

A MALAPROPIAN PROVISION OF STATE CONSTITUTIONS

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I

"The legislature shall pass no local or special act in any case where a general act can be made applicable."¹ The constitutions of one-half of the states of the Union contain provisions to this effect.² Iowa was the first to adopt a prohibition of this type.³ The Supreme Court of Iowa, in considering the legality of a statute⁴ entitled "An act to legalize the organization of the independent school district of Epworth, County of Dubuque, Iowa," said:

Certain irregularities in the manner of the organization of the independent school district of Epworth, are alleged to have occurred. No other such precise or analogous case is alleged or suggested as existing anywhere else in the State. No legal presumption arises that there is one. A general law, therefore, which would be suited to the necessities of the independent school district of Epworth, could have no other or greater operation than the act in question; and if it could or would have no other effect, then no advantage could be derived, nor any evil avoided, by making a general

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1. Mich. Const. art. V, sec. 30.

2. Ariz., art. IV, sec. 11; Ark., art. V, sec. 25; Cal., art. IV, sec. 25; Colo., art. V, sec. 25; Ill., art. IV, sec. 22; Iowa, art. III, sec. 30; Ind., art. IV, sec. 23; Kan., art. II, sec. 17; Ky., sec. 59, par. 29; Mich., art. V, sec. 30; Minn., art. IV, sec. 33; Miss., art. IV, sec. 87; Mo., art. IV, sec. 33; Mont., art. V, sec. 26; Neb., art. III, sec. 18; Nev., art. IV, sec. 21; N. M., art. IV, sec. 24; N. D., art. II, sec. 70; Okla., art. V, sec. 59; S. C., art. III, sec. 34; S. D., art. III, sec. 23; Tex., art. III, sec. 56; Utah, art. IV, sec. 26; Wyo., art. III, sec. 27. Maryland has a provision that although expressed differently comes to much the same thing, art. III, sec. 33: "* * * And the General Assembly shall pass no special law for any case for which provision has been made by an existing general law. The General Assembly, at its first session after the adoption of this constitution, shall pass general laws providing for the cases enumerated in this section which are not already provided for, and for all other cases where a General Law can be made applicable." See also the New Jersey Constitution, art. 4, sec. 7. The language of the other constitutions listed varies somewhat.

3. The language however is affirmative: "* * * in all other cases where a general law can be made applicable all laws shall be general and of uniform operation throughout the state." Art. III, sec. 30.

4. Iowa Laws of 1868, c. 21.

law instead of the law which was enacted. This law, then, is not within the evil which the Constitution sought to provide against, nor would the enactment of a general law therein afford any remedy for, or relief from, that evil.⁵

From this decision as to the meaning of the original of this type of constitutional prohibition it appears that a general law is thought not to be applicable when no identical or analogous case exists in the state other than the one specified in the statute challenged.

Missouri has a similar constitutional provision.⁶ The Supreme Court of Missouri has said:

There can be no question but that an act which relates to persons or things as a class is a general law. * * * It is well settled, however, in this state, that it is only when the conditions reasonably justify the distinguishing of a class, and the law affects equally all who come within that class, that such law is not within the constitutional inhibition.⁷

With this the Supreme Court of Iowa agrees. It has said of a certain statute: "And it applies to all cities in the State falling within the class specified, and, hence, is not local nor special, but of uniform operation."⁸

The Iowa court thus says that if the single object to which the statute applies is in a class by itself, a general law cannot be made applicable in the constitutional sense;⁹ but two years

5. *State v. Squires* (1868) 26 Iowa 340, 344.

6. "In all other cases where a general law can be made applicable, no local or special law shall be enacted; and whether a general law could have been made applicable in any case is hereby declared a judicial question, and as such shall be judicially determined, without regard to any legislative assertion on that subject." Mo. Const., art. IV, sec. 53, par. 32.

7. *State v. Swagerty* (1907) 203 Mo. 517, 102 S. W. 483, 10 L. R. A. (N. S.) 601, 120 Am. St. Rep. 671, 11 Ann. Cas. 725, cited with approval in *Hays v. Hogan* (1917) 273 Mo. 1, 200 S. W. 286, 293. " * * * and it is now no longer an open question in the courts of this state that legislation applicable to a particular class is not violative of the constitutional provision which prohibits the enactment of special laws." *O'Connor v. St. Louis Transit Co.* (1906) 198 Mo. 622, 97 S. W. 150, 153. This is the general rule. Cooley, *Constitutional Limitations* (8th ed. 1927) 259.

8. *Haskel v. Burlington* (1870) 30 Iowa 232, 237. See also *McAunich v. Mississippi, etc. R. R.* (1866) 20 Iowa 338, 343; *Iowa R. Land Co. v. Soper* (1874) 39 Iowa 112, 115.

9. *State v. Squires* (1868) 26 Iowa 340, cited supra, note 5. The court held that in the case at bar a general law could not be made applicable. Opinions that reach the opposite conclusion on the facts before them frequently point out the possibility of drafting a bill which would include other persons or things similarly situated. See *Cloe and Marcus, Special and Local Legislation* (1936) 24 Ky. L. J. 351, 367; *Noler v. Whisman* (1912) 243 Mo. 571, 147 S. W. 985, 988; *Ex parte Lerner* (1920) 281 Mo. 18, 218 S. W. 331, 333.

later the same court indicates that a statute applying to an object which is in a class by itself *is* a general law.¹⁰ In the first case the court should have held the curative act to be general.¹¹ It was no doubt misled by the language of the constitution, "where a general law can be made applicable." If by definition a general law is one that applies to all persons or things of a class legitimately constituted, then a general law is applicable to every situation save only that where the desire of the legislature is to give special privileges to individuals or groups less than a class. It would seem that to prevent the consummation of this desire is the purpose of the constitutional prohibitions. Consequently the provision that general laws are required only when applicable was not intended to permit the legislature to give special, separate treatment to persons, things, or localities whenever it suited the legislature's whim. Is not the provision either nonsensical or equivalent to a prohibition of all special and local legislation?

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. However, consideration of the former law, the evil or mischief sought to be remedied, and the remedy intended to be provided¹² discloses an answer.

The former constitutional law (before the adoption of the re-

10. *Haskel v. Burlington* (1870) 30 Iowa 232. This second proposition is almost universally accepted. 1 Cooley, *Constitutional Limitations* (8th ed. 1927) 259; 59 C. J., *Statutes* (1932) 728, sec. 318. However, some reported cases state the qualification that the law is special if it names the subject instead of designating it by description since similar subjects may acquire the characteristics of the class in the future but would be excluded by such specification. This qualification does not apply to curative statutes. 1 Lewis' *Sutherland, Statutory Construction* (2d ed. 1904) 398, sec. 214. Compare note 31, *infra*, and accompanying text.

11. In affirming the constitutionality of an 1893 act providing for the completion of a combination city hall and county courthouse for Minneapolis the Supreme Court of Minnesota said: "No legislation more general in fact than the act of 1893 would fully meet the case. If the act had been general in form, it could not be made more general in fact and still fully cover the situation. * * * we know that this is the only case of the kind * * * which now exists or ever can exist * * * ." *State v. Cooley* (1893) 56 Minn. 540, 58 N. W. 150, 154.

12. Cooley, *Constitutional Law* (4th ed. 1931) 428, sec. 6; 11 Am. Jur., *Constitutional Law* (1937) 675, sec. 62. This principle of construction is applied to the special and local legislation provision of a state constitution in *McGregor v. Baylies* (1865) 19 Iowa 43, 46.

strictions) to a considerable extent permitted the passage of laws naming or specifying the things, places, or persons to which the laws applied. What evils are generally recognized as resulting from the exercise by legislatures of this almost¹³ unrestricted liberty to differentiate? The following have been pointed out by writers, judges, legislators, and members of constitutional conventions:

1. Special and local laws violate the fundamental principle of legislation that there should be but one rule for cases substantially similar.¹⁴

2. There is a tendency for material discriminations which involve economic or other advantage to creep in.¹⁵

3. The time of the legislature is wasted on trivial matters, and its attention is distracted from the welfare of the state as a whole.¹⁶ Elihu Root while presiding over a constitutional convention in New York said:

We found that the Legislature of the State had declined in public esteem, and that the majority of the members of the Legislature were occupying themselves chiefly in the promotion of private and local bills, of special interests, with which they came to Albany, private and local interests upon which apparently their reelections to their positions depended, and which made them cowards and demoralized the whole body.¹⁷

4. The needlessly protracted sessions and unnecessarily increased printing bill add to legislative expense.¹⁸

13. Even without constitutional provisions which expressly restrict special and local legislation, some restriction exists; see *infra*, notes 64-70.

14. Jones, *Statute Law Making* (1912) 37; *Maize v. State* (1853) 4 Ind. 342, 348; 2 *Indiana Constitutional Debates* (1852) 1767.

15. See 1 McQuillin, *The Law of Municipal Corporations* (2d ed. 1928) 426, sec. 150; Jones, *loc. cit.* *supra*, note 14; Cloe and Marcus, *Special and Local Legislation* (1936) 24 Ky. L. J. 351, 357; Anderson, *Special Legislation in Minnesota* (1922) 7 Minn. L. Rev. 133. "The theory of our institutions is, that every man's civil liberty is the same with that of others,—that all men are equal before the law in rights, privileges, and legal capacities * * *. A State, therefore, has no business to bestow favors or to establish unjust discriminations." Cooley, *Constitutional Law* (4th ed. 1931) 282.

16. Dealey, *Growth of American State Constitutions* (1915) 224; *Debates in the Massachusetts Constitutional Convention of 1917-1918* (1920) 221, 222, 318, 319, 320, 337. The latter work is cited hereinafter as *Mass. Const. Debates*.

17. Quoted in *Mass. Const. Debates* at 318.

18. *Id.* at 319, where it is said that average cost in Massachusetts of every bill passed is \$500; Small, *Debates of the Georgia Constitutional Convention of 1877*, 167, 375; Dealey, *op. cit.* *supra*, note 16, at 225.

5. Experience shows that lobbying, log-rolling, and corruption increase,¹⁹ and that machine rule is strengthened when the legislature customarily passes local legislation. The legislative bosses can make it difficult for any member to bring up on the floor or to get out of committee the local or special measures which his constituents insist that he pass for them.²⁰ As pointed out by Mr. Root in the foregoing quotation, the member's reelection seems to depend upon his successful representation of special interests in his election district. Thus the political leaders are able to place pressure upon the member and to force him to accept their dictation.²¹

6. The undue enlargement of the statute books makes the use of the books difficult.²² The important acts of state-wide interest are buried among acts amending the charter of Homeville (population 300), relieving John Smith from his obligation as surety on a bail bond, reviving the Iron Foundry Corporation's charter so that the corporation may be liquidated, or authorizing the Trustees of Columbia Township to pave the sidewalks along a certain road.

7. Most citizens of ability are unwilling to seek seats in the legislature when a large part of that body's time is devoted to trivial matters for which provision could be made by delegating authority to administrative officers or to the people of the locality affected, or by other general laws. Charles A. Beard says:

Persons of high standards and more than average intelligence are not willing to waste their life trying to get an iron bridge over Duck Creek in Posey township or working for a highway through the town of Bad Angel. Business of this kind appeals to men of small caliber; sometimes to men deficient in integrity.²³

19. *Mass. Const. Debates* at 321, 324, 363; Beard, *American Government and Politics* (4th ed. 1924) 604; Chamberlain, *Legislative Processes* (1936) 237; Walker, *Law Making in the United States* (1934) 258; *McGregor v. Baylies* (1865) 19 Iowa 43, 45.

20. Dealey, *op. cit. supra*, note 16, says at 224 that "through such measures friends are won."

21. Chamberlain, *op. cit. supra*, note 19, at 242.

22. *Mills v. Board* (1918) 175 N. C. 215, 95 S. E. 481; *Mass. Const. Debates* at 351, 319; Dealey, *op. cit. supra*, note 16, at 225; Jones, *loc. cit. supra*, note 14.

23. Beard, *op. cit. supra*, note 19, at 604. "Really capable men wearied by numerous demands on their time and patience in the consideration of relatively unimportant matters drop out of our legislatures and yield place to small men * * *." Dealey, *op. cit. supra*, note 16, at 224.

8. The passage of local legislation interferes with local self-government.²⁴

9. Decisions concerning corporate and municipal charters require technical knowledge which legislators do not possess, and careful investigation which legislators cannot, or at least do not, make.²⁵

10. Special or local legislation does not have the benefit of consideration by a considerable number of the legislators.²⁶ The wishes of the member or members from the district affected are controlling. Judge White speaking to the Pennsylvania Bar Association of the scandal that had surrounded the Pennsylvania Legislature prior to the Constitutional Convention of 1873 said:

What caused that scandal? Special legislation, local interest, the retirement of statesmanship from its deliberations, and the substitution of mere county commissionerships, that allowed an individual from every locality to arise in his place and say, "Mr. Speaker, that is my bill, what right has the gentleman from Luzerne or elsewhere to interfere with it." That settled it. No man had the temerity to contest a bill of that character.²⁷

Such are the evils intended to be remedied. They are not matters of form but of substance. The form of a statute may be general but the statute nevertheless apply only to an individual

24. *Illinois Constitutional Convention Bulletins* (1920) 378; Small, *op. cit. supra*, note 18, at 167; McQuillin, *op. cit. supra*, note 15, at 426; Horack and Welsh, *Special Legislation: Another Twilight Zone* (1937) 12 *Ind. L. J.* 133, 193. "The very purpose of the restriction upon the power of the legislature was to remit to the local authorities such functions of government and administration as concerned the people of the locality, and which could be better determined and discharged by such authorities than by the central legislative body at the capital of the state." *In re Burns* (1898) 155 *N. Y.* 23, 49 *N. E.* 246, 247. See *Van Riper v. Parsons* (1878) 40 *N. J. L.* 1, 5.

25. *Mass. Const. Debates* at 345; *Chamberlain*, *op. cit. supra*, note 19, at 237.

26. *State v. Lawrence Bridge Co.* (1879) 22 *Kan.* 438, 456; and see committee report in *1904 Maryland Bar Association Report* at 160. In the latter at pages 163 and 168 is this: "The local laws are so easily amended or repealed that the temptation to 'do something' to win local acclaim or political advantage cannot be resisted by the average assemblyman. * * * And, under the ridiculous but prevailing theory that what the representatives from a particular county say they want, is in fact wanted by, and is in fact beneficial to, the locality which they represent, and to the State, the desired changes would as a matter of course be made.

"Under this theory of local lawmaking the patron and creator of the law, to wit, the State, surrenders all right of judgment and acts merely as the recorder of the wishes of individual members or groups of members."

27. (1899) 5 *Pa. State Bar Ass'n Rep.* 225.

case which does not constitute a class. This is particularly true of municipalities when the basis of differentiation is population. In Missouri, an act has been held special and unconstitutional which described the subject of the enactment as "all counties in this state which contain or may hereafter contain two hundred thousand and less than four hundred thousand inhabitants and which county or counties contain one hundred and fifty miles or more of macadamized roads outside of municipal corporations and which county or counties pay to the county surveyor a salary of three thousand dollars or more annually";²⁸ in Iowa, an act which applied to "all cities in this state, which had by the state census of 1885, a population of 30,000 or more";²⁹ in Ohio, an act to redistrict "every city * * * which had at the last federal census a population not less than 5550 and not greater than 5560."³⁰

On the other hand, the specification of a named city to which the law is to apply does not necessarily make it a special act.³¹ In affirming the constitutionality of a statute which provided for borrowing money to complete a combination city hall and county courthouse in Minneapolis, the Supreme Court of Minnesota pointed out that the conditions under which the building was being erected were unique and that the case dealt with in the statute was the only case of the kind which existed or ever could exist. The opinion says:

The last proposition to which we will refer is that the character of an act as general or special depends on its substance, and not on its form. It may be special in fact although gen-

28. *State v. Southern* (1915) 265 Mo. 275, 177 S. W. 640.

29. *State v. Des Moines* (1896) 96 Iowa 521, 65 N. W. 818, 59 Am. St. Rep. 381, 31 L. R. A. 186.

30. *Kenton v. State* (1894) 52 Ohio 59, 38 N. E. 885.

31. Usually, naming the person or municipal corporation in the statute results in the statute being special. This is true not because the constitution forbids that form but because of the substantial requirement that all similarly situated must be included. Even if no other person or municipality is similarly situated at the time of the passage of the law, some may be in an identical situation in the future. When the purpose is temporary or there is no possibility of another case of the kind, the naming of the subject does not keep the act from being general. The statement to the contrary in *Cloe and Marcus, Special and Local Legislation* (1936) 24 Ky. L. J. 351, 377, 378, is not borne out by the cases cited to support it. The very first case cited (*Webb v. Adams* (1930) 180 Ark. 713, 23 S. W. (2d) 617) says: "It is not the form, but the operation and effect, which determines the constitutionality of a statute." 23 S. W. (2d) at 621. The other cases cited do not emphasize the question of form.

eral in form; and it may be general in fact, although special in form. The mere form is not material * * *. In most, if not all, of the adjudicated cases, the laws under consideration were general in form, but were assailed as being special in fact; but the test must be the same when the law is special in form, but is claimed to be general in fact * * *. Finally, as we have already seen, the facts that the law is special in form, and that it applies to only a single object, or, in the language of another rule, that the class consists of only one member, are not important. Our conclusion is that the act, although special in form, is general in fact, within the meaning of the constitution.³²

Since the test for a local or special statute is not whether the statute names the thing or things to which it applies, the test must be the operation and effect of the statute. It is a special or local statute when its operation and effect are such as to contribute to the evils which the constitution seeks to remove. It is a general statute when it does not exclude cases which are substantially similar to those included in its operation, when it makes no unjust distinctions and confers no special favors, and when able and honest men will recognize that the differentiation is justified and therefore time, attention, and money are not wasted.³³

Obviously a general law thus conceived can be adapted to every legislative need. No matter how restricted the class which the act includes, the act is general if the limits of the class have a reasonable relation to the other provisions of the act.³⁴ The

32. *State v. Cooley* (1893) 56 Minn. 540, 58 N. W. 150, 154.

33. This conclusion is of course based on the evils of special legislation pointed out from time to time by writers and speakers and classified in seven groups by the present writer. See the text accompanying notes 14 through 23, *supra*. The eighth, ninth, and tenth evils there listed do not apply to all special and local legislation. They, therefore, seem to have less weight in determining the meaning of the constitutional provision. The significance of the Anglo-American ideal of local self-government, for example, is obscure in its application to a constitutional restriction in terms also applicable to types of special legislation other than local—such types as grant a divorce to Mary Jones, change the name of John Smith to John Jones, declare Ed White of age, or authorize Bill Brown to practice medicine. Cf. *Horack and Welsh, Special Legislation: Another Twilight Zone* (1937) 12 Ind. L. J. 183, 193.

34. *Ladd v. Holmes* (1901) 40 Ore. 167, 172, 66 Pac. 714, 716, 91 Am. St. Rep. 457, 461. The most frequent application of this principle is to classifications of cities or counties according to population. If the spread between the upper and lower limits is not extremely narrow, the courts usually take for granted a reasonable relation between the basis of classification and the purpose and subject of the act. See *Cobbs v. Home Ins. Co.*

idea that a situation calling for legislative action might arise to which a general law could not be made applicable is therefore a fallacy.³⁵ Yet twenty-odd states³⁶ have made this idea the basis of constitutional provisions, and courts have from time to time tried to apply the fallacy to fact situations.³⁷ This folly reached its height, perhaps, when a distinguished group of political scientists included the "no local or special act where a general act can be made applicable" provision in a "model" state constitu-

(1920) 18 Ala. App. 206, 91 So. 627; *McLaughlin v. Ford* (1925) 168 Ark. 1108, 273 S. W. 707; *McInerney v. Denver* (1892) 17 Colo. 302, 29 Pac. 516; *Givens v. Hillsborough County* (1903) 46 Fla. 502, 35 So. 88, 110 Am. St. Rep. 104; *People v. Onahan* (1897) 170 Ill. 449, 48 N. E. 1003; *Indianapolis v. Navin* (1897) 151 Ind. 139, 47 N. E. 525, 526, 51 N. E. 80, 41 L. R. A. 337, 344; *Eckerson v. Des Moines* (1908) 137 Iowa 452, 115 N. W. 177, 185; *Parker-Washington Co. v. Kansas City* (1906) 73 Kan. 722, 85 Pac. 781; *State v. Cooley* (1893) 56 Minn. 540, 58 N. W. 150; *State v. St. Louis County Dist. Court* (1895) 61 Minn. 542, 64 N. W. 190; *State v. Speed* (1904) 183 Mo. 186, 81 S. W. 1260; *State v. Clayton* (1910) 226 Mo. 292, 126 S. W. 506; *State v. Frank* (1900) 60 Neb. 327, 83 N. W. 74; *State v. Malone* (1905) 74 Neb. 645, 105 N. W. 893; *Matter of Church* (1883) 92 N. Y. 1; *Admiral Realty Co. v. New York* 206 N. Y. 110, 99 N. E. 241, 249, Ann. Cas. 1914A 1054; *Marmet v. State* (1887) 45 Ohio St. 63, 12 N. E. 463; *Commonwealth v. Mathews* (1931) 303 Pa. 163, 154 Atl. 359; *State v. Schragg* (1930) 159 Wash. 68, 292 Pac. 410; *State v. Archibald* (1911) 146 Wis. 363, 131 N. W. 895; *McGarvey v. Swan* (1908) 17 Wyo. 120, 96 Pac. 697. In New Jersey, classification of cities not based on population has been upheld although at the time of the passage of the law the class had only one member. *Van Reipen v. Jersey City* (1896) 58 N. J. L. 262, 33 Atl. 740 ("any municipal corporation having a board of public works, and a board of finance and taxation"); *State v. Govern* (1885) 47 N. J. L. 368, 1 Atl. 835, aff'd sub nom. *Govern v. Bumstead* (1886) 48 N. J. L. 612, 9 Atl. 577; *Rutgers v. New Brunswick* (1880) 42 N. J. L. 51; *Van Riper v. Parsons* (1878) 40 N. J. L. 123, 125. See also *Matter of Church* (1883) 92 N. Y. 1.

35. One of the earliest and most thorough students of the subject was guilty of the same fallacy. He wrote that one of the chief objections to the prohibition of special and local legislation is that it interferes with the proper adaptation of legislation to particular cases. Yet, on another page, he says: "A general law is one which applies to and operates uniformly upon all members of any class of persons, places or things, requiring legislation peculiar to itself in the matter covered by the law." *Binney, Restrictions upon Local and Special Legislation in the United States* (1893) 32 Am. L. Reg. (N. S.) 613, 622, 725. Perhaps Mr. Binney had in mind the possibility of a desire by a progressive community to have something which more backward communities would not wish. The courts would not hold that this situation justified differentiation in the face of an absolute prohibition of special legislation, and other bases for "valid" classification might not exist. But the use of local option or home rule would solve this problem.

36. See note 2, supra.

37. Notes 46-50, infra. The majority of jurisdictions hold, however, that the question, whether a general law can be made applicable, is exclusively for the legislature, see note 45, infra.

tion prepared under the auspices of the National Municipal League.³⁸

The widespread use of this provision in state constitutions may be explained by one or both of two historical facts. First, when this language was originally used in the constitutions, the terms "general act" and "special act" had not acquired definite meanings;³⁹ the existence of the mischief was recognized, but the exact nature of the evil had not been defined. One aspect of this situation was confusion of mind as to whether the distinguishing point was merely a matter of form. Second, because England and the American colonies and states had always had special legislation,⁴⁰ it was assumed that some special legislation was necessary.⁴¹ There may have been some slight justification for this view at the time Iowa and the other pioneers in the field adopted the provision. The administrative organization was quite rudimentary in that period.⁴² Consequently the legislatures felt that it was necessary to exercise administrative and judicial functions.⁴³ This lack of adequate administrative machinery does not exist today.

38. "The legislature shall pass no local or special act in any case where a general act can be made applicable; and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by a majority of the electors voting thereon in the district to be affected, except acts repealing local or special acts in effect before the adoption of this constitution and receiving a two-thirds vote of all members of the legislature on the question of their repeal." *A Model State Constitution* (Rev. ed., published by the National Municipal League) 5, sec. 21. This section follows the language of the Michigan Constitution, art. V, sec. 30.

39. Prior to the adoption of the constitutional provisions, the phrases "special act" and "local act" had no legal significance. "Local act," particularly, had no defined meaning in the common law. *McGregor v. Baylies* (1865) 19 Iowa 43, 47. General and special had been used as synonyms respectively for public and private in connection with the doctrine of judicial notice. See 1 Blackstone *Comm.* *85.

40. Clifford, *History of Private Bill Legislation* (1885); Binney, *Restrictions upon Local and Special Legislation in the United States* (1893) 32 Am. L. Reg. (N. S.) 613.

41. "We must have some local legislation in Georgia * * *." Delegate Hansell, as quoted in Small, *Debates of the Georgia Constitutional Convention of 1877*, 166.

42. See *II Massachusetts Constitutional Convention Bulletin* (1917) 483.

43. Corporations were chartered by special acts. Va. Acts of 1842-1843, 92-102. Banks were examined by committees of the legislature in some states. Ga. Acts of 1831, 280; Ga. Acts of 1837, 273. Physicians were admitted to practice by name. Ga. Acts of 1831, 185; Ga. Acts of 1855-56, 499; Ga. Acts of 1857, 283; Ga. Acts of 1876, 393. Divorces were granted. Mont. Acts of 1864-65, 554, 610, 674, 685, 695, 699, 700; Va. Acts of 1849-50, 227-230. Names were changed. Va. Acts of 1847-48, 348. Illegitimate children were legitimated. Clayton's *Compilation of Ga. Laws* (1812) 249, 510.

But whatever the origin of the constitutional phrase, "can be made applicable," the constitutional provision containing it has been unsatisfactory. This is due in part to the doctrine that whether a general law can be made applicable is a legislative question in the absence of a contrary constitutional declaration.⁴⁴ In a majority of jurisdictions the courts will not consider whether provision can be made by general law but will treat the legislative determination as conclusive.⁴⁵ South Carolina⁴⁶ and Indiana⁴⁷ seem to be the only jurisdictions in which this doctrine has been expressly repudiated by the courts when the question was squarely presented. However, Iowa⁴⁸ and Nevada⁴⁹ apparently agree with South Carolina and Indiana, and cases in other jurisdictions have held special laws invalid because a general law could be made applicable, without discussing the effect of the implied legislative determination to the contrary.⁵⁰ Other cases⁵¹ have said that statutes were unconstitutional because they violated both the "provision can be made by general law" clause and some specific prohibition. Even in South Carolina the rule is that the legislative determination of the question must be given

44. In Minnesota the constitution was amended to make the question one for the courts, but they have not invoked the clause to declare statutes unconstitutional, relying rather on the specific prohibitions of special legislation. Anderson, *Special Legislation in Minnesota* (1923) 7 Minn. L. Rev. 133, 143, 144.

45. *Guthrie National Bank v. Guthrie* (1899) 173 U. S. 528; *Herschbach v. Kaskaskia, etc. Dist.* (1914) 265 Ill. 388, 106 N. E. 942; *Gentile v. State* (1868) 29 Ind. 409; *Lewis' Sutherland, Statutory Construction* (2d ed. 1904) 339. "To determine under a state constitution what can be accomplished by general or special legislation, has been, with but few exceptions, held to be a question solely for the Legislature." *Oklahoma City v. Shields* (1908) 22 Okla. 265, 305, 100 Pac. 559, 576. See Note (1892) 14 L. R. A. 566.

46. *Carolina Grocery Co. v. Burnet* (1909) 61 S. C. 205, 39 S. E. 381, 51 L. R. A. 687; *Thomas v. Spartanburg R. etc. Co.* (1915) 100 S. C. 478, 480, 85 S. E. 50. Cf. *Pell v. Newark* (1878) 40 N. J. L. 71.

47. *Heckler v. Conter* (1933) 206 Ind. 376, 187 N. E. 878, disapproving *Gentile v. State* (1868) 29 Ind. 409, cited supra, note 45. See Horack and Welsh, *Special Legislation: Another Twilight Zone* (1936) 12 Ind. L. J. 109, 113.

48. *Ex parte Pritz* (1858) 9 Iowa 30, 36.

49. *Quilici v. Strosnider* (1911) 34 Nev. 9, 115 Pac. 177, 180.

50. *McGregor v. Baylies* (1865) 19 Iowa 43; *Miller & Lux v. Board* (1922) 189 Cal. 254, 208 Pac. 304, 314; cf. *People v. Mullender* (1901) 132 Cal. 217, 64 Pac. 299.

51. *Bloss v. Lewis* (1895) 109 Cal. 493, 41 Pac. 1081; *Stratman v. Commonwealth* (1910) 137 Ky. 500, 125 S. W. 1094, 136 Am. St. Rep. 299, 27 L. R. A. (N. S.) 949. In *Openshaw v. Halfin* (1902) 24 Utah 426, 68 Pac. 138, 91 Am. St. Rep. 796, the equal protection of law clause was involved.

due consideration and should not be overruled by the courts if predicated upon any reasonable hypothesis.⁵² If a general law on the same subject has already been passed, it would seem that the legislature has signified its belief that a general law can be made applicable, and the courts should declare a subsequent special law unconstitutional. It has been so held,⁵³ but there is strong authority to the contrary based on the idea that a determination by one legislature is not binding on a subsequent legislature.⁵⁴ If the same legislature should pass both a general and a special law on the same subject, would these latter courts hold that the legislators have a perfect right to change their minds? If the second view (that the courts should not interfere even though there is an existing general law) is followed, the constitutional provision becomes merely directory.⁵⁵ To strengthen the provision four states have added a declaration that the question whether a general law can be made applicable shall be a judicial question.⁵⁶

In a jurisdiction where the courts hold that whether a general law can be made applicable is a legislative question but becomes judicial when a general law is passed, the rule might be stated thus: No special law shall be passed in any case for which provision has been made by general law. In a number of states the rule is so stated in the constitution.⁵⁷

II

It is probable that public opinion serves to check special legislation to some extent. So do considerations of legislative convenience. The extent to which they control is very slight however.⁵⁸ On this, as on most matters of everyday governmental

52. *Thomas v. Spartanburg R. etc. Co.* (1915) 100 S. C. 478, 85 S. E. 50.
 53. *Leatherwood v. Hill* (1906) 10 Ariz. 16, 85 Pac. 405, *semble*; *Ventura County Harbor Dist. v. Ventura County* (1930) 211 Cal. 271, 295 Pac. 6; *State v. Drabelle* (1914) 258 Mo. 568, 167 S. W. 1008. Cf. *Henderson v. Koenig* (1902) 168 Mo. 356, 68 S. W. 72, 78; *State v. Anslinger* (1903) 171 Mo. 600, 71 S. W. 1041.

54. *St. Louis S. W. Ry. v. State* (1911) 97 Ark. 473, 477, 134 S. W. 970; *Indianapolis v. Nevin* (1897) 151 Ind. 139, 47 N. E. 525, 41 L. R. A. 337; *Washoe County, etc. Dist. v. Beemer* (Nev. 1935) 45 P. (2d) 779, 784; *Oak Cliff v. State* (Tex. Civ. App. 1903) 77 S. W. 24, 26.

55. *Powell v. Durden* (1895) 61 Ark. 21, 31 S. W. 740, 742.

56. Kan., art. II, sec. 17; Mich., art. V, sec. 30; Minn., art. IV, sec. 33; Mo., art. IV, secs. 53, 54. See also Ala., art. IV, sec. 105.

57. Ala., art. IV, sec. 105; Ga., art. I, sec. 4; Ky., sec. 60; Md., art. III, sec. 33; Miss., art. IV, sec. 87; Pa., art. III, sec. 7.

58. That factors other than the language of constitutions play a part in

policy, public opinion is only slowly aroused.⁵⁹ The abuse of special legislation is not spectacular enough, its undesirable consequences are not glaring enough, to attract and hold the attention of the public at large. Undoubtedly the passage of a large number of special bills is a nuisance to any legislature, but this inconvenience is offset in most cases by a corresponding opportunity to gain favor with those who seek the passage of special acts. The legislator's greatest opportunity to impress members of his constituency lies in his ability to obtain the passage of special acts which they desire.

Some early American cases held that an inherent restriction in the republican form of government prevented state legislatures from passing valid laws that are unjust, or immoral.⁶⁰ The courts could therefore hold statutes void which they considered against natural justice and common right, although there was no provision in the state constitution which would make them invalid. This doctrine has been discredited and almost, if not entirely, abandoned in the later cases.⁶¹ Therefore no type of special legislation would be held invalid by a court unless it could hold it unconstitutional.⁶² This is well settled today although an early Vermont case said by way of *obiter dictum* that the exemption of "a particular person from the general liability by law attaching to all other persons similarly situated * * * would be void, probably, as an act of special legislation, upon general principles of reason and justice."⁶³

Although "general principles of reason and justice" do not constitute a restriction on the passage of special laws, there are

results is rather obvious. To consider a few illustrations: Maryland with comparatively elaborate restrictions has about the same poor success at curtailing legislation as Tennessee with few restrictions and Massachusetts with none. Ohio with comparatively slight constitutional regulation has a minimum of special and local laws.

59. Common experience makes this a truism. Dr. George Gallup in *The Way the People Are Thinking*, N. Y. Times Magazine, April 24, 1938, says that the American Institute of Public Opinion has found the typical American remarkably alive to the issues of the day and highly articulate about them. Perhaps this is true of the typical American, but it is certainly true that talk is all he does about many of these issues.

60. Sedgwick, *Statutory and Constitutional Law* (1857) 147.

61. Cooley, *Constitutional Limitations* (8th ed. 1927) 175, 177, 264, 345; *Gray v. McLendon* (1910) 134 Ga. 224, 67 S. E. 859; *Bertholf v. O'Reilly* (1878) 74 N. Y. 509, 30 Am. Rep. 323.

62. *Davis v. State* (1880) 68 Ala. 58, 44 Am. Rep. 128; *Sayles v. Christie* (1900) 187 Ill. 420, 58 N. E. 480.

63. *Hatch v. Vermont* C. R. R. (1852) 25 Vt. 49, 61.

certain limitations, implied from well known constitutional provisions, that do. These provisions relate to the exercise of the powers of government by three separate departments. The implication is that the legislature shall exercise only legislative functions—its pronouncements must be laws, not decrees. So it has been held that a legislature cannot determine which of two claimants is entitled to an office,⁶⁴ nor vacate, modify, revive or validate a judgment which determines a controversy on its merits,⁶⁵ nor grant new trials nor rehearings.⁶⁶ It has been said that a legislature cannot confirm title to land so as to adjudicate conflicting claims,⁶⁷ and that it cannot determine the right to the custody of minors.⁶⁸ All these matters are said to involve judicial questions outside the sphere of the legislature.⁶⁹

Certain other provisions common to perhaps all the state constitutions serve to control special legislation to some slight extent without directly referring to it. These provisions guarantee "equal protection of the laws" and "due process" and forbid deprivation of rights unless by the law of the land. These clauses usually appear in the bill of rights and serve principally to check class legislation but incidentally certain kinds of special legislation.⁷⁰ Then there are requirements of uniform taxation,⁷¹ county officers,⁷² and courts.⁷³

Investigation of the legislative history of any of the older states or of the recent legislation of the New England states shows conclusively that the checks discussed so far are not very

64. *State v. Carr* (1891) 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177.

65. *Menges v. Dentler* (1859) 33 Pa. 495, 75 Am. Dec. 616; *Bates v. Kimball* (Vt. 1824) 2 Chipman 77.

66. *In re Greene* (1901) 166 N. Y. 485, 60 N. E. 183; *Dorsey v. Gary* (1872) 37 Md. 64, 11 Am. Rep. 528.

67. *Spragg v. Shriver* (1855) 25 Pa. 282, 64 Am. Dec. 698. See in this connection *Wellington v. Wellington* (1891) 46 Kan. 213, 26 Pac. 415; *Holden v. James* (1814) 11 Mass. 396, 6 Am. Dec. 174, 176.

68. *Ex parte Tillman* (1910) 84 S. C. 552, 66 S. E. 1049, 1053, 26 L. R. A. (N. S.) 781.

69. Two acts found in Georgia laws are typical. One authorizes the judge of a certain superior court to enter settled the case of Jesse A. Glenn charged with homicide. Ga. Acts of 1866, 208. The other reinstates Wm. C. Campbell and Nicholas C. Campbell of the County of Meriwether as executors of the will of their father—evidently an encroachment upon the province of the Court of Ordinary. Ga. Acts of 1870, 457.

70. See *Anderson, Special Legislation in Minnesota* (1923) 7 Minn. L. Rev. 133, 136, 141.

71. Mo. Const. art. X, sec. 3.

72. Ga. Const. art. II, sec. 3.

73. Pa. Const. art. VI, sec. 26.

effective.⁷⁴ Special legislation has and will run rampant in spite of them. Direct constitutional regulation is the only way to stamp out the evil.

One type of restriction placed in the constitutions for this purpose was the specific prohibition. The framers of the constitution would list subjects on which special legislation should not be passed. It was impossible to make these lists complete, and the result was a change in the subjects of special legislation with frequently very little reduction in the amount. North Carolina is a good example. Article II, Section 29, and Article VIII, Section 1, of the Constitution of that state list fourteen subjects on which the legislature is forbidden to pass special laws. In 1929 in spite of these restrictions 724 special acts were passed.⁷⁵ New York⁷⁶ and New Jersey⁷⁷ have attempted to curb the tide by prohibiting special and local acts on specific subjects; nevertheless their session laws are not free from local legislation. The legislatures of Mississippi and Maryland still pass much local and private legislation despite the specific prohibitions in their constitutions. In some states narrow interpretation of the language specifying the prohibited subjects has had a part in bringing about unsatisfactory results.

North Carolina, although not very successful in curbing the passage of special and local laws, was the first to impose the safeguard of local notice around their passage. Section 12 of Article II of its present constitution was taken from an amendment to the original constitution. The Amendment was adopted in 1835 and provided that the General Assembly shall not pass any private law unless it shall be made to appear that thirty days' notice of application to pass such law shall have been given.⁷⁸ Several other states including Georgia,⁷⁹ Missouri,⁸⁰ Pennsylvania,⁸¹ and Texas⁸² adopted similar provisions.

74. Connecticut has a separate volume for local and special acts. A majority of the Massachusetts acts are local or special. See also the Tennessee Session Laws; in that state a prohibition of special acts relating to municipalities is the only important restriction.

75. See Van Hecke, *Four Suggested Improvements in the North Carolina Legislative Process* (1930) 1, 9, 11.

76. N. Y. Const. art. III, sec. 18.

77. N. J. Const. art. IV, sec. 7, pars. 1 and 11 (added by amendment).

78. N. C. Code of 1854, p. 24.

79. Ga. Const. art. VII, sec. 16.

80. Mo. Const. art. IV, sec. 54.

81. Pa. Const. art. III, sec. 8.

82. Tex. Const. art. III, sec. 57.

Another type of restriction, somewhat similar but less effective, provides that all laws of a general nature must be uniform in their operation throughout the state. In most of the constitutions⁸³ where this provision appears, it is coupled with one of the other general restrictions just discussed and, in a few,⁸⁴ with lists of specific restrictions. The uniformity clause itself has not been the basis of very many cases holding statutes unconstitutional. The general rule disclosed by the cases is that the required uniformity cannot be defeated by amendment or partial repeal.⁸⁵ When an existing general law provides for a given situation, this uniformity requirement operates in the same manner as the other mandatory general restrictions and makes a subsequent special law unconstitutional.⁸⁶ This follows from the fact that the special act in order to have any effect on the given situation must amend, suspend, or partially repeal the general act and will thereby interfere with its uniform operation. This phase of the act would not be of any importance under constitutions containing other mandatory general restrictions. It would be important if the constitution contained in addition to the uniformity requirement only specific restrictions or only the provision that no special law shall be passed in any case for which provision can be made by general law.

In another phase this constitutional provision prevents the passage of laws general in form and dealing with a general subject but containing exceptions.⁸⁷ The other mandatory restrictions previously mentioned prevent the passage of special laws *where there is an existing general law*. The provision now under discussion forbids the placing of exceptions in *a law of a general nature*. Just what is a law of a general nature has never been clearly determined.⁸⁸ It seems that the legislature may, so far

83. See, *e. g.*, Ga. Const. art. I, sec. 4; Ind. Const. art. IV, sec. 23; S. C. Const. art. III, sec. 34.

84. See, *e. g.*, Fla. Const. art. III, sec. 21; Iowa Const. art. I, sec. 6, art. III, sec. 30.

85. *Omnibus R. Co. v. Baldwin* (1881) 57 Cal. 160; *Darling v. Rodgers* (1871) 7 Kan. 592; but see *People v. Judge* (1861) 17 Cal. 547; *Sprague v. Fremont, etc.*, R. C. (1888) 6 Dak. 86, 50 N. W. 617.

86. See cases cited in note 85, *supra*.

87. *Mordecai v. Board of Supervisors* (1920) 183 Cal. 434, 192 Pac. 40.

88. *State v. Davis* (1896) 55 Ohio St. 15, 44 N. E. 511, speaks of "laws having a general subject-matter and therefore of a general nature," whereas *State v. Spellmire* (1902) 67 Ohio St. 77, 65 N. E. 619, 622, says, "It is obvious that every law upon a general subject is not *per se*, nor by

as this provision is concerned, provide by special act for organizing an irrigation district in Madera County but cannot provide how irrigation districts shall be organized in counties generally and except from the operation districts which had adopted a charter prior to a stated date.⁸⁹ As a result of the vagueness with which it indicates the field to which it is to apply, this provision will interfere only slightly with special legislation.

Until 1926 the restrictions on special legislation contained in the Constitution of Missouri were the strongest in the United States. They are (1) prohibitions of special laws on thirty-two specific subjects ranging from laws "regulating the affairs of counties, cities, townships, wards or school districts" to laws "giving effect to informal or invalid wills or deeds"; (2) provision that no local or special law shall be enacted in all other cases where a general law can be made applicable; (3) declaration that whether general law can be made applicable is a judicial question;⁹⁰ (4) requirement that notice of intention to apply for special or local law be published in the locality where the matter or thing to be affected may be situated, at least thirty days prior to introduction of bill, and that notice be recited in act according to its tenor.⁹¹ The express constitutional provisions have been strengthened by the ruling of the Supreme Court of Missouri that where the legislature has adopted a general law applicable to a subject, the court in determining the validity of a subsequent special law on the subject need not determine the necessity of a special law or whether a general law can be made applicable.⁹²

The foregoing glance at the situation presented by restrictions of state constitutions on special and local legislation shows that this corner of the field of constitutional law is in an unsatisfactory state. The very language of the constitutional prohibition

constitutional intendment, necessarily a law of a general nature." See also *Rambo v. Larrabee* (1903) 67 Kan. 634, 73 Pac. 915; *Richardson v. Kansas City Bd. of Ed.* (1906) 72 Kan. 629, 84 Pac. 533, 540; *Vermont Loan & Trust Co. v. Whited* (1891) 2 N. D. 82, 49 N. W. 318, 320.

89. *Mordecai v. Board of Supervisors* (1920) 183 Cal. 434, 192 Pac. 40.

90. Mo. Const. art. IV, sec. 53.

91. Mo. Const. art. IV, sec. 54. Art. IX, sec. 7, provides that the classes of cities and towns created by the General Assembly shall not exceed four, and that provision for organization, classification, and power of cities and towns shall be made by general laws. Art. XII, sec. 2, prohibits special corporate charters.

92. *State ex rel. Garesche v. Roach* (1914) 258 Mo. 541, 167 S. W. 1008.

of special and local statutes where general statutes can be made applicable encourages special and local legislation by implying that there are instances calling for its use. Furthermore, the language is inconsistent with the judicial definition of local, special, and general laws. The restrictions which consist of lists prohibiting laws upon certain specified subjects are, because of the difficulty of foreseeing every possibility, necessarily incomplete. This latter plan of control is also subject to the objection that a resourceful lawyer can always raise the question whether a particular subject is covered by the language used in the constitution. The provision that no special or local law shall be enacted in any case which is provided for by general law leaves the legislature too much freedom of choice and frequently raises for the judiciary the puzzling question whether a given case is provided for by a certain existing general law. The requirement that laws of a general nature have a uniform operation is not sufficiently restrictive and presents the problem: What is a law of a general nature? The condition precedent of notice and the condition subsequent of a referendum⁹³ may serve to remove or at least to mitigate the deprivation of self-government, but they give little relief to the legislature.

Practically the only suggestion that has been made⁹⁴ for remedying the situation as a whole is the adoption of the practice of the English Parliament. Parliament requires the presentation of a petition for the passage of the bill, before the houses convene. The preamble of the bill must allege facts showing a need for special legislation, and, even if the bill is unopposed, proof of the allegations must be made before a committee.⁹⁵ The proposal to use similar procedure in this country overlooks the different personnel and traditions of American legislatures. It seems to the present writer that it is most unlikely that our legislators will take their committee responsibilities as seriously as do members of Parliament.⁹⁶ Can they be expected to abandon the long and well established practice of passing whatever local

93. This requirement has been used little if at all in constitutions, but several states have statutes which require a referendum.

94. Horack and Welsh, *Special Legislation: Another Twilight Zone* (1937) 12 *Ind. L. J.* 183, 199; Cloe and Marcus, *Special and Local Legislation* (1936) 24 *Ky. L. J.* 351, 384.

95. Clifford, *History of Private Bill Legislation* (1885).

96. See the unfavorable comparison of state legislative committees with Congressional committees in Chamberlain, *Legislative Processes* (1936) 90.

acts are approved by the representatives of the localities affected? The proposed plan has been incorporated in the Mississippi Constitution and has been adopted voluntarily by the Massachusetts General Court. A considerable amount of special and local legislation is nevertheless passed in each of these states—so much, in fact, that a separately bound volume is required for it.⁹⁷ Other criticisms that can properly be made of the English system are that it does not relieve the legislature of the burden of handling these comparatively unimportant matters and that it does not permit local self-government. The different views of the inhabitants of the locality may be heard by the committee, but there is no requirement that the view of the majority prevail. The exercise of political powers by citizens of the various communities, as local communities, has been said to be the most important feature of our system of government.⁹⁸ According to this view legislative efficiency is not the only desideratum; local autonomy with a minimum of interference by the state legislature is also important.

In all fields of human endeavor we observe some pioneer making a discovery or taking a progressive step and others wondering why they had not thought of it long before. In 1926 the state of Arkansas adopted an amendment to its constitution which read as follows: "The General Assembly shall not pass any local or special act. This Amendment shall not prohibit the repeal of local or special acts."⁹⁹ This is a far simpler and more comprehensive solution than the plan used in Missouri. Certainly, it does not eliminate all problems of construction and application. Such problems are inherent in written constitutions. Their num-

97. See Miss. Const. art. IV, sec. 59; Miss. Code (1930) sec. 5958; *Mass. Const. Debates* at 316. The Georgia Constitution of 1877 contained a somewhat similar provision (art. III, sec. 7, par. 15), which was stricken in 1886. See Ga. Code (1933) sec. 2-1815.

98. McQuillin, *The Law of Municipal Corporations* (2d ed. 1928) 512, sec. 188. Cf. Thieme, *A Business System of City Government* (1934) 65, 67: "The cities of European countries enjoy the blessings of home rule, but if they were asked what it means they would probably not know the term, for the reason that they have known nothing else for from thirty-five to seventy-five years. * * * In this country our great powerful cities embracing the culture, intelligence and wealth of the state must go like beggars to a state legislature composed of representatives, political or otherwise, from the farms and villages and cities throughout the state, wholly unacquainted with city problems and usually quite indifferent to them."

99. Amendment 14, Ark. Dig. of Stats. (1937) 188. See also note 116, *infra*.

ber and complexity should be reduced with the adoption of this provision. It has the advantage of simplicity of statement, and it eliminates questions concerning when a general law can be made applicable, how to reconcile the judicial concept of a general law with the idea that a general law is not always applicable, what is covered by the numerous specifications of forbidden subject matter. When a law is challenged under the Missouri language, thirty-odd prohibitions must be tentatively considered. The decisions under one prohibition do not necessarily assist in the interpretation of another prohibition. The Missouri constitution has been successful in curbing the passage of special and local laws,¹⁰⁰ but its provisions on the subject seem to encourage litigation. The Missouri cases indicate that the courts of the state have been frequently called upon to decide cases under these provisions of the constitution.¹⁰¹ In some of the other states similar provisions of the constitutions have not even been successful in checking special and local legislation.¹⁰² In these states there is need for a sounder rule because of the effect that it would have upon the bulk of legislation as well as upon the case law.

Before the adoption of the constitutional amendment the Arkansas legislature passed a great deal of local legislation. In 1919 the output filled three large volumes of more than a thousand pages each—almost four thousand pages of local legislation. In 1923, 1,810 pages were filled with special legislation. Since the adoption of the constitutional prohibition, the situation is entirely different. In 1937 the special legislation in Arkansas consisted of about a half-dozen acts authorizing appointment of a court reporter in certain districts and an act to fix the salaries of deputy prosecuting attorneys in the Third Judicial Circuit.¹⁰³ The reported cases indicate that the litigation over the application of the constitutional amendment has revolved around the question: What was the amendment intended to prohibit?¹⁰⁴ Any

100. Courts are almost the only subject dealt with. Mo. Laws of 1931, 181, 184, 185, 188, 189, 193, 194, 195, 196, 197; Mo. Laws of 1937, 211, 216, 218, 219. Possibly these acts should be considered special only in form. See also Mo. Laws of 1937, 519. On pages 194 and 195 of Mo. Laws of 1937 are acts authorizing the judges of the St. Louis Court of Criminal Correction to appoint janitors. What weighty matters the legislatures sometimes pursue!

101. See Mo. Dig. (1930) tit. Statutes, key no. 76.

102. *E. g.*, Georgia, Maryland, North Carolina, South Carolina.

103. Ark. Acts of 1937, 26, 29, 191, 483, 1375.

104. Among other things it prohibits amendment of a local act. *Benton v. Thompson* (1933) 187 Ark. 208, 58 S. W. (2d) 924.

provision in this field will raise the question of the meaning of "local or special act." This meaning is reasonably well settled in principle in almost all of the states.¹⁰⁵ There remains of course the problem of the application of the principle to individual cases.

Contrary to the belief of some, the result of tying the hands of a state legislature by adopting a constitutional provision similar to the Arkansas amendment will not be disastrous. One of the subjects upon which it is most frequently claimed that special legislation is necessary in municipal corporations, yet many state constitutions now forbid such legislation. Among them is Pennsylvania's. The present constitution of that state was adopted in 1873. After it had been in force for twenty-five years, certain members of the state bar association proposed to strike from the constitution the prohibition of local laws regulating the affairs of counties, cities, townships, wards, boroughs, or school districts. A committee was appointed by the association and in 1899 made a report favoring a recommendation by the association of a constitutional amendment effecting a repeal of the prohibition.¹⁰⁶ The arguments of the committee and of those who supported it in the ensuing debate were directed largely to the disadvantages of enforced uniformity in city government. They pointed out that there had been numerous attempts to evade the constitution, that the result of the prohibition was that the legislature classified cities, thereby in effect specially legislating for Philadelphia, Pittsburgh, and Alleghany, without being subject to the usual safeguards placed around the passage of local laws, and that the development of the large number of cities in the third class was arrested because they were forced to operate under a uniform charter, although they varied in size from 6,000 to 100,000 and in material interests—some being manufacturing cities, some mining, and some maritime.¹⁰⁷ The arguments were promptly riddled by the opposition—one speaker observing that the fact that one city was in the coal region and another in the agricultural region made no difference since "the system of government of cities * * * is not for the regulation of their commercial or business affairs."¹⁰⁸

105. See notes 7, 8, 31, 34, 35, *supra*.

106. (1899) 5 Pa. Bar Ass'n Rep. 134.

107. *Id.* at 217.

108. *Id.* at 231.

Of course, the needs of cities differing commercially will differ somewhat. A maritime city may need the power to build municipal wharves. Why not give this power to all cities? It seems clear that the solution is to be found in a general law conferring a variety of powers from which each city will exercise as many or as few as its particular needs justify. In other words, the difficulty in Pennsylvania was with the general law passed to put the constitution into effect and with the supreme court's interpretation of the constitution and not with the constitutional principle that municipalities should be created and regulated by general laws. The Pennsylvania Bar Association was of this opinion and rejected the committee's report by a two-to-one vote.¹⁰⁹ This evidence that special legislation for towns and cities is not necessary is all the more important because the Supreme Court of Pennsylvania had interpreted the state constitution so as to deprive the legislature of the device of local option¹¹⁰ and so as to limit the power to classify.¹¹¹

The conclusion reached by the Pennsylvania Bar Association is also the correct conclusion regarding other subjects of legislation. There must be differentiation, but the requisite differentiation can be accomplished by utilizing administrative or judicial machinery,¹¹² local option¹¹³ or home rule,¹¹⁴ and classification.¹¹⁵ In some instances only one of the three would be neces-

109. *Id.* at 241.

110. *Appeal of Scranton School District* (1886) 113 Pa. 176, 6 Atl. 158; *Commonwealth v. Reynolds* (1891) 137 Pa. 389, 20 Atl. 1011.

111. *Chalfant v. Edwards* (1896) 173 Pa. 246, 33 Atl. 1048; *Appeals of Ayars* (1889) 122 Pa. 266, 16 Atl. 356; *David v. Clark* (1884) 106 Pa. 377. Constitutional amendments have relaxed the restrictions. Pa. States (1928 Cum. Sup.) vii.

112. See R. S. Mo. (1929) secs. 4538-4541, 4556; Ga. Code (1933) sec. 95-905, par. 3; Mo. Const. art. 4, sec. 53, par. 13; R. S. Mo. (1929) sec. 1351.

113. See Mo. Laws of 1933, 284; R. S. Mo. (1929) sec. 6930; Ga. Acts of 1890-1891, 96, Ga. Parks Ann. Code (1914) secs. 4831(a)-4831(nn). Massachusetts combines classification with local option. Boston is put in a class by itself, and the other cities are given a choice of several plans of government. Mass. Gen. Laws (1921) c. 43.

114. See Mo. Const. art. IX, sec. 16; Neb. Const. art. XI, secs. 2-5; N. Y. Cahill's Consol. Laws (1930) c. 6a, sec. 20. See Story, *Local Self-Government for Cities and Counties* (1920) 2 U. of Ill. L. Bull. 339-350 for a list of states and a discussion of local self-government. See also note 98, *supra*.

115. See Ala. Code (1928) secs. 1739, 1743, 1758, 1759; Ill. Rev. Stats. (1937) c. 24; R. S. Mo. (1929) secs. 6090-6094. Horack and Welsh, in *Special Legislation: Another Twilight Zone* (1937) 12 Ind. L. J. 183, 197, show the needs for sounder judicial standards of classification. Their conclusions on other points are not so obviously correct. They recognize the conflict between centralization and local autonomy and advocate centraliza-

sary, in others two would be required, and in still others all three. Some special and local legislation can be replaced by general laws granting, to all, privileges which otherwise might be doled out to individuals or localities. Differentiation should be accomplished by general laws based upon a statewide plan rather than by special laws passed because localities or groups of individuals desire the special laws and are able to persuade a politically-minded committee that they should have them. Literal uniformity is an unobtainable ideal, but there will be a nearer approach to uniformity in the passage of general laws which provide for classification, local self-government, or judicial or administrative machinery. Home rule results in about the same want of uniformity as does the passage of special legislative charters, since local attorneys draw the charter in either case. However, home rule relieves the legislature of the burden of local affairs and removes the cause of much log-rolling, lobbying, corruption, and undue multiplication of state law. Grover Cleveland's conclusion seems to be the correct one. He said, in an 1884 governor's message to the New York Legislature, that local legislation and grants of special privileges "ought not upon any pretext to be permitted to encumber the statutes of the state."¹¹⁶

tion through the continued interference of the legislature in local affairs by means of a plan similar to that of the English Parliament. They seem to think that the difference in needs of different communities justifies the statement of an Indiana judge that "in many cases local laws are necessary because general ones cannot be properly and justly applicable." The present article has undertaken to show that, according to judicial definition, this is not true of local and general laws as those terms are used in the state constitution. See *supra*, note 35, and accompanying text.

116. Quoted in *Mass. Const. Debates* at 317. This conclusion is reached also by those who prepared A Suggested State Constitution in Appendix A of Willis, *Constitutional Law* (1936) 1002, art. IV, sec. 1 of which reads: "The General Assembly shall pass no local or special laws * * *."