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## State Constitutional Prohibitions on Special Laws

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# STATE CONSTITUTIONAL PROHIBITIONS ON SPECIAL LAWS

JUSTIN R. LONG\*

## ABSTRACT

Since the nineteenth century, most states have had constitutional clauses prohibiting “special laws.” These clauses were ratified to protect the people of each state from domination by narrow economic elites, who would use their economic power to win grants of privilege from the state legislatures. To fight the corrupt favors garnered by private interests in this way, state constitutional drafters wrote clauses requiring their legislatures to pass only “general laws” that would apply equally to all members of the regulated class. For a brief period, these clauses were enforced in the courts—but more to protect economic elites than the democratic prerogatives of common people.

The problem of capture of the political process by economic elites and its conversion to a spoils system for their own gain remains a threat to American democracy, particularly for state governments. By the mid-twentieth century, however, courts began to stop enforcing these clauses. Today, most courts interpreting their special laws clauses apply rational-basis review modeled on federal equal protection doctrine. Sometimes, these courts will hold explicitly that their special laws prohibitions are equivalent in meaning to federal equal protection. Under that doctrine, grounded in the federal Fourteenth Amendment’s prevailing concern for racial equality, economic legislation receives only perfunctory review in court. By applying federal doctrine, state courts have essentially read special laws prohibitions out of state constitutions.

The dead-letter treatment of these state constitutional clauses in conformity with federal practice poses a challenge to the leading theories of state constitutional interpretation, all of which depend to varying degrees on the possibility of legal pluralism within the federalist framework. In this Article, I examine how state popular movements to restrain their legislatures became ignored by their courts. I suggest that current state constitutional theories are undermined by this judicial practice. Those theories justify and legitimize state constitutional interpretation by reference to the capacity of state courts to diverge from federal tropes of analysis when the people so command through their state constitutions. With special laws prohibitions, this process failed, and perhaps inevitably so.

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#### I. INTRODUCTION

Twenty years ago, James Gardner described the state of state constitutionalism, and the view was bleak.<sup>1</sup> As illustrated by its various critiques from Alaskans,<sup>2</sup> Oregonians,<sup>3</sup> and their Romantic Subnationalist<sup>4</sup> compatriots, *The Failed Discourse*

<sup>1</sup> See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

<sup>2</sup> See Ronald L. Nelson, *Welcome to the "Last Frontier," Professor Gardner: Alaska's Independent Approach to State Constitutional Interpretation*, 12 ALASKA L. REV. 1, 4 (1995) (attempting "an Alaskan rebuttal" of *The Failed Discourse*).

<sup>3</sup> See David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 276 (1992) (proposing Oregon jurisprudence as proof of the richness of state constitutional discourse).

<sup>4</sup> "Romantic Subnationalism" is Professor Gardner's term for the American state equivalent of nineteenth-century notions of peoplehood. In this usage, Romantic nationalism was the view that different nations were imbued with inherent traits, evident in their history, laws, social practices, and artistic culture, which together formed the sole legitimate basis for a national identity. See generally Richard S. Kay, *Constituent Authority*, 59 AM. J. COMP. L. 715, 740–741 (2011) (describing the romantic view of the German "Volk" as the basis for nationhood founded on ethnicity and common culture). Romantic Subnationalism, then, is the view that each American state has a culturally unique "people" who inhabit it and by their

of *State Constitutionalism* provoked deep questions about the capacity of these documents (and their judicial interpreters) to sustain the sort of rich constitutional culture purportedly necessary to the preservation of important rights. Now, with the twenty-first century well under way, any serious analysis of remedies available in court under state constitutions must also account for the courts' ongoing discursive poverty. Through a detailed exploration of state prohibitions on "special laws," this Article seeks to describe how state high courts still have not developed<sup>5</sup> independent constitutional discourse, even where every conventional interpretive tool would suggest that they should. This ongoing failure weakens both leading schools of state constitutional theory, positivism and universalism, and has stark implications for populist efforts at law reform through state constitutional litigation.

State constitutional "special laws" clauses are express prohibitions on legislation that would provide public benefit to private parties, such as earmarks. Although historically distinct from "takings" clauses, special laws prohibitions effectively mirror the "public purpose" requirement of takings clauses. Just as constitutional texts prohibit states from taking private property without a public purpose, special laws clauses prohibit states from *giving* public property without a public purpose. State constitutional prohibitions on "special" laws currently appear, in various forms, in the vast majority of state constitutions.<sup>6</sup>

The special laws clauses' focus on protecting the public from its nominally representative legislatures reflects a deep concern for legislative "capture," what Samuel Isaacharoff has termed "clientelism"—"a patron-client relationship in which political support (votes, attendance at rallies, money) is exchanged for privileged

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innate common values imbue the state with normative legitimacy. No major state constitutionalists today are committed to a defense of Romantic Subnationalism, although judicial opinions sometimes still reflect that worldview.

<sup>5</sup> The question of responsibility for the underdevelopment of state constitutional law typically tracks the following circle of blame: courts blame the bar for not pressing fresh arguments; the bar blames law schools for not teaching state constitutional cases; and law schools blame courts for not authoring teachable opinions. Because appellate courts are usually quick to dismiss arguments that were never presented by counsel, I treat the state constitutional decisions below as if the advocates had raised the appropriate arguments at least sufficiently to permit the court to rule on that basis, even though I lack empirical confirmation that this was so.

<sup>6</sup> See ALA. CONST. art. IV, §§ 104-111; ALASKA CONST. ART. II, § 19; ARIZ. CONST. art. IV, § 19; ARK. CONST. art. II, § 3, amend. 14; art. V, § 25; CAL. CONST. art. IV, § 16; COLO. CONST. art. V, § 25; FLA. CONST. art. III, §§ 10, 11; GA. CONST. art. III, § VI, para. IV; HAW. CONST. art. I, § 21; IDA. CONST. art. III, § 19; ILL. CONST. art. IV, § 13; IND. CONST. art. IV, §§ 22, 23; IOWA CONST. art. I, § 6, ART. III, §§ 30, 31; KAN. CONST. art. II, § 17; KY. CONST. §§ 3, 59, 60; LA. CONST. art. III, § 12; ME. CONST. art. IV, pt. 3, § 13; MD. CONST. art. III, § 33; MASS. CONST. pt. I, art. VI, amend. art. LXII, § 1; MICH. CONST. art. IV, §§ 29, 30; MINN. CONST. art. XII, §§ 1, 2; MISS. CONST. art. IV, §§ 87-90; MO. CONST. art. III, §§ 39-42; MONT. CONST. art. V, § 12; NEB. CONST. art. III, § 18; NEV. CONST. art. IV, §§ 20, 21; N.J. CONST. art. IV, § 7, para. 9; N.M. CONST. art. IV, §§ 24, 26; N.Y. CONST. art. III, § 17; N.C. CONST. art. I, § 32, art. II, § 24; N.D. CONST. art. I, § 21, art. IV, § 13; OHIO CONST. art. I, § 2, art. II, § 26; OKLA. CONST. art. V, §§ 46, 51, 59; OR. CONST. art. I, §§ 20, 23; PA. CONST. art. I, § 17, art. III, § 32; R.I. CONST. art. VI, § 11; S.C. CONST. art. III, § 34; S.D. CONST. art. III, § 23, art. VI, § 18; TENN. CONST. art. XI, § 8; TEX. CONST. art. I, § 3, art. III, § 56; UTAH CONST. art. VI, § 26; VA. CONST. art. I, § 4, art. IV, §§ 14, 15; WASH. CONST. art. I, §§ 8, 12, art. II, § 28; W.VA. CONST. art. VI, § 39; WIS. CONST. art. IV, § 31; WYO. CONST. art. III, § 27.

access to public goods.”<sup>7</sup> Nineteenth-century constitution-drafters frequently adopted a belt-and-suspenders approach to prohibiting the effects of this type of corruption, ratifying redundant clauses that both prohibited special laws where general laws could be enacted and prohibited special laws in specific subject areas;<sup>8</sup> some state constitutions even explicitly require the judiciary to determine whether a general law could have been made applicable. Yet, as they have for a long time,<sup>9</sup> state high courts typically (although not universally) interpret these clauses as offering protection equivalent to the federal Equal Protection Clause. As a result, these courts adopt deferential stances toward their legislatures and skeptical stances toward rights claimants, even where the textual support for the claim is strong, one side seems to be an economic elite, and the legislature’s action appears countermajoritarian.

This interpretive approach calls for explanation. Why would state high courts decline to enforce special laws prohibitions? While rationales to support enforcement may seem persuasive, even courts that do intermittently enforce the special laws prohibitions have been largely incapable of articulating a coherent standard of enforcement that would permit predictability in this area for legislators and the public.

Ultimately, there seems to be no hint in existing caselaw or trends that state high courts might start to accept a more activist inquiry toward special laws. This, in turn, presents a challenge to the leading theories of state constitutionalism. I group these theories into three schools of thought: constitutional positivists, exemplified by scholars like Professors Robert Williams and Helen Hershkoff; constitutional universalists, including Professors Robert Cover and James Gardner and Dean Robert Schapiro; and constitutional pragmatists, including Dean Daniel Rodriguez and Professor Jim Rossi.

The lack of judicial enforcement of the special laws prohibitions poses a problem for the positivists because they believe the courts should center their interpretation of the state constitution on each unique constitution itself (whether text or structure), but these clauses contain such deep incoherency that they are barely amenable to application. In contrast to standard equal protection doctrine, where courts will invalidate legislation motivated by a pernicious purpose, “special” legislation might have won support for some entirely rational public purposes apart from its disproportionate advantage to private parties. What is a positivist to do if the people put unintelligible clauses into their constitutions?

The universalists face an even bigger problem, because they believe that state constitutions are a forum for debate about values in a community broader than the state. For that forum to work as a site that makes values contestation possible, state constitutional meaning must be capable of diverging from the broader community’s conventional wisdom. State constitutions, in this view, are like river eddies that can support habitats that differ from the body of the stream while still receiving from and contributing to it. But non-enforcement of the unusual areas of state constitutional law where the constitutions do diverge from federal practice washes away these

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<sup>7</sup> Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118 (2010).

<sup>8</sup> See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 278 (2009).

<sup>9</sup> See Robert F. Williams, *The Emergence of State Constitutional Law: Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1197 (1985) (detailing the “misunderstanding and underdevelopment” of state constitutional equality principles).

productive eddies. For example, Professor James Gardner's theory of interactive federalism depends on the citizens of each state adjusting their state constitutional arrangements to reflect their relative trust in their state and federal governments. If the people of each state cannot effectively disempower their state legislature through special laws prohibitions, then state constitutional jurisprudence cannot accomplish the democratic purposes the theory assigns to it.

In Part II, I describe the landscape of contemporary special laws jurisprudence and review the arguments for and against judicial enforcement of these clauses, concluding that meaningful interpretation might never be possible. In Part III, I describe the leading current state constitutional theories. Finally, in Part IV, I explain the challenge special laws jurisprudence poses to those theories.

## II. SPECIAL LAWS JURISPRUDENCE

### *A. Special Laws Defined*

Special laws clauses bar the granting of public benefit for private purposes. A typical clause, like Nebraska's, lists a long series of subject areas where the legislature may act only by general rule rather than with reference to particular cases, and concludes with a catch-all clause requiring all legislation to be "general" where possible:

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

For granting divorces.

Changing the names of persons or places.

Laying out, opening altering and working roads or highways.

Vacating roads, Town plats, streets, alleys, and public grounds.

Locating or changing County seats.

Regulating County and Township offices.

Regulating the practice of Courts of Justice.

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

Providing for changes of venue in civil and criminal cases.

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

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

Summoning or empanelling Grand or Petit Juries.

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

Providing for the management of Public Schools.

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

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

The protection of game or fish.

Chartering or licensing ferries, or toll bridges, remitting

finances, penalties or forfeitures, creating, increasing and decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed.

Changing the law of descent.

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

Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever; Provided, that notwithstanding any other provisions of this Constitution, the

Legislature shall have authority to separately define and classify loans and installment sales, to establish maximum rates within classifications of loans or installment sales which it establishes, and to regulate with respect thereto.

In all other cases where a general law can be made applicable, no special law shall be enacted.<sup>10</sup>

Another common version, like Illinois's, omits the non-exhaustive list of prohibited subjects and explicitly adds a grant of judicial review, insisting that: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination."<sup>11</sup>

While the clauses on their face treat "special or local laws" as a single rhetorical phrase, typically neither "special" nor "local" earns a constitutional definition. In this article, I do not attempt a comprehensive distinction between "special" and "local." Intuitively, local laws are those confined in their application to a geographic subunit of the state, while special laws are those that favor a particular corporation or person without reference to location. Sometimes, legislatures might wish to bestow public benefits on a class narrowly defined by both geography and corporate identity, such as funding a particular company to build a bridge in a specified place; this legislation would presumably implicate both the "special" and "local" constitutional notions.

However, the provision of state benefits to a single local public entity like a municipality seems to pose very different conceptual problems from those created by state favoritism for private firms.<sup>12</sup> Most significantly, if a town wins an appropriation from the geographically representative legislature, it is likely to do so through ordinary politics. Its influence might be perceived as disproportionate or unfair by other places with fewer delegates in the legislature, but the process remains overtly democratic. In contrast, laws that advantage private entities may have been obtained by extraordinary campaign contributions, bribery, or other exercises of economic power in tension with majoritarian representation.

<sup>10</sup> NEB. CONST. art. III, § 18.

<sup>11</sup> ILL. CONST. art. IV, § 13.

<sup>12</sup> See generally *Recent Cases*, 76 HARV. L. REV. 635, 653-55 (1963) (discussing state constitutional prohibitions on local laws); Charles Chauncey Binney, *Restrictions Upon Local and Special Legislation in the United States: II: The Distinctions Between General, Local and Special Legislation*, 32 AM. L. REG. & REV. 721 (1893) (describing special and local laws).

In this Article, I do not seek to examine the theoretical underpinnings for any potential distinctions between special and local laws. Perhaps because whether a law affects a single geographic district is easier to determine objectively than whether it unfairly privileges a private interest, courts have often been more willing to find “local” laws in violation of the constitutional prohibitions. But this Article is limited to the constitutional resistance to excessive economic power embodied in the concept of special laws. Where I describe court cases concerning local laws, I do so only where the court treats the two concepts as doctrinally indistinguishable, making the local laws case an applicable precedent for special laws challenges.

As in the Nebraska example quoted above, special laws prohibitions are targeted directly at state legislatures, both by direct reference (“The Legislature shall not . . . .”) and by placement in the legislative powers article of the state constitution (in Nebraska, article III). Directing these clauses exclusively at the legislature leaves intact courts’ or administrative agencies’ power to offer public benefits (like divorce, name-changes, trust reformation, or welfare payments) to specific parties. Courts may also continue to develop the common law, case by case, without fear of creating “special” laws. Furthermore, by not placing these clauses in the states’ bills of rights, this structure emphasizes the role of special laws clauses as restrictions on legislative power rather than as grants of individual rights.

Special laws prohibitions are just one of a variety of equality protections typically found in state constitutions. Other examples include direct mimics of the federal Equal Protection Clause, “privileges or emoluments” prohibitions, mini-Equal Rights Amendments, segregation prohibitions, and “common benefit” requirements.<sup>13</sup> Many state constitutions include several different equality provisions at once.<sup>14</sup> In this Article, I do not attempt to compare special laws prohibitions to the other forms of equality protection found in state constitutions, nor do I analyze the jurisprudence interpreting those other provisions. Professor Jeffrey Shaman has consistently argued that judicial interpretations of state constitutional equality provisions are converging on a nationwide model exemplified by federal practice.<sup>15</sup> If he is correct, as I believe, then the theoretical complications I describe in this Article likely apply with similar force to other clauses, but I do not expressly make that argument in the pages below.

### *B. History of Special Laws Prohibitions*

The earliest state constitutions insisted that legislatures could act only for the public benefit, but their language reflects the framers’ sense that they were merely memorializing an inescapable principle of natural law. Massachusetts’s first—and only—constitution, for example, included the clause: “Government is instituted for the common good; for the protection, safety, prosperity and happiness of the people; and not for the profit, honor, or private interest of any one man, family, or class of men . . . .”<sup>16</sup> These constitutions expressed the triumph of Whig exaltation of the

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<sup>13</sup> See JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* 3-4 (2009).

<sup>14</sup> *Id.*

<sup>15</sup> See Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 *RUTGERS L.J.* 1013, 1123 (2003).

<sup>16</sup> MASS. CONST. art. VII (1780).

legislature, placing in that institution the power to assert the public good over both aristocratic prerogatives and individual rights.<sup>17</sup> In the social and philosophical context of the turn of the nineteenth century, legislatures simply could never rightly allocate communal resources to private parties, almost as a matter of definition. These republican clauses, called “commonwealth” clauses in Daniel Elazar’s terminology,<sup>18</sup> owed their existence as much to philosophy<sup>19</sup> as to any concrete social problem facing the early framers.

In line with the Whig attitude toward legislative supremacy, but inconsistently with the early republicans’ commitment to the public good, early to mid-nineteenth century legislatures busied themselves with essentially adjudicatory adjustments of private needs such as the granting of divorces. In Indiana, for example, the overwhelming majority—nearly 90%—of the legislative output of 1849-50 was private laws.<sup>20</sup> Naturally, the quantity of “private bills” and the easy advantages they offered to well-connected supplicants attracted pernicious influences to the state houses.<sup>21</sup>

This level of distraction from public business strongly motivated the delegates to Indiana’s 1850 constitutional convention to constrain special legislation.<sup>22</sup> The quantity of private bills posed two related problems: the legislators were not developing and passing bills in the public interest as early republican ideals required, and they were passing bills to benefit their favorite patrons, in contravention of principles of populist control. One leading delegate abhorred the influence of economic elites on the legislature, decrying the ease with which “the agents of corporations have been able, in the capacity of lobby members, to carry through the Legislature almost any measure which their principals deemed of sufficient importance to expend money enough to carry.”<sup>23</sup> Interestingly, populist democrats were able to push special laws prohibitions through state constitutional conventions despite the powerful influence of corporations on the legislatures. This seems to have been possible because of the characteristics of the conventions that left them

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<sup>17</sup> Toward this end, early state constitutions commonly established state-supported religions. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 224-31 (2009) (describing the state constitutional imposition of taxes to support religious institutions).

<sup>18</sup> See Daniel J. Elazar, *The Principles and Traditions Underlying State Constitutions*, 12 *PUBLIUS* 11, 18 (1982) (describing a state constitutional pattern of “basically philosophic” text that emphasizes individual responsibility to the community).

<sup>19</sup> See, e.g., Donald L. Doernberg, “*We the People*”: John Locke, *Collective Constitutional Rights, and Standing to Challenge Government Action*, 73 *CALIF. L. REV.* 52, 59-61 (1985) (describing John Locke’s pervasive influence on late-1700s American constitution framers).

<sup>20</sup> See *Alpha Psi Chapter of Pi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cnty.*, 849 N.E.2d 1131, 1135 (Ind. 2006) (Shepard, C.J.), *quoted in* WILLIAMS, *supra* note 8, at 278.

<sup>21</sup> See CHARLES CHAUNCEY BINNEY, *RESTRICTIONS UPON LOCAL AND SPECIAL LEGISLATION IN STATE CONSTITUTIONS* 6-7 (1894) (lamenting the disproportionate influence of “unscrupulous men” on legislatures overwhelmed with the production of special laws, and explaining state constitutional prohibitions on special laws as the popular reaction).

<sup>22</sup> See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 69-70 (2006).

<sup>23</sup> *Id.* (quoting Delegate John Morrison).

outside of normal establishment politics.<sup>24</sup> Ordinary farmers and workers could find their way into the conventions by means they found unavailable for access to the legislatures.<sup>25</sup> Then, once in the conventions, these ordinary citizens' absence of further political ambition and the lack of any convention re-election fights meant that economic elites had limited control over the conventions' outcome.

By the 1830s, the dominant rationale for special laws prohibitions had shifted away from (but not abandoned) the commonwealth ideas associated with eighteenth century political philosophers and toward the more worldly worries seen in the Indiana convention. In addition to the time-consuming and corrupting minutia of legislative adjudication, which violated the ideal of legislatures working for the common benefit, early nineteenth century legislatures turned their attention to economic development. This would not have been problematic but for the capture of the legislatures by economic elites, leading to foolish investments with disastrous effects.<sup>26</sup> Directly as a result of the astonishing success of New York's investment in the Erie Canal, which was completed in 1825, legislatures across the country became entranced by large-scale infrastructure projects.<sup>27</sup> If managed by the federal government, these projects might have been coordinated to develop a nationally stable set of prudent investments. Instead, because the Jacksonian populists perceived such investment as beyond Congress's enumerated powers, the field was left open for the chaotic enthusiasms of the states.<sup>28</sup>

State debt connected with high-risk investments grew out of control; between 1825 and 1860 the combined debt of Pennsylvania and Ohio grew from \$6.7 million to \$1.5 billion.<sup>29</sup> Over the course of the 1830s, eighteen states contracted debt nearing \$150 million in aggregate, mostly for highly unsound investments in transportation infrastructure.<sup>30</sup> The revenue from tolls and taxes proved insufficient to service the states' debt.<sup>31</sup> By 1837, debt loads had become so unmanageable that nine states defaulted amidst a nationwide financial panic.<sup>32</sup>

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<sup>24</sup> See, e.g., SUSAN P. FINO, *THE MICHIGAN CONSTITUTION: A REFERENCE GUIDE* 8 (1996) (noting the absence of "corporate wealth or railroad interests" from among the delegates to the 1850 Michigan constitutional convention).

<sup>25</sup> See *id.*

<sup>26</sup> See Richard Briffault, Foreword, *The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 911 (2003) (describing the success of the Erie Canal and subsequent failure of other states' sloppy efforts to invest in infrastructure).

<sup>27</sup> See Susan P. Fino, *A Cure Worse Than the Disease? Taxation and Finance Provisions in State Constitutions*, 34 RUTGERS L.J. 959, 966-67 (2003) (describing the nationwide infrastructure bubble inflated by the financial success of the Erie Canal).

<sup>28</sup> See G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 110 (1998) (explaining that states invested in dubious infrastructure projects because national Jacksonians held Congress back).

<sup>29</sup> 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, 395 (1999).

<sup>30</sup> MARVIN MEYERS, *THE JACKSONIAN PERSUASION: POLITICS AND BELIEF* 85 (1957).

<sup>31</sup> See Rubin, *supra* note 29, at 395.

<sup>32</sup> See TARR, *supra* note 28, at 111-12.

The state governments' financial burdens ultimately fell on the common taxpayers, of course, so populists responded to the states' collapse and concurrent depression by seeking to place constitutional limits on legislative spending on private companies.<sup>33</sup> Even then, some commentators doubted the feasibility of enforcing the newly popular restraints on legislative excess, arguing that the constitutions would not succeed at expressing a workable, enforceable definition of the prohibited appropriations. As one anonymous critic complained, "[a]s with cant in general, the cant of 'special legislation' does not of itself afford any very definite notion of what is meant by it, though the purpose for which it was sounded is plain enough."<sup>34</sup> But the outraged populists carried the day. As Charles Chauncey Binney, a contemporary of the anti-special legislation drafters, observed, after 1837, constitution framers demonstrated "a belief that legislatures are by nature utterly careless of the public welfare, if not hopelessly corrupt," and therefore could not be trusted to invest even in public works.<sup>35</sup> A slew of constitutional clauses meant to inhibit the vagabonds in the state capitols ensued.

However, as predicted, the prohibitions on special laws adopted in the 1840s and 1850s proved insufficient to protect the public from renewed legislative entanglements with risky investments after the Civil War.<sup>36</sup> This time, railroads rather than canals were the trend. To assure state investment in their companies, shady corporate agents routinely turned to outright bribery<sup>37</sup> as a supplement to their ordinary interest-pleading. Legislatures backed railroad-corporation junk bonds with state credit, invested directly in railroads, and undertook public works projects meant to subsidize what we might now call "railroads to nowhere."<sup>38</sup>

Again, a financial crisis, the depression of 1873, exacerbated the losses from the states' imprudent investments, and again, new financial burdens fell on the ordinary taxpayer.<sup>39</sup> The populist backlash rested on a firm belief among farmers and laborers that the large railroad corporations had taken control of the legislature, such that the most powerful economic and political forces in the state were united against the working class.<sup>40</sup> Constitutional conventions in the 1870s were marked by renewed efforts to pull the states away from investing in private corporations, and special laws prohibitions were the preferred technique.<sup>41</sup> As convention followed convention across the country, states added more and more restrictions on their

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<sup>33</sup> See DINAN, *supra* note 22, at 68-69.

<sup>34</sup> *Special Legislation*, 25 AM. JURIST & L. MAG. 317 (1841).

<sup>35</sup> See BINNEY, *supra* note 21, at 9.

<sup>36</sup> See Briffault, *supra* note 26, at 912.

<sup>37</sup> Rubin, *supra* note 29, at 395-96 (describing how railroad promoters won state investments in junk stock by bribing legislators).

<sup>38</sup> See *id.*

<sup>39</sup> See TARR, *supra* note 28, at 113-14.

<sup>40</sup> See *id.* at 115; see also Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1253-54 (1996) (describing the public's sentiment that powerful economic minorities had converted state legislatures to their own purposes).

<sup>41</sup> See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 349 (2d ed. 1984).

reviled legislatures, culminating in North Dakota's 1889 list of thirty-five enumerated areas rendered beyond the legislature's constitutional authority.<sup>42</sup>

Some of the topics in the list-style prohibitions, as Dan Friedman has recently argued, look more like separation of powers provisions than fiscal clauses: legislatures were prohibited from resolving divorces, changing names, or other non-judicial functions.<sup>43</sup> New work by Nathan Chapman and Michael McConnell confirms the general connection between individual rights and governmental structure, arguing that the federal Due Process clauses have more to do with separation of powers than substantive rights.<sup>44</sup> But the remaining topics in constitutional lists of special laws prohibitions, such as prohibitions on lending the credit of the state to private entities, support the view that the constitutional framers operated under a presumption of legislative incompetence and unreasonableness, and sought constitutional methods to preclude judicial deference to the politicians' economic classifications.

From the late 1890s through the 1920s, several state courts did examine the purported public purposes of special legislation and, where found wanting, invalidated the offending statutes. But the effects of these decisions fell far from the populist and progressive impetuses that motivated the adoption of special laws clauses. Furthermore, the textual bases for these early exercises of vigorous judicial review were frequently shrouded in pre-*Erie* haze concerning the actual source of the law being applied. As was then common with much of "constitutional" jurisprudence, courts commonly referred to no precise text supporting their holdings at all.<sup>45</sup> As Helen Hershkoff's insight on *Lochner*-era state constitutional jurisprudence demonstrates, state high courts during this period had yet to fully embrace the supremacy of state constitutional text over the common law.<sup>46</sup> One effect of this tension was a generic judicial hostility to aid for the poor, which legislatures had undertaken by private bills before the rise of the administrative state.<sup>47</sup> When invited to attack these poor-relief private bills, courts found in special

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<sup>42</sup> *See id.*

<sup>43</sup> *See* Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 443-44 (2012).

<sup>44</sup> *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1755-73 (2012) (describing categories of property deprivation properly conducted only by courts).

<sup>45</sup> *Cf.* Hans A. Linde, *State Constitutions are not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927 (1993) (arguing that state courts should interpret state constitutions, without reference to federal jurisprudence, because they are positive law of the state).

<sup>46</sup> *See* Helen Hershkoff, "Just Words": *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1544-46 (2010) (describing the anti-poor effects of the contest between constitutional and common law supremacy).

<sup>47</sup> *See* Charles Warren, *Massachusetts as a Philanthropic Robber*, 12 HARV. L. REV. 316, 317-19 (1898) (cataloging legislative efforts to provide pensions, disability benefits, and poor relief by special legislation).

laws prohibitions a welcome excuse to bar legislative appropriation for redistributive purposes.<sup>48</sup>

For example, a well-researched, carefully written Hawai'i case from the territorial Supreme Court invalidated a legislative appropriation intended to compensate the victim for a fine he paid pursuant to a wrongful conviction (for conspiring to rebel against the Dole Republic<sup>49</sup> in favor of the deposed monarch).<sup>50</sup> The *Cummins* court believed that the legislature's lack of any legal obligation to the intended beneficiary rendered the appropriation merely a gift, and the legislature had no power to use the public purse to give gifts to its private friends. The basis for this holding was a "fundamental" limit on the legislature, but for support the court pointed merely to a treatise by Cooley and the opinions of various states' courts rather than any clause of federal or territorial positive law.

Similarly, in the earlier case of *Mead v. Acton*, the Massachusetts Supreme Judicial Court approved the argument of municipal taxpayers to invalidate the Town of Acton's 1882 effort to award retroactive enlistment bonuses to Civil War veterans.<sup>51</sup> The court based its decision on what it determined to be the inherent meaning of the term "taxation," which by definition (the court held) excludes the raising of funds for private benefit.<sup>52</sup> The court could imagine no public purpose for the payments, because the Acton veterans in question never expected the bonuses when they signed their paperwork to stay in the fight in Louisiana. Even if they had, the moral obligation would fall on the state, not the town. And even if towns had been responsible for enlistment bonuses, the passage of time meant that Acton lacked any reason to provide incentives for military recruitment for a war long past.<sup>53</sup> Elsewhere, courts did identify a specific text as their source for invalidating legislation in aid of private parties, but they sometimes cited special laws prohibitions and at other times relied upon the much older republican provisions<sup>54</sup> setting forth the legislature's establishment for public benefit.

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<sup>48</sup> See Helen Hershkoff, Foreword, *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 821-23 and nn.97-98 (2002) (describing redistributive welfare before the administrative state as the product of private bills).

<sup>49</sup> Hawai'i was controlled by plantation owners under the presidency of Sanford Dole between 1893, when U.S. Marines committed a coup d'état against the last queen, and 1898, when Congress annexed the islands as a territory. See generally Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 HAW. L. REV. 463, 465-66 (1995) (describing Hawai'i's tortuous, and arguably tortious, path to statehood).

<sup>50</sup> *In re Appeal of Cummins*, 20 Haw. 518, 529 (1911).

<sup>51</sup> *Mead v. Acton*, 1 N.E. 413 (Mass. 1885).

<sup>52</sup> *Id.* at 415.

<sup>53</sup> See *id.*

<sup>54</sup> See, e.g., CONN. CONST. art. I, § 1 ("All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.").

Today, courts and legislatures alike generally treat these commonwealth clauses—with one notable exception<sup>55</sup>—as hortatory, like the federal Preamble. Even after the *Mead* case in Massachusetts, the legislature continued providing special appropriations to benefit particular individuals. These benefits included the provision of pensions to state workers and their survivors, even where the workers had not contracted for them; salary payments to state workers injured on the job, whether by the tortious conduct of others or by accident, even where contracts did not compel them; and (again) payments to individuals who had been convicted but then pardoned or otherwise determined to be wrongfully convicted.<sup>56</sup> Of course, many payments also went to high officials for less transparently benevolent purposes, such as to the heirs of deceased legislators.<sup>57</sup>

These grants of public money to private persons so infuriated one well-known Boston lawyer that he described the Commonwealth as a “philanthropic robber.”<sup>58</sup> This nefarious reliance on special laws came to pass, he argued, because of what we now call collective-action problems. The woebegone family of an injured state worker would seek relief from the local representative, who would then raise the issue in committee, which would have no time or inclination to dispute the point. The “debate” would attract no attention from the public, but would be closely attended by the parties seeking the appropriation. Finally, in exchange for similar treatment for their constituents, the proponent’s colleagues would back the grant, with no incentives for anyone to resist.<sup>59</sup> During the 1890s, Massachusetts spent between eight and eighteen thousand dollars per year on these grants.<sup>60</sup> For well-heeled opponents of these one-by-one appropriations, the legislature exceeded its power any time it awarded a single dollar to specific individuals beyond its minimal legal obligation.

Even with the current political climate’s skeptical approach toward state workers, few would advocate against the payment of benefits to a man injured while protecting state property from rioters, or to a prison guard disabled while at work.<sup>61</sup> But today’s more forgiving attitude may in part reflect legislative correction of the haphazard method of awarding benefits historically attacked as special laws. Eventually, legislatures passed prospective general statutes awarding pensions, disability benefits, and the like to state workers, thereby avoiding the concern that private parties were raiding the treasury piecemeal, based on their personal powers of persuasion or political connectedness. No longer does an injured worker’s relief depend on the vagaries of statehouse politics or the clout of his own representative. In addition, these statutes made more obvious the link between the provision of

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<sup>55</sup> *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999) (relying upon the “common benefits” clause of the Vermont constitution to require equal treatment under law for opposite-sex and same-sex couples).

<sup>56</sup> *See* Warren, *supra* note 47, at 317-19.

<sup>57</sup> *Id.* at 319.

<sup>58</sup> *Id.* at 334.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* The average cost of food for a family of five in the 1890s was about \$300 annually. *See The Cost of Living*, N.Y. TIMES, Nov. 23, 1903 (citing a study by Carrol D. Wright).

<sup>61</sup> *Cf.* Warren, *supra* note 47, at 334 (arguing against such payments).

adequate benefits for state workers and the workers' incentives to join or remain in the state's service; thus, the public's direct advantage from these arrangements became more apparent. Nevertheless, the public retains an intuition that public appropriations for state workers beyond their legal entitlement treads on the rights of the taxpayers. For example, a public commission's award of substantial severance pay beyond what the employee's contract seemed to require recently sparked local outrage, official investigation, and lawsuits.<sup>62</sup>

By 1931, a commentator observed a clear gap between how much discretion special laws prohibitions seemed to afford legislatures and how much the courts actually provided.<sup>63</sup> States needed to fight the Great Depression with public investment, and courts rapidly began their retreat from meaningful application of the special laws clauses.<sup>64</sup> In the next part, I address modern court approaches to these clauses.

### C. Judicial Interpretations

Contemporary courts commonly apply "rational-basis review" when interpreting state constitutional special laws prohibitions.<sup>65</sup> Some courts have even expressly identified their special laws prohibitions as equivalent to equal protection under the federal Fourteenth Amendment. One consequence of treating these cases as conventional economic-classification equal protection problems is the courts' failure to think seriously about remedies. In some cases, litigants seek to invalidate a privilege bestowed on a politically favored competitor. In others, litigants seek only to win the same privilege for themselves on an equal footing, treating the special law as a burden that unfairly singles out a disfavored plaintiff rather than a privilege. Contemporary courts mimicking federal equal protection doctrine almost never consider whether the "special" law is a rare benefit for the plaintiff's adversary or an unjustly particularized burden on the plaintiff, and so miss the chance to analyze whether the special laws prohibitions should apply at all. A law passed for private gain without public benefit should, under the plain text of the constitutional prohibitions, always be rendered void. To extend its improper benefits to the targets' economic competitors is merely to compound the wrong. But equal protection doctrine, being founded on different concerns, does not require courts to consider this problem.

As early as 1958, the New Jersey Supreme Court (a national leader in state constitutional interpretation) held its constitutional prohibition on special laws<sup>66</sup> to be congruent with federal rational-basis equal protection.<sup>67</sup> The court affirmed that

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<sup>62</sup> See Steve Pardo, *Wayne County Expected to Ban Severance Payments in Wake of Mullin Deal*, DET. NEWS, Jan. 12, 2012, at A4.

<sup>63</sup> Walter F. Dodd, *Judicially Non-Enforcible Provisions of State Constitutions*, 80 U. PA. L. REV. 54, 60 (1931).

<sup>64</sup> See Briffault, *supra* note 26, at 912-13.

<sup>65</sup> See SHAMAN, *supra* note 13, at 36.

<sup>66</sup> N.J. CONST. art. IV, § VII, para. 9 ("The Legislature shall not pass any private, special or local laws . . . [g]ranting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever.").

<sup>67</sup> See *Robson v. Rodriguez*, 141 A.2d 1 (N.J. 1958) (equating the special laws prohibition with equal protection). *But see* Randy Samson, Comment, *Atlantic City Special: Whether the*

approach in a case challenging a statutory exemption from hospital licensing requirements for a narrowly defined non-profit planning to build a new facility.<sup>68</sup> The plaintiff, a hospital corporation already possessing a facility, asked the court to invalidate the legislative privilege of exemption from certificate-of-need requirements afforded to its rival.<sup>69</sup> Facing simultaneous claims under the federal equal protection clause and the state's prohibition on special laws, the court noted that the court below had "acknowledged" that the two clauses called for the same test, and later asserted directly that, "The propriety of exclusions must be examined utilizing the principles generally applicable to [federal] equal protection."<sup>70</sup> Under that highly deferential review of economic classifications, the court found no difficulty in concluding that a "rational basis" supported the legislation.<sup>71</sup>

The Illinois constitution not only prohibits special laws, it expressly declares that "[w]hether a general law is or can be made applicable shall be a matter for judicial determination."<sup>72</sup> Yet the Supreme Court there has held that this prohibition is identical in effect to an equal protection clause, and that the same standard of equal protection applies under both the state and federal constitutions.<sup>73</sup> Consequently, where the legislature had enacted a protection from competing new franchises for existing auto dealerships but not for existing franchises of other industries, the Illinois Supreme Court needed barely a paragraph to determine that the statute was rationally related to the legitimate purpose of "protecting the public from harmful franchise practices by automobile manufacturers."<sup>74</sup> The franchisor's effort to void the statutory privilege protecting existing dealerships failed.<sup>75</sup>

In Nevada, the special laws prohibition declares that "In all cases . . . where a general law can be made applicable, all laws shall be general and of uniform operation throughout the State."<sup>76</sup> But in a case concerning reduced procedural

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*Casino Exception to the New Jersey Smoke-Free Air Act Comports with the New Jersey Constitution's General Prohibition of Special Laws*, 38 SETON HALL L. REV. 359, 379-80 (2008) (arguing that whether the New Jersey Supreme Court distinguishes between legislation rationally related to any conceivable purpose and legislation rationally related to its actual purpose is an open question).

<sup>68</sup> See *Paul Kimball Hosp., Inc. v. Brick Twp. Hosp., Inc.*, 432 A.2d 36 (N.J. 1981) (treating the special laws prohibition as equivalent to federal equal protection).

<sup>69</sup> *Id.* at 43.

<sup>70</sup> *Id.* at 45.

<sup>71</sup> See *id.* at 46.

<sup>72</sup> ILL. CONST. art. IV, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.").

<sup>73</sup> See *General Motors Corp. v. Ill. State Motor Vehicle Rev. Bd.*, 862 N.E.2d 209, 229 (Ill. 2007). *But cf.* *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1070 (Ill. 1997) (purporting to apply special laws analysis equivalent to federal Fourteenth Amendment rational-basis review, but invalidating a statute capping non-economic damages in medical malpractice tort litigation).

<sup>74</sup> See *General Motors Corp.*, 862 N.E.2d at 229 (Ill. 2007).

<sup>75</sup> *Id.*

<sup>76</sup> NEV. CONST. art. 4, § 21.

protections for civil claims under \$50,000,<sup>77</sup> the Supreme Court cited its special laws prohibition but applied, without analysis, its longstanding doctrine treating the state constitutional prohibition on special laws as indistinguishable from federal equal protection. After conducting a single rational-basis review simultaneously addressed to both constitutional claims, the court rebuffed the challenge presented under both constitutions because it was rational for the legislature to devise different procedures for high- and low-value lawsuits.<sup>78</sup> It is, indeed, quite rational to offer more cost-effective procedural protections for low-value civil claims than for high-value claims. And perhaps the legislature was not subject to nefarious capture by politically important low-value repeat plaintiffs seeking expedited methods to collect, say, gambling debts. But these are distinct questions. On its face, the constitutional prohibition requires the court to determine whether a “general law” could have applied to both high-value and low-value cases. By following federal doctrine instead of its own text, the Nevada Court never even began this basic inquiry.

Wyoming lacks a single state constitutional equal protection clause, but does prohibit special laws.<sup>79</sup> In a tort case, plaintiffs argued that governmental immunity for the local irrigation district violated the state constitution because the district was not funded by state taxpayers.<sup>80</sup> The Supreme Court treated a “cluster” of state constitutional clauses, including the prohibition on special laws, as “the state’s functional equivalent of the federal equal protection clause,” without discussing why these clauses should be treated in that way.<sup>81</sup> Following federal practice, the court considered whether the statutory grant of immunity was “rationally related” to the achievement of an “appropriate legislative purpose,” and determined, on the basis of a rationale not stated in the legislative history, that the plaintiffs had not carried their “heavy burden” to establish the legislation’s irrationality.<sup>82</sup>

Most state high courts interpret special laws prohibitions with extraordinary self-restraint.<sup>83</sup> Even in states that have not expressly determined their special laws

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<sup>77</sup> *Zamora v. Price*, 213 P.3d 490 (Nev. 2009) (calling the special laws prohibition an “equal protection” clause and treating it as equivalent to federal equal protection); *see also* *Rico v. Rodriguez*, 120 P.3d 812, 817 (Nev. 2005) (treating the special laws prohibition as identical to the federal Fourteenth Amendment); *Barrett v. Baird*, 908 P.2d 689, 698 (Nev. 1995) (holding, without analysis, that “[t]he standard for testing the validity of legislation under the equal protection clause of the state constitution is the same as the federal standard.”), *overruled on other grounds by* *Lioce v. Cohen*, 174 P.3d 970 (Nev. 2008).

<sup>78</sup> *See Zamora*, 213 P.3d at 495.

<sup>79</sup> *See* WYO. CONST. art. 3, § 27 (“The legislature shall not pass local or special laws [in a range of enumerated situations]. In all other cases where a general law can be made applicable no special law shall be enacted.”).

<sup>80</sup> *Krenning v. Heart Mountain Irrigation Dist.*, 200 P.3d 774 (Wyo. 2009).

<sup>81</sup> *Id.* at 784 n.4.

<sup>82</sup> *See id.* at 784-85. If the plaintiffs had prevailed, the district’s statutorily granted privilege would have been voided, not extended to the plaintiffs, making this more like a conventional special laws issue.

<sup>83</sup> At least twenty-nine states apply a rational-basis or similarly lax test to special laws. The following list does not include states that apply a rational-basis-with-teeth, slightly more rigorous, review. *See* *Ala. Power Co. v. Citizens of Ala.*, 740 So. 2d 371, 385-87 (Ala.1999)

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(holding that any public purpose is sufficient to sustain a statute against a special laws challenge); *Pebble v. Parnell*, 215 P.3d 1064 (Alaska 2009) (holding the special laws clause satisfied if the statute “bears a fair and substantial relationship to legitimate purposes,” which the court describes as equivalent to a “reasonableness” test); *O’Connell v. City of Stockton*, 162 P.3d 583, 592 (Cal. 2007) (holding that the special laws prohibition does not prohibit legislation with a “rational basis”); *Gilemmo v. Cousineau*, 694 S.E.2d 75, 77-78 (Ga. 2010) (holding a statute constitutional if it operates “uniformly” and is not “arbitrary” or “unreasonable”); *Arel v. T & L Enters.*, 189 P.3d 1149, 1155-56 (Idaho 2008) (holding that a statute is constitutional if it is not “arbitrary” or “unreasonable”); *General Motors Corp. v. Ill. Motor Vehicle Review Bd.*, 862 N.E.2d 209, 228-29 (Ill. 2007) (applying federal rational-basis review to a special laws challenge); *Christopher R. Brown, D.D.S., Inc., v. Decatur Cnty. Mem’l. Hosp.*, 892 N.E.2d 642 (Ind. 2008) (finding no special laws violation where the legislative classification is “reasonably related” to the “inherent” differences between classes); *City of Coralville v. Iowa Utils Bd.*, 750 N.W.2d 523, 530-31 (Iowa 2008) (applying rational-basis review to special laws challenge); *Johnson v. Gans Furniture Indus.*, 114 S.W.3d 850, 856-57 (Ky. 2003) (holding that legislative classifications must be “natural,” meaning that the statute reasonably distinguishes between classes for a rational purpose); *Green v. N.B.S., Inc.*, 976 A.2d 279, 288-89 (Md. 2009) (holding that laws are not “special” if they are not unreasonable or arbitrary); *Oxford Asset Partners, LLC v. City of Oxford*, 970 So. 2d 116 (Miss. 2006) (applying highly deferential review); *Alderson v. State*, 273 S.W.3d 533, 538-39 (Mo. 2009) (treating state prohibition on special laws as equivalent to federal Equal Protection Clause); *Rohlf’s v. Klemenhausen, LLC*, 227 P.3d 42, 45-47 (Mont. 2009) (upholding statute where the legislative classification was “reasonable”); *Yant v. City of Grand Island*, 784 N.W.2d 101, (Neb. 2010) (upholding a legislative classification where distinction was “reasonable”); *Zamora v. Price*, 213 P.3d 490, 495 (Nev. 2009) (treating special laws prohibition as equivalent to federal Equal Protection Clause); *Jordan v. Horsemen’s Benevolent & Protective Ass’n.*, 448 A.2d 462, 467-69 (N.J. 1982) (holding that if there exists “any conceivable state of facts” that would make the legislative classification reasonable, the law does not violate the special laws prohibition); *Garcia ex rel. Garcia v. La Farge*, 893 P.2d 428, 434-35 (N.M.1995) (holding that so long as a statute is supported by more than “mere caprice,” it does not violate the special laws prohibition); *Hotel Dorset Co. v. Trust for Cultural Res.*, 385 N.E.2d 1284, 1288-92 (N.Y. 1978) (holding that so long as the class might someday expand, the statute does not violate the special laws prohibition); *Williams v. Blue Cross Blue Shield*, 581 S.E.2d 415, 425-29 (N.C. 2003) (upholding a legislative classification where the statute had a “reasonable basis”); *Teigen v. State*, 749 N.W.2d 505, 509-14 (N.D. 2008) (applying a “reasonableness” standard to evaluate the legislative classification); *Pa. Tpk. Comm’n v. Commonwealth*, 899 A.2d 1085, 1094-97 (Pa. 2006) (holding that the state special laws clause is equivalent to federal equal protection doctrine); *Associated Gen. Contractors v. Schreiner*, 492 N.W.2d 916, 924-25 (S.D. 1992) (holding that a legislative classification is constitutional so long as it applies to all members of the class defined by the statute); *McCarver v. Ins. Co. of Pa.*, 208 S.W.3d 380, 384-85 (Tenn. 2006) (upholding a legislative classification so long as it has a “rational basis”); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 636 (Utah 1990) (upholding a legislative grant of tort immunity (to a private railroad!) because the classification was reasonable); *Jefferson Green Unit Owners Ass’n v. Gwinn*, 551 S.E.2d 339, 344-46 (Va. 2001) (upholding a “reasonable” legislative classification that affected a single private firm); *Port of Seattle v. Pollution Control*, 90 P.3d 659, 689-90 (Wash. 2004) (holding that any “rational” classification would satisfy the constitutional special laws clause); *Gallant v. Cnty. Comm’n.*, 575 S.E.2d 222, 229-31 (W. Va. 2002) (finding no constitutional violation where the legislative classification was reasonably related to the statute’s purpose); *Libertarian Party v. State*, 546 N.W.2d 424, 430-33 (Wis. 1996) (upholding tax exemptions that benefitted a single for-profit professional sports team); *Krenning v. Heart Mountain Irrigation Dist.*, 200 P.3d 774, 784 n.4 (Wyo. 2009) (treating the special laws prohibition as equivalent to federal equal protection).

prohibitions to be repetitive of federal equal protection standards, the caselaw broadly tracks the highly deferential standards of ordinary federal rational-basis review. For example, Alaska's Supreme Court has upheld as not "special" a pollution-prevention ballot proposal applicable to only two specific mines;<sup>84</sup> Massachusetts's justices have opined that a statute obligating the state treasurer to issue bonds, pay the receipts in part to private rail companies, and then collect reimbursement from the companies in intervals over time was not impermissibly lending the credit of the commonwealth for private benefit;<sup>85</sup> and the New York Court of Appeals denied that a statute providing tax benefits solely to the Museum of Modern Art violated the constitutional prohibition on special-law tax exemptions.<sup>86</sup> As a matter of public policy, these decisions might very well be sound. It is quite plausible that the challenged statutes were *not* the result of logrolling, or legislative capture, or a desire to evade political accountability for laws that would have earned broad opposition if more generally applied.<sup>87</sup> We will never know, because under such deferential interpretations of their special laws prohibitions, the courts never asked.

Despite the general trend, a few state high courts do give independent meaning to their constitutional special laws prohibitions. State courts have rarely been accused of rigid adherence to doctrinal coherency. Sometimes, even where the special laws prohibitions are treated as equivalent to federal equal protection, the courts apply rational basis with teeth.<sup>88</sup> In *Weiss v. Geisbauer*, for example, the Arkansas Supreme Court confirmed that it applies a "'rational basis' standard of review when determining whether legislation is special or local" under the state constitution's prohibitory clause and explicitly matched that analysis with federal equal protection.<sup>89</sup> Then the Court faced a statute that gave tax advantages to gas stations in cities abutting the state line running through the Mississippi River, but not to border cities on other rivers.<sup>90</sup> Surely, the court observed, the legislature was sensible to perceive a different risk to tax revenue between cities where the motorist would only need to cross a street to find cheaper fuel and cities where the motorist

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<sup>84</sup> See *Pebble Ltd. P'ship v. Parnell*, 215 P.3d 1064 (Alaska 2009). The mine owners sought to invalidate the proposed legislation as a special burden, not a special benefit.

<sup>85</sup> See *Opinion of the Justices*, 660 N.E.2d 652, 657 (Mass. 1996). Here, the challengers sought a remedy of invalidating the bonds, rather than seeking additional bonds for themselves.

<sup>86</sup> See *Hotel Dorset Co. v. Trust for Cultural Res.*, 385 N.E.2d 1284, 1288 (N.Y. 1978). Plaintiffs, business rivals to the museum, sought to invalidate the tax exemptions rather than to win them for themselves.

<sup>87</sup> Cf. *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[N]othing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.").

<sup>88</sup> Cf. *Romer v. Evans*, 517 U.S. 620 (1996) (applying rational-basis review under the federal equal protection clause, but nevertheless invalidating a state constitutional amendment discriminating against a non-suspect class).

<sup>89</sup> *Weiss v. Geisbauer*, 215 S.W.3d 628, 630 (Ark. 2005). The state constitution prohibits the legislature from passing "any local or special act." ARK. CONST. amend. 14 (1926).

<sup>90</sup> *Weiss*, 215 S.W.3d at 629.

would confront an impassable waterway or a burdensome trip over a bridge to save pennies on the gallon.<sup>91</sup> But distinguishing between cities on one river or another, the court held, was simply irrational.<sup>92</sup> (Interestingly, the court purported to exercise its own imagination to find some basis for the legislation,<sup>93</sup> as with conventional rational-basis review, there was no inquiry into the legislature's rationale-in-fact.)<sup>94</sup> The court concluded that because the distinction was irrational, the statute violated the special laws prohibition. The court remedied the violation by striking the favorable treatment provided to Mississippi River towns rather than by extending the benefit to the disfavored riparian plaintiff.<sup>95</sup>

These unusual state high courts have developed genuinely non-federal jurisprudence, but they have failed to define special laws in a consistently coherent or logical way. The slipperiness and unpredictability of these doctrines suggests that perhaps state high courts are not more frequently applying special laws prohibitions independently because the task is simply impossible. When is a law a benefit to one class instead of a burden on the class's mirror image? When is a law directed in favor of a mere subset of the "truly" relevant class, and when is the law properly directed at the entirety of the class? As a question of philosophical logic, these questions can yield no meaningful answer. But law has never been bound by mathematical rigor,<sup>96</sup> and the difficulty of line-drawing is far from unique to special laws. Law is a human creation, and the act of judging is political, social, and overwhelmingly human. More interesting, then, than the question of whether a logically rigorous meaning can be afforded to the phrase "special laws" is the question of how courts ought to consider these clauses within the social and political contexts in which they operate.

For an example, let us examine the Arizona Supreme Court's interpretation of its constitution's article IV. This article, which is devoted to structuring and limiting the legislature, contains a clause prohibiting the passage of "local or special laws" in a variety of enumerated contexts, including divorces, changing names, and (most importantly), "[w]hen a general law can be made applicable."<sup>97</sup> In *Republic Investment Fund v. Surprise*,<sup>98</sup> the Arizona Supreme Court considered challenges to

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<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 632.

<sup>93</sup> *See id.* ("The court can find no basis upon which to justify [the distinction]" (emphasis added)).

<sup>94</sup> *See id.*

<sup>95</sup> *See id.* at 633.

<sup>96</sup> *See, e.g., Nix v. Hedden*, 149 U.S. 304 (1893) (holding, for cultural reasons despite scientific evidence to the contrary, that tomatoes are a vegetable and not a fruit because they are rarely eaten for dessert).

<sup>97</sup> ARIZ. CONST. art. IV, pt. 2, § 19. The 1910 Arizona Constitutional Convention that wrote this clause left no record of any deeper purpose beyond the surface meaning. *See* Roger C. Henderson, *Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910*, 35 ARIZ. L. REV. 535, 577 n.31 (1993).

<sup>98</sup> *Republic Inv. Fund v. Surprise*, 800 P.2d 1251 (Ariz. 1990). As stated in the text, while this case deals with the prohibition on geographically-limiting "local" laws, the Arizona court applied reasoning indistinguishable from its economically-limiting "special" laws jurisprudence. *See also Sherman v. City of Tempe*, 45 P.3d 336, 342 (Ariz. 2002) (upholding

a statute meant to reform the process by which towns “deannexed” parts of their land. The statute placed restrictions on towns “having a population of less than ten thousand persons according to the 1980 United States decennial census within a county having a population in excess of one million two hundred thousand persons according to the 1980 United States decennial census,” which affected only twelve municipalities within a single county.<sup>99</sup> Applying a 1981 precedent that expressly distinguished between equal protection and the prohibition on special laws based on the difference between burdens and benefits, the court addressed the mystical question of whether the statute burdened the dozen towns to which it applied or benefitted all other towns and concluded that both perspectives required constitutional justification.<sup>100</sup>

The court easily determined the statute’s burden on the dozen towns to be rationally related to a legitimate purpose, and therefore satisfactory under the state’s federal-style equal protection analysis. The special laws prohibition, however, required more. The court realized that the Arizona special laws prohibition had a distinct purpose from equal protection: “to avoid the evils created by a patchwork type of legal system where some laws applied in a few locations while others applied elsewhere.”<sup>101</sup> This rationale clearly applies only to “local” laws (and makes little sense in any event where municipalities may pass local ordinances, thereby creating a “patchwork” of laws). The court in *Republic Investment* had before it a challenge to “local” rather than, strictly speaking, “special” laws, but it explicitly linked both special and local laws as subject to the same analysis. That analysis proceeded in two steps: first, the Court determined whether the law applied evenly to all members of the relevant class, i.e. the class of entities the legislature sought to regulate through the particular statute under challenge. Once the court deemed the class defined by the statute as “legitimate,” it went on to test whether the class was “elastic.” A class is elastic if members can exit or others can enter the class. In *Republic Investment*, the statute limited the class to municipalities meeting demographic characteristics as of a fixed moment in time, and therefore those municipalities would always belong to the class and no other municipalities would ever qualify. In contrast, the Court pointed out, a statute that limits a class to cities of a certain population might apply to only one city at the time of passage, but future cities could grow into the class or the existing city could shrink out of it.<sup>102</sup> The deannexation statute’s applicability to only a closed set, therefore, doomed it as a prohibited “special law.”<sup>103</sup>

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a charter provision against special laws scrutiny because it bore a “rational relationship to [a] legitimate government objective” and applied to all members of the “relevant” class and the class membership could change over time); *Big D. Constr. Corp. v. Court of Appeals*, 789 P.2d 1061, 1071 (Ariz. 1990) (holding a statute invalid under both the equal protection and special laws clauses of the Arizona constitution).

<sup>99</sup> See *Republic Inv. Fund*, 800 P.2d at 1255.

<sup>100</sup> See *id.* at 1256.

<sup>101</sup> *Id.* at 1257.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

Rather than invalidate the “benefit” of exemption from the deannexation statute for the other towns, however, the court invalidated the statute’s burden on the dozen municipalities fixed in the class.<sup>104</sup> Without saying so directly, the court seems to have shifted its consideration of the burden/benefit distinction from benefitted towns/burdened towns to benefitted landowners/burdened landowners. The deannexation statute burdened a dozen towns, but *for the benefit* of landowners in those towns who opposed annexation. “Because a general law would have provided a remedy to individuals in all areas annexed by large or small cities within the state, as indicated by the original bill, the statute’s limited application violates the special law prohibition.”<sup>105</sup> Of course, the class of *landowners* who benefitted from the deannexation statute was always open; anyone could unexpectedly and suddenly decide to buy land in Surprise,<sup>106</sup> and anyone can get sick of Maricopa County and leave town.<sup>107</sup>

Because the court left its shift from concern for benefitted towns to concern for benefitted landowners unspoken, the opinion offers no explanation for the logical difference between the closed class of towns and the open class of landowners. The court never articulated why the remedy was to invalidate the statute rather than require the statute’s application to the entire “relevant” class (which was, the court believed, at least all of those municipalities large and small that had previously abused loopholes in the prior annexation regime).<sup>108</sup>

The court’s remedy benefitted the plaintiff towns at the expense of local land developers. The opinion leading to that remedy explained the seeming purpose of the deannexation statute overall (to fix “abuses” of the prior procedure by towns including Surprise), but offered no discussion of why the statute was limited to only twelve towns when the problem had been much broader. Perhaps the court reached its constitutional conclusion because it was concerned about land speculators taking advantage of small towns in a changed real estate market; perhaps the justices were informally aware of legislative capture by the developers but lacked a basis to include that problem in their opinion. In any event, the court’s firm rhetoric, repeated insistence that the special laws prohibition is more stringent than the state’s equal protection clause, and ultimately articulation of a test that leaves the court itself with wide discretion must have sent a distinct message to the legislature. While outsiders to Arizona politics of the early 1990s might never know the full meaning of that message, such an activist application of judicial review might well have been perceived as a significant intervention by the statute’s sponsors.<sup>109</sup>

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<sup>104</sup> See *id.* at 1258.

<sup>105</sup> *Id.* at 1259.

<sup>106</sup> See, e.g., *Homes, ZILLOW*, [http://www.zillow.com/homes/surprise,-arizona\\_rb/#/homes/for\\_sale/Surprise-AZ/](http://www.zillow.com/homes/surprise,-arizona_rb/#/homes/for_sale/Surprise-AZ/) (last visited Oct. 22, 2012) (listing homes for sale in Surprise).

<sup>107</sup> For example, Hon. Sandra Day O’Connor.

<sup>108</sup> See *Republic Inv. Fund*, 800 P.2d at 1257.

<sup>109</sup> See LAURA LANGER, *JUDICIAL REVIEW IN STATE SUPREME COURTS: A COMPARATIVE STUDY* 35 (2002) (noting that “policy pronouncements from any member on the bench are typically frowned upon in most legislatures, especially when it [sic] involves . . . a fiscal matter.”).

Likewise, in *Lawnwood Medical Center v. Seeger*, the Florida Supreme Court applied its constitutional prohibition<sup>110</sup> on special laws to invalidate a legislative economic classification.<sup>111</sup> The legislature had passed a statute meant to resolve a dispute between the medical staff and the board of a private, for-profit hospital. After having failed to prevail in court on several attempts to discipline two controversial pathologists, the governing board sought relief at the statehouse.<sup>112</sup> The legislature responded with an admittedly “special” law applying only to the two private hospitals in St. Lucie County owned by the same corporation that would solidify the board’s control over the medical staff. The Court considered and rejected the hospital’s argument that the statute, while “special,” was not a prohibited “grant of privilege” because it provided no direct financial benefit to the corporation.<sup>113</sup> Rather than giving to credence to the purported legislative purpose of patient safety, the Court applied dictionary definitions of “privilege” to conclude that the statute’s grant of unilateral control over the medical by-laws to the board violated the constitution.<sup>114</sup> The Court determined the entire statute irredeemable, leaving none of the governance privileges it had awarded the board in place.<sup>115</sup> This case stands as one of the most vigorous enforcements of special laws prohibitions by a modern court.

While *Lawnwood* was richly larded with rhetoric of respect for the legislature,<sup>116</sup> the court’s opinion included two features that suggest a different concern. First, the opinion opens with a careful exposition of the prior disputes in court between the medical staff and the board.<sup>117</sup> The board, dissatisfied with the two pathologists, had suspended them through procedures later found improper by a state court. The board responded to that court’s judgment by firing the medical officers, and again lost in state court. Again, the board responded aggressively by attempting to unilaterally amend the medical by-laws, and finally turned to the legislature when the staff would not recognize the newly imposed rules. By invalidating the statute in its entirety, the *Lawnwood* court restored the practical effect and power of the earlier trial court decisions. The Supreme Court’s review of the history of that prior litigation was not strictly necessary for the Supreme Court’s special laws analysis. But it establishes a narrative in which the legislature, not the courts, is the activist institution inappropriately transgressing the separation of powers.

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<sup>110</sup> FLA. CONST. art. III, § 11(a) (“There shall be no special law or general law of local application pertaining to . . . grant of privilege to a private corporation.”).

<sup>111</sup> *Lawnwood Med. Ctr. V. Seeger*, 990 So. 2d 503 (Fla. 2008).

<sup>112</sup> *See id.* at 507.

<sup>113</sup> *See id.* at 510, 513-14.

<sup>114</sup> *See id.* The court was supported in this result by amicus briefs on behalf of the medical staff from the American Medical Association, the Florida Medical Association, and the Association of American Physicians and Surgeons. *Id.* at 506 n.1.

<sup>115</sup> *See id.* at 518.

<sup>116</sup> *See, e.g., id.* at 509 (“We do not take lightly a contention that a statute passed by the Legislature is unconstitutional and we start with the well-established principle that a legislative enactment is presumed to be constitutional.”).

<sup>117</sup> *See id.* at 507.

This story also ties the dispute more closely to the constitutional provision itself, which is the second key feature that might explain the result in *Lawnwood*. The Florida constitution of 1885, the court explained, prohibited a broad list of special legislation in areas like criminal penalties, divorces, name changes, adoption, and the recognition of wills.<sup>118</sup> In this context, the legislature could still establish general standards for proving the need for a divorce, etc., but was excluded from piecemeal legislation changing a single person's name or confirming the validity of a specific (otherwise insufficient) will. These specific prohibitions were carried forward and expanded in the 1968 constitution, including the addition of the bar on granting "privileges" to private corporations.<sup>119</sup> "One purpose of expanding the scope of prohibitions of special laws," the Court said, "was to prevent state action benefiting local or private interests and to direct the Legislature to focus on issues of statewide importance."<sup>120</sup>

Looking over the list of areas excluded from special legislation reveals how very *judicial* these functions are today.<sup>121</sup> *Lawnwood*, then, looks less like a case of irrational economic discrimination (after all, the invalid statute did not include any appropriation of funds or taxation) and more like a turf battle between the judiciary and legislature. Dan Friedman, an expert on Maryland constitutional law, has argued that the special laws prohibition there is primarily directed at separation of powers,<sup>122</sup> a view *Lawnwood* suggests might apply more generally. In the next Part, I address the theoretical consequences of state courts' refusal to enforce these constitutional provisions.

#### *D. Approaches to Judicial Enforcement of Constitutional Special Laws Prohibitions*

State constitutional scholarship has a tendency to swing from phases of self-confident enthusiasm<sup>123</sup> to periods of self-doubt.<sup>124</sup> In that context, the story of special laws prohibitions may offer a middle way. Having reviewed the cases, disciples of the Linde<sup>125</sup>-Williams<sup>126</sup> positivist, anti-lockstepping school of state

<sup>118</sup> See *id.* at 514 n.12.

<sup>119</sup> See *id.* at 514 n.13.

<sup>120</sup> *Id.* at 513.

<sup>121</sup> At the federal level, some of these functions fall more to administrators in the Executive Branch than to courts, but the judicial role in these areas at the state level is one of the characteristics of state judiciaries that distinguishes them from federal courts. See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1872-75 (2001) (describing state courts' administrative roles)

<sup>122</sup> See Friedman, *supra* note 43, at 443.

<sup>123</sup> See, e.g., William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Nelson, *supra* note 2; Judith S. Kaye, Brennan Lecture, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995).

<sup>124</sup> See, e.g., Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985); James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992); Daniel B. Rodriguez, *State Constitutional Failure*, 2011 U. ILL. L. REV. 1243 (2011).

<sup>125</sup> See generally Hans A. Linde, *Are State Constitutions Common Law?*, 34 ARIZ. L. REV. 215 (1992).

constitutionalism might be surprised that the courts give such federally-dependent readings to textual provisions that lack any analogue in the federal Constitution. Disciples of the Cooley<sup>127</sup>-Cover<sup>128</sup>-Kahn<sup>129</sup>-Schapiro<sup>130</sup> polyphonic, discursive school of state constitutionalism might not be surprised by the federalist and not-particularly-positivist caselaw, but might still wonder a bit at the weakness of special laws enforcement. In this Part, I seek to lay out the leading reasons for why one should expect courts to behave as they do (by not giving vigorous, autonomous meaning to the prohibitions) and why, conversely, one should not. By playing out these rationales, I intend this Part to clarify what function these clauses play in state constitutions and the limits of what we can hope for from them.

To start, one might be surprised by the courts' reliance on special laws analysis derived from the federal Fourteenth Amendment, because the social evils the Fourteenth Amendment was designed to address were so transparently different from the problems that inspired the special laws prohibitions. The Fourteenth Amendment, like the other Reconstruction amendments, was meant to advance racial equality.<sup>131</sup> Federal jurisprudence interpreting it has fixated on protection for "suspect classes," not generic equal protection for all social and economic rights.<sup>132</sup> No evidence suggests that special laws prohibitions, in contrast, were motivated anywhere by a popular will to protect any particular class members bearing any disfavored characteristics of identity. Instead, as discussed above in Part I, these clauses originated specifically in response to economic inequality and were intended from the start to protect the People from oppression by the combination of abusive economic and political institutions.<sup>133</sup> This distinction undermines the applicability of federal precedents directed primarily at racial equality to state constitutional clauses directed at economic abuses. State courts' inattention to this distinction should be surprising, because it conflicts with the interpretive convention that state constitutional interpretation should engage with the social, political, and economic

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<sup>126</sup> See generally Robert F. Williams, *Dual Enforcement of Constitutional Norms: State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499 (2005).

<sup>127</sup> See generally THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (1868).

<sup>128</sup> See generally Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977).

<sup>129</sup> See generally Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993).

<sup>130</sup> See generally Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

<sup>131</sup> See Richard L. Aynes, *The Continuing Importance of Congressman John A. Bingham and the Fourteenth Amendment*, 36 AKRON L. REV. 589, 603-05 (2003).

<sup>132</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944) (establishing strict scrutiny for racial classifications).

<sup>133</sup> See, e.g., Jonathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation?*, 69 TEMP. L. REV. 1247, 1247 (1996) (contrasting the history of the Washington special laws prohibition with that of the Fourteenth Amendment).

context in which the document was formed—the interpretive approach generally called “originalism.”<sup>134</sup> This gap between observed state court practice and the theoretically expected behavior calls for alternative explanations.<sup>135</sup>

More broadly, courts might not be willing to engage in a strong and autonomous interpretation of special laws prohibitions because to do so would require a searching inquiry into the legislative process. If a court were to seriously pursue the clauses’ apparent purpose of resisting legislative dysfunction (such as logrolling, capture by interest groups, unfair incumbent protection, distraction, or outright corruption), then special laws opinions would be dominated by close readings of legislative history as the court sought out the legislature’s “true” subjective purpose in passing the challenged law. That task is tilting at windmills, one might argue. To the extent that such a thing as legislative “intent” even exists, it can be impossible to discern from outside the corridors of political power. If state constitutional framers expected their judges to undertake such an examination, they simply misunderstood the inherent limitations on the judicial role.

However, there are doctrines that depend crucially on the judicial interpretation of subjective legislative intent. When evaluating employment discrimination claims, for example, the *McDonnell-Douglas* test famously demands that courts look past the defendant’s superficial reasons for challenged conduct to determine whether the action was, in fact, motivated by race (or another protected class).<sup>136</sup> Is a racial motivation any easier to distinguish from a bona fide business rationale than a private purpose is to distinguish from a public purpose? In *McCreary County v. American Civil Liberties Union*, the United States Supreme Court evaluated the constitutional legitimacy of a so-called “Ten Commandments” display under the federal Establishment Clause.<sup>137</sup> Contrary to a direct argument that the legislative purpose was ultimately and inherently unknowable, the Court held that the display’s constitutionality hinged on the state actors’ purpose.<sup>138</sup> Justice Souter, writing for the Court, explained that appellate courts routinely examine subjective purpose, even purpose submerged beneath pretext, when evaluating the legality of challenged actions.<sup>139</sup> Is it more difficult to tell whether a statute was intended as a favor for a major campaign contributor than whether a statute was intended to promote religion?

In a legal area much closer to the special laws problem than employment discrimination or religious establishment, the answer is yes. In *Kelo v. City of New London*, the federal Supreme Court considered whether a government taking

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<sup>134</sup> See *People v. Harding*, 19 N.W. 155, 156 (Mich. 1884) (Cooley, J.) (asserting that “in seeking for [a state constitution’s] real meaning we must take into consideration the times and circumstances under which the State Constitution was formed—the general spirit of the times and the prevailing sentiments among the people.”).

<sup>135</sup> See *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1464 (1982) (complaining that “the possibility that factors peculiar to the states may strengthen the case for judicial intervention in the economic realm has largely been ignored”).

<sup>136</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>137</sup> See *McCreary Cnty. v. Am. Civil Liberties Union*, 545 U.S. 844, 851 (2005). I thank Chris Lund for suggesting the relevance of this case to my point here.

<sup>138</sup> See *id.* at 861.

<sup>139</sup> *Id.*

satisfied the Fifth Amendment's "public use" requirement.<sup>140</sup> The Court affirmed the theoretical principle that government may not take private property under a sham public purpose when its actual purpose is for private benefit.<sup>141</sup> However, the Court went on to adopt an enormously deferential approach, holding that the municipality's taking of private homes for transfer to a global pharmaceutical corporation was a sufficiently "public" purpose.<sup>142</sup> It was impossible, *Kelo* held, for a court to rationally distinguish between economic development and any other public purpose. The question before the *Kelo* Court, whether a particular government action was motivated by a public or private purpose, is the same question special laws prohibitions seem to put to state courts. The Supreme Court's deferential approach under the Takings Clause makes a strong argument that any more meaningful review would be futile or overreaching.<sup>143</sup>

The judicial desire to avoid unwarranted interference in legislative prerogatives, especially in the economic sphere, echoes the battle over *Lochner*-ism.<sup>144</sup> Perhaps state courts refrain from vigorous enforcement of special laws prohibitions because they have been once burned and twice learned. The judicial ideology represented by *Lochner* used the language of liberty to abandon Americans to the clutches of their economic oppressors. Worse, by constitutionalizing laissez-faire economics, the doctrine left no escape valve for the subsequent political backlash, forcing a well-known constitutional show-down that nearly demolished the federal Supreme Court's credibility.<sup>145</sup> The mechanics of *Lochner* required a close inquiry by courts into the actual purpose of legislation, so that populist legislatures' dispersal of public goods for the private benefit of workers could be rooted out and eliminated.<sup>146</sup>

Some of the earliest judicial efforts to suppress labor by means we would today call *Lochner*ism were, indeed, linked to state constitutional prohibitions on special privileges. For example, the California Supreme Court invalidated a restriction on bakers' work hours as early as 1880, on the ground that the protective statute was "special legislation."<sup>147</sup> Today's state court judges might avoid that technique out of *Lochner*-phobia, regardless of the special laws clauses' textual invitation to the contrary.

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<sup>140</sup> *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

<sup>141</sup> *See id.* at 478.

<sup>142</sup> *See id.* at 482.

<sup>143</sup> On the other hand, the *Kelo* Court noted that some states have interpreted their state constitutional takings clauses as necessitating a more searching inquiry into the purpose of the taking. *See id.* at 489 n.22, *citing* *Cnty. of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (invalidating a taking intended to promote economic development). *But cf.* Ilya Somin, *What if Kelo v. City of New London Had Gone the Other Way?*, 45 IND. L. REV. 2121, 2126 (2011) (arguing that state statutes intended to impose higher property protections than had *Kelo* had "little or no meaningful constraint" on takings).

<sup>144</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>145</sup> *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 877 (1987).

<sup>146</sup> *See id.*

<sup>147</sup> *See* HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 87 (1993), *quoting Ex Parte Westerfield*, 55 Cal. 550, 551 (1880).

On the other hand, rather than perceiving the state constitutions' call to expose and expunge private favoritism as linked to the reviled *Lochner*, it might be more plausible for state jurists to associate special laws prohibitions with the equally famous but much-loved *Carolene Products* footnote four.<sup>148</sup> There, the federal Supreme Court offered the possibility that rigorous judicial review might be appropriate where “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities.”<sup>149</sup> With this euphonious phrase, Justice Stone gently raised the argument that judicial review can be used to *protect* democratic functioning where the political equivalent of market failure has gummed up the works. Similarly, judges might see special laws prohibitions as an invitation to protect democratic processes from capture by elite economic minorities. In this conception of special laws clauses, vigorous judicial review is merely the mirror image of the heightened scrutiny courts already employ to protect disfavored minorities from political exclusion. In other words, where minorities face unfair *obstacles* in the legislative process, the courts will intervene; so, too, where minorities face unfair *advantages* in the legislative process, the courts should intervene.

Some courts, in an effort to make sense of their special laws prohibitions, have paid particular attention to whether the legislative class is “closed” or not.<sup>150</sup> A statute alleged to be special might, for now, apply to only one company—but if other firms could eventually satisfy the statutory specification, then the class is “open” and not special. By contrast, if a class is defined so narrowly that no other firm could enter or exit the class, such as when the dates required for eligibility have passed, then the class is “closed” and thus prohibited.

For example, in a recent Florida case,<sup>151</sup> the Florida Supreme Court considered whether a restriction on horserace betting parks broadcasting their races to other betting parlors nearby amounted to a special law. The court rested its decision invalidating the statute on the unlikelihood that any park could join the favored class.<sup>152</sup> If there had been a “reasonable possibility” that the legislatively-defined class could contain other firms in the future, the court would have upheld the statute even though it applied to only one part of the state at the time of decision.<sup>153</sup>

Even the analysis of “closed” versus “open” classes in special laws jurisprudence, which on its face seems uniquely state-focused and autonomous of federal influence, closely resembles the “immutable characteristics” doctrine of standard federal equal protection. Under federal jurisprudence, the few classes

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<sup>148</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>149</sup> *Id.*

<sup>150</sup> *See, e.g., Haman v. Marsh*, 467 N.W.2d 836, 847 (1991) (“A legislative act can violate Neb. Const. art. III, § 18, as special legislation in one of two ways: (1) by creating a totally arbitrary and unreasonable method of classification, or (2) by creating a permanently closed class.”).

<sup>151</sup> *Fla. Dep’t of Bus. & Prof’l Regulation v. Gulfstream Park Racing Ass’n*, 967 So. 2d 802 (Fla. 2007).

<sup>152</sup> *See id.* at 809.

<sup>153</sup> *See id.*

afforded heightened protection (meaning diminished judicial deference to legislation) are defined primarily by two elements: the members have been subject to a long history of de jure invidious discrimination, and the members are thought of as unable to escape their “immutable” membership in the class.<sup>154</sup>

This second element has never been entirely literal, in that the courts have consistently protected religious identity as if it were beyond the choice of any individual adherent. Scholars have recently begun to challenge the courts’ emphasis on immutability, arguing that subjugated classes should be protected regardless of whether the defining traits are immutable or not.<sup>155</sup> Nevertheless, current doctrine continues to emphasize immutability as a rationale for equal protection in the courts. Rarely do courts attend with any seriousness to why we treat religion as if it were unchangeable (even if the arguments are not that hard to imagine).

During the reign of Lochnerism, courts sometimes treated individuals’ economic attachments as closer to immutable. Workers had freedom to choose any “lawful” profession, but once chosen, the state could only displace them for weighty reasons. Though couched in the language of “liberty of contract” and laissez-faire economics, these decisions emphasized the close connection between each worker’s identity and occupation. For example, a state regulation that forced a baker to earn less or to face greater difficulty in finding work in that profession struck at what the courts assumed was a central aspect of the person’s identity, something it would be unfair for the state to demand the person change under economic coercion.<sup>156</sup> Even outside the context of economic regulation, the courts tended to treat workers’ professional identity as a trait the state could only regulate under extraordinary circumstances. In the famous education-law case of *Meyer v. Nebraska*, the federal Supreme Court disapproved a state statute prohibiting the teaching of modern foreign language in public elementary schools.<sup>157</sup> It offered, as part of its explanation, a defense of the teacher’s right to his occupation free from legislative impairment: “Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”<sup>158</sup>

The judicial move away from Lochnerism essentially rejected this approach. Instead, courts began to rule consistently with a view that the investors or workers in any given firm or industry are relatively free (in a practical, cultural sense rather than in the formal legal sense promoted by *Lochner*) to exit the firm or industry for other

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<sup>154</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (prohibiting discrimination on the basis of sex as an immutable characteristic, subject to historic invidious discrimination, and typically irrelevant to job performance).

<sup>155</sup> See, e.g., Susan Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495 (2009) (arguing that the left’s political attachment to the idea of homosexuality as immutable relates to the overemphasis on immutability in the federal Supreme Court’s caselaw and that equal protection doctrine ought instead to be concerned with human dignity).

<sup>156</sup> See *Lochner v. New York*, 198 U.S. 45, 54 (1905) (invalidating a state statute that restricted the terms of bakers’ contracts), *overruled by* *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

<sup>157</sup> *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that the statute violated the federal Fourteenth Amendment).

<sup>158</sup> *Id.* at 400.

areas of the economy, and therefore lack a strong right to remain in their chosen field. According to the mainstream contemporary view that economic regulation deserves minimal judicial scrutiny, individuals' economic attachments have lost their quasi-immutable sheen. If an Oklahoma eyeglass technician finds state regulations to be unfavorable, she is free to become an ophthalmologist—or an oil-rig worker or short-order cook or novelist.<sup>159</sup> It follows, then, that legislatures are free to favor or disfavor economic activity so long as natural persons remain free to enter other business. In this sense, whether a class is “closed” (i.e., immutable) rests on the fiction of corporations as legal persons more than on the literal inescapability of the regulated class.

But unlike federal equal protection doctrine, which centers on the protection of disfavored minorities from invidious discrimination, special laws prohibitions target legislative favoritism. A grant of privilege to a single firm, in terms by which no other firm could ever win the privilege, restricts the economic opportunity of natural persons more effectively than oppressive regulation of a single firm. Whereas every baker unhappy with New York's wage-and-hour laws could decide to become a fishmonger instead, the owners of a horseracing track are not simply free to buy (privately held) shares in the legislatively-privileged riverboat casino; nor would all the racetrack bookies be free to take up employment on the riverboat.

*Lochner* upheld workers' and investors' right to stay in their chosen industry without state interference, a decision that today is near-universally condemned as an excessive restriction on the legislatures' power to structure the economy and thereby steer workers and investors into favored sectors. If New York's minimum-price law on milk made the product too expensive for Nebbia to sell, then he was free to sell something else instead; storeowners simply did not have judicially enforceable rights to sell whatever they wanted at any price.<sup>160</sup> If state courts perceive enforcement of special laws prohibitions as judicial overreaching into economic regulation in the manner of *Lochner*, they will naturally avoid it or face popular and scholarly critique. However, the distinction I have described above illustrates that courts enforcing the “closed set” concept of special laws may not be repeating the mistakes of *Lochner* (even if there remain other objections to special laws prohibition enforcement). Where *Lochnerism* confronted the legislature's ability to target broad areas of the economy—industries or professions—for regulation, special laws prohibitions instead target legislative action directed at immutable economic classes such as a single firm. If baking is unprofitable for employers who must pay a minimum wage, then they are free to invest in other industries. But a baker who must compete with a rival who has been granted a legislative appropriation earmarked for a closed class cannot simply shift her economic allegiance to the rival firm. Courts' attentiveness to whether the legislature's classification reasonably admits the possibility of entry or exit from the class thus tracks the federal equal protection concern with immutable characteristics.

This reading of the special laws prohibitions highlights another, related, reason that one might expect more vigorous judicial enforcement than the caselaw actually reveals. Special laws clauses are majoritarian. Judicial minimalists have long argued that courts diminish their political capital when they invalidate popular laws

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<sup>159</sup> Cf. *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (upholding a state statute requiring eyeglass-fitting stores to keep on site someone licensed to prescribe eyewear).

<sup>160</sup> See *Nebbia v. New York*, 291 U.S. 502 (1934) (upholding price-fixing statute).

or otherwise set themselves against the democratic institutions of government.<sup>161</sup> But here, if a state court concludes that the challenged legislation is special, it has necessarily decided that the great mass of taxpayers have been compelled to support some minority without any clear benefit to the public. Judicial interventions of that sort, one might think, would be likely to increase rather than decrease the perceived popular legitimacy of the court. After all, as Samuel Issacharoff and Richard Pildes have observed, “politics shares with all markets a vulnerability to anticompetitive behavior.”<sup>162</sup> A court that could break through this anticompetitive behavior by economic minorities working in combination with political incumbents would be enhancing, not diminishing, the state’s democratic legitimacy. This motivation ought to be especially strong where the judges are elected, as many are.<sup>163</sup> Would one not expect judges to delight at the prospect of campaigning on a record of protecting the public from the “special interests that dominate the legislature”?<sup>164</sup>

The skeptic’s predictable reaction is to note that if economic elites have captured the legislature, they might well have captured the courts, too. Judges, especially elected judges, are under increasing pressure to seek office in ways indistinguishable from “real” politicians.<sup>165</sup> Any state’s particular special interests likely to succeed in winning public benefits from the legislature are also likely to have disproportionate influence over the judicial selection and retention process. Even less crassly, state high court judges are likely to share common cultural and ideological attitudes with the other members of the state’s ruling class. They may perceive legislative appropriations, taxation, or regulation as having a public purpose more easily when they perceive the private interest as normatively desirable. As we like to say here in Detroit, “what was good for our country was good for General Motors, and vice versa.”<sup>166</sup> This difficulty with strong enforcement of special laws prohibitions supports the view that courts could never be completely effective at checking legislative capture.

Nevertheless, perfection cannot be the standard in human endeavors. And deterrence of legislative capture is not the only rationale behind the special laws prohibitions. Even if judges and legislators share a common political culture, one might expect the judges to welcome an opportunity to impede logrolling, the diversion of legislative time to trivial matters, fiscal recklessness, or legislative

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<sup>161</sup> See, e.g., Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

<sup>162</sup> Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 646 (1998).

<sup>163</sup> See G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 291 (2007) (providing statistics on the number and nature of elected and appointed state judges).

<sup>164</sup> See generally David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2115 (2010) (describing majoritarian judicial review).

<sup>165</sup> Cf. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (describing a litigant who spent over \$3 million in support of a candidate for state supreme court justice who then won office and voted in the litigant’s favor).

<sup>166</sup> Don Mayer, *Community, Business Ethics, and Global Capitalism*, 38 AM. BUS. L.J. 215, 236 n.72 (2001) (quoting Charles E. Wilson’s statement at his Senate confirmation hearing to become Secretary of Defense).

interference in conventional judicial functions. When provided with a textual invitation to engage in these matters, why would state judges withdraw into the comforting cocoon of federal rational-basis review?

Perhaps judicial re-examination of legislative economic classifications is too far outside of American judges' role as they understand it culturally and psychologically. But state high court judges commonly engage in judicial activity that also does not fit cleanly in the federally centered story of "what judges do." Professor Helen Hershkoff compiled a magisterial exposition of state court practices that would range from odd to unthinkable for federal courts.<sup>167</sup> Among these are advisory opinions (which are almost always extraordinary judicial interventions into the legislative process, frequently involving the court in an assessment of pending—but not yet adopted—legislation), taxpayer standing (which invites judicial review of legislative appropriations), and the resolution of political questions.<sup>168</sup> Though often forgotten in public rhetoric, it also remains true that state high courts are self-consciously law-making institutions through their promulgation of the common law<sup>169</sup> and direct legislation in subject areas like civil procedure and evidence. These common practices weaken the argument that judges are culturally unequipped to engage in the activist review that special laws prohibitions seem to demand.

Moreover, special laws prohibitions do confront state judges with a task unequivocally in the core of the judicial function: interpretation of a text. "Special" and "general," "public" and "private" are all capacious terms with a broad array of potential meanings. But they mean something, and judges faced with those phrases could reasonably be expected to make a good-faith effort at elaboration. This highly positivist rationale calls on judges to worry less about the judicial role, institutional capacity, economic policy, and political alliances and more about what the constitutional command in front of them calls upon them to do. Whatever level of deference the various clauses suggest, no "public meaning" understood by the voters who ratified these clauses<sup>170</sup> could plausibly indicate that judges stymied by the interpretive puzzle should fall back to federal rational-basis review. Yet state constitutionalism has never been strictly positivist (or originalist).<sup>171</sup>

### III. THEORIES OF STATE CONSTITUTIONAL ENFORCEMENT

In this Part, I examine the state constitutional philosophies of leading scholars. The first section reviews the works of two foundational state constitutional positivists, Professors Robert Williams and Helen Hershkoff. Both Williams and Hershkoff have developed complex and nuanced arguments for why state

<sup>167</sup> See Hershkoff, *supra* note 121.

<sup>168</sup> See *id.* at 1836-38.

<sup>169</sup> See Laurence P. Claus & Richard S. Kay, *Constitutional Courts as "Positive Legislators" in the United States*, 58 AM. J. COMP. L. 479, 479-80 (2010) (noting that "[j]udicial lawmaking is, of course, an entirely familiar feature of common law adjudication").

<sup>170</sup> See generally Lawrence B. Solum, *The Fourteenth Amendment and the Bill of Rights: Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 413 (2009) (describing originalist theories of constitutional interpretation).

<sup>171</sup> See James A. Gardner, *Whose Constitution Is It?: Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1247-48 (2005) (describing state courts' routine unwillingness to apply positive law).

constitutional texts ought to be interpreted on their own terms rather than assumed to be equivalent to either a generic national “constitutionalism” or specifically federal constitutional jurisprudence.

The second section considers the state constitutional approach advocated by Justice William Brennan, Professors Robert Cover and James Gardner, and Dean Robert Schapiro. This approach, which I call constitutional universalism, insists that state constitutions be interpreted in their legal context, a context which includes a profoundly influential federal constitutional tradition. To ignore federal practice in the interpretation of state constitutions would be both descriptively futile and prescriptively unwise. Nevertheless, these scholars do favor constitutional pluralism. In different ways, they each argue that state constitutions afford their interpreters a legal space in which to contest national constitutional values.

Finally, in the third section of this Part, I describe the writings of Dean Daniel Rodriguez and Professor Jim Rossi, whose state constitutional approach I call “constitutional pragmatism.” They view state constitutional interpretation as a matter of practical compromises derived experientially from the fine-grained factual circumstances facing the legal interpreter.<sup>172</sup> Frequently, these compromises will be best achieved when state constitutional interpreters (courts or agencies) consciously pursue doctrine that permits or encourages state cooperation with federal authority.

Having established the contours of these three schools of state constitutional thought in this Part, I proceed in Part IV to show how state courts’ special laws jurisprudence undermines the normative power of all three theories. I argue that special laws clauses are not an odd corner-case that successful theories can disregard as marginal. Instead, the failure of the theories described in this Part to respond adequately to the challenge posed by state practice in this area is a fundamental failure that only a new approach could address.

#### A. Constitutional Positivists

##### 1. Williams

Perhaps the state constitutionalist most closely associated with critiques of “lockstepping,” the unreasoned adoption of federal jurisprudence as state constitutional interpretation, is Professor Robert Williams. He has carefully mapped a variety of subcategories of lockstepping. These include prospective lockstepping, in which a state high court concludes that a particular clause of the state constitution shall be forever interpreted as equivalent to the federal Supreme Court’s interpretation of a parallel federal clause—regardless of any changes in federal doctrine. For example, regardless of any differences in text, purpose, or history, a state court might conclude that a state constitutional clause guaranteeing the liberty of persons will always be read as identical to federal search-and-seizure doctrine.<sup>173</sup>

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<sup>172</sup> My use of the term “pragmatism” in this way will match some definitions and depart from others. See Susan Haack, *On Legal Pragmatism: Where Does the Path of Law Lead Us?*, 3 PRAGMATISM TODAY 8, 10 (2012) (offering nineteen different widely-used definitions of “pragmatism”). I use this ambiguous term with reference to Rodriguez and Rossi because of their emphasis on judicial interpretation that solves the problem in front of the court as a matter of policy and governance rather than comports with an overarching theory.

<sup>173</sup> See WILLIAMS, *supra* note 8, at 113-23. Florida, among other states, has gone so far as to inscribe prospective lockstepping directly in its state constitutional text. FLA. CONST. art. I, § 12 (1982) (declaring that protection from unreasonable search and seizure “shall be

In a less rigid form of lockstepping, courts will adopt or deny federal doctrine case-by-case. A particular fact pattern might lead the court to treat state constitutional protection as no greater than the federal doctrine provides, while leaving open the possibility that a future case will call for interpreting the same state clause above the federal floor.<sup>174</sup> Finally, a state court might also apply federal interpretive methods, but disagree on the ultimate result such methods produce. In same-sex marriage cases, for example, both Iowa<sup>175</sup> and Massachusetts<sup>176</sup> purported to apply federal rational-basis review, but reached the opposite conclusion anticipated under federal jurisprudence.<sup>177</sup> While this last approach leads to independent state constitutional results, it remains a form of lockstepping when the state court simply follows federal models of judicial reasoning without an examination or explanation of whether the federal model truly comports with the state constitutional text.

Prof. Williams's consistent attacks on these varieties of lockstepping derive from his insistence that courts ought to read state constitutions and interpret them as autonomous sources of law. These texts satisfy the positivist definition of law as those rules created by processes socially recognized as law-producing.<sup>178</sup> For Williams, that means that these texts and their unique histories must form the central focus of any legitimate effort at state constitutional interpretation.<sup>179</sup> To disregard the state constitutional text in favor of generic federal doctrine is to abrogate the state sovereign's law-making authority, and thereby to disempower the democratic polity of each state. Lockstepping nullifies whatever political compromises or collective wisdom the states' people have adopted.

By contrast, legitimate state constitutional interpretation (in Williams's view) would examine the features of each state constitution on its own terms. If the state constitution protects free "expression" rather than free "speech," Williams would insist that the state courts consider what the drafters meant by "expression," not merely assume that the federal First Amendment occupies the field. Oregon Justice Hans Linde's "primacy" approach serves as the leading example of this method<sup>180</sup>.

## 2. Hershkoff

Professor Helen Hershkoff, like Williams, adopts a positivist approach to state constitutions in the sense that she urges state courts to give effect to their constitutional texts, even if to do so would depart from national norms outside the

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construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court").

<sup>174</sup> See *id.*

<sup>175</sup> See *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (purportedly applying federal-style rational basis review but invalidating the state ban on same-sex marriage).

<sup>176</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003) (same).

<sup>177</sup> Cf. *Baker v. Nelson*, 409 U.S. 810, 810 (1972) (dismissing a same-sex marriage claim for want of a "substantial" federal question).

<sup>178</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 15 (1961).

<sup>179</sup> See Jim Rossi, Book Review, *Assessing the State of State Constitutionalism*, 109 MICH. L. REV. 1145, 1149-50 (2011) (describing Williams as a legal positivist).

<sup>180</sup> See Linde, *supra* note 125.

state constitutions.<sup>181</sup> In a series of path-breaking works, she argues that state constitutions contain a variety of textual and structural features that diverge from the federal Constitution and its interpretive tradition. For her, the presence of these features requires that state courts adopt a different role from the rigidly constrained practice of federal courts. For example, because state constitutions commonly contain so-called “positive” rights that require legislative action for fulfillment, such as the right to education, right to welfare, right to public health, or the right to a protected environment, Hershkoff argues that state courts should actively oblige the legislatures to execute these provisions. The standard federal rationales for judicial minimalism—Bickel’s<sup>182</sup> “passive virtues”—simply do not apply in the distinct constitutional universe of state law, Hershkoff demonstrates. Instead, features of state judiciaries like the power to make common law or the election of judges leave state courts a responsibility to assume a greater role in state governance.

For Hershkoff, state courts that decline to exercise this responsibility by lockstepping or by embracing federal courts’ cramped view of judicial power, as too many do, fail their states. Crucial to her arguments along these lines is Hershkoff’s view that state constitutions, as positive law, are independently worthy of interpretation. If Texas has a right to education in its state constitution but the federal Constitution does not, legal doctrine should reflect the difference and actual cases should come out differently. If state courts are empowered to routinely make common law but federal courts are not, legal doctrine should likewise reflect the difference. Merely to assume that these textual or structural differences are meaningless and that the state courts are free to mimic federal jurisprudence without further examination is, for Hershkoff, a grave abdication of the courts’ responsibility. Descriptively, Hershkoff has documented extensively state courts’ failure to meet this responsibility in a wide variety of doctrinal areas. Prescriptively, she argues, this failure denigrates the law-giving democratic authority of the people who ratified each state constitution.

### B. Constitutional Universalists

#### 1. Brennan

By 1977, as the Warren Court’s attention to equality and rights protection waned, Justice William Brennan found himself increasingly in dissent. Frustrated by the futility of dissents that were less and less persuasive to the Burger-led majority, Brennan did what so many people do when seeking to make a bigger influence on the real world than was possible at work: he wrote a law review article. His piece, published in the *Harvard Law Review* under the title *State Constitutions and the Protection of Individual Rights*,<sup>183</sup> was dominated by a single insight. Brennan realized that he had friends in low places. Perhaps because of his prior service on the New Jersey Supreme Court (still one of the most highly regarded in the country), Brennan remembered that state high courts could carry on the civil rights agenda even if Brennan’s colleagues on “The Court” would not.

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<sup>181</sup> See generally Hershkoff, *supra* note 121.

<sup>182</sup> See generally Bickel, *supra* note 161.

<sup>183</sup> Brennan, *supra* note 123.

Brennan's article was not entirely original, since a 1970 piece<sup>184</sup> by Hans Linde had already detailed the potential for state courts to use their state constitutions for more rights-protective criminal procedure. Nor was the article entirely developed; *State Constitutions and the Protection of Individual Rights* is barely more than a skeleton on which Brennan hung string citations. First, he presented a mountain of footnotes showing that the federal Supreme Court was retreating from its prior approach to rights protection. Then, he matched it with a similar pile of footnotes showing that state high courts had sometimes adopted higher standards of rights protection. He concluded, rather axiomatically, that we need more of the latter until we get less of the former. Nor was the article entirely friendly to state courts, in that Brennan viewed them strictly instrumentally, as tools to effectuate the jurisprudence he described in his dissents.

Despite its flaws, *State Constitutions and the Protection of Individual Rights* was strikingly influential. LexisNexis reports that it has been cited more than two hundred times by state courts, and scholars of state constitutions typically credit Brennan with provoking state courts to begin the New Judicial Federalism revolution. Every origin myth deserves investigation, and the view of federalism represented by Brennan's article rewards a close reading. Two features stand out: Brennan's implication that state constitutional jurisprudence appropriately changes in reaction to the work of the federal Supreme Court, and his implication that the text of state constitutions would not stand as a serious obstacle for state judges eager to carry out a larger, national jurisprudential agenda.

We might begin with surprise that Brennan wrote at all as an advocate for vigorous state constitutionalism. After all, his opinions on the federal high court never displayed an overweening regard for states' rights. But in effect, his article was consistent with that federal-centered approach. By calling upon state high courts to adjust their interpretations of their own constitutions in response to shifts in federal jurisprudence, Brennan maintained the federal Supreme Court as the epicenter of American constitutionalism. His article positions state constitutions as essentially fungible, with just enough legitimacy to support a state high court's rights-protective program but not so much that their textual differences might stand as a positive restraint on judicial activism. As early as this foundational work, then, we see the foreshadowing of the view that the state and federal high courts engage in dialogue to develop national norms of liberty and equality, coupled with a non-positivist approach to state constitutionalism.

## 2. Cover

Meanwhile, also in 1977, Professor Robert Cover and Alexander Aleinikoff published an examination of the habeas corpus device in criminal procedure.<sup>185</sup> At the time Cover and Aleinikoff were writing, habeas corpus jurisprudence invited federal courts to review state convictions de novo for federal constitutional

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<sup>184</sup> Hans Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) (calling for state constitutional interpretive autonomy). See generally Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. vii, xiii (1996) (describing the early history of New Judicial Federalism).

<sup>185</sup> See Cover & Aleinikoff, *supra* note 128.

violations.<sup>186</sup> In light of the relative success of equity in remedying the civil rights violations of the 1950s and 1960s, an observer might have expected the Warren Court to approach criminal procedure with a similar willingness to engage in reform by injunction. Instead, the Court expanded the previously unusual use of collateral review to bring state criminal trial procedures into compliance with the newly articulated constitutional requirements (e.g., *Miranda* or *Gideon* requirements). In Cover and Aleinikoff's account, this practice led to what they called "dialectical federalism," a necessary conversation between state and federal courts about constitutional values.<sup>187</sup>

Where the federal Supreme Court had not yet defined the specific contours of a constitutional right, like whether the right to counsel applied to parole or probation revocation, state courts had open interpretive space to reach their own conclusions about the meaning of the federal Sixth Amendment (and the Supreme Court precedents interpreting it). Because the federal courts would use habeas to review these state court interpretations *de novo*, the federal judges also had formal authority to establish their own views of the federal requirement. If the federal courts reached a more rights-protective conclusion than the state courts, then they would free the state prisoners on habeas writs (or order retrials). Even so, if the state courts were willing to pay that price, they were not formally bound to follow the federal courts' view in the absence of a Supreme Court resolution of the dispute. Federal district courts and courts of appeals cannot bind state courts to their view of federal law.

As a result, some federal circuits adopted liberal constructions of the right at stake while the state courts persisted in applying a narrower standard; other federal circuits adopted strict standards on habeas review even where at least some states in their circuits had adopted a more liberal construction for themselves. Both state and federal courts confronted with these issues frequently cited each other for persuasive reasoning, and different theories shuttled around across the country, crossing state-federal boundaries along the way. Ultimately, as in a Bickelian dream come true, the federal Supreme Court weighed the different state and federal approaches that had developed while it was waiting to reach the issues, and then based its dispositive holding on a combination of state and federal judicial values.

In the criminal procedure setting Cover and Aleinikoff examined, both the state courts and lower federal courts were interpreting the same source of law, the federal Constitution, and both judiciaries were formally bound by holdings of the Constitution's definitive expositor, the federal Supreme Court. State constitutions offer a different set of possibilities by providing state courts with a different source of law to apply (to the same fact patterns otherwise governed by federal law) and with an expanded formal capacity to deviate not just from the lower federal courts but also from the federal Supreme Court. Nevertheless, the dialectical federalism Cover and Aleinikoff described, the obligatory and productive interaction between state and federal judiciaries to develop a more richly nuanced understanding of rights, serves as an important precursor to contemporary state constitutional theory.

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<sup>186</sup> Cf. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (a federal statute establishing a highly deferential standard of review for collateral attacks on state criminal convictions).

<sup>187</sup> Cover and Aleinikoff, *supra* note 128, at 1046.

### 3. Schapiro on Polyphonic Federalism

Dean Robert Schapiro built on the dialectical federalism concept in his book *Polyphonic Federalism*.<sup>188</sup> Schapiro examined the phenomenon of “intersystemic adjudication,” the interpretation of federal law in state courts and state law in federal courts.<sup>189</sup> While Cover and Aleinikoff were concerned with the loss of federal court supervision over state court interpretation of federal law, their description of dialectical federalism directly conflicts with “dual spheres” federalism, the primary target of Schapiro’s book. Dual spheres federalism seeks to divide state and federal authority according to substantive areas of law. Education, family law, criminal justice, and land use would thus fall within exclusive state control, while interstate economic regulation, civil rights, and environmental protection would fall within exclusive federal control. In the judicial context, dual spheres federalism acknowledges concurrent state-federal jurisdiction as a perhaps-necessary but better-avoided allocation of jurisdiction. Diversity jurisdiction should be limited or eliminated, while removal of federally significant cases should be encouraged. Schapiro’s work opposes this approach to federalism, arguing that “polyphony” is a better metaphor, both descriptively and prescriptively. In polyphonic federalism, both state and federal courts share subject matter jurisdiction over the widest array of laws.

Schapiro’s concept of polyphony differs from Cover in two significant respects. Although Cover’s approach rejected dual spheres federalism with respect to courts and legal interpreters, he still maintained a relatively robust view of the distinction between state and federal law. This view that makes sense in light of Cover’s commitment to civil rights<sup>190</sup> and the work federal law was still doing in this area in the 1970s. In contrast, Schapiro views state and federal law as blended together more thoroughly than did Cover, and he prizes the multiple interpreters of both state and federal law in part because he views those interpretations as mutually influential. Through his metaphor of polyphony, Schapiro also emphasizes the simultaneity of multiple interpretations (as instruments play over each other in an orchestra) in contrast to Cover’s use of the term “dialectic,” which implies a series of exchanges between partners like a tennis match. These distinctions make Schapiro even more of a universalist than Cover in the interpretation of state constitutions because the polyphony notion prioritizes the way judicial interpretations fit with (or against) each other on a national scale, with less regard for the geographic or political source of any given legal text.

### 4. Gardner on Interactive Federalism

After *Failed Discourse* detailed the ways that state constitutionalism does not comport with conventional understandings of constitutional interpretation, Professor James Gardner turned his attention to developing an interpretive theory for state constitutions that better describes state courts’ actual practice. His book *Interpreting*

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<sup>188</sup> ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 23 (2009).

<sup>189</sup> *Id.* at 122.

<sup>190</sup> See Martha Minow, Michael Ryan & Austin Sarat, *Preface*, in NARRATIVE, VIOLENCE AND THE LAW: THE ESSAYS OF ROBERT COVER ix-x (1993) (describing Cover’s civil rights activism).

*State Constitutions: A Jurisprudence of Function in a Federal System*<sup>191</sup> asked state constitutional scholars and judges to stop forcing state constitutional interpretation into a theoretical mold it does not fit, and instead to devise a theory that describes and justifies state constitutionalism in light of the purpose those documents play in our national federal system. In taking on this project, Gardner “move[d] beyond” positivist interpretation of constitutional text in favor of a context-driven broad approach.<sup>192</sup> Romantic subnationalism, the idea that the people of each state are a normatively autonomous polity with unique values and cultural traits,<sup>193</sup> simply does not withstand examination. Gardner suggests that state constitutional court judges know this, intuitively or explicitly, and that is why he finds them so frequently dispensing with autonomous analysis or blending federal values and positive law into state constitutional jurisprudence.

If state constitutions do not reflect the deepest values of the unique people of each state, what is left to guide their interpreters? Gardner argues that state constitutions play a crucial role in the federal system. He focuses on the metaphor of the American people as a sovereign with government as their agent. In the original federal Plan of the Convention, the people divided their allegiance between state and federal governments to check each other and protect the people’s liberty. This is hardly a radical account of either democratic government or of federalism, but in Gardner’s hands the principal-agent model took on special significance. Gardner describes state constitutions as reflecting a balance of three political impulses among Americans: trust/mistrust for the federal government as a balance against states; trust/mistrust for state government as a balance against the federal government; and trust/mistrust for government at any level as a balance against private power. As a national constitutional community, Americans have employed federalism so that these balances can be allocated differently across state lines. For Gardner, the crucial distinction between this form of balancing and Romantic subnationalism (i.e., conventional state constitutionalism) is that the values and goals animating this process are national in scope. The American people are the smallest coherent political community, in his account, and they delegate their sovereignty competitively between the state and federal governments somewhat like Richard Nixon’s presidential management technique of assigning the same task to two different teams, letting each compete for his approval.<sup>194</sup>

Some state constitutions, therefore, exhibit what Gardner describes as a high degree of trust in the federal government. These documents share features like a weak, vague, or non-existent bill of individual rights; formally empowered judiciaries with Hershkoff-style<sup>195</sup> vigorous judicial review, capable of using federal law to check state institutions; divided or weak executive power; and procedural or substantive limitations on legislative power. The combination of few rights clauses

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<sup>191</sup> JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* 117 (2005).

<sup>192</sup> Jim Rossi, Book Review, *The Puzzle of State Constitutions*, 54 *BUFF. L. REV.* 211, 215 (2006) (reviewing GARDNER, *supra* note 191).

<sup>193</sup> GARDNER *supra* note 191, at 53-54.

<sup>194</sup> See Richard Neustadt, *PRESIDENTIAL POWER AND THE MODERN PRESIDENTS* 113 (1991).

<sup>195</sup> See Hershkoff, *supra* note 121, at 1870 (arguing for aggressive state court review of legislation).

that could provide greater liberty than the federal Fourteenth Amendment with weak state institutions that lack power to resist federal government activity equate, for Gardner, to a popular choice to trust federal power over state power.

This set of arrangements differs from a more libertarian distrust for both layers of American government primarily by virtue of the bill of rights. Where the constitution that privileges federal power weakens both state institutions and state protections of individual rights, the libertarian constitution weakens state institutions (again through impediments to legislative action, division and restraint in executive power, and judicial power sufficient to check the branches of state government) while simultaneously providing expansive individual rights (permitting state courts to protect people from both federal and state overreaching).

Gardner's third set reflects a greater trust for the state government than federal government, and a greater trust in governmental than in private power. The constitutions drawn from this perspective include relatively weak individual rights against the state (but might include enforceable rights against private forces); strong, vigorous executive powers; few substantive restrictions or procedural speed-bumps on the plenary power of state legislatures; and a relatively weak state judiciary not well-suited to blocking state government initiative.

In describing these various allocations of popular trust, Gardner notes that they are likely to change over time as well as across space. When the federal government has taken the more prominent role in achieving nationally popular goals, such as civil rights enforcement in the 1960s, state constitutions are likely to reflect an increased respect for federal power and a corresponding weakening of state institutions. Inversely, when state governments seem more active in achieving national goals, state constitutions are likely to allocate increased flexibility and power to the most energetic state branches. And moments or places dominated by trust in private power but disdain for governmental power will be marked by state constitutions meant to hobble state government but protect individual rights.

The idea that state constitutions contain features to *frustrate* state government from achieving legislative and executive aims is often lost in judicial and scholarly discussion of state constitutions. For Gardner, this is a central purpose of the documents, because impairing state government is always understood in the context of Americans' relationship with the federal government and private power. Active and strong state governments are better suited to resist federal initiative, such as by structuring state agencies to make cooperation with their federal counterparts more difficult or by adopting policies at odds with federal goals (even where that discrepancy means a loss of federal funding). Weak state governments are more dependent on the federal government or private institutions for both policy initiative and funding support. Gardner specifically identifies a variety of state constitutional features intended to hamper state legislative and executive branches, including term limits, legislative-session limits, bill title and single-subject limits, taxation limits, and most pertinently, prohibitions on special laws. Gardner identifies special laws prohibitions as a good example of how Americans divide power among their agents: these clauses hamper the legislature from achieving its policy aims in the manner it deems best, while also empowering the judiciary to monitor and restrain private power when it starts to dominate public deliberation. This arrangement reflects diminished trust in state government and private power, leaving greater political space for the federal government to act.

### C. Constitutional Pragmatists

#### 1. Rodriguez

Dean Daniel Rodriguez, like Gardner, is interested in state constitutional failure. In his limpidly titled piece, *State Constitutional Failure*, Rodriguez looks at the onslaught of practical problems confronting state governments and describes a need to consider the effectiveness of state constitutions as rules for governance.<sup>196</sup> Rodriguez describes successful constitutions as those that empower the multiple components of state government to solve real problems, while failed state constitutions are those that establish institutional obstacles to effective pragmatic governance.<sup>197</sup> This approach is somewhat positivist, to the extent it encourages state constitutional interpreters to reject blind lockstepping and consider the state's own "distinct principles of how to structure the processes of government, and how to allocate to legislative and executive institutions the powers of governance."<sup>198</sup> But Rodriguez's focus on effective governance also contains a thread of universalism, in that Rodriguez does not call for state constitutional theorists to explicate fifty different theories of interpretation; he urges the use of political theory to describe and advance best practices that would fit problems common to states across the country.<sup>199</sup>

In line with his focus on the practical political girders underlying constitutions, Rodriguez describes state constitutionalism as a combination of "incentive-compatible" and "incentive-incompatible" rules; the former, like a rule of judicial interpretation honoring legislative history, lubricate political compromise and encourage elected officials to take action.<sup>200</sup> The latter, like a balanced budget amendment, slow or block politicians from achieving their policy aims as easily as they would prefer.<sup>201</sup> Both types of rules, in a highly functioning constitution, reflect "high fidelity"—a close fit between the governance structures created by the constitution, the policy outcomes those structures promote, and the will of the people.<sup>202</sup> But for state constitutions to succeed as "hi-fi" law, they must cleanly translate the popular will expressed through social movements and the like into legal structures that in reality carry out this will through governance. Rodriguez's

<sup>196</sup> Rodriguez, *supra* note 124, at 1244; see also Daniel B. Rodriguez, *State Constitutional Theory and its Prospects*, 28 N.M. L. REV. 271, 272 (1998) (describing state constitutional theory as "barren").

<sup>197</sup> See Rodriguez, *supra* note 124, at 1246-47 see also Rodriguez, *supra* note 196, at 273 ("A principal role [of state constitutions] is the facilitation of strategies of intrastate governance, and, in particular, the design of intrastate institutional mechanisms that enable differentiated local communities to flourish economically, politically, and socially.")

<sup>198</sup> See Rodriguez, *supra* note 196, at 273.

<sup>199</sup> See Rodriguez, *supra* note 124, at 1247-54 (outlining features common to all successful constitutions).

<sup>200</sup> See Daniel B. Rodriguez, *Change that Matters: An Essay on State Constitutional Development*, 115 PENN ST. L. REV. 1073, 1077 (2011).

<sup>201</sup> See *id.*

<sup>202</sup> See *id.* at 1080-81 (describing "high fidelity" constitutionalism as that which "minimizes political noise and distortion" where the metaphorical master recording is the popular will and the metaphorical reproduction is the ultimate adoption of policy).

sustained attention to this problem offers a label but does not solve the theoretical problem posed by the highly distorted jurisprudence surrounding special laws prohibitions, which bears almost no resemblance to the political agenda of the popular movements that birthed those clauses. The caselaw around these clauses is so low-fi as to be indecipherable.

## 2. Rossi

Professor Jim Rossi shares Rodriguez's practical perspective on state constitutions. Rossi uses his administrative law expertise to analyze how state constitutions create or fail to create institutional structures that promote effective governance. For example, Rossi has written about state constitutional separation-of-powers impediments to the effective exercise of gubernatorial power during crises,<sup>203</sup> state constitutional non-delegation impediments to effective state implementation of federal programs,<sup>204</sup> and state constitutional obstacles to interstate cooperation toward shared policy goals.<sup>205</sup> From his study of state constitutions' role in policy development and execution, Rossi concludes that state constitutional interpreters should neither assume that the state constitution incorporates federal doctrine nor that it exists autonomously independent of the nationwide legal currents swirling around it. Rossi, therefore, is neither wholly universalist nor wholly positivist.<sup>206</sup> His theory encourages state constitutional drafters and interpreters to pursue the policies that would work best to solve state problems, even if that means adopting strained interpretations of the constitutional text.<sup>207</sup> At the same time, Rossi appreciates a role for state courts as enforcers of constitutional bargains between the people and their government, so that he supports courts' effort to block legislative efforts to hide or escape political responsibility for the elected officials' policy choices.<sup>208</sup>

## IV. NON-ENFORCEMENT OF SPECIAL LAWS CLAUSES AS A PROBLEM FOR STATE CONSTITUTIONAL THEORY

On balance, despite the reasons why state courts could or should give teeth to their special laws clauses, there is no hint that the courts are headed in that direction. So we have constitutional text that: (1) specifically derives from two distinct historical mass movements to regulate economic classifications; (2) expressly authorizes judicial review; (3) lacks any semantic relationship with any part of the federal constitution; and (4) targets political failures leading to corrupt antimajoritarian legislation, yet is ultimately insufficient to persuade state courts to

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<sup>203</sup> See Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237, 238 (2006).

<sup>204</sup> See Jim Rossi, *Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards*, 46 WM. & MARY L. REV. 1343, 1345 (2005).

<sup>205</sup> See Jim Rossi, Essay, *Constitutional Isolationism and the Limits of State Separation of Powers as a Barrier to Interstate Compacts*, 90 MARQ. L. REV. 721 (2007).

<sup>206</sup> See JAMES A. GARDNER & JIM ROSSI, *NEW FRONTIERS OF STATE CONSTITUTIONAL LAW: DUAL ENFORCEMENT OF NORMS* 17 (2010).

<sup>207</sup> See Rossi, *supra* note 204, at 1374-80 (describing the normative concerns around state constitutional interpretation that blocks effective policy choices).

<sup>208</sup> See *id.*

engage in meaningful judicial review. If the central purpose of a constitution is to maximize the principal's control over its agents (the public over its officials), as some commentators argue,<sup>209</sup> then what is left for the sovereign People to do when state constitutions fail?

Certainly, the perception remains that elected officials are using their legislative powers to aid powerful economic interests at the public's expense. One recent poll determined that 74% of Americans believe that government policy has helped big banks, while 27% believe that policy has benefitted the middle class.<sup>210</sup> States continue to appropriate public resources for narrow corporate profit.<sup>211</sup> Even federal earmarks, like a grant of roughly \$1.6 million to General Electric followed shortly after by corporate contributions to the representative who submitted the request, continue to undermine popular confidence in government.<sup>212</sup> Many of us might prefer the small-bore corruption associated with today's restrained judicial review rather than risk a return to the reactionary judicial war on workers of the 1910s and '20s. But what if most voters still like the idea of courts acting as a check on legislative gifts to private companies? Are the existing state constitutional clauses doomed forever to dead-letter status?

Neither the positivist, nor the universalist, nor the pragmatic state constitutional scholarship detailed above in Part IV adequately answers the democratic deficit challenge posed by the courts' inability to enforce special laws prohibitions. For the positivists like Williams and Hershkoff, special laws clauses are the strongest possible example of state constitutional text that courts should interpret autonomously. All of the conventional indicators of legal interpretation—text, history, structure, purpose, ratification context, even political context—deviate sharply from anything in the federal Constitution and point toward interpretation free from federal influence. Strong judicial enforcement would be majoritarian, by denying private elites their unwarranted privileges, and elected judiciaries should be more willing to embrace that result. Similarly, enforcement would be democracy-protective in the *Carolene Products* sense because it would help to insulate the political machinery from capture by private interests and the consequent cementing of incumbent advantage. If all of these factors together still leave state courts applying explicitly federal “rational basis” review without analysis, then the positivists' normative theories lose their mooring in actual constitutional practice.<sup>213</sup>

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<sup>209</sup> See Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1587 (2010) (arguing that the relationship between state and federal constitutions and the structure of state constitutions evolved to maximize the efficient control of government by the people).

<sup>210</sup> Dana Milbank, *Massey Energy's Blankenship: No Shame, but Plenty of Blame*, WASH. POST, July 25, 2010, at A17.

<sup>211</sup> See, e.g., Jeffrey Standen, *The Monopoly Myth: A Comment on the Public Funding of Sports*, 16 VILL. SPORTS & ENT. L.J. 267, 267 n.3 (2009) (observing that Louisiana makes direct cash payments from public funds to its two private, for-profit professional sports teams).

<sup>212</sup> See Eric Lipton & Ron Nixon, *Companies Find Ways to Bypass Ban on Earmarks*, N.Y. TIMES, July 4, 2010, at A1.

<sup>213</sup> For support for the principle that theories of constitutional interpretation ought to be measured against what real-world judges do with their constitutions, see Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 562 (1999) (arguing that

Hershkoff, in particular, has written extensively about the gap between how state courts actually decide constitutional cases—often according to federal precepts—and how they should ground their decisions in their often-distinctive state constitutional texts. Hershkoff’s prescriptive arguments on this point are hard to refute, and I would not wish to. But ultimately prescriptive theories that rely on constitutional text (rather than universalist “values” or customs) lose some persuasiveness if courts persist in ignoring those texts. Special laws clauses, I have suggested, are perhaps the best and strongest state constitutional text that should warrant autonomous interpretation. If even here, courts cannot refrain from treating the texts as irrelevant by comparison to familiar federal doctrine, no matter how persuasive the positivists’ normative arguments might be, the special laws jurisprudence demonstrates that state courts simply do not reliably treat their constitutions as positive law. Continuing to urge courts to do so on the basis of their texts, then, and developing ever more refined, thoughtful, well-researched reasons to do so, seems a bit like taking a foreign language speaker’s incomprehension as a signal to speak more loudly.

Even worse for the positivists, these clauses might ultimately be incapable of an interpretation more coherent than the courts have so far applied. The special laws prohibitions, although conceptually quite distinct from the federal Equal Protection Clause, are ultimately a species of equality law. As the foundational piece on equality by Tussman and ten Broek reminds us, equality questions will always boil down to a substantive assessment of the standard against which the “equal” classification is measured: in other words, “equal” with respect to what?<sup>214</sup> Can a consistent explanation be found that distinguishes between “privilege” for one class or “burden” for the other; between a classification “relevant” to the class over all and an “irrelevant” classification; or even between a “private” purpose and a “public” purpose? If these distinctions are not evident on the face of the text, are the judges of any court capable of looking behind the statutory text to legislators’ multiple purposes, and identifying whether the corrupt outweighs the noble? If judges’ interpretive tools cannot coherently draw meaning from these clauses, as the caselaw suggests, then the special laws prohibitions demonstrate that state constitutions’ accessibility to popular reform has led to “law” incapable of effect.<sup>215</sup> Positivists face a paradox if a text created by the regular procedures socially sanctioned for law-creating cannot intelligibly be interpreted as law.

Some courts, as I have described, do attempt to enforce their prohibitions on special laws. These attempts, though, remain in such logical disarray that no legislator, advocate, or citizen would be able to confidently predict whether a given law would survive judicial review. Predictability is only one virtue of law, of course, and perhaps these cases provoke enough uncertainty in the legislatures to disincentivize private law-making. The number of enforcement cases is so small, however, and the pressure on legislators from elite economic forces is so strong, that it seems more likely business continues as usual. In the majority of states that simply

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theories should be evaluated according to the results they are likely to produce and the kind of judicial behavior they are likely to encounter).

<sup>214</sup> See Joseph Tussman & Jacobus ten Broek, *The Equal Protection of the Law*, 37 CALIF. L. REV. 341, 357 (1949).

<sup>215</sup> Cf. Robert M. Cover, Essay, *Violence and the Word*, 95 YALE L.J. 1601, 1606-07 (1986) (arguing that what distinguishes law from literature is the law’s inherent, even if latent, capability to legitimate and to cause action in the real world: specifically, violence).

do not attempt enforcement, captured legislatures need not fear these constitutional clauses.

The failure to enforce special law prohibitions, assuming they are capable of enforcement, also presents a major problem for the universalists. As Professor Reva Siegel has argued extensively, the normative legitimacy of any constitution depends on the public's engagement with it.<sup>216</sup> As she explains, "Popular engagement in constitutional deliberation sustains the democratic authority of original acts of constitutional lawmaking and supplements constitutional lawmaking as a source of the Constitution's democratic authority."<sup>217</sup> The special laws example provides a case where an important social problem (legislative corruption leading to fiscal ruin) was addressed by mass social movements (first the Populists, then the Progressives) through direct amendment of the state constitutions: paradigmatic constitutional engagement. Clearly, the constitutional activists believed that exercising their authority over the constitution would bind their legislators and judges. But when the activists went home, the constitutional text they had written lost its power. The federal Constitution filled the void.

For constitutional universalists Cover and Schapiro, the music of constitutionalism is polyphony. American constitutionalism is richest—most legitimate, most democratic, most useful, most important—when multiple legal spaces exist for popular and professional debate over constitutional meaning. This polyphony depends on a genuine federalism.<sup>218</sup> State polities must be free to pursue constitutional goals in harmony with, or even at odds with, federal practice. Lockstepping, however frustrating it might be to scholars, can frequently match popular will, as when a court treats its search-and-seizure clause as equivalent to the federal jurisprudence in a tough-on-crime state. In the special laws context, though, the citizens clearly addressed themselves to a problem they perceived as distinct from federal problems and offered a solution they believed particular to the states. When the judges adopted federal practice instead of the state law in front of them, the universalists' polyphony became an orchestra of a few state penny-whistles amidst twenty-nine federal trombones.

Even the universalist theory most comfortably adapted to state courts' adoption of federal principles for interpretation of their own constitutions, Gardner's theory of interactive federalism,<sup>219</sup> depends on the ability of the public to change their state constitutions when sufficiently motivated. For state courts to fulfill their interactive role as a competitor for the people's loyalty and a bulwark for the people's liberty, they must be subject to clear constitutional commands by the people. Gardner describes a federalism in which people distrustful of private economic oppression

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<sup>216</sup> See Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1343 (2006).

<sup>217</sup> *Id.*

<sup>218</sup> *But cf.* MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 24 (2008) (arguing that American government is merely decentralized administration, not a true federalism of locally diverse values).

<sup>219</sup> See Brennan, *supra* note 123, at 489 (Brennan's approach to state constitutions, like Gardner's, invited state courts to interpret their constitutions in light of federal caselaw and to agree or disagree with U.S. Supreme Court holdings as they saw fit. Brennan never elaborated the normative or functional justification for this counter-intuitive practice, but because Gardner has, I address only Gardner's theory in the text.

can empower their states and federal governments to protect them. In other states, or at other historical moments, people might distrust their state governments but trust the federal government, or vice-versa; or they might wish to weaken both state and federal governments in favor of the leading economic forces. The people give effect to these constantly shifting allegiances, Gardner believes, by using state constitutions to alter both their protection for individual rights and the structure of their state government.<sup>220</sup> Notably, this account depends on a close link between the shifting affections of the people and matching shifts in the willingness of their judges to apply or to resist federal doctrine. But the story of special laws prohibitions demonstrates that sometimes the levers of power the people pull are no longer connected to the gears of state. Like an elevator passenger repeatedly pushing the pointless “Close Doors” button, the people of the states have repeatedly tried to arrange their state governments to protect them from economic abuse by private capture of the legislatures. The people have shown no confidence that the federal government is capable of satisfying this responsibility.<sup>221</sup>

Gardner’s theory of interactive federalism suggests that people can mitigate their dissatisfaction by making constitutional adjustments. A major strength of this theory is that it sidesteps the normative primacy vs. lockstep debate in favor of an accurate description of how state courts interpret their constitutions while constantly conscious of the overarching federal constitutionalism. The special laws cases amply demonstrate this feature of interactive federalism; as demonstrated above, the courts habitually employ federal standards (explicitly or implicitly) to interpret clauses that on their surface look nothing like any federal constitutional provision. The meaning of “equal protection jurisprudence” is thus the subject of a perpetual conversation between state and federal courts as each makes accommodations or incursions on the others’ articulation of American equality norms. Similarly, the historical evidence is persuasive that the federal courts’ rejection of *Lochner* was strongly influential on the state courts’ willingness to engage in meaningful review of economic discrimination. Gardner’s theory accounts for all of this. But the next step is missing.

When the people overhear this constitutional discourse among courts, interactive federalism theory supposes that the ordinary citizens will lend their authority more freely to the level of government that better suits the popular understanding of equality. To do this, they must engage in political action. In its softer forms, this action could be informal expressions like letters to the editor, rallies, or campaigning. More formally, state constitutional amendment or judicial election challenges stand as the strong methods of popular constitutionalism, expressing to the judges and public officials where the people stand on the constitutional question under discussion. But interactive federalism theory lacks a descriptive or normative response for when the interactive discourse has become so unmoored from the text that the people can no longer shift their authority in favor of or against their chosen

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<sup>220</sup> See GARDNER, *supra* note 191.

<sup>221</sup> See, e.g., Jeff Zeleny & Megan Thee-Brenan, *New Poll Finds a Deep Distrust of Government*, N.Y. TIMES, Oct. 26, 2011, at A1 (reporting that just nine percent of Americans approved of Congress’s performance).

institutions, because the judiciary persists regardless of how directly the people command otherwise.<sup>222</sup>

At first glance, the pragmatists seem least discomfited by the states' special laws jurisprudence. If legislatures are trying to achieve practical objectives and courts look beyond the constitutional text to authorize the legislative methods, pragmatists might see a well-functioning judiciary. Pragmatists of this vein would rejoice, for example, at the federal Supreme Court's decision in *Kelo*,<sup>223</sup> knowing that New London's plan to give the taken land to a major pharmaceutical company was the city's best chance at meaningful economic development (regardless of how much it looked like a corporate giveaway). This approach *works* well, in the sense that the branches of state government function cooperatively and effectively to accomplish short-term majoritarian policy aims. The constitution's dead hand does not strangle living politicians. Both Rossi and Rodriguez call for greater cooperation between branches of state government and between the states and the federal government as the states carry out federal policy.

Nevertheless, Rodriguez in particular has emphasized that constitutional judicial review requires the courts to protect the institutional arrangements of democratic government so that the state's policymaking can maintain its normative legitimacy and efficiency.<sup>224</sup> In circumstances where the legislature has not enacted "good" public policy because it has been captured by narrowly private economic forces, there is nothing pragmatic about judicial acquiescence. Prohibitions on special laws were intended to be both populist and good-governance measures, providing democratic accountability and restraining the legislatures from inefficient policy choices. In practice, courts have shown themselves incapable of fulfilling this role as assigned by their constitutions. The pragmatists' call to work cooperatively for effective policies does nothing to address this gap between the pragmatists' goals—democracy and effective policy—and the inability of the courts to carry out their role with respect to those goals.

## V. CONCLUSION

From a positivist perspective, it is hard to imagine what different language the populist framers could have adopted in the 1840s and 50s (or the progressive framers in the 1870s-90s) that would have better expressed their will to the state courts. Yet the jurisprudential effect has been nearly the same as if the people had adopted the exact text of the federal Fourteenth Amendment, a text directed at an entirely different evil. With few exceptions, state high courts simply ignore the constitutional text. As a result, state constitutional special laws prohibitions, no matter how desperately desired by state framers, lack the normative power to restrain the legislatures from anti-majoritarian legislation.

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<sup>222</sup> Special laws prohibitions are far from the only area where state constitutional text has lost its link to judicial interpretation. *See, e.g.*, Scott R. Bauries, *The Education Duty*, 20 WAKE FOREST L. REV. 101, 149 (2012) (describing how judicial enforceability of state constitutional education obligations has no discernable relationship to the strength or weakness of the constitutional texts).

<sup>223</sup> *See Kelo v. City of New London*, 545 U.S. 469, 471 (2005) (upholding the "public use" of a municipal taking that had the effect of transferring property from one private party to another).

<sup>224</sup> *See supra* Part III.

Many state constitutionalists are not strongly positivist, recognizing instead that the state constitutional texts exist in a thick context of federal constitutional law. For these universalists, the toothless jurisprudence of special laws prohibitions poses a different challenge. Instead of state constitutions serving as a foil for a trans-American constitutionalism—a site where constitutional values can have formal space to compete for national prominence—the special laws cases demonstrate just how cramped this conversation has become. Professor Alan Tarr’s recent work on terminology is very helpful here. He defines “sub-national constitutional space” as the formal gap in a federal constitution that leaves room for sub-federal units like states to arrange their own internal institutions and to carry out governmental roles.<sup>225</sup> The formal space available to American states under the federal Constitution is quite significant. State constitutional universalists emphasize that the space is not so great that state constitutions can sensibly be read in isolation from the federal Constitution, but their theories depend on at least enough sub-national constitutional space for state judges to develop alternative ways of thinking about national constitutional problems and to express alternative constitutional values. Yet the special laws jurisprudence, by mimicking federal law from an unrelated category of equal protection, collapses this space into meaninglessness. The people attempted to develop alternatives to permissive federal judicial review, but there was no space for that in the minds of state judges. The people attempted to express alternative constitutional values about acceptable levels of economic control over government, but there was no space for that either. The result is a bland conformity that belies the universalists’ description of a national discourse. One voice, the federal voice, has shouted over any attempt at divergence.<sup>226</sup>

Similarly, the pragmatists, although comfortable with strained readings of constitutional text in the service of good policy, can neither defend nor explain the state courts’ refusal to oppose bad public policy even when offered a sound textual basis for doing so. The pragmatists’ emphasis on intra- and inter-governmental cooperation succeeds admirably in many circumstances. But cooperation, especially for pragmatists, is only an instrumental good valuable for obtaining effective and democratic governance. The special laws jurisprudence reveals how state constitutions are frequently written not to facilitate cooperative government but to inhibit it. Just as single-subject bills, part-time legislatures, and balanced-budget amendments are state constitutional attempts to *block* cooperative and efficient government, so the prohibitions on special laws are meant to interfere with legislative prerogative. So long as high court judges view their role pragmatically as to assist the legislature by providing legal cover for its policy ambitions, the courts lack fidelity to the constitutions that establish them.

What then is left for state constitutional theory? First, the theories described above continue to be persuasive in many applications of state constitutional law, particularly in areas of individual rights. But future state constitutionalists must

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<sup>225</sup> See G. Alan Tarr, *Explaining Sub-national Constitutional Space*, 115 PENN. ST. L. REV. 1133, 1135 (2011).

<sup>226</sup> Ironically, Robert Cover himself predicted that formal legal systems tend to crowd out their competitors in a “jurispathic” process that stifles dissenting visions of law and justice. See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 21 (1983). Here, federal jurisprudence has jurispathically ended the opportunity for states to enforce restraints on economic domination of the political process.

account for circumstances where federal law has so overwhelmed state autonomy that even formal state constitutional change as a result of repeated popular movements cannot carve out enough sub-national constitutional space to take effect. This occurs despite more-than-ample space in the formal federal Constitution for the state innovations at issue. When federal law swamps state constitutions in this way, the state constitutions are: (1) no longer binding positive law; (2) no longer sites of contestation for national constitutional values; and (3) no longer effective frames of government capable of empowering or restraining the people's agents toward wise public policy. A complete state constitutional theory must account for and incorporate these surprising effects.

Constitutional positivists are well aware of how frequently state courts deviate from an autonomous interpretation of constitutional text. The challenge for them is not that courts do this from time to time, because the positivists simply argue that those opinions are wrongly decided and that courts should attempt text-based interpretation. But in the context of special laws prohibitions, the very best rationales for textual interpretation, offered by the most persuasive positivists and supported by the most compelling fit to these particular constitutional texts, still have made no influence on judicial practice. These theorists must eventually confront the likelihood that no argument, however brilliant, and no text, however explicit, will convince state judges to interpret their state constitutional text even where theory most strongly suggests that they should. Positivists should stop developing ever-more elegant arguments for textual interpretation. Instead, they should begin to study which legal process *does* create texts uniformly recognized as constitutional law by state high courts, if any. In particular, positivists should seek to explain why the constitutional amendment and revision process that led to prohibitions on special laws, itself a process explicitly described in constitutional text, failed to produce texts recognized as binding law by the judges who interpret those constitutions. It might be that as a descriptive matter, the only positive texts that consistently win recognition from state constitutional courts as legitimate explications of constitutional principle are federal Supreme Court opinions. In any event, positivists should worry about this question.

Constitutional universalists should understand that the special laws jurisprudence represents the evaporation of subnational constitutional space to contest national values. This poses no problem if the people of the states genuinely prefer federal policy; the state-federal discourse need not always be one of conflict and resistance. But the key to the universalists' description of federalism as a principal-agent relationship where the people have two agents competing to offer the best policy is that the people are the principal. If state judges simply refuse to offer an alternative to federal jurisprudence, no matter how clearly the people insist upon it, then the principal has lost the benefit of competitive agents. Universalists should examine more closely the mechanics of how they expect ordinary citizens to express and effectuate their shifting allegiances between state and federal governments. The power of the universalists' benevolent vision of state-federal discourse is that it ultimately serves republican ends through the promotion of public reasoning and explicit articulation of otherwise unspoken principles. Universalists must consider not merely whether such a discourse exists, but whether structural obstacles prevent citizens from expressing their preference among the competing constitutional visions.

Finally, constitutional pragmatists should take the example of special laws prohibitions as a reminder of how frequently state constitutions are intended to

impede, rather than to enhance, state governance. This feature conflicts so strongly with state judges' perceived role as expeditors of efficient state policy that they will resist even direct constitutional commands to exercise non-deferential judicial review. The judges' willingness to stretch their jurisprudence so far beyond the text to benefit the legislature only appears democratic. The people themselves are left in the cold. Perhaps the pragmatists prefer good policy over democratic accountability, but if so, they should explain why. More importantly, the pragmatists should identify how they recognize "good" policy if the constitutional polity disagrees (and has expressed that disagreement in the constitutional text).

The theoretical prescriptions I offer here simply scratch the surface of how scholars should respond to the problem I have identified in this Article. But the problem of why state courts do not give effect to their constitutional prohibitions on special laws is both lasting and important. Scholars hoping to understand how and why state constitutions work must acknowledge the challenge this jurisprudence poses. Only then can state constitutionalism fulfill its potential as a democratic institution.

