

## Reviving Legislative Generality

Evan C. Zoldan

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### Repository Citation

Evan C. Zoldan, *Reviving Legislative Generality*, 98 Marq. L. Rev. 625 (2014).  
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# REVIVING LEGISLATIVE GENERALITY

EVAN C. ZOLDAN\*

*The Supreme Court does not recognize a constitutional principle disfavoring special legislation, that is, legislation that singles out identifiable individuals for benefits or harms that are not applied to the rest of the population. As a result, both Congress and state legislatures routinely enact special legislation despite the fact that it has been linked to a variety of social harms, including corruption and the exacerbation of social inequality. But the Court's weak protections against special legislation, and the resulting harms, are not inevitable. Instead, special legislation can be limited by what may be called a value of legislative generality, that is, a principle that legislation should be disfavored as suspect simply because it singles out identifiable individuals for special treatment.*

*In this Article, I argue that the value of legislative generality should be enforced as an independent constitutional principle. Three pillars—history, text, and philosophical considerations—support the conclusion that legislative generality is a principle of constitutional significance. First, the history of the revolutionary period leading up to the framing of the Constitution suggests that a key purpose of the Constitution was to address evils associated with special legislation. Second, the Constitution contains a number of under-enforced clauses that, when read together and in context, delineate a norm of legislative generality. Third, an interpretation of the Constitution that includes a value of legislative generality fits well with a number of philosophical traditions and leads to normatively attractive results. Together, these pillars support the conclusion that legislative generality is a value with constitutional weight and suggest that current constitutional doctrine should be modified to give*

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\* Assistant Professor, University of Toledo College of Law. For their invaluable comments, I would like to thank Christopher J. Peters, D.A. Jeremy Telman, Robert Jones, Carlton Larson, Peter Smith, William Richman, Lee Strang, Susan Martyn, and participants in the Loyola University—Chicago School of Law Annual Constitutional Law Colloquium, the Valparaiso Law School Regional Faculty Workshop, and the Northeastern University School of Law—Legal Scholarship 4.0 Conference. I would also like to thank Samantha Meiers, Trevor Colvin, and Aly Breyman for their research assistance, as well as the University of Toledo College of Law for providing research support for this article.

*effect to this principle. I conclude by calling for heightened judicial scrutiny over special legislation that offends the value of legislative generality, including contemporary special legislation in the areas of immigration, public benefits, and criminal law.*

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## I. INTRODUCTION

*Is there no danger of a Legislative despotism?  
Theory & practice both proclaim it.<sup>1</sup>*  
— James Wilson

The principle that rules of conduct ought to apply generally to all of society's members, rather than single out individuals for special treatment, has long been advocated by jurists and philosophers of law. In his foundational text, *The Morality of Law*, Lon Fuller argues that law's internal morality requires that rules of conduct operate on the population generally rather than in a patternless set of orders to individuals.<sup>2</sup> Fuller's conclusion echoes and expands on a centuries-old tradition; Cicero condemned as "unjust" the Roman legislative practice of singling out individuals for special treatment.<sup>3</sup> The value articulated by Fuller and Cicero, that law ought to be generally applicable, is expressed in a number of clauses in the American Constitution: for example, the Bill of Attainder Clauses prohibit certain types of laws that single out individuals for punishment without trial; more generally, the Equal Protection Clause manifests the principle that the law ought to treat like cases alike. But despite these clauses of the Constitution, and despite the intuitive and rhetorical power of the principle articulated by Fuller and Cicero, both Congress and state legislatures routinely pass laws that single out identifiable individuals for special treatment. This type of law, called "special legislation," is often criticized but rarely invalidated by the courts. A well-known, but far from unique, example of special legislation is the statute enacted in the wake of the Terri Schiavo affair.

Terri Schiavo was just twenty-six years old when she fell into the persistent vegetative state that would last the rest of her life.<sup>4</sup> After eight years of constant medical care, during which time Schiavo never regained consciousness, her husband moved the court to order the

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1. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 254 (Max Farrand ed., 1911) [hereinafter FARRAND].

2. LON L. FULLER, THE MORALITY OF LAW 46–48 (rev. ed. 1969).

3. MARCUS TULLIUS CICERO, *On the Laws*, in ON THE COMMONWEALTH AND ON THE LAWS 105, 173 (James E.G. Zetzel ed., 1999).

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

withdrawal of her artificial life support.<sup>5</sup> Her parents objected, setting off a prolonged legal battle to determine whether Schiavo, who had left no living will, would have wanted to be kept alive artificially “or whether she would wish to permit a natural death process to take its course.”<sup>6</sup> The court found that Schiavo would have wanted her life support removed,<sup>7</sup> and after several more years of appeals and remands,<sup>8</sup> the hospice facility in which she resided was ordered to withhold food and water, permitting her to die.<sup>9</sup>

Schiavo’s tragic situation triggered a media frenzy; it not only sparked a heated argument over the right to die, but it also rekindled smoldering national debates over issues as far-reaching and divisive as abortion, stem cell research, and human cloning.<sup>10</sup> In reaction to the publicity surrounding the order to withhold her life support, Congress enacted a statute entitled an “Act for the Relief of the Parents of Theresa Marie Schiavo.”<sup>11</sup> “Terri’s Law,” as the statute was called,<sup>12</sup> permitted “any parent” of Terri Schiavo to bring suit to redress the decision to stop providing her with food and medical treatment.<sup>13</sup> Although belabored debates often grind the legislative machinery to a halt, Terri’s Law was rushed through the legislative process. It was passed by the Senate the same day that it was introduced and was passed by the House, presented to the President, and signed into law all on the following day.<sup>14</sup> Through Terri’s Law, Congress wiped away the previous decade of state court litigation over Schiavo’s intentions.<sup>15</sup>

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

6. *Id.* at 180.

7. *Id.* at 176–80.

8. Stephen 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); Noah, *supra* note 4, at 114–15.

9. *In re* Guardianship of Schiavo, No. 90-2908-GD-003, 2005 WL 459634, at \*2 (Fla. Cir. Ct. Feb. 25, 2005).

10. 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, available at 2005 WLNR 23621548; Vickie Chachere, *Schiavo Case Latest Chapter in Culture War*, CINCINNATI POST, Mar. 28, 2005, at A3, available at 2005 WLNR 4972036.

11. Pub. L. No. 109-3, 119 Stat. 15 (2005).

12. Calabresi, *supra* note 8, at 152.

13. Terri’s Law § 2, 119 Stat. at 15.

14. 151 CONG. REC. 5483, 5486–87 (2005) (statement of Sen. Frist); *id.* at 5447, 5480–81 (statement of Rep. Sensenbrenner); George W. Bush, Statement on Signing Legislation for the Relief of the Parents of Theresa Marie Schiavo, 1 PUB. PAPERS 500 (Mar. 21, 2005).

15. Terri’s Law § 2, 119 Stat. at 15.

No matter where one stands on the social issues raised by the Schiavo case, there is no doubt that Terri's Law was a remarkable piece of legislation. Unlike most laws, which provide generally applicable rules of conduct for society at large, Terri's Law made an exception from the general rules for two readily identifiable individuals, Schiavo's parents. Even a cursory look at Terri's Law reveals why special legislation is controversial. By creating an exception from the generally applicable laws for a single individual or small, identifiable group, special legislation is apt to treat similar cases differently. Because it is enacted to favor, or to harm, named individuals, special legislation often arises from legislative passion or prejudice rather than from serious deliberation. By substituting legislative conclusions for facts normally found by judges and juries, special legislation encroaches on the judicial function. For these reasons, among others, special legislation long has been criticized.

But, despite these and other normative problems, both Congress and state legislatures routinely enact special legislation. And the Supreme Court, when reviewing special legislation, subjects it only to minimal scrutiny. Moreover, although they have wrestled to articulate a legal basis for requiring meaningful scrutiny for special legislation, scholars so far have failed to articulate a coherent constitutional theory that protects against abusive special legislation. The principle introduced in this Article fills the gaps left by modern jurisprudence and scholarship by offering a more robust approach to the problem of special legislation. I explore forgotten parts of our constitutional history, our philosophical traditions, and nearly forgotten clauses of the Constitution itself. Based on this inquiry, I conclude that there is a principle that may be used to restrain special legislation; this principle — which may be called the value of legislative generality — should be judicially enforced as an independent constitutional principle.

In Part II, I define special legislation and identify the kinds of special laws that Congress and state legislatures enact.

In Part III, I examine the response of courts and scholars to special legislation. The Supreme Court has rejected a constitutional principle that would restrict special legislation because of its particularized effect. Similarly, although scholars continue to wrestle with special legislation, they have failed so far to articulate a robust principle constraining special legislation that is rooted in the history of the framing of the Constitution, American philosophical traditions, and the Constitution's text.

In Part IV, I seek to fill the gap left by courts and scholars by identifying the constitutional bases on which a value of legislative generality rests. First, the history of the revolutionary period leading up to the framing of the Constitution suggests that a key purpose of the Constitution was to address evils associated with special legislation. Second, the Constitution contains a number of under-enforced clauses that, when read together and in context, delineate a norm of legislative generality. Third, an interpretation of the Constitution that includes a value of legislative generality fits well with a number of philosophical traditions and leads to normatively attractive results.

In Part V, I turn to the first of the constitutional bases identified in Part IV—the history leading up to the framing of the Constitution—to analyze the revolutionary generation’s experiences with special legislation. This inquiry reveals that the revolutionary generation enacted special legislation that, like modern special legislation, granted special privileges and levied special penalties. After years of enacting special laws, including statutes confiscating property, statutes granting immunity from civil and criminal prosecution, statutes granting or withdrawing property rights, and bills of attainder, the revolutionary generation became acutely aware of special legislation’s negative consequences. By the time of the framing of the Constitution, and wearied by a decade of abusive special laws, they repudiated the power of the legislature to enact special laws.

In Part VI, I argue that the value of legislative generality should be enforced in a way that gives meaning to the historical experiences of the revolutionary generation. As a result, the value of legislative generality should be enforced as a stand-alone constitutional value, much as the judiciary enforces the constitutional right to privacy or the principle of separation of powers. Enforcing this value not only makes sense in light of historical evidence, but also would rationalize an incoherent area of the law.

This Article focuses on historical evidence supporting the value of legislative generality. As a result, its conclusions should be of interest to the many judges<sup>16</sup> and scholars<sup>17</sup> who recognize historical experience as

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16. *E.g.*, *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) (“[W]e put significant weight upon historical practice.” (emphasis removed)).

17. *E.g.*, Jane Harris Aiken, *Ex Post Facto in the Civil Context: Unbridled Punishment*, 81 KY. L.J. 323, 326 (1992–1993); Harlan Grant Cohen, “Undead” *Wartime Cases: Stare*

one of the traditional methods used to find meaning in constitutional text. This includes both originalists as well as non-originalists who, like me, consider history probative, but not dispositive, of constitutional meaning.

But even for those courts and scholars who have little interest in historical analysis, even as one method of constitutional interpretation, the value of legislative generality possesses other virtues. For example, measured by many standards of justice, laws that single out individuals for special treatment are suspect. They tend to treat like cases differently, lead to conflicts of interest—and even corruption—and inure to the benefit of the well-connected. Judicial recognition of a value of legislative generality would allow courts to invalidate many of the most abusive modern special laws. In sum, although this Article is limited, due to space constraints, to the historical underpinnings of the value of legislative generality, non-historically contingent arguments are central to a robust articulation of this value. These arguments, sketched in Part IV, will be addressed more fully in later work.

## II. THE PHENOMENON OF SPECIAL LEGISLATION

Special legislation—that is, legislation that singles out an individual or small, known group for special treatment—is an accepted fact of modern legislative practice. Special laws are enacted both by Congress and state legislatures. They are enacted in a variety of substantive legal areas, including tax, immigration, criminal law, and public benefits. They are enacted both as private laws and public laws; they are used both to confer benefits and levy detriments. In order to facilitate analysis of the causes and consequences of the prevalence of special legislation, this Part will define and categorize the most common types of special laws.

### A. *Special Legislation Defined*

“Special legislation” is legislation that singles out an individual natural person or corporation, or a small number of identifiable individuals, for treatment that is not applicable to the general population.<sup>18</sup> Although special legislation can include legislation either

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*Decisis and the Lessons of History*, 84 TUL. L. REV. 957 (2010); Melissa L. Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245, 252–53 (1997).

18. See, e.g., Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 315 (2007) (“[S]pecial’ or ‘partial’ legislation” includes legislation that “pick[s] out a

at the state or federal level, it excludes government action by the executive and judicial branches. For example, a government prosecutor's decision to prosecute an accused individual is "special" in the sense that it singles out one person for particularized treatment. However, this is not special *legislation* because it is a decision by the executive rather than the legislature. Similarly, decisions of executive agencies, like a state zoning board's decision to grant a variance or the Army's decision to award a government contract, are not legislation and, therefore, do not fall within the scope of this article. Judicial action, likewise, is not legislation; therefore, a court order awarding a money judgment is not contemplated by this Article.<sup>19</sup>

There is no doubt that constitutional constraints on government action taken by the executive and judicial branches are important issues; nevertheless, this Article focuses on special legislation alone for three reasons. First, as described in Part V, Americans in the years leading up to the framing of the Constitution expressed particular concern with special legislation as opposed to particularized action by the judiciary or executive branches. Second, there is an abundance of literature examining issues related to particularized government action in the context of executive and judicial action. In particular, much has been written about restrictions imposed by the Equal Protection and Due

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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) (special legislation includes both "local and private legislation" and is distinguished from "[g]eneral legislation"); Dale F. Rubin, *Public Aid to Professional Sports Teams—A Constitutional Disgrace: The Battle to Revive Judicial Rulings and State Constitutional 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) (special legislation includes legislation applying to "only one or a few determinable individuals").

19. Moreover, "special legislation" does not include all legislation that makes distinctions based on membership in a class; it does not include industry-specific legislation, like legislation affecting the banking industry, which has thousands of members. It also excludes legislation that levies detriments on a group, for example, because of an immutable characteristic, like race or religion. Although the issue of class legislation is surely an important one, it is one that has been well-articulated by others and therefore will not be repeated here. See, e.g., William N. Eskridge, Jr., *A Pluralist Theory of the Equal Protection Clause*, 11 U. PA. J. CONST. L. 1239, 1239, 1246–47 (2009); Saunders, *supra* note 17, at 254, 289–90; see also Balkin, *supra* note 18, at 315–16; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 528–30 (2004); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 959–65, 995–96 (2009).

Process Clauses;<sup>20</sup> by contrast, there is a dearth of scholarship addressing particularized legislative action. Third, as will be described more fully in future work, a value of legislative generality, as opposed to a value of generality in the executive and judicial branches, makes the most sense given the different roles of the three branches of government.<sup>21</sup> For these reasons, the scope of this Article is limited to special legislation.

### *B. Identifying and Classifying Special Legislation*

It can be challenging to identify special legislation because of the wide variety of ways in which it is enacted. Although some special laws name a single individual in the law's title,<sup>22</sup> other laws name a number of individuals.<sup>23</sup> Still others refrain from naming any individuals but, by intent or operation, apply only to a small number of identifiable individuals.<sup>24</sup> Moreover, special laws may provide either benefits or detriments and may be enacted either as criminal or civil statutes. As described below, Congress and state legislatures routinely enact laws denominated as public or private, that grant special benefits or special detriments, and that may be construed as either criminal or civil laws. No matter which of these attributes a statute possesses, it properly may be considered "special" legislation if it singles out an individual person, or small, identifiable group, for treatment not experienced by the general population.<sup>25</sup>

#### 1. Both Public and Private Laws Can Be Special Legislation.

Congress and state legislatures occasionally enact "private laws," which, as opposed to more common "public laws," are denominated as being "for the benefit" or "relief" of a particular named party.<sup>26</sup> In

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20. See *infra* text accompanying notes 112–16.

21. See FULLER, *supra* note 2, at 170–76.

22. E.g., Priv. L. No. 112-1 (2012).

23. E.g., Priv. L. No. 108-4, 118 Stat. 4028 (2004).

24. 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 & n.20 (1978)) (state statute perhaps aimed at "one particular employer planning to terminate its pension plan"); *Foretich v. United States*, 351 F.3d 1198, 1204 (D.C. Cir. 2003) (holding that the Elizabeth Morgan Act, Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996), "targeted" a single individual despite its purported generality).

25. See *supra* note 18.

26. E.g., Priv. L. No. 112-1; see also Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 723 (2012).

recent years, Congress has enacted private legislation exempting named individuals from the general requirements of the immigration and naturalization laws,<sup>27</sup> granting money payments to former government employees,<sup>28</sup> and granting an individual the right to live on public lands.<sup>29</sup> However, because of state restrictions on private laws,<sup>30</sup> high-profile scandals associated with private legislation,<sup>31</sup> and restrictions imposed on the introduction of private bills in the United States House of Representatives,<sup>32</sup> their numbers have declined in recent years.<sup>33</sup> Nevertheless, Congress still enacts private bills in practically every legislative session.<sup>34</sup>

Somewhat harder to identify,<sup>35</sup> but far more common, are public laws so limited in scope that, like private laws, they apply only to an individual or small, identifiable group.<sup>36</sup> A well-known example is the legislation, noted above, that granted a private remedy to the parents of Terri Schiavo.<sup>37</sup> Although styled as a public law, Terri's Law applied by its terms 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

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27. *E.g.*, Priv. L. No. 112-1; *see* MARGARET MIKYUNG LEE, CONG. RESEARCH SERV., PRIVATE IMMIGRATION LEGISLATION 2 (2007).

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

29. Priv. L. No. 109-1, 120 Stat. 3705 (2006).

30. Ireland, *supra* note 18, at 299 ("By the early twentieth century most states had by constitutional revision specifically prohibited a variety of special legislation."); *see also* Comment, *Special Legislation Discriminating Against Specified Individuals and Groups*, 51 YALE L.J. 1358, 1358 (1942) ("All but four of the state constitutions contain express restrictions against the enactment of special legislation."). However, state courts have tended to construe state constitutional bans on special legislation narrowly, permitting state legislatures to enact special laws with a great deal of discretion despite these restrictions. *See, e.g.*, Rubin, *supra* note 18, at 398 n.22.

31. A "series of corruption scandals such as Abscam, involving payoffs for the sponsorship of private immigration laws, culminated in the expulsion of one Member of the House of Representatives and led to a decline in private immigration laws, which were perceived as tainted in general by the scandals." LEE, *supra* note 27, at 9.

32. *Id.* at 4, 7–8.

33. *Id.* at 9.

34. *E.g.*, Priv. L. No. 112-1 (2012); Priv. L. No. 111-1, 124 Stat. 4523 (2010).

35. Indeed, public laws sometimes are used in place of private bills because they are harder to identify and therefore draw less scrutiny. *See* LEE, *supra* note 27, at 30.

36. *E.g.*, Terri's Law, Pub. L. No. 109-3, § 2, 119 Stat. 15, 15–16 (2005); *see also* Comment, *supra* note 18, at 712 n.1.

37. Terri's Law §§ 2–3, 119 Stat. at 15.

bills.”<sup>38</sup> Despite the obviously special nature of Terri’s Law, it was enacted as a public law.<sup>39</sup>

Similarly, Congress and state legislatures routinely enact public laws that single out an individual natural person,<sup>40</sup> corporation,<sup>41</sup> or small, identifiable group<sup>42</sup> for special treatment without explicitly naming these individuals in the statute. For example, in the guise of a narrowly drawn public law, the State of Minnesota provided a very specific definition of companies that would be penalized for terminating their pension plans.<sup>43</sup> The Supreme Court held that this law, although facially general in application, in fact “was aimed at specific employers” or perhaps even “one particular employer planning to terminate its pension plan.”<sup>44</sup> Similarly, in the Elizabeth Morgan Act, Congress exempted a mother and daughter from the ongoing jurisdiction of a court in a custody dispute.<sup>45</sup> Although the law was drafted to be facially neutral, the court held that it too was designed to reach only a particular pending case.<sup>46</sup> Like Terri’s Law, these laws made exceptions for particular, identifiable individuals or small, known groups from the generally applicable laws that otherwise would have governed their disputes. Because they single out a known set of individuals, these narrowly tailored public laws, just like private laws that overtly grant special treatment to named individuals,<sup>47</sup> properly can be called “special legislation.”<sup>48</sup>

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38. *Id.* §§ 2, 7, 119 Stat. at 15–16.

39. Terri’s Law, 119 Stat. at 15–16.

40. *E.g.*, *Bridges v. Wixon*, 326 U.S. 135, 158 (1945) (Murphy, J., concurring); *Foretich v. United States*, 351 F.3d 1198, 1204 (D.C. Cir. 2003) (citing Elizabeth Morgan Act, Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996)).

41. *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 & n.20 (1978)).

42. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 591 (1983) (challenged state tax law “targets a small group of newspapers”).

43. *Allied Structural Steel Co.*, 438 U.S. at 247–48 & n.20.

44. *Energy Reserves*, 459 U.S. at 412 n.13 (citing *Allied Structural Steel Co.*, 438 U.S. at 247–48 & n.20).

45. Elizabeth Morgan Act § 350, 110 Stat. at 2979.

46. *Foretich v. United States*, 351 F.3d 1198, 1204 (D.C. Cir. 2003).

47. *E.g.*, Priv. L. No. 112-1 (2012); Priv. L. No. 109-1, 120 Stat. 3705 (2006); Priv. L. No. 107-4, 116 Stat. 3122 (2002); Priv. L. No. 107-3, 116 Stat. 3121 (2002).

48. *See, e.g.*, Balkin, *supra* note 18, at 315; Ireland, *supra* note 18, at 271; Rubin, *supra* note 18, at 399; Comment, *supra* note 18, at 712 n.1.

## 2. Categories of Special Legislation

Special laws can touch on a wide variety of substantive subject matters, including public spending, immigration, and taxation, to name a few. No matter the substantive subject matter of the law, special legislation can provide special benefits or special detriments and can be considered civil or criminal in nature. As a result, special laws of all types can be placed into one of four conceptual categories: special benefit civil legislation, special detriment civil legislation, special benefit criminal legislation, and special detriment criminal legislation. Legislation falling into each of these categories has been enacted by Congress and state legislatures since the Constitution's ratification and, in many cases, was enacted by the states prior to the ratification of the Constitution. As will be described more fully in Part V, special legislation was particularly rampant during the period between independence from Britain and the framing of the Constitution.

### *a. Special Benefit Civil Legislation*

The most common category of special legislation today is special benefit civil legislation. State legislatures and Congress routinely provide special benefits by statute, including transferring public funds to particular natural persons<sup>49</sup> or corporations,<sup>50</sup> providing preferential tax treatment to specific corporations,<sup>51</sup> granting exemptions from generally applicable statutes and regulations,<sup>52</sup> and extending statutes of limitations for particular cases.<sup>53</sup> Perhaps the most widespread example

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49. *E.g.*, Continuing Appropriations Act, 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013); Priv. L. No. 108-5, 118 Stat. 4030 (2004); Priv. L. No. 107-2, 116 Stat. 3119 (2002); Priv. L. No. 103-5, 108 Stat. 5064 (1994); Priv. L. No. 103-3, 108 Stat. 5062 (1994).

50. Rubin, *supra* note 18, at 398 n.22; *see also* Kathryn Wakefield, Comment, *Just-in-Time Legislation: Do Corporation-Specific Statutes Violate State Constitutional Prohibitions on Special Legislation?*, 61 U. PITT. L. REV. 843, 853 (2000).

51. *See* DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 80 (1991).

52. Priv. L. No. 111-2, 124 Stat. 4525 (2010); Priv. L. No. 111-1, 124 Stat. 4523 (2010); Priv. L. No. 108-6, 118 Stat. 4032 (2004); Priv. L. No. 108-4, 118 Stat. 4028 (2004); Priv. L. No. 108-3, 118 Stat. 4026 (2004); Priv. L. No. 108-1, 118 Stat. 4023 (2004); Priv. L. No. 107-5, 116 Stat. 3123 (2002); Priv. L. No. 107-1, 115 Stat. 2471 (2001) (all granting exemptions from the Immigration and Nationality Act and reducing the total number of visas otherwise available); *see also* Priv. L. No. 105-4, 111 Stat. 2699 (1997) (granting citizenship retroactively to permit beneficiary to be eligible for benefits only available to citizens).

53. *E.g.*, *Merly v. State*, 558 A.2d 977, 984-85 (Conn. 1989); *Osborn v. Rhode Island*, No. NC84-0101, 1992 WL 813531, at \*6 (R.I. Super. Ct. Mar. 23, 1992).

of this type of special law is private immigration legislation.<sup>54</sup> There have been thousands of private immigration bills enacted;<sup>55</sup> these special laws typically name a single individual<sup>56</sup> or small group<sup>57</sup> and provide that, notwithstanding generally applicable legal requirements, the named individuals are granted legal permanent resident status.<sup>58</sup> Another common type of special benefit legislation is the payment of public funds to named individuals; in two recent examples of special transfers of public wealth, Congress provided for gratuitous payments of \$193,400<sup>59</sup> and \$174,000,<sup>60</sup> respectively, to the widows of two deceased Senators.

*b. Special Detriment Civil Legislation*

Special detriment civil legislation, widespread throughout the revolutionary period,<sup>61</sup> is common today as well. The paradigmatic example of special detriment civil legislation is a legislative taking.<sup>62</sup> In one recent, well-publicized example of a legislative taking, Congress enacted a statute taking property from the City of San Diego, setting aside a California state court ruling that enjoined the transfer under state law.<sup>63</sup> Outside of the takings arena, Congress and state legislatures enact laws that levy special detriments on particular corporations<sup>64</sup> or abrogate specific contracts.<sup>65</sup>

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54. *E.g.*, 124 Stat. at 4525; 124 Stat. at 4523.

55. LEE, *supra* note 27, at 2.

56. *E.g.*, 115 Stat. at 2471.

57. *E.g.*, 118 Stat. at 4028.

58. *E.g.*, 124 Stat. at 4525; 124 Stat. at 4523.

59. Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 1601, 127 Stat. 198, 426 (2013).

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

61. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 302 (enlarged ed. 1992); LEONARD W. LEVY, ORIGINS OF THE BILL OF RIGHTS 71 (1999); W.P. Trent, *The Case of Josiah Philips*, 1 AM. HIST. REV. 444, 454 (1896).

62. *E.g.*, Mt. Soledad Veterans Memorial Preservation Act, Pub. L. No. 109-272, § 2, 120 Stat. 770, 770-72 (2006); *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007); *see also* 16 U.S.C. § 79c(b)(1) (2012).

63. § 2, 120 Stat. at 770-72.

64. *E.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 591 (1983) (challenged state tax law "targets a small group of newspapers"); *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 & n.20 (1978)).

65. *E.g.*, *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 11-14 (1977).

*c. Special Detriment Criminal Legislation*

The paradigm of special detriment legislation in the criminal context is the bill of attainder.<sup>66</sup> Although the newly independent states enacted thousands of bills of attainder during the revolutionary era,<sup>67</sup> perhaps the most famous was the Virginia Assembly's bill declaring Josiah Philips and his gang guilty of high treason.<sup>68</sup> When the authorities were unable to apprehend Philips, whom they believed to be the leader of a "disorderly mob,"<sup>69</sup> the Virginia Assembly attainted Philips in order to avoid "the delays which would attend" proceeding "according to the usual forms and procedures of the courts of law."<sup>70</sup>

Although most special detriment criminal legislation effectively has been barred by the Constitution's prohibition on bills of attainder, modern legislatures still occasionally impose special criminal detriments. For example, responding to Cold War anti-Communist fervor, Congress enacted a statute specifically directed at deporting one particular person, Harry Bridges, because of his affiliation with the Communist Party.<sup>71</sup>

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66. ZECHARIAH CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 93 (1956); LEVY, *supra* note 61, at 68; GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 279 (1969); *see also* Comment, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330, 330–31 (1962).

67. CHAFEE, *supra* note 66, at 93; LEVY, *supra* note 61, at 70–71; WOOD, *supra* note 66, at 279; Trent, *supra* note 61, at 454; *see* Comment, *supra* note 66, at 331.

68. An Act to Attaint Josiah Phillips and Others, Unless They Render Themselves to Justice Within a Certain Time, ch. 12 (1778), in 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE, IN THE YEAR 1619, at 463, 463–64 (William Waller Hening ed., Richmond, J. & G. Cochran 1821) [hereinafter STATUTES AT LARGE OF VIRGINIA]. Like many bills of attainder enacted in England, Philips's attainder was conditional; that is, he was attainted of treason only if he refused to turn himself in to the authorities. *See id.*; LEVY, *supra* note 61, at 72.

69. Trent, *supra* note 61, at 445 (quoting THE PROCEEDINGS OF THE CONVENTION OF DELEGATES FOR THE COUNTIES AND CORPORATIONS IN THE COLONY OF VIRGINIA 9 (rprt. 1816) (1775)).

70. An Act to Attaint Josiah Phillips and Others, Unless They Render Themselves to Justice Within a Certain Time, ch. 12, in 9 STATUTES AT LARGE OF VIRGINIA, *supra* note 68, at 463–64. Philips was captured alive and, despite the outstanding bill of attainder, was tried and executed for robbery rather than for treason. Why Philips was tried for robbery rather than executed for treason is subject to historical debate. LEVY, *supra* note 61, at 72–74; Trent, *supra* note 61, at 448.

71. H.R. 9766, 76th CONG. (3d Sess. 1940); Maurice A. Roberts, *The Harry Bridges Cases*, 76 INTERPRETER RELEASES 1385, 1387 (1999). The deportation of Harry Bridges is

*d. Special Benefit Criminal Legislation*

Also less common today, special benefit criminal legislation has also been enacted in the United States since the revolutionary era.<sup>72</sup> During the war for independence, the Vermont Legislature pardoned, by name, the instigators of a riot because of their previous service in the Continental Army.<sup>73</sup> In a more recent example, the State of California granted immunity from criminal prosecution to specific government officials who had been determined by a state court to have violated the law.<sup>74</sup>

III. JUDICIAL AND SCHOLARLY RESPONSE TO SPECIAL LEGISLATION

A value of legislative generality—that is, a principle that there is something suspect about legislation that singles out known individuals for special treatment—is not enforced as an independent constitutional value. Courts, while subjecting special laws to judicial scrutiny in individual cases, have failed to conceptualize special legislation as a category of law deserving coherent and meaningful restriction due to its lack of generality. Moreover, scholarship addressing special legislation has not offered a robust theory that would justify restraining special legislation because of its particularized effect. As a result, the value of legislative generality remains largely unenforced, and special legislation remains an accepted part of the legislative process.

*A. The Supreme Court Does Not Effectively or Coherently Restrain Special Legislation.*

The Supreme Court neither articulates a principle that coherently addresses special legislation nor meaningfully restricts the power of the legislature to enact special legislation. The Court expressly has rejected a principle that would treat legislative specification as constitutionally

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analogous to the Parliamentary banishments enacted in England. See CHAFEE, *supra* note 66, at 117.

72. *E.g.*, ADDRESS OF THE COUNCIL OF CENSORS (Feb. 14, 1786) [hereinafter VERMONT REPORT], in RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT 58, 70 (Paul S. Gillies & D. Gregory Sanford eds., 1991).

73. *Id.*

74. Act of Feb. 20, 2009, ch.9, § 5, 2009 Cal. Stat. 3418, 3419 (“Notwithstanding any other law, no governmental entity, or officer or employee of a governmental entity, shall incur any liability or be subject to prosecution or disciplinary action because of benefits provided to a judge under the official action of a governmental entity prior to the effective date of this act on the ground that those benefits were not authorized under law.”).

suspect. Moreover, when the Court has reviewed individual special laws, it has announced a variety of overlapping but inconsistent tests, rendering a coherent principle concerning special legislation impossible within the confines of current doctrine.

1. The Court Does Not Treat Special Legislation as Suspect Because of Its Particularized Effect.

The Supreme Court's modern cases do not treat special legislation as constitutionally defective because of its lack of generality. In *Plaut*,<sup>75</sup> a group of investors brought suit against an investment company for securities fraud; the Court held that the fraud suit was brought after the applicable statute of limitations, and the suits were dismissed.<sup>76</sup> In response, Congress retroactively abrogated this decision, providing that the dismissed suits would be treated as if timely filed. In *Plaut*, the Court invalidated the statute but definitively rejected the argument that the statute was defective because it targeted a specific class of cases or a particular defendant.<sup>77</sup>

The Court held that whether Congress singled out a group of lawsuits for special treatment did not affect the law's validity. Viewing the issue as one of separation of powers, the Court noted that neither favoritism nor particularized action on the part of the legislature rendered the statute constitutionally infirm.<sup>78</sup> The Court dismissed the notion 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."<sup>79</sup> Even laws that single out an individual natural person or corporation, the Court held, "are not on that account invalid."<sup>80</sup> The Court noted that Congress long has enacted private bills and reaffirmed that Congress is permitted to legislate even for "a legitimate class of one."<sup>81</sup> The Court specifically rejected Justice Breyer's concurrence, in which he expressed some concern that a law that retroactively reopens

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75. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 214–15 (1995).

76. *Id.* at 213–14 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)).

77. *Id.* at 238–39.

78. *Id.* at 228, 239.

79. *Id.* at 239 n.9.

80. *Id.*

81. *Id.* (quoting *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 472 (1977)) (internal quotation marks omitted).

previously dismissed but readily identifiable lawsuits could be used to oppress individual litigants.<sup>82</sup>

*Plaut's* sanction of particularized legislative action, and in particular its reiteration that Congress possesses the power to legislate for a "legitimate class of one," typifies the modern rule that the legislature may, without offending the Constitution, enact a law that singles out a named individual so long as the focus of the enactment can be "fairly and rationally understood."<sup>83</sup> In *Nixon*, the Court considered a federal statute ordering the Administrator of General Services to take possession of all tape recordings made by President Nixon, who was specifically named in the statute.<sup>84</sup> The Court recognized that the statute, in addition to singling out Nixon for special treatment, was "predominantly precipitated by a resolve to undo" a particular contract between the former President and the Administrator of General Services that described the scope of materials that would be donated to the public for keeping.<sup>85</sup> Nevertheless, the Court held that this special law was constitutional because the law could be "rationally understood"<sup>86</sup> as an "act of nonpunitive legislative policymaking."<sup>87</sup> Similarly, the Court has 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.<sup>88</sup>

Although the Court has suggested that it will entertain a challenge to a statute brought by a plaintiff who has been singled out as a "class of one," protection under this theory is limited. A plaintiff may invoke a class of one theory under the Equal Protection Clause only when she is "intentionally treated differently from others similarly situated."<sup>89</sup>

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82. Compare *id.* at 238, with *id.* at 242–43 (Breyer, J., concurring).

83. *Nixon*, 433 U.S. at 472–73.

84. *Id.* at 433–34.

85. *Id.* at 431, 479.

86. *Id.* at 472.

87. *Id.* at 477.

88. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 266 & n.22 (1995) (Stevens, J., dissenting) (noting that the law at issue in *Landgraf* "was intended to exempt a single disparate impact lawsuit against" a particular company (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 258 (1994))). Following the lead of the Supreme Court, state courts have declined to offer meaningful protection against special legislation. See Long, *supra* note 26, at 742–43. Although many states have specific constitutional prohibitions in place designed to combat special legislation, state courts generally apply very lenient standards, akin to rational basis, when reviewing special laws. *Id.* at 732, 759.

89. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

Moreover, a class of one challenge is limited to “intentional and arbitrary” discrimination when there is “no rational basis” for the differential treatment.<sup>90</sup> The Court has further limited the class of one theory to circumstances in which there is a “clear standard against which departures . . . could be readily assessed,” thus insulating state action from class of one equal protection review when the action is otherwise within the discretion of the state actor.<sup>91</sup>

## 2. The Court Has Failed to Articulate a Coherent Method of Analyzing Special Legislation.

Consistent with its statements in *Plaut* and *Nixon* that reject the notion that there is something wrong with particularized legislative action, the Court’s decisions reviewing special legislation do not describe a coherent principle indicating when special laws will run afoul of the Constitution. Instead, when the Court examines special laws, it considers them under a variety of constitutional provisions, including the Equal Protection Clause,<sup>92</sup> the Bill of Attainder and Ex Post Facto Clauses,<sup>93</sup> the Spending Clause,<sup>94</sup> the Takings Clause,<sup>95</sup> the Contract Clause,<sup>96</sup> and the *Klein* anti-rule of decision principle.<sup>97</sup> When deciding

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90. *Id.* (quoting *Sioux City Bridge Co. v. Dakota Cnty.*, 260 U.S. 441, 445 (1923)).

91. *Engquist v. Or. Dep’t of Agric.* 553 U.S. 591, 598, 602 (2008).

92. U.S. CONST. amend. XIV, § 1. *Compare Engquist*, 553 U.S. at 602, with *Olech*, 528 U.S. at 564.

93. U.S. CONST. art. I, §§ 9–10.

94. *Id.* art. I, § 8, cl. 1. The Court exercises virtually no oversight over special legislation related to spending. *Alabama v. Texas*, 347 U.S. 272, 273–74 (1954) (per curiam) (“The power of Congress to dispose of any kind of property belonging to the United States ‘is vested in Congress without limitation.’” (quoting *United States v. Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840))); *see also* Comment, *supra* note 18, at 718–23. Although the Court has suggested that the General Welfare Clause limits appropriations to expenditures designed “to provide for the general welfare,” 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). Accordingly, courts have “stretched to find public purposes in the most dubious spending schemes.” Richard Delgado, *Inequality “From the Top”: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100, 106 (1984).

95. 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). However, the Court has limited the application of the Takings Clause, holding that “a State may transfer property from one private party to another if future ‘use by the public’ is the purpose of the taking.” *Id.* at 477, 488–89.

96. U.S. CONST. art. I, § 10, cl. 1; *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1,

cases under these provisions, the Court has formulated a number of different tests, applied different standards, and deferred to the legislature in varying degrees, depending on the clause invoked and the subject matter of the legislation. For example, the Court provides almost no protection against special legislation related to public spending<sup>98</sup> or immigration,<sup>99</sup> and minimal protections against special legislation in the equal protection context.<sup>100</sup> By contrast, the Court provides more significant protections in the context of takings<sup>101</sup> and criminal law.<sup>102</sup> As a result of this multifarious and inconsistent approach to dealing with special legislation, jurisprudence surrounding special legislation lacks coherence.

*a. Lack of Coherence Between Special Benefit and Special Detriment Legislation*

Supreme Court doctrine draws a sharp distinction between laws imposing special detriments and those providing special benefits. The

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29–31 (1977) (holding that the Contract Clause prevents government self-dealing by prohibiting the states from breaching contracts to which they are a party in order to gain advantages for the government at the expense of the contracting party); see Evan C. Zoldan, *The Permanent Seat of Government: An Unintended Consequence of Heightened Scrutiny Under the Contract Clause*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 163, 208–09 (2011).

97. Rooted in the principle of separation of powers, the Court has held that Congress may not prescribe a rule of decision in a pending court case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 143–46 (1872) (Congress may not deny federal courts jurisdiction “founded solely on the application of a rule of decision, in causes pending”). Despite this prohibition, the Court’s reaction to laws that address particular cases have been mixed. In *Miller*, the Court limited *Klein*, holding Congress is not prohibited from directing the court to alter an injunction previously entered by the court. *Miller v. French*, 530 U.S. 327, 344 (2000).

98. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 356–57 (2008).

99. *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (“At the outset, it is important to underscore the limited scope of judicial inquiry into immigration legislation. This Court has repeatedly emphasized that ‘over no conceivable subject is the legislative power of Congress more complete than it is over’ the admission of aliens.” (quoting *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 339 (1909))); see also James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 429–30 (2010).

100. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam).

101. Compare *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 472 (1977) (holding that the legislature can create a “legitimate class of one” as long as the distinction is “fairly . . . understood”), with *Kelo v. City of New London*, 545 U.S. 469, 477 (2005) (the legislature cannot “take the property of A for the sole purpose of transferring it to another private party B, even though A is paid just compensation”).

102. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867).

Court provides some protections against special detriment legislation under the Bill of Attainder, Takings, Ex Post Facto, and Equal Protection Clauses.<sup>103</sup> However, no similar doctrine provides restrictions against special benefit legislation.<sup>104</sup> As a result, special benefit legislation—like special immigration laws, laws providing civil and criminal immunity, and laws providing financial benefits to named parties—is subject to virtually no scrutiny under the Court’s current jurisprudence. The incoherence of this doctrine is elucidated in the following example: as noted, Congress recently provided a \$174,000 gratuitous payment to Bonnie Englebardt Lautenberg, the widow of the late United States Senator Frank Lautenberg.<sup>105</sup> This special benefit raises no constitutional concerns under the Court’s current doctrine. However, if Congress had enacted a law *taking* \$174,000 from Mrs. Lautenberg, such a statute would raise concerns under the Equal Protection Clause, the Takings Clause, the Due Process Clause, and possibly the Ex Post Facto Clause. In other words, the Court’s doctrine provides strikingly different protections against special legislation depending on whether the legislation imposes detriments or provides benefits.

*b. Lack of Coherence Between Criminal Laws and Civil Laws*

Supreme Court doctrine distinguishes between special laws denominated as criminal and those denominated as civil. Although the Court restrains some special criminal laws under the Bill of Attainder and Ex Post Facto Clauses, it does not recognize analogous restrictions in the civil context.<sup>106</sup> The following example demonstrates the incoherence of this distinction: in the Fraud Enforcement and Recovery Act (FERA) Amendments to the False Claims Act (FCA), Congress retroactively revived particular lawsuits dismissed pursuant to a narrow interpretation of the FCA.<sup>107</sup> Courts are split, however, as to whether

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103. *E.g.*, *Kelo*, 545 U.S. at 469; *Olech*, 528 U.S. at 564; *Nixon*, 433 U.S. at 472–73; *Cummings*, 71 U.S. (4 Wall.) at 323.

104. *See Fiallo*, 430 U.S. at 792; Bagenstos, *supra* note 98, at 356–57; *see also* *Alabama v. Texas*, 347 U.S. 272, 273–74 (1954); Pfander & Wardon, *supra* note 99, at 429–30.

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

106. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.); *Nixon*, 433 U.S. at 472–73.

107. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 4, 123 Stat. 1617, 1621–25 (2009); S. REP. NO. 111-10, at 4, 10–12 (2009).

the FCA is a “criminal” law within the meaning of the Ex Post Facto Clause. Because the Ex Post Facto Clause extends only to criminal laws, only courts holding that the FCA is criminal have invalidated the revival of the dismissed FCA suits; by contrast, courts holding that the FCA is civil uphold the revival of these same suits.<sup>108</sup>

*c. Lack of Coherence Between State Laws and Federal Laws*

Finally, the Court draws a distinction between state laws and federal laws that single out individuals for special treatment. When either a state or the federal government breaches a public contract, that is, a contract to which it is itself a party, it reallocates a burden that properly belongs to the entire body politic onto the contractor alone. When a breach of this sort occurs through the enactment of a statute, therefore, it properly can be called special legislation because the breach affects particular contracts and known parties.<sup>109</sup> However, despite the fact that a breach of a public contract reallocates burdens to known individuals irrespective of whether the contracting party is a state or the federal government, the Court treats breaches of public contract by the states differently than breaches by Congress. A state’s ability to breach its own contractual obligations is narrowly limited to circumstances in which the law is “reasonable” and “necessary” to implement an “important public purpose.”<sup>110</sup> By contrast, Congress is permitted to breach a contract to which it is itself a party unless it has committed “unmistakably” to bind its sovereign legislative power by contract,<sup>111</sup> a far more lenient standard. As a result, two otherwise identical contracts, and otherwise identical special laws breaching those contracts, will be subject to widely divergent legal standards depending on whether a state

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108. Compare *United States v. Hawley*, 812 F. Supp. 2d 949, 961–62 (N.D. Iowa 2011) (holding that the FERA Amendments are unconstitutional under the Ex Post Facto Clause because they are retroactive and punitive), and *United States ex rel. Baker v. Cmty. Health Sys., Inc.*, 709 F. Supp. 2d 1084, 1112 (D.N.M. 2010) (same), and *United States ex rel. Sanders v. Allison Engine Co.*, 667 F. Supp. 2d 747, 753–54 (S.D. Ohio 2009), with *United States ex rel. Miller v. Bill Harbert Int’l Constr., Inc.*, 608 F.3d 871, 878 (D.C. Cir. 2010) (holding that the Ex Post Facto Clause does not apply to the FCA), and *United States ex rel. Drake v. NSI, Inc.*, 736 F. Supp. 2d 489, 502 (D. Conn 2010) (same).

109. Zoldan, *supra* note 96, at 209.

110. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977). The constitutional basis for the much-criticized *United States Trust* doctrine is the Contract Clause, which applies only against the states, not the federal government.

111. *United States v. Winstar Corp.*, 518 U.S. 839, 871–72 (1996).

or the federal government was the public entity that breached its obligation.

*B. Scholars Have Not Formulated a Robust Theory of Constitutional Protections Against Special Legislation.*

Because the Court has failed to conceptualize special legislation as a category of law deserving scrutiny because of its particularized effect, it is perhaps not surprising that scholars have failed to provide a robust constitutional theory that would protect against special legislation. There are three main lines of scholarship addressing special legislation: equal protection, state constitutional restrictions, and individual substantive legal areas. Although each of these lines of scholarship addresses some aspects of the problem of special legislation, each fails to provide an approach that connects the text of the Constitution with the historical experiences of the generation that framed that text and with the philosophical traditions that gave rise to it. The principle introduced in this Article contributes to a lively but unresolved debate over constitutional restraints on special legislation by offering an approach that is based on the text of the Constitution, its philosophical underpinnings, and the history leading up to its framing.

Scholars seeking to articulate federal constitutional restrictions on special legislation primarily advocate an expansive reading of the Fourteenth Amendment's Equal Protection Clause.<sup>112</sup> A number of scholars have argued that the Equal Protection Clause should be read more broadly than an anti-discrimination device, instead focusing on the clause's potential to eliminate all class-based distinctions.<sup>113</sup> Professor Balkin, for example, has argued that the Equal Protection Clause should be read to prohibit "class legislation," codifying a pre-Civil War idea that "'special' or 'partial' legislation that picked out a group for special benefits or special burdens" violated principles of equality.<sup>114</sup> Professor Balkin's argument is closely related to work by Professors Saunders and Nourse, who connect the Equal Protection Clause with the antebellum

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112. Eskridge, *supra* note 19, at 1246–47; Saunders, *supra* note 17, at 288–90; *see also* Balkin, *supra* note 18, at 315–16; Goldberg, *supra* note 19, at 528–30; Nourse & Maguire, *supra* note 19, at 959–65, 995–96.

113. Eskridge, *supra* note 19, at 1246–47; Saunders, *supra* note 17, at 254–55; *see also* Goldberg, *supra* note 19, at 528–30; Nourse & Maguire, *supra* note 19, at 959–65, 995–96; Balkin, *supra* note 18, at 315–16.

114. Balkin, *supra* note 18, at 315.

tradition that citizens are entitled to be governed by general, as opposed to special, laws.<sup>115</sup> As Professor Saunders describes, in the decades leading up to the ratification of the Equal Protection Clause, special laws were considered offensive because they benefitted one individual or group at the expense of the rest of the population, undermining equality and fostering faction and corruption.<sup>116</sup> Although this line of scholarship does provide a link between the American aversion to special legislation and a clause of the Constitution, it fails to connect this aversion to the numerous provisions in the Constitution other than the Equal Protection Clause that demonstrate a commitment to the limitation of special laws, including, most importantly, the Bill of Attainder, Title of Nobility, and Ex Post Facto Clauses. It also fails to connect the text of the Constitution to the historical experiences that gave rise to the inclusion of all of these clauses in the Constitution.

A second line of scholarship focuses on state constitutional restrictions on special legislation. Professor Long has argued that interpretations of state constitutional provisions restricting special legislation defer to the legislature in imitation of weak federal protections under the Equal Protection Clause.<sup>117</sup> Professor Long argues that the incorporation of equal protection jurisprudence into state special legislation doctrine, and the resulting deference to state legislatures, is unnecessary. Somewhat in tension with Professors Balkin, Nourse, and Saunders, Professor Long argues that the concerns motivating the ratification of the Equal Protection Clause differed from those motivating state constitutional restrictions on special legislation. As a result, he argues, state courts should be free to interpret their state constitutional provisions independently of, and potentially more broadly than, federal Equal Protection doctrine.<sup>118</sup> Because this line of scholarship focuses on the historical backdrop to *state* constitutional provisions that address special legislation, it is inadequate to address the problem of special legislation enacted by Congress. It also fails to take into account the many provisions of the federal Constitution that address special laws and the historical backdrop that precipitated their inclusion in the document's text.

A third line of scholarship has identified the individual clauses of the

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115. Nourse & Maguire, *supra* note 19, at 959–65; Saunders, *supra* note 17, at 252–53.

116. Saunders, *supra* note 17, at 252–55.

117. Long, *supra* note 26, at 742; *see also* Rubin, *supra* note 18, at 405.

118. *See* Long, *supra* note 26, at 742–43.

Constitution that are well-suited to address the problem of special legislation. Based on one or more of these clauses, these scholars have suggested an expanded role for courts reviewing special laws.<sup>119</sup> For example, scholars interpreting the Bill of Attainder Clauses have argued that they best can be viewed as a way to prohibit laws that impose a variety of disabilities on known, identifiable groups.<sup>120</sup> Other scholars have suggested that the Title of Nobility Clauses might restrict the government from participating in the private development and distribution of “biological benefits,” such as “organ transplants, life extension, [and] cloning,”<sup>121</sup> or prohibit states from granting special consideration to legacy candidates for admission to public universities.<sup>122</sup> In the realm of spending, a number of scholars have argued that the general welfare restriction on the Spending Clause could be used by courts to police special spending legislation more aggressively.<sup>123</sup> Others view immigration as a special case, noting that special immigration statutes, but probably not other types of special legislation, are prohibited by the Constitution.<sup>124</sup> Although this line of scholarship does reflect the many clauses of the Constitution that relate to special

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119. See, e.g., Wayne A. Logan, “Democratic Despotism” and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts, 12 WM. & MARY BILL RTS. J. 439, 498–99 (2004); Robert G. Natelson, *Statutory Retroactivity: The Founders’ View*, 39 IDAHO L. REV. 489, 523, 529 (2003); Laura Ricciardi & Michael B.W. Sinclair, *Retroactive Civil Legislation*, 27 U. TOL. L. REV. 301, 376–77 (1996).

120. Mark Strasser, *Ex Post Facto Laws, Bills of Attainder, and the Definition of Punishment: On DOMA, the Hawaii Amendment, and Federal Constitutional Constraints*, 48 SYRACUSE L. REV. 227, 228 (1998). Other commentators have argued that the Bill of Attainder Clause is best understood as a shield for political activity otherwise protected by the First Amendment, Thomas B. Griffith, Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 VA. L. REV. 475, 476 (1984), or a guarantee of neutral judicial process, Jane Welsh, Note, *The Bill of Attainder Clause: An Unqualified Guarantee of Process*, 50 BROOK. L. REV. 77, 80 (1983).

121. Delgado, *supra* note 94, at 101, 127. Professor Delgado describes that the Court’s equal protection cases limiting certain types of state-sponsored giving seem to “result in invalidation of programs that confer benefits permanently and unreviewably; that establish groups apt to be perceived as privileged or ‘special’; and that create closed classes.” *Id.* at 106.

122. Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U. L. REV. 1375 (2006).

123. See, e.g., Bagenstos, *supra* note 98, at 356–57; Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 TEX. REV. L. & POL. 239, 274–76 (2007); see also Lynn A. Baker, *The Spending Power and the Federalist Revival*, 4 CHAP. L. REV. 195, 198 (2001).

124. Pfander & Wardon, *supra* note 99, at 399.

legislation, by emphasizing only one or more clauses individually, it fails to identify the coherent principle that animates all of these clauses. Moreover, it fails to recognize the historical circumstances and philosophical traditions that link these clauses to one another.

This Article contributes to the three lines of scholarship noted above, which focus alternately on the Equal Protection Clause, state constitutional provisions, and individual substantive areas of law, by articulating a robust and coherent constitutional principle restraining special legislation. The principle restraining special legislation articulated in this Article has its foundations in the history of the framing of the Constitution, the text of the Constitution itself, and the philosophical traditions underpinning the Constitution. As a result, the principle articulated in this Article offers a number of contributions to the existing literature. It makes sense of under-enforced, but undoubtedly important, clauses of the Constitution; it connects these constitutional clauses with the historical backdrop and philosophical principles that motivated their inclusion in the Constitution; it applies coherently across different substantive areas of law; and it applies seamlessly both to state legislatures and Congress. This principle, the constitutional value of legislative generality, is described in Part IV, below.

#### IV. AN INTRODUCTION TO THE VALUE OF LEGISLATIVE GENERALITY

Both Congress and state legislatures routinely enact special legislation, and neither the Supreme Court nor scholars have articulated a principle requiring courts to exercise coherent and meaningful judicial review over it. Nevertheless, a value that disfavors special legislation should be enforced as an independent constitutional principle. This principle, which may be called the value of legislative generality,<sup>125</sup> is supported by three distinct, but related, pillars—history, constitutional text, and philosophical considerations. First, the history of the revolutionary period leading up to the framing of the Constitution suggests that a key purpose of the Constitution was to address evils associated with special legislation. Second, the Constitution contains a number of under-enforced clauses that, when read together and in context, delineate a norm of legislative generality. Third, an

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125. This principle, and its connection to the Bill of Attainder, Ex Post Facto, Title of Nobility, and Contract Clauses, was introduced in Zoldan, *supra* note 96, at 207–08.

interpretation of the Constitution that includes a value of legislative generality fits well with a number of philosophical traditions and leads to normatively attractive results. Together, these pillars support the conclusion that legislative generality is a value with constitutional weight and suggest that current constitutional doctrine should be modified to give effect to this value. Each of these three pillars will be sketched briefly in this Part. Part V will fully articulate the historical basis for the value of legislative generality. The other two pillars—the text of the Constitution and philosophical and normative considerations—will be fully articulated in later work.

*A. The Historical Basis for a Value of Legislative Generality*

Modern special laws, including the special detriment and special benefit laws described above, strongly resemble special legislation enacted during the colonial and revolutionary periods. Members of the revolutionary generation suffered from special legislation enacted by Parliament and, in the years after independence, by their own state legislatures. This special legislation came in the form of special detriment legislation, like bills of attainder<sup>126</sup> and laws confiscating property.<sup>127</sup> It also came in the form of special benefit legislation, including laws immunizing named individuals from civil suit,<sup>128</sup> nullifying judgments already rendered against them,<sup>129</sup> providing immunity from criminal prosecution,<sup>130</sup> and granting legislative divorces.<sup>131</sup>

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126. See CHAFEE, *supra* note 66, at 93; WOOD, *supra* note 66, at 279; Comment, *supra* note 66, at 330–31.

127. *E.g.*, An Act to Compel Non-Residents to Return Within a Certain Time or in Default Thereof, That Their Estates Be Confiscated, and for Confiscating the Estate of William Knox, Esq. Formerly Provost Marshal, of the Then Province, Now State of Georgia (1778), *in* 19 (pt. 2) THE COLONIAL RECORDS OF THE STATE OF GEORGIA 126, 126–27 (Allen D. Chandler ed., 1911); An Act to Confiscate the Estates of Sundry Persons Therein Named, ch. 19 (1778), *in* 4 LAWS OF NEW HAMPSHIRE 191, 191–93 (Henry Harrison Metcalf ed., 1916); An Act to Confiscate the Estates of Certain Notorious Conspirators Against the Government and Liberties of the Inhabitants of the Late Province, Now State, of Massachusetts Bay, ch. 48 (1778), *in* 5 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 966, 966–67 (Boston, Wright & Potter Printing Co. 1886) [hereinafter ACTS AND RESOLVES OF THE MASSACHUSETTS BAY]. In many cases, the confiscations were directed at Tories, who also saw their ability to practice their professions curtailed by opportunistic Whig legislatures. BAILY, *supra* note 61, at 302; LEVY, *supra* note 61, at 71; Trent, *supra* note 61, at 454.

128. *E.g.*, *Mortimer v. Caldwell*, 1 Kirby 53, 54 (Conn. Super. Ct. 1786); VERMONT REPORT, *supra* note 72, at 60–70.

129. VERMONT REPORT, *supra* note 72, at 60–70; *see also* Timothy A. Lawrie,

Wearied by a decade of special laws, and recalling the history of abusive special legislation enacted by Parliament, the revolutionary generation ultimately rejected special legislation, denouncing state legislatures for “extending their deliberations to the cases of individuals.”<sup>132</sup> They rejected all manner of special laws, including those “amend[ing] titles to land,” “dissolving . . . the bonds of marriage,” attainting suspects of crimes, granting state benefits to citizens,<sup>133</sup> and deciding pending legal disputes.<sup>134</sup> The revolutionary generation rejected the power of the legislature to declare named individuals ineligible for the protections of the standing laws.<sup>135</sup> Popular opinion disclaimed the right of the legislature “to give monopolies of legal privilege—to bestow unequal portions of our common inheritance on favourites.”<sup>136</sup> By the close of the confederation period, both special privileges and special detriments were considered “repugnant to the spirit of the American republics.”<sup>137</sup> It was with these experiences, and in large part driven by them, that the framers of the Constitution arrived in Philadelphia in 1787.<sup>138</sup>

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*Interpretation and Authority: Separation of Powers and the Judiciary’s Battle for Independence in New Hampshire, 1786–1818*, 39 AM. J. LEGAL HIST. 310, 315 (1995).

130. E.g., VERMONT REPORT, *supra* note 72, at 70.

131. E.g., *id.* at 60.

132. COUNCIL OF CENSORS, A REPORT [hereinafter PENNSYLVANIA REPORT], in THE CONSTITUTION OF THE COMMONWEALTH OF PENNSYLVANIA 35, 38 (Philadelphia, Francis Bailey 1784).

133. *Id.* at 41, 46–48, 57, 59.

134. *Id.* at 40.

135. See *The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution* [hereinafter *Convention of Virginia*], in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 1, 66–67 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES].

136. WOOD, *supra* note 66, at 402 (quoting DEBATES AND PROCEEDINGS OF THE GENERAL ASSEMBLY OF PENNSYLVANIA 130 (Mathew Carey ed., 1786) [hereinafter PENNSYLVANIA DEBATES AND PROCEEDINGS]) (internal quotation marks omitted); George P. Smith, II, *Dr. Bonham’s Case and the Modern Significance of Lord Coke’s Influence*, 41 WASH. L. REV. 297, 304–05 (1966) (noting that Coke believed that all monopolies were rendered unlawful by the Magna Charta).

137. WOOD, *supra* note 66, at 401; James Madison, Title for the President (May 11, 1789), in 12 THE PAPERS OF JAMES MADISON 154, 155–56 (Charles F. Hobson & Robert A. Rutland eds., 1979).

138. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220–21 (1995); EDWARD S. CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 36–37, 62 (Peter Smith 1963) (1914) [hereinafter CORWIN, DOCTRINE OF JUDICIAL REVIEW]; EDWARD S. CORWIN, JOHN MARSHALL AND THE CONSTITUTION 148–50 (1919) [hereinafter CORWIN, JOHN MARSHALL AND THE CONSTITUTION]; EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT 70–71 (1948)

*B. The Textual Support for a Value of Legislative Generality.*

The text of the Constitution memorializes the aversion to special legislation, and the commitment to the value of legislative generality, that the framers of the Constitution developed through hard experience during the confederation period. Much like the principles of separation of powers<sup>139</sup> or the right to privacy,<sup>140</sup> the value of legislative generality is not found in any single clause of the Constitution in isolation. Rather, the value can be gleaned by reading a number of related clauses of the Constitution together. These clauses, covering subject matters as diverse as public records, immigration, and criminal law, together suggest a constitutional norm of legislative generality. In particular, the Bill of Attainder, Ex Post Facto, and Title of Nobility Clauses, all of which restrain both Congress as well as state legislatures, embody a value of legislative generality and properly may be called the “generality clauses” of the Constitution.

Among the generality clauses, the Bill of Attainder Clauses<sup>141</sup> most explicitly address the practice of singling out individuals or small groups for special treatment. Reflecting the recognition that the legislature, unrestrained by precedent, reason, or rules of evidence, can punish individuals for running afoul of the popular will,<sup>142</sup> the clauses prevent the majority from burdening individuals unable to protect themselves through normal political processes. The clauses restrict both the state legislatures and Congress from singling out an individual or small, known group for special detriments like death, banishment, the confiscation of property, and exclusion from one’s profession.<sup>143</sup>

The Title of Nobility Clauses<sup>144</sup> are the mirror image of the Bill of Attainder Clauses, supporting the value of legislative generality by prohibiting both Congress and state legislatures from granting certain special benefits to individuals or small, determinable groups. Certainly,

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[hereinafter CORWIN, LIBERTY AGAINST GOVERNMENT].

139. *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (per curiam) (holding that the principle of separation of powers is “woven” into the Constitution and can be discerned by reading together a number of the Constitution’s clauses).

140. *See Roe v. Wade*, 410 U.S. 113, 152 (1973) (although the “Constitution does not explicitly mention any right of privacy,” this right can be gleaned from reading a number of provisions of the Constitution).

141. U.S. CONST. art. I, §§ 9–10.

142. *United States v. Brown*, 381 U.S. 437, 441–42 (1965).

143. *See id.*

144. U.S. CONST. art. I, §§ 9–10.

the clauses prohibit the granting of literal titles, like “dukes, marquesses, earls, viscounts and barons.”<sup>145</sup> However, in light of the manifold legal and economic privileges that are associated with the English nobility,<sup>146</sup> a more plausible reading of the clauses includes preventing the establishment of both a literal titled nobility, as well as a functional nobility imbued with these special privileges.

The Ex Post Facto Clauses operate as a check against special legislation by preventing the legislature from doing indirectly what it cannot do directly because of the Bill of Attainder or Title of Nobility Clauses. When a legislature enacts retroactive legislation, it acts with the knowledge of conduct that already has occurred. As a result, the ability to enact retroactive legislation permits the legislature to punish or benefit an individual without naming him specifically but with the knowledge of whom the legislation will benefit or harm.<sup>147</sup> The case of Harry Bridges is an explicit, but far from unique, example of the use of a retrospective law to single out an individual for punishment. Amidst anti-Communist fervor, the United States House of Representatives passed a special bill directing the deportation of Harry Bridges.<sup>148</sup> When it became clear that the special law would be considered an unconstitutional bill of attainder, a new bill was introduced that did not use Bridges’s name specifically but retroactively made his conduct a deportable offense.<sup>149</sup> Removing all doubt about the intent of the retroactive law, the author of the second bill introduced it in the following way: “It is my joy to announce that this bill will do . . . what the bill specifically aimed at the deportation of Harry Bridges seeks to accomplish. This bill changes the law so that the Department of Justice should now have little trouble in deporting Harry Bridges.”<sup>150</sup> The second bill, designed to reach the conduct of a particular individual,

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145. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 303 (Wayne Morrison ed., Cavendish Publ’g 2001).

146. *Id.* at 390. These special privileges include the freedom from arrest for civil cases, privileges in judicial proceedings, and the freedom from being subjected to judgment by a jury made up of commoners. *Id.*

147. Charles B. Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 HARV. L. REV. 692, 693 (1960).

148. H.R. 9766, 76th CONG. (3d Sess. 1940); Roberts, *supra* note 71, at 1387; *see, e.g.*, Comment, *In re Harry Bridges*, 52 YALE L.J. 108, 109–10 (1942).

149. *Bridges v. Wixon*, 326 U.S. 135, 158 (1945) (Murphy, J., concurring) (“As a substitute for this direct legislative assault upon Bridges, Congress amended the deportation law” to reach him indirectly.).

150. 86 CONG. REC. 9031 (1940).

became the law, leading to the institution of deportation proceedings against Bridges.<sup>151</sup> As the Bridges case elucidates, the prohibition of retrospective laws, a right protected by the Ex Post Facto Clauses, prevents the legislature from making an end-run around the Bill of Attainder and Title of Nobility Clauses to benefit or harm known individuals. Perhaps not surprisingly, during the republic's early years, the Ex Post Facto Clauses were viewed as the primary constitutional source for the prevention of special legislation.<sup>152</sup>

The connection among the generality clauses, and the fact that they all address different aspects of the same problem of special legislation, is reflected in early cases that defined them. Describing the connection among the generality clauses in *Ogden v. Saunders*, the Court held that the "collocation" of these clauses together, in Article I, Section 10 of the Constitution, reveals that these clauses are "members of the same family brought together in the most intimate connexion with each other."<sup>153</sup> They must be read together because the "spirit and motives of these prohibitions . . . agree in the *principle* which suggested them."<sup>154</sup> The principle alluded to in *Saunders* was made explicitly in *Fletcher v. Peck*, in which Chief Justice Marshall opined, "It is the peculiar province of the legislature to prescribe *general* rules for the government of society; the *application* of those rules to individuals in society would seem to be the duty of other departments."<sup>155</sup>

In addition to the Bill of Attainder, Title of Nobility, and Ex Post Facto Clauses, which most specifically disfavor special laws, the Constitution also contains a number of other clauses that imply a norm of generality in legislation. For example, the Appointments Clause denies Congress the right to exercise the power of appointment of officers that was so abused by the state legislatures during the confederation period.<sup>156</sup> Other constitutional clauses that suggest a

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151. *Bridges*, 326 U.S. at 158–59 (Murphy, J., concurring).

152. CORWIN, JOHN MARSHALL AND THE CONSTITUTION, *supra* note 138, at 148–50. Congress was far from innovative in using retrospective laws to reach an individual who could not be punished through the normal legal processes. In England, Parliament used retrospective laws in order to punish public ministers who had run afoul of Parliament's graces but committed no illegal act. CHAFEE, *supra* note 66, at 111–13.

153. *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 265–66 (1827).

154. *Id.* at 267.

155. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (emphasis added).

156. U.S. CONST. art. II, § 2, cl. 2; WOOD, *supra*, note 66, at 145; 2 FARRAND, *supra* note 1, at 314–15.

norm of legislative generality include the General Welfare,<sup>157</sup> Naturalization,<sup>158</sup> and Bankruptcy Clauses,<sup>159</sup> all of which suggest that Congress's power to enact legislation in these areas is limited to uniform laws. Constitutional amendments, too, including the Fifth Amendment's Takings Clause and the Fourteenth Amendment's Equal Protection Clause, suggest a norm of legislative generality.

In conclusion, although the Constitution contains no single clause that guarantees that state legislatures and Congress will enact only generally applicable laws, a number of clauses, when read together, suggest that one of the goals of the Constitution is the avoidance of legislative specification. In future work, I will further elaborate on the textual basis for the value of legislative generality, focusing on the clauses most well-suited to support a value of legislative generality.

### C. *The Philosophical Underpinnings of a Value of Legislative Generality*

It is not surprising that the text of the Constitution and the history leading up to its framing support a value of legislative generality; indeed, there is a long tradition among jurists and philosophers of law that excludes special legislation from the definition of law and recognizes legislative generality as a normatively attractive value. Traditionally, scholars and philosophers of law drew a sharp distinction between rules that apply to the population generally and rules that apply only to a single individual. William Blackstone<sup>160</sup> and John Locke<sup>161</sup> argued that a rule that applies to a single individual simply falls outside the definition of "law." Blackstone reasoned that an act of the legislature must be "universal" to qualify as a law; if it applies to one

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157. U.S. CONST. art. I, § 8, cl. 1. See also The Preamble to the United States Constitution, which declares that a purpose of the union of the states is to "promote the general welfare."

158. *Id.* art. I, § 8, cl. 4.

159. *Id.*

160. Blackstone's *Commentaries*, widely read by educated members of the revolutionary period, "undoubtedly influenced American thinking" about legislative power. CHAFEE, *supra* note 66, at 95–96; see also CORWIN, LIBERTY AGAINST GOVERNMENT, *supra* note 138, at 54.

161. John Locke's writings on natural rights and the social contract were cited in "pamphlet after pamphlet" by American writers of the revolutionary generation. BAILYN, *supra* note 61, at 27. Locke was studied by James Wilson and was quoted in influential reports written by the Pennsylvania Council of Censors and the Vermont Council of Censors. PENNSYLVANIA REPORT, *supra* note 132, at 37; VERMONT REPORT, *supra* note 72, at 63.

person alone, it “has no relation to the community in general” and is therefore “rather a sentence than a law.”<sup>162</sup> Locke agreed, arguing that, even to be considered a law, a rule must be “common to every one of that society”;<sup>163</sup> the legislature therefore was constrained to promulgate “one rule for rich and poor, for the favourite at court, and the country man at plough.”<sup>164</sup>

Modern philosophers of law have adopted and reasserted this basic principle that the definition of law simply does not include orders to individuals. Lon Fuller describes generality in law as a precondition to the existence of a legal system. In *The Morality of Law*, in order to elucidate the features of legality, Fuller describes the ways in which an attempt at lawmaking may fail.<sup>165</sup> Fuller argues that the first and most obvious failure of a legal system is the inability to promulgate general rules of conduct. Because it fails to provide notice to guide future conduct and fails to uphold the expectations of those who are bound by it, even a perfectly fair and equitable system of adjudication cannot properly be called a legal system in the absence of generally applicable laws. As a result, Fuller calls the generality of law the “first desideratum of a system for subjecting human conduct to the governance of rules.”<sup>166</sup>

Moreover, scholars assessing the normative implications of special legislation conclude that they are immoral and lead to a variety of societal harms. Cicero described laws that single out an individual for special treatment, even laws that confer special benefits, as “unjust.”<sup>167</sup> David Hume<sup>168</sup> was particularly critical of laws that exempted the powerful of society from the general applicability of the laws.<sup>169</sup>

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162. 1 BLACKSTONE, *supra* note 145, at 33.

163. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT § 22 (C.B. Macpherson ed., Hackett Publ’g Co. 1980).

164. *Id.* § 142.

165. FULLER, *supra* note 2, at 46–48.

166. *Id.* at 46.

167. CICERO, *supra* note 3, at 173.

168. David Hume’s writings strongly influenced, among others, Wilson, Madison, and Hamilton. JOSEPH J. ELLIS, FOUNDING BROTHERS: THE REVOLUTIONARY GENERATION 60–61 (2000) (Hamilton); Douglas Adair, “*That Politics May Be Reduced to a Science*”: David Hume, James Madison, and *The Tenth Federalist*, 20 HUNTINGTON LIBR. Q. 343, 346–49 (1957) (Madison); William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901, 902–04 (2008) (Wilson).

169. DAVID HUME, *Of the Rise and Progress of the Arts and Sciences*, in POLITICAL ESSAYS 58, 62–63 (Knud Haakonssen ed., 1994).

Algernon Sidney<sup>170</sup> went even further, arguing that the liberty of England's Saxon ancestors was predicated on the requirement that legislators could not exempt themselves from the generally applicable laws.<sup>171</sup>

Ultimately, the consistency with which special laws have been condemned, and the repeated articulation of a value of legislative generality by philosophers of law, is no doubt closely linked to the harms associated with special legislation and the normative benefits that will result from its diminution. The value of legislative generality is normatively attractive because the power to enact special laws is closely linked with corruption,<sup>172</sup> the unequal treatment of similar cases,<sup>173</sup> the failure to reform broken statutory schemes,<sup>174</sup> encroachment on the judicial function,<sup>175</sup> and a host of other harms.

To take just one example of a harm closely associated with special laws, special legislation long has been linked to quid pro quo corruption. In the notorious "Abscam" scandal, a number of Congressmen were implicated in a scheme to introduce special legislation in exchange for bribes.<sup>176</sup> In the Abscam investigation, FBI agents claimed to represent two wealthy Arab sheiks who desired to immigrate to the United States.<sup>177</sup> The agents met a number of federal officials, including United States Congressmen, who promised to introduce private immigration

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170. Algernon Sidney, a republican theorist and opponent of monarchical influence in England, was widely read by the Framers and was quoted by Joseph Story in his *Commentaries on the Constitution*. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 36-37 (Fred B. Rothman & Co. 1991). Sidney's writings also helped the colonists, inexperienced at nation-building, ground their increasingly radical politics in political philosophy. BAILYN, *supra* note 61, at 34-35, 53-54.

171. ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 569-72 (Thomas G. West ed., LibertyClassics 1990).

172. CHARLES CHAUNCEY BINNEY, RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS 6 (Philadelphia, Kay & Brother 1894).

173. See, e.g., Terri's Law, Pub. L. No. 109-3, 119 Stat. 15 (2005).

174. E.g., Priv. L. No. 111-2, 124 Stat. 4525 (2010); Priv. L. No. 111-1, 124 Stat. 4523 (2010); Priv. L. No. 108-6, 118 Stat. 4032 (2004); Priv. L. No. 108-4, 118 Stat. 4028 (2004); Priv. L. No. 108-3, 118 Stat. 4026 (2004); Priv. L. No. 108-1, 118 Stat. 4023 (2004); Priv. L. No. 107-5, 116 Stat. 3123 (2002); Priv. L. No. 107-1, 115 Stat. 2471 (2001) (all granting exemptions from the Immigration and Nationality Act).

175. E.g., Mt. Soledad Veterans Memorial Preservation Act, Pub. L. No. 109-272, § 2, 120 Stat. 770, 770-72 (2006).

176. Bennett L. Gershman, *Abscam, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1571-72 (1982).

177. *Id.*

legislation to allow the fictitious sheiks to immigrate to the United States without having to comply with the generally applicable immigration laws.<sup>178</sup> In all, twenty-five people, including one United States Senator and six United States Representatives, were indicted for corruption related to the Abscam investigation.<sup>179</sup> The bribery at issue in the Abscam scandal was only possible because of the power of the legislature to enact special laws. Because Congress is permitted to admit individual aliens in derogation of the standing immigration laws, a market exists for individuals to influence—and in this case bribe—members of Congress to introduce bills to provide them with special legislative treatment. A value of legislative generality that prohibits the legislature from providing special laws would eliminate this type of bribery by eliminating the supply of special legislative favors that can be bought.

Of course, whether a value of special legislation is normatively attractive depends on whether it can be applied in a way that eliminates harmful special legislation without creating other undesired results. The value of legislative generality articulated by jurists and philosophers of law leaves open a few key questions: Must a law apply to everyone to be sufficiently general? Should a legislature be prohibited from enacting special laws if only the effect, but not the intent, is to confer special treatment? Should there be any exceptions for curative laws or emergency situations? The scope of this Article precludes a thorough evaluation of normative arguments about the desirability of special legislation in limited circumstances. In future work, I will describe the harms created by special legislation and evaluate the extent to which some special legislation can be justified on normative grounds.

Taken together, the historical, textual, and philosophical arguments outlined in this Part support the conclusion that a value of legislative generality should be recognized as an enforceable constitutional value. Each of these three pillars warrants further elaboration. The textual support and philosophical underpinnings will be addressed in future

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178. *United States v. Myers*, 527 F. Supp. 1206, 1225 (E.D.N.Y. 1981), *aff'd* 692 F.2d 823 (2d Cir. 1982); Gershman, *supra* note 176, at 1572–75.

179. Gershman, *supra* note 176, at 1575; *see also* LEE, *supra* note 27, at 9 (“Abscam, involving payoffs for the sponsorship of private immigration laws, culminated in the expulsion of one Member of the House of Representatives . . .”). Corruption related to private laws has existed in the context of private bills since before the ratification of the Constitution. Pfander & Wardon, *supra* note 99, at 431.

work; the principal subject of this Article, the historical basis for the value of legislative generality, is articulated in Part V, below.

#### V. THE HISTORICAL BASIS FOR A VALUE OF LEGISLATIVE GENERALITY

The Constitution's structure and provisions were informed not only by logic and political philosophy, but also, and perhaps most directly, by the experiences of the revolutionary generation in the years leading up to the framing of the Constitution.<sup>180</sup> A thorough understanding of the revolutionary period, therefore, can inform our understanding of the conditions that gave rise to the Constitution's text and help guide, even if it does not compel, our interpretation of this text. Reviewing the history of this period strongly suggests that the Constitution was designed, in part, to remedy evils associated with special legislation.

Before independence, colonial Americans viewed their legislatures as the protectors of their liberties against abuses by the royal governors and judges, who were representatives of the monarchy and seen to represent the monarchy's interests.<sup>181</sup> The people viewed their state legislatures as the institutional descendants of Parliament,<sup>182</sup> which, since its protracted battle for sovereignty with the British Crown,<sup>183</sup> had been considered the protector of the rights of the people.<sup>184</sup> Indeed, because the people placed so much trust in their legislatures, by the time of the revolution, the notion of "tyranny by the people was theoretically inconceivable."<sup>185</sup> It was only natural then that in the years immediately after the revolution the people of the United States emphasized their

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180. CORWIN, JOHN MARSHALL AND THE CONSTITUTION, *supra* note 138, at 147–50. Although Justice Holmes described the development of the common law when he wrote that "[t]he life of the law has not been logic: it has been experience," the adage applies perhaps with equal force to constitutional law. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Am. Bar Ass'n 2009).

181. BAILYN, *supra* note 61, at 163–64; CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 35; WOOD, *supra* note 66, at 598.

182. CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 36.

183. *Id.* at 28–29. After the Glorious Revolution, the view that Parliament could create as well as implement law gained ascendancy. BAILYN, *supra* note 61, at 201. Through Blackstone's writings, this view was transmitted to the American colonies. CHAFEE, *supra* note 66, at 95–96.

184. BAILYN, *supra* note 61, at 285–86. Of the House of Commons, Thomas Paine wrote that on its "virtue depends the freedom of England." *Id.* (quoting THOMAS PAINE, COMMON SENSE 5 (Peter Eckler Publ'g. 1918)) (internal quotation mark omitted).

185. WOOD, *supra* note 66, at 62.

freedom from monarchical rule by structuring their new state governments to exalt rather than to restrain legislative power.<sup>186</sup> In the spate of constitution-making that occurred after the revolution, the states focused on ensuring that the legislatures represented the will of the people and did not consider the dangers of unchecked democracy.<sup>187</sup> State constitutions elevated the position of their legislatures to the detriment, almost to the exclusion, of their executive and judicial branches.<sup>188</sup> By failing to recognize the potential for abuse by the people, the revolutionary generation laid the institutional foundation for the runaway legislative abuses of the confederation period.<sup>189</sup>

Ultimately, the unbridled legislative power unleashed after the revolution introduced the people of the United States to the dangers of special legislation. After a decade of experiencing the harms precipitated by the power to make special laws, both elite and ordinary members of the revolutionary generation denounced special legislation and articulated a value of legislative generality. Indeed, there was perhaps no factor that more directly motivated the calling of the Philadelphia Convention than the recognition, after this first, long decade of independence, of the evils that result from unchecked legislative power to enact special laws.<sup>190</sup>

#### A. *Special Legislation in Confederation-Era America*

The legislative abuses wrought by the revolutionary generation came largely in the form of special legislation.<sup>191</sup> The new state legislatures, unrestrained by their constitutions or coordinate branches of government, and emboldened by the ideology that the will of the people alone—for the first time unencumbered by Crown or Nobles—was

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186. CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 35–36; see THE FEDERALIST NO. 48, at 309–10 (James Madison) (Isaac Kramnick ed., 1987).

187. THE FEDERALIST NO. 48, *supra* note 186, at 309–10 (James Madison).

188. CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 36–37; see THE FEDERALIST NOS. 48–49, *supra* note 186, at 309–10, 313 (James Madison).

189. See THE FEDERALIST NOS. 48–49, *supra* note 186, at 309–10, 313 (James Madison).

190. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 220–21 (1995); CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 36–37, 62; CORWIN, JOHN MARSHALL AND THE CONSTITUTION, *supra* note 138, at 148–50; CORWIN, LIBERTY AGAINST GOVERNMENT, *supra* note 138, at 70–71.

191. WOOD, *supra* note 66, at 155–56, 191–95, 279, 404; CORWIN, LIBERTY AGAINST GOVERNMENT, *supra* note 138, at 70–71.

sovereign, routinely enacted special laws.<sup>192</sup> These special laws enacted by the revolutionary generation both imposed special detriments and provided special benefits.

### 1. Special Detriment Legislation

The history of the early republic is replete with stories of special detriment legislation. Most well-known are the countless bills of attainder, in which suspected Tories<sup>193</sup> or other social undesirables<sup>194</sup> were singled out by statute and sentenced to death or banishment by their state legislatures without judicial process.<sup>195</sup> The motivation for these attainders varied. In some cases, the legislatures desired to confiscate property.<sup>196</sup> In one case, a tavern keeper was threatened with banishment for allegedly insulting a legislator, a credible threat in that climate of legislative omnipotence.<sup>197</sup> The Virginia Assembly's stated purpose in attaining Josiah Philips and his gang was to avoid "the delays which would attend the proceeding to outlaw the said offenders, according to the usual forms and procedures of the courts of law."<sup>198</sup> Summarizing the mood of Virginia's legislature at the time of the attainder of Philips, Patrick Henry defended the decision: Philips, declared Henry, was not entitled to "beautiful legal ceremonies" because it was well-known that he was "a fugitive murderer and an

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192. *Plaut*, 514 U.S. at 219–21; PENNSYLVANIA REPORT, *supra* note 132, at 40–59; VERMONT REPORT, *supra* note 72, at 60–70; CORWIN, LIBERTY AGAINST GOVERNMENT, *supra* note 138, at 70–71.

193. *Respublica v. Gordon*, 1 U.S. (1 Dall.) 233 (Pa. 1788); An Act for Disposing of Certain Estates, and Banishing Certain Persons, Therein Mentioned, no. 1153 (1782), in 4 THE STATUTES AT LARGE OF SOUTH CAROLINA 516, 516–17 (Thomas Cooper ed., Columbia, A.S. Johnston 1838); CHAFEE, *supra* note 66, at 97; LEVY, *supra* note 61, at 71–72.

194. *E.g.*, An Act to Attaint Josiah Phillips and Others, Unless They Render Themselves to Justice Within a Certain Time, ch. 12 (1778), in 9 STATUTES AT LARGE OF VIRGINIA, *supra* note 68, at 463–64; Trent, *supra* note 61, at 444–54.

195. *See* CHAFEE, *supra* note 66, at 93; WOOD, *supra* note 66, at 279; Comment, *supra* note 66, at 330–31.

196. *E.g.*, An Act In Addition to an Act Intituled "An Act to Confiscate the Estates of Sundry Persons Therein Named," ch. 8 (1779), in 4 LAWS OF NEW HAMPSHIRE, *supra* note 127, at 216, 216–18; CHAFEE, *supra* note 66, at 93; LEVY, *supra* note 61, at 70–71, Trent, *supra* note 61, at 454.

197. WOOD, *supra* note 66, at 367.

198. An Act to Attaint Josiah Phillips and Others, Unless They Render Themselves to Justice Within a Certain Time, ch. 12, in 9 STATUTES AT LARGE OF VIRGINIA, *supra* note 68, at 463–64.

outlaw.”<sup>199</sup> Philips deserved no legal process, Henry argued, because he had been no Socrates.<sup>200</sup>

Bills of attainder were most commonly deployed to punish suspected but unproved Tories.<sup>201</sup> Early during the War of Independence, the State of New York declared that certain named individuals were guilty of having “voluntarily been adherent” to George III and enacted a bill of attainder that forever banished them from the state.<sup>202</sup> Should they later be found anywhere in the state, they were “adjudged and declared guilty of felony” without the benefit of indictment and trial and sentenced to “death as in cases of felony.”<sup>203</sup> New York ultimately attainted nearly 1,000 people during the revolutionary period.<sup>204</sup> Similarly, during those heady days of freedom from colonial rule, the General Assembly of South Carolina confiscated property from, or levied fines on, nearly three hundred supposed, but unproved, Tories.<sup>205</sup> Massachusetts, Pennsylvania, Virginia, and Georgia, too, attainted suspected Tories by the hundreds.<sup>206</sup> By the end of the revolutionary period, each of the newly independent states had enacted bills of attainder.<sup>207</sup>

An air of opportunism surrounded the attainder of suspected Tories; in some cases the states confiscated Tory property for their own use,<sup>208</sup>

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199. *Convention of Virginia*, *supra* note 135, at 140. Thomas Jefferson himself was responsible for writing the bill attainting Philips and shepherding it through the Virginia Assembly. LEVY, *supra* note 61, at 72.

200. *Convention of Virginia*, *supra* note 135, at 140.

201. LEVY, *supra* note 61, at 71–72.

202. An Act for the Forfeiture and Sale of the Estates of Persons Who Have Adhered to the Enemies of this State, and for Declaring the Sovereignty of the People of this State, in Respect to all Property Within the Same, ch. 25 (1779), in 1 LAWS OF THE STATE OF NEW YORK 26, 26–27 (Thomas Greenleaf ed., New York, 1792).

203. *Id.* at 27.

204. LEVY, *supra* note 61, at 71.

205. WOOD, *supra* note 66, at 279.

206. *E.g.*, *Cooper v. Telfair*, 4 U.S. (4 Dall.) 14 (1800); *Republica v. Gordon*, 1 U.S. (1 Dall.) 233 (Pa. 1788); *Commonwealth v. Caton*, 8 Va. (4 Call) 5, 5–6 (1782); *see also* LEVY, *supra* note 61, at 71.

207. CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 72.

208. *E.g.*, An Act to Compel Non-Residents to Return Within a Certain Time or in Default Thereof, That Their Estates Be Confiscated, and for Confiscating the Estate of William Knox, Esq. Formerly Provost Marshal, of the Then Province, Now State of Georgia (1778), in 19 (pt. 2) THE COLONIAL RECORDS OF THE STATE OF GEORGIA, *supra* note 127, at 126, 126–27; An Act to Confiscate the Estates of Sundry Persons Therein Named, ch. 19 (1778), in 4 LAWS OF NEW HAMPSHIRE, *supra* note 127, at 191, 191–93; An Act to Confiscate the Estates of Certain Notorious Conspirators Against the Government and Liberties of the

and in others, they confiscated property in order to transfer it to another private party.<sup>209</sup> Serving the dual interests of protecting Whigs from economic competition and preventing Tories from receiving fair legal representation, New Jersey and Pennsylvania barred Tory lawyers from practicing in their courts.<sup>210</sup> In what may only be viewed as equally unfair play, the loyalist wing of some state legislatures attainted leaders of the rebellion during this period as well.<sup>211</sup>

The revolutionary generation was well aware, too, of the long history of special detriment legislation enacted in Great Britain leading up to and during the colonial period. In the century leading up to the American Revolution, bills of attainder and bills of pains and penalties were common in England.<sup>212</sup> As in America, British special laws were often directed at political undesirables and accompanied by forfeiture of property.<sup>213</sup> One well-known example was the attainder of Thomas Wentworth, the Earl of Strafford. Like the subsequent attainder of Philips in Virginia, Strafford was attainted as an expedient to obviate the normal legal processes.<sup>214</sup> An adviser to Charles I, Strafford fell out of favor with Parliament because of his influence over the King. Parliament charged him with treason and began his trial before the House of Lords; during the trial, it became evident that Strafford had

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Inhabitants of the Late Province, Now State, of Massachusetts Bay, ch. 48 (1778), in 5 ACTS AND RESOLVES OF THE MASSACHUSETTS BAY, *supra* note 127, at 966–67. In many cases, the confiscations were directed at Tories, who also saw their ability to practice their professions curtailed by opportunistic Whig legislatures. LEVY, *supra* note 61, at 71; BAILYN, *supra* note 61, at 302; Trent, *supra* note 61, at 454.

209. PENNSYLVANIA REPORT, *supra* note 132, at 39–40.

210. LEVY, *supra* note 61, at 71.

211. *E.g.*, An Act to Attaint of High Treason the Several Persons Herein After Named if They Do Not Render Themselves to Justice by a Certain Day and for Other Purposes Therein Mentioned (1781), in 1 THE REVOLUTIONARY RECORDS OF THE STATE OF GEORGIA 364, 364–70 (Allen D. Candler ed., Atlanta, Franklin-Turner Co. 1908).

212. *E.g.*, An Act for the Attainder of the Pretended Prince of Wales of High Treason, 1701, 13 & 14 Will. 3, c. 3, in 7 STATUTES OF THE REALM 739 (John Raithby ed., London, 1820); An Act to Attaint Such of the Persons Concerned in the Late Horrid Conspiracy to Assassinate His Majesties Royal Person Who Are Fled from Justice Unless They Render Themselves to Justice and for Continuing Several Others of the Said Conspirators in Custody, 1696–1697, 8 & 9 Will. 3, c. 5, in 7 STATUTES OF THE REALM, *supra*, at 165; An Act for Attainting Thomas Dolman Joseph Bampfield and Thomas Scott of High-Treason if They Render Not Themselves by a Day, 1665, 17 Car. 2, c. 5, in 5 STATUTES OF THE REALM 578 (John Raithby ed., London, 1819); LEVY, *supra* note 61, at 69–70; Comment, *supra* note 66, at 330–31.

213. CHAFEE, *supra* note 66, at 101–17; LEVY, *supra* note 61, at 68.

214. CHAFEE, *supra* note 66, at 109–13.

committed no act that could be called treason. In order to accomplish by statute what it could not accomplish in a court of law, Parliament changed course, instead enacting a bill of attainder and sentencing Strafford to death.<sup>215</sup>

## 2. Special Benefit Legislation

Although statutes levying special detriments, like bills of attainder, are perhaps the best known of the special laws that plagued the new states, they are far from the only examples. During the revolutionary period, states passed all manner of special benefit laws, including laws that provided legal, financial, and political benefits to named individuals or small, known groups.

Among the most common laws providing special legal benefits were laws immunizing named individuals from civil suit,<sup>216</sup> nullifying judgments already rendered against them,<sup>217</sup> providing immunity from criminal prosecution, and granting legislative divorces.<sup>218</sup> Parties to lawsuits, too, called on their state legislatures to intercede on their behalf in private disputes.<sup>219</sup> At the behest of litigating parties, state legislatures enacted measures for the purpose of “setting aside court decisions, for suspending the general law for the benefit of named individuals . . . and even for deciding cases.”<sup>220</sup> The legislatures, having usurped the role of the courts,<sup>221</sup> unabashedly decided the “personal

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215. *Id.* at 112–13.

216. *E.g.*, *Mortimer v. Caldwell*, 1 Kirby 53, 54 (Conn. Super. Ct. 1786).

217. *E.g.*, VERMONT REPORT, *supra* note 72, at 60–70; *see also* Lawrie, *supra* note 129, at 315.

218. *E.g.*, VERMONT REPORT, *supra* note 72, at 60–70; *Caldwell*, 1 Kirby at 54–55.

219. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–21 (1995). The arbitrariness with which the state legislatures rendered judgment on request from private parties calls to mind the abuses of the earliest days of the development of the writ system in England. JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, *HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS* 90 (2009). Although a party could go to the king to seek justice “more quickly than he could expect from the ordinary local courts,” the danger in this rough justice was “the utter lack of control.” *Id.* Indeed, as a result of the expansion of the arbitrary rendering of decrees, “during many decades following 1066 abuse was made of this remedy, abuse which would in the course of time excite a reaction in favor of judicial guarantees.” *Id.*

220. CORWIN, *LIBERTY AGAINST GOVERNMENT*, *supra* note 138, at 70; *Plaut*, 514 U.S. at 219–21; PENNSYLVANIA REPORT, *supra* note 132, at 40.

221. Madison described the legislature as the “vortex” into which all power of the government tends to be drawn. THE FEDERALIST NO. 48, *supra* note 186, at 309 (James Madison).

affairs of their constituents in private law judgments.”<sup>222</sup> Rather than providing extraordinary relief to ensure that justice was done, these special laws interfered with the “known established laws of the land” for the benefit of “private interests.”<sup>223</sup> Often, the judgments rendered decided disputes brought by “one individual or group against another” without regard to the standing laws.<sup>224</sup> The case of *Mortimer v. Caldwell*<sup>225</sup> is illustrative. Caldwell was one of two partners of a recently bankrupt business. After the bankruptcy, Caldwell obtained a special law from the state legislature that exempted him from imprisonment for his inability to pay his debts. Mortimer, a creditor of the bankrupt business, sued Caldwell to recover money owed to him by the defunct partnership.<sup>226</sup> The court held that Caldwell was immune from suit because of the special law protecting him.<sup>227</sup>

Similarly, special laws providing financial benefits were “wide ranging” during the revolutionary period.<sup>228</sup> These special financial benefits included the transfer of public land and funds to private individuals<sup>229</sup> and the legislative appointment to office.<sup>230</sup> Some of the most controversial pieces of abusive special benefit legislation in the period leading up to the framing of the Constitution were special laws that provided monopoly rights to individual natural persons or corporations. The grant of monopoly rights—state conferred exclusive privileges to engage in a particular trade<sup>231</sup>—were resented by Americans long before they rebelled against Great Britain. Indeed, the

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222. WOOD, *supra* note 66, at 156. Although colonial legislatures, too, decided private rights, as did Parliament before them, the revolution “intensified legislative domination of the other parts of the government.” *Id.* at 155.

223. *Plaut*, 514 U.S. at 220–21 (quoting Address of the Council of Censors (Feb. 14, 1786), in VERMONT STATE PAPERS 531, 540 (William Slade ed., 1823)).

224. WOOD, *supra* note 66, at 154–55. Extraordinary legal protections were also conferred on members of favored groups: as late as 1784, New Hampshire ratified a constitution that provided for the equal protection under the law for Christians only. N.H. CONST. of 1784, pt. I, art. VI.

225. *Mortimer v. Caldwell*, 1 Kirby 53 (Conn. Super. Ct. 1786).

226. *Id.* at 53–54.

227. *Id.* at 55–56.

228. WOOD, *supra* note 66, at 191.

229. *Id.*

230. 2 FARRAND, *supra* note 1, at 314–15.

231. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL’Y 983, 984 (2013).

practice of legislatively conferring “monopolies was a direct cause of the American Revolution.”<sup>232</sup>

In addition to legislation conferring special financial and legal benefits, the economic and political turmoil during the war years led some powerful and influential statesmen to advocate laws that would confer special political benefits.<sup>233</sup> At the extreme, “a cabal of the officers of the army” pushed for Congress to appoint George Washington to the position of King.<sup>234</sup> Others, believing that republicanism could be restored once the political and economic crises passed, agitated for the legislature to appoint a temporary Dictator on the Roman model.<sup>235</sup>

Given Americans’ recent experiences under British rule, talk of creating an undemocratic political hierarchy that lodged power in a small, known group must have seemed no idle threat. Before independence, royal governors were entitled to reward loyal colonists with land and pensions.<sup>236</sup> Most colonists bristled under this regime of “special favors and monopolies.”<sup>237</sup> They viewed the royal procurement of loyalty by exercising the “power of patronage and preferment”<sup>238</sup> as akin to the system of personal dependence that plagued the mother country. They saw not just maladministration but a sinister design in the elevation of sycophants and flatterers to the detriment of men of virtue and talent.<sup>239</sup> The royal governors offered colonists “opportunities for profits through the dispensing of government contracts and public money, thereby buying their support.”<sup>240</sup> The people saw the creation of favored and disfavored citizens, and privileges based on personal relationships, as the foreshadowing of an English design to create an

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232. *Id.* at 1007–08.

233. LOUISE BURNHAM DUNBAR, *A STUDY OF “MONARCHICAL” TENDENCIES IN THE UNITED STATES FROM 1776 TO 1801*, at 80 (Johnson Reprint Corp. 1970).

234. *Id.* at 40–46 (quoting Thomas Jefferson, Notes on Fifth Volume of Marshall’s *Life of Washington*, in 9 *THE WRITINGS OF THOMAS JEFFERSON* 262, 262 n.1 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1898)) (internal quotation mark omitted).

235. Letter from Philip Schuyler to Alexander Hamilton (Sept. 10, 1780), in 2 *THE PAPERS OF ALEXANDER HAMILTON* 425, 425 (Harold C. Syrett & Jacob E. Cooke eds., 1961).

236. WOOD, *supra* note 66, at 78–82.

237. Nourse & Maguire, *supra* note 19, at 963.

238. WOOD, *supra* note 66, at 145.

239. BAILY, *supra* note 61, at 130; WOOD, *supra* note 66, at 35, 78–79.

240. WOOD, *supra* note 66, at 146, 157; BAILY, *supra* note 61, at 109.

American aristocracy.<sup>241</sup> And indeed, to the vexation of the colonists, in the years leading up to the revolution, Parliament seriously considered establishing an American aristocracy to foster loyalty in the colonies.<sup>242</sup>

In sum, their experiences during the late colonial and revolutionary periods, along with well-known British history, provided the framers, as they met in Philadelphia to draft the Constitution, ample examples of evils resulting from legislative power to enact special legislation. They had witnessed populist fervor threaten personal security, property rights, and political equality. They watched as their legislatures scapegoated and condemned individuals who were neither formally accused nor tried for political offenses. They saw special interests take control of willing representatives and push private agendas through state legislatures at the expense of the public interest and in derogation of the very rights for which they purportedly had fought the British. They saw bills of attainder replicated by the thousands in their seats of liberty and, perhaps worse, directed at middling merchants rather than generals and ministers of state. They saw that legal and political privilege insinuated itself into society, not by force, but rather by flattery, favors, and self-interest; and this privilege was perpetuated by enshrining special treatment for adherents of particular political beliefs. Opportunistic confiscations of property filled state coffers, and barriers to competition protected the well-connected. The revolutionary generation had subjected their courts to oversight by the popular will, unbounded by logic or reason. It was in this environment that they realized, perhaps for the first time, that tyranny of the majority was not only possible but actual; and although they were still in the process of articulating a workable theory of judicial review,<sup>243</sup> they surely understood by 1787 that limitations on the legislature, to create a space safe from democracy, were a necessary component of a stable and just society.<sup>244</sup> Indeed, by the time they arrived in Philadelphia to frame the new national government, they had in mind the object to put an end to laws that singled out individuals for special treatment,<sup>245</sup> including both special benefit and special detriment legislation.

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241. WOOD, *supra* note 66, at 111–12.

242. BAILYN, *supra* note 61, at 278–79; WOOD, *supra* note 66, at 111–12.

243. CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 72–77.

244. WOOD, *supra* note 66, at 456.

245. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995); CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 36–37, 62; CORWIN, JOHN MARSHALL AND THE

*B. Revolutionary-Era Americans Affirmed a Commitment to Legislative Generality.*

By the end of the 1780s, the lessons learned from a decade of freedom had altered the mood of the nation and impressed themselves on the minds of the framers of the Constitution. Their aversion to monarchy was tempered by a fear of unrestrained democracy. As James Wilson succinctly summarized the lessons of the confederation period, “Is there no danger of a Legislative despotism? Theory & practice both proclaim it.”<sup>246</sup> Even democratically inclined anti-federalists concluded that the injustices of the years since independence were borne of an “excess of democracy” rather than from imperial design.<sup>247</sup> Among the social ills that resulted from the tyranny of the majority, foremost was special legislation; indeed, the recognition of the evils of special legislation prompted, in no small part, the convocation of the Philadelphia Convention.<sup>248</sup> It is not surprising, then, that when debating, drafting, and advocating for the ratification of the Constitution, the members of the generation that framed the Constitution affirmatively articulated a value of legislative generality and roundly rejected special legislation.

1. The Revolutionary Generation Affirmatively Articulated a Value of Legislative Generality.

James Wilson, among the most influential members of the Philadelphia Convention, and undoubtedly the most learned in the history and theory of government,<sup>249</sup> articulated a strong theoretical defense of legislative generality. In his highly regarded *Lectures on Law*, Wilson explained that “[l]aw is called a rule, in order to distinguish it from a . . . particular order.”<sup>250</sup> The element of “uniformity,” he

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CONSTITUTION, *supra* note 138, at 148–50; CORWIN, LIBERTY AGAINST GOVERNMENT, *supra* note 138, at 70–71.

246. 1 FARRAND, *supra* note 1, at 254.

247. *E.g., id.* at 48 (Gerry); THE FEDERALIST NOS. 6, 15, *supra* note 186, at 106, 145–46 (Alexander Hamilton); *see also* WOOD, *supra* note 66, at 513; Keith Werhan, *Popular Constitutionalism, Ancient and Modern*, 46 U.C. DAVIS L. REV. 65, 84–85 (2012).

248. *Plaut*, 514 U.S. at 221; CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 36–37, 62; CORWIN, JOHN MARSHALL AND THE CONSTITUTION, *supra* note 138, at 148–50; CORWIN, LIBERTY AGAINST GOVERNMENT, *supra* note 138, at 70–71.

249. *See* Ewald, *supra* note 168, at 1002–09.

250. JAMES WILSON, *Of the General Principles of Law and Obligation*, in LECTURES ON LAW, PART I, in 1 COLLECTED WORKS OF JAMES WILSON 464, 468 (Kermit L. Hall &

argued, is essential to the definition of a law.<sup>251</sup> Wilson described approvingly the ancient Saxon and Roman governments, and the modern Prussian government, as positive role models of legislative generality. Perhaps idealizing ancient Saxon governance, Wilson recalled it as “uniform” in its “laws and liberties.”<sup>252</sup> Describing the “science” of legislation in Rome, Wilson asserted that the object of the Roman legislative process was to ensure that there was “no regulation, which might produce a partial advantage” to a law’s sponsor or his friends or family.<sup>253</sup> By contrast, Wilson argued, for any member of society to be “privileged from the awards of equal justice, is a disgrace, instead of being an honour.”<sup>254</sup> Similarly, Wilson praised the idea, which he attributed to Frederick of Prussia,<sup>255</sup> that “the poorest peasant is a man, as well as the king himself”; as a result, all are equal under the law.<sup>256</sup> Wilson distinguished generality in law from the privileges that inhered in the recently rejected British system of government: in America, unlike in England, the “arcana of privilege, and the arcana of prerogative, are equally unknown.”<sup>257</sup>

Wilson’s concept of legislative generality, that all are equally subject to the laws of society, was a basic premise on which he rested his defense of the structure of the new government of the United States. Wilson defended the power of Congress against the charge of despotism by asserting that the legislature may authorize penalties only “by general rules, and against all the members of the society indiscriminately.”<sup>258</sup> In other words, the fact that all members in society, including the legislators themselves, must comply with the laws they enact, ensures that the legislature will act impartially.<sup>259</sup>

Wilson’s theoretical defense of legislative generality was reflected in

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Mark David Hall eds., 2007).

251. *Id.* at 464–65.

252. JAMES WILSON, *Of the Executive Department*, in LECTURES ON LAW, PART II, in 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 250, at 873, 878.

253. JAMES WILSON, *Of the Constitutions of the United States and of Pennsylvania—Of the Legislative Department*, in LECTURES ON LAW, PART II, *supra* note 252, at 829, 864.

254. JAMES WILSON, *Of the Nature of Courts*, in LECTURES ON LAW, PART II, *supra* note 252, at 943, 947.

255. *Cf.* LOCKE, *supra* note 163, § 142.

256. WILSON, *supra* note 254, at 948.

257. WILSON, *supra* note 253, at 853.

258. JAMES WILSON, *The Subject Continued. Of Juries*, in LECTURES ON LAW, PART II, *supra* note 252, at 954, 960.

259. *Id.*; *see also* SIDNEY, *supra* note 171, at 569–72.

the much-cited report of the Pennsylvania Council of Censors, which was charged with assessing the Pennsylvania Assembly's compliance with its constitution.<sup>260</sup> In language impossible to misunderstand, the Censors reproached the Assembly for enacting private laws in the years following independence. The Censors proclaimed that the legislative power simply did not extend to deciding the rights of individual subjects in ways that deviated from the "promulgated standing laws."<sup>261</sup> Indeed, because the very definition of "law" included only "a rule prescribed or made beforehand,"<sup>262</sup> special legislation did not fall within the definition of the word. The Assembly violated this principle, the Censors wrote, by "extending their deliberations to the cases of individuals, who have been taught to consider an application to the legislature, as a shorter and more certain mode of obtaining relief . . . than the usual process of law."<sup>263</sup> The Censors reproached the Assembly for enacting laws that had the effect of "amend[ing] titles to land," "dissolving . . . the bonds of marriage," attainting suspects of "notorious frauds and other enormous crimes," granting state benefits to citizens,<sup>264</sup> and deciding pending legal disputes.<sup>265</sup>

Other prominent Americans, too, reaffirmed the criticisms of special legislation identified by the Censors. Focusing on one type of special law identified by the Censors, Hamilton argued that the legislature has no power to revise court judgments. Reacting to the pervasiveness of legislative interference in judicial business during the revolutionary era, Hamilton asserted that the "legislature, without exceeding its province, cannot reverse a determination once made in a particular case."<sup>266</sup> And in rare agreement with Hamilton, Jefferson criticized the newly independent Virginia legislature for "decid[ing] rights which should

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260. The Pennsylvania Report was described at length in *The Federalist No. 48* by Madison. Madison relied on the Report's finding that "cases belonging to the judiciary department [are] frequently drawn within legislative cognizance and determination" as evidence of legislative abuse of power. THE FEDERALIST NO. 48, *supra* note 186, at 311–12 (James Madison).

261. PENNSYLVANIA REPORT, *supra* note 132, at 37 (quoting LOCKE, *supra* note 163, § 136).

262. *Id.* at 38.

263. *Id.*

264. *Id.* at 41, 46–48, 57, 59.

265. *Id.* at 40.

266. THE FEDERALIST NO. 81, *supra* note 186, at 452 (Alexander Hamilton); CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 46.

have been left to judiciary controversy.”<sup>267</sup> These notable statements reflect the broader awareness overtaking the revolutionary generation that the legislature simply did not have the power “to suspend, supercede, or render void by extemporary decrees . . . established standing laws,” even if these special laws were enacted in accordance with formal lawmaking requirements.<sup>268</sup>

## 2. The Revolutionary Generation Rejected Special Benefit Legislation.

After suffering through years of state grants of special privileges, by the end of the confederation period Americans were becoming convinced that “none were entitled to any rights, but such as were common to all.”<sup>269</sup> Granting “peculiar privileges” either to individuals or to “any body of men” was considered “repugnant to the spirit of the American republics.”<sup>270</sup> As a result, popular sentiment rejected the power assumed by state legislatures during the revolutionary era to bestow special benefits. Among the special benefit laws criticized by the revolutionary generation, three types stand out: first, special laws granting exclusive legal and financial privileges; second, special laws appointing officers to positions of public trust; and third, special laws recognizing and confirming the elevation of some members of society over others.

First, the highly influential Vermont Council of Censors, which, like its analog in Pennsylvania, catalogued its legislature’s violations of its constitution, sharply criticized the Vermont legislature for granting special legal privileges during the revolutionary period. Among other abuses, the Censors chided the legislature for granting divorces to named parties and declaring them eligible to remarry, granting named individuals immunity from civil suit or nullifying judgments already

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267. THOMAS JEFFERSON, *Query XIII*, in NOTES ON THE STATE OF VIRGINIA 176, 196 (London, John Stockdale 1787); see also *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–24 (1995); THE FEDERALIST NO. 48, *supra* note 186, at 311 (James Madison).

268. WOOD, *supra* note 66, at 404–05 (emphasis omitted) (quoting *Letter from a Gentleman in the Country, to His Friend in This Town*, INDEP. CHRON. & UNIVERSAL ADVERTISER, Jan. 29. 1778, at 1); BAILYN, *supra* note 61, at 68–69.

269. WOOD, *supra* note 66, at 214 (quoting 2 DAVID RAMSAY, HISTORY OF THE UNITED STATES 168 (1816)) (internal quotation marks omitted); VERMONT REPORT, *supra* note 72, at 61.

270. WOOD, *supra* note 66, at 401 (quoting PENNSYLVANIA DEBATES AND PROCEEDINGS, *supra* note 136, at 77) (internal quotation mark omitted); 12 THE PAPERS OF JAMES MADISON, *supra* note 137, at 155–56.

rendered against them, and even conferring criminal immunity on two individuals responsible for leading a riot.<sup>271</sup> The Censors expressed bewilderment at the presumptuousness of the legislature's decision to grant special exemptions from the standing laws. The Censors asked, rhetorically, why a named individual "should be made an exception to the general rule" and "whence the authority was derived, that, in this instance, altered or dispensed with the operation of the law."<sup>272</sup> With equal fervor, the Pennsylvania Censors denounced the Pennsylvania Assembly for awarding public benefits to individuals on any basis other than a neutral assessment of services rendered to the commonwealth.<sup>273</sup> Similarly, as the state constitutional delegations considered the ratification of the Constitution, members reiterated the conviction that the legislature was not permitted to grant exclusive legal or financial privileges to individuals. In the Virginia Ratifying Convention, delegates expressed concern that the new Constitution might be read to permit a European-style economic regime, in which favored merchants were given exclusive privileges at the expense of others.<sup>274</sup> They opposed any reading of the Constitution that allowed Congress to grant these "exclusive privileges and immunities" either on federal lands or in the states.<sup>275</sup>

A focal point of concern was the practice of granting exclusive rights to certain, named individuals to engage in a particular trade—a practice known as granting a monopoly.<sup>276</sup> Common in Britain during the sixteenth century, this practice famously was criticized by Lord Coke in the *Case of Monopolies*, in which Coke opined that monopolies were opposed to the common law and against the Magna Charta.<sup>277</sup> Because the American colonies were settled when Coke was most influential in England, his opinions, including his opinion that monopolies were unlawful, maintained longevity long after his fame declined in Britain

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271. VERMONT REPORT, *supra* note 72, at 60–70.

272. *Id.* at 61.

273. PENNSYLVANIA REPORT, *supra* note 132, at 38.

274. *Convention of Virginia*, *supra* note 135, at 291, 431.

275. *Id.*

276. Calabresi & Leibowitz, *supra* note 231, at 1007–08.

277. *Case of Monopolies*, (1602) 77 Eng. Rep. 1260 (K.B.) 1262–63; 11 Co. Rep. 84b, 85b–86a; Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 604–08 (2009).

itself.<sup>278</sup> In line with, and perhaps because of, Coke's opinion in the *Case of Monopolies*, the confederation period saw popular sentiment reject the power of the legislature "to give monopolies of legal privilege—to bestow unequal portions of our common inheritance on favourites."<sup>279</sup> The granting of monopolies, along with other "unequal or partial distribution of public benefits," was attacked as tantamount to the "establishment of an aristocracy."<sup>280</sup> Writers bemoaned the compromised ideals of the new nation, which had been "sacrificed constantly to local views" and "lost in the scramble for private advantages and local favors."<sup>281</sup> No doubt it was this sentiment that led the people of Massachusetts to adopt a broad prohibition on special benefits in its Constitution of 1780. Authored by John Adams, the Massachusetts Constitution provided that "[n]o man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public."<sup>282</sup> Expressing the same sentiment, the Virginia Declaration of Rights of 1776 declared that "no man, or set of men, are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services."<sup>283</sup>

Second, the revolutionary generation rejected the power of the legislature to appoint officers to positions of public trust. During the colonial period, the doling out of offices was the hated prerogative of the Crown.<sup>284</sup> However, once the colonies became independent states dominated by their legislative branches, the appointment of favorites to offices of trust became the hallmark of the state legislatures. The reaction was predictable: after the experience of the 1780s, Federalists argued credibly that the real danger to liberty came not from an

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278. Gedicks, *supra* note 277, at 614; *see also* CORWIN, DOCTRINE OF JUDICIAL REVIEW, *supra* note 138, at 28–29; WOOD, *supra* note 66, at 264.

279. WOOD, *supra* note 66, at 402 (quoting PENNSYLVANIA DEBATES AND PROCEEDINGS, *supra* note 136, at 130) (internal quotation marks omitted); Smith, *supra* note 139, at 304–05 (noting that Coke believed that all monopolies were rendered unlawful by the Magna Charta).

280. WOOD, *supra* note 66, at 401 (quoting *Strictures on the Bank, and on a Paper Currency*, PA. PACKET, Mar. 31, 1785, at 3).

281. *Id.* at 501 (quoting 1 FARRAND, *supra* note 1, at 552) (internal quotation marks omitted).

282. MASS. CONST. of 1780, pt. I, art. VI.

283. VA. CONST. of 1776, § 4.

284. WOOD, *supra* note 66, at 111–12.

aristocracy, but from the ability of the legislature to hand out appointments to those eager to wrest private gain from the public fisc.<sup>285</sup> By the time of the ratification of the Constitution, the corruption caused by legislative appointments was widely acknowledged.<sup>286</sup> In the Philadelphia Convention, the state legislatures' abuse of the appointments process was cited as "proof" that the "Legislature was an improper body for appointments."<sup>287</sup> Wilson affirmed that "he had always thought the appointment of the Executives by the Legislative department wrong."<sup>288</sup> Madison articulated the theoretical defense of divesting the legislature of its historical power of appointment of officers: only by denying the legislature the power to appoint officers would those officers execute their positions free from the corruption that comes from dependence on the legislative branch.<sup>289</sup> Wilson responded that the "proper cure . . . for corruption in the Legislature was to take from it the power of appointing to offices."<sup>290</sup>

Third, the American rejection of special benefit laws was intimately connected with their perception that special privileges were the first step toward establishing a hereditary aristocracy.<sup>291</sup> As a result, throughout the ratification process, the revolutionary generation asserted that the legislature had no power to create special legal privileges for itself that distinguished it from the population at large. John Adams, an early critic of unchecked legislative power, viewed special legislation as the method by which the legislature established itself as an aristocracy.<sup>292</sup> Anticipating Wilson's later defense of the United States Constitution, Adams argued that an unchecked legislature will make "one little distinction after another" between its own prerogatives and the rights of the common people.<sup>293</sup> An "unchecked" assembly, argued Adams,

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285. *Id.* at 551.

286. *Id.* at 145.

287. 2 FARRAND, *supra* note 1, at 314–15.

288. *Id.* at 231.

289. *Id.* at 34.

290. 1 *id.* at 387.

291. References to the prevention or elimination of an American aristocracy abound during the revolutionary era. See, e.g., *id.* at 83, 402–03, 474, 544–45; 2 *id.* at 207, 530; *The Debates in the Convention of the State of New York on the Adoption of the Federal Constitution* [hereinafter *Convention of New York*], in 2 ELLIOT'S DEBATES, *supra* note 138, at 205, 277.

292. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 379–81 (London, John Stockdale 1794).

293. *Id.* at 379.

would “exempt itself from the burdens it laid on its constituents, and pass and execute laws for its own benefit.”<sup>294</sup> Although the special privileges will start small, each inequality introduced by the legislature will lead to greater usurpations, eventually allowing the state legislatures to subvert democracy entirely.<sup>295</sup> Similarly, in the Virginia Ratifying Convention, George Nicholas argued that the proposed Constitution permitted the legislature to “pass no law but what will equally affect their own persons, their families, and property.”<sup>296</sup>

The revolutionary era’s distrust of laws that smacked of aristocracy is best exemplified by the popular reaction to the Society of the Cincinnati, a fraternal order established by former Revolutionary War officers.<sup>297</sup> Membership in the Society was limited to former Continental Army officers and their descendants; other than honorary members, no one could ever be a member of the Society except the officer himself and either his “eldest son or other heir at law.”<sup>298</sup> Reaction to the establishment of the Society was swift and ferocious.<sup>299</sup> Americans saw the creation of the Cincinnati as an attempt by the officers to establish a “hereditary Military Nobility.”<sup>300</sup> Despite the fact that the organization was private in nature, and not sanctioned by the state, Americans were so sensitive even to the specter of the establishment of an American aristocracy that they insisted that the Society was “against the Confederation; against the letter of some of our constitutions; against the spirit of them all.”<sup>301</sup> Overwhelming popular opposition to the Cincinnati led the well-respected Washington to demand that the Society eliminate the hereditary character of the organization’s membership.<sup>302</sup>

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294. BAILYN, *supra* note 61, at 288–89.

295. 1 ADAMS, *supra* note 292, at 379–81.

296. *Convention of Virginia*, *supra* note 135, 18.

297. WOOD, *supra* note 66, at 399–400.

298. Larson, *supra* note 122, at 1387–88.

299. WOOD, *supra* note 66, at 399–400.

300. *Id.* at 400 (quoting Letter from Samuel Adams to Elbridge Gerry (Apr. 23, 1784), in 4 THE WRITINGS OF SAMUEL ADAMS, 1778–1802, at 300, 301 (Harry Alonzo Cushing ed., 1908)).

301. Letter from Thomas Jefferson to George Washington (Apr. 16, 1784), in 7 THE PAPERS OF THOMAS JEFFERSON 105, 106 (Julian P. Boyd et al. eds., 1953); Larson, *supra* note 122, at 1388–89, 1393; *see* VA. CONST. of 1776, § 4.

302. Larson, *supra* note 122, at 1397–99. As Professor Larson explains, although the Cincinnati failed to rescind formally the hereditary character of the Society because the proposed amendment was not ratified by the necessary number of State chapters, opposition

The strong opposition to privileges established by law did not end with the dustup over the Cincinnati; the delegates to the Philadelphia Convention agreed, without dissent, to prohibit both the states and the federal government from granting any titles of nobility.<sup>303</sup> Through the addition of the Appointments Clause, they also affirmed that Congress could not itself exercise the power of appointment that was so abused by the state legislatures during the confederation period.<sup>304</sup> In New York's Constitutional Convention, a motion was made to explicitly prevent Congress from having the power "to grant monopolies, or erect any company with exclusive advantages of commerce."<sup>305</sup> And the newly constituted House of Representatives took the restriction on titles of nobility so seriously, if not literally, that it "formally & unanimously condemned" a suggestion to address President Washington as "Excellency" or even "Esquire."<sup>306</sup> Madison, although incredulous that merely ascribing a European-style title to the new President would precipitate an end to republicanism, agreed that titles "are not very reconcilable with the nature of our government, or the genius of the people";<sup>307</sup> this sentiment was widely shared by the end of the 1780s.<sup>308</sup>

### 3. The Revolutionary Generation Rejected Special Detriment Legislation.

The generation of the framing of the Constitution denounced special detriment legislation with equal vigor. In recalling the attainder of Philips, Edmund Randolph called it "shocking," declaring that he would sooner abandon his beloved home rather than see Virginia permit a repetition of such an "arbitrary deprivation of life."<sup>309</sup> Speaking of New York's attainder of Loyalists during the revolution, John Jay stated that "New York is disgraced by injustice too palpable to admit even of palliation."<sup>310</sup> In sharp contrast with the zeal with which state

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faded away after Washington denounced the hereditary component and the general meeting of the Society proposed eliminating the hereditary element. *Id.*

303. See 2 FARRAND, *supra* note 1, at 177, 183.

304. U.S. CONST. art. II, § 2, cl. 2.

305. *Convention of New York*, *supra* note 291, at 407.

306. Letter from James Madison to Thomas Jefferson (May 9, 1789), in 12 THE PAPERS OF JAMES MADISON, *supra* note 137, at 142, 143.

307. Title for the President, *supra* note 137, at 155.

308. DUNBAR, *supra* note 233, at 80–81.

309. *Convention of Virginia*, *supra* note 135, at 66–67.

310. CHAFEE, *supra* note 66, at 93.

legislatures attainted suspected Tories during the revolution, the members of the Philadelphia Convention accepted the addition of the Bill of Attainder Clauses without debate.<sup>311</sup> Indeed, by the time of the ratification of the federal Constitution, several states already had banned bills of attainder.<sup>312</sup>

So, too, did the revolutionary generation come to regret the confiscations of property that were so rampant during the confederation period. Citing Blackstone, Hamilton wrote that the confiscation of property by the legislature is a “gross and notorious . . . act of despotism,” tantamount to tyranny.<sup>313</sup> The Pennsylvania Censors reflected the mood of the waning confederation years when it denounced its legislature for confiscating property of the Commonwealth’s inhabitants.<sup>314</sup> Not surprisingly, by the time of the ratification of the Constitution, a number of states specifically protected property in their Constitutions from confiscation without judicial process.<sup>315</sup>

Putting this widespread sentiment into theoretical terms, Wilson explained why the legislature lacks the power to enact laws that strip privileges from individually identified people. As opposed to generally applicable laws, which may “be safely trusted to the representatives of the community,” laws that purport to act on individuals must be restrained in order to avoid injustice.<sup>316</sup> If a corporate charter, public contract, or a citizen’s naturalization may be repealed by legislative act, Wilson argued, the legislature will manufacture any pretense, however specious, to harm individuals or known groups that run afoul of the majority will.<sup>317</sup> In other words, because the majority is bound by a generally applicable law, majoritarianism ensures that generally applicable laws will be just. By contrast, because the majority can agree to single out a single person for negative treatment, special laws are

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311. 2 FARRAND, *supra* note 1, at 375–76; CHAFEE, *supra* note 66, at 95.

312. CHAFEE, *supra* note 66, at 94–95; WOOD, *supra* note 66, at 436–37.

313. THE FEDERALIST NO. 84, *supra* note 186, at 474–75 (Alexander Hamilton) (quoting 1 BLACKSTONE, *supra* note 145, at 101).

314. PENNSYLVANIA REPORT, *supra* note 132, at 39–40.

315. MASS. CONST. of 1780, pt. I, art. X; N.H. CONST. of 1784, pt. I, art. XII; PA. CONST. of 1776, art. VIII; VT. CONST. of 1777, ch. I, art. IX; VA. CONST. of 1776, § 6.

316. JAMES WILSON, *Considerations on the Bank of North America 1785*, in 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 250, at 60, 71.

317. *Id.* at 71–72.

prohibited because majoritarianism does not restrain the evils of special legislation.

In sum, the history of the period leading up to the framing of the Constitution demonstrates that special legislation was a primary concern facing the revolutionary generation. In the early years after independence, populist state legislatures levied all manner of injustices through special legislation. They enacted bills of attainder, confiscated property, reversed court judgments, revoked corporate charters, and threatened to undermine republicanism in the new states by special grants of prerogative and privilege. After a long decade of these abuses, both common and prominent members of the revolutionary generation reaffirmed a commitment to legislative generality and rejected the power of the legislature to enact special laws. They rejected both special benefit and special detriment legislation, articulated a theoretical defense of legislative generality based on their inherited philosophical tradition, and began to enshrine protections against abusive special legislation in their state constitutions. It was with these shared experiences that the framers gathered in Philadelphia to frame a government.

### *C. Post-Ratification History's Challenge to the Value of Legislative Generality*

As described above, special legislation was a significant source of suffering during the confederation period; and the revolutionary generation, including many of the Constitution's framers, vehemently criticized special legislation as the revolutionary era drew to a close. As a result, it would be only reasonable to suppose that Congress and state legislatures ceased enacting special legislation after the ratification of the Constitution. This was not the case; indeed, legislatures continued to enact special legislation after the ratification of the Constitution, presenting a challenge to the conclusion that the history of the framing period supports a value of legislative generality. The objection based on post-ratification history can be stated as follows: the fact that state legislatures and Congress enacted special legislation after the ratification of the Constitution suggests that, however real were the revolutionary generation's concerns about special legislation, these concerns were not manifested in an enforceable constitutional value.

Although this is a serious objection calling for an exploration of post-ratification history, an examination of the period following ratification supports the conclusion that the value of legislative

generality persisted after the ratification of the Constitution. First, an examination of the special laws enacted by Congress immediately after ratification suggests that its members disapproved of the types of special legislation enacted by the revolutionary-era legislatures. Second, an examination of the special laws that were proposed and rejected during the first years after ratification suggests that special legislation was still disfavored after ratification. Third, doctrinal history suggests that the early Supreme Court enforced the value of legislative generality. Taken together, this post-ratification history supports the conclusion that the value of legislative generality articulated by the framing generation survived the ratification of the Constitution.

1. The Special Laws Enacted By the First Congress Do Not Evince an Acceptance of Special Legislation.

Congress and state legislatures continued to enact special laws after the Constitution's ratification. Indeed, several private bills were enacted by the first Congress;<sup>318</sup> state legislatures increasingly enacted private laws in the years after ratification, enacting more private laws than public laws until well into the nineteenth century.<sup>319</sup> This evidence could suggest that the revolutionary generation's concerns about special legislation were not enshrined in a right enforceable under the new Constitution.<sup>320</sup>

However, a close examination of the special laws enacted by the first Congress does not lead to the conclusion that the framers accepted the constitutionality of special legislation in general. First, the special laws enacted by the first Congress were, for lack of a better word, special. The vast majority, and perhaps all, of these special laws arose out of claims against the United States precipitated by the recently concluded war for independence.<sup>321</sup> The first Congress's special laws guaranteeing

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318. *E.g.*, Act of June 4, 1790, ch. 16, 6 Stat. 2 (“adjusting and satisfying the claims of Frederick William de Steuben”); Act of Sept. 29, 1789, ch. 26, 6 Stat. 1 (allowing “the Baron de Glaubeck the pay of a Captain in the Army of the United States”).

319. Ireland, *supra* note 18, at 271–73.

320. Pfander & Wardon, *supra* note 99, at 399.

321. William C. diGiacomantonio, *Petitioners and Their Grievances: A View from the First Federal Congress*, in *THE HOUSE AND SENATE IN THE 1790S: PETITIONING, LOBBYING, AND INSTITUTIONAL DEVELOPMENT* 29, 49, 53–54 (Kenneth R. Bowling & Donald R. Kennon eds., 2002); *see, e.g.*, Act of Aug. 11, 1790, ch. 45, 6 Stat. 4 (providing relief for “the persons therein mentioned or described”); Act of Aug. 11, 1790, ch. 44, 6 Stat. 3 (providing relief to “disabled soldiers and seamen lately in the service of the United States, and certain

pensions for the wounded,<sup>322</sup> benefits for the widowed<sup>323</sup> and orphaned,<sup>324</sup> and reimbursement for those whose property was commandeered during the war<sup>325</sup> are best seen as “cleanup” laws designed to settle the accounts of the United States for debts incurred during the confederation period before Congress came into existence. Congress paid these claims not as a gratuity but “only when it felt contractually bound to do so.”<sup>326</sup>

Second, many of the laws enacted by the first Congress that named individuals were “special” neither within the strict definition nor spirit of the word because they did not single out the individuals named in the laws for special treatment. By contrast, these laws were generalizing; that is, they ensured that the named individuals would be treated the same as others similarly situated.<sup>327</sup> For example, the first Congress granted death benefits to the widow and orphan, respectively, of two men killed in battle.<sup>328</sup> In this same law, however, Congress also provided that “the widow or orphan of each officer, non-commissioned officer, or soldier, who was killed or died whilst in the service of the United States” was entitled to a pension.<sup>329</sup> Similarly, a private law granting a pension to a particular foreign officer who served in the United States army during the Revolutionary War provided that he was to be paid “in the same manner as other foreign officers in the service of the United States” had been paid.<sup>330</sup>

Third, early special laws, while on their terms providing special benefits, often were enacted as precursors to generally applicable laws that would be enacted at a later time. For example, the first Congress provided for the payment of pensions for certain disabled soldiers by

other persons”); ch. 16, 6 Stat. 2; ch. 26, 6 Stat. 1.

322. Ch. 44, 6 Stat. 3.

323. Act of Feb. 27, 1793, ch. 14, 6 Stat. 12 (“making provision for the persons therein mentioned”); ch. 45, 6 Stat. 4.

324. Act of Mar. 2, 1793, ch. 28, 6 Stat. 12 (“providing an annual allowance for the education of Hugh Mercer”); ch. 14, 6 Stat. 12; ch. 45, § 2, 6 Stat. at 5.

325. Act of Apr. 13, 1792, ch. 21, 6 Stat. 8 (compensating “the corporation of trustees of the public grammar school and academy of Wilmington, in the state of Delaware, for the occupation of, and damages to, the said school during the war”).

326. DiGiacomantonio, *supra* note 321, at 49.

327. Ch. 45, § 4, 6 Stat. at 5; ch. 44, § 5, 6 Stat. at 4.

328. Ch. 45, §§ 1–2, 4, 6 Stat. at 4–5.

329. *Id.* § 4, 6 Stat. at 5.

330. Act of Sept. 29, 1789, ch. 26, 6 Stat. 1.

name.<sup>331</sup> However, in this same statute, Congress provided that the pensions for the named soldiers “shall be paid, according to such laws as . . . shall be made relative to invalid pensioners” and that back pay for pension arrears should be paid “in such manner as Congress may hereafter provide.”<sup>332</sup>

In sum, the special laws enacted by the first Congress were, in a sense, *sui generis*: they reimbursed individuals who had valid legal claims that arose before the existence of Congress; they ensured that similarly situated individuals would be treated alike rather than differently; and they established that the named individuals would be included in the class of people who would benefit from generally applicable rules once general laws were enacted by Congress. They bear little resemblance to the special laws enacted by the states and criticized by the revolutionary generation prior to the ratification of the Constitution. As a result, no fair reading of these laws can serve as evidence that special laws were accepted without qualification by the revolutionary generation.

## 2. The First Congress Failed to Enact a Wide Variety of Special Laws.

In addition to examining laws that were enacted by the first Congress, it is also instructive to examine the types of laws that were *not* enacted during this period. Although Congressional silence is not always good evidence of intent, silence is perhaps more probative when compared with the track record of legislation in the years leading up to the ratification. It is true that the first Congress enacted the arguably special laws described above; however it must be recalled that the first Congress did *not* enact most of the types of special laws so criticized by the founding generation. As noted above, before the ratification of the Constitution, state legislatures enacted countless bills of attainder, laws confiscating property, laws immunizing named individuals from civil suit and nullifying judgments already rendered against them, and laws providing immunity from criminal prosecution, as well as laws granting special financial benefits and exemptions from generally applicable laws.<sup>333</sup> No law like these, which were so harshly criticized by the framing generation, was enacted by the first Congress. Moreover, the

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331. Ch. 44, § 1, 6 Stat. at 3.

332. *Id.* § 5, 6 Stat. at 4.

333. *See supra* part V.A.

first Congress ignored most of the private petitions presented to it because the petitions did not reflect previously existing legal obligations.<sup>334</sup> The first Congress also declined to pass a number of bills aimed at providing funding for particular projects with merely local effect.<sup>335</sup> The sharp curtailing of special laws, which abounded just a few years earlier, strongly suggests that the first Congress recognized that these types of special laws were no longer acceptable after the ratification of the Constitution.<sup>336</sup>

### 3. The Early Court Recognized a Value of Legislative Generality.

Just as the explosion of special laws in the mid-nineteenth century obscures their marked decrease immediately after the ratification of the Constitution, the Supreme Court's modern indifference toward special legislation belies the early Court's dim view of its constitutionality. Indeed, in many of its best-known decisions—including the *Dartmouth College Case*, *Fletcher v. Peck*, and *McCulloch v. Maryland*—the early Supreme Court invalidated special legislation. Although these cases are known for their expansive interpretation of the powers of the new federal government, a fair reading of these cases must take note of the way that they criticize, and ultimately invalidate, special legislation. This view of early post-ratification doctrinal history suggests that the value of legislative generality, although now all but ignored by the Court, once was an enforced value.

In the *Dartmouth College Case*, the legislature of the State of New Hampshire intervened in a dispute between the president and trustees of Dartmouth College. After the trustees deposed Dartmouth's president, the legislature transferred the assets of the College to the

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334. DiGiacomantonio, *supra* note 321, at 53–54.

335. *Id.*

336. For reasons of space, a comprehensive review of state legislation after ratification is beyond the scope of this article. However, an initial inquiry reveals that the states enacted far fewer special laws in the years following the ratification of the Constitution. In Delaware, special laws decreased by approximately 25% from the two-year period before ratification to the two-year period after ratification. See, e.g., THE LAWS OF THE STATE OF DELAWARE, IN TWO VOLUMES (New Castle, Samuel Adams & John Adams 1798). Moreover, although Delaware's pre-ratification special laws included the types of laws criticized by the revolutionary generation—including laws that named individuals to government positions, disallowed named individuals from a generally applicable amnesty, and granted public wealth to private individuals—in the years immediately following ratification, Delaware's special laws were limited to incorporating business associations and permitting the reformation of wills. *Id.*

newly created Dartmouth University.<sup>337</sup> Daniel Webster, on behalf of the College, argued that the legislature's attempt to single out a particular corporation and give its property to another was unconstitutional because "these acts are not the exercise of a power properly legislative."<sup>338</sup> Webster argued that "acts of the legislature, which affect only particular persons and their particular privileges" are not, properly speaking, laws.<sup>339</sup> In his opinion, Justice Story agreed with Webster that New Hampshire's statute was defective because it was special, as opposed to general, legislation. Story distinguished New Hampshire's statute from a general law that permitted individuals to divorce, arguably breaking their marriage contract. Story held that "general laws regulating divorces" certainly were not prohibited by the Contract Clause.<sup>340</sup> By contrast, the dissolution of a particular marriage, like New Hampshire's special statute, "entrench[ed] upon the prohibition of the constitution."<sup>341</sup> A corollary to this rule, wrote Story, is that the legislature may not "lawfully take the property of A. and give it to B."<sup>342</sup> In light of this distinction, Story rejected the power of the New Hampshire legislature to transfer the property of Dartmouth College to the newly created Dartmouth University.<sup>343</sup>

The distinction in *Dartmouth College* between general and special laws reaffirmed the principle that the Court previously made explicit in *Fletcher v. Peck*. In *Fletcher*, the legislature of the State of Georgia enacted a statute authorizing the governor to sell state-owned land.<sup>344</sup> When it came to light that the original sale of land may have been tainted by bribery, a newly elected legislature enacted a statute purporting to nullify the previous act.<sup>345</sup> Peck's counsel argued that the power to declare legislation authorizing the sale of land void was not a legislative power: "It is the province of the judiciary to say what the law is, or what it was. The legislature can only say what it *shall be*."<sup>346</sup> Chief Justice Marshall, writing for the Court, adopted this limitation on the

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337. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 546–47 (1819).

338. *Id.* at 558.

339. *Id.* at 580.

340. *Id.* at 696 (opinion of Story, J.).

341. *Id.*

342. *Id.* at 702.

343. *Id.* at 712.

344. *Fletcher v. Peck*, 10 U.S. (6 Cranch.) 87 (1810).

345. *Id.* at 90.

346. *Id.* at 123.

power of the legislature and restated it forcefully. Marshall conceded that “[t]o the legislature all legislative power is granted”; but this truism, Marshall wrote, did not resolve the question of the scope of legislative power.<sup>347</sup> The real question is whether an act nullifying the power to transfer a particular parcel of land is even a legislative act. Marshall answered in the negative: “It is the peculiar province of the legislature to prescribe *general* rules for the government of society; the *application* of those rules to individuals in society would seem to be the duty of other departments.”<sup>348</sup> Because the Georgia legislature’s second statute was not a general rule for the government of society, it simply was outside the scope of the legislative authority.<sup>349</sup>

The principle articulated in *Fletcher* and *Dartmouth* is evident in the results of other Marshall Court cases as well. In *McCulloch*, the Court struck down a tax imposed by the legislature of Maryland that was “levelled exclusively at the branch of the United States’ Bank established in Maryland.”<sup>350</sup> In striking down the tax, the Court emphasized that its unconstitutionality was linked to its special nature. The Court held that Maryland’s tax would not have been unconstitutional if it were confined to taxing “the real property of the bank, *in common with* the other real property within the State.”<sup>351</sup> In other words, the fact that the tax was levied on a single institution drove the conclusion that it was unconstitutional; by contrast, a tax levied generally would not be unconstitutional.<sup>352</sup>

Read together, these early Court opinions suggest that special laws enacted after the ratification of the Constitution were disfavored

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347. *Id.* at 136.

348. *Id.* (emphasis added).

349. *Id.* Moreover, the clause of the Constitution prohibiting bills of attainder, ex post facto laws, and laws impairing the obligation of contracts also restricts the power of the state legislature to nullify a previously enacted statute.

350. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 392 (1819).

351. *Id.* at 436 (emphasis added).

352. Similarly, in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), the Court struck down a New York state law that granted two individuals the exclusive right to use steam navigation on all of the waters of New York for thirty years. 22 U.S. at 6–7. Meanwhile, an act of Congress provided a generally applicable law for licensing and regulating ships. *Id.* at 28. Although the Court did not address the question of special legislation directly, in striking down the state law granting the special privilege, it did note that federal law, unlike the state statute, provided a method of licensing that “applies to every vessel.” *Id.* at 220. In so noting, the *Gibbons* Court suggests that its decision took into account the fact that it was striking down a special law in favor of a general one.

because of their particularized nature. Although these Marshall Court cases are remembered for their expansive reading of federal power, reading them closely reveals that the special nature of the laws at issue was an integral part of the Court's decision to strike them down.

Reading these Marshall Court cases as consistently disfavoring special legislation also helps make sense of the Court's earlier *Calder v. Bull*<sup>353</sup> decision. In *Calder*, the Court upheld the right of Connecticut's lawmaking body, the General Court, to vacate a lower court judgment and grant a new trial to the losing party. As each of the Justices took great pains to clarify, the action of the General Court did not trigger the restrictions of the Ex Post Facto Clause because the grant of a new trial was not a law. Each of the Justices writing opinions noted that, at the time *Calder* was decided, Connecticut's General Court sat both as a legislature and as a court of appeal, much like the English House of Lords.<sup>354</sup> Each Justice opined that the Ex Post Facto Clause did not reach the General Court's grant of a new trial because the General Court was acting in its judicial capacity rather than in its legislative capacity; in other words, the Ex Post Facto Clause did not apply because the General Court simply had not enacted a law.<sup>355</sup> Although the Court's distinction between the judicial and legislative functions of the General Court may seem strained, it makes perfect sense in light of a preexisting value of legislative generality. If the order granting a new trial was considered to be a legislative act, it would have been a special law. As a result, in light of the value of legislative generality, the only way the Court could affirm the act of the General Court was to find that the action of the General Court was not a law at all, which is precisely what the Court did. In the absence of a value of legislative generality, it would have been possible, and far simpler, for the Court to rest on its alternative ground that the Ex Post Facto Clause applies only to criminal laws. The Court's insistence that the grant of a new trial was not a law makes sense only in light of the constraint imposed by the value of legislative generality.

In sum, the history of the revolutionary period strongly suggests the existence of a value of legislative generality at the time of the ratification of the Constitution. Although the post-ratification history is

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353. *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798).

354. *Id.* at 395 (opinion of Paterson, J.).

355. *Id.* at 387–88 (opinion of Chase, J.); *id.* at 400–01 (opinion of Cushing, J.).

decidedly more mixed,<sup>356</sup> it does not vitiate the basic lessons of the revolutionary period. A fair reading of the post-ratification history indicates that the first Congress did not sanguinely continue the states' pre-Constitution practice of enacting special legislation without restraint. Rather, the worst types of special laws ceased immediately after ratification. Special laws enacted after ratification included, by contrast, "clean-up" legislation designed to settle the accounts of the Congress from the confederation period and legislative precedents for future general laws on similar subjects, such as pensions. The Supreme Court's early cases strongly suggest that special legislation continued to be disfavored after ratification of the Constitution, at least during the republic's first decades. For these reasons, even considering the post-ratification history of special laws, the history of the revolutionary period indicates strong support for the value of legislative generality.

#### VI. THE CONTOURS OF THE VALUE OF LEGISLATIVE GENERALITY AND THE IMPACT OF ITS REVIVAL

The precise contours of the value of legislative generality, and a comprehensive evaluation of the impact of its enforcement, must wait

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356. The existence of special legislation after ratification is in some tension with the strongly articulated pre-ratification value of legislative generality. However, pre-ratification history is more probative of the intention of the framers at the time of ratification than is post-ratification history. First, post-ratification legislation reflects political decisions, not constitutional interpretation. Once the Constitution was ratified, the framers who served in Congress became politicians, subject to the same pressure to serve their constituents that always has characterized electoral politics. 1 WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 338 (1953). As a member of the House of Representatives, Madison urged interpretations of the Constitution that were entirely at odds with positions he took in the Virginia Constitutional Convention. *Id.* Perhaps not surprisingly, Madison later remarked that "legislative precedents are . . . entitled to little respect" when interpreting the Constitution. Letter from James Madison to Judge Spencer Roane (May 6, 1821), *in* 2 *THE PAPERS OF JAMES MADISON: RETIREMENT SERIES* 317 (David B. Mattern, J.C.A. Stagg & Mary Parke Johnson eds., 2013); Letter from James Madison to James Monroe (Dec. 27, 1817), *in* 1 *THE PAPERS OF JAMES MADISON: RETIREMENT SERIES* 190, 191 (David B. Mattern et al., 2009). Second, the framers were a relatively small part of, and were only sporadically influential on, the decisions of the first Congress. Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 *CALIF. L. REV.* 1745, 1767–68 (2006). For these reasons, perhaps, the Supreme Court's reliance on post-ratification history to interpret the Constitution has been mixed. As the Court recently reiterated, "post-enactment" history is a "contradiction in terms"; it is "not a legitimate tool" of interpretation because statements made after a provision is enacted have no bearing on the intention of those enacting that provision. *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081–82 (2011).

until after an articulation of the value's textual and philosophical underpinnings. Nevertheless, the foregoing historical evidence allows us to draw some preliminary conclusions with a fair degree of confidence. First, the history of the revolutionary period suggests the types of special laws that are disfavored by the value of legislative generality. Second, judicial recognition of this value should lead courts to modify doctrine related to special legislation. Third, enforcing a value of legislative generality would improve jurisprudence by making judicial doctrines related to special legislation more coherent.

*A. The Contours of the Value of Legislative Generality*

The history of the revolutionary era strongly suggests that legislative generality is a value of constitutional dimension. The most prevalent, and most offensive, of the legislative abuses unleashed after independence came in the form of special laws. After a decade of abusive special legislation, members of the revolutionary generation rejected the power of the legislature to enact special laws. They affirmed their commitment to the value of legislative generality both by articulating a theoretical defense of this value and by enshrining protections against abusive special legislation in their state constitutions. By the time they arrived in Philadelphia to frame the new national government, they had in mind the object to put an end to laws that singled out individuals or groups for special treatment, including special benefit and special detriment legislation. The revolutionary generation's commitment to legislative generality is evident in the early legislative and judicial practice of the new republic. Congress enacted few special laws after ratification and none of the types most criticized during the confederation period. The early Court enforced the value of legislative generality by criticizing, and ultimately invalidating, a number of special laws.<sup>357</sup> For these reasons, any court or scholar who considers the history of the framing of the Constitution probative of its interpretation should treat the value of legislative generality as an independent constitutional principle and evaluate the constitutionality of legislation in light of this principle.

Having evaluated the history of the framing period, the central tenet of the value of legislative generality is easy to state: the value of legislative generality disfavors legislation that singles out a person or

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357. *See supra* Part V.

small, identifiable group for special treatment to which the general population is not subject. The core commitments of the value of legislative generality prohibit the legislature from: granting special benefits, like licenses and transfers of property; levying special harms, like confiscation of property and deprivation of liberty; interfering with both civil and criminal judicial processes for named claimants or defendants; declaring the proper interpretation of a standing law in a particular case; declaring void a previously enacted law; and transferring property from one person to another.

In addition to these core commitments, the history of the revolutionary generation suggests some broader principles that help guide the interpretation of the value of legislative generality. The value of legislative generality is less likely to disfavor special laws that prefigure generally applicable laws, like a law incorporating a particular corporation that also applies generally to future corporations. Similarly, the value of legislative generality is less likely to disfavor special laws that eliminate, rather than create, disparities between people, like a law that ensures that an individual is treated the same as others similarly situated. Nevertheless, even if extenuating circumstances require the enactment of special legislation, the core commitments to the value of legislative generality, stated above, should be respected.<sup>358</sup>

*B. Enforcing the Value of Legislative Generality Will Require the Court to Modify Doctrine Related to Special Legislation.*

Modern Supreme Court jurisprudence rejects the argument that “there is something wrong with particularized legislative action,”<sup>359</sup> measuring special legislation instead against deferential doctrines like equal protection, due process, and separation of powers, rather than against an independent principle of legislative generality.<sup>360</sup> As a result, restrictions on special legislation are weak, and both Congress and state legislatures freely enact special laws. Among the most common modern special laws, legislatures enact statutes transferring public funds to named natural persons<sup>361</sup> or corporations,<sup>362</sup> granting exemptions from

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358. *See supra* Part V.

359. *Plaut*, 514 U.S. at 239 n.9.

360. *See supra* text accompanying notes 92–102.

361. *E.g.*, Continuing Appropriations Act, 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013); Priv. L. No. 108-5, 118 Stat. 4030 (2004); Priv. L. No. 107-2, 116 Stat. 3119 (2002); Priv. L. No. 103-5, 108 Stat. 5064 (1994); Priv. L. No. 103-3, 108 Stat. 5062 (1994).

generally applicable statutes and regulations,<sup>363</sup> singling out individuals for special legal disabilities,<sup>364</sup> confiscating particular pieces of property,<sup>365</sup> levying special detriments on particular corporations,<sup>366</sup> and abrogating specific contracts.<sup>367</sup>

The value of legislative generality as described above suggests that, notwithstanding the Court's modern jurisprudence, there *is* something wrong with particularized legislative action.<sup>368</sup> As a result, courts should invalidate special laws that violate this principle. For example, courts should invalidate laws like Terri's Law, which applied only to "any parent" of a particular person, granting a special exemption from generally applicable jurisdictional rules without prefiguring generally applicable laws. Similarly, courts should invalidate private immigration laws, which violate the principle of legislative generality by relieving named individuals from generally applicable laws governing immigration and naturalization.<sup>369</sup> Courts also should invalidate the numerous special laws that Congress and state legislatures bury in unrelated public laws; for example, Congress's transfer of public wealth to the widows of two deceased Senators by name<sup>370</sup> should be struck down as violative of the principle of legislative generality.

Some special laws do not implicate the core commitments of the value of legislative generality; for example, a legislature might enact a

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362. Rubin, *supra* note 18, at 398 n.22; *see also* Wakefield, *supra* note 50, at 853.

363. Priv. L. No. 111-2, 124 Stat. 4525 (2010); Priv. L. No. 111-1, 124 Stat. 4523 (2010); Priv. L. No. 108-6, 118 Stat. 4032 (2004); Priv. L. No. 108-4, 118 Stat. 4028 (2004); Priv. L. No. 108-3, 118 Stat. 4026 (2004); Priv. L. No. 108-1, 118 Stat. 4023 (2004); Priv. L. No. 107-5, 116 Stat. 3123 (2002); Priv. L. No. 107-1, 115 Stat. 2471 (2001) (all granting exemptions from the Immigration and Nationality Act and reducing the total number of Visas otherwise available); *see also* Priv. L. No. 105-4, 111 Stat. 2699 (1997) (granting citizenship retroactively to permit beneficiary to be eligible for benefits only available to citizens).

364. Elizabeth Morgan Act, Pub. L. No. 104-205, § 350, 110 Stat. 2951, 2979 (1996).

365. *See* Mt. Soledad Veterans Memorial Preservation Act, Pub. L. No. 109-272, § 2, 120 Stat. 770, 770-72 (2006); *Paulson v. City of San Diego*, 475 F.3d 1047, 1048 (9th Cir. 2007); *see also* 16 U.S.C. § 79c(b)(1) (2012); *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 395 (1922).

366. *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 & n.20 (1978)).

367. *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 11-14 (1977).

368. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 n.9 (1995).

369. *E.g.*, Priv. L. No. 112-1 (2012); Priv. L. No. 111-2, 124 Stat. 4525 (2010); Priv. L. No. 111-1, 124 Stat. 4523 (2010).

370. Continuing Appropriations Act, 2014, Pub. L. No. 113-46, § 145, 127 Stat. 558, 565 (2013); Consolidated and Further Continuing Appropriations Act, 2013, Pub. L. No. 113-6, § 1601, 127 Stat. 198, 426 (2013).

special law that eliminates disparities between people or sets the stage for future generally applicable laws, as did the first Congress. The value of legislative generality would not necessarily counsel in favor of striking down such a law. However, most special laws do no such thing; rather, they single out named individuals for special treatment, either to apply special detriments or grant special benefits. Invalidation of these laws is consistent with the value of legislative generality as described by the historical experiences of the revolutionary generation.

In order to accommodate the value of legislative generality, the Supreme Court will have to modify, albeit modestly, its standing doctrine. With some exceptions, federal courts will entertain a challenge to the constitutionality of a statute only if the plaintiff alleges “injury fairly traceable to the defendant’s allegedly unlawful conduct” that is “likely to be redressed by the requested relief.”<sup>371</sup> A person who suffers harm that is merely “generalized and attenuated” from the claimed unlawful action does not qualify for Article III standing.<sup>372</sup> Many of the special laws discussed above cause harm that can be redressed consistent with these standing doctrine principles. For example, the father whose court-ordered visitation rights were eliminated by Congress in the Elizabeth Morgan Act suffered a specified injury that can be traced to the Act and would be redressed by its invalidation.<sup>373</sup>

A somewhat harder case is presented by laws that grant exemptions from generally applicable laws, like special immigration status laws. Recall that these laws confer preferential immigration status on named individuals, but at the price of reducing the number of visas available to individuals from the country of origin of the beneficiaries of the special law.<sup>374</sup> As a result, for every person who is granted special immigration status, another person is, in a palpable way, harmed. However, the visa applicant who was next in line for a visa, and was therefore harmed by the special immigration law, would not know that she was next in line for a visa and would, therefore, not know that she had been harmed by the law. As a result, the person whose visa was denied as a direct

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371. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 598 (2007) (plurality opinion) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)) (internal quotation mark omitted).

372. *Hein*, 551 U.S. at 599 (plurality opinion).

373. *See supra* notes 45–46 and accompanying text.

374. *E.g.*, 124 Stat. at 4525; 124 Stat. at 4523.

consequence of a special immigration law cannot trace her injury to that law. In order to enforce a value of legislative generality meaningfully in the case of special immigration laws, therefore, the Court would have to expand the universe of individuals permitted to challenge these special laws. But a modification of standing doctrine in the case of special immigration laws could be accomplished without seriously compromising the purpose of standing. In the case of a special immigration law, standing could be expanded to include only current visa applicants from the country of origin of the beneficiary of the law. This modestly expanded definition of standing would permit meaningful enforcement of the value of legislative generality while, at the same time, limiting standing to individuals who have more than a generalized and attenuated interest in the constitutionality of immigration legislation.

The value of legislative generality is hardest to square with current standing doctrine in the context of special financial benefit legislation. For example, the recent special laws that granted gratuitous payments to the widows of two deceased Senators benefitted these individuals at the expense of the public fisc.<sup>375</sup> In general, no one has standing to challenge special financial benefit legislation because the Court has held that the interest of a taxpayer in the allocation of public money is too “generalized and attenuated” to qualify for Article III standing.<sup>376</sup> However, under the *Flast* exception to this general rule, a taxpayer has standing to challenge the unconstitutionality of a congressional transfer of wealth if the taxpayer shows that “the challenged enactment exceeds specific constitutional limitations imposed upon the exercise of the congressional taxing and spending power.”<sup>377</sup> A fair reading of *Flast* might permit a taxpayer to challenge a special financial benefit law on the theory that Congress violates the taxing and spending power by exercising that power in violation of the value of legislative generality. However, even if *Flast* does not apply by its terms to a challenge based on a violation of the principle of legislative generality, the Court could use *Flast* as a model for another, limited exception to the taxpayer standing rule for special financial benefit laws. A new, limited exception to the taxpayer standing rules, modeled on *Flast*, would give meaning to

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375. Continuing Appropriations Act, 2014, § 145; Consolidated and Further Continuing Appropriations Act, 2013, § 1601.

376. *Hein*, 551 U.S. at 599 (plurality opinion).

377. *Flast v. Cohen*, 392 U.S. 83, 102–03 (1968).

the value of legislative generality but would not affect the overwhelming majority of Congress's allocation decisions, which are done through general, as opposed to special, laws.

*C. The Value of Legislative Generality Provides Coherent Treatment of Special Legislation.*

Although a complete evaluation of the consequences of enforcing a value of legislative generality must wait until the completion of future work, one normatively attractive feature is readily apparent even now. The Court considers challenges to special legislation under a number of constitutional doctrines and has formulated a number of different tests, applied different standards, and deferred to the legislature in varying degrees, depending on the constitutional doctrine invoked, the subject matter of the legislation, and the status of the individual or group singled out for special treatment. As a result, when courts invalidate special laws, they do so in an incoherent, and sometimes unpredictable, manner. Enforcement of a value of legislative generality will bring coherence to current doctrine related to special legislation.

1. A Value of Legislative Generality Disfavors Both Special Benefit and Special Detriment Legislation.

The Court's current doctrine provides significantly greater protections against laws that impose special detriments than those that provide special benefits. For example, as noted above, the Court subjects a gratuitous payment from the public fisc to a named individual to virtually no scrutiny; by contrast, a law appropriating the same amount from the same individual might raise concerns under the Equal Protection, Ex Post Facto, or Takings Clauses.<sup>378</sup> The incoherence between judicial review of special benefit and special detriment legislation would be corrected by enforcing a value of legislative generality that takes into account the historical experiences of the revolutionary generation. The legislative abuses of the revolutionary period included not only special detriment statutes banishing individuals, confiscating property, and rescinding property rights, but also legislation granting monopoly rights, immunity from prosecution, office holding privileges, and unequal legal protections.<sup>379</sup> The value of

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378. See *supra* text accompanying notes 103–05.

379. See *supra* text accompanying notes 191–242

legislative generality strongly suggests, therefore, that both special benefit and special detriment laws are constitutionally suspect. Judicial doctrine treating both special detriment and special benefit laws similarly would therefore be more coherent than the Court's current doctrine.

2. A Value of Legislative Generality Disfavors Both Criminal and Civil Special Legislation.

Current doctrine distinguishes between special legislation that provides criminal penalties and special legislation that creates civil liability. Because current jurisprudence protects against special laws more strongly in the criminal than in the civil context, otherwise identical laws are subjected to different levels of scrutiny depending on whether the court characterizes them as a criminal or civil laws. As noted above, the FERA Amendments to the FCA revived particular dismissed cases. Courts reviewing the constitutionality of these amendments focus on whether the FCA is criminal or civil rather than whether the FERA amendments provided special treatment for particular cases. Because they do not take into account the special nature of the amendments, some courts have struck down the amendments as retroactive criminal laws while others have permitted them as civil laws.<sup>380</sup> A value of legislative generality would eliminate this incoherence by disfavoring special legislation in both the criminal and civil contexts, as is suggested by the historical experiences of the revolutionary generation. The revolutionary generation enacted, and ultimately came to repent of, both criminal and civil special statutes, including statutes preventing Tories from practicing their professions, statutes granting immunity from civil liability and criminal prosecution, statutes granting or withdrawing special property rights, and bills of attainder.<sup>381</sup> This history strongly suggests that the constitutionality of the FERA Amendments, and laws like it, should not turn on whether a court characterizes the law as criminal or civil; rather, the essential issue is whether the law can be said to violate the principle of legislative generality.

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380. See *supra* text accompanying notes 106–08.

381. See *supra* text accompanying notes 191–242.

### 3. A Value of Legislative Generality Disfavors Both State and Federal Special Legislation.

The Court's current jurisprudence draws a distinction between state laws and federal laws that single out individuals for special treatment. As noted above, a state law breaching a public contract, effectively singling out for detrimental treatment the party who contracted with the government, is reviewed with greater scrutiny than an identical federal breach of a public contract.<sup>382</sup> A value of legislative generality would eliminate this incoherence by treating breaches of public contracts the same, no matter whether the law breaching the contract was state or federal in origin. A value that treats federal and state breaches the same way reflects the historical experiences of the revolutionary generation. The special laws that impelled the revolutionary generation to reform their legal systems included not only their direct experiences with special laws enacted by their own state legislatures, but also the cultural memory of special laws enacted by Parliament in Britain. Bills of attainder not only proliferated during the revolutionary war, but also were enacted for centuries by Parliament.<sup>383</sup> American state grants of property to well-connected citizens mirrored the hated monopoly rights granted by Parliament in Britain.<sup>384</sup> And the popular reaction to the Cincinnati was understandable only in light of the special legal privileges accorded by Parliament to the nobility in England.<sup>385</sup> The fact that special laws rejected by the revolutionary generation included laws both originating in the states and, prior to that, in Parliament, suggests that a value disfavoring special laws should be enforced irrespective of the source of the law. As a result, a value of legislative generality should operate to restrain both Congress and state legislatures.

In sum, the Court's jurisprudence does not provide coherent protections against special legislation; that is, protections against special legislation vary depending on whether the law at issue provides benefits or detriments, whether it is criminal or civil, and whether the law is a state or federal statute. The Court is more deferential toward special legislation on certain subject matters, like immigration, than it is on others, like takings. The Court's doctrine forces lower courts to make

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382. See *supra* text accompanying notes 109–11.

383. See *supra* text accompanying notes 194–215.

384. See *supra* text accompanying notes 136, 231–32.

385. See *supra* text accompanying notes 297–308.

distinctions, as in the case of the FERA Amendments, that lead to inconsistency between courts and unpredictability for legislatures. The historical experiences of the revolutionary generation suggest that the value of legislative generality transcends these distinctions; accordingly, the constitutionality of special legislation should be measured against the value of legislative generality irrespective of the characteristics normally used to distinguish between different types of special laws. In light of a value of legislative generality, a special law granting special immigration status should be scrutinized like a special law stripping a citizen of citizenship; a special law convicting a named party of a crime should be treated the same as a special law granting a named party immunity from prosecution; a special law granting public property to a private party should be scrutinized along with a special law confiscating private property. By eliminating these distinctions, enforcing an independent principle of legislative generality will make the Court's doctrine related to special legislation more coherent.

#### VII. CONCLUSION

I expect that the thesis of this article comes as a surprise even to readers steeped in constitutional law and history. The power of the legislature to enact special legislation without meaningful or coherent constitutional restraints has been taken for granted by the courts and questioned only at the periphery by scholars. But I do not suggest lightly that a value restraining special legislation should be revived as an enforceable constitutional principle. Rather, I am compelled to this result by evidence of the historical experiences of the period leading up to the framing of the Constitution, the Constitution's text, and its philosophical underpinnings.

Because the full spectrum of issues implicated by reviving legislative generality as an enforceable constitutional value cannot possibly be addressed in the limited space of a single article, this piece is intended to be an introduction to the value of legislative generality rather than the last word on the subject. In future work, I will explore the textual and philosophical justifications underlying the value of legislative generality; this inquiry may well suggest refinements to this principle as well as provide additional support for it. No matter how the value of legislative generality develops, however, any judicial recognition of this value will serve an important goal of the Constitution: to create a "safe space" from democracy, a space in which individuals are insulated against a thoughtless or corrupt legislature, the vicissitudes of public opinion, and

the passions and prejudices of the majority.