industrial loan and investment companies were placed in receivership.[58] They and a number of other such companies had been operating without federal insurance provided by the Federal Deposit Insurance Corporation ("FDIC").[59] However, the Nebraska Depository Institution Guarantee Corporation ("NDIGC") purported to protect depositors up to $30,000.[60] Unfortunately, the NDIGC was insolvent, offering depositors little protection.[61] When the three companies entered receivership, there were no funds in the NDIGC to pay their claims.[62] The state stepped in with legislation that would pay the claims of depositors when such companies enter receivership and cause losses.[63]

Closed status, however, did not emerge from the face of the legislation. That is, there was no restriction in the legislation that required, for instance, that depositors suffer losses from companies that were in receivership on a certain date.[64] The court, however, concluded that the class of depositors entitled to payment was closed because it was unlikely any other companies would enter receivership without FDIC insurance as members of the NDIGC.[65]

> "[T]he court must consider the actual probability that others will come under the act's operation. If the prospect is merely theoretical, and not probable, the act is special legislation. The conditions of

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the class-legislation tests addressed here. See *infra* Part IV.C.

54. *See, e.g.*, Pebble L.P. v. Parnell, 215 P.3d 1064 (Alaska 2009); *In re* S.B. 95, 261 P.2d 350 (Colo. 1961); *In re* S.B. 9, 56 P. 173 (Colo. 1899); Banks v. Heineman, 837 N.W.2d 70 (Neb. 2013); Teigen v. State, 749 N.W.2d 505 (N.D. 2008).

55. *See, e.g.*, City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002) (population on a certain date operated to restrict a parking-tax enabling provision to three cities).

56. *See id*; see *also* City of Scottsbluff v. Tiemann, 175 N.W.2d 74 (Neb. 1970).

57. 467 N.W.2d 836 (Neb. 1991).

58. *Id.* at 841.

59. *See id.* at 841–42.

60. *Id.* at 841.

61. *Id.*

62. *Id.*

63. *Id.*

64. *See id.*

65. Id. at 849–50.

> entry into the class must not only be possible, but reasonably probable of attainment."[66]

The second test has the most variation among the states.[67] Taken as a whole, these tests are primarily geared at detecting arbitrarily defined classes. I refer to these tests as class-legislation tests. State courts first used these tests to implement "law of the land" and due-process principles, before special-legislation provisions were adopted.[68] They are sometimes referred to as doctrines that restrain "class legislation" or "partial laws".[69] Generally speaking, these tests require that legislative classifications involve distinctions among objects that are relevant to some legitimate public purpose:

> But the true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the objects so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having a reference to the subject-matter of the proposed legislation between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree at least, account for or justify the restriction of the legislation.[70]

As the New Jersey Supreme Court quipped, "Hence a law enacting that in every city in the state in which there are ten churches there should be three commissioners of the water department, with certain prescribed duties, would

66. *Id.* at 849; *see also, e.g.*, Republic Inv. Fund v. Surprise, 800 P.2d 1251 (Ariz. 1990) (striking down annexation statute identifying a closed class); St. Vincent's Medical Center v. Memorial Healthcare Grp., 967 So. 2d 794 (Fla. 2007) (evaluating a statute that was tailored to the experience of a particular hospital and affirming a decision that there was no "reasonable possibility" that another hospital would fulfill the statutory criteria).

67. It also attracts the most attention in the literature. *See, e.g.*, MARRITZ, *supra* note 10.

68. *See* RODNEY LOOMER MOTT, DUE PROCESS OF LAW 192-207 (1926) (discussing the development of this doctrine); THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS, 389-97 (1868); *see, e.g.*, Low v. Reese Printing 59 N.W. 362 (Neb. 1894) (drawing upon law-of-the-land and due-process cases in striking down an overtime law that exempted agricultural and domestic laborers as special legislation).

69. *See, e.g.*, Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 272, 332 (1997). Furthermore, sometimes these tests are referred to as "special legislation" tests. *Id.* at 332. Notably these tests have been called upon in the debate about what the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution should mean. *Id.* This appears to be a result of these test's use within special-legislation doctrine, not their development under special-legislation provisions specifically. Indeed, early courts had a difficult time hitching classification doctrine geared at equality to a constitutional text. *See id.* (describing the development of "class legislation" in the early 1800s and references to its use in the late 1800s as a reference to "partial or special legislation" and noting that the doctrine found many different textual hooks).

70. Nichols v. Walter, 33 N.W. 800, 802 (Minn. 1887) (quoting State v. Hammer, 42 N.J. Law 439).

present a specimen of such a law."[71] Often, a presumption of validity accompanies such a test, but not always.[72] Often, the courts also focus on under-inclusiveness: "The test of a special law is the appropriateness of its provisions to the objects that it excludes."[73]

Class-legislation tests can be more rigorous than the lowest level of review under the 14th Amendment of the United States Constitution. For example, in *Best v. Taylor Machine Works*,[74] the Illinois Supreme Court concluded that a cap on non-economic damages in personal injury cases was unconstitutional under its special-legislation provision.[75] In keeping with the under-inclusiveness notions of some class-legislation inquiries, the court rejected the typical "one step at a time" rationale that often acts as an impediment to successfully making out an equal-protection challenge[76] and concluded that the law arbitrarily treated similar tort victims and tortfeasors differently for no good reason. Thus, the court concluded the legislation was special and, thus, unconstitutional.[77]

Other courts have reached different conclusions with regard to similar legislation, even though they purport to be applying the same constitutional language and, often, the same test. For example, in Idaho, the court concluded that a cap on non-economic damages in personal injury cases was not special legislation, finding that the legislature was "striking [a] balance between a tort victim's right to recover noneconomic damages and society's interest in preserving the availability of affordable liability insurance," and adding that "the legislature 'is engaging in its fundamental and legitimate role of structuring and accommodating the burdens and benefits of economic life.'"[78]

The difference between such cases boils down to how closely the court looks at legislative classifications.[79] Some courts fall closer to equal-protection

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71. *Id.* (quoting State v. Hammer, 42 N.J. Law 439).

72. *See* SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 40:6 n.7 (Norman J. Singer and J.D. Shambie Singer eds., 7th ed. 2007) (collecting cases); Marritz, *supra* note 10, at 211–12.

73. Mooney v. Board of Chosen Freeholders of Atlantic County, 299 A.2d 426 (N.J. Super. Ct. Law Div. 1973), aff'd, 310 A.2d 502 (N.J. Super. Ct. App. Div. 1973).

74. 689 N.E.2d 1057 (Ill. 1997). Illinois constitutional provision has evolved to omit the list of enumerated subjects, but it continues to restrict special laws in favor of general law. ILL. CONST. art. IV, § 13.

75. *See Best*, 689 N.E.2d at 1057.

76. *See id.* at 1088.

77. *See id.* at 1105; *accord* Ferdon v. Wisconsin Patients Compensation Fund, 701 N.W.2d 440 (Wis. 2005) (striking down similar legislation on state equal protection grounds, using a rational-basis with bite standard); Libertarian Party v. State, 546 N.W.2d 424 (Wis. 1996) (using the same standard for special-legislation analysis); *see also* Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315 (criticizing Best and accusing the court of imposing its own policy judgment).

78. Kirkland v. Blaine County Medical Center, 4 P.3d 1115, (Idaho 2000) (quoting Patton v. TIC United Corp., 77 F.3d 1235, 1247 (10th Cir. 1996) (internal quotations omitted).

79. There is another difference that I do not pursue at length in this article. Some courts implement narrow versions of the police power when they identify the purposes upon which the classification may be based, which is consistent with nineteenth century views of government's role. *See, e.g.*, Low v. Reese, 59 N.W. 362 (Neb. 1894) (relying on a liberty of contract and property to strike down the classification); COOLEY, *supra* note 68, at 393; HOWARD GILLMAN, THE CONSTITUTION

doctrine's rational-basis test. Indeed, some courts simply adopt it as the appropriate test.[80] Some courts will look closer, giving these tests more "bite," by making inquiries into the factual bases for legislative distinctions and policing instances of under-inclusiveness. Courts that look closer run the risk of being deemed activist, especially in light of a modern body of constitutional law that pays most of its attention to federal doctrine. There, of course, the doctrine as it relates to economic and social matters is dominated by very lax rational-basis reviews. Of course, one must keep in mind that state provisions differ from federal provisions in fundamental respects—they "were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy."[81]

Taken together, closed-class and class-legislation tests are confusing because it is not clear what constitutional harm they are getting at. From an individual-rights perspective, perhaps it is some egalitarian principle, in which case class-legislation approaches would be apt.[82] Perhaps it is some notion of

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BESIEGED 45-60 (1993).

For example, in *Haman v. Marsh*, the court also concluded that the class was arbitrary under Nebraska's version of the class-legislation test articulated above. 467 N.W.2d 836 (Neb. 1991). It appears the court concluded that there was no relevant difference between depositors suffering losses and anyone else who would like to get money from the state. *Id.* The court concluded the state owed no "moral obligation" to such claimants and that paying them would undermine confidence in the legislature. *Id.* at 848. That part of the opinion, however, is more tied to a narrow version of legitimate governmental purposes than pure classification review. *Id.* (quoting Weaver v. Koehn, 231 N.W. 703, 704 (1930) ("Clearly it has not yet come to pass that the state, in its supervision of the banking business, has become an eleemosynary institution")). *Weaver* was a due process case of the substantive sort. *Weaver*, 231 N.W. 703. The court reaffirmed this position in *Henry v. Rockey*, when the legislature attempted to circumvent *Haman* by styling its payment to depositors as an appropriation bill. 518 N.W.2d 658 (Neb. 1994).

80. "[T]he applicable standard governing Special Legislation is the same rational basis test that applies to [equal] protection doctrine." Coal. for Equal Rts. v. Owens, 458 F. Supp.2d 1251, 1263 (D. Colo. 2006), aff'd, Coal. for Equal Rts. v. Ritter, 517 F.3d 1195 (10th Cir. 2008); Texas Boll Weevil Eradication Found. v. Lewellen, 952 S.W.2d 454, 465 (Tex. 1997); Owens Corning v. Carter, 997 S.W.2d 560, 583 (Tex. 1999); Utilicorp United Inc. v. Iowa Utilities Bd. 570 N.W.2d 451, 455 (Iowa 1997) (traditional equal protection analysis); Johnson v. State Hearing Examiner's Office, 838 P.2d 158 (Wyo. 1992) (using its own unique equal-protection analysis adopted from Justice Stevens' approach in *City of Cleburne*).

Interestingly, equal-protection jurisprudence may have adopted these tests from state constitutional law cases dealing with special legislation. *See* Saunders, *supra* note 69. Equal-protection jurisprudence has, of course, deviated in many ways from this standard in many subtle and not-so-subtle ways.

If equal-protection originated with class-legislation provisions, then what might appear as state-court lockstepping is somewhat more complex. Here, courts are adopting a test that was adopted from them, but it underwent significant changes in the interim and, generally, those changes were developed by courts using the test to implement a different constitutional provision.

81. Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 141 (1970). Others have observed how difficult it is to reconcile the use of class legislation tests in special-legislation doctrine. *See, e.g.*, William Anderson, *Special Legislation in Minnesota*, 7 MINN. L. REV. 133, 140 (1922) ("The two categories of class legislation and special legislation are similar in only one important respect, namely in that they both involve problems of classification. Nevertheless the two objects have become so confused and entangled in the decisions of the highest court of this state as to be almost if not quite inextricable.").

82. *See* Marritz, *supra* note 10; Michael L Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571, 616 (2008) ("First, [the restriction on special and local laws] is intended to prevent an irregular system of laws that lacks

minoritarianism—"special interests" wielding too much political power. This would be consistent with significant parts of the constitutional history described above[83] and would explain some class-legislation approaches adapted to instances in which the judiciary detects a minority interest that has gotten some benefit from the legislature.[84] But, if either of those is the case, then the closed-class test appears out of place.[85]

Closed-class test aside, it is difficult to glean from the text any support for the notion that these constitutional harms are in play. The text is, of course, important. Hans Linde has adequately stated the problem with doctrine that is textually unsupported: "without . . . a conflict with a written constitutional provision, there is no basis for any general judicial power to invalidate a law if it is 'bad' enough."[86] To him, the constitutional text is the cornerstone of any coherent judicial review: "Unless one begins judicial review with this recognition that it arises out of the constitutional text, one never even reaches a question of interpretation."[87]

The text of special-legislation provisions reveals little in terms of a concern for substantive equality, whether it is the minoritarian concerns of the mid- to late-1800s or some broader notion of equality. The distinction between special and general laws hardly reveals such a concern, given its authorization of special laws in some instances and its absolute prohibition of them in others. And, given the enumerated cases associated with the absolute prohibition, it

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uniformity or grants special legal preferences to particular classes or individuals. Second, it is closely connected to the concept that all residents of a state should enjoy equal protection of law.").

83. *See* TARR, *supra* note 21; Williams, *supra* note 26, at 1206–10; *see* also GILLMAN, *supra* note 79 (discussing these provisions in the context of judicial philosophies of the time).

84. *See* Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) ("This court has consistently held that the purpose of the special legislation clause is to prevent arbitrary legislative classifications that discriminate in favor of a select group without a sound, reasonable basis."); John Martinez, *Getting Back the Public's Money: The Anti-Favoritism Norm in American Property Law*, 58 BUFF. L. REV. 619, 659 (2010).

85. Previously, I have attempted to rationalize the closed-class test under an equal-rationale, using a theory of temporal equality—that is, the notion that future similarly situated objects should be treated the same as those in existence and included within such a class. Assuming that to be the case, a concern for equality may animate it. If that is not the case, then there is no support to be found in equality rationales for such a rule. *See* MIEWALD, LONGO & SCHUTZ, THE NEBRASKA CONSTITUTION: A REFERENCE GUIDE 161–62 (2d ed. 2009) (explaining the closed-class rule as rule derived from the class-legislation test used in Nebraska, but failing to link either test to the text of Nebraska's provision). Some courts have equated closed classifications with arbitrary classifications as well. *See, e.g.*, City of Miami v. McGrath, 824 So. 2d 143, 154 (Fla. 2002) ("this Court utilizes a reasonable relationship test for analyzing special laws, but . . . a population classification tied to a specific date will fail this test if it constitutes an arbitrary classification"). This idea would find an analogue in the deontological justification for the rule of precedent, which involves considerations of temporal equality and consistency. *See* Benjamin Friedman, *Fishkin and Precedent: Liberal Political Theory and the Normative Uses of History*, 42 EMORY L. J. 647, 704–05 (1993).

86. Linde, *supra* note 81, at 130.

87. Linde, *supra* note 81, at 131; *see also,* TARR, *supra* note 21, at 194–96 (discussing how state constitutional interpretation is often premised upon a textual approach). Interestingly, Linde's approach to textualism preceded similar approaches to federal constitutional interpretation. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (Amy Gutmann et. al. eds., 1997); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

does not appear that these are areas in which concerns for inequality would have been paramount. Subjects like divorce, name changes, public-school management, and changes of venue do not reveal a concern for equality or a finer-grained concern for minoritarianism.

Moreover, the only textual evidence of minoritarian concern begs for an answer to the question of whether a law is general or special. The provision set forth above, like many others, prohibits at least three instances of legislative favoritism in its 18th, 20th, and 21st clauses. The one most clearly related to minoritarian concern prohibits "granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever."[88] But it does not absolutely prohibit granting such privileges. Rather, it prohibits such a grant through a special law. A general law creating such a benefit would be acceptable. Thus, the meaning of special and general laws must relate to something other than bestowing special benefits on a minority interest. What that may be, however, remains somewhat of a mystery.[89]

In sum, special-legislation doctrine involves tests that are difficult to reconcile with one another and the constitutional text. An egalitarian or minoritarian rationale does not appear textually supported. Even if such rationales are historically grounded to some extent, some parts of the doctrine appear geared at such concerns, while others do not. And it is difficult to discern what, if anything, laws failing these tests have in common with laws that identify objects (which all agree are special laws). Thus, these provisions at least deserve further examination as a theoretical matter.

More practically, further examination is necessary because of the problems these provisions present to legislators, citizens and courts. Legislators who care about the parameters of their institution's authority find little assistance in the cases. Other legislators, and the lobbyist trying to persuade them, use the prospect of litigation as a tool to cloud political debate. Citizens are left wondering what legislation they can request and what legislation they should challenge. And courts are put in the position of acquiring activist status.[90] Even if the judiciary's reputation remains intact when it strikes down legislation, the existence of unconstitutional legislation damages the legislature's reputation and causes skepticism about the legislative process.[91]

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88. For a case evaluating similar language, after first finding the law was special, see *Lawnwood Medical Center, v. Seeger*, 990 So. 2d 503 (Fla. 2008), which collected cases on the definition of privilege clauses found in enumerated subjects.

89. Cases hitching these tests to the general-preference clause confuse matters as well because they leave the term "special" undefined. *See* South Bend v. Kimsey, 781 N.E.2d 683, 693 (Ind. 2003). Textually, there is no reason to test a law under this language unless it is special. Indeed, such cases tend to use arbitrariness inquiries to identify special laws.

90. *See* Clark, *supra* note 16, at 651–53 (criticizing a series of cases in which public policy seemed to be the driving force behind the special-legislation conclusion). For elected judges, which are common in state judicial systems, perceptions of activism can drive outcomes in ways that are more significant than in the federal system.

91. Normally an article of this sort would present a summary of the large body of scholarship devoted to the subject, placing this piece within the larger literature. However, most treatments of this

## II. UNCOVERING A STRUCTURAL RATIONALE

A structural rationale explains these provisions, their text, and the proper role of the implementing doctrine. I build this structural rationale from two sources. In section A, the article expands on the history of constitution making associated with these provisions and explains what special-legislation provisions were designed to do—restrict legislatures from making laws for individual constituents. In section B, the article illustrates this understanding by considering how the restriction plays out in a hypothetical case of an archetypical special law.

### *A. Individualized Treatment in Legislative Bodies*

As explained above, restrictions on special and local laws were adopted in an era when the constitutional agenda was dominated by concerns for the special treatment of powerful interests. But a concern for powerful interests does not precisely capture the nature of the problem. Rather, the special-legislation problem had more to do with the legislature's ability to identify objects in legislation than with legislative favoritism. Indeed, legislative favoritism is more properly characterized as one consequence of the legislature's power to provide individuals with legislation.

Contemporary statements of the problem are consistent with this understanding. Governor Morton of Massachusetts addressed the problem of special laws in his inaugural address in 1839. According to an 1841 author, his description "may probably be considered as an authentic exposition of what is supposed to be meant by 'special legislation.'"[92]

> A recurrence to our legislative history will show how small a proportion of our labor is given to the public, and how much to individuals. Of the nine hundred acts which were passed in the last four years, seven hundred fall under the denomination of 'special laws,' while not over two hundred were general laws. And, as might naturally be expected, a still greater proportion of the resolves are of a private nature. There are undoubtedly cases involving private interests, which deserve and should receive the attention and the action of the legislature. But surely it should not be our principal employment to enact 'special statutes.' It also appears, that some of

subject are descriptive or critical only in the sense that they argue that the classification tests have become too lax or are being employed inconsistently by a state supreme court. *See, e.g.*, Anderson, *supra* note 81; Clark, *supra* note 16; Marritz, *supra* note 10. Others operate at a broad level across constitutional provisions within a constitution, briefly citing these provisions as part of a larger inquiry. *See*, e.g., GILLMAN, *supra* note 79, at 58-60; Williams, *supra* note 26. My purpose, however, is to explore the text of these provisions and their history to understand the doctrine and identify instances in which it goes wrong or gets things right. There simply isn't a large canon of scholarship devoted to that subject to report here. That which is relevant is cited throughout the article.

92. Charles C. Little & James Brown, *Special Legislation*, 25 AM. JURIST & LAW MAG. 317, 318 (1841) (quoting the inaugural address of Governor Morton) (internal quotations omitted).

> the private acts are passed for the purpose of exempting particular cases from the operation of general laws. I need not suggest, that such legislation is fraught with danger. This body is not favorably constituted for the investigation of private claims, and is liable to be misled by the representations and importunities of individuals complaining of the unjust and severe application of general rules. In a government of laws, the laws themselves should be general and just, and should be allowed to have a free and equable course, uninterrupted by the interference of any department of government.[93]

While Governor Morton's exposition refers to broad notions of equality in the last sentence, the rest of this quote reveals concerns attending individualized legislation. The strongest evidence of this concern is the count he offers. He, and many others, counted the number of special laws as a means of justifying prohibitions on the practice.[94] Such counts are only possible with laws that identify objects. Governor Morton also characterizes this count as evidence of disproportionate labor devoted to individuals and their "particular cases."

The terminology that special-legislation provisions use was also not new when it was adopted. The terms "special" and "general" were used in earlier restrictions related to corporate charters. There, the text clearly refers to individualized treatment, mandating general corporation laws rather than allowing legislatures to make an individualized determination of whether a particular corporate charter should issue or be amended.[95]

Robert Ireland, a historian, has thoroughly studied the problem of special legislation.[96] His study reveals that the main concern was with legislation that named its objects. The examples and contemporary statements of the problem that he collects reveal that the primary focus of these provisions was on laws that identified an object and singled it out for special treatment.[97]

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93. *Id.* at 318–19.

94. LUCE, *supra* note 43, at 544–46 (collecting counts); Ireland, *supra* note 8.

95. *See, e.g.,* NEB. CONST. art. XII, § 1 ("The Legislature shall provide by general law for the organization, regulation, supervision and general control of all corporations .... No corporations shall be created by special law ....").

96. *See* Ireland, *supra* note 8.

97. *See* Ireland, *supra* note 8. Modern examples of special laws that name objects can also be found in states that allow special laws, conditioned upon compliance with a process for their enactment. For example, Florida allows special laws, but only if notice of them is published. *See* FLA. CONST. art. III, § 10 ("No special law shall be passed unless notice of intention to seek enactment thereof has been published in the manner provided by general law."); *see also* MO. CONST. art. 3, § 42. Florida also has an outright prohibition on special laws dealing with enumerated subjects. *Id.* § 11.

Connecticut allows special laws except in a few instances. *See* CONN. CONST. art. X. Interestingly, it also includes a provision effectively making special legislation an individualized inquiry: the legislature, "shall enact no special legislation relative to the powers, organization, terms of elective offices or form of government of *any single* town, city or borough, except ...." CONN. CONST. art. X, § 1 I have yet to find an example of legislation involving a classification that has been designated as a special law by a modern legislature.

There were at least four problems associated with such legislation that one gleans from the historical sources. The first and most significant was a lack of legislative scrutiny, which arose from the representative composition of the legislature. As Governor Morton put it, the legislature is "not favorably constituted"[98] for some matters. Decisions for things like individual charters, divorces, or name changes were not likely to garner sufficient attention. When a representative came to the floor with a bill that applied to one company or person within his or her constituency, there was little reason for the general public to take note. As a result, other legislators were unlikely to expose the matter to rigorous debate, let alone investigate the merits of the bill.[99]

If the other legislators were inclined to pay attention, their attention was not driven by constituency impact. Rather, it was tied to the prospect of getting the proposing legislator's vote on their measures. However, even that sort of attention became hard to count on. In many instances, an understanding developed among legislators that the proposing legislator's peers would not resist the proposed legislation, so long as the proposing legislator would not resist similar bills from his or her peers. This "legislative courtesy" or "logrolling" was common in the nineteenth century and was one of the primary reasons why constitutional drafters decided that special lawmaking was problematic.[100]

Second, such legislation involves things that can reflect poorly on the administration of justice. Ex parte communications and perceived conflicts of interest (if not all-out bribery[101]) attended lawmaking that involved individual constituents. Given the volume of bills, the lack of public impact, and legislation that often provided beneficial treatment to such individuals, a sense of distrust developed within the electorate.[102]

Third, individualized lawmaking took time; time that was better spent on law that applied to broader problems.[103] Taking up individual cases for each representative robbed the legislature of the time it needed to deal with problems of a more public nature.

Fourth, bottling up legislative judgments in terms that name but one object

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98. Little & Brown, *supra* note 92, at 318 (quoting the inaugural address of Governor Morton).

99. *See* Ireland, *supra* note 8, at 286 (no time for investigation); *accord* HENRY HITCHCOCK, AMERICAN STATE CONSTITUTIONS: A STUDY OF THEIR GROWTH 39–40 (1887).

Constitutional provisions that include a public-notice process for enacting special laws are clear evidence of this problem. *See, e.g.*, ALA. CONST. art. IV, § 106; FLA. CONST. art. III, § 10; MO. CONST. art. 3, § 42. In these states, the approach has been to overcome the tendencies of such representative lawmaking by erecting a process that exposes them to more public attention and, thus, legislative scrutiny. *See* Howard P. Walthall, Sr., *A Doubtful Mind: Understanding Alabama's State Constitution*, 35 CUMB. L. REV. 7, 58-59 (2004). Such an approach is open to the criticism that the public is ill-suited to police such legislation, for the same reasons that legislators are unlikely to look twice: the bulk of it doesn't affect a sufficient number of constituents.

100. Ireland, *supra* note 8, at 273; Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government* Law, 80 VA. L. REV. 625, 642-57 (1994); South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003).

101. Ireland, *supra* note 8, at 277-78.

102. *See id.*

103. *See id.*; LUCE, *supra* note 43, at 540-44.

withheld similar treatment to similar objects.[104] The next bill that came before the legislature on the same subject with the same facts had no assurance of similar treatment.

A limitation on special laws can be construed as a means of dealing with these problems,[105] all of which are structural and arise most clearly with laws that identify objects. There is, however, further evidence of a structural orientation that can be gleaned from special-legislation provisions' placement within state constitutions, contemporaneous constitutional changes, and the overall goals of nineteenth century reformers.

The placement of these provisions within state constitutions is consistent with a structural rationale. Special-legislation provisions are not contained within bill-of-rights articles of state constitutions. Rather, they are found in the legislative articles. And their text often specifically limits their applicability to "the legislature." This indicates a concern with the legislative body and suggests similar concerns do not arise with other branches of state government.

Special-legislation provisions were also included in state constitutions along with a slate of other procedural checks on legislatures, like single-subject rules, requirements concerning the title of bills, requirements for multiple readings, and so on.[106] Those checks clearly reflect a concern for legitimate and transparent lawmaking and were adopted to facilitate the public's oversight of legislation and legislators. When considered in the context of these provisions, special-legislation provisions could be a realization that these procedural checks were insufficient to guard against other forms of legislation that can raise transparency and accountability problems, like laws that apply to individual objects.

Finally, the overall goals of many nineteenth century reforms are consistent with a structural rationale for these provisions. Distributing governmental power away from legislatures to other branches was a common feature of nineteenth century constitutional reforms. Along with that redistribution came reforms making the judiciary, the chief executive, and many other executive actors democratically accountable. Special-legislation

104. Ireland, *supra* note 8, at 279. Professor Ireland devotes only a part of a paragraph to the question of equality in his study of the era in which these provisions were adopted. He describes a few critics claiming special legislation amounted to the denial of equal protection, violating the "salutary maxim of 'equal rights special privileges to none,'" and describes a gubernatorial veto based upon the principle. *Id.* This is further evidence that these provisions were not designed to impose a broad notion of equality. Rather, it means they were designed to prohibit a practice that offended the principle of equality. The text, thus, has a narrower focus, but the restriction it places on legislatures serves egalitarian ends.

105. There are other ways of dealing with these problems. An interestingly similar set of problems arose with regard to claims against the U.S. government. Shimomura provides a thorough explanation of how that system evolved. Shimomura, *supra* note 19. There, the progression began with legislative adjudication, evolved to a hybrid model where both the courts and the legislature were involved, and culminated in a judicial model. As with the states' experience with special legislation, the administrative burden on the legislature and the appearance of impropriety in claim acceptance or rejection were reasons for moving from the legislative model in the 1830s and 1840s. *Id.* at 648-50.

106. ERNST FREUND, STANDARDS OF AMERICAN LEGISLATION, 151-58 (1917) (discussing changes in state constitutions).

provisions can be understood as limiting legislative authority to deal with individualized cases and shifting that power to these other branches of government. Taken in that light, these provisions have separation-of-powers implications. In fact, individualized legislation passed before the adoption of special-legislation provisions raised significant separation-of-powers concerns.[107] These provisions can be seen as dealing with those concerns.

### *B. Illustrating the Structural Rationale*

Considering an example of how a special-legislation provision affects a law that names its object reveals how these provisions impact a legislature and define its role within the state constitutional structure. Imagine that I go to my friendly legislator asking him to introduce a bill dissolving my marriage.[108] In making my plea (over drinks and ex parte) I explain my circumstances: the marriage is broken, the children are grown, and the assets are clearly and amicably divided. In my opinion, there is little reason for our legal relationship to persist.

Assume that my legislator agrees and introduces a bill for my relief. Once introduced, my bill passes along with hundreds of others dealing with similar individual matters. It is unlikely that any of these bills will receive much legislative scrutiny. Indeed, given legislative courtesy, my bill and others like it are virtually guaranteed passage with no debate. There is also little reason for the public—the most important check on legislative abuse—to take notice, call their legislators, or exercise their votes as objections to their legislators' assent. After all, the matter has almost no impact on them. Similarly, such lawmaking is unlikely to garner media attention because it is unlikely to raise the public's interest. In essence, "this body is not favorably constituted for the investigation of [my] private claims,"[109] because, given its structure and the impact of this legislation, the legislature likely will not scrutinize the matter at all.

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107. *See, e.g.*, Stewart v. Griffith, 33 Mo. 13 (1862) (sale of minor's real estate, collecting cases, and expressing "the general *impolicy* of acts of like character"); State v. Fry and Others, 4 Mo. 120, 134-35 (1835); Opinion of the Court, 4 N.H. 572 (1829) (expressing doubt that the legislature could authorize the sale of land of a particular minor); *see also*, Ronald L. Nelson, *Social Instrumentalism in the Jacksonian Decade: State High Court Decisions Regarding Marriage and Religion, 1928-1837*, 48 AM. J. LEGAL HIST. 1, 7-8 (2006); Ireland, *supra* note 8.

108. Ireland, *supra* note 8, at 289-90. Divorce is the most common enumerated subject upon which no special law can be passed. To the modern eye, my example might appear contrived. But when these provisions (or precursors dealing only with divorce) were adopted, the practice was somewhat common. *See id.* (describing the practice and reporting that "Kentucky lawmakers divorced 138 couples by special legislation at their 1848-49 session."); *see also* Wood v. Wood, 159 Tex. 350, 353 (1959) (evaluating a constitutional challenge to a Texas domiciliary statute granting military personnel the power to petition for divorces, concluding the special-legislation prohibition was geared only at granting divorces to individuals with legislation, and noting the historical practice of legislative divorces); Teft v. Teft, 3 Mich. 67 (1853) (holding a statute granting a named individual a divorce upon proof of insanity of the other spouse was constitutionally prohibited, and noting other states' special law's provisions on the subject). Any example of a low-impact law would, however, illustrate the point.

109. *Special Legislation*, 25 AM. JURIST & L. MAG. 317, 318-19 (1841); *see also* Walthall, *supra* note 99, at 59 (stating that local legislation is prone to the same difficulty).

If the custom of running this legislation through without scrutiny emerges, it robs the legislature of time it could spend on other matters. And even if legislators wanted to spend time scrutinizing the matter, they would not have the time to do so given the volume of requests. This would mean that either many bills pass with no scrutiny, or many bills do not get taken up while others do.[110]

Each legislator is also effectively vested with the authority to grant the desired relief. This would be a problem, for example, if my legislator denied my request. I would have no recourse. And for any who come after me with the same request, there is no formal precedent to be found in the legislator's prior actions. The lawmaking function thus flies under the public's radar and it becomes sporadic, unreasoned, perhaps trivial, and available only to some on unknown terms.

The prohibition on special legislation, however, changes matters remarkably. It requires the legislator to take my circumstances to the legislative body. The legislator will then present them in the form of a law that erects a standard or set of criteria that, if met, enunciates circumstances under which anyone can get a divorce. This, in turn, extends my treatment to others similarly situated. Expanding the scope of the law is more likely to engender legislative scrutiny because it will draw the public's attention and, thus, that of other legislators. The legislature has also been transformed from a place for seeking redress to a standard-setting or rule-making body. The law, of course, still classifies. Those meeting the criteria are treated differently from those that do not. But creating that classification was one point of restricting the legislative power to deal only with my case.

There is also no individualized fact-finding problem when the law is framed in general terms. There is no need for the legislature to investigate the facts of my case, though it may need to investigate the factual predicate for affording people like me a divorce. For instance, it may need to examine the impact of divorce on children, the difficulty associated with dividing assets, and so on, as it determines how to create a standard and process for divorces. But legislatures are up to the task of this sort of legislative factfinding.[111] In fact,

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110. There are some who argue that the time concern, as well as others, was overstated. *See, e.g.*, *Special Legislation for Municipalities*, 18 HARV. L. REV. 588, 602 (1905).

111. The difference is between legislative factfinding, which legislatures are suited to do, and adjudicative factfinding, which they are not. Kenneth Culp Davis cryptically stated the nature of legislative factfinding:

> Because they are the direct representatives of the people, the law imposes no restrictions on them with respect to their use or nonuse of facts as a basis for legislating. Legislators are unrestricted in receiving information or misinformation from any source by any means; they may suppress or disclose it as they choose. They may legislate, if they choose, with a bull-in-a-china-shop ignorance, without facts, without reasons, and with minds closed to reasoned argument, as long as what they enact is sufficiently reasonable to meet due process requirements.

Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 931-32 (1980). However, because they are representatives of the people, special-legislation provisions recognize that legislative attention to individual cases raises process problems.

by requiring the legislature to speak in rules and standards, special-legislation provisions put legislatures in the position of having to make these inquiries. When a legislator brings standards or sets of criteria to the legislative body for approval, reasonable disagreement among legislators is likely to facilitate a more arduous process within which factual predicates will be explored and debated.

Once the legislature is placed in its policymaking role, a need emerges for an apparatus to administer such a law. Indeed, with a subject like divorce, it would be absurd to simply extend my divorce to all others similarly situated. Rather, the ensuing law will likely include a standard under which willing petitioners can seek to have their marriage dissolved based upon certain showings. The result, for our purposes, is that other branches of government will be enlisted to deal with individual cases. The judiciary is, of course, the obvious place to look in this particular case. It will be charged with making the factual judgments necessary to the legislation's application and enter an order backed by the state. And it will do all of this in a way that is unclouded by the kinship petitioners may have with their legislators. Thus, the legislature can be seen as fulfilling a policymaking role that creates laws that are administered and enforced by other institutional actors more suited to operate in individual cases.

This hypothetical also reveals one more crucial aspect of special-legislation provisions: Legislatures probably were not enacting all special laws simply to confer invidious benefits on powerful interests. That is, those who would come before the legislature in pursuit of individualized treatment were doing so for good reasons as well as bad ones. In some instances that reason may have been greed, backed by power. But in other instances, the request would simply be a legitimate, well-grounded request for legal relief. Providing that relief was one of many tasks legislators were faced with, and it was likely to garner the legislator political favor among his or her constituents.

From this, one can conclude that special lawmaking is not inherently vicious. But the dangers that accompany legislatures adjudicating individual cases, and the lack of any institutional capacity to do so, make them an inappropriate place in most cases[112] to provide individualized relief. Consequently, constitution drafters decided to restrict the legislative response to constituents by requiring it to speak in rules or standards and utilize other branches of government that were more suited to the task.

By requiring legislatures to respond in this manner, the scope of what constituents can ask the legislature for is also limited—their arguments must resonate on the merits because the legislature must use the merits in setting a standard or establishing criteria for whatever legal treatment it deems appropriate. Those standards or criteria will, in turn, provide the individual and others similarly situated the relief that the legislature concludes they deserve.

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112. Special lawmaking is, after all, allowed outside of enumerated cases, when a general law cannot be made applicable. *See supra*, text accompanying note 37 & *infra* Part IV.C.

This hypothetical shows that the main problem underlying special legislation was structural. A representative body making law for an individual poses significant dangers of process failure. That failure and the resulting legislation can damage the reputation of the legislature. When restricted from providing legislation to individuals, the legislature is placed in a standard- or rule-making role that provides law for similar cases and, often, utilizes the implementation expertise of other branches of state government.

## III. APPLYING THE STRUCTURAL RATIONALE: A TWO-STEP UNDERSTANDING

In light of the text, history, and example discussed above, the term "special law" should be interpreted as a restriction on the form legislation may take, restricting the legislature's ability to identify objects. This, however, does not mean that special-legislation doctrine should be eliminated. Rather, the primary role of special-legislation doctrine is, or should be, to detect evasion by identifying general laws that are functionally special. This two-step understanding best implements the text in light of its structural rationale.

### *A. Step One: Formal Interpretation*

Recall that special-legislation provisions restrict the ability to use "special" laws in enumerated cases and require the use of "general" (i.e., not special) laws when a general law can be made applicable. Interpreting these terms was, of course, what launched the last part's inquiry.

The term "special" should be interpreted to refer only to laws that identify objects. With that interpretation, these provisions would restrain the form of legislation. Laws that speak in terms of standards or criteria would not be special. They would be general. Stated differently, laws that create or use classifications (which are all laws that do not identify objects) would be general. This interpretation fits the structural rationale underlying these provisions, makes sense historically and textually, and provides legislators, judges, and citizens with guidance.

The structural rationale demands only that the legislature translate individual circumstances into general laws, requiring legislatures to frame their judgments in terms that apply to all similarly situated objects. When this happens, the problems associated with individualized treatment are eliminated.[113] Thus, when the legislature in my divorce hypothetical writes a divorce law that uses my circumstances as a foundation for a general law, there is little danger of the problems that attend individualized treatment and many benefits that emerge. There may be a danger that the circumstances the legislature chooses to translate into standards or criteria will be bad policy, but

113. *See* Albert M. Kales, *Special Legislation as Defined in the Illinois Cases*, 1 ILL. L. REV.63, 79 (1906) (while not drawing a distinction between special and functionally special laws, observing that a restriction on identification "can hardly be said [to] serve no good purpose").

there is nothing special about that danger. After all, legislation is often a response to individuals' problems. What makes legislation special is the structural problem that accompanies legislation tending only to an individual's problem.

Historically and textually, this interpretation also makes sense.[114] As I have explained above, individualized treatment was clearly the problem. And if a special law is a law that identifies its objects, then the text simply says that a legislature may not identify objects in the enumerated cases, and it must refrain from doing so when it can.

This interpretation also provides courts, legislators, and citizens with a clear rule, justified by the underlying structural rationale it serves. Adopting such an interpretation thus has the effect of clearing up our understanding of these provisions. Perhaps as a consequence, but in any event, this also means that special-legislation provisions perform a great deal of their work without judicial oversight.[115] Legislators can clearly avoid identifying objects, the public knows not to ask for such legislation, and the need for judicial enforcement should, thus, be limited.

In some cases, of course, individualized treatment will not present all of the problems implicated in my divorce law. But this does not require a different interpretation. Consider, for example, a higher-profile example. Imagine a state law identifying a pipeline company called TransCanada and requiring it to route a pipeline carrying diluted bitumen[116] along a route that avoids a large groundwater formation called the High Plains Aquifer. Many people own shares of TransCanada, and they are distributed throughout the state and beyond. It is being regulated because of the environmental risk it poses to a large portion of the state. There are many constituents within the state that would benefit financially from the construction of that pipeline. And the pipeline would generate a large amount of tax revenue.

Individualized treatment of this matter is much different than individualized treatment of my divorce. The matter is hardly the sort of subject that will fly under the radar. The law identifies TransCanada, but it affects many constituents. And many voices will offer evidence to the legislative body

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114. Indeed, some early commentators refer to "special" laws as individualized laws, distinct from laws that classify. *See* MOTT, *supra* note 68, at 256-74; COOLEY, *supra* note 68, at 389-97.

115. On the importance of unlitigated provisions, *see* Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 813 n.1 (2010) (citing SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006)).

116. This hypothetical is based on a true story, but only loosely. *See supra* note 17. "Diluted bitumen is one of the types of crude oil derived from the Canadian oil sands in Alberta, Canada. It is a combination of bitumen, the heavy oil that is extracted from the oil sands, and a diluent, which is usually natural gas condensate, naphtha or mix of other light hydrocarbons. The diluted mixture improves the quality of bitumen and allows the crude oil (referred to as "dil-bit" in the industry) to meet pipeline product quality specifications posted with federal regulators so the crude oil flows through transmission pipelines." *Pipeline Transportation of Diluted Bitumen from the Canadian Oil Sands*, AOPL, http://www.cepa.com/wp-content/uploads/2013/10/Facts-About-Pipeline-Transportation-of-Diluted-Bitumen.pdf (last visited Jan. 24, 2013). AOPL, PIPELINE TRANSPORTATION OF DILUTED BITUMEN FROM THE CANADIAN OIL SANDS, available at http://www.cepa.com/about-cepa/industry-information.

in support of their arguments. In short, there is little risk that the legislature will insufficiently scrutinize the merits of this case. At least, there is little risk that the legislature's representative composition will impede its investigation and judgment.

From this, one could conclude that laws naming high-profile objects should not be regarded as special because, functionally, such laws do not raise significant legislative-scrutiny concerns.[117] However, given the history of these provisions, the absence of a legislative-scrutiny concern is not necessarily a problem.[118] The formal restraint can be imposed in high-profile cases on prophylactic grounds. Because naming is so problematic in many cases and resulted in so many problems historically, the absence of some of those problems in a particular case of an identified object is not important.

Under this line of reasoning, the special-legislation provision imposes a formal restraint on the legislature to refrain from naming names in all cases. There are also important benefits that follow this restriction, even in high-profile cases. As with my divorce law, restricting the legislature's ability to identify TransCanada still has profound effects. Once the legislature articulates its concerns in terms of standards or criteria, it avoids an appearance of impropriety. It will also not be as likely to spend time on individual cases like this one in the future, after having provided a more generally applicable law. Such a law will also extend the legislature's judgment to other similarly situated objects. By forcing the legislature into this policymaking role, the restriction will also likely create a role for other branches of government to implement the law. Thus, when special-legislation provisions are interpreted to restrict the form lawmaking takes, they solve the structural problems a particular case presents and produce important benefits, including a clear rule for legislatures to follow. However, the clarity of this interpretation does not foreclose the need for judicial review.

### *B. Step Two: Functional Implementation*

The second step to understanding special-legislation provisions is to view their doctrine as implementing the interpretation adopted above. When the doctrine is viewed in this light, the tests described above fit together as a coherent doctrine. While I have not found a state that has stitched the doctrine and text together in this way, it accounts for some states' approaches. However, some states are going well beyond the structural rationale of these provisions by applying classification tests to general legislation that raises no suspicion of individualized treatment. Such cases effectively police some ill-defined notion of individual rights that the text and its underlying structural rationale do not support.

Given the primary goal of these provisions—to restrict legislatures from

117. I consider the prospect of sufficient legislative scrutiny as it relates to functionally special laws below, in Part IV.B.1.

118. *Cf.* Kales, *supra* note 113, at 63, 79.

identifying objects—one could question why judicial review and a special-legislation doctrine are necessary. They are necessary because legislators have good reasons for wanting to concern themselves with individual cases. In comparison with policymaking, individualized lawmaking is easier and, thus, tempting. It may, for example, avoid the prospect of extended debate, put the legislator in the good graces of his or her constituents, and discharge the legislator of a duty to think about broader consequences, future consequences, and conflicting policies.

Of course, special-legislation provisions were added, in part, *because of* these temptations. Constitutional drafters wanted legislatures to take up the more difficult task of policymaking. But the temptation persists. Just as legislators had good reasons for wanting to provide individualized treatment with special laws, they continue to have good reasons for providing individualized treatment with general laws. Thus, the formal interpretation does not adequately guard against the prospect of individualized treatment and the structural problems it presents. Rather, fully implementing these provisions must also involve a doctrine that handles the temptation to evade the special-legislation provision.[119]

Legislation that applies to only one or a few objects is some evidence that a law was written for an individual case. However, sometimes such legislation is dealing with a problem that is unique to a class of that size. Thus, the doctrine must be careful to avoid falsely detecting instances of individualized lawmaking. Indeed, the constitutional drafter's judgment was only to limit instances of individualized lawmaking in which the object was identified. The doctrine, and the doctrine alone, expands the inquiry to cases in which a general law appears suspicious.

To strike a balance between the need for narrow laws and the prospect of evasion, the doctrine should detect functionally special laws. It does this through the closed-class and class-legislation tests. A special law involves the use of a name that operates to identify a very small class, closes the class to future entry and denies its coverage to similarly situated objects. A functionally special law, then, could be said to involve a similarly sized class that restricts its coverage in the same way. Both the closed-class test and the

119. Some early cases were explicitly geared at evasion, apparently operating under the notion that special legislation was that legislation which named its object. Thus, in *Darrow v. People*, 8 Colo. 417, 418-19 (1885), the court evaluated legislation creating superior courts in cities with populations exceeding 25,000 inhabitants. The court concluded:

> If this act were a clear and unequivocal attempt to evade the constitutional inhibition, and create a superior court for one particular city, we would unhesitatingly accede to the views of counsel. Such legislation, although the purpose be disguised by the use of general language, is not to be tolerated. But, construing all the provisions of the statute together, we cannot discover any such attempted evasion. Denver, it is true, is the only city to which the act at present applies. But the legislature clearly intended to provide for places that may hereafter acquire the population mentioned. The law is general, and is unlimited as to time in its operation. There is nothing unreasonable in the supposition that other towns and cities within the state will eventually contain 25,000 inhabitants. Whenever this size is attained by such municipal corporations, the act becomes applicable thereto.

class-legislation test get at this problem, identifying instances in which other objects should be included. This search for special laws masquerading as general ones detects instances of evasion.

I analyze how the doctrine does this below, but an initial word of caution is in order. The discussion below presents special-legislation doctrine as involving multiple parts: (1) an individualized-treatment trigger, (2) a closed-class test, (3) a class-legislation test, and (4) a possible inquiry into legislative history. All of this could be taken as too complicated to effectively guide decisionmakers. It is not. From a legislature's perspective, the general rule should be kept in mind: If legislation applies to only one or a few present objects, then the class it creates must be open to future entry and the class needs to include all relevant members.

From a judicial perspective, the inquiry may involve many shades of gray. The appearance of individualized treatment may be questionable because the legislation extents to more than one object. Class membership may be somewhat open and somewhat closed. And classification criteria may make some sense, but appear questionable. In such close cases—cases that are likely to be litigated—even the best doctrinal structure is likely to break down. The primary benefit of the structural rationale comes to bear in those close cases. It provides guidance. It gives courts a better understanding of what dangers special legislation presents and the way in which the doctrinal tests implement those concerns.

### 1. Class Size

The primary indicium of evading a rule against individualized treatment is present class size. If legislation applies[120] to only one (or very few) existing objects, then a concern arises that the legislation was created to deal only with that object. And, as explained above, dealing with only one object poses significant problems in legislatures, the most important of which is the risk of insufficient legislative scrutiny. In such circumstances, the law should trigger some sort of a test to check for evasion.

Considerations of class size have been met with somewhat confusing results in the case law. Historically, early courts explicitly considered class size in their analysis.[121] Factually, many successful special-legislation challenges involve a class of one or only a few members.[122] But most modern courts have

120. It is important to realize that individualized treatment can be given through exclusion as well as inclusion. *See* Ireland, *supra* note 8, at 291. That is, the exclusion of an individual from a law's general coverage can qualify as individualized treatment, just as a law that positively covers the same individual. Similarly, an amendment to a general law that operates to exclude a single object could qualify as well. I use the term "applies" to simplify matters.

121. "It is to be remembered that one alone may constitute a class as well as a thousand; but the fewer there are in a class the more closely will courts scrutinize an act if its classification constitutes an evasion of the constitution." Loew v. Hagerle Bros., 33 N.W.2d 598, 601 (Minn. 1948); *accord* Hamlin v. Ladd, 14 N.W.2d 396 (Minn. 1944).

122. *See, e.g.*, City of Miami v. McGrath, 824 So. 2d 143 (Fla. 2002) (population on a certain date operated to restrict a parking-tax enabling provision to three cities).

not been willing to articulate class size as a trigger for judicial review.[123] Indeed, much of the case law that mentions class size runs to the contrary. However, many of these declarations should be examined more closely. If a case concludes that class size is irrelevant when a class of one is open and the law passes a class-legislation test, such an observation should not be taken too far. Class size did not matter in the outcome of those cases, where the classification passed muster. But if it had not passed muster, class size is the only factor that gives rise to a concern for evasion.[124]

The only cases that overlook class size are those involving large classes that were deemed special because they failed a class-legislation test or involved a closed class.[125] A good example is *Best v. Taylor Machine Works*, discussed above, in which the court struck down a tort-reform measure as special legislation. That legislation had no indicia of evasion. There is no reason, in other words, to regard the law in that case as functionally special.

To illustrate a general law raising a concern for individualized lawmaking, reconsider an adaptation of the TransCanada legislation: The state legislature passes a law requiring all pipeline companies to seek approval of an administrative agency for routing pipelines through the state. Assume as well that the law only practically impacts a company called TransCanada, which is on the verge of finalizing plans for a pipeline. Such a law would appear to involve a small class, just as it would if it named TransCanada. Thus, the small class size triggers a concern for individualized treatment that is in need of further review.

Assessing the number of objects a law covers at the time of its passage raises can sometimes raise difficult questions. But it is imperative to make this inquiry because the concern for individualized treatment is all that justifies further review. If the law covers many other pipeline companies, there is no evasion concern. All the legislation would be in the absence of such evidence is a law that, like all others, involves a classification. There would be, to put it tritely, nothing special about it.

123. By way of exception, see *Penn. Turnpike*, 899 A.2d 1085 (Pa. 2006).

124. Binney's 1894 observations are consistent with this understanding: "If the classification be valid, the number of members in a class is wholly immaterial." BINNEY, *supra* note 8, at 84. Importantly, Binney did not go so far as to say that class size was irrelevant. Rather, his observation fits an evasion inquiry: class size is relevant when the classification criteria have an insufficient relation to some legitimate end. *Id.*

125. In some instances, these cases can be explained by reasonable responses to the appearance of arbitrariness. Take, for example, *Nichols v. Walter*, 33 N.W. 800 (Minn. 1887). There the court was faced with an arbitrary distinction between counties in a law that dealt with the removal of county seats. The court recounted those cases in which classes of one dealing with municipalities were struck down under special-legislation provisions because their classifications were arbitrary. Those cases, however, explicitly mentioned evasion. The court, without consulting the constitutional text, concluded that because the classification before it was arbitrary, the legislation was special. *Id.* Of course, without the class of one before it, the law raised no structural concerns.

2. Closed Classes

Once a court determines that a general law only applies to a very small class, it must determine whether or not the legislature has evaded the restriction. The closed-class test represents one way of detecting evasion. Just as a special law creates a closed class, a general law closing its class and applying to one object (or very few) is functionally special.[126]

Consider, for example, a hypothetical pipeline law with a closed class. Assume this law requires administrative review for all pipeline companies that have an application pending before the U.S. State Department as of October 15, 2011. TransCanada is the only pipeline company that meets this definition. Such a law is, functionally, no different than a law that identifies TransCanada. As the Ohio Supreme Court said of a similar statute, "The effect of the act would have been precisely the same if the [object] had been designated by name instead of by the circumlocution employed."[127] Such laws present all of the dangers of special legislation. Indeed, if the legislature wanted to name TransCanada then it should have. It cannot, however, evade the provision by framing the law generally and closing the class.

The legislature is, of course, not without a means of further limiting the scope of such a law. If there is some legitimate reason why pipeline companies like TransCanada should be regulated, and others not regulated, then the legislation should articulate those reasons as further conditions. If, for example, this company deserves regulation because it will involve a high-capacity pipeline of 25" or more, then that should be included as a classification criterion. This expands the law's coverage to all similar pipelines. If, however, the criteria create a class that applies to only one present object (or very few), then opening the class does not appear sufficient to allay evasion concerns.

3. Class-legislation Tests

Class-legislation tests, which require that legislative classifications involve distinctions among objects that are relevant to some legitimate public purpose, also detect laws that are functionally special when applied to legislation that covers one existing object (or very few).[128] As with a special law, a functionally

126. *South Bend v. Kimsey*, 781 N.E.2d 683, 693 (Ind. 2003), does not use this test to detect functionally special laws. Rather, it uses this test to determine whether a "a general law can be made applicable." (quoting IND. CONST. art. IV, § 23). The problem with hitching the doctrine to that text is that it offers no opportunity to justify a closed class. This framework does. See infra. Part IV.C.

127. State ex. rel. City of Columbus v. Mitchell, 31 Ohio St. 592, 607-08 (1877). *See also* Note, *Constitutionality of Classification of Cities*, 16 HARV. L. REV. 59 (1902) (stating that the mere fact that there is but one city in a class should not raise a problem, but if there is no possibility of another entering, "then clearly the intent for its special effect is revealed").

128. *South Bend v. Kimsey*, 781 N.E.2d 683, 693 (Ind. 2003) purports to use its class-legislation test to determine whether "a general law can be made applicable." (quoting IND. CONST. art. IV, § 23). However, its test for general or special status turns on the arbitrariness of the classification criteria. For example, it concluded that population criteria isolating one county made a law special because the classification "served no purpose other than to identify" that county. *See also* Alpa Psi v. Auditor of Monroe County, 849 N.E.2d 1131 (Ind. 2006).

special law withholds its coverage from other similarly situated objects. The special law does it with a name (which also operates to close the class), but a functionally special law can do it with other conditions.

This is an important conclusion. The structural rationale brings both the closed-class test and the class-legislation tests together in pursuit of the same underlying constitutional harm. Both tests, it turns out, are getting at the same concern for individualized treatment by identifying instances of evasion.

Class-legislation tests geared at evasion deem a law functionally special only when the classification appears to identify traits that are irrelevant to the legislation's purposes. The inquiry is relatively weak because the conditions the legislature employs may serve to identify classes that, although very small, present problems that are unique. Thus, the inquiry tempers concerns for evasion with the existence of problems involving very few existing objects.

Consider again, the hypothetical pipeline statute, this time regulating pipelines of 25" or more. If TransCanada were the only company with a high-capacity pipeline in the works when this legislation is passed, then it would raise a suspicion of individualized treatment and would trigger judicial review. The criteria should be tested to ensure that the legislation was not written to deal only with TransCanada. The open class is one indication that is was not, but the small present class still raises concerns. Of course, it could be that TransCanada, and those like it that may come within the law's coverage in the future, present unique circumstances that require a law that is not more generally applicable.

The class-legislation test operates to distinguish between sound legislative judgments and legislative evasion. For example, if the 25" criterion or the pipeline-company criterion[129] were irrelevant to the purposes underlying the legislation, the appearance of evasion would emerge because the law would isolate its coverage on one entity and fail to extend it to others similarly situated. If the criteria were relevant—e.g., because pipelines of that size and above present dangers to natural resources that smaller pipelines do not—then the legislature has not written a functionally special law, but rather has written the legislation to deal with a problem that is unique to TransCanada and other future objects that will fall within its coverage.

The finer points of class-legislation tests raise a host of questions that I consider in more depth in the next Part of this article. However, for present purposes, it is sufficient to conclude that the structural rationale places class-legislation tests within a larger framework that is textually supported. These tests do not define special laws. Rather, they are one way of detecting general laws that are functionally special.

### 4. Legislative History

Because the tests used in special-legislation doctrine are geared at evasion,

129. Both, of course, operate to identify the class upon which this legislation applies.

legislative history would appear quite relevant. Of course, all of the well-known dangers of digging into legislative history are present, like the ability to manipulate it and the difficulty of getting an adequate understanding of debate and investigation by reading a dry record.[130] Most courts[131] do not make direct inquiries into the legislative history, probably for these reasons. But there is at least one additional reason for proceeding into the legislative history with caution.

In special-legislation cases, there is a unique concern for legislative history that shows some attention to individual circumstances. Many legislative histories will reveal some level of concern for individual problems. However, restrictions on special legislation do not mean that individual circumstances are beyond legislative cognizance. Rather, special-legislation restrictions require only that those individual circumstances be translated into standards or criteria that apply more broadly. Thus, any inquiry into legislative history should take care to recognize that legislative attention to important areas of policy and policy adjustment are often attributable to individuals who bring a matter to their representative, asking for assistance. Concluding that legislation was limited to a very small class simply because an individual came to the legislature with a problem would cut too broad a path and ignore the practical workings of a legislative body. This sort of evidence is marginally relevant to the questions presented by special-legislation doctrine.

Stronger evidence would include a legislative history showing that members were very concerned about whether anyone else would be brought within the law's reach. This could indicate that the law was structured to effectively deal with one individual's problem and framed in a way that ensured it did only that.

For example, the hypothetical pipeline law might have a legislative history in which many legislators stated their concerns about the pipeline company that the law covers. However, that does not indicate a problem. Rather, what the court should concern itself with is any indicia (that it concludes is reliable enough) revealing an effort to effectively limit the coverage of the law to this one company.

To illustrate, imagine the pipeline law with another condition in addition to size. That is, the law restricts its coverage to those pipelines carrying diluted bitumen. Evidence of individualized treatment would include pipeline companies with pipelines larger than 25" in diameter arguing about adverse economic impacts to them. If such evidence appeared, it might suggest that the diluted-bitumen condition was placed in the law to focus the legislation on this company.

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130. *See generally*, Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

131. Some courts, however, do. Indiana, for example, has looked who sponsored the bill and an emergency clause as relevant "circumstances surrounding the enactment." South Bend v. Kimsey, 781 N.E.2d 683, 693 (Ind. 2003). *See also* Hug v. City of Omaha, 749 N.W.2d 884 (Neb. 2008); D-Co. v. City of La Vista, 829 N.W.2d 105 (Neb. 2013).

Such a suggestion would appear strong, however, only if carrying diluted bitumen was an arbitrary condition. Thus, for example, the evidence of evasion would be weak if carrying diluted bitumen involves a higher risk of environmental harm or if the substance has some correlation with other legitimate concerns (e.g., pipeline companies carrying diluted bitumen are uniquely situated to bear the costs of increased environmental regulation in ways that pipelines carrying other substances are not). Thus, it could be that the arbitrariness test adequately covers matters in some cases. But it could also mean that the evidence gathered through a foray into legislative history could inform those other tests, such as when a criterion appears somewhat arbitrary.

* * *

In sum, an appropriate interpretation of special-legislation provisions restricts the legislature from identifying objects in legislation. An implementing doctrine is necessary, however, because legislators are likely to attempt to evade the restriction and provide individualized relief to their constituents. To detect evasion, judicial review should be triggered if the legislation applies to a class of one (or very few). If such a class is closed or arbitrarily excludes other members, then the legislation is functionally special and constitutes evasion. Legislative history can also be used to assist the court with such an inquiry.[132]

This means that legislation involving larger classes should not be subject to judicial review under these provisions. But this does not mean that equality principles are insignificant. Equality is, of course, a valid concern. The point is simply that these provisions are not equal-protection provisions in the sense that some courts have made them out to be. There is, for instance, nothing special about tort-reform legislation[133] or payments to large numbers of investors.[134] Other provisions of state constitutions or extra-constitutional norms should be used to support broader equality doctrines.[135]

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132. Of course, not all special laws or functionally special laws are unconstitutional. Recall that the special-legislation restrictions only prohibit special legislation on enumerated subjects. In all other matters, these provisions require that special laws be avoided when a general laws "can be made applicable." Courts confronting special laws should observe this text, once they reach the special-legislation conclusion. Thus, they should be careful not to strike down legislation simply because it is special or functionally special. I turn to the complexity that this inquiry entails in part IV.C below.

133. Best v. Taylor Machine Works, 689 N.E.2d 1057 (Ill. 1997) (striking down a statutory cap on compensatory damages for noneconomic injuries in personal injury actions).

134. Haman v. Marsh, 467 N.W.2d 836 (Neb. 1991) (striking down a statute providing payment to defrauded investors of industrial loan companies). *Haman* is, however, a harder case than would first appear. There were, after all, only three industrial loan companies that fell within the scope of that act. The court, however, focused on the class of depositors to whom the legislature provided relief. On that view, there was nothing special about that legislation.

135. Special-legislation provisions, of course, serve egalitarian ends in two ways. First, because these provisions require legislatures to speak in terms that classify objects, these provisions help achieve some level of equality. Once the legislature speaks in terms that identify the legislation's objects through criteria or standards, all similarly situated objects are treated similarly. Thus, people like me get divorces. People who are not like me, will not. Pipeline companies like TransCanada are given

## IV. RECONSIDERING SPECIAL-LEGISLATION DOCTRINE

What I have said above develops the landscape of special-legislation provisions and their doctrine as it pertains to the term "special law." The structural rationale ties the doctrine together, links it to the text, and narrows it to cases involving evasion. In this part, the article discusses four aspects of special-legislation doctrine in more depth. In section A, it briefly examines the parameters of the class-legislation test geared at evasion, distinguishing it from rational-basis review under the 14th Amendment. In section B, it explores three possible doctrinal innovations. In section C, it discusses the restraint on special and functionally special legislation, revealing how the rest of the constitutional text affects the doctrine above.

### *A. Class-legislation Tests and The Judiciary's Role*

The details of class-legislation tests present one of the murkiest areas of special-legislation doctrine. To this point, I have been content to use the structural rationale to cast this test in the role of an evasion test that courts (should) apply to legislation raising a suspicion of individualized lawmaking. However, the structural rationale informs class-legislation tests in two more ways. First, it informs the finer points of these tests, counseling in favor of a test that is in some ways more demanding than rational-basis review under the 14th Amendment.[136] Second, the structural rationale justifies this more demanding review.

#### 1. The Finer Points of Class-Legislation Tests

There are at least three common inquiries that courts undertake in conjunction with class-legislation tests that are worth exploring briefly here: (1) identifying the legislation's purposes, (2) examining the factual basis for distinguishing between those objects included and excluded from the legislation's coverage, and (3) exploring the relevance of those distinctions to the legislation's purposes.

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similar treatment, but those that are not like it, are not. By modifying the form of lawmaking, special-legislation provisions generate legislation that extends individual treatment to others.

Second, because these provisions require legislatures to write broader standards and rules, they create more opportunities to check legislation for equality under typical equal-protection jurisprudence or a similar state equal-rights provision. Take, for example, the divorce hypothetical. Special-legislation provisions require the legislature to articulate standards or criteria that identify who should get a divorce. In the hypothetical case, these standards and criteria are a translation of the introducing legislator's reasons for thinking I deserve a divorce and reflect the views of the body, given the legislative scrutiny that ensues. If my race or my gender were articulated as reasons, then equal protection would eliminate the inequality. Making an equal-protection challenge would be much more difficult if the legislation simply named me.

136. Of course, it cannot solve the problem of courts employing a test haphazardly. *See, e.g.*, Clark, *supra* note 16, at 653-54 (criticizing the Kansas Supreme court for inconsistently deferring to legislative factual judgments and taking judicial notice of facts that indicate it is using its own policy preferences to decide cases).

With the structural rationale in mind, and its corollary concern for evasiveness, one can better understand how a court should undertake these inquiries. I discuss each inquiry briefly below, but my point is not to exhaust all possible details.[137] Rather, these are some initial thoughts on how classification review should be undertaken if the concern is evasion.

*Legislation's Purposes*

To start, the court should identify the purposes of the challanged legislation.[138] This is a notoriously difficult subject. I frame it as a problem of identifying the means through which purposes will be detected because that is the main problem confronting this doctrine. Equal-protection doctrine under the 14th Amendment, of course, uses the concept of legislation's purposes differently. At times, it requires that class criteria serve an important or compelling purpose in order to justify their use. With an evasion inquiry, there is little reason to take such an approach. The main question to be answered, after all, is whether the classification criteria were used for no other reason than to narrow the class to one.[139]

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137. One such problem is that of individual and cumulative testing. While I address it in this note, discussing it in the text would take the analysis too far afield. Each criterion should probably be tested individually, to ensure relevance, and collectively to ensure that the confluence of relevant factors was not used to limit the scope of the law to an individual object. Individual and collective analysis of multiple criteria has been a difficult issue for courts to grapple with. *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 298-99 (7th ed. 2009). The structural account would, however, indicate that collective attention is warranted to detect instances of evasion.

The most obvious example of when two relevant criteria could be combined to limit applicability to one object are instances in which the criteria are duplicative relative to a particular concern. This happens, for example, when one criterion is subsumed within another broad criterion. The appearance of two independently relevant criteria like this would suggest they were combined to limit the law's reach to only one object. *See* Town of Secaucus v. Hudson Co. Bd. of Taxation, 628 A.2d 288 (N.J. 1993).

138. By "purpose" I mean the goals legislation reasonably appears to achieve. I choose the term "legislation's purpose" rather than "legislative purpose" for this reason. The term allows this purpose to be shown by those things that convention places within the institution of legislation, like committee reports, preambles, and the like. RONALD DWORKIN, A MATTER OF PRINCIPLE 321 (1985). I do not refer to any sort of psychological understanding of purpose. Personifying legislative bodies and saddling courts with inquiries concerning multi-member bodies' "motive", "intent", or "purpose" is fraught with difficulty. *See id.* at 321-24. *See generally* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005).

Another way of thinking of legislation's purpose is to ask whether the effects of a statute played a causative role in its adoption. Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1439 n.128 (1994). Often this sort of inquiry is used to judge whether or not an illicit effect played such a causative role in the law's creation that it should be deemed unconstitutional. Inquiries that care only about illicit effects, however, do not require such an inquiry. Inquiries that make unconstitutionality turn on illicit purpose, however, do require such an inquiry.

Yet other accounts can be found in BINNEY, *supra* note 8, at 59, 71-77; Joseph Tussman & Jacobus tenBroek, *The Equal Protection* laws, 37 CALIF. L. REV. 341, 344-47 (1949); C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933, 972-84 (1983); Hans A. Linde, *Due Process of Lawmaking* 55 NEB. L. REV. 197, 213 (1976).

139. Indeed, it may run contrary to the evasion-based inquiry. As long as the characteristic exists in fact and is relevant (i.e., serves a legitimate end), it would appear the legislature did not act evasively.

For example, there is little reason in our pipeline hypothetical to judge the 25" limitation or the pipeline limitation in terms of whether it is serving a legitimate, important, or compelling interest. All this doctrine needs to do is determine whether or not it is serving some purpose other than operating to limit the classification to TransCanada. So the first step is, simply, identifying the purposes from sources the court is willing to use.

In determining what the legislation's purposes are, a court need not entertain any reasonable purpose supported by the text. An "any legitimate purpose the judiciary can imagine" standard may overlook instances in which a legislature framed a class evasively. For instance, if the judiciary explains criteria with purposes that played no part in the legislation's creation, it may unwittingly overlook evasion. Still, if the pipeline legislation included no articulation of economic impact, then attributing the size limitation to a concern for the differential economic impact on smaller pipelines might mask an instance of evasion.

The solution to this sort of oversight is to examine only those purposes appearing in whatever places the court concludes are within the convention for determining legislation's purpose—purpose statements in the legislation, committee reports, floor debates, or whatever.[140] When the legislature provides this guidance, the inquiry is more robust than one where courts imagine purposes that explain the criteria. It also operates to place a burden on the legislature to articulate its purposes in the legislative process, and it reduces the risk that the judiciary will be seen as grasping (or failing to grasp) for purposes to support its conclusions.

Requiring a legislative articulation of purpose has another laudable aspect to it. I have been careful thus far to use the term "purposes" instead of "purpose." Legislation, like any other exercise in judgment, involves trade-offs concerning multiple ends. Often courts characterize legislation's purpose as singular and judge classifications with regard to that. This is a problem because some criteria might reflect a middle ground between two legitimate, but conflicting purposes.[141] Focusing on one purpose to the exclusion of others can

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An inquiry that requires criteria to serve a higher purpose necessarily means that some classifications that server legitimate ends would be deemed unconstitutional. Such an inquiry would go beyond evasion, detecting only a lack of sufficient justification, not necessarily an instance of evasion.

In fact, one could argue that the ends can be any ends. If the rationale articulated violates some other constitutional norm, then those other constitutional norms can strike the law as unconstitutional. Here, after all, the inquiry is wholly tied to distinguishing between laws that are framed in general terms that are there to identify an object and those that are framed in general terms for other reasons. To conclude, for example, that the ends must at least be legitimate is to introduce an array of constitutional norms into the mix, some of which may be much different in state constitutions than they are as a matter of federal constitutional law. See GILLMAN, *supra* note 79; Haman v. Marsh, 467 N.W.2d 836 (Neb. 1991).

140. Notably, the choice about what to include in the convention raises its own questions about the ability of legislators to submarine legislation's purpose or artificially manufacture it.

141. See Courtney Simmons, *Unmasking the Rhetoric of Purpose; the Supreme Court and Legislative Compromise*, 44 EMORY L.J. 117, 131-32; Landgraf v. USI Film Prods., 511 U.S. 244, 286 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main

result in invalidity when the legislature was simply balancing competing policies. Instead, courts should expand the scope of the inquiry to consider the more realistic prospect that many different goals, trade-offs, and compromises are made in legislation, all for legitimate policy reasons. This can be accomplished by allowing the legislature to articulate the purposes by which the legislation will be judged.

*Examining Factual Distinctions*

With purposes in mind, the test next examines factual distinctions for their existence. A judiciary could reasonably conclude to go beyond an "any state of facts" line of inquiry to place some burden on the legislature to investigate its hunches. This, in turn, allows a review of something that has come before the legislative body rather than a wide-roaming inquiry driven by imagination (or perceived to be driven by policy preference).[142] The failure of a factual distinction to emerge confirms that the legislation is evasive. The doctrine may, however, need to give the legislature a fairly wide berth when reviewing these matters. Factfinding that doesn't pan out, but which appeared reasonable, doesn't indicate evasion as well as alleged distinctions that have no basis in reality.

The inquiry should also focus on those excluded from the small class that triggers review: "The test of a special law is the appropriateness of its provisions to the objects that it excludes."[143] Underinclusiveness is, of course, the problem with special legislation. Thus, a showing that members of the small class covered by the law exhibit relevant factual differences is irrelevant to an evasion inquiry. Overinclusiveness is not a problem from a special-legislation perspective.[144]

Consider, again, the pipeline hypothetical. Suppose an environmental concern for groundwater supplies emerges from the conventional place and constitutes a purpose of the legislation. Suppose that a concern for economic impacts on small-capacity pipelines also emerges from the conventional place.

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goal.").

142. See Clark, *supra* note 16, at 653-54 (criticizing the Kansas Supreme court for inconsistently deferring to legislative factual judgments and taking judicial notice of facts that indicate it is using its own policy preferences to decide cases).

143. Mooney v. Board. of Chosen Freeholders of Atlantic County., 299 A.2d 426 (N.J. Super. Ct. Law Div. 1973), *aff'd sub nom.*, 310 A.2d 502 (N.J. Super. Ct. App. Div. 1973). The reasons for the classification criteria cannot be adequately evaluated simply by a showing that those included are worth regulating. Indeed, the merits of regulating those included are of little use to the question of evasion. This observation is consistent with the notion that special laws withhold their treatment from others, as well as the theory that this doctrine is gathering as much legislative attention as possible.

144. This distinguishes the inquiry from that occurring under the Equal Protection Clause of the 14th Amendment of the U.S. Constitution in two ways. Underinclusiveness, not overinclusiveness, is clearly the problem. And there is a means by which under- and over- inclusiveness can be separated—by looking to the small class under review. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 301–03, § 18.2(b) (4th ed. 2007); Railway Express Agency v. N.Y., 336 U.S. 106, 109–11 (1949) (rejecting the idea that underinclusiveness matters).

The court's examination of factual distinctions would be undertaken with these purposes in view. Thus, it would ask whether pipelines present environmental risks that are different than other polluters. And it would ask whether or not small pipelines are different than large pipelines in terms of their ability to bear the costs associated with this regulation, their environmental risk, or both. Again, deference may be in order.

*Examining Relevance*

The final part of this test overlaps to a large extent with the inquiry into factual distinctions. That inquiry requires that factual distinctions be substantiated. Of course, no one would identify a factual distinction for substantiation without some purpose in view. Thus, the factual distinctions the prior inquiry detects should be relevant to the purposes in view.[145]

The point of mentioning the notion of relevance as a third inquiry, however, is to simply stress the point and differentiate relevance from higher standards. Some equal-protection tests, for example, require that classification criteria be "necessary to" or "substantially serve" a governmental purpose.[146] The need for this sort of heightening is absent from an evasion perspective.

With the pipeline law, for example, the purposes the legislature articulated determined which factual distinctions to examine in the prior inquiry. Relevance should emerge with such an inquiry. If it does not, then it suggests the criteria were employed for no other reason than to identify TransCanada.[147]

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In sum, an appropriate standard for these inquiries—one upon which a failure shows evasion—takes a legislation's purposes from a set of sources

145. For the sake of brevity, I do not address the problem of framing purposes at broad or narrow levels and how that might impact the design of this test. *See* Suzanne B. Goldberg, *Equality Without Tiers*, 77 SO. CAL. L. REV. 481, 541–44 (2004) (discussing the breadth of justifications and how it factors into equal-protection analysis and proposing the use of an "extracontextual inquiry" to determine whether the "justification for official distinctions based on a trait is so general that it would support discrimination based on that trait in virtually any context"). However, it could be that the focus of these inquiries on distinctions, rather than focusing on the class included, drives purposes to be framed at levels that show relevance.

146. 3 ROTUNDA & NOWAK, *supra* note 144, at § 18.3.

147. Indeed, as with purpose, heightening the standard of relevance would tend to falsely detect problems. Thus, if necessity were the standard, then the prospect of using other means casts doubt on the use of the relevant criteria selected. So if there were ways of distinguishing pipelines' environmental risks that are better than pipeline size, like performance history, then a court might conclude the distinction employed was not relevant enough. The existence of another way to accomplish the purpose, however, risks moving from a concern for evasion to one of sufficient justification. So long as size matters, it would appear relevant and, thus, raise no concern.

Similarly, if no differential economic impact distinguishes large-capacity pipelines from small ones, then the legislation would fail the second inquiry. Requiring that the distinction be very significant risks going beyond the purpose of the inquiry.

within the convention the court is willing to use, evaluates the classification criteria for a low, but substantiated level of factual support, and judges their relevance under a relatively weak standard. A legislative classification identifying a single object (or very few) and failing to pass muster means the legislation withholds its coverage from similarly situated objects and is functionally special. If it passes muster, then the legislature responded to a narrow problem that happened to be presented by very few existing objects and the law should retain its general status.

2. A Process Justification

What I have said above belies the variations that one encounters in the case law. Generally speaking, however, class-legislation inquiries range from those that match deferential rational-basis review under the Fourteenth Amendment's equal-protection clause to inquiries that are similar to the one I have presented. From a federal equal-protection standpoint, a more demanding review is somewhat alarming[148] when it is deployed (as is often the case) to review economic or social legislation. Such a review appears heightened relative to the run-of-the-mill rational-basis review that the U.S. Constitution would demand.[149]

The structural rationale, however, provides a justification for a more invasive judicial role here.[150] Recall that legislation triggering this review applies only to a very narrow class—something akin to a class of one. Such a class raises questions about legislative scrutiny. Thus, one can justify judicial review as a means of ensuring that the legislation was the product of a legitimate legislative process. To the extent the inquiry rises above rational-basis review and puts the judiciary in a less-than-deferential role, such concerns can be met with the underlying structural rationale for these provisions: the legislature is not well-suited to write laws dealing with very narrow classes. The judiciary may, of course, not be well-suited to write laws either, but its role as a check on legislatures in these sorts of circumstances can be justified on process grounds.[151] Notably, however, judicial review of legislation involving

148. It is not, however, alarming to everyone. Goldberg, *supra* note 145, has argued that class-legislation review from state courts is a better approach to equal-protection jurisprudence than the standard three-tiered approach. *See also* Saunders, *supra* note 69.

149. One can legitimately question the need to answer such a criticism. On the one hand, it is clearly not the case that a more stringent review here runs afoul of equal-protection doctrine. This is not equal-protection doctrine. But it could run afoul of the reasons that underlie present rational-basis review, like judicial competency. Interestingly, however, judicial competency in state courts is often not a question involving democratic accountability. I consider the impact of inter-branch lawmaking capacity below, in Part IV.B.3.

150. *See* Friedman, *supra* note 8, at 461 ("If the prohibition against special laws exists, however, to prevent corrupt legislatures from adopting corrupt legislation, then it would be silly to leave its enforcement to the legislature").

151. For constitutional-law scholars who are familiar with *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), and the "discrete and insular minorities" idea of ratcheting up the standard of review, this should sound a familiar note. The main difference between that take on equal-protection doctrine and this take on special-legislation doctrine is the presence of a metric by which to identify the

larger classes raises all of the objections that support a more deferential standard, including relative institutional capacity.

Courts could, of course, opt for a modern version of rational-basis review, akin to that found under the Fourteenth Amendment. And many have. This is appropriately deferential to the legislature under many theories of how judicial review should work. But, again, the institutional reasons for deferring are missing in this context. The structural rationale reveals as much.

### *B. Doctrinal Innovations*

The best understanding of the special-legislation doctrine is that it imposes a check on evasive legislatures by testing general laws that apply to very small classes. Such laws pose the dangers associated with special legislation. The tests operate to confirm that such laws are functionally special. That is, general laws failing these tests, like special laws, limit their application by withholding similar treatment to similar objects that would enter the class in the future or arbitrarily withhold their treatment from other similar present objects.

Three possible doctrinal modifications emerge from the idea that the special-legislation doctrine identifies functionally special laws. The first would bring more precision to the doctrine by reconfiguring the trigger for judicial review. The second would expand the doctrine to larger classes by drawing upon the notion of legislative scrutiny and reconfiguring the role of the closed-class and class-legislation tests. The third would expand the overall scope of the doctrine by considering the lawmaking capacity of other branches of state government. I conclude the first modification would be theoretically sound, though practically difficult. But I conclude the second and third would carry the doctrine too far afield. Considering all three, however, deepens our understanding of why some general legislation is a problem.

#### 1. Triggering Judicial Review

The most important reason for triggering judicial review of general laws applying to very small classes is the risk that such laws will lack sufficient legislative scrutiny.[152] This was a fundamental reason why special laws were restricted. Legislative scrutiny is driven by public awareness, which is driven by the impact of legislation. Without a sufficient impact and the awareness it engenders, legislators are unlikely to scrutinize what is before them, likely to engage in problematic logrolling, or both. There is also little reason to develop information relevant to the merits of the legislation. And the lack of public awareness was at least partly responsible for the appearance of impropriety

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sort of legislation that should trigger a more demanding judicial review. *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1391–92 (2011). As I explain in Part IV. B.1, below, that metric appears to be the narrow distribution of constituency impact.

152. *See supra* Part II.A. The matter is somewhat akin to the idea of political powerlessness or discreet and insular minorities. *See supra* note 151.

associated with special laws.[153]

Indeed, public awareness is such an important aspect of special legislation that some state constitutions allow special laws once the public is made aware of the legislation.[154] That is, special laws in many states are allowed if notice is posted to inform the public about the legislation. In those states, public awareness (or at least the prospect of it) guards against the primary danger of special legislation. A similar approach can be taken with the special-legislation doctrine when courts ask whether legislation is functionally special.[155] Below, this section explains how this could occur by rethinking the trigger for judicial review.

As an initial matter, it is worth noting that there may be no need for rethinking the trigger. The closed-class and class-legislation tests do not impose significant burdens on legislation. If the legislation applies to a very small class, the class must simply remain open and not be arbitrary. Nonetheless, the doctrine does operate to restrict legislative authority and, thus, the need for judicial oversight should be demonstrated before a court reviews legislation. Thus, it is worth exploring how one might design a more accurate trigger.

Class size is a rough proxy for a risk of insufficient legislative scrutiny akin to that accompanying special legislation. For example, the generally framed pipeline regulation weaved throughout Part III is continuously exposed to judicial review only because it presently applies to one object—TransCanada. And it is reviewed even though there is no danger of a lack of legislative scrutiny approaching that of archetypical special laws. Perhaps there are better ways of triggering review that would tie the doctrine closer to its structural rationale and the risk of insufficient legislative scrutiny.

Legislative scrutiny is a function of public awareness and its effect on legislative debate. To assess public awareness, a court would need to concern itself with the legislation's coverage, its indirect impacts on constituents, its subject matter, its operation over time, and constituency cognizance. This list is, of course, not exhaustive. But it at least sheds some light on what a finer-grained analysis would entail.

Public awareness will vary depending upon the objects the law covers. A law can deal with people, political subdivisions, entities, or whatever. Laws that deal with large numbers of people and expose them to some legal

153. A great deal of it was also due to the appearance of legislation naming its object and the ex-parte aspects of lawmaking, but some was surely attributable to the limited impact of the legislation. This, in turn, likely fosters a sense of distrust borne of a perception that only some get access to the legislative apparatus. *See supra,* Part II.

154. *See supra* note 99.

155. A court might resist arguments about constituent awareness in the absence of a notice provision. After all, if the drafters did not include one, they may have made a judgment that awareness was not enough. On the other hand, it is just as likely that the drafters concluded that a published public notice was insufficient to establish such awareness. Thus, the absence of such a notice provision says little about whether constituent awareness should be used as part of a trigger for judicial review of general legislation.

consequence are likely to garner attention from the public. But laws that deal with other objects may or may not, depending upon the numbers of people underlying those objects. In the case of a city, the matter would depend upon the size of the city. In the case of an entity, the matter would depend upon, for example, the number of owners. The point, of course, is to assess the legislation's coverage in term of the electorate.

Assessing legislation's coverage considers the direct impact the legislation has on the electorate. However, legislation can have small impacts within its coverage and large impacts on people that it does not cover. Perhaps the best way of determining the prospect of impact from coverage or more indirect impacts is to consider the subject matter. Depending upon the subject (taxation, environmental protection, economic regulation, social legislation, etc.), one can get a better sense of the ramifications to both the covered population and the indirect impacts on those not covered.

Temporal considerations associated with these aspects of legislation are also significant. The prospect of future coverage or future effects serves to garner public attention.[156] The future applicability of legislation also has an important impact on public awareness.

More direct evidence of constituency cognizance can also help determine legislative scrutiny. In this regard, evidence of public outcry or support would be relevant, as would evidence that emerges from evaluating the legislative history. But a look at legislative history should be careful to detect evidence of constituent involvement rather than debate among legislators. Nineteenth-century constitution writers were concerned with the law's impact on constituents and public awareness as drivers of legislative debate. The mere existence of legislative attention, without the prospect of some impact on legislators' constituencies, is little evidence of a legitimate process and may simply indicate problematic logrolling.[157]

Public awareness is, however, only part of a legislative-scrutiny analysis. In addition, public awareness must be distributed at a broad enough level to engender legislative scrutiny within a representative lawmaking body. The representative nature of the legislature raises geographic considerations that are relevant to the question of legislative scrutiny. Consider, for example, my divorce law. There, the lack of legislative scrutiny was tied not only to the limited impact of the legislation, but also to its geographic distribution. Only one or two legislative districts were impacted. Even if other constituents had some reason to care, their attention would be unlikely to generate legislative scrutiny if they were not from other legislative districts where they could get the attention of their representatives. Thus, a finer-grained trigger should take

156. This aspect of public scrutiny is also reflected within the closed-class test. Its consideration here uses the concern to help justify judicial review.

157. For a similar political-process perspective of laws that make changes to evidentiary or procedural laws in a way that masks their effect on substantive law, *see* Martin H. Redish & Christopher R. Pudelski, *Legislative Deception, Separation of Powers, and the Democratic Process: Harnessing the Political Theory of* United States v. Klein, 100 NW. U. L. REV. 437 (2006).

into account the geographic distribution of impacts across legislative districts,[158] looking for instances in which the distribution is isolated to one district (or very few districts).[159]

An example of how this would work helps illustrate the consequences of reconfiguring the trigger. Consider, again, the generally framed pipeline legislation. Above, the legislation triggered review even though it was general because it applied only to one pipeline company. With a reconfigured trigger, this law would get no judicial review under the special-legislation doctrine because the size of its class would not trigger judicial review. Rather, the political attention and impact of the legislation would serve to alleviate concerns about legislative scrutiny and, thus, a court would leave the matter to legislative judgment.[160] This would be true even if the class it created were closed or arbitrarily defined. This is acceptable because such a law could not be functionally special—it would lack one of the key attributes of such a law and, thus, eliminate one of the key reasons for extending the restriction on special laws to general laws.

One could object to this result on grounds that sound similar to evasion.[161] That is, allowing this law to escape judicial review allows the legislature to effectively write a law for TransCanada without identifying TransCanada. Indeed, it does. But the law is not special, as it would be if it identified TransCanada.[162] And it cannot be functionally special because it raises no risk

158. Similarly, legislation that involves a set of interests that are located beyond the state's boundary pose a legislative-scrutiny problem. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 431 (3d ed. 2006) (mentioning the political process and virtual representation theories of the dormant commerce clause doctrine); BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 6.06 (2d ed. 2013).

159. This becomes particularly relevant with political subdivisions. Those that exist wholly within one legislative district create legislative scrutiny concerns when they are identified with a special law. Those that cross district boundaries do not create as much of a problem, but the point at which enough legislative districts are implicated to alleviate concerns for legislative scrutiny is unclear.

A city involving multiple districts may still pose legislative scrutiny concerns. Legislators may, for instance, band together to act as one and shield the matter from legislative scrutiny through criteria that effectively name their city. This raises nearly the same concerns as individualized treatment. In any event, these laws are probably better evaluated with regard to the term "local" because it may involve additional concerns. But individualized treatment of such objects raises questions of legislative scrutiny that are within the scope of that term.

160. Similarly, under this approach, a law involving a large class with an impact that is isolated would cause concern and be subject to review to ensure the legislative apparatus did not malfunction.

161. One could also object on grounds that ring of justification. That is, legislative scrutiny should not justify laws that close their classes or are arbitrary. That argument, however, misses the point. The idea is not one of ex-post justification. Rather, it is one of determining when judicial review and its effect on legislation should be triggered. It thus puts the cart before the horse to argue justification. The questions of closed-classes or arbitrariness are logically subsequent to the question of whether judicial review is necessary.

162. This may appear somewhat odd because a law that names TransCanada would clearly be special, even though it creates no risk of insufficient scrutiny. But restricting special laws carries with it such a long history of abuse that a prophylactic rule is justified. And the constitutional text demands that special laws be restricted. When the doctrine extends the rules on special laws to general laws, it must remain tied to the reasons why special laws are a problem. So regardless of how a bill naming TransCanada would be treated, a bill that does not name it can only trigger review if it raises the concerns underlying special laws. An expanded trigger reveals that there is no such concern here.

of insufficient legislative scrutiny. Testing the law's classification for open status or arbitrariness is therefore beyond the scope of the special-legislation doctrine.

In the end, a finer-grained trigger geared at the risk of insufficient legislative scrutiny is theoretically sound. But it may be fraught with too many difficulties. It raises a number of considerations involving geography, coverage, indirect impacts, temporal considerations, subject matter, and constituency awareness. The very-small-class-size trigger, on the other hand, is easy for the judiciary to apply and it gives legislators guidance as to when they should expect judicial review. That review is not altogether demanding, but understanding the prospect of such review is important to establishing a record that will enable the judiciary to see the legislature's work. A trigger that is more like a standard risks uncertainty. If the standard becomes uncertain and difficult to apply, the judiciary is given an opportunity to overreach (or exposed to the risk that it will be seen as overreaching).

2. Enhancing Legislative Scrutiny

The most basic problem underlying special laws is the risk of insufficient legislative scrutiny. The concern for legislative scrutiny is, in turn, tied to the impacts legislation has. Thus, one could frame the problem of special legislation as involving legislation that was crafted to avoid legislative scrutiny by confining the legislation's impact to an identified object. Functionally special legislation could be said to pose the same problem.

This idea of limiting impacts reveals a different account of the special-legislation doctrine. That is, the doctrinal tests can be understood as ensuring that as much legislative scrutiny is brought to bear on a piece of legislation as possible under the circumstances. Opening the classification and requiring the extension of the legislation's treatment to similarly situated objects extends the impacts of the legislation. This, in turn, raises public awareness and, thus, has a beneficial impact on the prospect of legislative scrutiny. It also accommodates the legitimate need to deal with problems affecting very small classes by operating to ensure that the impacts extend as far as can reasonably be expected under the circumstances.

This understanding of the role the special-legislation doctrine plays is consistent with the structural rationale for these provisions. However, this understanding should not be taken too far. Even though the special-legislation doctrine could be said to extend the impacts of legislation, this should not mean that special-legislation provisions require the extension of impacts in all legislation. The key limiting factors are the constitutional text, its restriction on special laws, and the structural rationale that underlies it.

Special laws, of course, involve restrictions on the impact of legislation. But not all legislation with limited impacts is special legislation. With special legislation, the impact is so narrow that there are concerns for legislative capacity and appearances of impropriety that are implicated by the very low level of legislative scrutiny likely to ensue. When the legislative classification

expands, the danger of insufficient scrutiny does not exist at nearly the same degree.

The one thing a law providing individualized treatment has in common with a law involving a larger closed class or a larger arbitrarily selected class is that a portion of the votes supporting it was attributable to the limitation. If the special-legislation doctrine were expanded to larger classes, it would no longer police legislation that runs the risk of flying under the radar. Rather, special-legislation provisions would enable the judiciary to strike down legislation that passes because marginal votes were obtained by closing the class to future growth or arbitrarily limiting its size. The concern for special legislation does not extend that far.[163]

### 3. Considering Inter-branch Lawmaking Capacity

Other branches of state government are relevant to special-legislation provisions, even though these provisions only apply to the legislature.[164] Recall that the concern for legislative capacity grew out of the ability of the legislature to verify the claims that an individual made when coming to the legislature for individualized treatment. Other branches are better suited to performing that task, so these provisions were adopted to push individualized attention to those branches. The concern attending individualized treatment can therefore be explained in terms of legislative capacity or expanded into a judgment that another branch of state government is more suited to a particular task than the legislature. If the concern for legislative capacity can be broadened to a notion of inter-branch suitability, the lawmaking capacity of the other branches of government would be highly relevant to the question of

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163. Constitutional provisions that reflect broader concerns for equality, however, might. Thus, there is an argument for using this sort of a process-based rationale for provisions susceptible to broader application. Justice Jackson offered this rationale for the Equal Protection Clause in *Railway Express*, concurring with the Court's judgment, but rejecting the notion that underinclusiveness was not a problem:

> Invocation of the equal protection clause . . . . merely means that the prohibition or regulation must have a broader impact . . . . The framers of the Constitutional knew, and we should not forget today, that there is no more effective practical guarantee against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

Railway Express Agency v. N.Y., 336 U.S. 106, 112-13 (1949); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1447-48 (2d ed. 1988); Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) (arguing that special interest legislation should be broadened judicially); Ethan Klingsberg, *Contextualizing the Calculus of Consent: Judicial Review of Legislative Wealth Transfers in a Transition to Democracy and Beyond*, 27 CORNELL INT'L L. J. 303, 337–40 (1994) (explaining the equal treatment rationale of the Hungarian Constitutional Court).

164. Local governments are probably also relevant, but I do not address the vertical separation-of-powers issues that may arise from these provisions. *See supra*, note 42.

what sorts of general legislation are problematic. Thus, the judiciary's[165] and the executive's roles would be relevant to the proper scope to give special-legislation provisions.[166]

Expanding or contracting the scope of the special-legislation doctrine on this basis would likely take the form of triggering review in cases of larger classes, ratcheting up the standards for excluding marginally relevant class members, or both. In the end, however, the suitability of other branches does not indicate superiority relative to the legislative branch. Thus, while these observations are interesting and shed some light on the question of why legislative bodies present unique structural problems relative to other branches, they do not constitute a convincing case for expanding special-legislation restrictions.

Inter-branch suitability is a difficult concept to pin down, especially in the state system. Unlike the federal system, where democratic accountability only acts as a check on the legislature and the chief executive, many states elect judges (or vote to remove them) and many other actors within the executive branch are directly elected. Considering their suitability to make law, vis-à-vis a legislature, is therefore not a question of democratic accountability. What it is a function of, however, remains unclear.

Perhaps the key distinction between these democratically accountable bodies and the legislature lies in the representative nature of each branch. Legislators are prone to logrolling (of the extreme sort seen in special legislation, or of the modest form seen in legislative dealmaking) because they each represent relatively large numbers of constituents and have plenary lawmaking power. Thus, narrow legislation that does not affect a member's constituency is likely to garner a vote from that legislator, in exchange for a vote on some other matter that has a similar low cost. And because the legislative body has plenary authority, this trading can occur across a broad range of subjects.

In other branches, this sort of exchange doesn't occur for two primary reasons: First, there may be a narrow scope of legal subjects upon which the branch (or set of actors within the branch) has lawmaking authority. Second, the branch (or set of actors within the branch) may have a different representative composition.

Take, for example, the lawmaking authority of the judiciary. An elected judge is responsible to all the voters in his or her judicial district, but judges do

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165. There is a great deal of evidence that constitutional drafters envisioned a robust lawmaking court. *See* TARR, *supra* note 22, at 122-24. Many state judges are, of course, elected and were made so during the same era in which special-legislation provisions were written into state constitutions. For the relationship between state legislatures and judiciaries, and how it differs in many ways from the federal system, *see* Michael L. Buenger, *Friction by Design: The Necessary Contest of State Judicial Power and Legislative Policymaking*, 43 U. RICH. L. REV. 571 (2008).

166. Alabama's constitution appears to recognize the link between judicial power and the definition of special laws, implying that special laws encroach on the judicial function: "No special . . . law . . . shall be enacted . . . when the relief sought can be given by any court of this state . . . ." ALA. CONST. art. IV, § 105. Also, many pre-adoption cases involving special legislation were resolved on separation of powers principles. *See supra*, note 110.

not come together to make decisions at the trial-court level. So while they may have a fairly wide range of subjects upon which they can act, the scope of their electorate is relatively broad with diverse and often conflicting interests. Moreover, while they make important decisions in individual cases, their operational structure does not often expose them to broader questions than those presented in a particular case.[167] While they may effectively write the law for a particular set of circumstances, they generally do not write law beyond the set of facts they are faced with.

At the supreme-court level, matters are somewhat different. There, a representative democracy exists, but the representative composition is different than in the legislature because there are so few judicial districts. Thus, the opportunity for vote trading based on a lack of impact is narrower than it is in the legislature because of the broad set of interests each judge represents. Cases also come to the Supreme Court with closed records, which complicates the ability to accommodate a particular party's position. The adversarial nature of the proceeding and doctrines like standing also limit, with judicial cognizance, the scope of information that the judiciary can consider. Thus, judges are somewhat hesitant when considering how the decision they reach will impact others not before the court. In addition, the culture of judicial impartiality provides an important check on democratic forces and hinders vote trading there.

Within the executive branch, the governor is largely immune from logrolling concerns. He or she simply has no one to trade with. As for administrative agencies under his or her auspices, the political accountability of the gubernatorial vote (through the appointment and removal powers) carries with it no logrolling concern because of the statewide electoral structure. Again, there are no votes to trade, even if there are political games to play. Other executive branch bodies, while they may be politically accountable and elected from districts, generally operate within narrow subject areas and have electoral districts at broader scales, which drastically limits the ability of actors within those areas to trade votes.

Matters are, of course, more complicated than this rough sketch. But an important point emerges: the question of what sorts of general legislation are problematic under the special-legislation doctrine is, potentially, a question informed by the suitability of other branches of government to make decisions that govern the electorate. To the extent the doctrine places matters off limits for the legislature, it does not limit the authority of any other branch of government to provide the same relief. Thus, while a broad special-legislation doctrine invites laws that become arbitrary in their application because the legislature cannot take account of relevant differences that exist at small scales, another branch may be able to deal with the problem.

The judiciary, for example, may be able to make exceptions and perform

167. This is not to say, of course, that judicial lawmaking does not occur at broad levels. The modern class action is one example of judicially attending to matters involving multiple members of the electorate. And, given the role of precedent, individualized lawmaking always has a governing impact.

interpretational moves that will ensure the legislative goals are achieved in application.[168] And, given the role of precedent, this is no less lawmaking than if the legislature had done it. Rather, the main difference is the institutional actor involved in the decision, and the characteristics of that institutional actor inform whether or not the judiciary should do it instead of the legislature. If, on the other hand, the special legislation doctrine restricts nothing more than general legislation involving very small classes, then the legislature's ability to fashion law that suits the complex society in which it will be deployed is preserved and the judicial role diminished. Thus, if we put the need for individualized or small-class treatment in focus, the question of how broadly or narrowly to interpret special-legislation restrictions involves inversely proportional scopes of judicial and legislative power. As legislative power decreases, the judiciary may take up the slack, and vice versa.

As for the executive, the parameters of the delegation doctrine could also influence the question of how much to restrict the legislature. Courts, interestingly enough, are the arbiters of this relationship, but they would do well to recognize this link, allowing a broader sphere of delegation where a broad special-legislation doctrine places a great deal off of the legislative agenda. With a narrower limitation, the delegation doctrine can be limited without sacrificing the ability of government to deal with problems at small scales.[169]

### *C. Enumerated Cases, General-law Preferences, and Associated Doctrinal Impacts*

The discussion in Part III created a two-step understanding of special-legislation provisions and their doctrines, concluding that these restrictions affect special laws and functionally special laws. That analysis overlooks what the restriction on such laws entails—what the rest of the text means, how it should be applied, and what impact it may have on the doctrine.

Recall that some special-legislation restrictions only prohibit special legislation on enumerated subjects. In all other matters, those provisions require that special laws be avoided when general laws can be used.[170] The case law often overlooks this distinction. In many special-legislation cases, special-legislation provisions are cited as prohibiting special legislation, the tests are quoted from an earlier case as the tests for detecting special laws, and then they are applied. Laws that pass muster are constitutional, while those that do not, are not.[171]

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168. There is sometimes constitutional protection afforded this role. *See, e.g.*, NEB. CONST. art. V, § 9 (protecting district courts' equity jurisdiction); K N Energy, Inc. v. City of Scottsbluff, 447 N.W.2d 227 (Neb. 1989) (stating that "[t]he equity jurisdiction of a district court is granted by the Constitution and legislature could not be legislatively limited or controlled").

169. There are, however, other reasons not to limit the delegation doctrine. Some matters, for instance, require the expertise of administrative agencies.

170. *See supra*, text accompanying note 37.

171. *See, e.g.*, Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251 (Ariz. 1990) (striking down

The outcome-determinative reasoning of these cases is textually problematic. The text says that special laws are acceptable, so long as they do not relate to an enumerated subject and a general law cannot be made applicable. If special laws are acceptable in some cases, but not others (as the provision says), then deploying doctrines that doom all functionally special laws is not textually sound.

These cases could be explained as strong approaches to evasion. That is, if the point of the special-legislation doctrine is to detect instances of evasion, one could argue that failing the doctrinal tests means that the legislature has broken the rules and, thus, its legislation should be struck down without further inquiry. However, evasion is premised upon the existence of a functionally special law, and the text allows special laws. The doctrine is the only thing that extends the constitutional rules on special laws into the realm of general laws. If the doctrine strikes down general laws simply because they are functionally special, it is exceeding the scope of the constitutional harm embodied in the text.[172] Thus, courts should take into account the rest of the text of these provisions.[173]

Within the enumerated subjects, the rest of the text is simple: no special law can be enacted. Thus, for example, if the hypothetical pipeline law fell within an enumerated subject, then it would simply be struck down if it were special (i.e., it identified TransCanada) or functionally special (i.e., it created a closed class or involved an arbitrary class).[174]

Beyond enumerated cases lies the general-preference clause—constitutional text mandating the use of a general law when one can be made applicable.[175] Thus, if a law is special or functionally special and does not deal with an enumerated subject, then it poses no constitutional problem unless a general law can be made applicable. Consequently, for example, the pipeline law might be allowed even if it is special or functionally special.

Most cases that address this language make a judgment using a justificatory standard geared at uniqueness. Justice Cardozo famously provided an example of such a test under the Maryland provision in a case reviewing a special law:

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a deannexation statute identifying a closed class); State Compensation Fund v. Symington, 848 P.2d 273 (Ariz. 1993) (en banc) (striking down a statute as special legislation where it irrationally classified the State Compensation Fund and required it to pay a minimum tax).

172. *See* Clark, *supra* note 16, at 643 (criticizing the Kansas Supreme Court for not making this second inquiry).

173. A few courts have recognized this. *See, e.g.*, South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003). Other provisions of state constitutions may also allow special or local laws. *See, e.g.*, Maple Run at Austin Mun. Util. Dist. v. Monaghan, 931 S.W.2d 941, 949 (Tex. 1996) (allowing a generally framed law that was deemed local because another provision of the Texas Constitution allowed local laws).

174. *But see,* Banks v. Heineman, 837 N.W.2d 70 (Neb. 2013) (concluding that a statute involving a closed class was constitutional even though it granted a corporation a special privilege because the legislature had a "reasonable basis" for doing so). Notably, *Banks* can be read as involving no special privilege and, thus, falling squarely within the general-preference provision.

175. In some states, the general-preference clause is all there is. The analysis provided here pertains to those states as well as states that have an enumerated list of subjects.

> The Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special form. The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand.[176]

Justice Cardozo's standard involves a "wide margin of discretion conceded to the lawmakers."[177] There is a strong argument that such discretion is inappropriate. The entire premise of restricting special legislation is that legislatures are not structurally fit to write special legislation. There is little reason to think they are structurally fit to determine whether or not special legislation is more appropriate than general legislation. The very problems that attend special legislation will attend the choice to use a special law in lieu of a general one.[178] Moreover, with a democratically accountable judiciary and a doctrine that triggers judicial review only of laws that amount to individualized treatment, the judiciary is suited to the task of reconsidering the merits of the legislative judgment. Thus, one could ratchet up the standard of review without offending the underlying rationale of these provisions. Given the structural rationale of these provisions, it may even be suitable to place the burden on those that defend such a law to justify its terms.

However, the point for present purposes is not to consider how that standard might be ratcheted up, but rather to consider how it affects the larger doctrinal landscape. General-preference tests, like Justice Cardozo's, do not affect the larger doctrinal landscape when applied to special legislation or functionally special, closed-class legislation. For example, the law naming TransCanada should be justified only upon a finding that there are very good, factually supported reasons to expose that pipeline company to exclusive regulation. Similarly, the closed-class pipeline law would be allowed if there are very good, factually supported reasons to expose pipelines with

176. Williams v. Mayor of Baltimore, 289 U.S. 36, 46 (1933). *See also* City of Malibu v. California Coastal Comm'n, 18 Cal. Rptr. 3d 40, 45 (Cal. Ct. App. 2004) (stating similar standard). *But see* Clark, *supra* note 16, at 636–37 (describing the Kansas Supreme Court's inconsistent use and standardless approach to the question of uniqueness, involving an expansive use of judicial notice and inquiries into legislative history).

177. *Williams*, 289 U.S. at 46.

178. *See supra* Part IV.A (considering a process-based justification for a relatively demanding class-legislation test geared at evasion); *Cf. Schrader v. Florida Keys Aqueduct Authority*, 840 So. 2d 1050 (Fla. 2003) (concluding the Florida Keys were so unique and of such statewide importance that naming them and allowing local governments within that area unique powers did not constitute a special or local law).

applications pending on a certain date to special treatment.[179]

However, when a law is functionally special because it fails the class-legislation test, matters are more complex. In many ways, the general-preference test looks like the class-legislation test that my framework uses to guard against evasion. Both are geared at the purposes underlying the legislation and the scope of the class relevant to those purposes. Assuming the parameters of these tests are the same[180] (though the standard may be higher under the general-preference clause[181]) there is no need to test functionally special laws involving arbitrary classifications for justification under the general-preference clause. Such functionally special laws have already been exposed to a relatively weak class-legislation test and they have failed. In all

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179. Although a fine and subtle point, the inquiry should not ask whether the pipeline company deserves special legislation. If the legislature wants to trigger such an inquiry, it should name the object. The court's inquiry should focus on the characteristics the legislature offers to define the class.

180. There is a line of Indiana cases that effectively concludes they are not. While defensible, they are ultimately unpersuasive. In *State v. Hoovler*, 668 N.E.2d 1229 (Ind. 1996), the court was faced with a law using population criteria that isolated Tippecanoe County and gave it taxing authority to clean up a Superfund site. *Id.* at 1231–32. The class was open, but the court concluded the legislation was "special" because population had nothing to do with the need for taxing authority. *Id.* at 1234. That is, the classification served no purpose other than to identify Tippecanoe County. Nonetheless, the court found that the special law was justified by unique conditions in that county, including a superfund liability. *Id.* at 1234–35. The court in *Municipal City of South Bend v. Kimsey*, 781 N.E.2d 683 (Ind. 2003), explained this case as resting on a distinction between "defining characteristics" and "justifying characteristics", concluding that even though the defining characteristics were arbitrary, there were justifying characteristics of the class member that made the special law constitutional. *Id.* at 691.

While the court's reasoning is defensible, it is unpersuasive. The doctrine should require the legislature to speak with the characteristics it finds relevant. That is, after all, one of the primary reasons for restricting it from naming names. Thus, it should have reasoned that the law was functionally special because arbitrary criteria were used to create a class of one. Effectively, that would end matters because the ensuing justification test would examine the same criteria under a standard that was at least as demanding.

The legislature could, of course, name the object. If it were to do so, the court would simply proceed to the justificatory test, unpaking the reasons why the legislature narrowed the class to the named object and judging whether those reasons are sufficient. To the *Kimsey* court, this meant that the law using arbitrary criteria to identify Tippecanoe County should be tested the same as a special law naming it. I agree, but the trick *Hoovler* used (and *Kimsey* explained) to generate a different result is ill conceived. It changed the parameters of the ensuing justificatory test to, incoherently, justify the arbitrariness found in the legislation's text. To do so, it looked to the class member to see if special treatment was justified. The inquiry should, however, remain with the class as defined.

When the inquiry remains on the classification criteria, it encourages legislative transparency and simplifies the judicial task. Whether the member of the class deserves special treatment is, of course, the right question when a special law or a functional special law is involved. But the court should examine the characteristics the legislature used to identify the class. Extending the inquiry to the class member encourages legislation that is evasive and unnecessarily complicates the judicial task by making it differentiate between defining characteristics (used to determine whether or not the law is functionally special) and justificatory characteristics (used to determine whether the functionally special law is justified).

Moreover, when the class is open to future entry (as was the class in *Hoovler*) future members will be able to get the special treatment accorded the present class member. They will, of course, have the defining characteristics, but they may have none of the justifying characteristics. The defining characteristics should be the only focus of the inquiry.

181. For instance, such a test could require that purposes be important and that taking account of the factual distinctions be necessary to achieve such a purpose. *See supra* Part IV.A (explaining how class-legislation inquiries should not become justificatory, but should rather remain geared at evasion).

cases, such a law would fail a general-preference test that is as stringent or more stringent.

The matter is somewhat tricky because passing the class-legislation test means the legislation is general and, thus, not subject to further review under the general-preference clause. For example, consider the open-class pipeline legislation, limiting its coverage to pipelines of a certain size. If that legislation passes the class-legislation inquiry, then it would be general and, thus, not subject to further inquiry. However, if that legislation fails the class-legislation inquiry, then it would be functionally special. Such a law should be exposed to another test to justify its use. However, because that law failed the low standard for detecting evasion, it would *a fortiori* fail another test that is at least as demanding. Thus, no further inquiry is needed.[182]

In effect, the class-legislation evasion test masks the presence of a general-preference justificatory test in cases involving functionally special laws with arbitrary classifications. This observation explains some cases that employ the class-legislation test in an outcome-determinative way to legislation that does not relate to an enumerated subject. Such cases are making an evasion inquiry, hopefully triggered by a very small class size. Laws that fail such tests are functionally special and should be available if they can be justified under the general-preference test. However, because the general-preference test involves the same sort of inquiry, perhaps in a more demanding form, there is no need to test the law again. In all cases, it would fail.

This is a sensible way of understanding the special-legislation doctrine in light of the general-preference language. There are, however, courts that interpret the general-preference language in a way that has a more far-reaching doctrinal impact. Some courts interpret that language as leaving the question almost entirely to the legislature. This ill-advised approach displaces all special-legislation doctrine outside of enumerated cases and overlooks the structural rational for these provisions.[183]

If the general-preference clause is interpreted to mean that the use of a special law is at the discretion of the legislature, then the court will make an evasion inquiry only in cases that involve enumerated subjects. This is because the status of a law as special, functionally special, or general largely does not matter in cases involving the general-preference clause. Even if the legislation constitutes functionally special legislation, there is no reason to apply the evasion tests because it is the legislature's prerogative to use a special or a general law. Thus, in some states, closed-class tests and class-legislation tests

182. This overlap may appear odd. There is one way of framing the doctrine to avoid it. A court could remove the class-legislation test from the evasion inquiry in cases that do not involve enumerated subjects. One cannot, however, move the class-legislation test from the evasion inquiry to the general-preference clause in all instances. Within the enumerated subjects, the class-legislation test must remain in the evasion inquiry. Otherwise, the doctrine would only prohibit general legislation that involves a closed class of one. Arbitrary classes of one would raise no problem even though such laws are functionally special.

183. In states with no list of enumerated cases, this approach displaces all of the special-legislation doctrine developed above.

are used only in cases involving enumerated subjects.

Colorado does this. It requires legislation on enumerated subjects to have an open, reasonable classification. Such legislation must involve a "real or potential class" rather than a class that is "logically and factually limited to a class of one and thus illusory."[184] But, under the general-preference clause, "the question of whether a general law could be made applicable is within the discretion of the General Assembly, and will not be disturbed absent an abuse of that discretion."[185] Also, "the size of the class becomes irrelevant."[186] The court is clearly failing to make an inquiry into whether a law is functionally special in cases that don't involve enumerated subjects. The reason is that it doesn't need to make such an inquiry. Because the general-preference question is for the legislature, there is no reason to apply the evasion tests. Indeed, a special law would get the same lack of judicial scrutiny.

Consequently, in Colorado, the hypothetical pipeline legislation would receive nearly no judicial review if the law did not involve an enumerated subject. And this would be the case if the law named TransCanada or used criteria to isolate it. However, if the legislation involved an enumerated subject, the inquiry would be different. Legislation that names TransCanada would be struck down. If the legislation uses criteria instead of a name, the court would use its evasion inquiries. If the law were deemed functionally special (or, as Colorado puts it, involves an "illusory class of one"[187]), then it would also be struck down.

Structurally speaking, the Colorado court's approach cannot be defended. There is no reason to leave to the legislature the question of whether a general law can be made applicable. Again, the entire premise of restricting special legislation is that legislatures are not structurally fit to write special legislation. There is little reason to think they are structurally fit to determine whether or not special legislation is more appropriate than general legislation. The very problems that attend special legislation will attend the choice to use a special law in lieu of a general one.[188] In fact, some constitutions have been amended in response to judicial doctrines like this, which place legislative foxes in charge of the special-legislation henhouse.[189]

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184. *In re* Interrogatory, 814 P.2d 875, 886 (Colo. 1991) (en banc). The Hawai'i courts have followed the Colorado approach, at least in enumerated cases. *See* Sierra Club v. Dept. of Transp. of State of Hawai'i, 202 P.3d 1226 (Haw. 2009).

185. *In re* Interrogatory, 814 P.2d at 885.

186. *Id.* at 886.

187. *Id.* at 887.

188. *See* Friedman, *supra* note 8, at 461 ("If the prohibition against special laws exists, however, to prevent corrupt legislatures from adopting corrupt legislation, then it would be silly to leave its enforcement to the legislature").

189. *See*, e.g., ILL. CONST. art. IV, sec 13; MINN. CONST. art XII, § 1; *see also* NAT'L MUN. LEAGUE, MODEL STATE CONSTITUTION 55-56 (6th ed. 1968).

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In sum, if a law is special or functionally special, then it should be struck down in enumerated cases without further inquiry. Beyond enumerated cases, special or functionally special laws can be employed, so long as a general law cannot be made applicable. The court should make this decision, and the test for justifying the use of special or functionally special laws should focus on why such legislation is necessary under the circumstances facing the legislature. Some functionally special laws (those failing class-legislation tests) will *a fortiori* fail a general-preference justification test.

## CONCLUSION

State constitutional law poses significant restraints on the ability of state legislatures to write some legislation. The special-legislation provision is one example. At its core, it restricts the legislature's ability to identify objects in legislation. While this may appear to be a minor matter of draftsman's form, it has a significant and underappreciated structural rationale that operates to place the legislature in a policymaking role and keeps it from becoming mired in attending to individual problems.

When fully appreciated, the judiciary's role and the tests courts employ come into sharper focus. The doctrine is, or should be, geared at reigning in evasive legislatures and detecting instances of functionally special laws. It does so by examining general legislation that applies to very small classes. If such a class is closed or bounded by arbitrary criteria that exclude similarly situated objects, then the legislation should be treated as functionally special. Such legislation should be struck down in enumerated cases or subjected to the same justificatory general-preference test that would apply had the legislature enacted a special law.

All of this is consistent with the text, the history, and the underlying structural rationale of these provisions. However, utilizing these provisions as individual-rights provisions does damage to the constitution drafters' design. Thus, judicial review should not extend to legislation involving classes that do not raise the problem of individualized treatment. Such reviews should be premised upon some other constitutional text that licenses courts to make such inquiries.

This study also reveals potential pitfalls that attend the structural understanding. For example, alternative process-based accounts of special-legislation doctrine may emerge, but they should not be taken to expand the scope of the doctrine to larger classes. And while there are concerns for inter-branch suitability that underlie these provisions, they should not operate to expand the scope of special-legislation doctrine.

There are, however, opportunities for doctrinal innovation. One identified here is taking a more fine-grained approach to identifying those pieces of legislation that raise the risk of insufficient legislative scrutiny and, thus,

deserve judicial review. Others surely will emerge with further study.

In short, special-legislation provisions reveal a host of interesting and important insights that this article has only begun to develop. The understanding developed here, of course, does not remove all uncertainty associated with special-legislation provisions. Nor does it remove all tools by which the judiciary may overreach. Class-legislation tests, for example, involve multiple inquiries that are difficult for the judiciary to perform and perform on a consistent basis. But my hope is that it provides guidance in an important area of constitutional law that often escapes rigorous consideration.