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THE EQUAL PROTECTION COMPONENT OF LEGISLATIVE GENERALITY

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INTRODUCTION

The goal of achieving equality under law is deeply rooted in American philosophical traditions and constitutional doctrine. And although there is no universally accepted definition of equality, some applications of the principle are uncontroversial; most conceptions of equality bristle at the notion of particularized legislative treatment of named individuals without adequate justification.

Consider the following example: a well-connected man, a high-ranking government official no less, dies. He truly is part of the "one percent," worth $50 million at his death. In its next Continuing Appropriations Act, between provisions about public health and veterans, Congress inserts a section transferring nearly $200,000 to the deceased millionaire's widow. The public owes no preexisting legal or financial obligation to the man or his widow: the transfer is neither a pension nor a life insurance payout. Rather, it is a mere gratuity. But, little attention is paid to this provision and it is passed by both chambers of Congress and signed into law by the President. A gratuitous transfer of this kind, of public wealth to a named individual, singles out a particular person for a special benefit that is not available to the population generally. This statute offends widely held conceptions of equality

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because it accords the official's widow a benefit without reference to any service that she provided to the community—and what is perhaps worse—simply because of her family connections.

As this example suggests, a statute that singles out a known individual for special treatment, called special legislation, can offend a number of plausible conceptions of equality. By treating like cases in an unlike manner, special legislation often offends the notion of formal equality. By perpetuating social stratification and reinforcing social hierarchy, special legislation often offends substantive conceptions of equality as well. But, despite the fact that it offends widely held visions of equality, special legislation is enacted every year by Congress and state legislatures. Through special laws, legislatures provide benefits, like transfers of wealth or exemptions from the standing laws, to named individuals; legislatures also use special laws to impose legal or economic burdens on particular individuals.[1] Indeed, the above example is no hypothetical. Congress made just such a transfer of wealth to Bonnie Englebardt Lautenberg following the death of her husband, the former Senator from New Jersey.[2]

The Supreme Court has been reluctant to interfere with special legislation. In all except the most egregious cases, special legislation has evaded judicial review. And perhaps surprisingly, the Court has been unwilling even to evaluate special legislation under the Equal Protection Clause, the constitutional provision most specifically directed toward the enforcement of equality. This anomalous situation raises a number of difficult questions: why does the Court fail to restrain such a significant source of inequality through the Equal Protection Clause? Should the Clause be read to restrain special legislation? Must the inequality created by special legislation go unchecked? These questions and their answers are the subject of this article. Although special legislation offends a number of widely held visions of enforceable equality, the Equal Protection Clause is incapable, on its own, of restraining it. And although the Equal Protection Clause ultimately cannot restrain special legislation, analyzing the Clause's doctri-

1. *E.g.*, Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15–16 (2005); *see also* Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 591 (1983) (finding that a state tax law "target[ed] a small group of newspapers"); MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., RL33024, PRIVATE IMMIGRATION LEGISLATION 2 (2005) (describing private immigration bills).

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

nal commitments and conceptual moorings reveals its connection to a number of other constitutional clauses and principles that are also offended by special legislation. Together, these clauses and principles suggest that there is a principle of constitutional dimension that should restrain special legislation. This principle—which may be called a value of legislative generality—can help perfect our commitment to equality by restraining special legislation.

This article is part of a long-term project that describes and defines the parameters of a constitutional value of legislative generality. This multistage project involves a deep exploration of each of the clauses of the Constitution, and other constitutional principles, that reflect a component of the value of legislative generality. The Equal Protection Clause, which is the subject of this article, is one of these clauses; others include the Bill of Attainder,[3] Ex Post Facto,[4] Contract,[5] Appointments,[6] Due Process,[7] Takings,[8] and General Welfare[9] clauses, as well as the *Klein* rule of decision principle.[10] Of course, none of these provisions are ex-

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

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

5. U.S. CONST. art. I, § 10, cl. 1; Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 n.13 (1983) (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247–48, 248 n.20 (1978)).

6. U.S. CONST. art. II, § 2, cl. 2; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 314–15 (Max Farrand ed., 1911) [hereinafter FARRAND].

7. U.S. CONST. amends. V, XIV.

8. 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) (emphasis omitted). This principle was earlier reflected in due process doctrine, which explained that the liberty component of due process is violated by "taking the property of A and giving it to B." JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 52–53 (2003). This component of due process ultimately was subsumed by the more amorphous concept of substantive due process. *Id.* at 73–74. When robust enforcement of substantive due process died along with the *Lochner* era, the concept that there was something wrong with "taking the property of A and giving it to B" as a stand-alone principle was interred with its bones. *Id.* at 53, 70, 73–74. Shadows of this principle survive in Administrative Law, which continues to recognize a distinction between rules of general applicability and rules that apply only to a few, known individuals. *See* Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo., 239 U.S. 441, 444–45 (1915); Londoner v. City & Cnty. of Denver, 210 U.S. 373, 375 (1908).

9. 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"; nevertheless, it has consigned the "general welfare" determination to Congress's discretion so long as Congress has not exercised "arbitrary power." Helvering v. Davis, 301 U.S. 619, 632, 640 (1937).

10. United States v. Klein, 80 U.S. (13 Wall.) 128, 144–47 (1871) (explaining that

clusively about generality in law; and none of them, standing alone, is sufficient to impose a comprehensive and coherent value of legislative generality. But, each of these provisions and principles contributes to the value of legislative generality because each contains a component that disfavors particularized legislation. For example, because the Bill of Attainder Clause prevents the legislature from passing a law imposing punishment on a named individual, it can be viewed as a guarantee of judicial process.[11] However, the Bill of Attainder Clause also can be viewed as a substantive limitation on the power of the legislature to single out a named individual for a burden that is not borne by the rest of the population. Similarly, the *Klein* rule of decision principle stands for the proposition that Congress may not direct a court to rule for a particular party in a pending case.[12] This provision is normally viewed as supporting the principle of separation of powers by preserving the independence of the judiciary. However, from another perspective, *Klein* prevents the legislature from singling out one individual to win a particular case (and another individual from losing that same case). In this way, each of the above-noted clauses and principles contains a component that 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. The project of articulating a value of legislative generality, therefore, is one of uncovering the commonality among these seemingly unrelated constitutional clauses and principles, and reading each to give meaning to the principle that they share.

My prior work introduced the concept of legislative generality and argued that it should be enforced as a stand-alone constitutional principle. A constitutional value of legislative generality rests on three pillars—philosophy, history, and text. First, jurists and philosophers of law have long articulated a value of legislative generality. Second, the history of the revolutionary period leading up to the framing of the Constitution suggests that a key

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Congress may not deny federal courts jurisdiction "founded solely on the application of a rule of decision, in causes pending"). Recently, the Court has read *Klein* narrowly, undermining its ability to support a constitutional value of legislative generality. *See* Evan C. Zoldan, Bank Markazi *and the Undervaluation of Legislative Generality*, 35 YALE L. & POL'Y REV. INTER ALIA 1, 3–4 (2016).

11. U.S. CONST. art. I, § 9, cl. 3; *see* United States v. Lovett, 328 U.S. 303, 316 (1946) (explaining that the Bill of Attainder Clause prevents a finding of guilt without judicial trial).

12. *Klein*, 80 U.S. (13 Wall.) at 146–47.

purpose of the Constitution was to address evils associated with special legislation. Third, the text and structure of the Constitution delineate a norm of legislative generality. Together, these pillars suggest that a value of legislative generality should be enforced as a constitutional principle and that current constitutional doctrine should be modified to give effect to this principle.[13]

This article advances the broad project outlined above by recognizing the equal protection component of legislative generality. Exploring the relationship between the Equal Protection Clause and the value of legislative generality both enhances an understanding of the proper bounds of the Equal Protection Clause and helps define the ultimate parameters of a value of legislative generality. Part I of this article defines and provides paradigmatic examples of special legislation. Part II identifies the most widely held conceptions of equality that can be enforced through the Equal Protection Clause and describes how special legislation offends these conceptions. Part III describes how the Equal Protection Clause, despite its powerful ability to enforce differing visions of equality, is incapable, on its own, of combatting special legislation. Part IV introduces the principle of legislative generality as a coherent mechanism for restraining special legislation. It concludes by drawing on equal protection doctrine and theory to help fashion a coherent and meaningful value of legislative generality.

My future work will further explore legislative generality as an independent constitutional principle that can limit special legislation. This work will explore the other clauses of the Constitution and constitutional principles that suggest the existence of a constitutional value of legislative generality. If enforced as an independent constitutional principle, the value of legislative generality can serve an important role in eliminating the unchecked harms caused by special legislation that each of these clauses and principles, standing alone, cannot address.

I. SPECIAL LEGISLATION DEFINED AND DESCRIBED

Through a combination of the Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process

13. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 650–60 (2014) [hereinafter Zoldan, *Reviving Legislative Generality*].

Clause, both the federal government[14] and the states[15] are prohibited from denying any person equal protection of the laws. The Supreme Court has interpreted this protection broadly, rendering the Equal Protection Clause a powerful and flexible tool for protecting individual rights against government overreach. The Court's interpretation of this Clause has been the subject of criticism, to be sure.[16] Nevertheless, it is beyond doubt that the Equal Protection Clause has come to embody the American constitutional ideal of equality.[17]

But despite the breadth of the Equal Protection Clause, and the commitment to the ideal of equality that it represents, legislatures often enact statutes that target an individual or small, identifiable group for treatment that is not applied to the general population. This type of legislation, often called special legislation, presents a fundamental challenge to equality by imposing paradigmatically unequal treatment without adequate justification. This part defines and describes special legislation; Part II describes how special legislation offends a number of plausible visions of equality.

A. *Special Legislation Defined*

Both state legislatures and Congress enact statutes that target individuals or small, identifiable groups for treatment that is not imposed on the general population. This category of particularized legislation is often referred to as "special legislation,"[18] alt-

14. United States v. Windsor, 133 S. Ct. 2675, 2695 (2013); Bolling v. Sharpe, 347 U.S. 497, 499–500 (1954).

15. The Fourteenth Amendment prohibits a state from denying "to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

16. *See, e.g.*, Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 673–81 (2003); Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2424 (1994).

17. ROBERT J. HARRIS, THE QUEST FOR EQUALITY: THE CONSTITUTION, CONGRESS AND THE SUPREME COURT 5 (1960); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011) [hereinafter Yoshino, *The New Equal Protection*].

18. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 315 (2007) [hereinafter Balkin, *Abortion and Original Meaning*] ("'[S]pecial' or 'partial' legislation" includes legislation that "pick[s] out a group for special benefits or special burdens."); Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 271 (2004) (explaining that special legislation includes both "local and private legislation" and is distinguished from "general legislation"); Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace. The Battle to Revive Judicial Rulings and State Constitutional*

hough there is no precise definition of the term. The primary dilemma encountered when defining "special legislation" is determining how small a group must be before it should be considered special.

The paradigm of special legislation is a law that targets a single individual; this type of statute has long been distinguished from generally applicable laws by legal philosophers and jurists. Locke argued that the legislative power does not include the power to vary the standing, generally applicable laws "in particular cases."[19] Similarly, Blackstone described that the concept of "law" properly includes only rules that are "permanent, uniform, and universal."[20] By contrast, an order concerning "a particular person" that "has no relation to the community in general. . . is rather a sentence than a law."[21] Moreover, there is a strain of Supreme Court doctrine, particularly from the early days of the republic, that emphasizes the difference between laws that target individuals and generally applicable laws. In *Fletcher v. Peck*, the Court considered whether an act nullifying the transfer of a particular parcel of land is a legislative act permitted by the Constitution.[22] Chief Justice Marshall answered in the negative: "[i]t 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."[23] This fundamental principle was restated in *Trustees of Dartmouth College v. Woodward*, in which the Court agreed with Daniel Webster's argument that "acts of the legislature, which affect only particular persons and their particular privileges" are "not the exercise of a power properly legislative."[24] The Court contrasted "general laws" setting out terms on which a marriage may be dissolved, which are not prohibited by the Constitution, from

Enactments Prohibiting Public Subsidies to Private Corporations, 30 U. TOL. L. REV. 393, 399 (1999) (defining special legislation as "laws . . . made applicable to a particular person, group or thing within a specified class, which are not applicable to the entire class"); Comment, *The Constitutionality of Private Acts of Congress*, 49 YALE L.J. 712, 712 n.1 (1940) (explaining that special legislation includes legislation applying to "only one or a few determinable individuals").

19. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT chap. XI, § 142 (C.B. Macpherson ed., 1980).

20. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *44.

21. *Id.*

22. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

23. *Id.* (emphasis added).

24. Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 558, 580 (1819).

the legislative dissolution of a *particular* marriage, which "entrench[es] upon the prohibition of the constitution."[25]

These jurists and philosophers of law described the difference between a statute that targets an individual—which is not an appropriate action for the legislature—and a law that is generally applicable. But, generality lies along a spectrum: legislation sometimes neither targets an individual nor applies to the population in general, but rather singles out a small, identifiable group, placing it between these two conceptual poles. For example, Congress and state legislatures have enacted statutes that exempt a particular husband and wife from the general laws,[26] grant a special benefit to four named members of the same family,[27] and impose a tax applicable to a small group of—perhaps two—publishers.[28] There are good reasons to include at least some of these in-between statutes in the definition of "special legislation." After all, a statute that singles out a small, determinable group raises many of the same concerns—like favoritism, animus, or encroachment on the judicial function—that attend individualized legislation.

Whether targeted laws of this scope should be considered "special" is a difficult question and probably explains the modern Supreme Court's reluctance to give effect to a principle that disfavors legislative specification.[29] For present purposes, however, we can draw some initial conclusions: because of the jurisprudential and doctrinal distinction between general laws and laws that single out individuals, special legislation must, at least, include a statute that singles out a particular individual. Moreover, because of the similarities between individualized statutes and statutes that single out very small groups, like the ones noted above, special legislation may ultimately be defined to include groups of this size as well.[30] Without finally defining the scope of

25. *Id.* at 695–96.

26. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

27. Priv. L. No. 106-20, 114 Stat. 3118 (2000).

28. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 591 n.15 (1983).

29. Bank Markazi v. Peterson, 136 S. Ct. 1310, 1327 (2016); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995); Zoldan, *Reviving Legislative Generality*, *supra* note 13, at 643–47.

30. An extension of the definition of special laws to include statutes that describe entire families is warranted by the Corruption of Blood and Forfeiture Clause and Title of Nobility Clauses. The former prohibits family-based collective punishment and the latter

special legislation, therefore, this article includes statutes that single out groups of two to five, as well as individualized laws, as examples of special legislation. The contours of a value of legislative generality—including the extent to which it restricts legislation that targets a small identifiable group—is a question that cannot be resolved until the constitutional clauses and principles that make up the value have been fully considered.

B. *Paradigmatic Examples of Special Legislation*

Special laws touch on a wide variety of substantive subject matters, including public spending, immigration, and taxation, to name a few. Special legislation can provide benefits or impose burdens and can be considered either civil or criminal in nature. Although special legislation as a category of law rarely is the subject of scholarly inquiry, individual examples of special legislation are often well-publicized,[31] roundly criticized,[32] and ubiquitous; indeed, special legislation is enacted in every term of Congress[33] and every year by state legislatures.[34] In order to appreciate the challenge presented by special legislation to the value of equality, it is important to understand the wide variety of special laws that are enacted. The following are just a few of the many special laws that Congress and state legislatures routinely enact and are representative of the phenomenon of special legislation.

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prohibit family-based collective reward. U.S. CONST. art. I, § 9, cl. 8; *id.* art. I, § 10; *id.* art. III, § 3, cl. 2. Together, they suggest that the Constitution's concern with specificity extends to identifiable families as well as identifiable individuals.

31. *See, e.g.*, Rafael Lorente, *Congress Turning its Focus to Life Issues, Schiavo Efforts May Be Sign of Future Battles*, S. FLA. SUN-SENTINEL, Mar. 25, 2005, at 11A.

32. CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6 (1894) (explaining that special laws enacted by the states "were often pushed through the legislatures by unscrupulous men, to the sacrifice of public interests"); Note, *Private Bills in Congress*, 79 HARV. L. REV. 1684, 1700 (1966) (explaining that, in the context of private immigration litigation, a bill that favors one petitioner "acts to the detriment of others who may be equally deserving").

33. *See, e.g.*, Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013); Priv. L. No. 112-1 (2012); Betty Dick Residence Protection Act of 2006, Priv. L. No. 109-1, 120 Stat. 3705 (2006); Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15 (2005).

34. *See, e.g.*, City of DeSoto v. Nixon, 476 S.W.3d 282, 291 (Mo. 2016); Okla. Coal. for Reprod. Justice v. Cline, 368 P.3d 1278, 1288 (Okla. 2016); Moline Sch. Dist. No. 40 Bd. of Educ. v. Quinn, 54 N.E.3d 825, 833 (Ill. 2016). Unlike the Federal Constitution, many state constitutions have specific provisions limiting the use of special laws. However, state special legislation has persisted despite these state constitutional provisions because they tend to be weakly enforced and are riddled with exceptions. The effect of state constitutional restrictions on special laws is an important topic but beyond the scope of this article.

1. Special Transfers of Public Property

Special laws often transfer public property to a named individual, like a former government employee[35] or member of his immediate family.[36] Because there is a mechanism for individuals with claims against the government to recover funds that are owed to them,[37] transfers of wealth made by Congress are gratuitous; that is, they are made to individuals to whom no legal obligation is owed.[38] In a recent example of a special grant of public wealth, Congress provided a gratuitous payment of $174,000 to Bonnie Englebardt Lautenberg, the widow of the late United States Senator Frank Lautenberg.[39] The special law transferring this money does not reflect any legal or financial obligation owed to Mrs. Lautenberg. Rather, it was made as part of Congress' routine practice of giving money to the surviving spouses of deceased members.[40] Nor was this money given to Lautenberg because she was in any financial need: she was already a millionaire prior to this wealth transfer.[41]

2. Special Exemptions From Standing Laws

Another common type of special law is an exemption for a named individual from the generally applicable laws. One high profile, but far from unique, example of a special exemption law was the statute enacted to resolve the fate of Terri Schiavo. An ongoing legal dispute between Schiavo's parents and husband over whether to withdraw her life support resulted in a court order requiring the hospice facility in which she resided to withhold food and water, permitting her to die.[42] In response, Congress enacted a statute entitled "For the Relief of the Parents of Theresa

35. Priv. L. No. 107-3, 116 Stat. 3121 (2002); Priv. L. No. 107-4, 116 Stat. 3122 (2002).

36. Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013).

37. Tucker Act, 28 U.S.C. § 1491 (2012).

38. R. ERIC PETERSEN & JENNIFER E. MANNING, CONG. RESEARCH SERV., RL 34347, MEMBERS OF CONGRESS WHO DIE IN OFFICE: HISTORIC AND CURRENT PRACTICES 12–14 (2012).

39. Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013).

40. PETERSEN & MANNING, *supra* note 38, at 12–14; Gregory Korte, *Spending Bill Gives $174,000 to Millionaire Senator's Widow*, USA TODAY (Sept. 27, 2013), http://www.usatoday.com/story/news/politics/2013/09/26/frank-lautenberg-widow-payment/2877049/.

41. Korte, *supra* note 40.

42. Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush*, 100 NW. U. L. REV. 151, 151–52 (2006).

Marie Schiavo." "Terri's Law," as the statute was called,[43] permitted "any parent" of Terri Schiavo to bring suit in federal district court to redress the decision to withhold life support.[44] Through Terri's Law, Congress set aside the previous decade of state court litigation over Schiavo's intentions, permitting relitigation of previously adjudicated issues. Although it was denominated a public law, by its terms the law applied only to "[a]ny parent of Theresa Marie Schiavo;" and in section 7 of the Act, entitled "No Precedent for Future Legislation," the law provided that "[n]othing in this Act shall constitute a precedent with respect to future legislation, including the provision of private relief bills."[45] Limited to one event, and providing relief for only two people, Terri's Law provided a special exemption from standing preclusion rules that apply to all other suits in district court.

A common type of special exemption statute is a private immigration bill that grants special immigration status to named individuals or small, identifiable groups, like members of a family. There have been thousands of private immigration bills enacted[46] and these all tend to take a similar form. Each special immigration law names an individual[47] or small group[48] and provides that, notwithstanding generally applicable legal requirements, the named individuals are granted special immigration status, normally legal permanent residence.[49]

3. Special Legal or Financial Disabilities

Congress and state legislatures also enact laws targeting individuals for special legal or economic burdens. In one well-publicized event, Congress enacted a statute that denied a particular father's court-ordered visitation rights based on unproved allegations of abuse made by the child's mother.[50] In the underlying custody dispute, Elizabeth Morgan claimed that Eric Foretich, her former husband, had sexually abused their minor

43. *Id.* at 152.
44. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15–16 (2005).
45. *Id.*
46. LEE, *supra* note 1, at 2.
47. *E.g.*, Priv. L. No. 107-1, 115 Stat. 2471 (2001).
48. *E.g.*, Priv. L. No. 108-4, 118 Stat. 4028 (2004).
49. *E.g.*, Priv. L. No. 111-1, 124 Stat. 4523 (2010); Priv. L. No. 111-2, 124 Stat. 4525 (2010).
50. Foretich v. United States, 351 F.3d 1198, 1207–08 (D.C. Cir. 2003).

child, Hilary. The trial court heard and rejected these claims of abuse and found that visitation with her father was in Hilary's best interests.[51] In defiance of the court's order, Morgan sent Hilary out of the country and, ultimately, fled the country to join her daughter in hiding. In response, Congress enacted the Elizabeth Morgan Act, which stripped the trial court of jurisdiction, permitting Morgan and Hilary to return to the United States without being subject to the trial court's findings and order.[52]

Similarly, in the guise of narrowly drawn public laws, states levy taxes or regulatory burdens on individual natural persons or corporations.[53]

II. SPECIAL LEGISLATION OFFENDS THE VALUE OF EQUALITY

In light of these examples, it should come as no surprise that special legislation has long been abused by legislatures. First, it is often used to target and punish suspected members of unpopular political minority groups without evidence or trial. During the revolutionary period, Tories were the targets of special laws stripping them of rights and even sentencing them to banishment or death.[54] During the twentieth century, suspected communists were singled out for deportation or other mistreatment.[55] Second, the ability to enact special laws has led to widespread corruption. During the nineteenth century, when special laws were the norm in state legislatures, legislators brazenly sold special favors like monopoly rights and tax breaks to wealthy constituents.[56] Although diminished, the overt sale of special legislation persists into the modern era. In the famous Abscam case, legislators accepted bribes in exchange for the promise to introduce special immigration legislation, revealing that the ability to introduce

51. *Id.* at 1204–05.

52. *Id.* at 1203–04.

53. *See e.g.*, Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 578 (1983); Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 n.13 (1983) (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247–48, 248 n.20 (1978)).

54. *See, e.g.*, Respublica v. Gordon, 1 U.S. (1 Dall.) 233 (Pa. 1788); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 71–72 (1999); ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787 97-98 (1956); *An Act for Disposing of Certain Estates, and Banishing Certain Persons, Therein Mentioned* (1782), *in* 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 516–17 (Thomas Cooper ed., 1838).

55. *E.g.*, United States v. Brown, 381 U.S. 437, 440 (1965); Bridges v. Wixon, 326 U.S. 135, 158 (1945) (Murphy, J., concurring).

56. BINNEY, *supra* note 32, at 6–7.

special legislation creates a market for legislators to trade on their official duties for private gain.[57] Third, when enacting special legislation, the legislature engages in conduct that is not properly legislative. Because special legislation creates a rule that applies only to a known individual, it fails to set generally applicable policy.[58] Because it applies only to a particular factual situation, special legislation resembles executive or judicial activity rather than legislative activity.[59]

Although each of these societal harms is important and worth exploring at some length, this article focuses on just one: the challenge to equality caused by special legislation. There is, of course, no universally accepted definition of equality and, as a result, no universal agreement about what conception of equality should be enforceable under the Constitution's Equal Protection Clause.[60] Nevertheless, some conceptions of legally enforceable equality are well-articulated and widely held. Among them, the anti-classification and anti-subordination theories of equal protection stand out as attractive conceptions of equality because they have theoretical, doctrinal, and historical support. As a result, these conceptions continue to attract broad support among scholars and courts. By examining special legislation in light of both the anti-subordination and anti-classification principles, as well as a number of other important conceptions of equality, it becomes apparent that special legislation offends the principle of equality, however it is conceived.[61] Part II.A describes significant alternative visions of equality; Part II.B describes how special legislation offends these visions of equality.

57. Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1571–72 (1982) [hereinafter Gershman, *Abscam*].

58. Evan C. Zoldan, *Congressional Dysfunction, Public Opinion, and the Battle Over the Keystone XL Pipeline*, 47 LOY. U. CHI. L.J. 617, 635 (2015) [hereinafter Zoldan, *Congressional Dysfunction*].

59. *E.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128, 143–46 (1871); *see also* Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15–16 (2005) (supplanting the judicial process); Keystone XL Pipeline Approval Act, S. 1, 114th Cong. (2015) (side-stepping the executive process).

60. *See* Hutchinson, *supra* note 16, at 619–20.

61. My aim is not, as others have attempted, to reconcile or choose between the anti-subordination and anti-classification theories.

A. *Alternative Visions of Equality*

1. The Anti-Classification Conception of Equality

One highly influential and widely held approach to understanding equality is to consider the Equal Protection Clause an anti-classification device. Sometimes called the anti-differentiation theory,[62] the anti-classification conception of equality stems from the Aristotelian ideal that like things should be treated alike.[63] Put otherwise, anti-classification's concern is "whether people who are similarly situated have been treated similarly."[64]

The anti-classification theory stresses formal equality[65] and is committed to the equal treatment of individuals rather than the equal treatment of groups.[66] Because of this emphasis, the anti-classification principle is offended when a person is subjected to differential treatment because of a morally irrelevant characteristic, such as race, gender, religion, or national origin.[67] Treatment according to a morally irrelevant characteristic strips a person of her individual identity and reduces her to a set of assumptions or stereotypes that frequently have no relation to her worth.[68] Consider, for example, a law that permits a married man to take his wife as a dependent for tax purposes without showing that he supports her financially; by contrast the statute requires a woman to demonstrate that she actually supports her husband before she may take him as a dependent. This law offends formal equality because it is rooted in the assumption, or stereotype, that women are (and perhaps, should be) financially dependent on

62. Timothy Zick, *Angry White Males: The Equal Protection Clause and "Classes of One,"* 89 KY. L.J. 69, 98–99 (2001).

63. Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 31 (2003).

64. Zick, *supra* note 62, at 98.

65. *See* Sonu Bedi, *Collapsing Suspect Class with Suspect Classification: Why Strict Scrutiny is Too Strict and Maybe Not Strict Enough*, 47 GA. L. REV. 301, 310 (2013); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1473 (2004).

66. Siegel, *supra* note 65, at 1473.

67. KATHERINE T. BARTLETT, DEBORAH L. RHODE & JOANNA L. GROSSMAN, GENDER & LAW: THEORY, DOCTRINE, COMMENTARY 25 (6th ed. 2013); Bedi, *supra* note 65, at 310.

68. BARTLETT ET AL., *supra* note 67, at 25.

their husbands, but that men are not financially dependent on their wives.[69]

Equality does not mean identity;[70] as a result, despite its emphasis on formal equality, the anti-classification theory does not suggest the identical treatment of all people.[71] Recognizing that legislative differentiation is inevitable[72]—and sometimes desirable[73]—the anti-classification vision of equality endeavors to distinguish between permissible and impermissible classification. For example, the anti-classification theory suggests that classification is impermissible if it is not rational, that is, if the classification does not serve its intended purpose.[74] Moreover, it suggests that classification is impermissible if the purpose of the classification is itself illegitimate.[75]

The anti-classification principle reflects both historical experience and constitutional doctrine. At the time of the framing of the Constitution, bestowing unearned privileges, or levying unwarranted disadvantages, on individuals or groups was considered an improper use of state authority.[76] Drawing on the classical idea that, despite their manifest differences, people are the same from a moral perspective,[77] a founding-era notion of equality did not permit the state to accord honor or privilege for reasons other than merit.[78] This view of equality did not prevent the state from rewarding individuals with honors or compensation; rather, it tried to distinguish between morally acceptable and unacceptable distinctions.[79] *Earned* privileges, like the privilege of representa-

69. *Cf.* Frontiero v. Richardson, 411 U.S. 677 (1973) (invalidating statutory scheme requiring women, but not men, to demonstrate that their spouses were actually financially dependent before permitting them to declare them as dependents).

70. HARRIS, *supra* note 17, at 14; DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 2–3 (2011).

71. BARTLETT ET AL., *supra* note 67, at 25.

72. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343–44 (1949).

73. BARTLETT ET AL., *supra* note 67, at 25.

74. Bedi, *supra* note 65, at 310; Zick, *supra* note 62, at 100–01.

75. Zick, *supra* note 62, at 101–02.

76. Council of Censors, A Report of the Committee, *in* THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA 35, 38 (Philadelphia, Francis Bailey 1784) [hereinafter PENNSYLVANIA REPORT]; Address of the Council of Censors (Feb. 14, 1786), *in* RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 58 (Paul S. Gillies & D. Gregory Sanford eds., 1991) [hereinafter VERMONT REPORT].

77. *See* HARRIS, *supra* note 17, at 6.

78. MASS. CONST. of 1780, pt. I, art. VI; VA. DECLARATION OF RIGHTS OF 1776, § 4 (1776).

79. *See* HARRIS, *supra* note 17, at 14.

tives to Congress to be called "honourable,"[80] or compensation based on service to the community,[81] were acceptable; by contrast unearned, *artificial* privileges—like hereditary titles—were not acceptable.[82] This conception of equality reflects the revolutionary generation's deep aversion to any social and political system that resembled their conception of European feudalism, in which success was dependent on birth and connections rather than on virtue and talent,[83] and which granted aristocratic classes special legal and social privileges.[84] Even the suggestion that a group had aristocratic pretentions was sufficient to elicit popular opprobrium, as was made plain by the ferocious popular reaction to the creation of the fraternal Society of the Cincinnati, whose membership was available only to descendants of Continental Army officers.[85] Just as collective, family-based rewards were anathema to the revolutionary generation, so, too were collective, family based punishments. The Constitution's Corruption of Blood and Forfeiture Clause does not prevent a person from being punished for his *own* crime, of course. But, it does prevent a person's descendants from suffering economic disabilities because of their ancestor's crime; it reflects the belief, as the Court has held, that "the children should not bear the iniquity of the fathers."[86]

This anti-feudal, republican conception of equality articulated during the revolutionary era is also reflected, somewhat modified, in later Jacksonian democratic sentiments. Jackson's famous message accompanying his veto of the national bank reflects the anti-classification vision when it rejects the power of Congress to grant "artificial distinctions, to grant titles, gratuities, and exclusive privileges."[87] Government grants of privilege, to be valid,

80. Thomas Paine, *Reflection on Titles*, 1 PA. MAG. 209, 209 (1775).

81. MASS. CONST. of 1780, pt. I, art. VI; HARRIS, *supra* note 17, at 22.

82. HARRIS, *supra* note 17, at 14; PENNSYLVANIA REPORT, *supra* note 76, at 38; Carlton F. W. Larson, *Titles of Nobility, Hereditary Privileges, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375, 1387–88 (2006); Paine, *supra* note 80, at 210.

83. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 130 (1967); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 35, 78–79 (1969).

84. *See* 1 BLACKSTONE, *supra* note 20, at *389–90; *see also* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 291, 431 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES].

85. WOOD, *supra* note 83, at 399–400; Larson, *supra* note 82, at 1388–89, 1393.

86. U.S. Const. Art. III, § 3; Wallach v. Van Riswick, 92 U.S. 202, 210 (1875).

87. 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., 1910).

must be confined—in Jackson's words—to providing "equal protection, and, as Heaven does its rains, shower its favors alike on the high and the low, the rich and the poor."[88] The anti-classification conception of equality reflects the antebellum judicial tradition disfavoring "class legislation," that is, legislation that singles out a class for special treatment without a concomitant public purpose.[89]

Although the Supreme Court has retreated from its strongest statements condemning class legislation, the Court's modern equal protection cases emphasize the anti-classification conception of equality as well.[90] In *Adarand*, the Court held that "governmental action based on race" is "in most circumstances irrelevant and therefore prohibited."[91] Rather than focusing on the historical subordination of particular disfavored minority groups, the Court focused on equal protection's role in protecting the right of the individual to be free from wrongful discrimination.[92] Typifying the anti-classification conception of equality, Chief Justice Roberts summed up the Court's current stance on equal protection in *Parents Involved*: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[93]

2. The Anti-Subordination Conception of Equality

The anti-classification conception of enforceable equality is often juxtaposed with the anti-subordination theory, which is itself a widely held and well-supported theory.[94] Together with the closely related "anticaste"[95] and "anti-domination"[96] principles, the anti-subordination conception of equality is concerned primarily

88. *Id.*

89. Barbier v. Connolly, 113 U.S. 27, 32 (1885); *see also* Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 261–62 (1997).

90. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect.") (citing Fullilove v. Klutznick, 448 U.S. 448, 523 (1980)).

91. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

92. *Id.*

93. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

94. *See, e.g.*, Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007 (1986); Hutchinson, *supra* note 16, at 622–23.

95. Sunstein, *supra* note 16, at 2411 (conceiving of equal protection as an anticaste principle that prohibits "translating highly visible and morally irrelevant differences into systemic social disadvantage, unless there is a very good reason for society to do so").

96. *See* HELLMAN, *supra* note 70, at 171.

with the disestablishment of tiers of favored and disfavored classes of people.[97] As Owen Fiss described, the core of the principle suggests that laws may not perpetuate or aggravate the "subordinate position of a specially disadvantaged group."[98] A law offends the anti-subordination principle of equality when it creates or reinforces a system that accords some members of society second-class status.[99] The anti-subordination principle places special emphasis on the role of preexisting social hierarchies in perpetuating inequality. In contrast with the anti-classification conception of equality, it posits that formally equal laws set against the backdrop of persistent social hierarchy do not create equality; rather, these laws merely reinforce already existing inequalities.[100] Because of its focus on structural inequality, the anti-subordination principle is offended when a group is subordinated because it is the object of fear, hatred, or political scapegoating by a dominant population.[101] In a related formulation, Professor Cass Sunstein describes an anticaste principle that suggests that law should not base "systematic social disadvantages" on "differences that are both highly visible and irrelevant from the moral point of view."[102]

Like the anti-classification theory of equality, the modern anti-subordination principle, in all its permutations, has deep historical and doctrinal roots. A key preoccupation of the American generation that declared independence from Great Britain and framed the Constitution was the elimination of social distinctions that threatened to divide the new nation into classes of subordinated and dominant citizens. Before independence, the American colonists were incensed by moves in Parliament to establish an American aristocracy.[103] During the period of the framing of the Constitution, those who drafted and ultimately ratified the document debated how best to forestall the development of an aristocratic elite.[104] As Sunstein suggests, the anti-feudal sentiments

97. Hutchinson, *supra* note 16, at 622–23.

98. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

99. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-21, at 1515 (2d ed. 1988); Sunstein, *supra* note 16, at 2432, 2436.

100. Scott Grinsell, *"The Prejudice of Caste": The Misreading of Justice Harlan and the Ascendency of Anticlassification*, 15 MICH. J. RACE & L. 317, 326 (2010).

101. Fiss, *supra* note 98, at 152.

102. Sunstein, *supra* note 16, at 2429.

103. BAILYN, *supra* note 83, at 278–79.

104. *See, e.g.*, 2 ELLIOT'S DEBATES, *supra* note 84, at 277; 1 FARRAND, *supra* note 6, at

expressed by the framing generation are directly connected to the Constitution's clauses that prohibit both the states and federal government from granting titles of nobility.[105] Similarly, the framing generation rejected the subordination of individuals because of their heterodox political beliefs or social status. They decried the use of bills of attainder to punish political outcasts and other social undesirables,[106] foreswore opportunistic confiscations of property,[107] and renounced the authority to strip named citizens of rights and privileges out of fear that this power would be used to punish disfavored individuals.[108] Just as parts of Jackson's message vetoing the national bank support the anti-classification vision of equality, the populist strains in his message exemplify the anti-subordination approach to equality by rejecting the power of the legislature "to make the rich richer and the potent more powerful."[109]

Also like the anti-classification principle, the anti-subordination principle has been linked to the pre-Civil War judicial tradition that disfavors class legislation.[110] Class legislation was criticized in the years leading up to, and after, the Civil War for creating classes of citizens that bear burdens, or receive benefits, because of their membership in a group.[111] For example, the grant of monopoly rights to particular companies was criticized for according favored status to some at the expense of other, less favored, members of the population.[112] Similarly, the Black Codes, which laid legal and social disadvantages on former slaves, were criticized because they subordinated black people as a class to white people as a class. Professor Akhil Reed Amar recognizes the kinship between an anti-class legislation principle and earlier constitutional history when he argues that the "Attainder Clause,

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83, 402, 474, 544–46; 2 FARRAND, *supra* note 6, at 207, 530.

105. *See* Sunstein, *supra* note 16, at 2428–29. Sunstein suggests that the anticaste principle he articulates grows out of the Constitution's explicit ban on titles of nobility. *Id.* Perhaps the Title of Nobility Clause is, itself, a reflection of a deep anticaste, or at least anti-feudal, sentiment that already was explicitly articulated at the time of the framing of the Constitution.

106. 3 ELLIOT'S DEBATES, *supra* note 84, at 66–67.

107. *See generally* THE FEDERALIST NO. 84 (Alexander Hamilton).

108. James Wilson, *Considerations on the Bank of North America 1785*, *in* 1 COLLECTED WORKS OF JAMES WILSON 60, 71–72 (Kermit L. Hall & Mark David Hall eds., 2007).

109. Jackson, *supra* note 87, at 1153.

110. Balkin & Siegel, *supra* note 63, at 9–10.

111. Saunders, *supra* note 89, at 253–54.

112. *Id.* at 256, 273.

in its logic and spirit, is an early forebear of the Equal Protection Clause."[113]

The anti-subordination principle is reflected in *Brown v. Board of Education*. In *Brown*, the Court held that racial segregation in public schools violates equal protection, in part, because of the nation's history of discrimination against blacks. The Court reasoned that segregation of black children "solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[114] Scholars explaining the anti-subordination theory of equal protection emphasize this passage of *Brown*, which focuses on the subordinated status of blacks created by racial segregation.[115] In *Bakke*, Justice Blackmun formulated the paradigmatic statement of the anti-subordination conception in the following way: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."[116] Although the anti-subordination principle is not the dominant vision of enforceable equality articulated by the Court, the principle received a strong endorsement in the Court's recent *Obergefell v. Hodges* decision.[117]

The anti-classification and anti-subordination theories of equal protection present partially overlapping,[118] but distinct, visions of equal protection. Both, for example, are offended by laws like the Black Codes, but for different reasons. The anti-subordination theory is offended by laws like the Black Codes because they burdened a historically subordinated population; the anti-classification theory is offended by these laws because they place different legal burdens on groups based on race, which is a morally irrelevant characteristic. Although the two conceptions of equality often overlap, they diverge over laws that use morally irrelevant characteristics as a basis for singling out historically

113. Akhil Reed Amar, *Attainder and Amendment 2:* Romer's *Rightness*, 95 MICH. L. REV. 203, 208 (1996).

114. *See* Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954).

115. Louis H. Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 24 (1959).

116. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

117. Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174–79 (2015).

118. Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 966–67 (2012); Balkin & Siegel, *supra* note 63, at 10.

disadvantaged groups for *advantages*, like affirmative action laws, rather than additional burdens.[119]

3. Other Significant Visions of Equal Protection

Although many conceptions of equality can be grouped loosely together with either the anti-subordination or anti-classification theories, there are a number of other notable theories of the role of equal protection that warrant special mention. Foremost among these is the political process school associated closely with John Hart Ely.[120] To Ely, the power of courts to invalidate democratically enacted legislation is most strongly justified when the legislation represents a malfunction in the political process.[121] Specifically, courts are best positioned to check legislation by which the "ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out" and when representatives "are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system."[122] To Ely, then, the touchstone for judicial review under the Equal Protection Clause is whether the political process itself is undeserving of trust and judicial intervention can reinforce the strength of representation of the minority group. For example, when a minority group is subject to hostility or prejudice by the majority population, it may be unable to engage in the normal political process of coalition-building with other groups, leaving its interests permanently unrepresented by the majority population.[123] The political process concerns voiced by Ely are reflected in equal protection doctrine, most notably in footnote 4 of *Carolene Products*, in which Justice Stone suggested that searching judicial review of statutes directed at "discrete and insular minorities" may be appropriate because prejudice against these minori-

119. Balkin & Siegel, *supra* note 63, at 11.

120. Because of Ely's focus on politically subordinated minority groups, his work could be grouped together with the anti-subordination theory. However, it rests on a distinct enough principle to warrant separate consideration.

121. Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1371 (2011).

122. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980) [hereinafter ELY, DEMOCRACY].

123. *Id.* at 153; Pamela S. Karlan, *John Hart Ely and the Problem of Gerrymandering: The Lion in Winter*, 114 YALE L.J. 1329, 1336–38 (2005).

ty groups "tends seriously to curtail the operation of those political processes" that should protect them.[124] Professor Victoria Nourse has linked political process theories with the pre-Civil War aversion to class legislation, which rejected the power of the legislature to enact legislation with the purpose of either benefitting powerful industries because of their close relationship to the halls of power or harming politically powerless minorities groups.[125]

Professor Deborah Hellman has advanced a theory that endeavors to distinguish between permissible and impermissible classification on the basis of the classification's tendency to demean.[126] Because it is "a bedrock moral principle" that all people are of equal moral worth, classifications that demean are wrongful because they treat the individual as if she had diminished moral worth.[127] For Hellman, the touchstone for wrongful discrimination is whether the classification fails to treat people as moral equals.[128] Hellman's theory finds support in a line of Supreme Court cases that express sensitivity to the law's ability to stigmatize. In *Lawrence v. Texas*, the Court struck down a state law criminalizing homosexual sexual activity, reasoning that a law intruding into the private lives of consenting adults denies them "respect" and "demean[s] their existence."[129] In its recent *Obergefell* decision, the Court reiterated this principle, holding that state laws limiting marriage to opposite-sex couples "demeans gays and lesbians" by excluding them from the "central institution" of marriage.[130]

B. *Special Legislation Offends Different Conceptions of Equality*

Although there is no universal agreement about how the value of equality should be enforced, the anti-classification and anti-subordination conceptions, along with the other significant theories noted above, represent plausible and widely held visions of

124. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53, 152 n.4 (1938).

125. V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 995 (2009) ("[P]olitical-process theories . . . are prefigured in the doctrine of class legislation.").

126. HELLMAN, *supra* note 70, at 171.

127. *Id.* at 6, 172.

128. *Id.* at 31.

129. Lawrence v. Texas, 539 U.S. 558, 562, 578 (2003).

130. Obergefell v. Hodges, 135 S. Ct. 2584, 2601–02 (2015).

equality. This section compares the three categories of special laws described in Part I—special transfers of wealth, special exemption laws, and special laws imposing legal and financial penalties—with the different conceptions of equality described in Part II.A. This analysis reveals that special legislation offends one or more widely held visions of equality.

1. Special Legislation Offends the Anti-Classification Conception of Equality

Special legislation offends the anti-classification conception of equality because it often accords legal and financial privileges and penalties without regard to morally relevant characteristics or an individual's contribution to society, and without any rational connection between the stated goal of the legislation and the effect of the legislation. Consider the financial transfer to Lautenberg. The statute transferring wealth to Lautenberg made the receipt of public benefits wholly contingent on a morally irrelevant characteristic. Whatever her virtues as a person, the special benefit was conferred by Congress on Lautenberg without regard to her character; the one and only factor that Congress considered was the fact that she had been married to a former Senator. The failure of the law to take into account Lautenberg's moral worth as an individual, and treatment of her as a member of a class whose sole distinction is a moral irrelevancy, offends the anti-classification conception of equality. Indeed, gratuitous transfers of wealth to a person, based solely on family connections, are menacingly close to the feudal tradition that the anti-classification conception of equality squarely rejects.[131]

Moreover, the transfer accords a privilege to Lautenberg, in this case money, without regard to any service to the community that she herself performed. A gratuitous payment that does not flow from any legal obligation epitomizes the kind of "artificial distinctions. . . gratuities, and exclusive privileges"[132] that the anti-classification theory rejects. Indeed, a transfer of wealth to an individual because of another person's service to the community offends the anti-classification theory's insistence—as epitomized by Massachusetts's 1780 Constitution—that no one has a right "to obtain advantages, or particular and exclusive privileges, dis-

131. *See supra* Part II.A.1.
132. Jackson, *supra* note 87, at 1153.

tinct from those of the community, [other] than what arises from the consideration of services rendered to the public."[133] Because Mrs. Lautenberg received a special financial benefit precisely because of the service of another—indeed, a family member—the special benefit she received offends the anti-classification theory of equality as surely as the special, family-based prerogatives of the Society of the Cincinnati offended the anti-feudal sensibilities of the framing generation.

Consider also the example of Terri's Law, which made a special exception from standing preclusion rules for "any parent" of Terri Schiavo, and no one else.[134] 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. Every year, generally applicable preclusion rules prevent countless individuals from relitigating, in district court, cases previously settled by state court judgments.[135] Moreover, even though Schiavo's circumstances were, admittedly, somewhat unusual, they were not unique: both proponents and opponents of Terri's Law acknowledged that there were "thousands" of people "who face similar situations."[136] By singling out "any parent" of Terri Schiavo for special treatment, and specifically providing that Terri's Law would not "constitute a precedent with respect to future legislation,"[137] Terri's Law treated Schiavo and her parents differently than those thousands of similarly situated individuals. For these same reasons, Terri's Law offends the anti-classification principle by failing to meet even a minimum rationality standard. Taking Congress at its word that the legislation's purpose was to save a life,[138] the fact that there were "thousands" of people in the same situation as Schiavo makes the decision to do so through a special, non-precedential statute irrational.[139]

133. *See* MASS. CONST. of 1780, pt. I, art. VI; HARRIS, *supra* note 17, at 22.

134. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15–16 (2005).

135. 28 U.S.C. § 1738 (2012), *construed in* Allen v. McCurry, 449 U.S. 90, 96 (1980).

136. 151 CONG. REC. S2928, 2929 (daily ed. Mar. 17, 2005) (statements of Sen. Tom Harkin & Sen. Ron Wyden).

137. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15–16 (2005).

138. 151 CONG. REC. S2926, 2929 (daily ed. Mar. 17, 2005) (statement of Sen. George Allen)

139. Terri's Law, like many special laws, may be the product of a cognitive bias called the "identified victim" effect. *See* Tehila Kogut & Ilana Ritov, *The "Identified Victim" Effect: An Identified Group, or Just a Single Individual?*, 18 J. BEHAV. DECISION MAKING

Similarly, special immigration laws offend the anti-classification conception of equality by singling out an individual based on morally irrelevant characteristics. A special immigration law singles out one visa applicant from a pool and grants its beneficiary special treatment not accorded to other applicants. Moreover, special immigration laws grant the beneficiary special treatment *at the expense* of other applicants: each special immigration law provides that, when the beneficiary receives special immigration status, "the total number of immigrant visas that are made available to natives of the country of birth" of the beneficiary of the special law, must be "reduce[d] by 1."[140] By benefitting one person at the expense of another, indeed another person from the same country as the beneficiary, special immigration laws draw legal distinctions between individuals without any accompanying morally relevant distinction. Much like Terri's Law, special immigration laws are not based on any congressional findings that the beneficiary is more worthy than any of the beneficiary's countrymen, or any other similarly situated individual who is denied this benefit. Indeed, special immigration laws are, perhaps, more obviously based on morally irrelevant characteristics because they are enacted without even the limited debate that accompanied the enactment of Terri's Law.

For many of these same reasons, special exemption laws like the Elizabeth Morgan Act offend the anti-classification vision of equality. The Act singled out Foretich for legal disabilities based on unproved allegations of sexual abuse. Although he had been exonerated in court, and was granted joint custody of his daughter, his former wife continued to press allegations of abuse after the court's order. In response, Congress eliminated the court's ability to enforce its custody order by stripping it of jurisdiction over the suit. In addition, the Act supplanted the court's order by denying Foretich custody, treating him as if he had been guilty, rather than exonerated, of sexual abuse.[141] Certainly, the anti-classification principle would not be offended if Foretich's visitation rights were terminated by a court after a finding that he had committed the alleged abuse. However, by terminating his legal rights without any supporting factual determination, Congress based its decision to treat Foretich like a criminal on the fact that

157, 159 (2005).

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

141. Foretich v. United States, 351 F.3d 1198, 1224 (D.C. Cir. 2003).

he was merely accused of a heinous crime. In light of the common law and constitutional presumption that criminally accused are innocent until proven guilty,[142] the legal distinction that Congress drew when it penalized Foretich, levying a legal penalty on him because he was accused of a crime, was based on a morally irrelevant distinction.

2. Special Legislation Offends the Anti-Subordination Conception of Equality

Special legislation offends the anti-subordination conception of equality because it often plays on societal prejudices and fears, reinforces existing social hierarchies, and inures to the benefit of the well-connected and to the detriment of the disadvantaged. Consider again the Elizabeth Morgan Act. The Act offends the anti-subordination conception of equality by penalizing Foretich because he is member of a group that is treated by society with fear and contempt: the criminally accused and, more specifically, those accused of sex offenses.

The anti-subordination conception of equality would view Congress's elimination of Foretich's rights to a jury and to confront witnesses against him through the prism of preexisting social structures. Notably, the Elizabeth Morgan Act was enacted against the backdrop of the odium with which our society approaches those accused of violent, and especially sex-related, crimes. Indeed, draconian state and federal laws broadly defining[143] and harshly punishing[144] sex offenses are a well-known part of our social fabric. In light of this existing societal environment, the Elizabeth Morgan Act can be seen as subordinating Foretich

142. Coffin v. United States, 156 U.S. 432, 453 (1895) ("[A] presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary.").

143. *E.g.*, ALA. CODE § 13A-12-131 (2016), *noted in* Major Andrew D. Flor, *Sex Offender Registration Laws and the Uniform Code of Military Justice: A Primer*, ARMY LAW. 1, 10 n.106 (2009) (noting how § 13A-12-131 might require one to register as a sex offender when displaying obscene bumper stickers); ARK. CODE ANN. §§ 5-11-103–104, 12-12-903(13)(r) (2016) (requiring registration as a sex offender for false imprisonment of a minor). For other state laws that define sex crimes to include non-sexual behavior, like streaking or public urination, see generally NIC/WCL PROJECT ON ADDRESSING PRISON RAPE, FIFTY STATE SURVEY OF ADULT SEX OFFENDER REGISTRATION REQUIREMENTS (2009), http://www.csom.org/pubs/50%20state%20survey%20adult%20registries.pdf.

144. *See, e.g.*, Paul Woolverton, *NC Law: Teens Who Take Nude Selfie Photos Face Adult Sex Charges*, FAYETTEVILLE OBSERVER (Sept. 2, 2015), http://www.fayobserver.com/news/local/nc-law-teens-who-take-nude-selfie-photos-face-adult/article_ce750e51-d9ae-54ac-8141-8bc29571697a.html.

because he is a member of a feared and hated subclass of society. Moreover, the Act can be seen as political scapegoating; Congress used the Act to demonstrate, in powerful and final terms, its (quite understandable) distaste for sex offenders by curtailing the rights of an individual accused, but not convicted, of this type of offense.

Perhaps less intuitively, the anti-subordination conception of equality also can be offended by special legislation that grants benefits. Consider the special transfer of wealth to Lautenberg.[145] This transfer offends the anti-subordination theory's commitment to disestablishing tiers of favored and disfavored citizens. The transfer of wealth to Lautenberg provided a financial benefit to a family member of a United States Senator for no reason other than her relationship to the late Senator. In other words, she received a financial benefit because of her social proximity to the nation's established elite. The anti-subordination conception of liberty is offended by this transfer because it reinforces the already-existing gap in wealth and power between members of the ruling elite and the rest of the population.

The fact that this benefit is, in practice though not by law, available to all survivors of deceased Congressmen does little to mitigate the concern: indeed, it highlights the fact that the transfer to Lautenberg represents a pervasive practice—perpetrated by the nation's lawmakers—of benefitting family members of the nation's elite merely because of their status. To put it in colloquial terms, the financial benefit enjoyed by Lautenberg is a manifestation of an "I'll scratch your back if you scratch mine" mentality by which members of Congress have agreed to share public benefits paid for by the public but not available to the public.

Because the anti-subordination conception of equality is sensitive to the way that neutral laws operate in the context of preexisting social hierarchies, the anti-subordination conception of equality would be offended by the fact that the beneficiaries of this benefit-sharing practice are financial as well as political elites. Indeed, more than half of United States Congressmen, both Representatives and Senators (including former Senator Lautenberg), are millionaires.[146] As a result, the decision to trans-

145. Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013).

146. Alan Rappeport, *Making it Rain: Members of Congress Are Mostly Millionaires*,

fer wealth to Lautenberg by this special law would be recognized by the anti-subordination theory as having the effect of shoring up wealth in the already richest members of society. In President Jackson's words, it is a distribution of benefits "to make the rich richer and the potent more powerful."[147]

3. Special Legislation Offends Other Significant Conceptions of Equality

In addition to the anti-subordination and anti-classification conceptions of equality, special legislation offends a number of other significant visions of equality. Special legislation offends the political process theory's conception of enforceable equality because it often reflects the inability of minority groups to protect themselves through the normal political process through coalition-building with members of other groups. Consider the Elizabeth Morgan Act: through this statute, Foretich was stripped of his court-ordered rights because he belonged to a pariah group, the class of those accused of violent, and in particular, sex, offenses. Those accused of sex crimes are a much-loathed group; they are unable to protect themselves through the normal political processes because other political groups are generally unwilling publicly to side with them. Indeed, as current trends in sexual assault investigation procedures demonstrate, those accused of sex crimes are apt to be treated with suspicion and odium, and denied basic protections like due process of law, the presumption of innocence, and the right to mount an adequate defense.[148] As a result, a law like the Elizabeth Morgan Act is not just an arbitrary limitation of one individual's rights; rather, it represents an attack on a member of an outcast class that is prevented by societal distaste from protecting itself through its association with other societal groups.

Special laws also warrant searching judicial review under the political process vision of equality because these laws can lead to a political process that is demonstrably undeserving of trust. When special legislation was the norm in state legislatures, cor-

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N.Y. TIMES (Jan. 12, 2015, 5:54 PM), http://www.nytimes.com/politics/first-draft/2015/01/12/making-it-rain-members-of-congress-are-mostly-millionaires.

147. Jackson, *supra* note 87, at 1153.

148. *See, e.g.*, Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HF DDiZN7nU2UwuUuWMnqbM/story.html.

ruption in the form of bribery was considered to be inseparable from special legislation. Lobbyists engaged in the "mercenary traffic in legislation" would obtain, through bribery, legislation conferring "some special or valuable privilege, franchise or pecuniary advantage" on their clients.[149] Even when special legislation is not expressly the result of bribery (which is, admittedly, probably rare), legislators stand to benefit from introducing bills to benefit powerful or wealthy constituents. The desire to win "acclaim or political advantage" encourages legislators to introduce legislation for the benefit of particular constituents.[150] Legislators, assured of the passage of their special bills because of the culture of logrolling, have been known to "eagerly introduce[] special bills" because it will lead to their own political aggrandizement.[151] Just as the carrot of political advancement and contributions leads legislators to cater to individual wealthy constituents, the threat of defeat at the polls acts as a stick driving similar behavior.[152]

Although most are surely not the product of outright corruption, special immigration laws provide a palpable example of how the power to enact special laws can infect the legislative process with untrustworthiness. In the notorious "Abscam" scandal, FBI agents posed as the representatives of wealthy Arab sheiks who purportedly wanted to immigrate to the United States.[153] The agents offered federal officials bribes in exchange for their promise to introduce private immigration bills[154] for the benefit of the fictitious sheiks.[155] Many of these officials readily accepted the bribes, promising to introduce special legislation in return. In all, "twenty-five individuals, including one United States Senator, six United States Representatives, and other public officials" were indicted for corruption related to the Abscam investigation.[156] Because they are closely associated with bribery and other forms of corruption, special laws reflect a legislative process that can be undeserving of trust.

149. Ireland, *supra* note 18, at 277.
150. *Id.* at 274.
151. *Id.* at 271, 273–75.
152. *Id.* at 275.
153. Gershman, *Abscam*, *supra* note 57, at 1571–72.
154. United States v. Myers, 527 F. Supp. 1206, 1225 (E.D.N.Y. 1981), *aff'd*, 692 F.2d 823 (2d Cir. 1982).
155. Gershman, *Abscam*, *supra* note 57, at 1572.
156. *Id.* at 1575; *see also* LEE, *supra* note 1, at 9.

Finally, special laws offend Hellman's concern with the demeaning effect of classification because special laws often demean their target. Consider again the Elizabeth Morgan Act. Congress enacted the statute on the heels of a custody dispute in which Foretich was accused of sexual abuse by his former wife. Although the court found that these charges were baseless, Congress reversed the court's custody order. By effectively denying him custody, Congress implied that Foretich was in fact guilty of the despicable conduct of which he was accused. The effect of the Elizabeth Morgan Act, in other words, was to demean Foretich by declaring that he was guilty of committing sexual abuse despite his exoneration in court.

III. EQUAL PROTECTION CANNOT ADEQUATELY CURTAIL SPECIAL LEGISLATION

Special legislation compromises the value of equality however it is articulated. Because the Equal Protection Clause has come to embody equality, it is natural to look to this clause as the constitutional tool best suited to curtail special legislation. Indeed, the Court has struggled to reconcile special legislation with its equal protection doctrine.[157] Ultimately, however, it has been unable to articulate a vision of equal protection that consistently and adequately addresses special legislation. Scholars have expanded on the Court's attempts by suggesting a broader reading of equal protection doctrine to restrain some types of special legislation.[158] But despite these efforts, and despite the strong association between equality and the Equal Protection Clause, this multipurpose constitutional provision cannot curtail special legislation on its own. This part describes the doctrinal and conceptual limitations that prevent the Equal Protection Clause from adequately protecting the value of equality by curtailing special legislation. Part IV introduces an alternative—the value of legislative generality—as a more promising mechanism to restrain special laws in a coherent and meaningful manner. It also demonstrates how the Equal Protection Clause, although on its own incapable of curtailing special legislation, contributes to the parameters of a value of legislative generality.

157. Robert C. Farrell, *Classes, Persons, Equal Protection, and* Village of Willowbrook v. Olech, 78 WASH. L. REV. 367, 368–69 (2003) [hereinafter Farrell, *Classes, Persons, Equal Protection*].

158. *See* William D. Araiza, *Flunking the Class-of-One/Failing Equal Protection*, 55 WM. & MARY L. REV. 435, 440 (2013) [hereinafter Araiza, *Flunking the Class-of-One*].

A. *Equal Protection Doctrine Does Not Curtail Special Legislation*

As it is currently formulated, equal protection doctrine does not consistently or adequately restrain the power of the legislature to enact special laws despite the inequality they create. Barring fundamental changes in equal protection doctrine, the Equal Protection Clause is ill-suited to address the inequalities created by special legislation.

1. Equal Protection Doctrine Is Primarily Committed to Preventing Burdens Imposed Because of a Suspect Trait

The Supreme Court has emphasized that the Equal Protection Clause is primarily concerned with governmental classifications that sort individuals into groups based on some identifiable characteristic.[159] However, because legislation inevitably divides the world into classes that are treated differently in some respect,[160] equal protection does not prohibit all classification.[161] Rather, the type of classification determines the level of scrutiny to which the Court subjects it. If the government classifies based on a trait that is considered suspect (paradigmatically race[162]), the Court will apply strict scrutiny to the classification, virtually guaranteeing its invalidation.[163] By contrast, legislation that implicates no suspect trait (traditionally economic or social legislation) is reviewed under the deferential rational basis test.[164] Between these two poles exists legislation that classifies based on a quasi-suspect trait, like gender, which receives intermediate scrutiny.[165] Despite serious criticisms of the Court's multi-tiered approach to the Equal Protection Clause,[166] with some notable exceptions,[167]

159. *See* Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 271–72 (1979); Zick, *supra* note 62, at 110.

160. Farrell, *Classes, Persons, Equal Protection*, *supra* note 157, at 368–69; Tussman & tenBroek, *supra* note 72, at 343–45.

161. *Feeney*, 442 U.S. at 271.

162. *See* Brown v. Bd. of Educ., 347 U.S. 483, 487–88 (1954). Other suspect classifications include alienage and national origin. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440-41 (1985).

163. Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 510 (2004).

164. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 491 (1955); Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 563–64 (1947).

165. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 198-99 (1976).

166. *See, e.g.*, Goldberg, *supra* note 163, at 484; Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 138 (2011).

167. *See City of Cleburne*, 473 U.S. at 446; Robert C. Farrell, *The Two Versions of Ra-*

this well-worn formula persists. Outside the realm of classification, the Court also subjects legislation to strict scrutiny when it burdens fundamental rights, like the right to vote.[168] Because special legislation does not classify according to a suspect trait and rarely, if ever, burdens a right that might be considered fundamental, there is little room for meaningful review of special legislation under equal protection doctrine.

First, special laws do not confer special treatment based on a suspect trait. Take, for example, the special transfer of wealth to Lautenberg. The class created by the special law includes Lautenberg alone. Because the class is defined without reference, even implicitly,[169] to a trait that has been designated suspect by the Court, like race, religion, or national origin,[170] the special transfer does not single her out because of a suspect trait. The same can be said of Terri's Law, which singled out Schiavo's parents, but not because of a suspect trait. Perhaps less intuitively, even a special immigration law, which grants special immigration status to a foreign national, does not make distinctions based on the country of origin of the beneficiary of that law. By requiring the diminution of available visas to compatriots of the special law's beneficiary,[171] each special immigration law makes a distinction between two foreign nationals who come from the same country, not between a foreign national and a citizen of the United States. Therefore, although the beneficiary of a special immigration law is receiving a benefit related to a suspect trait (nationality), the law providing for special treatment does not distinguish between the beneficiary and others because of that trait.

This last illustration reveals an important point about special legislation. Because it singles out an individual *qua* individual rather than as a member of a class, special legislation does not target an individual because of a trait that is the subject of heightened scrutiny.[172] As a result, special legislation will never be

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tional-Basis Review and Same-Sex Relationships, 86 WASH. L. REV. 281, 305 (2011) [hereinafter Farrell, *Two Versions of Rational-Basis*]; Yoshino, *The New Equal Protection*, *supra* note 17, at 759.

168. *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964).

169. *See* Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886).

170. *See* Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (per curiam); Strauss, *supra* note 166, at 146.

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

172. *See* William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 ECOLOGY L. Q. 493, 503 (2007).

reviewed under heightened scrutiny for classifying according to a suspect trait. Accordingly, unless the classification burdens a fundamental right, a court will review special legislation under the highly deferential rational basis standard.[173]

Second, most special laws are economic or social in nature, including wealth transfers,[174] regulatory measures,[175] and statutes relating to tax treatment.[176] As economic or social legislation, these special laws receive a great deal of judicial deference.[177] The high level of deference accorded economic measures is virtually complete in the context of public benefits. For example, in *Kotch*, the Court upheld a statute conveying state-sponsored preferential treatment to particular families under the Equal Protection Clause as economic legislation.[178] In *Kotch*, the challenged law limited the approval of pilot's license applications to only those people who had served as apprentices to current riverboat pilots.[179] The current pilots ensured that the apprentices, and thus future pilots, were chosen from the relatives and friends of the current pilots, effectively perpetuating a state-sponsored monopoly based largely on bloodline.[180] The Court acknowledged that the result of the law was pervasive, state-sponsored nepotism; nevertheless, the Court upheld the law under the Equal Protection Clause after speculating that family tradition might justify the nepotism.[181] As a consequence of this permissive approach toward economic and social legislation and, in particular, public benefits, the vast majority of special laws are outside of the reach of equal protection doctrine.

Third, even when the Court has struck down legislation under the rational basis standard, it has not done so for special legislation. Although the tiered scrutiny model describes the vast major-

173. *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 477 (1977).

174. *See, e.g.*, Continuing Appropriations Act of 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013).

175. *See, e.g.*, Energy Reserves Grp., Inc. v. Kan. Power & Light Co., 459 U.S. 400, 412 n.13 (1983) (citing Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 247–48, 248 n.20 (1978)).

176. *See* Williams v. Mayor of Baltimore, 289 U.S. 36, 40 (1933) (rejecting equal protection challenge to special state tax exemption for a particular company); DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 80 (1991).

177. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955).

178. *See, e.g.*, Kotch v. Bd. of River Port Pilot Comm'rs, 330 U.S. 552, 564 (1947).

179. *Id.* at 555.

180. *See id.*

181. *See id.* at 563–64.

ity of the Court's equal protection cases, there are a few cases in which the Court has purported to apply the rational basis standard but in fact failed to accord the legislature the deference normally associated with it.[182] These cases apply a standard that is often referred to as "rational basis with bite."[183] The Court has declined to explain the circumstances in which it will subject legislation to the rational basis with bite standard, and scholars have struggled to divine a coherent principle from the set of cases in which it has been applied.[184] Scholars such as Professors Yoshino[185] and Pollvogt[186] have identified animus as a motivating principle. They argue that the Court applies rational basis with bite when it identifies the presence of animus on the part of the legislature. Even if legislative animus does trigger rational basis with bite, it will not likely apply to special legislation in most cases. As noted, most special laws concern special benefits, like the transfer to Mrs. Lautenberg, or exemptions from the generally applicable laws, like Terri's Law. These types of statutes simply do not implicate any concern with animus. Moreover, animus is a difficult concept to define and apply. Although some special laws, like the Elizabeth Morgan Act,[187] could be attributed to animus against suspected sex offenders, most special burdens, like special taxes or other economic burdens, would not rise to the level of animus as suggested by the Court's few rational basis with bite cases.

In light of the Equal Protection Clause's commitments to members of suspect classes and fundamental rights, there is not much room, doctrinally, for its application to special legislation.

2. Equal Protection Doctrine's Limited Relevance to Special Legislation

Although the primary commitments of the Equal Protection Clause involve the protection of members of suspect classes and

182. *See* Romer v. Evans, 517 U.S. 620, 623 (1996); City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 537–38 (1973).

183. *E.g.*, Yoshino, *The New Equal Protection*, *supra* note 17, at 759–60.

184. *See* Farrell, *Two Versions of Rational-Basis*, *supra* note 167, at 305–06.

185. Yoshino, *The New Equal Protection*, *supra* note 17, at 763.

186. Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 924 (2012).

187. Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996) (codified at D.C. CODE § 11-925 (2001)).

fundamental rights, there are strains of equal protection doctrine that address phenomena similar to special legislation. The first strain disfavors legislation that singles out a class for special treatment, called "class legislation," and the second disfavors administrative action that singles out an individual for special administrative treatment, called the "class-of-one" theory of equal protection. Although neither class legislation nor the class-of-one theory addresses special legislation directly, each is similar enough to warrant particular consideration. However, despite their potential to restrain special legislation, neither theory plays a viable role in modern equal protection doctrine.

a. The False Start of Class Legislation

Immediately following the adoption of the Equal Protection Clause, the Court expressed a willingness to read it to invalidate "class legislation," a close relative of special legislation that singles out a class (as opposed to merely identifiable individuals) for special benefits or burdens.[188] In *Barbier v. Connolly*, the Court proclaimed that "[c]lass legislation, discriminating against some and favoring others, is prohibited."[189] Despite this broad promise to enforce equality, including, perhaps, to curtail special legislation, *Barbier* itself contained the seeds of the eventual doctrinal irrelevance of class legislation. *Barbier* concerned a state law that required public laundries to cease washing and ironing clothes at night. The owner of a laundry challenged this restriction, claiming that it discriminated between the class of businesses that included just laundries and the class of businesses that included all other enterprises.[190] The Court rejected the laundry owner's claim, holding that the regulation fell within the "police power" of the state to promote its citizens' "health, peace, morals, education, and good order."[191] Because the laundry business entailed a risk of fire, the state's restriction on hours of operation fell within its police power.[192]

Importantly, the Court distinguished laws that fell within the state's police power from legislation "discriminating against some

188. Nourse & Maguire, *supra* note 125, at 966–70.
189. 113 U.S. 27, 32 (1885).
190. *Id.* at 30.
191. *Id.* at 31.
192. *Id.* at 30–32.

and favoring others."[193] The Court acknowledged that the "very necessities of society" sometimes require the state to enact statutes that create burdens for some classes of people in order to promote a "public purpose."[194] Even if a statute creates different rules for different classes, however, it is not impermissible class legislation as long as it operates "alike upon all persons and property under the same circumstances and conditions."[195] Put otherwise, discrimination is permissible so long as it "affects alike all persons similarly situated."[196]

Determining whether two classes were "similarly situated," and whether the state was promoting a "public purpose," proved an impossible task for the Court to administer in a principled and meaningful manner. In the decades after *Barbier*, the Court reaffirmed the general principle that class legislation violated the Equal Protection Clause but consistently found reasons not to apply this principle.[197] In *Holden v. Hardy*, the Court broadly interpreted the scope of the state's police power to protect public health, upholding a state law regulating working hours in a single industry.[198] The Court also interpreted *Barbier*'s "similarly situated" language narrowly. For example, in *Missouri Pacific Railway Co. v. Mackey*, a statute created a liability scheme that applied only to the railroad industry. The Court upheld the regulation against the charge that it was impermissible class legislation because the legislation treated all railroads, although not all industries, the same.[199]

Ultimately, the Equal Protection Clause's potential to limit class legislation was never realized. Because of the difficulty administering the class legislation principle, the Court settled on the familiar tiers of scrutiny described above to enforce equal protection.[200] Despite the impressive work of scholars demonstrating that the Equal Protection Clause originally was understood to

193. *Id.* at 32.
194. *Id.* at 31–32.
195. *Id.* at 32.
196. *Id.*
197. *See* Nourse & Maguire, *supra* note 125, at 971–72, 980; Tussman & tenBroek, *supra* note 72, at 343.
198. 169 U.S. 366, 380, 398 (1898).
199. Missouri Pac. Ry. Co. v. Mackey, 127 U.S. 205, 210 (1888).
200. *See* Saunders, *supra* note 89, at 247–48; Tussman & tenBroek, *supra* note 72, at 342.

address class legislation,[201] therefore, modern doctrine does not represent a significant barrier to class legislation.

b. The Broken Promise of the Class-of-One Theory of Equal Protection

The Court's most explicit attempt to situate particularized government action within the framework of equal protection doctrine is the "class-of-one" doctrine that it articulated in *Village of Willowbrook v. Olech*.[202] In *Olech*, homeowners in the Village of Willowbrook asked the Village to connect their home to the municipal water supply.[203] They claimed that, in exchange for the connection, the Village demanded an abnormally large easement (thirty-three feet) compared to the demand made on other Village homeowners (fifteen feet).[204] Although the Olechs could claim no membership in a protected class, the Court held that the Olechs stated a claim under traditional equal protection analysis.[205] Recognizing a theory that had been developed in the lower courts, the Supreme Court held that a person may not be singled out as a "class of one" by government action if the differential treatment was "irrational and wholly arbitrary."[206] After *Olech*, lower courts and scholars struggled with how to square *Olech*'s seemingly broad class-of-one theory with traditional equal protection doctrine.[207] By holding that only arbitrary treatment and particularized action were required to state a claim under the class-of-one theory, *Olech* had the potential to expand the role that equal protection doctrine plays in the restraint of particularized government action, including special legislation. Some scholars read

201. *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 450 (2007); David E. Bernstein, *Revisiting* Yick Wo v. Hopkins, 2008 U. ILL. L. REV. 1393, 1394 (2008); William N. Eskridge Jr., *Original Meaning and Marriage Equality*, 52 HOUS. L. REV. 1067, 1084–85 (2015); Saunders, *supra* note 89, at 247–48.

202. *See* 528 U.S. 562, 564 (2000); William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 44–46 (2009) [hereinafter Araiza, *Constitutional Rules*]; Araiza, *Flunking the Class-of-One*, *supra* note 158, at 440.

203. *Olech*, 528 U.S. at 563.

204. *Id.*

205. *Id.* at 565.

206. *Id.* at 564–65.

207. *See* Araiza, *Flunking the Class-of-One*, *supra* note 158, at 439; Farrell, *Classes, Persons, Equal Protection*, *supra* note 157, at 403; Robert C. Farrell, *The Equal Protection Class of One Claim:* Olech, Engquist, *and the Supreme Court's Misadventure*, 61 S.C. L. REV. 107, 124 (2009) [hereinafter Farrell, *Class of One Claim*].

Olech in this way, arguing that the basic promise of the Equal Protection Clause, equality, is offended by singling out an individual as a class of one.[208] The Court's broad rendering of equal protection doctrine in *Olech* seemed to follow widely held notions of equality suggesting that it is unfair to target a person for individualized treatment.[209]

The inchoate promise of *Olech*, however, was cut short by *Engquist v. Oregon Department of Agriculture*, the Court's second—and final to date—articulation of the class-of-one doctrine.[210] In *Engquist*, an employee claimed that a state agency's decision to fire her had been irrational and that, as a result, she had been singled out as a class of one.[211] The Court rejected this use of the class-of-one theory, holding that it applied only when there is a "clear standard against which departures" by the government "could be readily assessed."[212] In *Olech*, the clear standard was the fifteen-foot easement normally required by the Village of Willowbrook; the Village's demand for thirty-three feet was a departure from that standard.[213] By contrast, forms of government action that "by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments," like government employment decisions, are not cognizable under the class-of-one theory.[214]

The immediate effect of *Engquist* was dramatic. Sensing that *Engquist* might be the death-knell for the class-of-one doctrine, Professor Farrell, among other scholars, concluded that "there does not seem to be anything left" of the doctrine.[215] The lower courts have largely borne out this prediction. Immediately after the *Engquist* decision, lower courts read the holding broadly, dismissing a host of class-of-one claims where the discriminatory government action was discretionary, including "selective parole decisions, government contracting, and municipal code and criminal law enforcement and prosecution" decisions.[216] In narrow circumstances, outside of the context of government employment,

208. Araiza, *Flunking the Class-of-One*, *supra* note 158, at 441–42.
209. See Araiza, Constitutional Rules, supra note 202, at 41.
210. 553 U.S. 591 (2008).
211. *Id.* at 595.
212. *Id.* at 602.
213. Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000).
214. *Engquist*, 553 U.S. at 603.
215. Farrell, *Class of One Claim*, *supra* note 207, at 129.
216. Araiza, *Flunking the Class-of-One*, *supra* note 158, at 450–51.

however, other lower courts have continued to find the class-of-one theory viable.[217]

Whether the Supreme Court will further limit, or eliminate altogether, the class-of-one theory remains to be seen. What is certain, however, is that the scope of the theory is narrow. Whatever its merits in the context of executive agency action, the theory is an uncomfortable fit with legislative classifications.[218] In particular, the class-of-one doctrine, as limited by *Engquist*, is unlikely to serve as a basis for challenging special legislation for two reasons. First, special legislation is rarely if ever a deviation from a clear standard as understood in *Engquist*. Second, *Engquist*'s parsimonious rendering of the class-of-one doctrine brings it into line with doctrinal areas that address classes of one outside of the equal protection context.

First, *Engquist* recast *Olech* as a case about the government's deviation from a clear standard.[219] But, a close look at *Engquist* reveals that, by "clear standard," the Court means only a classification that is rationally related to its purpose. The Court described the defect in *Olech*'s statute as the fact that the Village's treatment of the Olechs was based on something other than the easement length required of other homeowners. In other words, the only rational method for determining the Olechs' easement length was comparing it to the easement lengths of other homeowners. Because the Village treated the Olechs differently than others with respect to easement length, the Village had violated the Equal Protection Clause. The Court confirmed this reading of *Olech* through its analysis of another prior case, *Allegheny Pittsburgh*. As described by the *Engquist* Court, the flaw in the government's action in *Allegheny Pittsburgh* was to make a market valuation decision on the basis of a standard that was not "of the sort on which appraisers often rely."[220] Again, the Court implied that there was only one rational method of classification (in this case, typical appraisal criteria); it therefore equated a deviation from a clear standard with making a classification that is not rationally related to its purpose.

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217. *See, e.g.*, Geinosky v. City of Chicago, 675 F.3d 743, 749 (7th Cir. 2012); Fortress Bible Church v. Feiner, 694 F.3d 208, 222 (2d Cir. 2012); Analytical Diagnostic Labs, Inc. v. Kusel, 626 F.3d 135, 142 (2d Cir. 2010).

218. Farrell, *Classes, Persons, Equal Protection*, *supra* note 157, at 398, 428.

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

220. *Id.* at 603 (citing Allegheny Pittsburgh Coal Co. v. Cty. Comm'n, 488 U.S. 336, 338–42 (1989)).

In contrast to *Olech* and *Allegheny Pittsburgh*, the Court held that the decision to fire Engquist was not a deviation from a clear standard because employment determinations are based on "subjective, individualized determinations" and, therefore, discretionary.[221] As discretionary decisions, they are outside the scope of the class-of-one theory of equal protection.[222] In light of its rendering of *Olech* and *Allegheny Pittsburgh*, *Engquist* most likely means that, if a decision is discretionary, it is not a deviation from a clear standard and, therefore, necessarily rationally related to a legitimate goal.

The fact that discretionary activity is now presumed rational is the key to understanding why the class of one theory is unable to restrain special legislation. Although there may be a number of legitimate definitions of discretionary activity, legislation falls within the discretion of Congress and, therefore, outside the purview of the class-of-one theory of equal protection. The power to legislate, including the power to refrain from legislating, is consigned to the legislature; in the case of federal legislation, the power is granted to Congress by the Constitution.[223] When Congress legislates, it is free to take any course within a wide range of permissible alternatives. That is, as long as it does not otherwise violate the Constitution, Congress may legislate on any subject it chooses. Moreover, because the courts may not force Congress to legislate,[224] Congress may choose to pass no law at all. Put simply, Congress has discretion over legislation because it is the job of the legislature to enact, or not enact, legislation. In the sense of the word as used by the Court in *Engquist*, the legislature has discretion over legislation because the legislature is entitled to "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind . . . neglecting the others."[225] For this reason, even the classic example of special legislation, the legislature's decision to accord benefits to one person but not others, is discretionary. Because the Court

221. *Id.* at 602.

222. *Id.*

223. U.S. CONST. art. I, § 7; *see also* Michael J. Teter, *Letting Congress Vote: Judicial Review of Arbitrary Legislative Inaction*, 87 S. CAL. L. REV. 1435, 1438 (2014).

224. Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1126 n.164 (1992) (explaining that a "claim against Congress seeking to force it to implement a treaty would face insuperable justiciability problems"); *cf.* 5 U.S.C. § 706(1) (2012) (permitting judicial review of agency failure to act).

225. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489 (1955).

limited the class-of-one theory to non-discretionary activities, the legislature's decision to enact special legislation is outside the purview of a class-of-one equal protection claim.

Moreover, *Engquist* suggests that a decision can at once be arbitrary and discretionary. As noted, a discretionary action is outside the scope of the class-of-one doctrine. This significantly limits the force of *Olech*, which promised that government action taken for no reason at all would be considered arbitrary, and thus in violation of the class-of-one theory of equal protection. After *Engquist*, however, government action taken without an accompanying reason, although still arbitrary, is now considered discretionary and, therefore, outside the scope of the class-of-one doctrine.[226]

Second, *Olech*'s innovation was its recognition of the class-of-one doctrine in the equal protection context. But, before *Olech*, the Court long had wrestled with the concept of the class of one in other doctrinal areas. Evaluating *Olech* and *Engquist* in light of these other cases suggests that *Olech* is the aberration; *Engquist*, rather than being an anomaly, is best thought of as bringing the class-of-one theory back in line with modern pre-*Olech* doctrine.

The Court's most explicit recognition and rejection of a class-of-one argument is *Nixon v. Administrator of General Services*,[227] in which the Court considered a federal statute targeting the infamous Nixon White House tapes. In light of the "long national nightmare"[228] bookended by the Watergate break-in and the resignation of Richard Nixon, Congress passed a statute that ordered the Administrator of General Services to take possession of all White House tape recordings made by President Nixon.[229] Nixon was specifically named in the statute,[230] along with a specific agreement between the former President and the Administrator of General Services that described the scope of materials that would be transferred to the government.[231] The Court acknowl-

226. The presumption that a classification decision was made on a rational basis might be defeated if the government official's stated reason was to discriminate based on a suspect trait.

227. 433 U.S. 425 (1977).

228. Speech of Gerald Ford, Swearing in Ceremony (Aug. 9, 1974), *in* JAMES CANNON, GERALD R. FORD: AN HONORABLE LIFE 10 (2013).

229. Presidential Recordings and Materials Preservation Act, Pub. L. 93-526, 88 Stat. 1695 (1974).

230. *Id.*

231. *See Nixon*, 433 U.S. at 431–33.

edged that Congress had created a "class of one" by targeting Nixon; nevertheless, the Court upheld the statute because Congress had the legitimate objective of preserving presidential materials at risk of loss.[232] The specification of former President Nixon, therefore, created a "*legitimate* class of one" because the law could be "rationally understood" as an "act of nonpunitive legislative policymaking."[233]

Since *Nixon*, the Court has continued to affirm that the legislature has broad authority to single out a class of one for special treatment. In *Plaut v. Spendrift Farm*, the Court expressed skepticism about the notion, suggested by Justice Breyer in his concurrence, that "there is something wrong with particularized legislative action," noting that although "legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action."[234] Even laws that single out an individual natural person or corporation, the Court held, "are not on that account invalid."[235] Similarly, in *Landgraf v. USI Film Products*, the Court upheld the constitutionality of a provision of the Civil Rights Act of 1991, although it recognized that the provision "granted a special benefit to a single litigant in a pending" case.[236]

When considered in light of these other modern class-of-one cases, *Olech* appears to be only an evanescent departure from standard class-of-one doctrine. *Engquist*'s narrow reading of the class-of-one theory is consistent with class-of-one doctrine from outside the context of equal protection and reflects the Court's skepticism of the proposition that there is something wrong with particularized legislative action. The broken promise of the class-of-one theory, moreover, is consistent with the Court's retrenchment on class legislation, the Court's other abortive attempt to provide a meaningful check on particularized legislation outside of the context of suspect traits and fundamental rights. At one time, either the class legislation doctrine or the class-of-one theory might have served as a doctrinal basis for restraining special legislation under the Equal Protection Clause. Modern doctrine

232. *Id.* at 472.
233. *Id.* at 472, 477 (emphasis added).
234. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995).
235. *Id.*
236. *Id.* at 266 (citing Landgraf v. USI Film Prods., 511 U.S. 244, 258 (1994) ("The parties agree that § 402(b) [of the Civil Rights Act of 1991] was intended to exempt a single disparate impact lawsuit against the Wards Cove Packing Company.").

makes that impossible. As a result, the Equal Protection Clause cannot meaningfully restrict special legislation without serious modification to current equal protection doctrine.

In conclusion, an analysis of equal protection doctrine reveals that it cannot curtail special legislation in a meaningful way. Most significantly, it is unable to address special benefits, which make up the bulk of special legislation. The Court's attempt to address unequal benefits through the Equal Protection Clause, the class legislation doctrine, foundered on the difficulty of determining when two classes that are treated differently are "similarly situated" and when an unequal benefit can be viewed as serving a public purpose. In addition, equal protection doctrine has been unable to address special legislation related to economic and social legislation, whether it provides benefits or imposes burdens. Moreover, equal protection doctrine is unable to curtail special legislation because the enactment of legislation is discretionary in nature. By contrast, equal protection doctrine appears somewhat better suited to curtail special legislative burdens. Although it has not articulated a guiding principle behind its rational basis with bite doctrine, a "bite" based on animus could restrain some targeted legislative burdens like the Elizabeth Morgan Act. These limitations, although significant, suggest some ways in which equal protection doctrine resonates with a value of legislative generality. Even though doctrinal limitations prevent the Equal Protection Clause, alone, from curtailing special legislation, it can be read as a part of a value of legislative generality that can meaningfully limit special legislation. The contribution of equal protection doctrine to a value of legislative generality is explored in Part IV.

B. *The Equal Protection Clause Is Conceptually Unsuited to Curtail Special Legislation*

Modern equal protection doctrine does not provide a mechanism for restraining most forms of special legislation. But, as described above,[237] equal protection theory is broader than current doctrine, suggesting that equal protection has the potential to play a more prominent role in the elimination of special legislation. In particular, the history of the development of equal protec-

237. *See, e.g.*, Part II.

tion theory suggests that modern equal protection doctrine's inquiry into the legitimacy of the state's interest has its origin in a search for a public purpose.[238] The search for a public purpose, in turn, is closely associated with the antebellum doctrine of vested rights, which suggested that special laws were rarely if ever justified because they were enacted to serve private interests rather than a public purpose.[239] The class legislation principle once enforced under the Fourteenth Amendment is an intellectual compatriot of—though not identical with[240]—this version of a vested rights principle.[241]

The intellectual history of the development of the Equal Protection Clause, including the theoretical overlap between vested rights theory, class legislation, and special legislation, is an important topic that merits significant attention. It is only for reasons of space, therefore, that this article omits an inquiry into the history, including the intellectual history, of the Equal Protection Clause. But, even assuming that there is a theoretical connection between class legislation and special legislation, because of the way that equal protection theory has developed, there are significant conceptual difficulties that preclude reliance on equal protection theory to limit special legislation. First, the Equal Protection Clause cannot be used to address special legislation without leading to over-enforcement or incoherence. Second, a class including only a single person cannot properly be considered a class within the meaning of equal protection theory.

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238. Saunders, *supra* note 89, at 332.

239. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 256–58 (1914); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 423–24 (2010). A special thanks to Professor Jack Balkin for suggesting this line of inquiry.

240. The definition of "class legislation" is notoriously difficult to pin down. Whether at the time of the framing of the Fourteenth Amendment class legislation encompassed "special legislation" is an open question that is beyond the scope of this article. There is strong evidence that, at the time of the framing of the original Constitution, special legislation and class legislation were considered distinct phenomena. For example, the highly influential Blackstone ardently endorsed the paradigm of class legislation—special social, political, and legal prerogatives of the nobility—while strongly criticizing particularized legislation. *Compare* 1 BLACKSTONE, *supra* note 20 at *44 *with id.* at *389–90. Similarly, the most avid proponents of particularized legislation during the revolutionary period roundly criticized class legislation. *Compare* Zoldan, *Reviving Legislative Generality*, *supra* note 13, at 661–68 *with* WOOD, *supra* note 83, at 399, 422, 482, 553–54.

241. Williams, *supra* note 239, at 476.

1. The Equal Protection Clause Cannot Address Special Legislation Both Effectively and Coherently

Because the executive and judicial functions permit—even require—specification in some circumstances, the Equal Protection Clause cannot meaningfully restrict *legislative* specification without making equal protection jurisprudence hopelessly incoherent. If the Court were to read the Equal Protection Clause to restrain special legislation, it would have to choose among the unenviable options of over-enforcement of generality, incoherence, or lack of administrability.

First, the Court could enforce a value of generality against not only the legislature, but also the executive and the judiciary. This option would have the benefit of offering meaningful judicial review over special legislation. It also would have the benefit of coherence. Applying the Equal Protection Clause equally to all three branches makes sense out of the text of the Constitution, which does not distinguish among the branches of government. It also would comport with the Court's repeated affirmations that the Clause applies to the judicial, executive, and legislative branches alike.[242] However, applying a broad generality principle to all branches of government would prohibit specification in the executive and judicial context that is permitted, and even required, by the Constitution.

Many discretionary executive branch functions call for particularized action.[243] For example, the Constitution vests the President with the "Power to grant Reprieves and Pardons for Offences against the United States."[244] The President may exercise this power to select an individual for specialized treatment—pardon—that is not available to others convicted of the same crime. Indeed, as the Court has described, the "very essence of the pardoning power is to treat each case individually."[245] Like the President's power to pardon, discretionary decisions taken by members of the executive branch are, by necessity, particularized. A prosecutor must decide who to charge with a crime and what charges

242. United States v. Stanley, 109 U.S. 3, 58 (1883) (Harlan, J., dissenting); Virginia v. Rives, 100 U.S. 313, 318 (1879).

243. *E.g.*, H.L.A. Hart, *Discretion*, 127 HARV. L. REV. 652, 655 (2013).

244. U.S. CONST. art. II, § 2, cl. 1.

245. Schick v. Reed, 419 U.S. 256, 265 (1974).

to bring before a grand jury.[246] Prosecutorial discretion entails the power to decline to prosecute as well; a prosecutor therefore may choose whether or not "to grant immunity, accept a plea bargain, [or] dismiss charges."[247] Each of these decisions requires a prosecutor to evaluate the merits of an individual case and make a particularized decision about how to deploy his discretionary duties.[248] In a host of civil contexts, too, administrative agencies make individualized decisions: agencies grant licenses, make hiring and firing decisions, and purchase goods and services. Each of these powers requires particularized agency action: a license is granted to an individual company; particular employees are interviewed, hired, and, occasionally, dismissed; and agencies enter into purchase agreements for computers and conference tables.[249]

Similarly, the nature of judicial work necessitates particularized decision making. Courts resolve disputes between individual litigants. In federal court, this is not merely descriptive, it is part of what it means to be a federal court. Through the "case or controversy" requirement of Article III, the Constitution ensures that federal courts resolve only actual disputes between adverse litigants.[250] Even in state courts, unbound by Article III, the paradigm of judicial work is particularized action. The core functions of courts include sentencing individuals to imprisonment, rendering money judgments in favor of individuals, and enjoining individual litigants from taking action.[251]

Because the nature of executive and judicial functions require specification, it would make little sense, and indeed it would be constitutionally impermissible in some cases, to enforce a value of

246. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

247. Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 6 (2009).

248. Bennett L. Gershman, *Prosecutorial Decisionmaking and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1266 (2011). Prosecutorial discretion applies to civil agency action as well as criminal prosecution. Heckler v. Chaney, 470 U.S. 821, 831 (1985).

249. *See, e.g.*, *Heckler*, 470 U.S. at 839 (Brennan, J., concurring) (recognizing agency enforcement discretion).

250. *See* U.S. CONST. art. III, § 2, cl. 1; DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341–42 (2006).

251. *See, e.g.*, Commonwealth v. Cole, 10 N.E.3d 1081, 1089 (Mass. 2014) ("At the core of the judicial function is the power to impose a sentence."); Armadillo Bail Bonds v. State, 772 S.W.2d 193, 195 (Tex. App. 1989) (stating that a court's authority includes adjudicating "the rights of person or property between adversaries"); *In re* Young, 976 P.2d 581, 592 (Utah 1999) (noting that "unquestionably" judicial powers include "sentencing those who violate the criminal laws" and "entering a money judgment against a person").

generality against all three branches of government. For example, a limitation on special legislation might deny Congress the power to pardon an individual of a crime.[252] It would be constitutionally impermissible, however, to deny this power to the President. A limitation on special legislation might prohibit Congress from granting a sum of money to a named individual; but generality in judicial action—if it prevented a court from entering judgment in favor of a prevailing party—would strike at the heart of the judicial function. As a result, a reading of the Equal Protection Clause that enforces generality against all three branches of government would interfere impermissibly with the functions of the judicial and executive branches.

Second, the Court could enforce a value of generality against the legislature but not against the executive and judicial branches. This option would avoid the impermissible outcomes noted above by allowing executive officials and judges to engage in particularized decision making. However, an approach to the Equal Protection Clause that makes its protections depend on the branch on which it operates would introduce additional incoherence into an already confusing area of the law. The Equal Protection Clause provides that no state may deprive its citizens of "equal protection of the laws."[253] By its terms, the Clause applies to all branches of the government without any indication that it should, or even may, be applied in a way that is fundamentally different for any branch. Applying a value of generality under the Equal Protection Clause to one, but not the other branches, would be inconsistent with the Supreme Court's approach to other constitutional protections, like free speech and due process. In these contexts, the Court has consistently held that, even when a constitutional prohibition applies on its face only to one branch of government, it also applies to the other branches.[254] *A fortiori*, because the Equal Protection Clause facially applies to all branches, it should also be given this construction. And indeed, the Court

252. *Cf.* VERMONT REPORT, *supra* note 76, at 70.

253. U.S. CONST. amend. XIV. Similarly, the Fifth Amendment's equal protection component restrains all branches of the federal government. *See* U.S. CONST. amend. V.; Brinkerhoff-Faris Tr. & Sav. Co. v. Hill, 281 U.S. 673, 680 (1930) ("The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government.").

254. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713, 718 (1971) (Black, J., concurring); Bouie v. Columbia, 378 U.S. 347, 354 (1964); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 165 (1951) (Frankfurter, J., concurring); *see* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1222 (2010).

has said as much: more than a century of doctrine confirms that the Equal Protection Clause operates to constrain all state action, including "acts by its legislative, executive, and judicial authorities."[255] As a result, enforcing a value of generality under the Equal Protection Clause against the legislature, but not the executive and judicial branches, is possible only at the expense of introducing additional incoherence into equal protection jurisprudence.

Third, the Court could enforce a value of generality against all three branches, but only to the extent that the government action can be characterized as legislative. For example, although the legislative power of the United States is formally lodged in Congress,[256] the executive branch can be thought of as engaging in legislative activity when it promulgates administrative rules.[257] This distinction between the legislative and non-legislative activities of agencies finds support in administrative law doctrine. The Court has held that whether an administrative action requires a hearing depends in part on whether the result of the action is general or specific in nature.[258] Some lower courts have generalized this principle, asserting that "adjudications resolve disputes among specific individuals in specific cases, whereas rulemaking affects the rights of broad classes of unspecified individuals."[259]

On close inquiry, however, this simple equation of agency rulemaking with legislative activities proves superficial.[260] On its face, the Administrative Procedure Act ("APA") makes no such distinction. The APA provides that a "rule" is "an agency state-

255. United States v. Stanley, 109 U.S. 3, 58 (1883) (Harlan, J., dissenting); *see also* Shelley v. Kraemer, 334 U.S. 1, 14–15 (1948); Virginia v. Rives, 100 U.S. 313, 318 (1879). As Justice Stevens put it in another context, "[t]here is only one Equal Protection Clause." Craig v. Boren, 429 U.S. 190, 211 (1976) (Stevens, J., concurring).

256. U.S. CONST. art. I, § 1.

257. RICHARD J. PIERCE ET AL., ADMINISTRATIVE LAW AND PROCESS 294–95 (5th ed. 2009) [hereinafter PIERCE ET AL., ADMINISTRATIVE LAW]. Similarly, the Supreme Court arguably engages in legislative activity when it writes rules of procedure. 28 U.S.C. § 2072 (2012). Conversely, some activities conducted by members of the legislative branch are not legislative activities. For example, each chamber of Congress may pass resolutions, hold hearings, and judge the qualifications of newly elected members, none of which require the formalities of bicameralism and presentment. *See* Zoldan, *Congressional Dysfunction*, *supra* note 58, at 636–38. A special thanks to Professor Ganesh Sitaraman for suggesting this line of inquiry.

258. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445-46 (1915); Londoner v. Denver, 210 U.S. 373, 385-86 (1908).

259. Yesler Terrace Cmty. Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994).

260. *See, e.g.*, Ralph F. Fuchs, *Procedure in Administrative Rulemaking*, 52 HARV. L. REV. 259, 265 (1938).

ment of *general or particular* applicability . . . designed to implement, interpret, or prescribe law or policy."[261] As a result, although the statute permits an administrative rule to state generalized principles of policy, a rule may also apply the law to a particular case. The converse is also true: although an adjudication customarily resolves a particular dispute, a broadly applicable norm may also be stated in an adjudication.[262] As the Supreme Court has held, an agency is not ordinarily precluded from "announcing new principles in an adjudicative proceeding," even when rulemaking was an option available to the agency.[263]

Additionally, the process of formulating administrative rules does not resemble the legislative process. In the case of formal agency proceedings, rulemaking may be accomplished through procedures, often called trial-type proceedings, which resemble a judicial trial.[264] These procedures come "complete with a full panoply of discovery devices and direct and cross-examination of witnesses by advocates for the parties."[265] As with a federal judicial trial, formal procedures are presided over by an impartial finder of fact, who is prohibited from engaging in ex parte communications, [266] and who evaluates witness credibility, rules on evidentiary questions, and must make findings of fact for the record. [267] Like a litigant stating a claim, the proponent of an administrative rule bears the burden of proof.[268] Although the procedures that accompany informal rulemaking more closely resemble the process of lawmaking,[269] and are far more common than formal proceedings, neither can they be classified as purely legislative in character. Agencies are routinely required by statute to undertake procedures during the informal rulemaking process that closely resemble judicial work, including providing a hearing in which an agency official hears oral testimony, makes evidentiary rulings,

261. 5 U.S.C. § 551(4) (2012).

262. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294–95 (1974); Qwest Servs. Corp. v. FCC, 509 F.3d 531, 536 (D.C. Cir. 2007).

263. *Bell Aerospace*, 416 U.S. at 294–95; *Qwest Servs.*, 509 F.3d at 536.

264. 5 U.S.C. § 556–57 (2012); PIERCE ET AL., ADMINISTRATIVE LAW, *supra* note 257, at 327–28.

265. *E.g.*, Citizens Awareness Network, Inc. v. United States, 391 F.3d 338, 343 (1st Cir. 2004).

266. 5 U.S.C. § 557(d) (2012); Butz v. Economou, 438 U.S. 478, 516 (1978).

267. Gunderson v. U.S. Dep't of Labor, 601 F.3d 1013, 1021 (10th Cir. 2010); First Fed. Sav. & Loan Ass'n of Fayetteville v. Fed. Home Loan Bank Bd., 426 F. Supp. 454, 457 (W.D. Ark. 1977).

268. 5 U.S.C. § 556(d) (2012).

269. PIERCE ET AL., ADMINISTRATIVE LAW, *supra* note 257, at 294–95.

and finds facts.[270] Because rules and adjudications are not coextensive with general and particularized agency action, respectively, and because the rulemaking process cannot be fairly characterized as a legislative process, it is conceptually difficult, if not impossible, to distinguish neatly between legislative and nonlegislative functions of the executive branch. As a result, it would be difficult to administer a rule of generality that applies only to legislative activities in the executive branch but not to its nonlegislative activities.

The final option is not to enforce the Equal Protection Clause in a way that restrains special legislation. This is the option that the Court has taken, providing very few restraints under the Equal Protection Clause on particularized legislative action.[271] This option does not have the same problems as the previous three choices. It allows the Court to enforce the Equal Protection Clause against all three branches of government without placing it at irreconcilable odds with the constitutional and institutional commitments of the other branches. However, this option underenforces the value of equality by permitting, unchecked, the proliferation of special legislation. Moreover, as described in Part IV, this option also fails to recognize that a principle that restricts special legislation, but not other particularized government action, is one of constitutional significance.

2. Special Legislation Cannot Create Classes of Similarly Situated Individuals

Although special legislation creates classes, it does not create classes that can be similarly situated; as a result, special legislation cannot meaningfully be evaluated under the Equal Protection Clause. All statutes classify because all statutes create two or more groups that are treated differently.[272] In order to determine whether the classification is permissible, the Equal Protection Clause requires an evaluation of whether the classes are "similarly situated," that is, whether the classes that are created are similar in a way that is relevant to the purpose of the classification.[273] If the two classes are relevantly similar but treated dif-

270. *E.g.*, 15 U.S.C. 57a(c) (2012); 21 U.S.C. § 371(e)(3) (2012).

271. Zoldan, *Reviving Legislative Generality*, *supra* note 13, at 640–44.

272. Farrell, *Classes, Persons, Equal Protection*, *supra* note 157, at 368–69; Tussman & tenBroek, *supra* note 72, at 343–44; Zick, *supra* note 62, at 100.

273. *See* Tussman & tenBroek, *supra* note 72, at 343–45.

ferently, the classification will run afoul of the Equal Protection Clause unless there is sufficient justification for the disparate treatment.[274] By contrast, if the classes are relevantly different, then the differential treatment does not violate the Equal Protection Clause.[275] This idea is often expressed as "fit." A classification is a good "fit" with the purpose of a law when it advances the law's purpose without including too many people in the class that the purpose excludes, and without excluding too many people that the purpose includes.[276]

For example, a statute imposing a drinking age of twenty-one creates two classes: one that includes all people under the age of twenty-one and one that includes all other people. Whether the classification is permissible depends on the legislative purpose of the classification. In this example, the legislative purpose might be to enhance traffic safety.[277] Based on studies showing that, as they age, people become more emotionally mature, are better able to metabolize alcohol, and are better drivers, the legislature may determine that the class of people under twenty-one and the class of people twenty-one and older are sufficiently different as to warrant differential treatment. Under these facts, a court would likely find that the two classes are not similarly situated and, therefore, that the legislative classification is lawful. In other words, there is sufficient "fit" between the purpose of the law and the classification it makes.[278] Even when the legislative purpose is clear, it can be difficult to determine whether two classes are similarly situated. Twenty-five-year-olds may be quite different than eighteen-year-olds with respect to traffic safety, but the difference between twenty-year-olds and twenty-one-year-olds is surely more difficult to discern.[279] It is this practical difficulty inherent in Equal Protection analysis, in part, that is responsible for the Court's deferential stance toward the legislature in the case of

274. *See* Goldberg, *supra* note 163, at 510.
275. *See* HARRIS, *supra* note 17, at 62.
276. *See* Tussman & tenBroek, *supra* note 72, at 345.
277. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 199–200 (1976).
278. *See, e.g.*, Felix v. Milliken, 463 F. Supp. 1360, 1382 (E.D. Mich. 1978) (noting that a "significant increase in alcohol-related traffic accidents and fatalities affecting the 18 to 21 year old group . . . supports the finding of a rational basis for a classification comprised of 18, 19 and 20 year olds").
279. *See, e.g.*, *id.*

classifications that do not implicate fundamental rights or suspect traits.[280]

Practical difficulties aside, focusing on fit reveals a significant conceptual barrier to evaluating special legislation under the Equal Protection Clause. When a legislature singles out an individual for special treatment, the legislature has created two classes: one that includes a single individual and one that includes the rest of the world. In most cases, the purpose of the law is identical to the classification, that is, a person is singled out specifically to provide him with some unique treatment. Because the intended scope of the law is coextensive with the class created by the law, the classification can never be either over- or under-inclusive. In other words, the class created by a special law will always be a perfect fit with its purpose because its purpose is to create a class of one. As a result, the subject of a special law is never similarly situated to the class of people excluded by it because the law classifies by the only trait relevant to the special treatment, to wit, the identity of the target. Because the subject of a special law can never be similarly situated to the rest of the population, the Equal Protection Clause cannot be used to review special laws for lack of fit.

Take, for example, Terri's Law. The legislation created two classes: one class that included "any parent of Theresa Marie Schiavo" and one class of everyone else.[281] The purpose of the legislation was to single out the parents of Terri Schiavo for a special benefit not available to the rest of the population.[282] The purpose of the legislation, therefore, was a perfect fit with the classes it created because the law accorded special treatment to the entirety of, and only to, the intended class. As a result, the class of "any parent of Theresa Marie Schiavo" is not similarly situated to the other class created by the statute, a class which includes everyone except "any parent" of Schiavo. As this example illustrates, because these classes are, by definition, not similarly situated, there is no place for review of fit under the Equal Protection Clause for special legislation.

280. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981); Tussman & tenBroek, *supra* note 72, at 344.

281. Act for the Relief of the Parents of Theresa Marie Schiavo, Pub. L. No. 109-3, 119 Stat. 15, 15–16 (2005).

282. *See id.*

Although review of special legislation under the Equal Protection Clause allows no room for an analysis of fit, it is still possible for a court to review a special law for a legitimate purpose.[283] However, review of legislative purpose—except in the context of fundamental rights and suspect traits—almost never results in invalidation of special laws. As noted, review of legislative purpose, when neither a fundamental right nor suspect class is at issue, is minimal. Although the Court has expressed willingness to look into the actual legislative motivation behind laws that classify based on a suspect trait, like race, gender, or religion,[284] when the subject of the legislation is economic or social, there is virtually no review of legislative purpose. In a broad, but typical, statement of its review of legislative purpose for economic or social legislation, the Court held that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. . . . In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."[285]

Scholars have long recognized that the level of deference accorded to economic and social legislation makes the search for a legitimate purpose tautological. That is, the standard of review articulated for social and economic legislation permits courts to hypothesize a legitimate state purpose that comports with the statute. By hypothesizing a legitimate state purpose that fits the statute, a court guarantees that the statute, at least in part, fulfills a legitimate state purpose. Professor Ely articulated this tautology in the following way:

> A decision to aid artists rather than oilmen is defensible in terms of promoting the arts. . . . And so is any such choice thus defensible. . . . Thus each choice will import its own goal, each goal will count as acceptable, and the requirement of a "rational" choice-goal relation will be satisfied by the very making of the choice.[286]

283. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973).

284. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240 (1976); *see also* Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 N.Y.U. L. REV. 1784, 1852 (2008) ("Just as the judiciary will examine the internal legislative process when litigants accuse legislatures of racist or sexist motivations that implicate the Equal Protection Clause, modern judges use a similar approach when litigants accuse legislatures of religious motivations that implicate the Establishment Clause.").

285. FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993); *see* Norman T. Deutsch, Nguyen v. INS *and the Application of Intermediate Scrutiny to Gender Classifications: Theory, Practice, and Reality*, 30 PEPP. L. REV. 185, 189 (2003).

286. John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*,

For this reason, a court cannot find that a special economic or social law fails for lack of a legitimate state purpose. Consider again the special transfer of wealth to Lautenberg. Although, as a practical matter, there seems to be little public purpose to this transfer, it is certainly possible to *conceive* of a state interest (which is all that equal protection requires) that would be met by the law. For example, the transfer to Lautenberg might inform the public about the high esteem in which we hold our elected officials, thereby encouraging public service. In this way, any legitimate state purpose can be imagined when economic or social laws alone are at stake.

Putting together these insights about the inevitability of fit and the tautology of rational basis analysis leads to a final and important conclusion about the ability of equal protection theory to permit review of special legislation. As noted above, with few exceptions, all special laws are economic or social in nature and, therefore, will be reviewed under rational basis.[287] Because the scope of special laws are always a perfect fit with their purpose, there is no room for judicial review under the Equal Protection Clause for special laws. In light of these constraints, the scope of review available under the Equal Protection Clause for special legislation is not just crabbed—it is vanishingly small.

In conclusion, equal protection theory is largely incompatible with any meaningful limitation on special legislation. In order to impose a meaningful restraint on the legislature, the clause would either have to interfere with the necessarily particularized functions of the executive and judiciary or apply differently among the different branches of government. Moreover, the fact that special economic or social legislation will always be a perfect fit with its purpose makes scrutiny predicated on fit impossible. However, these limitations also suggest some ways in which equal protection theory supports an independent value of legislative generality. The contribution of equal protection theory to a value of legislative generality is discussed in Part IV.

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79 YALE L.J. 1205, 1247 (1970) [hereinafter Ely, *Legislative and Administrative Motivation*].

287. *See* Part III.A.1.

IV. THE EQUAL PROTECTION COMPONENT OF LEGISLATIVE GENERALITY

Although the Equal Protection Clause is a powerful tool for enforcing equality, it can be considered a failure in one important respect: the clause's doctrinal commitments and conceptual limitations make it insufficient, on its own, to effectively and coherently curtail the significant inequalities created by special legislation. Despite this failure, however, the foregoing analysis also reveals that there are some aspects of the Equal Protection Clause that resonate with a principle that disfavors laws singling out individuals for special treatment. This principle may be called the value of legislative generality. The idea of a value of legislative generality as a constitutional principle was introduced in previous work[288] and is summarized briefly below. After summarizing the support for recognizing legislative generality as a constitutional value, the remainder of this Part will use the lessons learned from analyzing the Equal Protection Clause to help define more precisely the parameters of the value of legislative generality.

A. *A Summary of the Constitution's Value of Legislative Generality*

A constitutional principle that disfavors targeted legislation may be called a value of legislative generality. Support for treating a value of legislative generality as a principle of constitutional dimension is found in the history of the period leading up to the framing of the Constitution, the text of the Constitution itself, and jurisprudential considerations that are reflected in philosophical works and Supreme Court doctrine.[289]

The history of the period leading up to the framing of the Constitution suggests that the Constitution was framed, in part, to put an end to the rampant and abusive special legislation enacted during the period between independence and the framing of the Constitution. By the close of the confederation period, in their writings, speeches, and debates, both ordinary and prominent

288. The value of legislative generality briefly described here was described in more detail in *Reviving Legislative Generality*. *See* Zoldan, *Reviving Legislative Generality*, *supra* note 13, at 650–60.

289. *Id.* at 650–51.

members of the American republics made it clear that they would no longer tolerate the common legislative practice of enacting statutes to benefit or burden specific individuals.[290] The aversion to special legislation nurtured during the confederation period is reflected in a number of clauses of the Constitution. The main subject of this article, the Equal Protection Clause, is one of these clauses; others include the Bill of Attainder, Ex Post Facto, Contract, Appointments, Due Process, Takings, and General Welfare clauses.[291] Although none of these clauses are exclusively about generality in legislation, each of these clauses suggests the impropriety of targeted legislation in certain circumstances. Read together, they suggest that generality in legislation is a value of constitutional weight. Finally, there is a long tradition among jurists and philosophers of law that criticizes targeted legislation. Both Locke and Blackstone argued that a statute affecting a single individual was simply not within the definition of the word "law."[292] A strain of early Supreme Court cases agreed that the legislative power includes only the power to prescribe general rules of conduct, not acts affecting only particular individuals.[293] Moreover, scholars assessing the normative implications of special legislation, like Cicero, David Hume, and Algernon Sidney, stressed the harm and injustice they caused.[294] More modern scholars, like Lon Fuller and H.L.A. Hart, have also emphasized the centrality of legislative generality to a legal system.[295]

In addition to establishing that the value of legislative generality is a value of constitutional weight, an analysis of the sources supporting its recognition help define the parameters of the value. Legislative generality does not mean that every statute must apply to every person; nor is every narrowly drawn statute necessarily unconstitutional. However, a value of legislative generality

290. *Id.* at 652.

291. U.S. CONST. art. I, § 8 (General Welfare Clause); *id.* art. I, §§ 9–10 (Bill of Attainder and Ex Post Facto clauses; *id.* art. I, § 10 (Contract Clause); *id.* art. II, § 2 (Appointments Clause); *id.* amend. V (Takings and Due Process clauses).

292. LOCKE, *supra* note 19, at chap. XI, § 142; *see* 1 BLACKSTONE, *supra* note 20, at *44.

293. *See, e.g.*, Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 558 (1819); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136, 138–39 (1810).

294. *See* ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 454–55 (Thomas G. West ed., 1990); MARCUS TULLIUS CICERO, *On the Laws*, *in* ON THE COMMONWEALTH AND ON THE LAWS 105, 173 (James E.G. Zetzel ed., 1999); DAVID HUME, *Of the Rise and Progress of the Arts and Sciences*, *in* POLITICAL ESSAYS 58, 62–63 (Knud Haakonssen ed., 1994).

295. LON L. FULLER, THE MORALITY OF LAW 46–48 (1964); H.L.A. HART, THE CONCEPT OF LAW 20–21 (2d ed. 1994).

would place outer limits on the ability of both state legislatures and Congress to enact targeted legislation. The history of the framing period suggests that the core commitments of a value of legislative generality are the elimination of: legislative grants of special benefits, like licenses and transfers of property; legislative imposition of special burdens, like confiscation of property and deprivation of liberty; interference with civil or criminal judicial processes for named claimants or defendants; exemptions from the standing laws for particular cases; and the transfer of property from one person to another.[296] The history of the framing period also suggests that laws that prefigure generally applicable laws, like a law incorporating a particular corporation that also applies generally to future corporations, is unlikely to trigger legislative generality's core concerns. Similarly, the value of legislative generality is less likely to disfavor laws that eliminate, rather than create, disparities among people, like a law that names an individual for the purpose of ensuring similar treatment as others in a similar situation.[297]

B. *Equal Protection's Contribution to the Value of Legislative Generality*

Determining the precise parameters of a constitutional value of legislative generality is a long-term project that will require analysis of each of a number of constitutional clauses and principles. The analysis conducted in this article contributes to this project by identifying those features of the Equal Protection Clause that support the value of legislative generality. This analysis also suggests some further refinements to the parameters of legislative generality.

First, modern equal protection doctrine does little to limit special benefit legislation; however, a review of earlier, now moribund strains of equal protection doctrine suggests a stronger commitment to generality. Specifically, some of the Court's class legislation and class-of-one cases reveal a concern with legislation that accords unequal benefits as well as unequal burdens. In *Barbier*, the Court viewed benefits and burdens as two sides of the same coin; legislation "discriminating against some and favor-

296. Zoldan, *Reviving Legislative Generality*, *supra* note 13, at 689.
297. *Id.*

ing others" was impermissible class legislation.[298] Similarly, the Court reaffirmed in *Engquist* that the Equal Protection Clause applies both to "privileges conferred," as well as "liabilities imposed."[299] This doctrine suggests that the legislative distribution of a benefit—like the transfer of wealth to Lautenberg—should be scrutinized. Although equal protection doctrine's other commitments prevent it from meaningfully curtailing the distribution of unequal benefits, an independent value of legislative generality can give effect to this principle. As a result, a value of legislative generality, properly formulated, should disfavor special benefits as well as special burdens.[300]

The major doctrinal challenge to a principle that prevents the distribution of special benefits is standing, which prohibits a person from challenging a congressional distribution of wealth if the harm it causes is generalized.[301] However, as I have argued in previous work, standing is not fatal to reviving a value of legislative generality because legislative generality can be seen as a specific limitation on the taxing and spending power.[302]

Moreover, even to the extent that standing presents a doctrinal challenge to enforcing a value of legislative generality in court, the legislature itself has the ability, and indeed the duty, to enforce constitutional values.[303] Professor Paul Brest argued that judicial deference to the constitutionality of statutes does not relieve members of the legislature from their duty to enact only legislation that comports with the Constitution.[304] Indeed, as Brest points out, "some provisions of the Constitution are explicitly addressed to legislators."[305] Notably, a number of clauses that help describe a value of legislative generality, like the Bill of Attainder, Ex Post Facto, and Title of Nobility clauses, expressly place

298. Barbier v. Connolly, 113 U.S. 27, 32 (1885).

299. Engquist v. Or. Dep't of Agric., 553 U.S. 591, 602 (2008) (quoting Hayes v. Missouri, 120 U.S. 68, 71–72 (1887)).

300. This conclusion is supported by the history of the period leading up to the framing of the Constitution. During that period, the revolutionary generation rejected the power of their legislatures to enact all types of special legislation, including the distribution of special legislative benefits. Zoldan, *Reviving Legislative Generality*, *supra* note 13, at 689.

301. *Id.* at 691–92.

302. *Id.* at 692–93.

303. A special thanks to Professor Akhil Amar for suggesting this line of inquiry.

304. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 586–87 (1975).

305. *Id.* at 587.

limitations on the legislative power.[306] This suggests that the legislature is duty-bound to consider these provisions as binding, even if the Court has not enforced or cannot enforce them.[307] As a result, even if standing principles preclude courts from giving full effect to a value of legislative generality, they do not preclude a "conscientious legislator"[308] from enforcing legislative generality by refusing to vote for bills that target individuals for special treatment. Doing so will give effect to the principle of legislative generality reflected in the text of the Constitution, the history surrounding its ratification, and the jurisprudential considerations that have guided its interpretation.

Second, the *Olech* Court held that equal protection can restrain targeted legislation if it is irrational. *Olech*'s class-of-one theory of equal protection, however, has proved illusory. Demonstrating that a legislative choice is irrational in the context of economic and social legislation is nearly impossible because the search for a choice-goal relation is tautological; that is, a court can always find a rational connection between an imagined goal and a statutory directive.[309] Consider Terri's Law: the statute was woefully underinclusive if its purpose was to save the lives of the thousands of people thought to be in Schiavo's situation;[310] however, if the purpose is imagined more narrowly, to preserve the life of Schiavo herself,[311] then there was a rational connection between Terri's Law and its purpose.

Although equal protection theory leaves little room for a finding of irrationality, *Olech* can be given meaning if targeted legislation is measured against the definition of rationality drawn from behavioral economics.[312] Even assuming the legitimacy of its purpose, a targeted statute, like Terri's Law, might be irrational because it is an example of the cognitive bias that social scientists

306. *Id.*; U.S. CONST. art. I, §§ 9–10.

307. Robin West, *The Missing Jurisprudence of the Legislated Constitution*, *in* THE CONSTITUTION IN 2020, at 79, 86 (Jack M. Balkin & Reva B. Siegel eds., 2009).

308. Brest, *supra* note 304, at 587.

309. Ely, *Legislative and Administrative Motivation*, *supra* note 286, at 1246–47.

310. 151 CONG. REC. S2926, 2928 (daily ed. Mar. 17, 2005) (statements of Sen. Tom Harkin & Sen. Ron Wyden).

311. This was the stated purpose of the law. 151 CONG. REC. H1700, 1712–13 (daily ed. Mar. 20, 2005) (statement of Rep. Phil Gingrey). Moreover, even if it was not stated explicitly, preserving life is a legitimate state purpose. Medtronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.").

312. A special thanks to Professor Naomi Mezey for suggesting this line of research.

label the "identifiable victim" effect.[313] Research has shown that an identifiable victim elicits a greater altruistic response than a hypothetical victim, even when no specific information is given about the identifiable victim.[314] For example, people are more willing to donate to a charitable organization when they are told that a needy (but undescribed) person "*has been selected*" by the charity to receive the donation; they are less willing to donate when they are told that a needy person "*will be selected*" to receive the gift.[315] Moreover, the identifiable victim effect is more pronounced when the victim is a single identified individual rather than a group.[316] This research suggests that when members of the legislature single out an individual for special treatment, they may be doing so not because the targeted individual's personal characteristics warrant differential treatment, but simply because the individual has been identified. The cognitive bias favoring action toward an identifiable victim can lead to irrational results within the meaning of behavioral economics.[317]

Terri's Law can be seen as an example of the "identifiable victim" effect. Even though members of Congress were aware that there might be others in Schiavo's situation, Congress focused on just one identifiable individual. The identifiable victim effect suggests that Congress's decision to pass a statute addressing only Schiavo's situation may not have been the result of an individualized, rational assessment about the needs of her case, but rather because of an irrational bias that favors particularized action over generalized action. In other words, Terri's Law was not merely under-inclusive because it was convenient or practical for Congress to address part of a problem; rather, Congress's decision may have been irrationally motivated because she was identified as a particular person in need. The identifiable victim effect, moreover, can be considered a subset of the "determined other effect," a cognitive bias by which "any determined target evokes a

313. *See generally* Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5 (2003); *see also* Donald A. Redelmeier & Amos Tversky, *Discrepancy Between Medical Decisions for Individual Patients and for Groups*, 332 NEW ENG. J. MED. 1162, 1162–64 (1990). A special thanks to Professor Deborah Small for her insights on the identifiable victim effect.

314. Small & Loewenstein, *supra* note 313, at 7.

315. *Id.* at 11–12.

316. Kogut & Ritov, *supra* note 139, at 164–65.

317. *Id.* at 164.

stronger emotional reaction than an undetermined target."[318] This effect likely explains some targeted laws that punish rather than benefit, like the Elizabeth Morgan Act, in which Congress targeted one person accused of a heinous crime.

The identifiable victim effect and, more generally, the determined other effect, suggest two conclusions that help refine the value of legislative generality. One, because targeted legislation, either beneficial or burdensome, might be the product of cognitive bias, a value of legislative generality should prevent targeted legislation even if the class-of-one theory has been fatally wounded after *Engquist*. By doing so, a value of legislative generality will give effect to the impulse in *Olech* that targeted legislation can indeed be irrational even in the context of economic or social legislation. Two, the fact that the identifiable victim effect is strongest when a single victim rather than a small group is identified provides support for including, at the very least, legislation that targets an individual in the definition of special legislation. These statutes are most likely to reflect irrational legislative decisions.

Third, the conceptual and doctrinal limitations of the Equal Protection Clause suggest that a value of legislative generality should be concerned with legislative action rather than executive or judicial action. The Court has struggled to articulate a value of legislative generality in large part because it has not been able to distinguish between particularized legislative action and particularized action of the other branches. As its class-of-one cases reveal, the Court does not distinguish between particularized executive action (like *Engquist's* administrative employment decision) and particularized legislative action (like *Nixon*'s targeted legislation). The inability to distinguish between legislative and non-legislative action has made it difficult for the Court to give effect to a value of *legislative* generality because of the practical and constitutional impossibility of enforcing generality over *executive* and *judicial* functions.[319] Nevertheless, the Court's class-of-one and administrative law cases reveal that the Court is troubled by specificity in certain circumstances. A value of legislative generality that applies only to the legislative branch can provide a better mechanism than current doctrine for giving effect to the Court's

318. Small & Loewenstein, *supra* note 313, at 14.

319. Moreover, administrative law's distinction between the legislative functions and non-legislative functions of administrative agencies is superficial because both rules and adjudications can be general and specific in scope.

concerns about specificity. By focusing on the legislative branch only, a value of legislative generality avoids the definitional problems that plague administrative law's distinction between rulemaking and adjudication. A value of legislative generality that focuses on the legislative branch also avoids the problems associated with over-enforcement of generality in the executive and judicial branches. Finally, a value of legislative generality makes sense of the distinction between the role of the legislature and the role of the other branches. As the Court held in *Fletcher*, "[i]t 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."[320]

CONCLUSION

Special legislation has long been a flaw in the edifice of equality. Often enacted without publicity or objection, special legislation quietly transfers assets to favored members of society or exempts them from the standing laws, or burdens individuals who have done no wrong but to offend popular sensibilities. Despite the pervasive inequality that special legislation creates, it cannot be constrained by the most powerful tool for equality written into the Constitution, the Equal Protection Clause. Because of the way that equal protection doctrine has developed and the commitments of the Clause to suspect classes and fundamental rights, the Equal Protection Clause is an insufficient constitutional tool to restrain special legislation and the inequality that it creates.

But, our traditional reliance on the Equal Protection Clause to enforce equality should not blind us to the value of legislative generality, an under-enforced principle of constitutional weight with the potential to restrain special legislation currently unchecked by the Equal Protection Clause. Because a value of legislative generality finds support in the text of the Constitution, the historical experiences of the generation that framed it, and the philosophical traditions that inform its provisions, it has the capability of limiting special legislation in a coherent and meaningful way.

320. Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810) (emphasis added); *see also* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 558 (1819).

Even outside of its elimination of special legislation, recognizing legislative generality as a value of constitutional weight serves an important role in our constitutional jurisprudence. It makes sense out of under-enforced, but doubtlessly important, clauses of the Constitution, like the Bill of Attainder, Title of Nobility, and Ex Post Facto Clauses. It gives meaning to the experiences of the members of the generation that framed the Constitution. It also places our constitutional protections squarely in line with a number of philosophical traditions, modern and ancient alike, that recognize the inequity of special privileges and burdens. In this way, the value of legislative generality does more than pick up where the Equal Protection Clause leaves off; rather, it helps define the uncertain but crucial boundary between the will of the majority and the autonomy of the individual. It is this line—separating the sphere of democracy from a space that is kept safe from democracy's failings—that is the essence and strength of a constitutional republic.

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