Maryland Law Review

Volume 78 | Issue 3 Article 2

Legislative Design and the Controllable Costs of Special Legislation

Evan C. Zoldan

LEGISLATIVE DESIGN AND THE CONTROLLABLE COSTS OF SPECIAL LEGISLATION

EVAN C. ZOLDAN*

ABSTRACT

Legislation that singles out an identifiable individual for benefits or harms that do not apply to the rest of the population is called "special legislation." In previous work, I have argued that special legislation is constitutionally suspect. In this Article, I explore the normative consequences of special legislation, assessing both the costs it imposes and the benefits that it can provide. Drawing on constitutional theory, public choice theory, and the history of special legislation, I argue that the enactment of special legislation is costly when it reflects the corruption of the legislative process and leads to low-quality legislation, unjustifiably unequal treatment, and legislative encroachment on the judicial and executive functions. By contrast, special legislation is normatively attractive when it addresses a problem unique to a particular location, when it addresses a matter of public concern, when it reduces rather than exacerbates disuniformity in the law, and when it provides relief for underrepresented political minorities. After considering these costs and benefits, I suggest modifications to the legislative process to diminish the costs associated with special legislation while still preserving its benefits.

INTRODUCTION

The Maryland statute creating a special exemption for Tesla did not single out the company by name, of course. But, lawmakers and media observers had no doubt that the statute's purpose was to allow Tesla, and no other carmaker, to circumvent the traditional manufacturer-dealer relation-

* Professor of Law, University of Toledo College of Law. I am grateful for the generous comments of Richard Briffault, Jeremy Kidd, Christopher M. Davis, Charles W. "Rocky" Rhodes, William P. Marshall, Kent Greenfield, James D. Nelson, Glen Staszewski, Matthew Steilen, Timothy Webster, Juliet P. Kostritsky, Jonathan H. Adler, B. Jessie Hill, Judith Welch Wegner, and Dan Friedman. Thanks also to participants in the Loyola University Chicago Constitutional Law Colloquium, the Southeastern Association of Law Schools Annual Conference, and the Yale/Stanford/Harvard Junior Faculty Forum. Thanks also to workshop participants from the faculty of Case Western Reserve University School of Law. This work was made possible by a University of Toledo University Summer Research Award and Fellowship. Thanks to Gregg Byrne for research assistance.

ship and sell cars directly to consumers.[1] The statute itself makes clear that it is limited to Tesla alone; it applies only to manufacturers that have no dealers in the state and that deal exclusively "in electric or nonfossil-fuel burning vehicles."[2] As Maryland's lawmakers knew, that description applied only to Tesla.[3] And to make sure that no upstart firm might later take advantage of the exemption, the legislature limited the number of licenses available under the new exception to four.[4] Observers noted at the time that the law was "specifically crafted for Tesla,"[5] and traditional automakers agreed to this exception only on the understanding that it "would apply to Tesla alone."[6] Maryland's "Tesla Law" is not unique. New Jersey and Washington, among other states, have passed their own Tesla Laws, ensuring that Tesla, and Tesla alone, can offer electric cars directly to consumers.[7]

Tesla Laws can be viewed, if taken in isolation, as the result of one company's shrewd lobbying and public relations campaign to obtain a market advantage. But, there is a richer story to be told—a story about the power of legislatures to single out named individuals for special treatment not accorded to anyone else. Statutes that grant special treatment to particular individuals—often called "special legislation"—are routinely, and often quietly, enacted by state legislatures and Congress every year.

The Anglo-American legal tradition reflects a suspicion of statutes, like Tesla Laws, that single out individuals for special treatment. Legal philosophers have long argued that special legislation tests the limits of what may be considered "law." John Locke wrote that the legislature may not "rule by extemporary arbitrary decrees."[8] Instead, it is confined to en-

1. Matthew Debord, *Maryland Carved out an Innovative Special Exception for Tesla to Sell Cars Directly to Consumers*, BUS. INSIDER (Apr. 15, 2015), https://www.businessinsider.com/maryland-carved-out-a-special-exception-for-tesla-to-sell-cars-directly-to-customers-2015-4; Angelo Young, *Tesla Motors Inc. (TSLA) Wins Approval for Direct Car Sales in Maryland, Starting October 1*, INT'L BUS. TIMES (May 12, 2015), https://www.ibtimes.com/tesla-motors-inc-tsla-wins-approval-direct-car-sales-maryland-starting-october-1-1918655.

2. MD. CODE ANN., TRANSP. § 15-305(e)(2)(i) (2018).

3. Debord, *supra* note 1.

4. MD. CODE ANN., TRANSP. § 15-305(e)(2)(ii).

5. Young, *supra* note 1.

6. Debord, *supra* note 1.

7. Daniel Crane, *Tesla, Dealer Franchise Laws, and the Politics of Crony Capitalism*, 101 IOWA L. REV. 573, 584–85 (2016); Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 439–40 (2017); Andrew Thurlow, *Washington Governor Signs Tesla Compromise Bill*, AUTOMOTIVE NEWS (Apr. 8, 2014), https://www.autonews.com/article/20140408/RETAIL07/140409837/washington-governor-signs-tesla-compromise-bill.

8. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 136 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

acting laws that are "common to every one of that society"[9] and that may not be varied "in particular cases."[10] Similarly, William Blackstone distinguished the concept of a civil law, which is "permanent, uniform, and universal," from a statutory order to a single individual, which he called "a sentence" rather than a law.[11] The United States Supreme Court invoked this long tradition when it noted that "not every act, legislative in form" can be considered "law."[12] Rather, "a special rule for a particular person or a particular case," including "acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another," are simply excluded from its definition.[13]

Modern philosophers of law, too, have struggled to explain whether a statute directed to a particular person can be considered law. In his seminal work, *The Concept of Law*, H.L.A. Hart wrestles to define law in a way that excludes the "gunman case"—that is, Hart seeks a definition of "law" that excludes the demand of an armed gunman to a bank clerk to hand over the money in his care.[14] One way that Hart distinguishes the demand of an armed gunman from the threat of punishment for violating a properly promulgated criminal law is the fact that the latter case, but not the former, requires the application of a generally applicable rule of conduct to a particular situation. Although a law sometimes can be directed at an individual, Hart argues, the "*standard* form" of a law "applies to a general class of persons who are expected to see that it applies to them and to comply with it."[15] In light of this distinction, the individualized order of a policeman, while resembling superficially the gunman's demand to the bank clerk, is quite different. The policeman enforces rules (for example, stop at stop signs) against particular individuals; but, the rules themselves are generally applicable—that is, everyone is bound to obey them. By contrast, the gunman's demand applies to the clerk alone.[16] Relying on this distinction between generally applicable rules and individualized commands, Hart concludes that "it is normally understood that . . . [a modern state's] general laws extend to all persons within its territorial boundaries."[17] Similarly, although stopping short of suggesting that every particularized statute falls

9. *Id.* at § 22.

10. *Id.* § 142.

11. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *44. By contrast, acts of Parliament that "only operate upon particular persons, and private concerns," called "[s]pecial or private acts," were required to be formally pleaded before judges would take notice of them. *Id.* at *86.

12. Hurtado v. California, 110 U.S. 516, 535 (1884).

13. *Id.* at 535–36.

14. H.L.A. HART, THE CONCEPT OF LAW 20–22 (2012).

15. *Id.* at 21.

16. *Id.* at 21–22.

17. *Id.* at 21.

outside the definition of "law," Lon Fuller argues that the generality of law is the "first desideratum of a system for subjecting human conduct to the governance of rules."[18] As a result, a system that fails to promulgate generally applicable rules has failed to make law.[19]

Whether special legislation is "law" is an issue separate from whether it is a normatively attractive way of setting legal rights and obligations. Philosophical arguments aside, therefore, we can ask whether a legislature *should* target an individual for special treatment not applicable to the population at large. This is not (merely) an academic question. Both state legislatures and Congress routinely enact statutes, like the Tesla Laws described above, that target a particular individual. Through special laws, Congress and state legislatures grant public funds to named individuals,[20] exempt particular people from generally applicable laws,[21] and even intervene in pending court cases to favor one litigant over another.[22] Identifying the normatively attractive and unattractive features of special legislation, and proposing ways that legislatures can minimize its unattractive features, are the subjects of this Article.

This Article is part of a long-term project that describes and defines the parameters of a constitutional principle that favors generality in legislation and disfavors special legislation. This principle, which I introduced in prior work,[23] may be called a value of legislative generality. A value of legislative generality finds support in the Constitution's history, text, and jurisprudential underpinnings. First, in the decade after independence, newly independent state legislatures enacted all types of particularized statutes. These statutes transferred title to land,[24] granted exemptions from the stand-

18. LON L. FULLER, THE MORALITY OF LAW 46 (1969).

19. *Id.* at 46–49.

20. Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013) (transferring $174,000 to named individual).

21. Act of Jan. 20, 2017, Pub. L. 115-2, § 1, 131 Stat. 6, 6; Priv. L. No. 111-1, § 1, 124 Stat. 4523, 4523–24 (2010).

22. Patchak v. Zinke, 138 S. Ct. 897, 905 (2018) (upholding a statute intervening in a particular, pending lawsuit); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1329 (2016) (upholding a statute picking the winner in one particular, pending case); *see* Evan C. Zoldan, *Is the Federal Judiciary Independent of Congress*, 70 STAN. L. REV. ONLINE 135 (2018).

23. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625 (2014) [hereinafter Zoldan, *Reviving Legislative Generality*]; Evan C. Zoldan, *The Equal Protection Component of Legislative Generality*, 51 RICH. L. REV. 489 (2017) [hereinafter Zoldan, *The Equal Protection Component*]; Evan C. Zoldan, *The* Klein *Rule of Decision Puzzle and the Self-Dealing Solution*, 74 WASH. & LEE L. REV. 2133 (2017) [hereinafter Zoldan, *The* Klein *Rule*].

24. COUNCIL OF CENSORS, *A Report*, *in* THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA, AS ESTABLISHED BY THE GENERAL CONVENTION 35, 40 (Philadelphia, Francis Bailey 1784) [hereinafter PENNSYLVANIA REPORT].

ing laws,[25] confiscated property from named individuals,[26] and punished political undesirables.[27] After a decade of suffering from social and economic dislocations caused by special legislation, the revolutionary generation wholeheartedly repudiated their legislatures' power to enact it. By the mid-1780s, in their writings, speeches, and debates, the revolutionary generation denounced their legislatures in no uncertain terms for "extending their deliberations to the cases of individuals."[28] On the eve of the drafting of the Constitution, ordinary and prominent members of the revolutionary generation alike made clear that American republicanism was inconsistent with the legislative imposition of privileges or burdens on identifiable individuals.[29]

Second, a value of legislative generality is supported by the clauses of the Constitution, and other constitutional principles, that disfavor legislation targeting identifiable individuals for particularized treatment. These clauses and principles include the Bill of Attainder,[30] Ex Post Facto,[31] Contract,[32] Equal Protection,[33] Due Process,[34] Takings,[35] and General Welfare[36] clauses, as well as the *Klein* rule of decision principle.[37] Although none of these provisions or principles is exclusively about legislative generality, each contributes to the value of legislative generality because each disfavors or

25. Address of the Council of Censors (Feb. 14, 1786), *in* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 58, 60–70 (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter VERMONT REPORT].

26. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 302 (1967).

27. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 279 (1969).

28. PENNSYLVANIA REPORT, *supra* note 24, at 38.

29. WOOD, *supra* note 27, at 401. For an extended historical argument about the revolutionary generation's rejection of targeted legislation, see Zoldan, *Reviving Legislative Generality*, *supra* note 23, at 669–79.

30. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; United States v. Brown, 381 U.S. 437, 441–42 (1965).

31. U.S. CONST. art. I, § 9, cl. 3; *id.* § 10, cl. 1; Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

32. U.S. CONST. art. I, § 10, cl. 1; United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

33. U.S. CONST. amend XIV; Vill. of Willowbrook v. Olech, 528 U.S. 562, 564–65 (2000).

34. U.S. CONST. amends. V, XIV; JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 52–53 (2003).

35. U.S. CONST. amend. V. The Court has recognized that "the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation." Kelo v. City of New London, 545 U.S. 469, 477 (2005).

36. U.S. CONST. art. I, § 8, cl. 1. The Court has suggested that appropriations must be limited to expenditures designed "to provide for the general welfare." Helvering v. Davis, 301 U.S. 619, 632, 640 (1937).

37. United States v. Klein, 80 U.S. (13 Wall.) 128, 144–47 (1871). The *Klein* rule of decision principle provides that Congress may not prescribe a rule of decision for the federal courts to follow in a particular pending case. *See* Zoldan, *The* Klein *Rule*, *supra* note 23, at 2133.

prohibits a certain type of particularized legislation.[38] For example, the Equal Protection Clause is primarily concerned with government classifications of individuals into groups according to some identifiable characteristic.[39] However, the Court has also emphasized that the Equal Protection Clause prohibits legislative specification by limiting the government's power to single out an individual as a "class of one."[40] Similarly, although the Due Process Clause has been applied to a wide array of government actions, one of its oldest applications prohibits the legislature from "taking the property of A and giving it to B."[41] In this same way, each of the above-noted clauses and principles reinforces legislative generality, either because of the effect given to it by the Court, its place in the constitutional structure, or the historical experiences that gave rise to its inclusion in the Constitution.

Third, jurists and philosophers of law have long argued either that targeted legislation is outside the legislative power altogether or that it is bad law. As noted above, Locke suggested that a statute singling out an individual for special treatment simply is not within the legislative power.[42] Moreover, commentators assessing the normative implications of special legislation have concluded that it is "unjust,"[43] "unfair,"[44] and iniquitous.[45]

This Article advances the broad project outlined above by assessing the costs and benefits of special legislation and suggesting modifications to the legislative process to reduce special legislation's costs without eliminating its benefits.

Part I defines special legislation and provides examples that elucidate its key features.

Part II describes the costs that special legislation imposes on society. Although not every special law imposes these costs, special legislation usually reflects some combination of the following: corruption of the legislative process; low-quality legislation; unjustifiably unequal treatment; and legislative encroachment on the judicial and executive functions.

Part III mounts a limited defense of special legislation. Special legislation persists despite the costs described above, in part, because special

38. Zoldan, *Reviving Legislative Generality*, *supra* note 23, at 653.

39. *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008).

40. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); *see* U.S. CONST. amend. XIV. For an explanation of the "class of one" doctrine, see Zoldan, *The Equal Protection Component*, *supra* note 23, at 525–31.

41. ORTH, *supra* note 34, at 52–53; *see also* Calder v. Bull, 3 U.S. 386, 388 (1798).

42. LOCKE, *supra* note 8, § 142.

43. Marcus Tullius Cicero, *On the Laws*, *in* ON THE COMMONWEALTH AND ON THE LAWS 173 (James E. G. Zetzel ed., Cambridge Univ. Press 1999).

44. FULLER, *supra* note 18, at 47.

45. VERMONT REPORT, *supra* note 25, at 67–68.

legislation can also benefit society. Specifically, special legislation can be a useful way to address a problem unique to a particular location, serve a public purpose, cure disuniformities created by the generally applicable laws, and provide relief for politically marginalized individuals.

Part IV suggests an approach to special legislation that is more nuanced than the one currently taken by the states and Congress. Many states broadly prohibit special legislation despite the benefits that it can provide. Federal law, by contrast, places almost no restrictions on special legislation despite its costs. Identifying special legislation's costs and benefits suggests, however, that neither of these approaches is optimal. Instead, both Congress and state legislatures can reduce the costs of special legislation without completely eliminating its benefits by modifying their rules of procedure. Specifically, legislatures should consider adopting one or more of the following procedural rules: a rule requiring that special legislation may be enacted only by a legislative supermajority; a rule requiring public notice and providing an opportunity for public participation before special legislation is enacted; and a rule prohibiting special legislation unless it is accompanied by an official statement of the law's purpose.

This Article offers a few contributions to the existing literature on special legislation. First, discussions of special legislation normally focus exclusively on special legislation enacted by state legislatures.[46] This Article, by contrast, draws on examples of both state and federal special legislation. By recognizing that both Congress and state legislatures enact special legislation, this Article is able to draw on a more robust set of examples and, as a result, is better able to evaluate special legislation's costs and benefits. Second, the costs of special legislation are often described as historically contingent—that is, commentators have described the costs of special legis-

46. CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6 (1894); WILLIAM BACKUS GUITTEAU, CONSTITUTIONAL LIMITATIONS UPON SPECIAL LEGISLATION CONCERNING MUNICIPALITIES 8 (1905); ROBERT LUCE, LEGISLATIVE PROBLEMS: DEVELOPMENT, STATUS, AND TREND OF THE TREATMENT AND EXERCISE OF LAWMAKING POWERS 532 (1935); Lyman Cloe & Sumner Marcus, *Special and Local Legislation*, 24 KY. L.J. 351, 356 (1936); Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 441 (2012); Clayton P. Gillette, *Expropriation and Institutional Design in State and Local Government Law*, 80 VA. L. REV. 625, 642 (1994); Thomas F. Green, *A Malapropian Provision of State Constitutions*, 24 WASH. U. L.Q. 359, 363 (1939); Frank E. Horack, *Special Legislation: Another Twilight Zone Part I*, 12 IND. L.J. 109, 115 (1936); Frank Horack & Matthew Welsh, *Special Legislation: Another Twilight Zone Part III*, 12 IND. L.J. 183, 183 (1937); Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 277–78 (2004); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 723 (2012); Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 43 (2014).

lation in particular time periods, including the colonial period,[47] during the confederation era[48] or the late nineteenth and early twentieth centuries.[49] This Article analyzes special legislation from a theoretical rather than a historical perspective, revealing that the costs and benefits of special legislation are not historically contingent. Third, although the costs of special legislation have been described by commentators, with limited exception, the benefits of special legislation have been overlooked.[50] This Article argues that, normatively, special legislation should not be treated monolithically. Rather, it can provide benefits as well as impose costs. Fourth, most recent work on special legislation (including my own work) has focused on whether special legislation is constitutional.[51] This Article considers whether, constitutional arguments aside, legislative rules can be designed to reduce special legislation's costs without eliminating its benefits altogether. As a result, this Article is addressed to legislatures—both state legislatures and Congress—rather than to state or federal courts.

I. SPECIAL LEGISLATION DEFINED

A statute that targets an individual or a small, identifiable group for treatment that is not imposed on the population in general is often called special legislation.[52] Although there is no universal definition, special legislation is most often defined as a statute that targets one, named person.[53]

47. RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 19–20, 64 (1917) (describing the flood of petitions that tied up the legislative process).

48. *E.g.*, EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 36–37 (1914); *see also* Bank Markazi v. Peterson, 136 S. Ct. 1310, 1331 (2016) (Roberts, C.J., dissenting); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995).

49. *E.g.*, BINNEY, *supra* note 46, at 6; GUITTEAU, *supra* note 46, at 8; Ireland, *supra* note 46, at 277–78.

50. *E.g.*, GUITTEAU, *supra* note 46, at 7–10; Ireland, *supra* note 46, at 271–280; *cf.* BINNEY, *supra* note 46, at 10, 174–75; Horack, *supra* note 46, at 113.

51. Gillette, *supra* note 46, at 631; Long, *supra* note 46, at 723; Zoldan, *Reviving Legislative Generality*, *supra* note 23, at 688.

52. *E.g.*, State *ex rel.* Atkins v. Lawler, 205 N.W. 880, 883 (N.D. 1925) ("[A] 'special law' . . . relates only to particular persons or things of a class, as distinguished from a 'general law,' which applies to all things or persons of a class . . . ."); State *ex rel.* Pub. Welfare Comm'n v. Cty. Court, 203 P.2d 305, 315 (Or. 1949) ("A special [law] . . . is only applicable to particular individuals or things."); BLACKSTONE, *supra* note 11, at *86 ("Special or private acts operate upon particular persons, and private concerns."); *see also* THOMAS ERSKINE MAY, THE LAW, PRIVILEGES PROCEEDINGS AND USAGES OF PARLIAMENT 824 (Gilbert Campion ed., 14th ed. 1946).

53. *See* ALA. CONST. of 1901, art. IV, § 110 ("A special or private law is one which applies to an individual, association or corporation."); Hurtado v. California, 110 U.S. 516, 535 (1884) (distinguishing a general law from a "special rule for a particular person or a particular case"); CCI Entm't v. State, 215 Md. App. 359, 396, 81 A.3d 528, 549 (2013) (holding that a "special law is one that relates to particular persons or things of a class, as distinguished from a general law

Despite this rule of thumb, defining special legislation poses some difficulty.[54] Individualized legislation is often,[55] but not always,[56] considered special. Moreover, legislation that targets more than one person, like two accused co-conspirators[57] or a handful of corporations,[58] also can be considered special, whether or not the statute specifically names its targets.[59]

The definitional difficulty stems from the fact that all laws apply to some class less than the total population.[60] Most of these laws are uncontroversial. For example, a law that taxes industrial property at a lower rate than residential property treats some members of the population differently than others. But, a targeted law like this is considered "general" rather than special because the differences between industrial and residential property

which applies to all persons or things of a class." (quoting Cities Serv. Co. v. Governor, 290 Md. 553, 567, 431 A.2d 663 (1981))).

54. LUCE, *supra* note 46, at 533 (noting that a law affecting one person may reflect a broad policy and a law generally written may affect only a few individuals); MAY, *supra* note 52, at 826–27 (noting the challenge of determining whether a statute is for the public or private benefit at the margins, but concluding that the distinction is useful); *see* Jeffrey Rosen, *Class Legislation, Public Choice and the Structural Constitution*, 21 HARV. J.L. & PUB. POL'Y 181, 184–85 (1997) (discussing the challenge of distinguishing between class legislation and public interest legislation).

55. *E.g.*, CCI Entm't, 215 Md. App. at 397, 81 A.3d at 549 (identifying a law as special if "a particular individual or business sought and received special advantages from the Legislature"); Perry Civil Twp. v. Indianapolis Power & Light Co., 51 N.E.2d 371, 374 (Ind. 1943) ("A special law is one made for individual cases . . . .").

56. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 472 (1977) (upholding a law singling out former President Nixon because it created a "legitimate class of one"); General Motors Corp. v. Dep't. of Treasury, 803 N.W.2d 698, 713 (Mich. Ct. App. 2010) ("[A law] may be general within the constitutional sense and yet, in its application, only affect one person or one place." (quoting Rohan v. Detroit Racing Ass'n, 22 N.W.2d 433, 441 (Mich. 1946))); Excise Bd. v. Lowden, 116 P.2d 700, 703 (Okla. 1941) ("[A] law may be general and yet have only one local application.").

57. People v. Canister, 110 P.3d 380, 381–82 (Colo. 2005) (statute creating class of two co-conspirators violated prohibition on special legislation).

58. Opyt's AMOCO, Inc. v. Vill. of S. Holland, 568 N.E.2d 260, 269 (Ill. App. 1991) ("Special legislation confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated.").

59. City of Topeka v. Gillett, 4 P. 800, 804 (Kan. 1884) ("[Legislation] may be special where it simply describes the particular persons or things so that they may be known, as well as where it gives their particular names . . . ."); Cities Serv. Co. v. Governor, 290 Md. 553, 569, 431 A.2d 663, 673 (1981) ("[S]tatutory provisions which did not name particular individuals or entities have been held to be prohibited special laws, whereas enactments naming specific entities have been held not to be special laws." (citations omitted)).

60. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343–44 (1949). Jeremy Bentham made the same point a century ago: "If we were to lay down as a principle that all men ought to enjoy 'equal rights,' we should thereby and of necessity render legislation impossible: for the law is ever establishing inequalities, as it cannot bestow rights upon some without, at the same time, imposing obligations upon others." JEREMY BENTHAM, 1 BENTHAM'S THEORY OF LEGISLATION 127–28 (Charles Milner Atkinson trans., 1914).

make the distinction "rational" or "reasonable."[61] Classification becomes controversial when the legislature appears to be conferring some unearned benefit or levying some undeserved punishment. Legislation that singles out an individual or a very small group in this way is often called special legislation.[62]

Two examples highlight some of special legislation's less obvious features. First, consider "Terri's Law," the well-known statute enacted to resolve the fate of Terri Schiavo. After Schiavo suffered cardiac arrest and fell into a persistent vegetative state, Schiavo's parents and husband battled over whether to withdraw her life support.[63] When a state court required her hospice facility to withhold food and water,[64] Congress enacted a statute allowing "any parent" of Terri Schiavo to bring suit in federal district court to redress this decision.[65] Through Terri's Law, Congress set aside the previous decade of state court litigation over Schiavo's intentions, permitting relitigation of previously adjudicated issues. The law was targeted to address Schiavo's situation alone: it applied only to "any parent" of Schiavo and specifically provided that it would not serve as a precedent for future legislation.[66] Limited to one event and providing relief for two people only, Terri's Law afforded a special exemption from general preclusion rules that apply to all other suits in district court.

Second, consider the statute that singled out a particular individual, James Mattis, and provided that he was eligible to be appointed Secretary of Defense.[67] This targeted statute was an explicit exception to the generally applicable law, which provides that a person may not be appointed Secretary of Defense within seven years of being relieved from active duty as an officer of the armed forces.[68] In Congress, the bill was introduced as "a one-time exemption on behalf of an individual;" proponents candidly acknowledged that the proposed legislation would not "permanently change the law."[69] To erase all doubt about the particularized nature of the statute,

61. *See* Citizens Against Range Expansion v. Idaho Fish & Game Dep't, 289 P.3d 32, 38 (Idaho 2012) (opining that if the state has a "legitimate interest" in enacting the targeted law, and the classification is not "arbitrary, capricious, or unreasonable," it is not a special law).

62. Zoldan, *The Equal Protection Component*, *supra* note 23, at 496; *see, e.g.*, Martin's Ex'rs v. Commonwealth, 102 S.E. 77, 80 (Va. 1920) (noting that special legislation often includes statutes "conferring special privileges and immunities, or special restrictions and burdens, upon particular persons or localities to the exclusion of other persons or localities similarly situated").

63. Barbara A. Noah, *Politicizing the End of Life: Lessons from the Schiavo Controversy*, 59 U. MIAMI L. REV. 107, 107–08 (2004).

64. *In re* Guardianship of Schiavo, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001).

65. Act of Mar. 21, 2005, Pub. L. No. 109-3, § 2, 119 Stat. 15, 15.

66. *Id.*; *see* Zoldan, *Reviving Legislative Generality*, *supra* note 23, at 629.

67. Act of Jan. 20, 2017, Pub. L. No. 115-2, § 1, 131 Stat. 6, 6.

68. 10 U.S.C. § 113(a) (2012).

69. 163 CONG. REC. H480 (daily ed. Jan. 13, 2017) (statement of Rep. Newhouse).

the statute itself provided that it was a "limited exception," applying "only to the first person appointed as Secretary of Defense" after the statute's enactment and "to no other person."[70]

Both Terri's Law and the Mattis waiver statute provide exceptions from generally applicable laws for known individuals. A close look at these statutes reveals a few of the peculiar attributes of special legislation. One, although courts and commentators have declined to refer to targeted federal statutes as special, federal statutes also can be tailored to affect a single individual or small group of known individuals. Under common definitions of "special law,"[71] therefore, targeted federal laws like the Mattis waiver statute and Terri's Law should be considered special.[72]

Two, like the Mattis waiver statute (or the Tesla Laws described in the Introduction), a law can be tailored to affect a single person or company without naming the target directly. Nevertheless, if the purpose or effect of a statute is to single out a known individual for special treatment, courts often consider it special.[73]

Three, like Terri's Law, statutes can be targeted to reach a small number of people rather than a single individual. Terri's Law, for example, provided an exemption for "any parent" of Schiavo. But, even when a class contains more than one person, when the class is defined to prevent individuals from entering or leaving the class in the future, courts often consider the legislation special.[74]

Four, special legislation is broader than, and includes, "private legislation." Private legislation is legislation introduced for the relief of a particular named individual. Unlike special legislation more generally, private legislation always names a particular individual, is titled "for the benefit" or "relief" of a particular named party,[75] and, in Congress, is restricted under

70. § 1, 131 Stat. at 6.

71. *E.g.*, ALA. CONST. art. IV, § 110 ("A special or private law is one which applies to an individual, association or corporation."); Best v. Taylor Mach., Works, 689 N.E.2d 1057, 1069 (Ill. 1997).

72. Indeed, the failure of federal courts to recognize targeted laws as special is surprising because, for nearly a century, federal law explicitly prohibited federal territorial legislatures from enacting special laws. Act of July 30, 1886, ch. 818, § 1, 24 Stat. 170, 170 (repealed 1983). During this time, federal courts invalidated special laws enacted by territorial legislatures. Smith v. Gov't of Virgin Islands, 240 F. Supp. 809, 810–11 (D.V.I. 1965).

73. *See supra* note 59.

74. People v. Canister, 110 P.3d 380, 384 (Colo. 2005) ("By contrast, a class that is drawn so that it will never have any members other than those targeted by the legislation is illusory, and the legislation creating such a class is unconstitutional special legislation.").

75. CHARLES W. JOHNSON ET AL., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE 166–67 (2017), https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-115/pdf/GPO-HPRACTICE-115.pdf ("A private bill is a bill for the benefit of one or several specified persons or entities" as opposed to being for a public benefit); *see, e.g.*, Priv. L.

legislative rules applicable only to private laws.[76] By contrast, many special laws, like the Mattis waiver (and Tesla Laws), are denominated as public laws despite their obviously targeted nature, do not name their target, and are treated for procedural purposes as public laws.

Terri's Law and the Mattis waiver statute are far from unique; Congress and state legislatures routinely enact special laws, including, in recent years, statutes granting public funds to named individuals,[77] statutes exempting particular people from generally applicable laws,[78] and even statutes intervening in pending court cases to favor one of the litigants.[79] Whether the existence of special legislation is normatively attractive or not depends on the costs it imposes and the benefits it provides. In Part II, I assess the costs of special legislation; in Part III, I assess its benefits.

II. THE COSTS OF SPECIAL LEGISLATION

Rather than addressing broad social problems,[80] establishing rules for future lawmaking,[81] or vesting authority in other government actors,[82] all of which provide stability and security to society, special legislation tends to be destabilizing. Indeed, the threats to personal security, property rights, and political equality created by special legislation were among the most pressing concerns that prompted the framing of the federal Constitution.[83] Likewise, the corruption, favoritism, and inefficiency that accompanied

No. 112-1 (2012) (providing an exemption from the Immigration and Nationality Act for one named person).

76. RULES OF THE HOUSE OF REPRESENTATIVES, r. XII, cl. 4, at 25 (2019) (prohibiting private bills related to pensions, bridges, military records, or money claims that are cognizable under the Federal Tort Claims Act from being received or considered); *see also* STANDING RULES FOR THE SENATE, S. DOC. NO. 113-18, r. XIV, cl. 9–10, at 10 (2013) (same).

77. Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013) (transferring $174,000 to a named individual).

78. Act of Jan. 20, 2017, Pub. L. No. 115-2, § 1, 131 Stat. 6, 6; Priv. L. No. 111-1, 124 Stat. 4523 (2010).

79. Act of Sept. 26, 2014, Pub. L. No. 113-179, § 2, 128 Stat. 1913, 1913 (applying to one particular piece of property); Bank Markazi v. Peterson, 136 S. Ct. 1310, 1317 (2016) (upholding a statute picking the winner in one particular, pending case); Foretich v. United States, 351 F.3d 1198, 1204–08 (D.C. Cir. 2003).

80. For example, Jeremy Bentham described the purpose of legislation as "the happiness of the body politic," which included subsistence, abundance, equality, and security. BENTHAM, *supra* note 60, at 123; *see also* Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 411–12 (1983) (noting that a legitimate public purpose includes "the remedying of a broad and general social or economic problem").

81. Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. L. ISSUES 717 (2005) (describing statutes that provide decision-making process for future legislation).

82. Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372 (1989) ("Modern legislation in its essence is an institutional practice by which the legislature . . . issues directives to the governmental mechanisms that implement that policy.").

83. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221 (1995); CORWIN, *supra* note 48, at 36–37, 62; EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 148–50 (1919).

special legislation in the nineteenth century prompted states nationwide to convene constitutional conventions.[84] Although not every special law imposes all of the costs described below, in the aggregate, a system that permits unrestricted special legislation encourages the following overlapping harms: corruption of the legislative process; low-quality legislation; unjustifiably unequal treatment; and legislative encroachment on the judicial and executive functions. This Part describes each of these costs.

A. Special Legislation Encourages Legislative Corruption

The power to enact special legislation allows lawmakers to create a valuable public good that they can then trade for private gain.[85] Because legislatures have the ability to confer great privileges on favored constituents, the power to enact special legislation permits legislatures to supply special privileges that are demanded by motivated constituents.[86] This dynamic often results either in bribes to individual legislators to introduce and support special bills or, even in the absence of bribery, special legislation to benefit politically powerful or well-connected individuals.

First, special legislation often leads to bribery. When special legislation dominated state legislative practice in the nineteenth century, bribery to secure the passage of special laws was widespread.[87] Contemporary observers noted that special legislation was "often pushed through the legislatures by unscrupulous men"[88] who exchanged special legislation for bribes.[89] Some of these private bills required the purchase of worthless land at extravagant prices solely to enrich landowners. Others required the improvement of streets without inhabitants "for no other purpose than to award corrupt contracts for the work."[90] Special laws "abolishing one of-

84. *E.g.*, Horack, *supra* note 46, at 115; Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1070 (Ill. 1997).

85. GORDON S. WOOD, REVOLUTIONARY CHARACTERS 148–49 (2006); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 373–74 (arguing that corruption includes "self-serving use of public power for private ends").

86. Richard T. Boylan, *Private Bills: A Theoretical and Empirical Study of Lobbying*, 111 PUB. CHOICE 19, 25–27 (2002) (discussing supply and demand for private immigration bills and their connection to corruption).

87. LUCE, *supra* note 46, at 548; Ireland, *supra* note 46, at 277–78.

88. BINNEY, *supra* note 46, at 6.

89. Maple Run at Austin Mun. Util. Dist. v. Monaghan, 931 S.W.2d 941, 945 (Tex. 1996) (special legislation prohibition "prevents lawmakers from engaging in the 'reprehensible' practice of trading votes for the advancement of personal rather than public interests" (citing Miller v. El Paso Cty., 150 S.W.2d 1000, 1001 (1941))); LUCE, *supra* note 46, at 548 (special legislation is a "prolific source of bribery and corruption"); Cloe & Marcus, *supra* note 46, at 356 (special legislation is "fertile ground for log rolling and bribery"); Green, *supra* note 46, at 363 ("[L]obbying, log-rolling, and corruption increase . . . when the legislature customarily passes local legislation.").

90. GUITTEAU, *supra* note 46, at 8.

fice and creating another with the same duties" were enacted to transfer lucrative government jobs from one person to another.[91] And seekers of valuable and scarce special incorporation laws created "a political culture of bribery and extortion" by competing with one another for these special privileges.[92]

The phenomenon of bribery in exchange for special legislation is not limited in time to the nineteenth century. In a series of scandals in the 1960s and 1970s, members of Congress were investigated,[93] indicted,[94] forced to resign,[95] and convicted[96] after allegations were made that they received bribes in exchange for introducing and supporting special legislation. In 1969, credible allegations that senators and their staff members had accepted bribes in exchange for introducing hundreds of bills to protect Chinese nationals from deportation prompted Senate hearings and a change in Senate rules to make the special immigration bill process more transparent.[97] In the mid-1970s, a congressman from New Jersey was indicted for accepting thousands of dollars from foreign nationals in return for sponsoring immigration bills to permit them to remain in the United States.[98] After these events, and years of allegations of bribery related to special immigration bills, the government orchestrated the notorious "Abscam" sting to catch government officials involved in these activities. Abscam involved FBI agents posing as representatives of two wealthy sheiks seeking to immigrate to the United States.[99] The agents offered the legislators money in exchange for their promises to introduce private bills on behalf of the fictitious sheiks,[100] which some of the congressmen "readily accepted."[101] In all, twenty-five people, including one United States Senator, six United States Representatives, and other public officials were indicted for corruption related to the investigation.[102] Although most immigration legislation

91. *Id.* at 9.

92. ADAM WINKLER, WE THE CORPORATIONS 90 (2018).

93. *Immigration Bill Probe*, 26 CONG. Q. ALMANAC 237 (1970).

94. Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1574–75 (1982).

95. JOSH CHAFETZ, CONGRESS'S CONSTITUTION 260 (2017).

96. *Id.*; Gershman, *supra* note 94, at 1577–78.

97. *Immigration Bill Probe*, *supra* note 93, at 237; *Three Branches Involved in Ethics Controversies*, 25 CONG. Q. ALMANAC 1021, 1025–26 (1969).

98. United States v. Helstoski, 442 U.S. 477, 479, 484 (1979).

99. Gershman, *supra* note 94, at 1571–72.

100. United States v. Myers, 527 F. Supp. 1206, 1225 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982).

101. Gershman, *supra* note 94, at 1572.

102. MARGARET MIKYUNG LEE, CONG. RESEARCH. SERV., RL33024, PRIVATE IMMIGRATION LEGISLATION 8 (2007) ("Abscam, involving payoffs for the sponsorship of private immigration laws, culminated in the expulsion of one Member of the House of Representatives . . . ."). Corruption related to private immigration laws has existed since before the ratification of the Consti-

is surely not the product of bribery, the Abscam scandal, along with other instances of bribery related to private bills,[103] reveals how the ability of legislatures to enact special legislation creates a marketplace where special privileges can be bought and sold.

Second, even in the absence of bribery, special legislation represents a corruption of the legislative process because special benefit legislation is enacted disproportionately for the benefit of powerful and politically well-connected individuals.[104] Potential beneficiaries of special laws are motivated to procure special benefit legislation through legal exchanges, like campaign contributions. A potential beneficiary of a special law is likely to be more successful at procuring a special bill than the public is at opposing it because an individual acting alone incurs no coordination costs and has a goal that is simple to explain to legislators. As Professors John McGinnis and Michael Rappaport explained, small but "well-organized . . . groups can use their cohesive organizations to influence politicians and the political process . . . to extract benefits from the nation."[105] By contrast, although the public in general is burdened by special legislation favoring one individual, the burden is diffuse, disincentivizing the public from forming a coalition to oppose the special legislation.[106] Moreover, because of coordination costs and free riders, it is more costly for large groups to form a coalition than small groups; small groups, as a result, "have an advantage in the competition for political influence."[107] For example, imagine that Company X is seeking a legislatively granted monopoly. Because the bene-

---

tution. James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic*, 96 VA. L. REV. 359, 388 (2010) (private bills made immigration legislation "more prone to corruption").

103. *See, e.g.*, United States v. Freeman, 6 F.3d 586, 595 (9th Cir. 1993) (describing that a legislative aid moved two private bills through the state legislative process in exchange for a bribe); United States v. Oaks, 302 F. Supp. 3d 716, 719 (D. Md. 2018) (describing the indictment of a state legislator for accepting a bribe in exchange for the introduction of special legislation).

104. Andrew Jackson, Veto Message (July 10, 1832), *in* 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1153 (James D. Richardson ed., 1897) [hereinafter Jackson, Veto Message] (arguing that "exclusive privileges . . . make the rich richer and the potent more powerful"); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION *393–94 (5th ed. 1883) (noting that special laws tend to interfere with the principle that the state "has no favors to bestow, and designs to inflict no arbitrary deprivation of rights"); Cloe & Marcus, *supra* note 46, at 357 (noting that special legislation is prone to provide special favors); Green, *supra* note 46, at 363 (recognizing that special legislation strengthens political "machine rule"); Ireland, *supra* note 46, at 281, 292; Schutz, *supra* note 46, at 45; Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1207–08 (1985).

105. John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 TEX. L. REV. 703, 735–36 (2002).

106. *Id.* at 737; Andrew McFarland, *Interest Group Theory*, *in* OXFORD HANDBOOK OF AMERICAN POLITICAL PARTIES AND INTEREST GROUPS 37, 41 (L. Sandy Maisel & Jeffrey M. Berry eds., 2010) ("[I]n the world of interest group politics . . . the few defeat the many.").

107. GLENN PARKER, CONGRESS AND THE RENT-SEEKING SOCIETY 30–31 (1996).

fit of the special law would be concentrated on Company X, Company X would have an incentive to obtain the legislation. Although granting the monopoly to Company X could have a deleterious effect on the public welfare, the burden would be diffuse. Moreover, the costs of coordinating a common, coherent response from the public could be high. As a result, the public is less likely to organize for the purpose of blocking the monopoly and a special bill is likely to pass even if it has no public purpose.[108]

American history bears out this theory: during the American confederation period,[109] in the first years under the Constitution,[110] throughout the nineteenth century,[111] and still today,[112] special legal exemptions and special financial benefits unavailable to the general public are often granted by legislatures to the politically well-connected. Take, for example, the well-known case of Baron von Steuben, who sought and received compensation from Congress for debts incurred while fighting for the revolutionary cause during America's War of Independence.[113] Although he did incur debt in the course of his wartime activities, Congress repaid him "far beyond what had been done for the thousands of less prominent Americans who also sacrificed for the cause."[114] His special legislation was not procured through bribery; nevertheless, von Steuben's case "was aided immeasurably by his status as one of America's few resident titled aristocrats and as a leader of

108. *Id.*

109. Mortimer v. Caldwell, 1 Kirby 53, 55 (Conn. 1786) (upholding a special law protecting one of two partners from liability); RAYMOND C. BAILEY, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN EIGHTEENTH-CENTURY VIRGINIA 120 (1979) (describing a gift of stock made to George Washington by a special act); Jeffrey L. Pasley, *Private Access and Public Power: Gentility and Lobbying in the Early Congress*, *in* THE HOUSE AND SENATE IN THE 1790S 57, 95 (Kenneth R. Bowling & Donald R. Kennon eds., 2002) (describing that well-connected individuals are more likely to benefit from special legislation).

110. *See* Pasley, *supra* note 109, at 66–67 (describing self-interested lobbying under the new Constitution).

111. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1070 (Ill. 1997) ("[S]pecial legislation enriched particular classes of individuals at the expense of others."); Yeoman v. Commonwealth, 983 S.W.2d 459, 466 (Ky. 1998) ("[T]he primary driving force behind the adoption of the 1891 Constitution was the fact that special interests were perceived as having carte blanche with the General Assembly to achieve whatever legislation they desired."); Clean Water Coal. v. M Resort, LLC, 255 P.3d 247, 254 (Nev. 2011) (recognizing that constitutional prohibition comes from territorial legislature's "practice of passing local and special laws for the benefit of individuals"); Harrisburg Sch. Dist. v. Zogby, 828 A.2d 1079, 1088 (Pa. 2003) (adding a prohibition on special legislation to "put an end to the flood of privileged legislation" (quoting Haverford Twp. v. Siegle, 28 A.2d 786, 789 (Pa. 1942))); Ireland, *supra* note 46, at 281, 292; Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUT. L.J. 1013, 1043–44 (2003) (explaining state prohibitions on special legislation enacted with a "desire to curb special privilege" (quoting JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 241 (1950))).

112. *See* Act of Jan. 20, 2017, Pub. L. No. 115-2, § 1, 131 Stat. 6, 6 (creating a special exemption for General James Mattis); Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013) (transferring $174,000 to wife of deceased Senator).

113. Pasley, *supra* note 109, at 95.

114. *Id.*

both high New York society and the Society of the Cincinnati."[115] Similarly, when the Virginia Assembly purchased stock in George Washington's corporation formed to clear the Potomac River, the Assembly gave Washington a gift of the corporation's stock worth $20,000,[116] a considerable sum at that time. By contrast, the claims of less prominent citizens were often ignored during the same period.[117]

B. A Special Legislation Leads to Low-Quality Lawmaking

A legislature's ability and willingness to enact special legislation can lead to low-quality lawmaking. Specifically, in jurisdictions in which it is common, special legislation clogs the legislative machinery, crowds out public-regarding legislation, and fails to provide guidance to the public.

First, when special legislation is common, it clogs the legislative machinery,[118] compromising the value of deliberation. Because special legislation concerns particular individuals rather than general policy, individuals eagerly seeking special benefits can overwhelm legislatures with bills to address the most minute of problems.[119] As early as the thirteenth century, the English Parliament found itself suffering from an overabundance of petitions for special legislation.[120] Before it developed procedures for dealing with private petitions,[121] Parliament was inundated with so many petitions for private bills that it struggled to consider all of them.[122] Similarly, colo-

115. *Id.*

116. BAILEY, *supra* note 109, at 120.

117. William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, *in* THE HOUSE AND SENATE IN THE 1790S, *supra* note 109, at 29, 53 (contrasting well-connected Americans with ordinary Americans during the confederation period); Pasley, *supra* note 109, at 96 (same).

118. LUCE, *supra* note 46, at 546.

119. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 220–21 (1995) (criticizing the confederation-era legislative habit of "extending their deliberations to the cases of individuals"); GUITTEAU, *supra* note 46, at 7–8 (explaining that "innumerable" special laws "detract greatly from the time and attention needed for general legislation"); Green, *supra* note 46, at 362 (noting that special legislation leads to time "wasted on trivial matters"); *see also* DAVID DEAN, LAW-MAKING AND SOCIETY IN LATE ELIZABETHAN ENGLAND: THE PARLIAMENT OF ENGLAND, 1584–1601, at 258 (1996) (noting that there was "never a shortage of people anxious to pursue private matters" in Parliament in the 1500s); diGiacomantonio, *supra* note 117, at 32–33 (noting that early Congresses were routinely petitioned by industrial groups for "protectionist" special laws).

120. BAILEY, *supra* note 109, at 9.

121. Private petitions, requesting private relief, may be distinguished from common petitions, which involved questions of public policy. BAILEY, *supra* note 109, at 10–11 (describing the origin of "common petitions"); GWILYM DODD, JUSTICE AND GRACE: PRIVATE PETITIONING AND THE ENGLISH PARLIAMENT IN THE LATE MIDDLE AGES 155 (2007) (distinguishing between private and common petitions).

122. BAILEY, *supra* note 109, at 9 (noting that private petitions occupied a "great deal of . . . time" in Parliament); DEAN, *supra* note 119, at 217 (explaining that local and private legislation "took up a good deal of time in every parliamentary session"); DODD, *supra* note 121, at 155 (describing how Parliament struggled to find time to devote to private petitions).

nial American legislatures were flooded with petitions for special bills; in the eighteenth century, they spent most of their time debating private matters and enacting special legislation.[123] After the revolution, early Congresses received "a flood of petitions" that threatened to grind congressional business to a halt.[124] Like the colonial legislatures, early Congresses spent "the principal part" of their time dealing with petitions for special legislation.[125]

This trend continued into the twentieth century; in many years, "Congress enacted more private bills than it did public bills."[126] For example, between 1905 and 1907, Congress "enacted more than 6,000 private bills, while it enacted fewer than 700 public bills."[127] During this same period, most state legislation was special.[128] To take just a few of the most egregious examples: ninety-five percent of Pennsylvania's statutes were special;[129] in Missouri, eighty-seven percent;[130] and more than ninety percent each in Kentucky[131] and Indiana.[132] Similar patterns existed in state legislatures throughout the country.[133] Indeed, between 1906 and 1907, state legislatures enacted some twenty-thousand special laws, roughly the same amount passed by Great Britain's Parliament during the entire nineteenth century.[134]

Because of the time necessary to deal with each bill, an abundance of special bills interferes with the ability of legislatures to deliberate, which is widely regarded as a normatively attractive goal of the legislative process, either instrumentally or as a good in itself.[135] An overwhelming number of

123. RALPH VOLNEY HARLOW, THE HISTORY OF LEGISLATIVE METHODS IN THE PERIOD BEFORE 1825, at 19–20, 64 (1917) (describing the flood of petitioning that tied up the legislative process).

124. diGiacomantonio, *supra* note 117, at 30.

125. Christine A. Desan, *Contesting the Character of the Political Economy in the Early Republic: Rights and Remedies in* Chisolm v. Georgia, *in* THE HOUSE AND SENATE IN THE 1790s, *supra* note 109, 178, 200–01 (detailing the overwhelming number of petitions in early Congresses); Richard R. John & Christopher J. Young, *Rites of Passage: Postal Petitioning as a Tool of Governance in the Age of Federalism*, *in* THE HOUSE AND SENATE IN THE 1790s, *supra* note 109, at 100, 107 (same).

126. JOHNSON ET AL., *supra* note 75, at 176.

127. *Id.*; *see also* LUCE, *supra* note 46, at 545–46 (describing the large quantity of special laws enacted by Congress).

128. LUCE, *supra* note 46, at 544.

129. Harrisburg Sch. Dist. v. Zogby, 828 A.2d 1079, 1088 (Pa. 2003) (recounting levels of special legislation in years prior to adopting a constitutional restriction on special legislation).

130. Cloe & Marcus, *supra* note 46, at 356.

131. *Id.*

132. Horack & Welsh, *supra* note 46, at 192–93.

133. GUITTEAU, *supra* note 46, at 8; Ireland, *supra* note 46, at 272.

134. LUCE, *supra* note 46, at 544.

135. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1692 (2002) (noting that theorists emphasize, alternatively, the "instrumental value for

bills imposes on the deliberative process by making it impossible for the legislature to learn much about any of the bills with which it is presented.[136] Early Congresses, unable to investigate petitions for special legislation adequately, often enacted special laws without regard for the merits of the underlying claims.[137] The states' experiences were similar. Representative of the broader mood of the period, members of the 1897 Delaware Constitutional Convention noted "the flood of special bills" that inundated the state's legislature "and the consequent demands upon the time of the General Assembly upon matters with which the members could not be or become familiar."[138] Indeed, nineteenth century state legislation was notable for its lack of deliberation for this reason. When the steady stream of special legislation present from the early days of the republic widened into a river by the middle of the nineteenth century, the volume of special legislation prevented state legislators from knowing much more about the bills they enacted than the title.[139] So many special bills were enacted during this period, and with such little deliberation, that legislatures sometimes passed duplicate bills a few days apart,[140] bills in direct conflict with one other,[141] and bills responding to requests without any, let alone adequate, investigation into their merits.[142] Critics noted that this ill-considered spe-

good policy" and deliberation's "intrinsic value to public life"); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1288 (2009) ("[R]easoned deliberation should facilitate tentative resolutions to specific policy questions that are more widely acceptable to a broader range of interests . . . ."); *see also* INS v. Chadha, 462 U.S. 919, 951, 959 (1983) (noting the value of deliberation in lawmaking); JON ELSTER, DELIBERATIVE DEMOCRACY 8 (1998) (describing some virtues of deliberation in democracy). For an argument about the value of deliberation and guidance as lawmaking values, see Evan C. Zoldan, *Congressional Dysfunction, Public Opinion, and the Battle over the Keystone XL Pipeline*, 47 LOY. U. CHI. L.J. 617, 622–25 (2015). As scholars have noted, Congress does not live up to the ideal of a deliberative body. *See e.g.*, Ittai Bar-Siman-Tov, *Lawmakers as Lawbreakers*, 52 WM. & MARY L. REV. 805, 863 (2010).

136. Wright v. Husbands, 131 A.2d 322, 332–33 (Del. 1957) (describing legislators' lack of knowledge of the merits of special bills).

137. Pasley, *supra* note 109, at 99 (noting that special laws were enacted, or not, without regard to their merits).

138. *Wright*, 131 A.2d at 332.

139. Ireland, *supra* note 46, at 272–73.

140. *Id.* at 273.

141. *Id.* at 278 (noting time spent harmonizing "discordant statutes"); Duke Power Co. v. S.C. Pub. Serv. Comm'n, 326 S.E.2d 395, 400 (S.C. 1985) ("Recourse to local or special laws often results in . . . laws, duplicative or conflicting, on the same subject.").

142. GUITTEAU, *supra* note 46, at 7 (noting that special legislation is passed perfunctorily); Green, *supra* note 46, at 364 (arguing that special legislation is enacted without proper consideration).

cial legislation lacked meaningful deliberation,[143] calling it "crude," "careless," "dangerous," and "trash."[144]

Second, a superabundance of special legislation crowds out general legislation addressing problems of public concern.[145] In the English Parliament, as early as the sixteenth century, petitions for private relief were often a substitute for generally applicable laws. When private petitions increased, they competed with generally applicable laws for parliamentary time.[146] As a result, even as Parliament evolved from a body that largely settled private disputes into a national legislature that boldly asserted its authority over state affairs, it found its time taken up by a "multitude of requests" from private petitioners.[147] Acting on special laws derived from these petitions "occupied so much time in the House of Commons that important public business was often delayed."[148] Similarly, after the newly independent American states began enacting special laws in great numbers, James Madison lamented their habit of focusing on particular requests to the exclusion of the "comprehensive and permanent interest of the State."[149]

The problem of special legislation occupying time, political capital, and energy that reduces the legislature's ability to address general problems only accelerated throughout the nineteenth century. During this period, state legislatures devoted so much time and energy to special legislation "that they lacked the time or the attention to enact general laws."[150] Rather than focus on problems of general and statewide interest,[151] legislators spent

143. Timmons v. S.C. Tricentennial Comm'n, 175 S.E.2d 805, 816 (S.C. 1970) (noting that special legislation lacked deliberation "and the consideration of those problems which make for a wise public policy" (quoting Tisdale v. Scarborough, 83 S.E.2d 594, 595 (S.C. 1914))).

144. Ireland, *supra* note 46, at 272–74.

145. *See* LUCE, *supra* note 46, at 542–43 (noting that legislators tend to consider the particular at the expense of the general); Comment, *Special Legislation Discriminating Against Specified Individuals and Groups*, 51 YALE L.J. 1358, 1370–71 (1942) [hereinafter *Special Legislation Discriminating*] ("[B]y occupying themselves with unimportant details of special legislation, legislative bodies tend to limit their effectiveness in laying down general rules on matters of policy.").

146. DODD, *supra* note 121, at 155. Conversely, as generally applicable laws became more prevalent, petitions for private relief decreased. *Id.* at 119–20, 135–36.

147. BAILEY, *supra* note 109, at 12.

148. *Id.* The problem of special laws crowding out public-regarding laws may have emerged in England by the fourteenth century. Over the course of the 1300s, petitions once denominated as private were instead filed as common petitions, presumably to gain more parliamentary traction. By the end of the 1300s, private petitions competed for Parliamentary time with common petitions. DODD, *supra* note 121, at 155.

149. THE FEDERALIST No. 46 (James Madison).

150. Ireland, *supra* note 46, at 279; *see also* GUITTEAU, *supra* note 46, at 7–8.

151. LUCE, *supra* note 46, at 541; Schutz, *supra* note 46, at 59; *Special Legislation Discriminating*, *supra* note 145, at 1370–71; *see also* Bonney v. Ind. Fin. Auth., 849 N.E.2d 473, 483 (Ind. 2006) (condemning special legislation "on the ground that attention to local issues diverted the legislature from matters of concern to the general public"); Cloe & Marcus, *supra* note 46, at 356 (noting the prevalence of "legislative attention being diverted from matters of important public concern for frivolity").

their time resolving individual disputes.[152] The address convening the Michigan constitutional convention is a typical statement of the problem faced throughout the country: "The evils of local and special legislation have grown to be almost intolerable, . . . consuming the time and energy of the legislature which should be devoted to the consideration of measures of a general character."[153] Similarly, both before and during his presidency, Grover Cleveland railed against special legislation, denouncing state legislators for neglecting the "study and understanding of the important questions involved in general legislation" because they were focused on the flood of special bills they encountered in office.[154]

Among other social and economic problems that state legislatures failed to address, many states chose to grant endless legislative divorces rather than reform antiquated divorce laws. It was not until legislative divorces were prohibited by state constitutional amendments that divorce by judicial decree became the norm.[155] Similarly, as long as special incorporation statutes were lawful, they were demanded by seekers of special corporate privileges and supplied by legislatures.[156] The general incorporation laws that did exist were a poor substitute for special incorporation laws because restrictions such as strict director liability made them an unattractive alternative to special incorporation statutes.[157] It was not until special incorporation laws were prohibited by state constitutional amendments did states pass effective general incorporation laws.[158]

152. *See* Mun. City of S. Bend v. Kimsey, 781 N.E.2d 683, 686 (Ind. 2003) (arguing that special legislation "has for years past engaged full three-fourths of the time of the General Assembly, to the exclusion (from their due consideration) of many other questions of great importance to the people of the State"); Fitzpatrick v. Greater Portland Pub. Dev. Comm'n, 495 A.2d 791, 794 (Me. 1985) (condemning special legislation for its tendency to "distract the attentions of legislators from matters of public interest" (citation omitted)); *see also* Cloe & Marcus, *supra* note 46, at 356–57; Schutz, *supra* note 46, at 59.

153. Twp. of Casco v. Sec'y of State, 701 N.W.2d 102, 113 (Mich. 2005) (citing 2 PROCEEDINGS & DEBATES, CONSTITUTIONAL CONVENTION 1907, at 1422–23).

154. THE WRITINGS AND SPEECHES OF GROVER CLEVELAND 175 (George F. Parker ed., New York, Cassell Publ'g Co. 1892).

155. Maynard v. Hill, 125 U.S. 190, 206 (1888) ("During the period of our colonial government, for more than one hundred years preceding the Revolution, no divorce took place in the colony of New York, and for many years after New York became an independent state there was not any lawful mode of dissolving a marriage in the life time of the parties but by a special act of the legislature."); Ireland, *supra* note 46, at 289–90; *see also* LUCE, *supra* note 46, at 551–52 (describing the transition from legislative to judicial divorces).

156. LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 512 (1985); Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of William Hurst's Study of Corporations*, 49 AM. U. L. REV. 81, 122–24 (1990).

157. Henry N. Butler, *Nineteenth Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 145–47 (1985); Charles M. Yablon, *The Historical Race: Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, J. CORP. L. 324, 331–32, 351–52 (2007).

158. Hamill, *supra* note 156, at 132.

Third, legislative output that consists largely of special laws fails to provide citizens with adequate guidance about the conduct that is required of them. General laws, which provide common rules to deal with similar situations, offer notice of what the law requires and guidance about how to comply with the law.[159] Special laws compromise the value of guidance by eliminating the coherence that makes law predicable, thereby denying even reasonably well-informed citizens the ability "to steer between lawful and unlawful conduct."[160] In the early days of the republic, a common source of discontent was the fact that special laws failed to provide guidance. In the confederation period, state legislation was criticized for having "been altered—re-altered—made better—made worse; and kept in such a fluctuating position, that persons in civil commission scarce know what is law, or how to regulate their conduct in the determination of causes."[161] Surveying the legislative ineptitude of the period, Madison denounced as inequitable laws that are "so incoherent that they cannot be understood" or that are "repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be to-morrow."[162] Special legislation drew the same criticism in the nineteenth century, when commentators observed that the proliferation of special legislation meant that "no man knows what his rights are, much less what they may be."[163] Two cases, identical but for the interposition of a special law, would be decided differently, "introducing uncertainty and confusion into the laws."[164] As a result, neither average citizens, nor even lawyers, could become competent in the law's requirements. A prominent nineteenth century judge echoed Madison's lament about special legislation when noting that statutes within the city of New York "have been modified, superseded and repealed so often and to such an extent that it is difficult to ascertain just what statutes are in force at any particular time."[165]

C. Special Legislation Leads to Unjustifiably Unequal Treatment

By targeting individuals for special privileges or burdens, special laws treat individuals differently in a way that cannot be squared with commonly

159. Frank Horack, *The Common Law of Legislation*, 23 IOWA L. REV. 41, 46 (1937) (arguing that legislation provides predictability and consistency, much like the common law).

160. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

161. VERMONT REPORT, *supra* note 25, at 68.

162. THE FEDERALIST NO. 62 (James Madison).

163. Ireland, *supra* note 46, at 278; *see also* GUITTEAU, supra note 46, at 7–8.

164. Twp. of Casco v. Sec'y of State, 701 N.W.2d 102, 113 (Mich. 2005) (citing 2 PROCEEDINGS & DEBATES, CONSTITUTIONAL CONVENTION 1907, at 1422–23)); *see also supra* note 152.

165. GUITTEAU, *supra* note 46, at 8.

accepted visions of equality.[166] Special legislation offends the anti-classification conception of equality—associated with formal equality—by according privileges or allocating burdens without regard to morally relevant characteristics.[167] Consider private immigration bills, like those that were the subject of the Abscam sting. Even though the vast majority of special immigration bills are not procured by bribery, and although very few are enacted today, all special immigration bills grant their beneficiaries special treatment not accorded to other applicants for legal resident status.[168] Moreover, like other private bills, private immigration bills are passed with little or no debate; as a result, members of Congress do not even discuss the merits of special immigration bills.[169] Because special immigration bills accord a benefit without reflecting a reason why one person rather than another was chosen, special immigration bills accord a special privilege without regard to any morally relevant characteristic.

Consider also the example of Terri's Law, which exempted "any parent" of Terri Schiavo, and no one else, from generally applicable preclusion rules.[170] Terri's Law offends the anti-classification conception of equality by making a distinction between Schiavo's parents and others without regard to any morally relevant characteristic. Each year, countless individuals are prevented from relitigating cases previously settled by state court judgments because of generally applicable preclusion rules.[171] And although Schiavo's circumstances were unusual, they were not unique: both proponents and opponents of Terri's Law acknowledged that "thousands of people . . . face similar situations" as did Schiavo and her parents.[172] By targeting Schiavo's parents alone, and specifically providing that it would not "constitute a precedent with respect to future legislation,"[173] Terri's Law treated Schiavo's parents differently than those thousands of similarly situated individuals without stating a morally relevant difference.

Special legislation also offends the anti-subordination vision of equality, a type of substantive equality, by perpetuating social stratification and

166. Reynolds v. Porter, 760 P.2d 816, 823 (Okla. 1988) ("The vice of special acts is that they create preferences and establish inequality.").

167. *See* Zoldan, *The Equal Protection Component*, *supra* note 23, at 513.

168. *E.g.*, Priv. L. No. 111-1, 124 Stat. 4523 (2010); Priv. L. No. 111-2, 124 Stat. 4525 (2010).

169. HOW CONGRESS WORKS 85 (5th ed. 2013).

170. Act of Mar. 21, 2005, Pub. L. No. 109-3, § 2, 119 Stat. 15, 15–16.

171. 28 U.S.C. § 1738; *see also* Allen v. McCurry, 449 U.S. 90, 95 (1980) ("The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts.").

172. 151 CONG. REC. S2926, S2928 (daily ed. Mar. 17, 2005) (statements of Sen. Tom Harkin & Sen. Ron Wyden).

173. § 7, 119 Stat. at 16.

reinforcing social hierarchies.[174] Members of disfavored political minority groups are often the targets of special legal burdens. During the revolutionary period, when political orthodoxy favored revolution, individuals accused of harboring Tory loyalties, but charged with no crime, were barred from practicing their professions,[175] suffered the expropriation of their property,[176] and even, albeit rarely, were sentenced to death[177] by special bills. In the twentieth century, again, individuals suspected of heterodox political views but not criminal activity were ordered deported[178] and denied government salaries[179] by special laws. More recently, individuals suspected, but neither charged nor convicted, of violent crimes[180] or fraud[181] have been the target of special laws that stripped them of legal rights or government benefits without trial. In each of these cases, special laws perpetuated social and legal hierarchies by penalizing members of groups with a disfavored social status or heterodox political beliefs.

D. Special Legislation Compromises the Principle of Separation of Powers

The principle of separation of powers is widely considered a safeguard to liberty,[182] a predicate of accountable government,[183] and a bulwark against tyranny.[184] When the legislature enacts special legislation, it un-

174. The anti-subordination conception of equality is concerned with the disestablishment of tiers of favored and disfavored individuals. Zoldan, *The Equal Protection Component*, *supra* note 23, at 505–06.

175. BAILYN, *supra* note 26, at 302; LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 71 (2001); W.P. Trent, *The Case of Josiah Philips*, 1 AM. HIS. REV. 444, 454 (1896).

176. *E.g.*, An Act in Addition to an Act Intituled "An Act to Confiscate the Estates of Sundry Persons Therein Named," ch. 8 (1779), *in* 4 LAWS OF NEW HAMPSHIRE 216, 216–18 (Henry Harrison Metcalf ed., 1916); ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 93 (1956); LEVY, *supra* note 175, at 70–71.

177. *E.g.*, Respublica v. Gordon, 1 U.S. (1 Dall.) 233 (Pa. 1788); *see also* LEVY, *supra* note 175, at 71; Matthew Steilen, *The Josiah Philips Attainder and the Institutional Structure of the American Revolution*, 60 HOW. L.J. 413, 427–28 (2017) (describing a Virginia bill attainting Josiah Philips).

178. H.R. 9766, 76th Cong. (1940); Maurice A. Roberts, *The Harry Bridges Cases*, INTERPRETER RELEASES, Sept. 20, 1999, at 1385, 1387.

179. United States v. Lovett, 328 U.S. 303, 305 (1946) (invalidating a statute denying salary to specific federal employees).

180. Foretich v. United States, 351 F.3d 1198, 1208–09 (D.C. Cir. 2003).

181. Acorn v. United States, 618 F.3d 125, 131 (2d Cir. 2010).

182. Boumediene v. Bush, 553 U.S. 723, 742 (2008) (noting that separation of powers "serves . . . to secure individual liberty"); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1539 (1991) (recognizing that the protection of individual rights is a "guiding principle" in issues involving separation of powers).

183. *Boumediene*, 553 U.S. at 742 (stating that separation of powers "serves . . . to make Government accountable").

184. *See* Loving v. United States, 517 U.S. 748, 756, (1996) ("Even before the birth of this country, separation of powers was known to be a defense against tyranny."); CHAFETZ, *supra* note

dermines the principle of separation of powers by performing functions assigned to the judicial and executive branches.

The core of legislative power is to set generally applicable policies that are applied by the courts and the executive in particular situations.[185] Indeed, this (admittedly simplified) explanation of separation of powers follows directly from Chief Justice Marshall's statement in *Fletcher v. Peck*:[186] "It is the peculiar province of the legislature to prescribe *general* rules for the government of society; the *application* of those rules to individuals in society would seem to be the duty of other departments."[187] But, although the contours of the powers of each of the branches has turned out to be more fluid than Chief Justice Marshall suggested,[188] "the entire constitutional enterprise depends on there being" lines that separate the branches of government.[189] Under most any view of the appropriate placement of those lines, special legislation compromises the principle of separation of powers.

First, special legislation violates the principle of separation of powers when it is used to decide live controversies by picking the winning and losing parties in particular, pending cases. In recent years, Congress has boldly asserted the authority to decide pending cases, both between private parties and between the government and private parties.[190] In *Bank Markazi v. Peterson*,[191] victims of terrorism, and family members and estate representatives of those victims, demonstrated that the republic of Iran was responsible for injuries and deaths caused by terrorist acts.[192] Because their judgments could not be satisfied by assets in the United States,[193] the claimants brought suit against Bank Markazi, the Central Bank of Iran. Under the

95, at 310–11 ("The multiple, overlapping, and nonhierarchical authority claims that the American constitutional regime fosters help to ensure that no one branch is able to exert tyrannical control over the nation."); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 329 (2010) (explaining that separation of powers is designed to avoid tyrannical government).

185. Plaut v. Spendthrift Farm, Inc., 514 U.S. 213, 219–20 (1995); THE FEDERALIST NO. 78 (Alexander Hamilton) (noting that while the legislature has the power to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated . . . [t]he interpretation of the laws is the proper and peculiar province of the courts").

186. 10 U.S. (6 Cranch.) 87 (1810).

187. *Id.* at 136 (emphasis added).

188. *See* Morrison v. Olson, 487 U.S. 654, 694 (1988) (noting that the Constitution "enjoins upon its branches separateness but interdependence, autonomy but reciprocity" (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

189. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1336 (2016) (Roberts, C.J., dissenting) (emphasis omitted).

190. *Id.* at 1317 (upholding a statute, 22 U.S.C. § 8772 (2012), that resolved dispute between private parties); Patchak v. Zinke, 138 S. Ct. 897, 903 (2018) (upholding an act, Pub. L. No. 113-179, 128 Stat. 1913 (2014), that resolved a dispute between the United States and a private party).

191. 136 S. Ct. 1310 (2016).

192. *Id.* at 1319–20.

193. *Id.* at 1319–20, 1319 n.5, 1320 n.6.

Foreign Sovereign Immunities Act,[194] however, a central bank could not be reached to satisfy existing default judgments against the bank's home country.[195] To avoid this result, Congress enacted the Iran Threat Reduction and Syria Human Rights Act of 2012,[196] which permitted claims against Iran under the FSIA to be satisfied by the assets of Bank Markazi. Specifically, Congress provided that the "financial assets that are identified in . . . Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518" would be available "to satisfy any judgment . . . awarded against Iran for damages for personal injury or death caused by" acts of terrorism.[197] As this language of the Iran Threat Reduction statute makes clear, it applied only to the particular, pending case against Bank Markazi.

More recently, the Supreme Court upheld a federal statute that terminated a particular, pending suit against the United States. *Patchak v. Zinke*[198] arose from the decision of the United States Department of the Interior to take a plot of land, known as the Bradley Property, into trust. Patchak, who owned land near the Bradley Property, brought suit challenging the legality of Interior's decision. While the suit was pending, Congress enacted a statute that declared Interior's decision lawful and directed the federal courts to dismiss all suits related to the Bradley Property.[199] The statutes at issue in *Bank Markazi* and *Patchak* are not unique; Congress frequently has enacted statutes targeted to resolve live disputes,[200] including determining the outcome of particular pending cases identified in statutory language.[201]

Second, special legislation interferes with the judicial process when it declares guilt and decides questions concerning legal rights and obligations. The most well-known special laws, bills of attainder, assign guilt outside of the judicial process. During the revolutionary period, the newly independent state legislatures enacted countless bills of attainder.[202] These bills, by declaring their target guilty and ordering punishment, including banishment

194. 28 U.S.C. §§ 1602–1611 (2012).

195. *Id.* § 1611(b)(1); *Bank Markazi*, 136 S. Ct. at 1318.

196. 22 U.S.C. §§ 8701–8795 (2012).

197. *Id.* § 8772(a)(1)(C), (b).

198. 138 S. Ct. 897 (2018).

199. *Id.* at 903–04 (citing Gun Lake Trust Land Reaffirmation Act, Pub. L. No. 113-179, 128 Stat. 1913 (2014)).

200. Protection of Lawful Commerce in Arms Act, Pub. L. 109-92, 119 Stat. 2095, 2095–96 (2005) (requiring immediate dismissal of pending lawsuits against manufacturers or sellers of firearms); New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008) (applying the Protection of Lawful Commerce in Arms Act); Nat'l Coal. to Save our Mall v. Norton, 269 F.3d 1092, 1097 (D.C. Cir. 2001) (upholding an act, Pub. L. No. 107-11, 115 Stat. 19 (2001), that applied to a single location); *see* Zoldan, *The* Klein *Rule*, *supra* note 23, at 2172 (discussing statutes that direct the result in particular, pending cases).

201. Robertson v. Seattle Audubon Soc., 503 U.S. 429, 433 (1992).

202. Zoldan, *Reviving Legislative Generality*, *supra* note 23, at 662.

or even death, substituted legislative judgment for court determinations without indictment, rules of evidence, confrontation of witnesses, juries, or even meaningful deliberation. The revolutionary-era case of Josiah Philips is instructive. When authorities in Virginia were unable to apprehend Philips, who was believed to have "commanded an ignorant disorderly mob," the Virginia Assembly attainted Philips of high treason[203] after declaring that he had "levied war against this commonwealth."[204] And what of judicial process? The act attainting Philips was designed specifically to avoid it, stating that the statute would obviate "the delays which would attend the proceeding to outlaw the said offenders, according to the usual forms and procedures of the courts of law."[205] A decade later, while considering the Constitution, Patrick Henry, governor at the time of Philips' attainder, defended the decision.[206] Philips, declared Henry, was not entitled to "beautiful legal ceremonies" (that is, indictment, a trial, rules of evidence, and confrontation of witnesses against him) because he was popularly known to be "a fugitive murderer and outlaw."[207] Philips was not entitled to legal process, Henry argued, because he had not been "a Socrates."[208]

Bills of attainder are largely a thing of the past;[209] but other special laws, like the statutes considered in *Bank Markazi* and *Patchak*, also continue to assign legal rights and obligations outside of, or in disregard of, the judicial process, interfering "in cases where individual rights are concerned, and where parties have no opportunity of being properly represented and heard."[210] Legislatures enacting special laws have interfered with judicial

203. Trent, *supra* note 175, at 445. For a recent historical study of the case of Josiah Philips, see Steilen, *supra* note 177.

204. An Act to Attaint Josiah Philips and Others, Unless They Render Themselves to Justice Within a Certain Time, ch. 12 (1778), *in* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 463–64 (William Waller Hening ed., Richmond, J. & G. Cochran 1821).

205. *Id.*; *see also* Steilen, *supra* note 177, at 426 (arguing that bills of attainder can be considered a summary legal procedure without the confrontation of witnesses or the presentation of testimonial evidence).

206. Trent, *supra* note 175, at 449.

207. LEVY, *supra* note 175, at 75; 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 140 (Jonathan Elliot ed., 1836) [hereinafter 3 ELLIOT'S DEBATES] (statement of Patrick Henry).

208. 3 ELLIOT'S DEBATES, *supra* note 207, at 140; PLATO, THE APOLOGY OF SOCRATES 30–31, 18c–d (D.F. Nevill trans., F.E. Robinson & Co. 1901) (suggesting that the execution of Socrates was unjust).

209. Largely, but not completely. *See* Foretich v. United States, 351 F.3d 1198, 1203 (D.C. Cir. 2003).

210. Friedman, *supra* note 46, at 440–41 (quoting 2 THE DEBATE OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 878 (Annapolis, Richard P. Bayly 1864)).

processes by nullifying judgments already rendered,[211] granting new trials or extraordinary rights of appeal to losing parties,[212] suspending the enforcement of judgments,[213] clothing particular individuals with civil immunity,[214] providing immunity for individuals from criminal prosecution,[215] creating special trial procedures directed to specific cases,[216] and transferring title to property between private parties.[217]

Third, special legislation also imposes on separation of powers values by encroaching on the role of the executive. When the legislature passes generally applicable laws, the executive branch executes these laws by applying them to particular factual situations. For example, administrative agencies implement generally applicable laws by adjudicating individual disputes within their authority. Similarly, prosecutors bring charges under the generally applicable laws—or decline to do so—against specific parties for specific conduct. When the legislature designs a law to target an individual, it usurps this role.

The recent, high-profile battle over the Keystone XL Pipeline illustrates special legislation's intrusion into the role of the executive. Under generally applicable law, when a company applies for a permit to engage in cross-border energy-related transactions, administrative agencies must review the pertinent facts and the applicable law to determine whether the company is eligible for the permit.[218] By contrast, the Keystone XL Pipeline Act of 2015,[219] which was passed by Congress but ultimately vetoed by the President, provided that TransCanada's application to build a pipeline from Canada into the United States was deemed "to fully satisfy" the requirements of "any . . . provision of law that requires Federal agency consultation or review."[220] By singling out a particular company and exempting it from laws that apply to all other companies, the Keystone legislation exempted TransCanada from the process of executive review for compli-

211. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219–21(1995); *see* VERMONT REPORT, *supra* note 25, at 60–70.

212. *Plaut*, 514 U.S. at 219–20; United States v. Sioux Nation of Indians, 448 U.S. 371, 404–05 (1980).

213. VERMONT REPORT, *supra* note 25, at 69.

214. Mortimer v. Caldwell, 1 Kirby 53, 53–54 (Conn. 1786); VERMONT REPORT, *supra* note 25, at 66.

215. VERMONT REPORT, *supra* note 25, at 70.

216. Ireland, *supra* note 46, at 288–89 (noting special laws that changed venue and created other special trial procedures).

217. PENNSYLVANIA REPORT, *supra* note 24, at 41; Bank Markazi v. Peterson, 136 S. Ct. 1310, 1319–20 (2016).

218. Exec. Order No. 13337, 3 C.F.R. § 13337 (2004) (setting out procedures for the issuance of permits for energy-related facilities engaged in cross-border transactions).

219. S. 1, 114th Cong. (2015).

220. *Id.* § 2(b)(2); *see* Zoldan, *supra* note 135, at 629.

ance with generally applicable laws.[221] When it enacts special legislation, like the Keystone pipeline measure, Congress impinges on the constitutional principle of separation of powers by assuming the power to apply the law in derogation of the responsibilities of the executive branch.[222]

III. IN DEFENSE OF SPECIAL LAWS

Not all special laws lead to all of the costs described above. Moreover, some special legislation is an uncontroversial way to deal with problems that are not or cannot be addressed by generally applicable laws. Specifically, special legislation sometimes addresses the needs of particular geographic locations, supports a public purpose, cures disuniformities created by the generally applicable laws, or provides relief for underrepresented political minorities.

A. Special Laws Can Address Local Problems

Formal equality suggests that the law should treat two things the same only if they are "similarly situated," that is, if they are the same in a relevant way.[223] Special legislation is justified by a formal conception of equality, therefore, when the subject of the legislation is not similarly situated to anything else. Consistent with this vision of equality, legislatures often enact special legislation treating particular geographic locations—like cities, counties, or other municipal subdivisions—uniquely;[224] this type of legislation is often called local legislation.[225] For example, a law providing a rule

221. S. 1; *see also* Message to the Senate Returning Without Approval the Keystone XL Pipeline Approval Act, 2015 DAILY COMP. PRES. DOC. 1 (Feb. 24, 2015).

222. Legislatures have also impinged on the executive power by enacting special laws pardoning individuals convicted of crimes. VERMONT REPORT, *supra* note 25, at 60–70.

223. Determining whether two things are similarly situated is notoriously difficult. For a discussion of problems surrounding this determination, see Zoldan, *The Equal Protection Component*, *supra* note 23, at 538–40. *See also* CHRISTOPHER M. DAVIS, CONG. RESEARCH SERV., RS22450, PROCEDURAL ANALYSIS OF PRIVATE LAWS ENACTED: 1986–2013, at 1 (2013) ("Private legislation is premised on the idea that general law cannot cover all situations equitably, and sometimes Congress must approve legislation to address unique problems . . . .").

224. Wilson v. Weiss, 245 S.W.3d 144, 146 (Ark. 2006) (invalidating an act applying to one city); Leighton v. City of Minneapolis, 25 N.W.2d 263, 266 (Minn. 1946) ("The fact that there is but one city in the state to which the act presently applies does not make the act special legislation."); U.S. Fidelity & Guar. Co. v. City of Columbia, 165 S.E.2d 272, 275 (S.C. 1969) (invalidating a statutory distinction between cities with 70,000 residents and cities with 90,000 residents).

225. BINNEY, *supra* note 46, at 24–26; Price v. Kenai Peninsula Borough, 331 P.3d 356, 359–60 (Alaska 2014) (describing a constitutional ban on special or local legislation). The terminology in this area of the law is used inconsistently by courts and commentators. BINNEY, *supra* note 46, at 21–26; Cloe & Marcus, *supra* note 46, at 366. Local laws are sometimes conflated with special laws. *See e.g.*, Republic Inv. Fund I v. Town of Surprise, 800 P.2d 1251, 1259 (Ariz. 1990) (invalidating a statute applying to select cities as "special or local" laws). Other times, local laws are considered neither special nor general. *See, e.g.*, *Weiss*, 245 S.W.3d at 152 (distinguishing be-

for cities of a certain population can be considered local if, in fact, only one city in the state has that population.[226] Unlike the special laws described above, local laws have often been defended on the ground that they address issues that are peculiar to the location where they apply. Every community has characteristics that distinguish it from others, including differences in wealth, population density, and the need for sanitation, police, and fire services.[227] Some areas of a state require more paved roads than others; some counties have hills that require tunnels, and others have rivers that require bridges. Moreover, different localities may have different preferences about how state money should be allocated and how their local governments should be structured.[228] In short, laws addressed to particular political subdivisions within the state can be justified by the differences between them. As a corollary, because problems addressed by local laws do not concern the entire state, a statewide rule is not appropriate to address a uniquely local problem.

An Arizona case illustrates why commentators[229] and courts[230] have been more sympathetic to local laws than to special laws more generally. In *Gallardo v. State*,[231] a generally applicable law divided the state into community college districts, each of which was governed by a five-member governing board.[232] The state amended the generally applicable law by adding two members to the governing board of any "county with a population of at least three million persons."[233] Although written generally, this law had only local effect. At the time it was written, only one county met the population threshold and the court found that no other county was even close to reaching it.[234] Despite the exclusively local effect, and the state's constitutional prohibition on local laws,[235] the court upheld the statute on the ground that there was a rational relationship between the size of a county and the size of its community college governing board.[236] The court not-

tween local and special laws); *see also* MAY, *supra* note 52, at 831, 828–30 (describing that local laws are sometimes considered public, other times private).

226. *U.S. Fidelity & Guar. Co.*, 165 S.E.2d at 275 (invalidating a statute's distinction between cities with 70,000 residents and cities with 90,000 residents).

227. Horack & Welsh, *supra* note 46, at 183–85.

228. COOLEY, *supra* note 104, at *389–90.

229. BINNEY, *supra* note 46, at 10, 174–175; Horack, *supra* note 46, at 113.

230. Mode v. Beasley, 42 N.E. 727, 729 (Ind. 1896) (praising the legislature for its "laudable desire to pass much needed local laws"); Yant v. City of Grand Island, 784 N.W.2d 101, 108–09 (Neb. 2010) (upholding a local law); Bray v. Cty. Bd., 77 S.E.2d 479, 483–84 (Va. 1953) (upholding a statute although it applies to only one geographic area).

231. 336 P.3d 717 (Ariz. 2014).

232. *Id.* at 719–20.

233. *Id.* (citing ARIZ. REV. STAT. § 15-1441(I) (2010)).

234. *Id.*

235. ARIZ. CONST. art. IV, pt. 2, § 19.

236. *Gallardo*, 336 P.3d at 722.

ed that a populous county is likely to have a large student population and, therefore, warrant a larger board to govern it.[237] Like *Gallardo*, courts routinely uphold local laws on the ground that the locality singled out possesses unique attributes that justify particularized treatment.[238]

B. A Special Law May Have a General Purpose

A perennial cost of special legislation is its tendency to avoid problems of general concern and instead provide exclusive, unearned privileges to favored individuals[239] or impose undeserved burdens on disfavored individuals.[240] But, sometimes a law tailored to reach an individual has a general purpose. Legislation that is tailored to an individual person, including an individual corporation, is often not regarded as special so long as it relates to a matter of general concern.[241] Consider a Utah statute enacted to avert an emergency threatened by rising water levels in the Great Salt Lake. The Great Salt Lake Causeway, a raised bed of landfill that divides the lake, prevented the water levels in the separate arms of the lake from equalizing. When rising water levels in one arm of the lake threatened to flood adjacent land, the owner of the causeway, the Southern Pacific Railway, agreed to breach the causeway to prevent further flooding.[242] Because breaching the causeway would inundate and destroy underwater mining operations that were conducted pursuant to a lease with the railway, the state enacted a law indemnifying the railway from liability arising from the destruction of the leased land.[243] The indemnification provision, as the Utah Supreme Court later noted, applied only to one piece of land and provided the benefit of indemnification for one entity alone.[244] Despite the targeted nature of the law, the purpose of the law, to mitigate flooding damage, was to advance the public interest.

---

237. *Id.*

238. *See* Lamasco Realty Co. v. City of Milwaukee, 8 N.W.2d 372, 377 (Wisc. 1943) (upholding a statute that applied only to Milwaukee because of the city's unique characteristics); Elliott v. Fuqua, 204 S.W.2d 1016, 1017 (Tenn. 1947) (upholding a statute that applied only to one county).

239. Jackson, Veto Message, *supra* note 104, at 1153; COOLEY, *supra* note 104, at *392–93; Cloe & Marcus, *supra* note 46, at 357; Horack & Welsh, *supra* note 46, at 183; Ireland, *supra* note 46, at 279; Schutz, *supra* note 46, at 45; Williams, *supra* note 104, at 1207–08; Zoldan, *The Equal Protection Component*, *supra* note 23, at 511–14.

240. United States v. Lovett, 328 U.S. 303, 309 (1946); Foretich v. United States, 351 F.3d 1198, 1204–08 (D.C. Cir. 2003); Roberts, *supra* note 178, at 1387; Steilen, *supra* note 177, at 426.

241. Price v. Kenai Peninsula Borough, 331 P.3d 356, 360–62 (Alaska 2014) (upholding targeted provision because it addressed a matter of general concern); Tusso v. Smith, 156 A.2d 783, 787–88 (Del. Ch. 1959) (same); *In re* Pub. Act 619 of the Pub. Acts of 2002 v. State, No. 257500, 2005 WL 659654, at *7,*8 (Mich. Ct. App. Mar. 22, 2005) (same); Associated Gen. Contractors of S.D., Inc. v. Schreiner, 492 N.W.2d 916, 924–25 (S.D. 1992) (same).

242. Colman v. Utah State Land Bd., 795 P.2d 622, 636 (Utah 1990).

243. *Id.* at 623–24.

244. *Id.* at 636.

Drawing the same distinction between special privileges or burdens and, on the other hand, statutes of general concern, courts routinely uphold targeted legislation when finding that it addresses matters that touch the public interest. This special legislation includes statutes prohibiting fishing in a particular stream,[245] reorganizing a particular school district,[246] permitting gambling in a particular location,[247] granting funds to particular counties,[248] creating a particular public interest corporation,[249] and, most famously, if uniquely, confiscating the papers of former President Nixon.[250]

C. A Special Law May Enhance Rather Than Impair Uniformity

Special laws are often criticized for creating disuniformity in the law,[251] which not only introduces unjustifiable inequalities, but also compromises the ability of the law to provide notice and guidance. However, not all laws that target particular individuals create or exacerbate disuniformity. First, a targeted statute repealing the special treatment created by a special law enhances rather than impairs uniformity.[252] A Kansas statute illustrates this principle: a generally applicable statute fixed the compensation of state officers; in derogation of this generally applicable law, the state granted a higher rate to probate judges in a particular, named county through special legislation.[253] A subsequent statute repealed the special law, returning the pay structure of the judges to the generally applicable rate. This latter statute was challenged as a special law; and indeed, as the

245. Morgan v. State, 470 S.W.2d 877, 879 (Tex. Crim. App. 1971) (upholding a statute regulating fishing in a particular area because of the state's interest in preserving fish in coastal waters).

246. Harrisburg Sch. Dist. v. Zogby, 828 A.2d 1079, 1088 (Pa. 2003) (upholding a statute taken by the state to "fulfill its duties connected with the public interest").

247. Polk v. Edwards, 626 So.2d 1128, 1133–34, 1136 (La. 1993) (upholding a law permitting gambling in particular locations because of state-wide interest).

248. Bonney v. Ind. Fin. Auth., 849 N.E.2d 473, 482 (Ind. 2006) (upholding allocations of funds to particular counties because of state-wide interest).

249. Utah Farm Bur. Ins. Co. v. Utah Ins. Guar. Ass'n, 564 P.2d 751, 753 (Utah 1977).

250. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 459, 477 (1977) (upholding a statute seizing papers and tapes of former President Nixon because of public interest in preserving these materials for historical purposes and for pending Watergate-related prosecutions).

251. State v. Lake Superior Ct., 820 N.E.2d 1240, 1248 (Ind. 2005) (noting that the purpose of including special legislation provision in state constitution was to address the lack of uniformity in state tax laws); Bd. of Trs. v. State, 761 S.E.2d 241, 246 (S.C. 2014) (Beatty, J., dissenting) ("The purpose of the prohibition on special legislation is to make uniform where possible the statutory laws of this State . . . ." (quoting Med Soc'y of S.C. v. Med. Univ. of S.C., 513 S.E.2d 352, 357 (S.C. 1999))); 54 Wis. Op. Att'y. Gen. 3, 7 (1965) (recognizing that the purpose of special legislation restrictions is to promote uniformity).

252. People *ex rel*. Rogerson v. Crawley, 113 N.E. 119, 121 (Ill. 1916) ("This court has never held any act unconstitutional, under this section, which tended to uniformity rather than to create differences . . . ."); Cloe & Marcus, *supra* note 46, at 361, 377 n.130.

253. State *ex. rel.* Jackson v. Prather, 112 P. 829, 830 (Kan. 1911).

court noted, it was special in a sense because it did single out one county's probate judges. Nevertheless, the court held that the repealing statute was "not within the reason or the spirit of the rule against special legislation" because it would "reduce the number of counties governed by special acts" by subjecting the county, previously governed by a special act, to the generally applicable law.[254] In other words, the court upheld the statute because it enhanced rather than reduced uniformity by placing the county's probate judges under the rule generally applicable to state officers. With this same goal, some state constitutions explicitly permit special laws enacted to repeal other special laws.[255]

Second, uniformity is enhanced by a targeted statute that seeks to ensure that like situations are treated alike, eliminating disuniformity created by the generally applicable laws.[256] Laws that seek to cure disuniformity created by the general laws are often called "curative" laws and upheld despite their targeted nature.[257] In *O'Brian v. County Commissioners of Baltimore County*,[258] a typical case upholding a targeted law as curative, a state agency awarded a contract to build a particular road pursuant to a generally applicable statute.[259] While the road was in progress, but before it was complete, the legislature repealed the generally applicable law.[260] The legislature apparently wanted the road-in-progress to be finished. Nevertheless, because the state legislature did not provide a savings clause in its repealer statute, no state agency had the authority to pay for the completion of the road. In order to correct this oversight, the legislature enacted a new statute, naming the road-in-progress and authorizing payment for its completion.[261] The law was challenged as prohibited special legislation. The court upheld the statute, noting that the targeted statute was intended to be "curative"; that is, it was intended to remedy the mischief created by the repeal of the generally applicable road authorization law without providing for the completion of roads-in-progress.[262] As a result, the statute was not

254. *Id.* at 831.

255. MO. CONST. art. III, § 41; PA. CONST. art. III, § 32; S.D. CONST. art. III, § 23.

256. DAVIS, *supra* note 222, at 1 (noting that private legislation is designed to address "problems that public law either created or overlooked").

257. BINNEY, *supra* note 46, at 174–75; Cloe & Marcus, *supra* note 46, at 377; *see* City of Muscatine v. Waters, 251 N.W.2d 544, 548, 550 (Iowa 1977) (upholding a targeted statute because it seeks "to cure or validate errors or irregularities in legal or administrative proceedings") (quoting McSurely v. McGrew, 118 N.W. 415, 419 (Iowa 1908))); Weber v. City of Helena, 297 P. 455, 466 (Mont. 1931) (upholding curative statute against challenge as special law).

258. 51 Md. 15 (1879).

259. *Id.* at 20–21.

260. *Id.*

261. *Id.*

262. *Id.* at 23.

prohibited as a special law.[263] The statute in *O'Brian*, although targeted to a specific road, did not create disuniformity. Rather, the statute arguably encouraged uniformity by ensuring that the contractor who had contracted with the state to build the road would be treated like all previous contractors with the state; that is, he would be paid for his work.[264]

Third, a statute that changes the law for a known individual may enhance uniformity if it also serves as a model for future cases. A legislature sometimes enacts a statute to govern future behavior that also applies to behavior that already has occurred. This is often the case when, in response to a particular event, the legislature passes a statute that addresses both that particular event and anticipated future conduct. If this new statute applies prospectively only, it would create disuniformity between future cases and the pending case that prompted the legislative response. However, if it applies retrospectively to include the pending case that prompted the change in law, it would apply uniformly to pending and future cases. Notably, the first Congress enacted a number of statutes that created a rule encompassing both named individuals and similar potential future cases. For example, Congress granted death benefits to a particular, named widow and orphan of soldiers killed during the Revolutionary War.[265] In the same statute, Congress also provided that "the widow or orphan of each officer, non-commissioned officer, or soldier, who was killed or died whilst in the service of the United States" was entitled to a pension on the same terms as provided to the named beneficiaries.[266] Although the statute singled out beneficiaries by name, the statute did not impair uniformity; instead, it ensured that there would be uniformity between the current, named beneficiaries and any similar beneficiaries that come into existence in the future.[267]

D. Special Laws Can Provide Relief for Underrepresented Individuals

While special benefit legislation concentrates benefits on a single individual, the corresponding costs tend to be diffused throughout a large, dis-

263. *Id.*

264. *Id.* at 25–26. The first Congress similarly ensured that like situations would be treated alike in the case of the Baron de Glaubeck, a German soldier who fought with the United States Army, earning a commission as captain without pay. JAMES GRAHAM, THE LIFE OF GENERAL DANIEL MORGAN 311 (New York, Derby & Jackson 1859); Michael J. Wishnie, *Immigrants and the Right to Petition*, 78 N.Y.U. L. REV. 667, 701–02 (2003). Congress enacted a special law granting "the pay of a captain in the army of the United States" to the Baron de Glaubeck. Act of Sept. 29, 1789, ch. 26, 6 Stat. 1. However, far from providing special treatment to de Glaubeck, the statute provided that he was to be paid "in the same manner as other foreign officers in the service of the United States ha[d] been paid." *Id.*

265. Act of Aug. 11, 1790, ch. 45, §§ 1–2, 4, 6 Stat. 4, 4–5.

266. § 4, 6 Stat. at 5.

267. *See also* MacImage of Me., LLC v. Androscoggin Cty., 40 A.3d 975, 989 (Me. 2012) (applying a new rule to a pending case despite a constitutional prohibition on special legislation).

organized, heterogeneous group. As a result, even if a special law lacks powerful supporters, opposition to special legislation tends to be weak.[268] It is precisely because opposition to special benefit legislation tends to be weak that it can be promoted successfully not only to aggrandize the wealthy and well-connected,[269] but also to provide relief for political minorities who are unrepresented in, or excluded from, the political process.[270] In colonial Virginia, the General Assembly would consider petitions for special bills not only from the wealthy and well-connected, but also from women, the poor, prisoners, free blacks, and even slaves.[271] The General Assembly's willingness to consider and occasionally enact special bills for individuals who could not vote or hold political office was a strikingly democratic feature in an otherwise hierarchical society. Indeed, social rank did not seem to influence whether the General Assembly enacted a special bill in response to a petition.[272] In one notable example, a group of free black men successfully petitioned for an exemption from certain taxes.[273]

A modern analog is special immigration legislation. Congress has enacted more than 7,000 special immigration bills,[274] the vast majority of which provided relief for individuals who were not politically well-connected. Historically, most private immigration bills have been enacted for otherwise underprivileged individuals, like orphans adopted by citizens of the United States, war brides and children of United States servicemen, and displaced persons or refugees.[275] Special immigration legislation procured by bribery for the benefit of the politically well-connected[276] is the exception to this general pattern.

IV. A BETTER APPROACH TO SPECIAL LEGISLATION

In light of the foregoing, it would be hasty to characterize special legislation as uniformly beneficial or costly. It can impose significant costs on society, to be sure; but, in other circumstances, it can also provide benefits.

268. *See* PARKER, *supra* note 107, at 30–31 (1996) ("[N]umerically large, diffuse interest groups normally will not be effective bidders for public policies, and small groups will have an inordinate amount of influence."); Herbert Hovenkamp, *Legislation, Well-Being, and Public Choice*, 57 U. CHI. L. REV. 63, 86–87 (1990) ("Interest groups that are small, single-minded, and well-organized tend to convey their messages more clearly than large interest groups with diverse agendas. This produces a significant bias in the legislative process in favor of smaller, more efficient special interest groups.").

269. *See* Jackson, Veto Message, *supra* note 104, at 1153.

270. BAILEY, *supra* note 109, at 42–43.

271. *Id.* at 10, 42–45, 166–67.

272. *Id.* at 42–43.

273. *Id.* at 44.

274. *See* LEE, *supra* note 102, at 2.

275. *Id.* at 8.

276. Gershman, *supra* note 94, at 1571–72.

As a result, neither a blanket prohibition on special legislation nor a blind eye toward it is likely to produce optimal societal results. Instead, it is preferable to attempt to formulate rules to govern the enactment of special legislation that will reduce its costs without completely eliminating its benefits.[277] This Part advocates a better approach to special legislation by proposing legislative procedures designed to discourage costly special legislation without eliminating its benefits. Both the chambers of Congress[278] and the chambers of state legislatures[279] have the power to adopt the changes proposed in this Part under their power to write rules governing their proceedings. As a result, the proposals in this Part are addressed to legislatures—both state legislatures and Congress—rather than to courts.

A. Three Caveats Before Suggesting Legislative Modifications

Before I suggest how legislatures can modify their internal rules, three caveats are in order. First, by proposing changes to legislative rules, I acknowledge that the enforcement of these proposals relies on the willingness of legislative chambers to adopt these restrictions and enforce them in particular cases. I am optimistic that legislatures would be willing to adopt and adhere to rules related to special legislation because the chambers of Congress already have adopted rules related to private legislation (a subset of special legislation) and earmarks (a close analog of special legislation), have generally observed these rules, and have adopted a mechanism for resolving difficult questions about their application.

House and Senate rules prohibit either chamber from considering private bills in certain circumstances[280] and restrict their consideration in oth-

277. For an argument that prohibitions on special legislation should be understood to help eliminate costly logrolling, see Gillette, *supra* note 46, at 642.

278. U.S. CONST. art. I, § 5 ("Each House may determine the Rules of its Proceedings . . . ."); *see also* JOSEPH STORY, 1 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 588 (Boston, Little, Brown & Co. 4th ed. 1873) ("No person can doubt the propriety of the provision authorizing each house to determine the rules of its own proceedings. If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order.").

279. State constitutions have provisions that mirror the federal Constitution's rules of proceedings clause. *E.g.*, ALA. CONST. art. IV, § 53 ("Each house shall have power to determine the rules of its proceedings . . . ."); ALASKA CONST. art. II, § 12 ("The houses of each legislature shall adopt uniform rules of procedure."); CAL. CONST. art. IV, § 7(a) ("Each house shall . . . adopt rules for its proceedings."). Moreover, even in the absence of an express constitutional grant, state legislatures would have the power to write their own rules of procedure. H. W. Dodds & John A. Lapp, *Procedure in State Legislatures*, 77 ANNALS AM. ACAD. POL. & SOC. SCI. (SUPP.) 1, 12–13 (1918); *see also* CHAFETZ, *supra* note 95, at 277–78 (describing colonial and early state legislative sources of authority to write procedural rules).

280. RULES OF THE HOUSE OF REPRESENTATIVES, r. XII, cl. 4, at 25 (2019); STANDING RULES FOR THE SENATE, S. DOC. NO. 113-18, r. XIV, cl. 10, at 10 (2013).

ers.[281] Despite the fact that both chambers frequently pass special legislation that is not covered by their rules, they have consistently refused even to consider private legislation when doing so would violate chamber rules.[282] For example, both House and Senate rules specifically prohibit the correction of military records by private bill.[283] When a private bill was introduced in the Senate to alter the military records of a particular former serviceman, the presiding officer sustained a point of order lodged against consideration of the bill, ruling that the prohibition was intended "to put a definite termination to the introduction of private bills for the correction of military records."[284] As a result, he ruled, "the bill proposed by the able Senator cannot be received."[285] Similarly, points of order have been sustained against amendments to private bills because they would have violated chamber rules, including amendments that were not germane,[286] impermissibly general,[287] and *pro forma*.[288]

Similarly, both chambers of Congress have adopted restrictions on earmarks.[289] There has been a great deal of debate concerning whether the reduction of earmarks has reduced federal spending or, instead, whether directed spending still happens in more informal ways, such as through "lettermarking."[290] Although the debate is still ongoing, initial political science

281. *E.g.*, RULES OF THE HOUSE OF REPRESENTATIVES, r. XV, cl. 5, at 29 (setting rules for consideration of bills on the private calendar).

282. 7 DESCHLER'S PRECEDENTS, H.R. DOC. NO. 94-661, ch. 22, §§ 11.10, 13.7–.8, at 4497, 4505–06 (1994); 7 CANNON'S PRECEDENTS, ch. CCXII, § 860, at 69–70 (1936). A special thanks to Christopher Davis for helping me think through this issue.

283. RULES OF THE HOUSE OF REPRESENTATIVES, r. XII, cl. 4, at 25; STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XIV, cl. 10, at 10.

284. 93 CONG. REC. 905 (1947).

285. *Id.*

286. 7 DESCHLER'S PRECEDENTS, H.R. DOC. NO. 94-661, ch. 22, §§ 13.7–.8, at 4505–06.

287. 7 CANNON'S PRECEDENTS, ch. CCXII, § 860, at 69–70; 7 DESCHLER'S PRECEDENTS, H.R. DOC. NO. 94-661, ch. 22, § 13.8, at 4506.

288. 7 DESCHLER'S PRECEDENTS, H.R. DOC. NO. 94-661, ch. 22, § 13.16, at 4510; *see also* JOHNSON ET AL., *supra* note 75, at 178, 719 (noting that private bills have been recommitted when two members object to its consideration); 7 DESCHLER'S PRECEDENTS, H.R. DOC. NO. 94-661, ch. 22, § 11.10, at 4497 (noting that private bills called up on the wrong day have been ruled ineligible for consideration).

289. RULES OF THE HOUSE OF REPRESENTATIVES, r. XXI, cl. 9, at 36 (2019); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XLIV, cl. 6, at 69 (2013). In addition to these formal restrictions, caucuses within each chamber have adopted informal policies to refrain from requesting earmarks. *See, e.g.*, HISTORY, RULES & PRECEDENTS OF THE SENATE REPUBLICAN CONFERENCE 10 (2014), https://www.republican.senate.gov/public/_cache/files/65589e31-c184-4c95-9947-770f1b3998c1/A669DDFC6A0CAF777199282DC623467F.conference-rules-2015.pdf ("[I]t is the policy of the Republican Conference that no Member shall request a congressionally directed spending item . . . .").

290. Lettermarking is a communication by a member of Congress to an administrative agency official requesting the specific direction of otherwise non-directed appropriations to a particular constituency. Jacob R. Neiheisel & Michael C. Brady, *Congressional Lettermarks, Ideology, and Member Receipt of Stimulus Awards from the Department of Labor*, RES. & POL., July–Sept.

and economics research suggests that Congress generally has adhered to its restrictions on earmarks and that the restrictions have reduced targeted spending.[291]

Enforcing restrictions on special legislation in each legislative chamber will be made easier by the presence of professional legislative personnel dedicated to the neutral resolution of difficult questions of procedure. The House of Representatives and the Senate, for example, each have a Parliamentarian who provides expert, nonpartisan advice about legislative procedure based on precedent.[292] If either chamber were to adopt rules about special legislation, the Parliamentarian would be able to help resolve, in a nonpartisan manner, questions that arise over whether a particular bill is special.

Because the chambers of Congress have adopted rules on private legislation and earmarks, have adhered to these self-imposed restrictions, and have adopted a mechanism for resolving legislative disputes in light of precedent, it is likely that the proposals in this Part, if adopted, can constrain legislative behavior even though they are not enforceable like constitutional requirements.[293]

Second, it is probably not possible to quantify all of the costs and benefits associated with many special laws. Consider, for example, the special law resolving the ongoing litigation in *Bank Markazi*. Recall that the special law deemed the assets of the central bank of Iran to be the assets of the country of Iran for the purpose of a single consolidated case, resulting in the satisfaction of judgments for victims of terrorism.[294] From an accounting perspective, the special law that allows the satisfaction of nearly $2 billion in judgments creates neither a cost nor a benefit, but rather is better characterized as a transfer payment.[295] From the perspective of the claimants,

---

2017, at 1, 5 (finding that the efficacy of lettermarking is limited); Jacob Dawson & Sam Kleiner, *Curbing Lettermarks*, 32 YALE J. ON REG. 201, 202 (2015).

291. Steven Gordon, *What Did the Earmark Ban Do? Evidence from Intergovernmental Grants*, 48 J. REGIONAL ANALYSIS & POL'Y, 20, 37 (2018) (finding that earmark restrictions "may have helped to reverse the trend of increasing grant levels"); Neiheisel & Brady, *supra* note 290, at 5 ("[M]ost legislators do not appear to have benefitted from writing lettermarks to the bureaucracy.").

292. JOHNSON ET AL., *supra* note 75, at iii.

293. Similarly, the British Parliament adheres to its rules for considering private bills. *See* MAY, *supra* note 52, at 830, 835–37 (noting that private bills may not proceed when the process for considering them is defective); *see also* Anita Krishnakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. LEGIS. 1, 16–17 (2009) (arguing that framework statutes, although are not binding, tend to be followed by legislature).

294. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1319–20 (2016).

295. *E.g.*, OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-4, at 38 (2003), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A4/a-4.pdf ("Transfer payments are monetary payments from one group to another that do not affect total resources available to society.").

however, this special law resulted not only in quantifiable judgments, but also in the unquantifiable benefit of resolving legal disputes that began decades earlier. But, the statute created costs as well. The *Bank Markazi* decision itself has led to follow-on litigation that is still ongoing, both in the United States and in the International Court of Justice.[296] Perhaps more importantly, and impossible to quantify, *Bank Markazi*'s special law arguably undermines the financial and diplomatic stability achieved by having a coherent and predictable policy toward foreign countries and their central banks. Because it is not possible to fully quantify the costs and benefits of many special laws, there may not always be agreement about whether the elimination of a particular special law is normatively attractive.

Third, the proposals in this Part draw inspiration from the practices of state legislatures,[297] Congress,[298] federal administrative agencies,[299] and the Parliament of Great Britain.[300] Although I argue that the proposals are normatively attractive, I do not suggest that these practices are binding as a matter of constitutional law.

With these caveats in mind, legislatures should consider one or more of the following procedural requirements to reduce the costs of special legislation: a rule requiring that special legislation may be enacted only by a legislative supermajority; a rule requiring public notice and providing an opportunity for public participation before special legislation is enacted; and a rule prohibiting special legislation unless it is accompanied by an official statement of the law's purpose.

B. A Legislative Supermajority Requirement

1. Models for a Legislative Supermajority Requirement

Federal lawmaking sometimes requires a legislative supermajority.[301] Consider just a few examples from the Constitution: a supermajority of the

296. *See* Certain Iranian Assets (Iran v. U.S.), Judgment, ¶ 13 (Feb. 13, 2019), https://www.icj-cij.org/files/case-related/164/164-20190213-JUD-01-00-EN.pdf; Peterson v. Islamic Republic of Iran, 876 F.3d 63 (2017).

297. *E.g.*, DEL. CONST. art. II, § 19 (requiring supermajority approval before enacting special legislation); OKLA. CONST. art. V, § 32 (requiring publication of the contents of a proposed special bill).

298. 28 U.S.C. §§ 1492, 2509 (2012) (describing the congressional reference case process); RULES OF THE HOUSE OF REPRESENTATIVES, r. XII, cl. 4, at 25 (2019) (prohibiting certain types of private laws).

299. 5 U.S.C. § 553 (2012) (requiring notice and comment rulemaking process); Chocolate Mfrs. Ass'n of the U.S. v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) (describing the obligations of an agency during the notice and comment process).

300. *See generally* DODD, *supra* note 121 (describing the practice of private petitioning of Parliament); MAY, *supra* note 52, at 824.

301. McGinnis & Rappaport, *supra* note 105, at 710–12.

Senate is required for the approval of treaties; and a supermajority of both chambers of Congress is required to override a veto and, when initiated by Congress, to propose amendments to the Constitution.[302] Outside of the Constitution, legislative rules have developed to require supermajority support before legislation can be enacted. Most famously, the Senate's chamber rules effectively require a supermajority for most legislation by permitting a minority to block it, a tactic known as the filibuster.[303]

Some state legislatures also abide by supermajority requirements for lawmaking, including both constitutional rules and internal provisions akin to the Senate's supermajority cloture rule.[304] Most notably, a number of state constitutions require supermajority approval by the legislature before special legislation may be enacted.[305] Delaware's constitution is typical: it permits certain types of special laws, but only provided that two-thirds of each chamber of its legislature approves the special law.[306] In all of these examples—the federal Constitution, state constitutions, and the filibuster—the effect is to slow down the legislative process and screen out minimally supported laws.[307]

2. A Legislative Supermajority Requirement Will Reduce the Cost of Special Legislation

A legislature can reduce the costs associated with special legislation by enacting it only by a supermajority. A supermajority requirement will reduce the costs of special legislation in three ways: first, by reducing all special legislation, freeing up legislative time for matters of public concern; second, by reducing harmful special legislation particularly well; and third,

302. U.S. CONST. art. II, § 2 (requiring the consent of a supermajority of the Senate to make treaties); *id.* art. I, § 7 (requiring a supermajority of both chambers of Congress to override a veto); *id.* art. V (requiring a supermajority of both chambers of Congress to propose amendments).

303. STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, r. XXII, at 15–17 (2013); GREGORY J. WAWRO & ERIC SCHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 6–7 (2006) (describing the importance of the filibuster to Senate procedure).

304. *E.g.*, ALASKA STATE LEGISLATURE UNIFORM RULES, r. 32(a), at 16 (2018) ("The previous question upon all recognized motions or amendments which are debatable may be ordered by a two-thirds vote of the members present. If ordered, the previous question has the effect of cutting off all debate . . . ."); *see also* PERMANENT RULES OF THE VERMONT SENATE, r. 55, at 12 (2016) ("A call for the previous question shall not at any time be in order.").

305. DEL. CONST. art. II, § 19; IOWA CONST. art. 3, § 31; MICH. CONST. art. 4, § 29; N.J. CONST. art. IV, § 7, ¶ 10.

306. DEL. CONST. art. II, § 19; Smith v. Balt. & Ohio. R.R., 85 A.2d 73, 75 (Del. Super. Ct. 1951) ("Having failed to pass both Houses of the Legislature by the required two-third vote of all the members it must be declared invalid.").

307. CHAFETZ, *supra* note 95, at 296 (describing the screening function of the Senate filibuster); McGinnis & Rappaport, *supra* note 105, at 788 n.359 (describing effects of constitutional supermajority provisions).

by failing to reduce beneficial special legislation as thoroughly as it reduces costly special legislation.

First, a supermajority requirement for special legislation will reduce all special legislation. As compared with a simple majority, a supermajority requirement demands that a greater percentage of legislators agree to a bill before it becomes law.[308] The increased cost (including time, money, and political capital) that a proponent of special legislation encounters should lower the demand for special legislation, reducing the likelihood that special legislation will be passed. As a result, a supermajority requirement for the enactment of special legislation encourages the persistence of the status quo.[309] Commentators have observed that supermajority requirements impede the passage of bills in the United States Senate, which, because of its chamber rules, permits a minority to block legislation. Professor Josh Chafetz has noted that the use of the filibuster in the Senate means that "many measures with broad and deep support" fail to pass because they earn "the support of fewer than sixty senators."[310]

Because a supermajority requirement will reduce both beneficial and costly special legislation, without knowing the details of a particular proposed special law, it is impossible to say whether it will be beneficial or harmful to reduce its viability through a supermajority requirement.[311] Nevertheless, the reduction of special legislation in general is normatively attractive in itself because of the costs created by excessive amounts of special legislation. As noted above, an abundance of special legislation can push public-regarding laws from the legislative agenda.[312] The reduction of special legislation precipitated by a supermajority requirement would help clear the legislative docket of special legislation that is likely to attract only a simple majority. Also, because legislators know that promoting legislation is relatively costly when it requires supermajority support,[313] a supermajority requirement could also reduce costs by encouraging legislators to spend less time promoting special laws.

Second, a supermajority requirement would reduce special legislation in a normatively attractive way because it would be particularly successful at reducing the costs associated with special legislation described above, including corruption and a lack of deliberation. Supermajority requirements would reduce the likelihood that special legislation is enacted without de-

308. John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 403–04 (1999).

309. *Id.*

310. CHAFETZ, *supra* note 95, at 296–97.

311. *See* McGinnis & Rappaport, *supra* note 105, at 742 (arguing that supermajority rules are attractive if baseline rules are attractive).

312. *See supra* Section II.B.

313. McGinnis & Rappaport, *supra* note 105, at 745.

liberation. As noted above, special legislation both tends to be under-deliberated and also places excessive demands on the legislative agenda more generally.[314] A supermajority requirement for special legislation (like all supermajority requirements) can encourage deliberation by making each legislative vote to secure the passage of a law more valuable. Because each vote is more valuable, legislators advocating a special bill will have to persuade more colleagues of its merits. Increasing the number of interactions that must take place among legislators before a law is enacted will promote the deliberation that accompanies discussion and debate.[315] The goal of enhancing the deliberative process has prompted a number of states to require their legislatures to enact special laws only with a supermajority of two-thirds.[316] The Delaware Supreme Court, for example, noted that its supermajority requirement for special legislation was driven by the "flood of special bills" that inundated the state's legislature "and the consequent demands upon the time of the General Assembly."[317]

Similarly, supermajority rules would likely be good at reducing special legislation that reflects the corruption of the legislative process, either because of overt bribery or because it is enacted for the benefit of powerful and politically well-connected individuals rather than for the benefit of the public.[318] By slowing down the legislative process and making each vote more valuable, a supermajority requirement would expose legislators' decisions to public scrutiny, which would help reveal whether the decision to support a bill was corrupt.[319] A supermajority provision would also reduce special legislation that inures to the benefit of the politically well-connected by raising the cost of procuring legislative support. The greater the number of legislators that must agree to enact a special law, the more it will cost to procure their support. A special law that provides private rather than public

314. *See supra* Section II.B.

315. John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 497 (1995) (describing the connection between debate and deliberation); Staszewski, *supra* note 135, at 1287–88 (describing benefits of discussion and debate).

316. DEL. CONST. art. II, § 19; IOWA CONST. art. 3, § 31; MICH. CONST. art. IV, § 29; N.J. CONST. art. 4, § 7, ¶ 10.

317. Wright v. Husbands, 131 A.2d 322, 332 (Del. 1957).

318. *See* Clean Water Coal. v. M Resort, LLC, 255 P.3d 247, 254 (Nev. 2011) (criticizing the legislature for enacting "special laws for the benefit of individuals instead of enacting laws of a general nature for the benefit of the public welfare" (quoting Evans v. Job, 8 Nev. 322, 333 (1873))).

319. Alvaro Cuervo-Cazurra, *Transparency and Corruption*, *in* THE OXFORD HANDBOOK OF ECONOMIC AND INSTITUTIONAL TRANSPARENCY 334 (Jens Forssbaeck & Lars Oxelheim eds., 2015) ("Transparency can help reduce corruption by exposing the corrupt relationships to public opprobrium . . . ."); Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 928 (2009) (noting that transparency encourages the public to "pull the alarm on . . . corruption").

benefits would be attractive to fewer legislators than a law with public benefits, all else being equal, because fewer legislators would have an incentive to create a privilege for the special law's beneficiary. As a result, the proponent of a special law would have to spend more to procure support of legislators who otherwise would have no incentive to enact special legislation without a public benefit. The increased cost of procuring special laws with only private benefit would will reduce the demand for them.

Third, although a supermajority requirement would be particularly successful at reducing the costs of special legislation noted above, it is less likely to impede special legislation enacted for a public purpose or special legislation addressing unique circumstances. Even if special, legislation that is enacted for a public purpose or to address a unique circumstance would have broad support and, as a result, could be enacted despite the increased difficulty in obtaining a supermajority. Consider, again, the Utah indemnity law that encouraged a railway to breach the Great Salt Lake Causeway, averting disaster.[320] Despite the fact that the law was special, the flooding was a unique circumstance that could not quickly be addressed by generally applicable law. Moreover, the purpose of the law, to mitigate flooding damage, was in the public interest. Because of the urgency of the situation, and because of the importance of the special law, it is likely that an indemnification law like this one would be so popular that it would garner not only majority, but supermajority, support.

C. Notice and an Opportunity to Participate

A legislature can reduce the costs of special legislation by requiring public notice before it acts on special legislation. Notice of a law, after it is enacted, serves the important purpose of providing individuals with knowledge of the conduct that society prohibits. A person who does not have notice of what conduct is unlawful is not "free to steer between lawful and unlawful conduct."[321] But, providing notice of a proposed law *before* it is enacted serves a different purpose. A person who is notified that a lawmaking body is considering creating a law has the opportunity to participate in the lawmaking process to some degree, either by opposing the proposed law[322] or influencing its final shape.[323]

320. Colman v. Utah State Land Bd., 795 P.2d 622, 623 (Utah 1990).

321. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

322. Burnett v. Chilton Cty. Health Care Auth., No. 1160958, 2018 WL 4177518, at *6 (Ala. Aug. 31, 2018) (opining that the notice requirement for special legislation was intended to provide opponents "a fair opportunity to protest against and oppose its enactment" (quoting Wallace v. Bd. of Revenue, 37 So. 321, 323 (Ala. 1904))); Deputy Sheriffs Law Enf't Ass'n of Mobile Cty., v. Mobile Cty., 590 So. 2d 239, 241 (Ala. 1991) (opining that the purpose of the notice provision "is to inform all persons affected by the local law, thus giving them an opportunity to voice their op-

1. Models of Notice and Participation

There is no formal mechanism for public participation in the federal process of statutory creation.[324] Indeed, Congress is not required to give public notice that it is considering legislation before it enacts it. Nor is Congress required to hold hearings on proposed legislation or to take public views before enacting legislation.[325] And, although Congress often does gather information before enacting legislation, which can help it decide whether to legislate, and what legislation should include,[326] congressional hearings are held at the discretion of Congress, or its individual chambers or committees, and cannot be required by the public or ordered by a court.[327] The centrality of lobbying to the federal legislative process is a testament to the fact that the formulation of statutory language is done outside of the public eye.[328] Even the tangled vines of rules that have grown up around lobbying do little to make lobbyist influence on members of Congress transparent to the public.[329]

Outside of the federal process of statutory formulation, however, it is easy to find models of robust public participation in lawmaking. Public participation, for example, is an integral and well-known part of the federal rulemaking process. With some exceptions, federal agencies must provide public notice before they promulgate rules.[330] The notice alerts the public to the subject of the proposed rulemaking and, in practice, normally in-

position"); BAILEY, *supra* note 109, at 31 (explaining that colonial legislative committees would consider counter-petitions before determining the facts relevant to a special bill).

323. Chocolate Mfrs. Ass'n of the U.S. v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) (opining that the purpose of the notice and comment procedure is "to allow the agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules" (quoting Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978))); *accord* BAILEY, *supra* note 109, at 75 (noting that colonial legislative committees would sometimes decline to enact a special bill because of public opposition).

324. Peter L. Strauss, *Rulemaking in the Ages of Globalization and Information: What America Can Learn from Europe, and Vice-Versa*, 12 COLUM. J. EUR. L. 645, 654–55 (2006) ("In formal terms legislative proposals come only from legislators.").

325. *Cf.* U.S. CONST. art. I, § 7 (providing exclusive lawmaking prerequisites).

326. James Hamilton et al., *Congressional Investigations: Politics and Process*, 44 AM. CRIM. L. REV. 1115, 1122 (2007).

327. *E.g.*, STANDING RULES OF THE SENATE, S. DOC NO. 113-18, r. XXVI, cl. 1, at 31 (2013) (authorizing standing committees and subcommittees to hold hearings authorized by Senate resolution).

328. Richard L. Hasen, *Lobbying, Rent-Seeking, and the Constitution*, 64 STAN. L. REV. 191, 202 (2012) (noting that lobbying rules do not require lobbyists to disclose activities with a great level of detail).

329. Anita S. Krishnakumar, *Towards a Madisonian, Interest-Group-Based, Approach to Lobbying Regulation*, 58 ALA. L. REV. 513, 520 (2007) (arguing that it is difficult even for a "watchful public citizen" to know how lobbyist behavior influences bill language).

330. 5 U.S.C. § 553 (2012) (setting out notice and comment rulemaking procedures for federal agencies). There are exceptions to the notice requirement that I will not discuss here.

cludes the text of the proposed rule itself.[331] The notice also provides instructions for public participation, including a time limit for interested members of the public to submit comments, including "written data, views, or arguments" for the agency to consider.[332]

The notice and opportunity to comment provided during rulemaking is designed to allow public views to influence agency decision-making.[333] As described by a number of the United States courts of appeals, the purpose of notice and comment procedures is to "allow the agency to benefit from the experience and input of the parties who file comments . . . and to see to it that the agency maintains a flexible and open-minded attitude towards its own rules."[334] Put in a more adversarial tone, but reflecting the same idea, it has been observed that "public participation requirements . . . force unelected bureaucrats to consider the public interest in the formulation of federal regulations."[335] In order to achieve this goal, federal agencies may not simply ignore public comments. Indeed, when finalizing a proposed rule, an agency is required to publish responses to "significant" public comments, which puts pressure on the agency to explain its decision-making process.[336] And, as scholars have argued, agencies "do take comments seriously and often modify the final rule" because of comments submitted.[337]

331. WILLIAM F. FUNK ET AL., ADMINISTRATIVE PROCEDURE & PRACTICE: PROBLEMS AND CASES 96–97 (4th ed. 2010).

332. 5 U.S.C. § 553(c). Although the vast majority of rulemakings attract fewer than 100 comments, a small percentage of proposed rules receive thousands of comments or more. STEVEN J. BALLA, ADMIN. CONFERENCE OF THE U.S., PUBLIC COMMENTING ON FEDERAL AGENCY REGULATIONS: RESEARCH ON CURRENT PRACTICES AND RECOMMENDATIONS TO THE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 25–26 (2011). The recent net neutrality rulemaking, in which 27 million comments were received (many of which were undoubtedly inauthentic), is unusual. PAUL HITLIN & SKYE TOOR, PEW RESEARCH CTR., PUBLIC COMMENTS TO THE FEDERAL COMMUNICATIONS COMMISSION ABOUT NET NEUTRALITY CONTAIN MANY INACCURACIES AND DUPLICATES (2017), http://www.pewinternet.org/2017/11/29/public-comments-to-the-federal-communications-commission-about-net-neutrality-contain-many-inaccuracies-and-duplicates/.

333. JEFFREY LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 271–72 (5th ed. 2012) ("[T]here is little question that agencies must and do take comments seriously and often modify the final rule" because of submitted comments.).

334. Chocolate Mfrs. Ass'n of the U.S. v. Block, 755 F.2d 1098, 1103 (4th Cir. 1985) (quoting Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978)).

335. Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. PUB. ADMIN. RES. & THEORY 245, 246 (1998).

336. Perez v. Mortg. Bankers Ass'n, 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."); Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992) (explaining that significant comments are "those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule").

337. LUBBERS, *supra* note 333, at 272; BALLA, *supra* note 332, at 35 ("There is little doubt that comments at times exert fundamental influence over agency decision making.").

It is also possible to find examples of notice and public participation in state rulemaking and legislative processes. Like their federal counterpart, state legislatures have enacted agency rulemaking procedures, most of which are at least as elaborate as the federal process described above.[338] Most relevantly, a number of states prohibit special legislation unless notice of the proposed special law is published in advance of its enactment.[339] In these states, notice: must be given for an extended period—typically a full month—before the legislative vote takes place;[340] must include not only the title, but also the contents, of the bill;[341] and, in the case of a local law, must be published in the location that will be affected by the proposed statute.[342] When states require notice in advance of the introduction or passage of a proposed special law, it is typically for the same reasons as the notice and comment process employed for federal regulations, that is, to influence its final shape or oppose it.[343] As one state court described, the purpose of its notice requirement for special legislation "is to inform all those affected . . . of the proposed legislation to the end that they have an opportunity to oppose such legislation if they deem it unwise."[344]

State legislative rules requiring notice and an opportunity for participation in advance of the enactment of special legislation have a long pedigree. Since the middle ages, Parliament has treated the private bill process like a contested proceeding in a court of justice.[345] Still today, the House of

338. *Compare* 5 U.S.C. § 553 (2012), *with* REVISED MODEL STATE ADMIN. PROCEDURE ACT art. 3 (UNIF. LAW COMM'N 2010).

339. ALA. CONST. art. IV, § 106 (providing that special laws are void unless public notice is provided in advance); LA. CONST. art. 3, § 13 (same); MO. CONST. art. 3, § 42 (same); N.J. CONST. art. 4, § 7, ¶ 8 (same); OKLA. CONST. art. V, § 32 (same); TEX. CONST. art. 3, § 57 (same).

340. ALA. CONST. art. IV, § 106 (requiring publication for four weeks prior to introduction into the legislature); LA. CONST. art. 3, § 13 (requiring publication for thirty days before a special law can be enacted); MO. CONST. art. 3, § 42 (requiring thirty days' notice before bill can be introduced into the legislature); OKLA. CONST. art. V, § 32 (requiring four weeks' notice before consideration by the legislature); TEX. CONST. art. 3, § 57 (same).

341. ALA. CONST. art. IV, § 106 (requiring publication of the contents of a proposed special bill); OKLA. CONST. art. V, § 32 (same); TEX. CONST. art. 3, § 57 (same).

342. LA. CONST. art. 3, § 13 (requiring publication in the locality affected by the proposed bill); MO. CONST. art. 3, § 42 (same); TEX. CONST. art. 3, § 57 (same).

343. Burnett v. Chilton Cty. Health Care Auth., No. 1160958, 2018 WL 4177518, at *6 (Ala. Aug. 31, 2018) (holding that the notice requirement for special legislation was intended to provide opponents "a fair opportunity to protest against and oppose its enactment" (quoting Wallace v. Bd. of Revenue, 37 So. 321, 323 (Ala. 1904))).

344. Adam v. Shelby Cty. Comm'n, 415 So. 2d 1066, 1069 (Ala. 1982) (quoting Wilkins v. Woolf, 208 So. 2d 74, 74 (Ala. 1968)); *see also* State v. Ward, 118 P.2d 216, 220 (Okla. 1941) (holding that the purpose of the notice requirement is to give the public "an opportunity to appear before the Legislature and remonstrate against the passage of such law if they did not think it was wise" (quoting Coyle v. Smith, 113 P. 944, 949 (Okla. 1911))).

345. DEAN, *supra* note 119, at 249 (describing the contested private bill process in Parliament); MAY, *supra* note 52, at 825 (describing Parliament's consideration of private bills as a judicial proceeding).

Commons's private bill procedure resembles a contested court proceeding, where "persons whose private interests are to be promoted appear as suitors for the bill, while those who apprehend injury are admitted as adverse parties in the suit."[346] Like paying a court filing fee, the promoters of a private bill are required to pay a fee in order to pursue their claim.[347] Affected parties must be provided notice of the private bill, and failure to do so voids the proceedings.[348] A committee of members of the House of Commons sits as a court[349] and the hearing proceeds like a trial: parties are entitled to present arguments in person, summon witnesses, and tender written evidence;[350] live witnesses can be compelled to testify and are subject to cross-examination;[351] the witnesses are examined under oath by the interested parties;[352] and the committee takes evidence on, and tries only the matters asserted in, the bill.[353] After conducting an adversarial proceeding, the committee can grant relief to the suitor based only on the facts asserted in the bill as proved by the evidence presented.[354]

Parliamentary practice gave rise to similar practices in the American colonies.[355] For the purpose of settling private claims with special bills, colonial legislatures created legislative committees to handle private petitions.[356] These committees would investigate the facts presented,[357] summon witnesses,[358] "accept and consider evidence from all interested parties" in trial-type proceedings, and rule on the claims.[359]

346. MAY, *supra* note 52, at 825; *see* HOUSE OF COMMONS PRIVATE BILL OFFICE, GUIDANCE ON PETITIONING AGAINST A PRIVATE BILL IN THE HOUSE OF COMMONS, 2018, at 3–5 (UK) (describing the process for petitioning against a private bill); STANDING ORDERS OF THE HOUSE OF COMMONS: PRIVATE BUSINESS SO 127, at 53 (2017) (UK) [hereinafter STANDING ORDERS] (describing proceedings in cases of private petitions).

347. STANDING ORDERS, *supra* note 346, at 97 (Table of Fees); DEAN, *supra* note 119, at 232 (describing fees to be paid by private bill promoters).

348. STANDING ORDERS, *supra* note 346, SOs 4(1), 10(1), 22, at 5, 8, 14; MAY *supra* note 52, at 843, 892–93.

349. STANDING ORDERS, *supra* note 346, SOs 89–91, at 43–44.

350. MAY, *supra* note 52, at 944–45; STANDING ORDERS, *supra* note 346, SOs 13–16, at 137–36 (Rules for the Practice and Procedure of the Court of Referees on Private Bills) (describing the reception of oral and written evidence).

351. MAY, *supra* note 52, at 944–45.

352. *Id.*

353. STANDING ORDERS, *supra* note 346, SO 136, at 55.

354. MAY, *supra* note 52, at 953; STANDING ORDERS, *supra* note 346, SOs 136, 142, at 55, 56.

355. HARLOW, *supra* note 123, at 11, 14, 20, 64 (describing the development of standing committees in colonial legislatures to deal with petitions); Desan, *supra* note 125, at 192 (same).

356. HARLOW, *supra* note 123, at 11, 20, 64; Desan, *supra* note 125, at 192.

357. HARLOW, *supra* note 123, at 14, 16.

358. *Id.* at 16.

359. BAILEY, *supra* note 109, at 31.

2. Notice and Participation Reduces the Cost of Special Legislation

Legislatures can reduce the costs of special legislation by providing public notice and an opportunity to participate in the legislative process along the lines described above. Notice of, and an opportunity to respond to, proposed special legislation will reduce the likelihood that the legislative process will be corrupted, reduce the likelihood that special legislation is enacted without deliberation, and help remove special legislation from the legislative agenda. Notice and participation is less likely to reduce legislation that is enacted for the public benefit or legislation that will decrease disuniformity in the law.

First, notice and an opportunity to participate will reduce special legislation reflecting the corruption of the legislative process. Notice will reduce special legislation procured through bribery by shedding light on the actions of legislators themselves. Even the (admittedly rare) legislator inclined to introduce and support legislation for an overtly corrupt purpose will be less willing to do so when public notice threatens to expose the arrangement and embarrass the self-dealing legislator.[360]

Notice and participation will also reduce legislation designed to benefit a politically powerful individual rather than the public. As noted, a person who stands to benefit from a special bill has a strong motivation to influence a legislator to introduce and support it. And a legislator who proposes a special bill on behalf of a particular beneficiary can often rely on a culture of logrolling for its passage.[361] As a result of logrolling, it is often the case that a special bill that is deeply important to one constituent, and of little consequence to others, is enacted despite the fact that it serves little or no purpose other than to enrich the beneficiary.[362] The requirement of notice before a special law is enacted will mitigate the effects of logrolling. Notice that a special bill has been proposed will alert constituents that a special benefit may be distributed and encourage otherwise minimally interested members of the public to pay attention to the potential impact of the bill, inquire into its necessity, and oppose it if they deem it unwise.[363]

360. PARKER, *supra* note 107, at 40 ("[T]he longer a legislator is involved in favor selling the greater the risk of being found out and punished."); Coglianese et al., *supra* note 319, at 298 (arguing that transparency encourages the public to "pull the alarm on extreme forms of agency wrongdoing, such as corruption"); Cuervo-Cazurra, *supra* note 319, at 334 ("Transparency can help reduce corruption by exposing the corrupt relationships to public opprobrium . . . .").

361. Ireland, *supra* note 46, at 273–75.

362. PARKER, *supra* note 107, at 30–31; *see* Gillette, *supra* note 46, at 648–49 (describing logrolling in the context of special legislation).

363. Burnett v. Chilton Cty. Health Care Auth., No. 1160958, 2018 WL 4177518, at *6 (Ala. Aug. 31, 2018) (holding that the notice requirement for special legislation was intended to provide opponents "a fair opportunity to protest against and oppose its enactment" (quoting Wallace v. Bd.

Second, notice and opportunity to participate will reduce special laws that fail to reflect deliberation. Notice and participation facilitate deliberation by slowing down the legislative process, extending the time between formulation of the text of the bill and its enactment. This delay ensures that legislators have an extended opportunity to review and discuss a bill before voting on it.[364] Perhaps more importantly, notice and an opportunity for participation will permit those affected by the laws—not just members of the legislature—to make their views known. By exposing legislators to a diverse set of views, a requirement of notice and an opportunity to participate will ensure that legislators are aware of the full range of the public's views on the proposed legislation. The public airing of differing views on proposed legislation make it more difficult, politically, for legislators to ignore these views.

Third, notice and an opportunity to participate will help remove unpopular special legislation from the legislative agenda. By exposing its proponents to additional public scrutiny, and by slowing down the process generally, notice and opportunity for participation will increase the cost of promoting special legislation. This increased cost should reduce their supply, that is, the frequency of their introduction. A legislator with limited time and political capital is unlikely to waste much time on bills that are unlikely to pass because of the significant cost associated with their passage. As a result, a notice and participation requirement should reduce the number of special bills that are introduced, which, in turn, will free up legislative time for deliberation about more promising legislation.

Fourth, although notice and public participation would reduce costly special legislation, it would be less likely to reduce beneficial special legislation, like legislation that has a public purpose and legislation that reduces disuniformity in the law. Special legislation that has a public purpose would likely not be discouraged by a requirement for notice and participation. If a proposed law has a public purpose rather than a private purpose, then publicity due to notice and participation should not dissuade legislators from supporting it. Even more, a proposed law with broad public support should be more popular after notice and public participation. Indeed, legislators might seek to prioritize a special law with broad public support over an equally meritorious bill without public support. Similarly, the passage of a special bill that seeks to reduce disuniformity by eliminating a special privilege should not be impeded by notice and public participation. A spe-

of Revenue, 37 So. 321, 323 (1904))); State v. Ward, 118 P.2d 216, 220 (Okla. 1941) (holding that the purpose of the notice requirements is to give the public "an opportunity to appear before the Legislature and remonstrate against the passage of such law if they did not think it was wise").

364. INS v. Chadha, 462 U.S. 919, 958 n.23 (1983) (noting that a more elaborate legislative process provides opportunity for debate and deliberation). For example, in a number of states, the notice period before special legislation can be enacted is one month. *See supra* note 340.

cial bill to take away a special privilege would likely be popular; as with a special law with a public purpose, notice and public participation should only increase the likelihood of the enactment of a special law eliminating a special privilege.

There are two situations in which notice and public participation might impede beneficial special legislation. As discussed above, emergency special legislation, like the Utah statute designed to incentivize a railway to help avoid massive flooding, will likely prove popular once its purpose is publicized.[365] For this reason, notice and public participation would likely not *prevent* emergency special legislation. However, because of the *delay* inherent in a process of notice and public participation, even very popular special legislation might be rendered moot by the time it can be enacted.

In addition, a special law that reduces disuniformity by curing a defect in the generally applicable laws, or by stripping an individual of a disability, might be impeded by notice and public participation. Take, for example, the *O'Brian* case, in which the Maryland legislature enacted a special law to allow a contractor to be paid after a generally applicable law mistakenly prevented him from being paid for work already completed.[366] Although there are obvious equitable reasons for the legislature to support the contractor's special bill, only the contractor's representative in the legislature has a direct interest in supporting a special bill for the contractor's benefit. Other members of the legislature may believe they have little to gain from supporting a special law for the benefit of a non-constituent. And members of the public might prefer to spare the public the cost of making the contractor whole even though the cost would be minimal for each member of the public. In this case, notice and participation may prevent a special law where, in the absence of notice and participation, it would have been passed due to logrolling and public disinterest.[367]

D. Legislative Reason-Giving

Official reason-giving by the legislature—or by some body empowered by the legislature to give reasons for the enactment of legislation—can reduce the costs of special legislation without eliminating its benefits.

365. *See supra* Section III.B.

366. O'Brian v. Cty. Comm'rs, 51 Md. 15, 20–21 (1879).

367. An objection to modeling public participation for special legislation on the notice and comment process is the fact that few people participate in the notice and comment process. *See* BALLA, *supra* note 332, at 25–26. However, because legislators have an incentive to publicize both the legislative action and inaction of themselves and others, it is likely that participation would be more robust for proposed legislation than for administrative agency rulemaking.

1. Models of Legislative Reason-Giving

Although the Constitution requires each chamber of Congress to keep and publish a journal of its proceedings,[368] there is no constitutional requirement either for individual legislators,[369] or for the legislature as a whole,[370] to explain the introduction or enactment of a bill.[371] Nevertheless, committee reports, authored by congressional[372] and some state legislative[373] committees, often provide robust explanations for the enactment of legislation. More specifically, both state and federal practice have models for official reason-giving to accompany the enactment of special legislation. First, some states require official reason-giving as part of the enactment of special legislation.[374] For example, Mississippi's constitution broadly prohibits special laws;[375] however, it also provides a safe harbor for the enactment of special legislation, provided that the legislature gives reasons for its enactment.[376] Specifically, Mississippi requires each chamber of its legislature to appoint a standing committee on local and private legislation. Before it is enacted, every special bill must be referred to this standing committee, which must report back to the legislature "with a recommendation in writing" to enact the special law, "stating affirmatively the reasons therefor."[377] Recalling British tradition that extends back to the Middle Ages,[378] the committee must also state "why the end to be accomplished should not

368. U.S. CONST. art. I, § 5; *see also* STORY, *supra* note 278, at 590–92 (explaining the Constitution's Journal Clause).

369. U.S. CONST. art. I, § 6, cl. 1 (providing that a member of Congress may not be questioned in any other place for a speech or debate given in Congress); *see also* Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (extending Speech or Debate Clause protections to "the act of voting").

370. *Cf.* U.S. CONST. art. I, § 7 (providing exclusive lawmaking prerequisites); *see also* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("[T]his Court has never insisted that a legislative body articulate its reasons for enacting a statute.").

371. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 636–38 (1995) (contrasting the typical absence of reason giving in statutory language with judicial or executive reason giving).

372. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 119 (4th ed. 1996) (describing the committee report process).

373. In most state legislatures, legislative history, including committee reports, plays a limited role. Richard A. Briffault, *Beyond Congress: The Study of State and Local Legislatures*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 23, 25 (2003).

374. MISS. CONST. art. IV, § 89; N.Y. CONST. art. IX, § 2.

375. MISS. CONST. art. IV, § 87.

376. *Id.* § 89.

377. *Id.*

378. DODD, *supra* note 121, at 80–81 (explaining that Parliament would reject private petitions on the ground that the matter could be adequately resolved by a court under the common law). Similarly, in early Congresses, even meritorious petitions for special laws were rejected if Congress anticipated later enacting a general law to cover the situation. diGiacomantonio, *supra* note 117, at 39.

be reached by a general law, or by a proceeding in court."[379] In this model, the legislature is empowered to enact special legislation, but only if a legislative committee explains why a special law is the appropriate way to address the problem.[380]

Second, although, most federal statutes are not accompanied by detailed official reasons for their enactment, a relatively obscure corner of federal practice maintains a role for legislative reason-giving for certain types of special laws.[381] By resolution, either chamber of Congress may refer a bill seeking money from the Treasury to the United States Court of Federal Claims.[382] Either chamber of Congress may refer this type of special bill when the relief sought cannot be obtained through the normal legal processes, for example, when the limitations period has run[383] or because sovereign immunity prevents a suit.[384]

When the Court of Federal Claims receives a bill referred to it by a chamber of Congress, it is required to ascertain whether the demand contained in the bill is "a legal or equitable claim," as opposed to a gratuity, and the amount due from the United States to the claimant.[385] In order to make this determination, the court conducts a hearing that, although advisory in nature, bears the hallmarks of a judicial trial. The court has the power to issue subpoenas, take testimony, and hear argument, all for the purpose of determining whether a claim is meritorious. Ultimately, the court must submit its findings of fact and legal conclusions as a "report" to the chamber of Congress that referred the case.[386] Although it is merely advisory,

379. MISS. CONST. art. IV, § 89.

380. In the case of Mississippi, the constitutional requirement of official reason-giving relies on legislative self-enforcement; the courts "will not consult legislative journals to determine whether" the legislature complied with the reference and recommendation process or invalidate a special law in the absence of evidence that it did so. Tunica Cty. v. Town of Tunica, 227 So. 3d 1007, 1022–23 (Miss. 2017).

381. 28 U.S.C. §§ 1492, 2509 (2012) (describing the process by which private bills are referred to the United States Court of Federal Claims).

382. *Id.* § 1492. Not all bills for money damages can be referred to the Court of Federal Claims. For example, § 1492 expressly excludes pensions. *Id.*

383. Cent. Pines Land Co. v. United States, 99 Fed. Cl. 394, 407 n.13 (2011), *aff'd*, 697 F.3d 1360 (Fed. Cir. 2012) (noting that the running of a statute of limitations may make a case "appropriate for a congressional reference, wherein a bill is referred to the chief judge of this court by either house of Congress for review by a three judge panel").

384. Cal. Canners & Growers Ass'n v. United States, 7 Cl. Ct. 69, 74, 86 (1984) (recognizing that the doctrine of sovereign immunity does not bar consideration of congressional reference claims).

385. 28 U.S.C. § 2509(c); *see* H. COMM. ON THE JUDICIARY, SUBCOMM. ON THE CONSTITUTION AND CIVIL JUSTICE, 114TH CONG., RULES OF PROCEDURE FOR PRIVATE CLAIMS BILLS 72 (Comm. Print 2015) (describing principles guiding the committee's consideration of claims).

386. 28 U.S.C. § 2509(b)–(e).

the report transmitted to Congress has the form and level of detail of a judicial opinion.[387]

2. Legislative Reason-Giving Reduces the Cost of Special Legislation

A legislative reason-giving requirement along the lines of the models described above can reduce the costs of special legislation without eliminating its benefits entirely. First, a rule requiring reason-giving to accompany special legislation will reduce the likelihood that special legislation reflecting corruption is enacted. Requiring a reasoned explanation for the enactment of special legislation will help make the purpose of the special law transparent. Transparency, in turn, gives the public the opportunity to "pull the alarm on . . . [the] corruption" that drives some special legislation.[388] Similarly, once the reasoning underlying the special law is laid bare, other legislators will have an opportunity to challenge it and expose it if it lacks a public purpose. Just as it is easier to respond effectively to a reasoned argument than to an *ipse dixit* conclusion, because the premises and supporting evidence of a reasoned argument are revealed, it is easier to test the soundness of a statute accompanied by official reasons than a statute without them. Put another way, requiring reason-giving will reveal the faulty premises and logical flaws in an explanation of a hard-to-justify special law.[389]

Second, giving reasons will reduce the statutory imposition of unjustifiable inequalities by exposing those inequalities that cannot be justified. As Professor Frederick Schauer has explained, the act of providing reasons for a particular outcome presupposes that there is a general rule that drives that outcome.[390] Consider Schauer's example: "You ask why I am carrying an umbrella, and I respond that the weather forecast predicted rain. Although the response is not explicitly prescriptive, it embraces the mandate, 'Carry an umbrella when rain is forecast' . . . ."[391] In other words, by providing a reason for carrying the umbrella, the carrier implicitly states a general rule that controls similar cases. Any time rain is forecast, one would expect to see the carrier with an umbrella.

Because reason-giving requires the statement, explicitly or implicitly, of a general principle, a legislature giving reasons for a special law will have a hard time explaining the principle underlying a law that creates unjustified inequalities. Take for example the Tesla Laws, described above,

387. Sneeden v. United States, 31 Fed. Cl. 671, 672 (1994).
388. Coglianese et al., *supra* note 319, at 928.
389. *See* Schauer, *supra* note 371, at 652–53.
390. *Id.* at 642–43.
391. *Id.* at 642.

that created special exemptions for Tesla and no other carmaker to sell electric cars outside of the traditional manufacturer-dealer relationship.[392] Perhaps, as Tesla argued when Maryland's Tesla Law was passed, a legislator would assert that the purpose of the law was to encourage "innovation," "free markets," and "consumer choice."[393] But, of course, none of these reasons—innovation, free markets, or consumer choice—justifies a Tesla-specific law rather than a generally applicable law. Indeed, if any of these principles were the real goal of Maryland's Tesla Law, a generally applicable law would have been a better fit. Consumer choice and free markets would be enhanced by a law permitting all manufacturers of electric cars to take advantage of the new leniencies accorded to Tesla. And, opening Maryland's automobile market to future electric carmakers would encourage innovation through competition. Maryland's Tesla Law, in fact, stifled free-market competition, and with it, innovation, by providing Tesla with protection from competitors; and it limited consumer choice by restricting entry into the electric car market. A reason-giving requirement would expose the unjustifiable inequality imposed by Maryland's Tesla Law. If required to give a reason for its unequal treatment of Tesla, the Maryland legislature would have had to generalize the law, strain to distinguish Tesla from present and future competitors in a meaningful way, or admit that the purpose was to accord a special benefit to Tesla.[394]

Third, special legislation reflecting *justifiable* inequalities would likely not be eliminated because of a requirement for legislative reason-giving. Rather, special laws imposing justifiable inequalities would be easy to explain through legislative reason-giving. Consider, again, the Utah indemnity law that encouraged a railway to breach the Great Salt Lake causeway.[395] If Utah's legislature had to give reasons for this special law, it would be able to generalize the decision to indemnify the railway by explaining that anyone should be protected from liability for property damage when acting to avert greater damage. This principle is easily justifiable because it is coherent with other areas of the law that recognize a defense for those acting to avoid a greater harm.[396] As a result, the Utah legislature, if forced to ex-

392. *E.g.*, MD. CODE ANN. TRANSP. § 15-305(e)(2) (West 2010 & Supp. 2018).

393. Debord, *supra* note 1.

394. A reason-giving requirement would also, in part, mitigate the fact that special legislation often fails to provide guidance. Although special legislation interferes with the coherence of the law and makes it less predictable, legislative reason-giving should both publicize these exceptions and explain their limits. The contextualization of a special law should provide guidance about the scope of its application.

395. Colman v. Utah State Land Bd., 795 P.2d 622, 623 (Utah 1990).

396. *E.g.*, State v. Wells, 598 N.W.2d 30, 35 (Neb. 1999) (holding that a defendant's evidence of the defense of justification or "choice of evils" includes "facts showing that he or she (1) acted to avoid a greater harm; (2) reasonably believed that the particular action was necessary to avoid a specific and immediately imminent harm; and (3) reasonably believed that the selected action was

plain the special indemnity law, could have made a cogent, well-reasoned argument as to why it was in the public interest.

V. CONCLUSION

The legislature is charged with many of the difficult policy decisions that governments must make. In order to ensure that it is acting in the public interest, rather than out of pique or favoritism, the legislature must undertake the task of weighing the costs and benefits of proposed legislation. Legislative rules can help accomplish a legislature's goal of enacting laws with benefits that outweigh their costs. By requiring special legislation to be enacted only by a supermajority, requiring notice and allowing for public participation, or requiring official reasons to accompany the enactment of special laws, legislatures will make it more difficult to enact special laws that create significant costs. By adopting and adhering to these legislative rules, legislatures will better be able to ensure that they are promoting the public welfare.

---

the least harmful alternative to avoid the harm"); *see also* MODEL PENAL CODE § 3.02 (AM. LAW INST. 1962) (setting out elements for the defense of choice of evils).