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# Article V, Section 12 of the Montana Constitution: Restoring Meaning to a Forgotten Provision

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# COMMENT

## ARTICLE V, SECTION 12 OF THE MONTANA CONSTITUTION: RESTORING MEANING TO A FORGOTTEN PROVISION

Constance Van Kley\*

### I. INTRODUCTION

The Montana Supreme Court does not—and should not—hesitate to refuse to “march lock-step” with the United States Supreme Court, “even where the state constitutional provision at issue is nearly identical to its federal counterpart.”<sup>1</sup> However, in interpreting Montana’s constitutional restriction on special legislation, the Court has done the opposite, applying a federal constitutional test to a state constitutional provision with no federal counterpart.

Article V, Section 12 of the Montana Constitution provides:

Local and special legislation. The legislature shall not pass a special or local act when a general act is, or can be made, applicable.<sup>2</sup>

The provision derives from the final sentence of Article V, Section 26 of Montana’s first constitution, ratified in 1889.<sup>3</sup>

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\* Law Clerk, Ninth Circuit Court of Appeals. This piece is an expansion of a research paper written as part of the author’s course work in a class on the Montana Constitution. The author thanks Professor Anthony Johnstone for his assistance and for sharing his knowledge of and enthusiasm for Montana constitutional law. She is also grateful to the editorial board and staff of the *Montana Law Review* for their diligence and thoughtfulness.

1. *State v. Guillaume*, 975 P.2d 312, 316 (Mont. 1999) (considering Montana’s constitutional guarantee against double jeopardy); *see also Ranta v. State*, 958 P.2d 670, 675 (Mont. 1998) (reviewing right to counsel under the Montana Constitution); *State v. Bullock*, 901 P.2d 61, 75–76 (Mont. 1995) (holding the federal open fields doctrine inconsistent with the Montana Constitution).

2. MONT. CONST. art. V, § 12.

3. MONT. CONST. of 1889 art. V, § 26. A constitution was also drafted in 1884, but it was never ratified. *See Montana Constitutional Convention, Constitution of the State of Montana*, as adopted by

The drafters of the 1972 Constitution were unsure of the meaning of Section 12. In fact, the delegate who introduced the provision to the Convention described much of the 1889 provision as “becoming obsolete” and suggested that it was duplicative of other provisions in the Montana and United States constitutions.<sup>4</sup> Nonetheless, the provision was uncontroversial, drawing no debate and passing with nearly unanimous support.<sup>5</sup> More importantly, the voters ratified it.<sup>6</sup> The ratifiers of the 1972 Constitution understood Section 12 to be substantively identical to the 1889 provision.<sup>7</sup> This understanding gives rise to two possible conclusions: (1) that Section 12 means what Section 26 meant in 1889; and (2) that Section 12 means what Section 26 had been interpreted to mean as of 1972.

In 1889, Section 26 had a meaning distinct from equal protection. Section 26 remedied serious problems with the democratic process by defining and limiting the role of the Legislature, helping it do its job effectively.<sup>8</sup> The provision operated to benefit the Legislature by preventing special legislation from “dominat[ing] the legislative calendar and crowd[ing] out statewide legislation.”<sup>9</sup> Additionally, it provided benefits for the people, particularly the underrepresented: the restriction furthered legal equality and decreased “the influence of private interests . . . [and] opportunities for corruption.”<sup>10</sup> Despite the unique meaning of special legislation in 1889, today the Montana Supreme Court essentially analyzes special legislation under federal equal protection doctrine.<sup>11</sup>

Section 12 can and should serve the Legislature and the people as a unique and meaningful protection of the democratic process. This paper

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the Constitutional Convention of the Territory of Montana, at the session thereof begun, January 14 and concluded Saturday, February 9, 1884, to which is appended an address to the electors of the territory of Montana (1884).

4. IV MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 674 (1972) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT].

5. *Id.* Following introduction of the provision, the delegates adopted it on voice vote with none opposed. *Id.* The delegates adopted Section 12 in its final form with a vote of 89 in favor, 5 opposed, and 6 absent. VI MONTANA CONSTITUTIONAL CONVENTION VERBATIM TRANSCRIPT 1884–85 (1972) [hereinafter CONSTITUTIONAL CONVENTION TRANSCRIPT 2].

6. An understanding of the meaning of a constitutional provision should focus on the ratifiers’ understanding of it, as the ratifiers, rather than the delegates, enacted the Constitution. Tyler M. Stockton, *Originalism and the Montana Constitution*, 77 MONT. L. REV. 117, 117–18 (2016).

7. The official Voter Information Pamphlet, distributed to all voters in 1972, instructed voters only that Section 12 presented “[n]o change except in grammar” from the 1889 provision. PROPOSED 1972 CONSTITUTION FOR THE STATE OF MONTANA: OFFICIAL TEXT WITH EXPLANATION § 1 (1972) [hereinafter PROPOSED 1972 CONSTITUTION].

8. 12 MONTANA CONSTITUTIONAL CONVENTION STUDIES 21 (1972).

9. *Id.*

10. *Id.*

11. See *Rohlf v. Klemenhausen, LLC*, 227 P.3d 42, 46 (Mont. 2009) (Under Section 12, “if the classification is reasonable and the law operates equally upon every person or thing within the given class, it is not unconstitutional.”).

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explores and advocates for a return to the meaning of Montana's constitutional restriction on special legislation. Part II presents the national history of special legislation in the mid- to late-19th century. Part III explores the history of special legislation in Montana, moving from the 1889 provision's text and interpretation into its revision and the ratification of Article V, Section 12 in 1972. Part IV considers the Court's current approach to special legislation and proposes a new analytical model, grounded in history but responsive to modern needs.

## II. SPECIAL LEGISLATION IN THE 19TH CENTURY

Montana's restriction on special legislation is not unique. In the years leading up to the 1972 Constitutional Convention, the Montana Legislature ordered a study into the adequacy of the 1889 Constitution. The ensuing report informed legislators that 32 states had some sort of restriction on special legislation.<sup>12</sup> The number may in fact be as high as 46.<sup>13</sup>

Montana's Section 12 textually incorporates Montana's history, with language pulled directly from Article V, Section 26 of the 1889 Constitution. The 1889 provision reads:

The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: For granting divorces; laying out, opening altering or working roads or highways; vacating roads, town plats, streets, alleys or public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates or constables; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or

12. 6 MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS Preface (1968).

13. Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 767 n. 6 (2012) (citing 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; IDAHO 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).

conducting of any election or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; chartering or licensing ferries or bridges or toll roads; chartering banks, insurance companies and loan and trust companies; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, per centages [sic] or allowances of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever<sup>14</sup>; for the punishment of crimes; changing the names of persons or places; for the assessment or collection of taxes; affecting estates of deceased persons, minors or others under legal disabilities; extending the time for the collection of taxes; refunding money paid into the State treasury; relinquishing or extinguishing in whole or in part the indebtedness, liability or obligation of any corporation or person to this State, or to any municipal corporation therein; exempting property from taxation; restoring to citizenship persons convicted of infamous crimes; authorizing the creation, extension or impairing of liens; creating offices, or prescribing the powers or duties of officers in counties, cities, township or school districts; or authorizing the adoption or legitimation of children. In all other cases where a general law can be made applicable, no special law shall be enacted.<sup>15</sup>

Section 26 borrows the language of other state constitutions, nearly verbatim.<sup>16</sup> The first half of the provision repeats, almost word-for-word, the restriction on special legislation from Colorado's Constitution of 1876.<sup>17</sup> The Colorado Constitution, in turn, "was largely a cut-and-paste job," drawing from nearly identical provisions in Illinois, Pennsylvania, and Missouri.<sup>18</sup> Similarly, the second half of Section 26 is strikingly similar to the language in California's analogous provision.<sup>19</sup> The problem of special legislation was sufficiently great in the mid- to late-19th century that Congress passed a law restricting special legislation in the territories, including Montana, in 1886.<sup>20</sup> Thus, the meaning of 1889's Section 26 cannot be understood without an inquiry into the national history of special legislation.

14. Note the similarity of this language to that of Article II, section 31 of the Montana Constitution: "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." Despite its similar language, Section 31 has a very different meaning and is understood to provide a protection equivalent to that afforded by Article I, § 10 of the U.S. Constitution. *See Seven Up Pete Venture v. State*, 114 P.3d 1009, 1020–21 (Mont. 2005).

15. MONT. CONST. of 1889 art. V, § 26.

16. The 1889 provision nearly reproduces that of the proposed Constitution of 1884. *State ex rel. Ford v. Schofield*, 165 P. 594, 598–99 (Mont. 1917) (Sanner, J., dissenting). Ultimately, however, the sources of the language in Section 26 are similar provisions in other states.

17. COLO. CONST. of 1876 art. V, § 25.

18. Dale A. Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies*, 73 U. COLO. L. REV. 587, 590 (2002).

19. CAL. CONST. of 1879 art. IV, § 25.

20. *State v. Long*, 117 P. 104, 108 (Mont. 1911); Charles Chauncey Binney, *Restrictions upon Local and Special Legislation in the United States*, 41 AM. L. REG. & REV. 613, 620 (1893).

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Section 26 enumerated no less than 34 instances in which special laws could not be passed.<sup>21</sup> To Montanans in 1972, the 1889 Constitution's laundry list of prohibitions appeared unwieldy, if not somewhat bizarre.<sup>22</sup> The history of special legislation in other states is illuminating—many categories of special and local legislation were expressly prohibited because there was a real history of state legislatures passing precisely those types of laws.<sup>23</sup> As a research analyst noted in his report on the Legislature to the 1972 Constitutional Convention, Article IV, Section 26 “is virtually a repository of all the unhappy experiences of the previous century . . . .”<sup>24</sup>

State constitutional provisions restricting special legislation are ultimately sourced in Parliament's historical quasi-judicial function.<sup>25</sup> Colonial (and later, territorial and state governments like Parliament) received and answered petitions from individuals and entities seeking remedies for specific wrongs.<sup>26</sup> Unlike Parliament, American legislatures did not develop procedural solutions to the burdens and potential injustices imposed by special legislation.<sup>27</sup> When the provisions began cropping up in the latter half of the 19th century, state legislatures were substantially overburdened by special legislation, which accounted for anywhere from 75 to greater than 90 percent of each state's legislation.<sup>28</sup>

The high volume of special legislation meant that state lawmakers were generally unaware of the laws that they had passed.<sup>29</sup> Additionally, individual lawmakers had no reason to be concerned with legislation affecting other localities, leading them to “support the proposals of the legislators

21. MONT. CONST. of 1889 art. IV, § 26.

22. 5 MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS 26 (1972).

23. Robert Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States*, 46 AM. J. LEGAL HIST. 271, 283–92 (2004). For example, Illinois passed a special law benefitting a minority of Chicagoans through “tax increases, amendments to the city charter, and salary increases.” *Id.* at 283. A Kentucky law amended Lexington's city charter to allow the (all white) city councilmembers to elect their own successors following passage of the Reconstruction Amendments. *Id.* States all too frequently passed laws giving special powers or benefits to officials within particular localities. *Id.* at 284. Legislatures even passed laws for the purpose of reversing judicial decisions, particularly those involving inheritance. *Id.* at 288; *Calder v. Bull*, 3 U.S. 386 (1798). Similarly, state lawmakers performed judicial functions; in its 1848–1849 session, the Kentucky Legislature divorced 138 couples. Ireland, *supra* note 23, at 289. Through special legislation, states allowed different punishments for the same crimes committed in different localities. *Id.* at 290.

24. MONTANA CONSTITUTIONAL CONVENTION STUDIES, *supra* note 8, at 20.

25. Ireland, *supra* note 23, at 271.

26. *Id.*; *Law Reform: Private and Local Legislation*, 1 UNIV. L. REV. 337, 338–39 (1893) [hereinafter *Law Reform*].

27. *Law Reform*, *supra* note 26, at 339 (advocating for the development of processes to assist state legislatures in enacting special legislation).

28. Ireland, *supra* note 23, at 271–72; see also Lyman H. Cloe & Sumner Marcus, *Special and Local Legislation*, 21 KY. L.J. 4, 356, 356 (1936) (“Immediately prior to constitutional limitations in Kentucky of two thousand enactments, less than a hundred and seventy were general. By 1859 in Missouri 87% of the legislation was special or local.”).

29. Ireland, *supra* note 23, at 283–92.

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from the affected area, even if they deem[ed] the proposal to be bad policy that they could not support if it affected their own constituents.”<sup>30</sup> This increased poor drafting and logrolling.<sup>31</sup> Further, the lack of concern from other lawmakers, coupled with legislators’ desire to pass special laws for the benefit of their electors, gave individual legislators inordinate power over their constituents.<sup>32</sup> If the voters of a locality elected only one representative to the state assembly, that representative had the “absolute and undisputed power” to pass laws governing his constituency.<sup>33</sup>

Special legislation compromised the democratic system, causing problems for both constituents and legislatures.<sup>34</sup> As one delegate to Maryland’s constitutional convention of 1864 stated, “There is no mischief in this State greater than . . . the interference of the Legislature in cases where individual rights are concerned, and where parties have no opportunity of being properly represented and heard.”<sup>35</sup> Citizens generally did not learn of local and special legislation until it had been enacted.<sup>36</sup> Partially for this reason, special legislation was a perfect vehicle for political favoritism,<sup>37</sup> if not outright corruption.<sup>38</sup> Even where the legislature had good intentions, special laws did not adequately resolve the problems faced in industrial America.<sup>39</sup>

Additionally, state legislators spent nearly their entire sessions passing laws affecting individuals, corporations, and localities, leaving little time and energy to attend to matters affecting the state as a whole.<sup>40</sup> Citizens, even lawyers, were left confused—laws could vary as divergently between localities as between states.<sup>41</sup> Each citizen was subject to both general and local legislation, but the relevant laws were difficult to locate and under-

30. *City of S. Bend v. Kimsey*, 781 N.E.2d 683, 686 (Ind. 2003).

31. Ireland, *supra* note 23, at 273–74; *see also* Justin W. Evans & Mark C. Bannister, *The Meaning and Purposes of State Constitutional Single Subject Rules: A Survey of States and the Indiana Example*, 49 VAL. U. L. REV. 87, 100 (2014) (writing that the people of Indiana viewed “private legislation and logrolling as twin evils.”).

32. Ireland, *supra* note 23, at 274.

33. *Id.* at 274 (quoting Mr. O’Neal, II PROCEEDINGS OF THE ALABAMA CONSTITUTIONAL CONVENTION 1851 (1901)).

34. *Id.* at 275.

35. Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 441 (2011).

36. Ireland, *supra* note 23, at 276.

37. Cloe & Marcus, *supra* note 28, at 357.

38. Binney, *supra* note 20, at 621.

39. Janet S. Lindgren, *Beyond Cases: Reconsidering Judicial Review*, 1983 WIS. L. REV. 583, 593–94 (1983).

40. Ireland, *supra* note 23, at 276–77.

41. Cloe & Marcus, *supra* note 28, at 357 (“If the cows trespassed in the Mother of God Cemetery in Kenton County a statute was enacted which related only to that plot and there might be a different law as to every burial ground in the state.”).

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stand, as they were buried among a wealth of special legislation governing residents of other localities.<sup>42</sup>

Criticism of special legislation was prevalent well before states began amending or drafting their constitutions to deal with these problems. In his *Second Treatise on Government*, John Locke wrote:

These are the bounds, which the trust that is put in them by the society, and the law of God and nature, have set to the legislative power of every common-wealth, in all forms of government. First, they are to govern by promulgated established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favourite at court, and the country man at plough.<sup>43</sup>

James Madison wrote in *Federalist Paper Number 46* that “[e]veryone knows that great proportion of the errors committed by the State legislatures proceeds from a disposition of the members to sacrifice the comprehensive and permanent interest of the State to the particular and separate views of the counties or districts in which they reside.”<sup>44</sup>

Even if special legislation was universally understood to be problematic, the federal Constitution did not provide a remedy. In *Calder v. Bull*, the United States Supreme Court refused to strike what was undeniably a special law, a Connecticut statute overturning the probate decision of a Connecticut court.<sup>45</sup> The Court was “fully satisfied that this court has no jurisdiction to determine that any law of any state Legislature, contrary to the Constitution of such state, is void.”<sup>46</sup>

The problem of special legislation was sufficiently great that reform, once begun, quickly swept through the nation on a tide of democratic populism.<sup>47</sup> Delegates to constitutional conventions in Indiana, Illinois, Pennsylvania, California, and Kentucky characterized the conventions as necessary to deal with the problem of special legislation.<sup>48</sup> Although the politically powerful would have preferred to keep the ensuing provisions out of their state constitutions, the format of the constitutional convention—unlike

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42. Ireland, *supra* note 23, at 278.

43. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 323 (6th ed. 1764).

44. JAMES MADISON, ALEXANDER HAMILTON, & JOHN JAY, *THE FEDERALIST PAPERS* 231 (Courier Corp. 2014).

45. 3 U.S. 386, 393 (1798).

46. *Id.* at 392.

47. Cloe & Marcus, *supra* note 28, at 355; Long, *supra* note 13, at 726.

48. Ireland, *supra* note 23, at 295–96; *see also* Perkins v. Philadelphia, 27 A. 356, 360–61 (Penn. 1893) (“It is certainly not forgotten that the well-nigh unanimous demand which brought the convention of 1873 into existence was prompted by the evils springing from local and special legislation. . . . That constitution, with this article the most prominent feature of it, was adopted by an unprecedented majority on a direct vote, indicating a settled determined purpose on the part of the people to hold back from the legislature the power to enact local and special laws.”).

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that of the legislative assembly—enabled direct participation by “[o]rdinary farmers and workers.”<sup>49</sup>

Where it existed, debate within state constitutional conventions focused on whether to prohibit all special legislation or only specific types.<sup>50</sup> Most constitutions—like that of Montana in 1889—did both, listing certain prohibitions on local and special laws and following the list with a general restriction.<sup>51</sup> Where state courts deferred to the legislature’s determination of the necessity of a special law, the general prohibitions were far less effective than those enumerated.<sup>52</sup>

Montana’s first Constitution restricted special legislation. Therefore, the problem of special legislation was never as extreme as it had been in other states. Still, Montana was not a stranger to the issue. In 1911, the Montana Supreme Court, reviewing a few special laws, wrote: “[The laws] are only a few of the special laws enacted in the early days of our territorial existence; but it will be observed that the Legislature, having been left free to enact special laws, exercised its authority freely and upon a great variety of subjects.”<sup>53</sup>

Considering this history, the 1889 constitutional provision remedied many specific wrongs unfamiliar to modern Montanans. It could be argued that Section 12 should be limited by the context in which Section 26 operated—that, like Section 26, it provides a solution for a particular historical problem. Following this logic, Section 12 has no real meaning today. Indeed, this argument finds some support in the 1972 Convention transcript, where the delegate introducing the provision minimized its importance.<sup>54</sup> Under this approach, Section 12 is little more than a historical relic. This approach must fail for at least two reasons: first, it is inconsistent with the Court’s interpretation of special legislation as of 1972; and second, it is unresponsive to the need for modern solutions to problems analogous to those faced in 1889.

### III. SPECIAL LEGISLATION IN MONTANA FROM 1889 TO 1972

In calling for the 1972 Constitution, the Montana Legislature sought a clearer, stronger Constitution.<sup>55</sup> And the Constitution, as originally ratified,

49. Long, *supra* note 13, at 726–27.

50. Ireland, *supra* note 23, at 296.

51. Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39, 46–48 (2014).

52. Ireland, *supra* note 23, at 297; Cloe & Marcus, *supra* note 28, at 358–60.

53. *State v. Long*, 117 P. 104, 108 (Mont. 1911).

54. CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 4, at 674.

55. Anthony Johnstone, *The Constitutional Initiative in Montana*, 71 MONT. L. REV. 325, 347–48 (2010).

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is indeed a model of brevity.<sup>56</sup> At first blush, Article V, Section 12 appears to be an unmitigated success. If the Legislature must always prefer general to special laws, the 1889 provision's laundry list of prohibitions is unnecessary, if not confusing.<sup>57</sup>

The linguistic simplicity of Section 12 belies its complexity, in large part because it is unclear what a special or local act is and how it differs from a general act.<sup>58</sup> The National Municipal League stated in its commentary to the 1968 Model State Constitution that the model constitution's special legislation provision may be ambiguous, as "[t]he distinction between general and special laws may be far from clear in any given case."<sup>59</sup> The confusion about special legislation in other jurisdictions does not foreclose the possibility that the provision is clear in Montana, particularly given the modernity of the Montana Constitution, and the wealth of historical resources available to explain its framing and ratification.<sup>60</sup>

Despite these advantages, special legislation doctrine remains underdeveloped, and the documentary history of the 1972 Constitution does not reveal any clear answers. To understand the meaning of Section 12, it is necessary to look beyond its drafting and ratification, starting with the 1889 provision's textual meaning and moving through its interpretation as of 1972.

#### A. *The Source: Article V, Section 26 of the 1889 Constitution*

By reworking the final sentence of the 1889 provision, the framers of the 1972 Constitution attempted to distill the earlier provision to its essence.<sup>61</sup> However, the meaning of the 1889 provision had been gradually eroded prior to ratification of the 1972 provision.

56. The 1972 Constitution had less than 13,000 words before any amendments were passed, in contrast to the 1889 Constitution's 22,000 words. *Id.* at 348.

57. The framers of the 1972 Constitution likely believed this to be the case. As the delegate introducing the provision stated, "I will say [Article V, section 26] has a long list of prohibitions. . . . [Section 12 is] simply a statement of the last sentence of Section 26. Our committee believes that this statement adequately covers the prohibitions . . . and partly because all these prohibitions are becoming obsolete." CONSTITUTIONAL CONVENTION TRANSCRIPT, *supra* note 4, at 674.

58. Friedman, *supra* note 35, at 431–32 ("When state constitutional conventions began to propose prohibitions on special laws, there was a general understanding of the problem but no accepted definition of what constituted a special law. Courts and commentators have struggled mightily to create appropriate definitions."); *see also* Thomas F. Green Jr., *A Malapropian Provision of State Constitutions*, 24 WASH. U. L. REV. 359, 361 (1939) ("Comparatively little attention has been given by judges or commentators to the problem of what is meant by 'general act' and 'local or special act' in the provisions of state constitutions restricting the passage of local or special acts.").

59. 6 MODEL STATE CONSTITUTION 56 (1968).

60. *See* G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 852 (1991).

61. PROPOSED 1972 CONSTITUTION, *supra* note 7, at art. V, § 1 (1972).

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Article V, Section 26 is vastly longer and more specific than its offspring, detailing over 34 specific limitations.<sup>62</sup> One commentator wrote in his graduate thesis on the 1889 constitutional convention, “It is the hardest kind of physical labor to drag one’s eyes through this tremendous paragraph.”<sup>63</sup> That scholar was rather critical<sup>64</sup> of the provision, stating that the effect of the catch-all language at the end of Section 26, which became the basis for Section 12, “was to tie the legislature in knots.”<sup>65</sup> And yet, the report prepared for the Legislature in 1972, which called strongly for a constitutional convention, took no issue with the 1889 provision.<sup>66</sup>

The text of the 1889 provision reveals two patterns. First, some prohibitions provide for the separation of powers,<sup>67</sup> both vertically—giving local governments greater control over local affairs<sup>68</sup>—and horizontally—preventing the Legislature from doing the work of the court.<sup>69</sup> These provisions are largely unnecessary in modern Montana. The 1972 Constitution provides for the powers of local governments, “direct[ing] that the powers of incorporated local units of government be liberally construed, that there are implied powers beyond the powers specifically provided by legislation, and that the legislature may delegate certain legislative powers to counties.”<sup>70</sup> Like the 1889 Constitution, the 1972 Constitution provides for the

62. MONT. CONST. of 1889 art. V, § 26. The full text of the provision is reproduced in Section II, *supra* note 15.

63. J. W. SMURR, A CRITICAL STUDY OF THE MONTANA CONSTITUTIONAL CONVENTION OF 1889 177 (1951) (unpublished thesis, University of Montana), available at <https://perma.cc/4D6U-PPY4>. The Montana Constitutional Convention Commission relied on Dr. Smurr’s work, reprinting the cited sentence in a paper presented to the delegates. MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS *supra* note 22, at art. V, 26.

64. Dr. Smurr introduced the provision with the phrase, “[t]he American people versus themselves.” SMURR, *supra* note 63, at 176. He also posed several rhetorical questions: “What did the delegates have in mind when they produced this section? . . . What were they trying to do?” *Id.* at 178–79.

65. *Id.* at 178.

66. MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS, *supra* note 12, at 26.

67. See Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1719 (2012) (noting that “special laws passed by a legislature that deprive an individual of rights . . . conflict with the separation-of-powers notion that the power to make laws—the power to ‘legislate’—is the power to establish general rules for the future, not to determine specific applications of law . . .”).

68. Most clearly, the provision prevents the Legislature from passing local laws “regulating county or township affairs” and “prescribing the powers or duties of officers in counties, cities, townships or school districts.” MONT. CONST. of 1889 art. V, § 26.

69. For example, the provision disallows special legislation interfering with family law matters (“granting divorces” and “authorizing the adoption or legitimation of children”) and individual probate proceedings (“affecting estates of deceased persons, minors or others under legal disabilities”). It also prohibits legislative interference with local court rules (“regulating the practice in courts of justice”). *Id.*

70. LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 191 (2001); see MONT. CONST. art. XI, §§ 1–9.

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separation of powers, and little confusion exists in case law separating legislative and judicial powers.<sup>71</sup>

Second, the provision restricts legislation passed in favor of the politically powerful.<sup>72</sup> Some of these enumerated restrictions are highly specific.<sup>73</sup> One particular provision may be broad enough to encompass modern legislation granting special benefits to individuals and entities—the restriction on special laws “granting to any corporation, association or individual the right to lay down railroad tracks, or any special or exclusive privilege, immunity or franchise whatever.”<sup>74</sup> Even if the seemingly incongruent reference to “railroad tracks” limits the meaning of the provision, the combined effect of the enumerated restrictions, coupled with the catch-all language at the end of Section 26, demonstrates an intention to prevent the Legislature from passing laws for the especial benefit of the politically powerful.<sup>75</sup> Unlike the first category of enumerated restrictions, the concerns reflected in this second group remain relevant today.<sup>76</sup>

### B. *Judicial Interpretations of the 1889 Provision*

Special legislation cases are rarely brought in Montana.<sup>77</sup> In most of the cases brought under the 1889 provision, the Court has dismissed the challenge with no clear analysis.<sup>78</sup> This article focuses on two sets of cases considering Section 26; the dividing line between the two groups is the United States Supreme Court’s turn toward extreme deference in applying rational basis review. The first line of cases, decided before *West Coast Hotel Company v. Parrish*,<sup>79</sup> gives independent meaning to Montana’s special legislation provision. The second line rejects that meaning, falling into lockstep with federal Fourteenth Amendment jurisprudence.

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71. ELISON & SNYDER, *supra* note 70, at 89–90 (“The several cases discussing legislative branch powers display few unexpected conclusions. . . . The cases discussing judicial powers and the possible intrusions on judicial powers are standard and expectable decisions.”). R

72. Section 26 prohibits special laws “remitting fines, penalties or forfeitures” and “for the assessment or collection of taxes.” MONT. CONST. of 1889 art. V, § 26.

73. For example, the provision disallows special legislation “chartering or licensing ferries or bridges or roads” or “chartering banks, insurance companies and loan and trust companies.” *Id.*

74. *Id.*

75. MONTANA CONSTITUTIONAL CONVENTION STUDIES, *supra* note 8, at 21. R

76. Evan C. Zoldan, *Reviving Legislative Generality*, 98 MARQ. L. REV. 625, 634–36 (2014).

77. As of November 28, 2017, a Westlaw search for “special legislation” in Montana brings up fifty-seven cases.

78. *See In re Dewar’s Estate*, 25 P. 1026 (Mont. 1891); *Hotchkiss v. Marion*, 29 P. 821 (Mont. 1892); *State ex rel. Lloyd v. Rotwitt*, 37 P. 845 (Mont. 1894); *Holliday v. Sweet Grass Cty.*, 48 P. 553 (Mont. 1897); *King v. Pony Gold-Mining Co.*, 62 P. 783 (Mont. 1900); *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 77 P. 312 (Mont. 1904).

79. 300 U.S. 379 (1937).

The Court first seriously attempted an understanding of Section 26 in 1911. In *State ex rel. Geiger v. Long*,<sup>80</sup> the Court outlined an analytical model, finding first that a general law could be made applicable before striking a special law. In 1917, the Court in *State ex rel. Ford v. Schofield* considered the level of deference owed to the Legislature in special legislation cases.<sup>81</sup> The 1922 case of *State ex rel. Redman v. Meyers*<sup>82</sup> provided the first serious attempt at a definition of “special legislation.” *Leuthold v. Brandjord*,<sup>83</sup> decided in 1935, signaled the beginning of confusion between Section 26 and the federal equal protection provision. Two years after *Leuthold*, the United States Supreme Court decided *West Coast Hotel*, ushering in the era of extreme deference under rational basis review,<sup>84</sup> and the transformation was complete.<sup>85</sup>

### 1. *Special Legislation before West Coast Hotel*

Early cases provided no more than a cursory discussion of Section 26, giving no real insight into the meaning of the provision. The 1891 case of *In re Dewar’s Estate* was the first to consider the issue, and it exemplifies the typical threadbare analysis the Court employed prior to 1911. Considering an act changing the fees payable to estate administrators, a subject upon which “[t]he legislature seems to have never tired of passing acts,” the Court held that the law did not violate Section 26.<sup>86</sup> The Court stated simply:

What shadow or pretense there is to pronounce this act local or special is not apparent to us. On the other hand, that it is not local or special seems to be perfectly clear, and so indisputably sustained by the decisions that to discuss the proposition or review the cases, would be an uninformative compiling of elementary and well understood law.<sup>87</sup>

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80. 117 P. 104, 109–11 (Mont. 1911).

81. 165 P. 594, 595 (Mont. 1917).

82. 210 P. 1064, 1065–66 (Mont. 1922).

83. 47 P.2d 41 (Mont. 1935).

84. See William Mac Morris, *A Lack of Deference: Rational Basis with Bite in Caldwell v. Maco Workers’ Compensation Trust*, 73 MONT. L. REV. 417, 420–21 (2012).

85. In 1938, in *State v. Safeway Stores, Inc.*, brought under the Fourteenth Amendment, Montana cited and applied the standard of rational basis review articulated in *West Coast Hotel Company v. Parrish*. 76 P.2d 81, 83 (Mont. 1938). Just one year later, the Court cited *Safeway Stores, Inc.* in a special legislation case, applying the same analytical method. *Rutherford v. City of Great Falls*, 86 P.2d 656, 658 (Mont. 1939).

86. *In re Dewar’s Estate*, 25 P. 1026, 1030 (Mont. 1891).

87. *Id.*

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A long string cite to 20 cases from courts throughout the nation follows the quoted language.<sup>88</sup> A similar approach is followed in substantially all the special legislation cases prior to 1911.<sup>89</sup>

The 1972 provision, like the 1889 provision, does not prohibit all special laws, but only special laws passed in the place of general laws.<sup>90</sup> In *Long*, decided in 1911, the Court articulated a simple analytical framework, considering not—as the Court does today—whether the special law is rational, but whether a general law exists or could have been passed.<sup>91</sup> The case involved an act establishing an election to change the county seat of Lincoln County, Montana.<sup>92</sup> Following the procedure set forth in the act, the people of Lincoln County narrowly voted to change the county seat from Libby to Eureka.<sup>93</sup> The Court initially found the law constitutional under Section 26.<sup>94</sup> However, upon rehearing, the Court struck the act down.<sup>95</sup>

The Court answered two questions in *Long*. First, without considerable analysis, it declared the act “a local and special law”—which had been agreed upon by the Court earlier when it upheld the law.<sup>96</sup> Second, the Court addressed a second issue: whether a general law is or could be made applicable.<sup>97</sup> The Court refused to assume that a general law could not apply simply because the Legislature passed a special law. To do so “would defeat the will of the framers of the Constitution in drafting section 26, art. 5, and the will of the people in adopting it . . . .”<sup>98</sup> The Court held that the law was unconstitutional because a general law could be made applicable; the Legislature may have been “derelict” in failing to pass a general law, but that did not justify the special legislation.<sup>99</sup>

In 1917, the Court expanded upon the model outlined in *Long*, addressing the question of deference in *Schofield*.<sup>100</sup> Consistent with the approach taken in *Long*, the Court wrote that it should not simply infer from the fact of a classification that a special law was necessary and justified.

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88. *Id.*

89. *See* Hotchkiss v. Marion, 29 P. 821 (Mont. 1892); State ex rel. Lloyd v. Rotwitt, 37 P. 845 (Mont. 1894); Holliday v. Sweet Grass Cty., 48 P. 553 (Mont. 1897); King v. Pony Gold-Mining Co., 62 P. 783 (Mont. 1900); State ex rel. Anaconda Copper Mining Co. v. Clancy, 77 P. 312 (Mont. 1904).

90. MONT. CONST. art. V, § 12; MONT. CONST. of 1889 art. V, § 26.

91. State v. Long, 117 P. 104, 105 (Mont. 1911).

92. *Id.* at 104–05.

93. *Id.* at 105.

94. *Id.* at 107.

95. *Id.* at 111–12.

96. *Id.* at 105, 107.

97. State v. Long, 117 P. 104, 111 (Mont. 1911).

98. *Id.*

99. *Id.*

100. State ex rel. Ford v. Schofield, 165 P. 594, 597 (Mont. 1917).

Noting that other jurisdictions split on the issue of whether the court or the legislature should decide when a general law could apply, the Court found itself “unable to agree entirely with either theory.”<sup>101</sup>

The Court outlined two hypothetical cases, one in which it would be appropriate to defer to the Legislature, and one in which a court should determine whether a special law is necessary to address the problem.<sup>102</sup> If the Legislature were to require ranchers in most counties to fence in their livestock, but exempt ranchers in one county due to unique topographical and agricultural features, the ensuing act would be constitutional special legislation, and the Court should defer to the Legislature.<sup>103</sup> If, on the other hand, the Legislature were to exempt some counties and not others from anti-gambling legislation, that law would be unconstitutional because “[i]t is inconceivable that there is such a different standard of morality prevailing in different sections of the state . . . .”<sup>104</sup> The difference between the two categories of cases is the degree to which the determination depends upon “extrinsic facts and circumstances” which the legislature is better suited to consider.<sup>105</sup> In other words, a court should first determine whether the classification depends upon facts outside of its control. Even if it does, *Schofield* suggests that courts should not simply presume that a general act may not apply.

*Long* provides the framework: a court should consider both the applicability of a general law and whether the enactment is local or special. *Schofield* adds to the analysis, providing that a court should not simply defer to the fact of classification, but consider for itself the possibility of legislative generality. One important question had not yet been explored until the Court decided *Meyers* in 1922: what is a special law?

To determine whether legislation is special, the Court asks: “Does it operate equally upon all of a group of objects which, having regard to the purpose of the Legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves?”<sup>106</sup> The test is also rephrased:

A special statute is one which relates to particular persons or things of a class or one made for individual cases and for less than a class. Or one which

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101. *Id.* at 595. At least as of 1936, Montana was the only state to take this approach. Cloe & Marcus, *supra* note 28, at 359 n. 30.

102. *Schofield*, 165 P. at 595–96.

103. *Id.* at 596.

104. *Id.* at 595.

105. State ex rel. Redman v. Meyers, 210 P. 1064, 1066 (Mont. 1922) (citing *Schofield*, 165 P. at 594).

106. *Meyers*, 210 P. at 1066. For cases quoting this test, *see, e.g.*, State ex rel. Fed. Bank of Spokane v. Hays, 282 P. 32, 36 (Mont. 1929); State ex rel. Fisher v. School Dist. No. 1 of Silver Bow Cty., 34 P.2d 522, 526 (Mont. 1934); D & F Sanitation Serv. v. City of Billings, 713 P.2d 977, 980 (Mont. 1986); Geil v. Missoula Irrigation Dist., 59 P.3d 398, 412 (Mont. 2002) (Trieweiler, J., dissenting).

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relates and applies to particular members of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable.<sup>107</sup>

Together, *Long*, *Schofield*, and *Meyers* present an independent, if incomplete, understanding of how to treat special legislation lawsuits, an understanding the Court retreated from shortly thereafter.

## 2. *The Turning Point: West Coast Hotel*

With *West Coast Hotel*, the United States Supreme Court expressly overturned *Lochner v. New York*,<sup>108</sup> signaling the end of an era in which the Court did not hesitate to scrutinize and strike down state and federal statutes under the Fourteenth Amendment.<sup>109</sup> The Montana Supreme Court quickly fell into line, not only with equal protection and due process challenges, but also in special legislation cases. Under the post-*West Coast Hotel* approach, the Court follows equal protection doctrine, first determining whether a classification exists<sup>110</sup> before deferring to the Legislature's purpose in enacting a special law and considering whether the stated purpose "is a sufficiently important governmental interest to justify the classification."<sup>111</sup> Under this approach, the Court can never reach the second question of whether a general law is or can be made applicable.

Looking back at the 1935 case of *Leuthold v. Brandjord*,<sup>112</sup> it appears that the confusion between equal protection and special legislation in Montana predates *West Coast Hotel*. In that case, the Court wrote:

[A] law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such classification is made upon some natural, intrinsic, or constitutional distinction between the persons within the class and others not embraced within it, but it is not "general," and it makes an improper distinction if it confers particular privileges or imposes peculiar disabilities upon a class of persons arbitrarily selected from a larger number of persons all of whom stand in the same relation to the privileges conferred or the disabilities imposed. The difference on which the classification is based must be such as, in some reasonable degree, will account for and justify the particular legislation.<sup>113</sup>

107. *Meyers*, 210 P. at 1065–66 (citing *In re Application of Church*, 92 N. Y. 1 (1883); *Guthrie Daily Leader v. Cameron*, 41 P. 635 (Okla. 1895); *Minnesota ex rel. Bd. of Courthouse & City Hall Comm'rs of City of Minneapolis v. Cooley*, 58 N.W. 150 (Minn. 1893)).

108. 198 U.S. 45 (1905).

109. *Morris*, *supra* note 84, at 420.

110. The first step in this analysis is consistent with the definitions of special laws articulated in *Meyers*, which essentially act whether a line is drawn between those covered by the law and those left out. *See Meyers*, 210 P. at 1065–66 (1922).

111. *D & F Sanitation Serv. v. City of Billings*, 713 P.2d 977, 980 (Mont. 1986).

112. 47 P.2d 41 (Mont. 1935).

113. *Id.* at 45.

This language, cited relatively frequently in recent Montana special legislation cases,<sup>114</sup> conflates the two steps clear on the face of Montana's restriction on special legislation. The cited language summarizes special legislation jurisprudence; it does not provide a test. In fact, in *Leuthold*, the Court applied the analysis developed in *Long*, *Schofield*, and *Meyers*.<sup>115</sup> However, the Court's use of the word "arbitrarily" reminds the modern reader of federal rational basis review under the Fourteenth Amendment.<sup>116</sup> This is potentially confusing because *Leuthold* predates modern rational basis review, and the United States Supreme Court had a different view of arbitrariness in 1935 than it does today.<sup>117</sup>

Under federal equal protection doctrine, a law is subject to highly deferential rational basis review if it does not discriminate on the basis of a very limited number of suspect categories.<sup>118</sup> As such, a law is extremely unlikely to fail.<sup>119</sup> "In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."<sup>120</sup>

When the United States Supreme Court introduced the modern deferential standard in *West Coast Hotel*, Montana had no state constitutional equal protection clause,<sup>121</sup> and its due process clause had been interpreted as coterminous with that of the federal constitution.<sup>122</sup> Thus, the Court had

114. *Kottel v. State*, 60 P.3d 403, 406 (Mont. 2002); *Rohlf's v. Klemenhausen, LLC*, 227 P.3d 42, 69 (Mont. 2009) (Nelson, J., dissenting). Interestingly, the Court applies this language from *Leuthold* by way of *Kottel* in *Montana Cannabis Industry Association v. State*, considering an equal protection challenge. 368 P.3d 1131, 1148 (Mont. 2016).

115. In determining whether the questioned law violated Section 26, the Court considered not whether it was rational special legislation, but rather whether it was a special or a general law. The Court held that it was a general law. *Leuthold*, 47 P.2d at 45.

116. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) ("Legislative response to that conviction cannot be regarded as arbitrary or capricious . . ."); *United States v. Windsor*, \_\_\_ U.S. \_\_\_, \_\_\_ 133 S. Ct. 2675, 2716 (2013) (Alito, J., dissenting) ("Underlying our equal protection jurisprudence is the central notion that '[a] classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"") (quoting *Reed v. Reed*, 404 U.S. 71, 76 (1971) (internal citation omitted)).

117. *Lochner v. New York*, 198 U.S. 45, 62 (1905) (finding a law restricting work hours for bakers "entirely arbitrary"); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (holding application of statute requiring teachers to use only English prior to the eighth grade unconstitutional as "arbitrary and without reasonable relation to any end within the competency of the state.").

118. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 314 (1993).

119. *Chapman & McConnell*, *supra* note 67, at 1800.

120. *Beach Commc'ns, Inc.*, 508 U.S. at 313.

121. *See* MONT. CONST. of 1889.

122. *See, e.g., McMillan v. Butte*, 76 P. 203, 204–05 (Mont. 1904) (adopting the U.S. Supreme Court's "very careful consideration of the expression 'due process'"); *see also* *State ex rel. Anaconda Copper Mining Co. v. Clancy*, 77 P. 312, 316 (Mont. 1904); *State ex rel. Charette v. District Court*, 86

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no choice but to “march lock-step” with Fourteenth Amendment jurisprudence. It is puzzling, though, that 1937 marked the creation of deferential rational basis review in cases brought under Section 26 as well as those brought under the federal constitution.

Just one year after *West Coast Hotel*, the Court decided *State v. Safeway Stores, Inc.*, applying rational basis review to uphold the prosecution of a grocery store for violating a state labor law.<sup>123</sup> The Court denied the defendant’s equal protection challenge, noting that “in the manner of classification, the Legislature enjoys broad discretion and is not required to go as far as it might in enacting a law.”<sup>124</sup> The analysis in *Safeway Stores* is unsurprising, as it was brought only under the federal constitution.<sup>125</sup> In 1939, however, the Court cited to *Safeway Stores, Inc.* in a case brought under Section 26, *Rutherford v. City of Great Falls*.<sup>126</sup>

*Rutherford* marks the beginning of the conflation of special legislation doctrine with Fourteenth Amendment rational basis review. The plaintiff argued that a state law creating and funding low-income housing developments was unconstitutional special legislation because it granted a special benefit to the poor.<sup>127</sup> The Court did not consider whether the law was special or local; nor did it address the applicability of a general law.<sup>128</sup> Instead, it cited to *Safeway Stores, Inc.* for the proposition that “[t]he matter of classification is primarily for the legislature, which enjoys a broad discretion in selecting a particular class for special consideration. The presumption is that it acted upon legitimate grounds of distinction, if any such grounds existed.”<sup>129</sup> The independent meaning of the restriction on special legislation, developed before *West Coast Hotel*, has not yet been resurrected, as the Court has continued to apply equal protection doctrine up to, and following, ratification of the 1972 Constitution.<sup>130</sup>

P.2d 750, 754 (Mont. 1939); *Thompson v. Tobacco Root Co-op. State Grazing Dist.*, 193 P.2d 811, 814 (Mont. 1948); *State v. Green*, 388 P.2d 362, 365 (Mont. 1964).

123. 76 P.2d 81, 83 (Mont. 1938).

124. *Id.* at 86.

125. *Id.* at 84.

126. 86 P.2d 656, 658, 660 (Mont. 1939).

127. *Id.*

128. *Id.* at 660–61.

129. *Id.* at 660.

130. *See, e.g., Blackford v. Judith Basin Cty.*, 98 P.2d 872, 878 (Mont. 1940) (“The classification not being capricious, arbitrary, or without proper basis, the Act is not a special law in violation of this constitutional provision.”); *Great Falls Nat’l Bank v. McCormick*, 448 P.2d 991, 993 (Mont. 1968) (“It is true that the Act does set up a class . . . this does not mean that the Act becomes unconstitutional as a result. It may be classified as constitutional if the class that is established is reasonable and treats all those equally that are within that class.” (internal citation omitted)); *Cecil v. Allied Stores Corp.*, 513 P.2d 704, 710 (Mont. 1973) (“It is clear that reasonable classifications and distinctions in legislative enactments which operate equally upon every person or thing in a given class are constitutionally permissible and do not violate the constitutional prohibition against special laws found in Art. V., Sec. 26,

### C. Drafting and Ratification of Article V, Section 12

Because the precedent was established in 1972, it can be argued that the ratification of Section 12 was a ratification of the conflation of special legislation with federal rational basis review. The history of the ratification, however, creates further possibilities. The ratifiers understood the provision to be identical in meaning to the 1889 provision.<sup>131</sup> This suggests that the provision incorporates the entire text of the 1889 provision. If the Court had the meaning right in the early-20th century, then the ratifiers may have enacted the analytical model established in *Long*, *Schofield*, and *Meyers*.

The intent of the framers in 1972 may also prove helpful, if primarily to point to the public meaning of special legislation in 1972.<sup>132</sup> The transcript from the proceedings of the 1972 Constitutional Convention itself provides little clarity. The provision was remarkably uncontroversial, stirring no debate and drawing few dissenting votes.<sup>133</sup> The delegate reporting to the Convention on Section 12 stated that the changes sufficiently incorporated the protections afforded by Section 26 and that the enumerated provisions were “becoming obsolete.”<sup>134</sup> He also told the delegates that Article I, Sections 8, 9, and 10 of the United States Constitution effectively cover the prohibitions listed in Section 26.<sup>135</sup> Quoting the Latin expression “*inclusio unius est exclusio alterius*,” he suggested that the express restrictions in Section 26 may actually create allowances for other special and local laws.<sup>136</sup> Finally, he instructed his colleagues that special legislation doctrine “is well established in Montana and the United States jurisprudence.”<sup>137</sup>

The brief discussion at the Convention covered less than a page of the Convention transcript,<sup>138</sup> but it suggests a wealth of possible meanings for Section 12. The introduction of the provision, coupled with the lack of discussion among the delegates, suggests that Section 12 may be unnecessary and unimportant. As the importance of the enumerated restrictions faded, so may have the general restriction. Further, according to the delegate intro-

1889 Montana Constitution. . . . [L]egislative classifications carry a presumption of constitutionality which can only be overcome by an affirmative showing that there is no valid reason or basis for singling out a particular class or thing for different legislative treatment.” (internal citations omitted).

131. PROPOSED 1972 CONSTITUTION, *supra* note 7, at art. V, § 12.

132. Stockton, *supra* note 6, at 117.

133. CONSTITUTIONAL CONVENTION TRANSCRIPT *supra* note 4, at 674; CONSTITUTIONAL CONVENTION TRANSCRIPT 2, *supra* note 5, at 1884–85.

134. CONSTITUTIONAL CONVENTION TRANSCRIPT *supra* note 4, at 674.

135. *Id.* Section 8 enumerates federal congressional powers. U.S. CONST. art. I, § 8. Section 9 outlines express limitations on Congress. U.S. CONST. art. I, § 9. Section 10 bars states from enacting specific laws that would interfere with federal governmental powers. U.S. CONST. art. I, § 10.

136. Prefaced by “[a]s the cowboys down in Powder River say,” the Latin phrase drew laughter from the delegates. CONSTITUTIONAL CONVENTION TRANSCRIPT *supra* note 4, at 674.

137. *Id.*

138. *Id.*

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ducing the provision, the prohibition was already covered by the federal Constitution, and no independent basis for the restriction was introduced.

The Convention transcript raises further questions about the meaning of Section 12. First, what—if anything—does federal constitutional law have to say about special legislation? The answer appears to be clear: nothing.<sup>139</sup> There is no federal constitutional equivalent, and Article I limits powers of Congress, not of state legislatures.<sup>140</sup> More importantly—and more to the point here—why did the Convention include a provision in the deliberately minimalist 1972 Constitution if it had no meaning? The answer must be that the inclusion was intentional, and the provision still has work to do.

Although many of the specific concerns faced by the ratifiers of the 1889 Constitution have abated, the modern State faces analogous concerns exacerbated by extreme deference to the Legislature under rational basis review.<sup>141</sup> In its commentary to the 1968 Model State Constitution, upon which the delegates relied,<sup>142</sup> the National Municipal League recommended that courts—not legislatures—should determine whether a general act does or could apply.<sup>143</sup> The suggested provision reads: “The legislature shall pass no special or local act when a general act is or can be made applicable, and whether a general act is or can be made applicable shall be a matter of judicial determination.”<sup>144</sup> The drafters of the model constitution noted that states divided on the issue of deference to legislative classifications.<sup>145</sup> Modeled after the constitutions of Alabama, Alaska, Kansas, Michigan, and Minnesota, the proposed constitution “takes the position that a meaningful policing of the limitations on special legislation should be left to the courts. The method appears to function well in the states that have adopted it.”<sup>146</sup>

139. *Calder v. Bull*, 3 U.S. 386 (1798); see Tony Mowry, *The Protection of (Unlawful) Commerce in Arms Act—Does Congress Have the Power to Pass Special Legislation?*, 14 TEMP. POL. & C.R. L. REV. 225, 242 (2004).

140. U.S. CONST. art. I, §§ 1–10.

141. See, e.g., Kathryn Wakefield, *Just-in-Time Legislation: Do Corporation-Specific Statutes Violate State Constitutional Prohibitions on Special Legislation?*, 61 U. PITT. L. REV. 843, 845, 878–79 (arguing that corporation-specific takeover statutes ought to be struck down under state special legislation provisions); Donald Marritz, *Making Equality Matter (Again): The Prohibition against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 207 (1993) (“The conditions that led to the enactment of the special laws prohibition may have been extreme; certainly the language describing them is colorful. However, the underlying problems that spawned that provision have existed since humans have lived together in societies with things of value to exchange. Favoritism, resulting especially from the corrupting influence of money, still looms very large in the political process.”).

142. MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS, *supra* note 22, at art V, 26.

143. MODEL STATE CONSTITUTION, *supra* note 59, at 55.

144. *Id.*

145. *Id.* at 56.

146. *Id.* at 56–57.

The Convention did not have the opportunity to decide whether to add similar language. A comparative study of the 1889 Constitution prepared for the Convention considered six other constitutions, including the model state constitution, the Alaska Constitution, and the Michigan Constitution.<sup>147</sup> However, the special legislation provisions reproduced for the Convention in this study are misleading. The preface to the paper states that its authors considered the 1968 revised edition of the Model State Constitution,<sup>148</sup> but the Convention was informed that the model contains “[n]o comparable section.”<sup>149</sup> The reproduced Alaska and Michigan provisions trail off in ellipses, removing any reference to the judiciary.<sup>150</sup>

The convention’s unawareness of the question of deference suggests that the judiciary should not simply infer from the fact of a legislative classification that a general law can be made applicable, weakening the case for continued application of rational basis review. A report on the Legislature prepared for the Convention pointed to Illinois’s special legislation provision as “very similar to the last sentence of the Montana provision.”<sup>151</sup> The author quoted the provision, “[w]hether a general law is or can be made applicable shall be a matter for judicial determination.”<sup>152</sup> This suggests that the author, and the delegates, likely understood the provision as calling for judicial review. *Schofield* was the only case specifically considering the question of deference as of ratification. *Schofield* also supports an understanding of Section 12 as asking courts to determine whether the Legislature is better suited, based on the facts of the case, to determine the applicability of a general law.<sup>153</sup>

In a report prepared for the predecessor to the Constitutional Convention Commission, the Legislative and Executive Subcommittee recommended deleting the special legislation provision in its entirety because the federal “equal protection clause probably makes it unnecessary.”<sup>154</sup> The subcommittee’s “intention was to meet the objectives suggested by the Legislative Council.”<sup>155</sup> That intention was essentially to expand legislative power:

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147. MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS, *supra* note 22, at iii.

148. *Id.*

149. *Id.* at art. V, 26A.

150. *Id.* Alaska’s provision reads: “The legislature shall pass no local or special act if a general act can be made applicable . . . (Part of Section 19, Article II).” Similarly, the Michigan provision is reproduced as: “The legislature shall pass no special act in any case where a general act can be made applicable . . . (Part of Section 29, Article IV).”

151. MONTANA CONSTITUTIONAL CONVENTION STUDIES, *supra* note 8, at 21–22.

152. *Id.* at 21.

153. State ex rel. Ford v. Schofield, 165 P. 594, 595 (Mont. 1917).

154. 7 MONTANA CONSTITUTIONAL CONVENTION OCCASIONAL PAPERS 75 (1969).

155. *Id.* at 7.

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Legislatures which are restricted can and often do find ways to avoid constitutional restraints but this encourages subterfuge and adds unnecessarily to expense in time and money. Furthermore, hindering provisions impede those legislatures which are trying to do their work effectively and responsibly, and they diminish the stature of the legislature in the eyes of the public.<sup>156</sup>

The drafters rejected this intention, at least as applied to special legislation, by including Section 12 in the 1972 Constitution.

## IV. A PROPOSED SOLUTION: MAKING SECTION 12 WORK TODAY

Under the modern approach to special legislation in Montana, Section 12 is essentially meaningless. It should not be. It has a meaning, independent from federal equal protection doctrine, that can and should be restored. The Court has the opportunity to return that meaning to Section 12, improving the legislative process by placing a procedural hurdle between special interest groups and self-serving legislation.

The Court's current approach is exemplified in the case of *Rohlfs v. Klemenhagen, LLC*, where the plurality applied equal protection doctrine and the dissent points back to the cases of the early 20th century, when the Court developed a unique test for special legislation.<sup>157</sup> The history, text, and structure of Montana's special legislation provision addresses the error of conflating special legislation with equal protection doctrine, demonstrating why the current approach cannot effectively work for Montana today. This criticism opens the door to a new approach, grounded in history but responsive to modern needs.

A. *Case Study: Rohlfs v. Klemenhagen, LLC*

With a vigorous dissent, the 2009 case of *Rohlfs* provides an ideal case study. A driver with a blood alcohol level of 0.14 drove his truck into the plaintiffs' car. The intoxicated driver had just left the Stumble Inn tavern, where he had been drinking for hours. Agents of the Stumble Inn learned of the accident that night.<sup>158</sup>

The law in question was Montana's Dram Shop Act, which "govern[s] the liability of a person or entity that furnishes an alcoholic beverage for injury or damage arising from an event involving the person who consumed the beverage."<sup>159</sup> A two-year statute of limitations applies under the act, in contrast to the three years allowed for other tort claims.<sup>160</sup> Additionally, a potential plaintiff must notify the potential defendant of the possibility of a

156. *Id.* at 7 (quoting SALIENT ISSUES OF CONSTITUTIONAL REVISION 79 (1961)).

157. 227 P.3d 42 (Mont. 2009).

158. *Id.* at 45.

159. MONT. CODE ANN. § 27-1-710(1) (2017).

160. Compare MONT. CODE ANN. § 27-1-710(6), with § 27-2-204(1).

lawsuit “by certified mail within 180 days from the date of sale or service.”<sup>161</sup>

The plaintiffs in *Rohlf*s failed to give notice to the Stumble Inn of the potential suit within 180 days of the accident.<sup>162</sup> They sued just over a year later, arguing that the notice requirement of the Dram Shop Act violated Montana’s constitutional provisions restricting special legislation and guaranteeing equal protection.<sup>163</sup> In a splintered decision, the Court upheld the Act.<sup>164</sup>

The plurality applied a version of the traditional test for special legislation: “a law is special legislation if it confers particular privileges or disabilities upon a class of person arbitrarily selected from a larger group of persons, all of whom stand in the same relation to the privileges or disabilities.”<sup>165</sup> Although the Act established a class—“those who seek to recover from a person or entity who furnished alcohol to a visibly intoxicated person who later caused an injury”—the Act was found constitutional because the classification was not “unreasonable.”<sup>166</sup> The plurality deferred substantially to the Legislature, which had determined that the notice requirement improved the likelihood that evidence would be preserved and insurance coverage secured.<sup>167</sup>

The approach taken by the plurality in *Rohlf*s can never expand upon rational basis review under equal protection doctrine. In *Rohlf*s, the plaintiffs also brought an equal protection claim.<sup>168</sup> Analyzing the issue of special legislation, the plurality asked whether the classification was itself reasonable, considering the fact of the classification sufficient justification for its existence. Under equal protection doctrine, the issue was whether the classification was rationally related to a legitimate government interest.<sup>169</sup> There could conceivably be a statute that passes under this form of special legislation review, but fails under equal protection, where a classification is reasonable but no legitimate government interest exists. If a court must defer to the Legislature’s interest in creating a classification, however, there can be no case where the inverse is true.<sup>170</sup>

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161. MONT. CODE ANN. § 27-1-710(6).

162. *Rohlf*s, 227 P.3d at 45.

163. *Id.* at 44-45.

164. *Id.* at 50.

165. *Id.* at 46.

166. *Id.* at 46-47; see MONT. CODE ANN. § 27-1-710(6).

167. *Rohlf*s, 227 P.3d at 47.

168. *Id.* at 44-45.

169. *Id.* at 49.

170. See *Brady v. PPL Mont., LLC*, 285 Fed. App’x 332, 334 (9th Cir. 2008) (applying Montana law and holding that the plaintiffs’ special legislation argument fails “[f]or the same reason” that it fails under equal protection analysis); *Linder v. Smith*, 629 P.3d 1187, 1191-93 (Mont. 1981) (“A law which

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The dissent, authored by Justice Nelson and echoed by Justice Cotter in her own dissenting opinion, took issue with the plurality's deferential standard of review.<sup>171</sup> Justice Nelson determined that the law is a special law because it draws a distinction between dram shop plaintiffs and all other "tort plaintiffs injured by an absent defendant who is unaware of the injury-causing incident."<sup>172</sup> He also examined the legislative history, which revealed that the Dram Shop Act was passed in direct response to intense lobbying by the Montana Tavern Association.<sup>173</sup>

In her brief dissent, Justice Cotter added the missing piece, plain on the face of Section 12, but noticeably absent in modern special legislation jurisprudence. A general law—the statute of limitations for tort actions—existed, and "[t]here is absolutely nothing in the legislative history demonstrating that the general act could no longer 'be made applicable' to the particular class of person victimized by overserved intoxicated persons."<sup>174</sup> She added, "If Article V, Section 12 is to mean anything, it must mean that if the general law works, then no special act should be passed."<sup>175</sup>

### B. *Why Equal Protection Does Not Work*

Federal equal protection doctrine does not fit Montana's special legislation provision for at least two reasons. First, the current approach to special legislation is inaccurate—historically, textually, and structurally. And second, modern special legislation jurisprudence is wholly ineffective, doing nothing to correct modern wrongs analogous to those remedied under the 1889 Constitution.

Courts throughout the nation frequently apply federal equal protection doctrine to special legislation challenges because it is more familiar. With no federal restriction on special legislation, the United States Supreme Court does not provide an analytical framework on which state courts may rely.<sup>176</sup> State constitutional provisions restricting special legislation are understood to restrict certain legislative classifications.<sup>177</sup> Thus, even though the prohibited classifications are different, state courts look to the federal courts for guidance.<sup>178</sup> While this approach is understandable, it is incorrect.

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operates in the same manner upon all persons in like circumstances is not 'special' in the constitutional sense.").

171. *Rohlf's*, 227 P.3d at 52 (Nelson, J., dissenting); *Id.* at 51–52 (Cotter, J., dissenting).

172. *Id.* at 70 (Nelson, J., dissenting).

173. *Id.* at 61–62.

174. *Id.* at 51–52 (Cotter, J., dissenting).

175. *Id.* at 52 (Cotter, J., dissenting).

176. Schutz, *supra* note 51, at 40–41.

177. *Id.* at 40.

178. *Id.* at 40–41.

The history of special legislation is distinct from that of equal protection.<sup>179</sup> Special legislation provisions exist because state legislatures could not be held politically accountable without them.<sup>180</sup> As a result, lawmakers were overly responsive to individuals and entities with political clout.<sup>181</sup> The Fourteenth Amendment's Equal Protection Clause was originally passed to protect the rights of newly freed slaves.<sup>182</sup> There are certainly compelling arguments for a broader understanding of federal equal protection doctrine,<sup>183</sup> and there are certainly common threads running through equal protection and special legislation doctrines.<sup>184</sup> However, the call for legislative generality preceded the passage of the Fourteenth Amendment, and Montana's special legislation provision must be considered in its context.

Montana's special legislation provision is also textually distinct from the Fourteenth Amendment. First, the 1972 provision, like the 1889 provision, calls on its face for the consideration of both whether a law is special and local and whether a general law may apply.<sup>185</sup> Second, the 1889 provision's enumerated restrictions, ratified again in 1972,<sup>186</sup> grant insight into two types of wrongs sought to be remedied: (1) strain on the Legislature; and (2) overrepresentation of the politically influential.<sup>187</sup> The 1972 Constitution creates a remedy for these problems in two ways. First, it provides for the separation of powers. Second, it places a procedural limitation on the Legislature, restricting its power to pass laws for the special benefit of individuals and entities. In contrast, federal and state equal protection clauses protect individual rights rather than restrict legislative power.<sup>188</sup>

Finally, the structure of the Montana Constitution—like that of other state constitutions—is found within the legislative article of the Constitution.<sup>189</sup> “This indicates a concern with the legislative body and suggests similar concerns do not arise with other branches of state government.”<sup>190</sup> It makes sense then that one of the delegate proposals to the Convention tied the limitation on special legislation with other restrictions on legislative

179. Marritz, *supra* note 141, at 194–95.

180. Ireland, *supra* note 23, at 272–75.

181. Cloe & Marcus, *supra* note 28, at 357; Binney, *supra* note 20, at 621.

182. Chapman & McConnell, *supra* note 67, at 1726.

183. See Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 314–15 (2007).

184. Zoldan, *supra* note 76, at 647–48.

185. MONT. CONST. art. V, § 12; MONT. CONST. of 1889 art. V, § 26.

186. PROPOSED 1972 CONSTITUTION, *supra* note 7, at § 12.

187. MONTANA CONSTITUTIONAL CONVENTION STUDIES, *supra* note 8, at 21.

188. ELISON & SNYDER, *supra* note 70, at 34.

189. MONT. CONST. art. V; Schutz, *supra* note 51, at 60.

190. Schutz, *supra* note 51, at 60.

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power.<sup>191</sup> As a structural limitation, rational basis review makes little sense, as the question is not whether the legislative classification is justified, but rather whether the Legislature has the power to make the classification.

Further, equal protection doctrine should be rejected in special legislation analysis because rational basis review does nothing to remedy modern wrongs analogous to those faced in Montana and throughout the states in 1889. Some of the concerns of the special legislation provision have abated, as other provisions help the Legislature respect separation-of-powers principles.<sup>192</sup> However, some concerns are lasting. One focus of special legislation provisions was economic, limiting the “pervasive effect [of economics] on every other sphere, including society and government.”<sup>193</sup> Today, there remains “a legitimate concern about the undue influence of money and the fact that it can buy special, private favors at the expense of the general, public interest.”<sup>194</sup> This is precisely the type of concern raised in *Rohlf*s—that the Tavern Association bought a law granting its members greater immunity from tort actions than members of other industries.<sup>195</sup>

### C. *A Model Approach*

The current approach to special legislation is inaccurate and ineffective, but the question remains: What should the Court do to remedy the problem? There are no easy answers, and there are seemingly as many solutions as there are scholars to create them.<sup>196</sup> However, a workable framework is possible, structured upon the two-part test clear on the face of Section 12 and developed in *Long* and the dissents to *Rohlf*s. Along with Montana case law, scholarship from jurisdictions with similar provisions helps flesh out the model. The Court should ask two questions: (1) is the law special or local?; and (2) does a general law apply, or can one be made applicable?

191. 1 MONTANA CONSTITUTIONAL CONVENTION 276 (1971–1972).

192. See MONTANA CONSTITUTIONAL CONVENTION STUDIES, *supra* note 8, at 21; MONT. CONST. art. III, § 1, art. V, § 11, art. VII, § 1, art. IX, §§ 4–7.

193. Marritz, *supra* note 141, at 206.

194. *Id.* at 207.

195. *Rohlf*s v. Klemenhausen, LLC, 227 P.3d 42, 61–62 (Mont. 2009) (Nelson, J., dissenting).

196. See Friedman, *supra* note 35, at 467–68 (suggesting, for Maryland, a four-part flowchart-style test positing yes or questions); Marritz, *supra* note 141, at 209–13 (proposing, for Pennsylvania, a “fair and substantial relationship test”); Schutz, *supra* note 51, at 68 (advocating for a gray-scale analysis involving four considerations for substantially all jurisdictions); Christopher L. Thompson, *Special Legislation Analysis in Missouri and the Need for Constitutional Flexibility*, 61 MO. L. REV. 185, 198–99 (1996) (calling for a more flexible approach to special legislation in Missouri, which had applied a *per se* rule striking hundreds of laws).

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### 1. *Is the Law Special or Local?*<sup>197</sup>

The Court must begin by addressing the triggering question—is the law special or local?<sup>198</sup> The clearest version of the test, set forth in *Meyers*, is:

A special statute is one which relates to particular persons or things of a class, or one made for individual cases and for less than a class, or one which relates and applies to particular members of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable.<sup>199</sup>

As posed, this question is similar to the first step of equal protection review, which asks whether a classification between similarly situated groups has been made.<sup>200</sup> However, given the differences between special legislation and equal protection, analysis of whether the group or individual within the classification is sufficiently distinguished requires a different inquiry.

A better test would begin with the quoted language from *Meyers* and follow with an explanation of the factors. To determine whether the law singles out an object or objects constituting less than a class, the Court should consider: (1) whether the class is open or closed; (2) the size of the class; and (3) whether the law was passed in response to lobbying paid for by the benefitting party. Additionally, the Court should consider whether the law imposes a burden or creates a benefit, as special legislation provisions are intended to remedy the latter but generally not the former.<sup>201</sup> Thus, the focus is on the benefitting party. In *Rohlf's*, the inquiry would center on the classification of the tavern industry as distinct from other business owners or tort defendants, not on the particular burden suffered by Dram Shop plaintiffs in contrast to other tort plaintiffs.

As a threshold matter then, the Court must decide whether the law creates a benefit. Special laws restrict laws benefitting individuals and entities, but they do not prevent laws from imposing burdens.<sup>202</sup> Of course, there are cases where the benefit cannot be considered without a corresponding burden,<sup>203</sup> but the question of classification should look to the

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197. The difference between special and local laws has not been widely considered, but is beyond the scope of this article. Logically, it seems that local laws would apply to specific localities and special laws to particular individuals and entities. The model focuses on special legislation, with the assumption that the same questions would apply under a local legislation challenge, since the separation-of-powers concern is largely irrelevant.

198. *State ex rel. Redman v. Meyers*, 210 P. 1064, 1065–66 (1922); *Grossman v. Montana Dep't of Nat. Res.*, 682 P.2d 1319, 1326 (Mont. 1984).

199. *Meyers*, 210 P. at 1065–66 (citing *In re Church*, 92 N. Y. 1 (1883); *Guthrie Daily Leader v. Cameron*, 41 P. 635 (Okla. 1895); *Minnesota v. Cooley*, 58 N.W. 150 (Minn. 1893)).

200. See *Rohlf's*, 227 P.3d at 48.

201. Friedman, *supra* note 35, at 424–25.

202. Schutz, *supra* note 51, at 56; Friedman, *supra* note 35, at 425–26.

203. Long, *supra* note 13, at 738.

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party receiving a legislative benefit, leaving consideration of legislative burdens for review under equal protection.<sup>204</sup> The distinction makes sense: legislatures passed special legislation to appease powerful constituents.<sup>205</sup>

Courts throughout the nation apply two tests to determine whether a law is special. First, some jurisdictions consider whether the class is closed—whether other individuals or entities may join the class at a later time.<sup>206</sup> Second, other jurisdictions look to whether the class is defined arbitrarily. These tests are grounded in due process principles<sup>207</sup> and vary among states.<sup>208</sup> Montana has traditionally applied the latter test, asking whether a classification is reasonable rather than whether the class is closed.<sup>209</sup> However, reasonableness naturally falls into the second question of the applicability of a general law.

It is logical to consider whether the class is closed in the first prong of the proposed model. A few methods are possible. For example, in Alaska, the plaintiff must show that a class is “permanently closed” to suggest an impermissible special law.<sup>210</sup> On the other hand, Florida finds that a class is closed if there is no “reasonable possibility” that other entities will join the class.<sup>211</sup> Hypothetically, if the Court adopted the “no reasonable probability” standard applied in Florida, it might find a closed class even where the law itself does not create a facial classification. *Rohlfs* presents an interesting example here. It is arguable that the Dram Shop Act creates a closed class because it applies specifically to the bar, restaurant, and tavern industries. However, this argument would most likely fail under either mode of analysis, as the walls of the created classification are permeable, allowing for the entry of new businesses serving liquor. Further, individuals serving alcohol to friends and family members are also covered under the Act.<sup>212</sup> Thus, under the proposed model, this factor would weigh against a finding of special legislation.

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204. Friedman, *supra* note 35, at 425–26.

205. Cloe & Marcus, *supra* note 28, at 357; Binney, *supra* note 20, at 621.

206. Schutz, *supra* note 51, at 51–53.

207. See generally Chapman & McConnell, *supra* note 67, for a discussion of the difference between modern due process jurisprudence and an originalist understanding of due process principles as protecting separation of powers.

208. Schutz, *supra* note 51, at 51–52.

209. *Rohlfs v. Klemenhausen, LLC*, 227 P.3d 42, 46–47 (Mont. 2009).

210. *Bridges v. Banner Health*, 201 P.3d 484, 494 (Alaska 2008). Similarly, Nebraska defines a closed class as “one that limits the application of the law to present condition, and leaves no room or opportunity for an increase in the numbers of the class by future growth or development . . . .” *City of Ralston v. Balka*, 530 N.W.2d 594, 601 (Neb. 1995) (internal quotations and citation omitted).

211. *St. Vincent’s Med. Ctr., Inc. v. Memorial Healthcare Grp., Inc.*, 967 So. 2d 794, 801 (Fla. 2007).

212. *Rohlfs*, 227 P.3d at 47.

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The Court should also consider the size of the class.<sup>213</sup> As the Minnesota Supreme Court wrote in 1948: “It is to be remembered that one alone may constitute a class as well as a thousand; but the fewer there are in a class the more closely will courts scrutinize an act if its classification constitutes an evasion of the constitution.”<sup>214</sup> Historically, courts generally considered class size, but they have moved away from this consideration in more recent years.<sup>215</sup> It makes sense to consider the number of objects included within a special law because “the concern for individualized treatment is all that justifies further review.”<sup>216</sup> In *Rohlf’s*, this factor would also weigh against a finding of special legislation because a significant number of businesses gain from the Dram Shop Act.<sup>217</sup>

Finally, the Court should consider whether the law was passed in direct response to lobbying efforts. Because the concern is economic,<sup>218</sup> this factor is not triggered when groups lobby on behalf of individuals or groups without an economic stake in the outcome, e.g., groups seeking funding for housing developments or medical facilities for underserved populations. Inclusion of this factor is supported by the clauses in the 1889 provision restricting legislative handouts<sup>219</sup> and by the history of widespread corruption and favoritism in the 19th century.<sup>220</sup>

There is a strong case that the Dram Shop Act challenged in *Rohlf’s* is a special law. In his dissent, Justice Nelson appropriately considered the legislative history, noting that no one spoke out against the Act and that most of those who testified in its favor were in fact tavern owners.<sup>221</sup> The tavern industry received the benefit for which it lobbied, and its members had strong economic interests in the outcome. This factor weighs strongly in favor of concluding that the law is special. Given that the test employs factors rather than elements, there is necessarily some gray area considering the balance of the factors, but it would become clearer as precedent developed. It would be reasonable for the Court to determine either that the law

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213. Schutz, *supra* note 51, at 68.

214. Loew v. Hagerle Bros., 33 N.W.2d 598, 601 (Minn. 1948).

215. Schutz, *supra* note 51, at 68–69.

216. *Id.* at 69.

217. “Each year, the Montana Liquor Control Division’s licensing specialists review more than 7,000 applications . . . .” *Alcohol Beverage Licenses*, MONT. DEP’T OF REVENUE, <https://perma.cc/V5WE-Z8LZ> (last visited October 3, 2017).

218. See Marritz, *supra* note 141, at 206.

219. See *supra* notes 71–73.

220. Cloe & Marcus, *supra* note 28, at 357; Binney, *supra* note 20, at 621.

221. Rohlf’s v. Klemenhagen, LLC, 227 P.3d 42, 62–63 (Mont. 2009).

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is—or is not—special under the proposed model.<sup>222</sup> Assuming that it is indeed special, the next consideration is whether a general law may apply.

## 2. *Does a General Law Apply, or Can One Be Made Applicable?*

If the Court finds that a special law has been passed, it would then consider whether a general law applies or is possible. Legislative generality prevents a diversity of laws on the same subject<sup>223</sup> and holds the Legislature politically accountable to their constituents.<sup>224</sup> It is here, under this step, that the Court should determine the level of scrutiny to apply.<sup>225</sup> Historically, the Court applied a reasonableness standard. As explained above, “reasonableness” took on a new meaning in the 1930s with *West Coast Hotel* and subsequent Montana case law. The question remains, then: how much the Court should defer to the Legislature?

Under the current approach to special legislation, if a classification is created for equal protection purposes, it is also created under special legislation review.<sup>226</sup> Under the proposed model, there are far fewer special laws than laws creating classifications.<sup>227</sup> It is logical then that the Court apply a more exacting standard of review than it does under rational basis. First, by their very nature, special laws are particularly unlikely to be sufficiently scrutinized by the Legislature, creating the need for a second level of review.<sup>228</sup> Second, rational basis review considers the substance of the law rather than the procedure followed in its enactment. This is improper when the provision, like Section 12, restricts legislative power by requiring adherence to a certain procedure.<sup>229</sup>

222. Even if the Court were to determine that the law was not special, consideration of the factors would put the Legislature—and lobbyists—on notice of the necessity of considering constitutional challenges under Section 12.

223. *D & F Sanitation Serv. v. City of Billings*, 713 P.2d 977, 980 (Mont. 1986) (citing *Leuthold v. Brandjord*, 47 P.2d 41, 45 (Mont. 1935)).

224. Steven F. Huefner, *The Neglected Value of the Legislative Privilege in State Legislatures*, 45 WM. & MARY L. REV. 221, 240–42 (2003).

225. See MODEL STATE CONSTITUTION, *supra* note 59, at 55–57.

226. *Rohlfis*, 227 P.3d at 46 (Under special legislation review, “Section 27–1–710(6), MCA, does set up a class: those who seek to recover from a person or entity who furnished alcohol to a visibly intoxicated person who later caused an injury.”); *Id.* at 48 (Considering the equal protection classes, “those who make a claim under the Dram Shop Act . . . are still in a similar situation as others who allege injury by the wrongful act or omission of another.”).

227. *Schutz*, *supra* note 51, at 79 n. 151 (“The main difference between [the *Carolene Products*] take on equal-protection doctrine and [the author’s] take on special-legislation doctrine is the presence of a metric by which to identify the sort of legislation that should trigger a more demanding judicial review.”).

228. *Id.* at 80.

229. See *Chapman & McConnell*, *supra* note 67, at 1801 (“To reject rational basis review [in federal due process cases] is not to hold that the government may pass irrational laws. Rather, it is to hold that laws passed by the people’s representatives, according to the constitutional prescriptions are per se

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Finally, a less deferential standard is best supported by the history of Section 12<sup>230</sup> and by precedent. *Schofield*, the only case to expressly consider the issue of deference, posited that the Court should—at minimum—consider whether deference is appropriate given the Legislature’s reliance on information within its particular control.<sup>231</sup> If a law is truly special—as few laws are—the Court should determine whether a law is applicable, unless the applicability of a general law hinges upon “extrinsic facts and circumstances” which the Legislature is better suited to address.<sup>232</sup>

Continuing the analysis of *Rohlf’s*, if the Court determined that the Dram Shop Act was indeed special, it would likely determine, as Justice Cotter did, that a general act could apply.<sup>233</sup> As Justice Nelson noted, a law passed to promote fairness for defendants who are “not present and may not be aware that an incident occurred until being served with a complaint”<sup>234</sup> would logically encompass additional tort defendants.<sup>235</sup> It was unreasonable for the Legislature to determine that a general act could not apply when legislative generality would serve the stated legislative purpose.

#### V. CONCLUSION

As the history of special legislation demonstrates, Section 12, like its antecedent Section 26, aims to correct two separate categories of wrong. It preserves the separation of powers, and it serves the Legislature and the people by preventing the passage of self-serving legislation on behalf of the politically influential. The second category remains relevant today, but its remedy was lost as the Court moved lock-step with federal equal protection doctrine. However, the independent meaning of Section 12 can be restored, and the provision can again do work for Montana.

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reasonable. Our protection against irrationality is institutional and democratic, not theoretical and judicial.”).

230. *See supra* notes 150–152.

231. *State ex rel. Ford v. Schofield*, 165 P. 594, 597 (Mont. 1917).

232. *Schutz, supra* note 51, at 94; *State ex rel. Redman v. Meyers*, 210 P. 1064, 1066 (Mont. 1922) (citing *Schofield*, 165 P. at 594 (Mont. 1917)).

233. *Rohlf’s v. Klemenhagen, LLC*, 227 P.3d 42, 52 (Mont. 2009) (Cotter, J., dissenting).

234. *Id.* at 69 (Nelson, J., dissenting) (quoting the majority opinion at 47).

235. *Id.* at 69–70.

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