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Unconstitutional State Special Laws: Is Rational Basis Review the Rational Solution?

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NOTE

Unconstitutional State Special Laws: Is Rational Basis Review the Rational Solution?

City of Aurora v. Spectra, 592 S.W.3d 764 (2019).

Chloe Slusher[*]

I. INTRODUCTION

For centuries, scholars, judges, and lawmakers have argued over the role of the judiciary in striking down laws created by a democratically elected legislature.[1] This problem has come to be known as the "Countermajoritarian Difficulty."[2]

The famous *Carolene Products* footnote offers one widely accepted answer to the Countermajoritarian Difficulty.[3] It stipulates that the judiciary should only invalidate laws that violate fundamental rights specified in the Constitution, disadvantage discrete or insular minorities, or undermine the political process.[4] This approach promised judicial deference and allowed the legislature to create economic regulations.[5]

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[1] Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 61–62 (1989).

[2] The countermajoritarian difficulty describes the inherent tension between the ability of the judiciary to exercise judicial review to strike down laws and principle that democratically elected officials should create the laws. ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (Yale Univ. Press, 2d ed. 1986).

[3] Chemerinsky, *supra* note 1, at 68–69.

[4] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

[5] Chemerinsky, *supra* note 1, at 68–69.

Debates on this subject typically involve federal courts.[6] However, the Supreme Court of Missouri's decision in *City of Aurora v. Spectra* raises these same issues on a state level.[7]

In cases like *Spectra*, Missouri courts have grappled with how to interpret the Missouri Constitution's special laws provision.[8] Special laws are statutes that benefit an individual as opposed to the public.[9] Special laws cases have created the same countermajoritarian issues that scholars have struggled with for centuries.[10] What amount of deference to the legislature should Missouri state courts allow when reviewing special laws that benefit an individual or locality as opposed to the public as a whole?

City of Aurora purports to solve this dilemma by reinforcing that rational basis review is the correct standard for reviewing special laws.[11] The court's holding, however, is dangerously vague.[12] When deciding whether a special law survives rational basis review, the court has two options.[13] The court could ask whether the legislature has a rational basis for including the specific class of persons that is in the law.[14] If the court took this route, there will almost always be a rational basis as to why the legislature included the specific class. The court will have abdicated the responsibility delegated to them by the Missouri Constitution to strike down impermissible special laws by instituting a standard of review so low that any law can survive.[15] Instead, the court should have specified that special laws are permissible if the legislature has a rational basis for excluding a similarly situated group.[16] This standard of review would strike the perfect balance between judicial deference to the democratically elected legislature while allowing the court to inquire into whether the legislature is unfairly giving out advantages to specific groups.

Part II of this Note describes the facts and holding of *City of Aurora v. Spectra.* Part III gives a summary of the Missouri Special Laws doctrine. Part IV reviews the reasoning of *City of Aurora v. Spectra*.

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[6] BICKEL, *supra* note 2, at 9.

[7] 592 S.W.3d 764 (2019).

[8] *Id.*

[9] Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415, 422–23 (2019).

[10] *See* Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719, 742 (2012).

[11] *City of Aurora*, 592 S.W.3d at 781.

[12] *See id.* at 780–82.

[13] Blaske v. Smith & Entzeroth, Inc, 821 S.W.2d 822, 832 (1991) (en banc).

[14] *Id.*

[15] MO. CONST. art. III, § 40.

[16] *Blaske*, 821 S.W.2d at 832.

Finally, Part V suggests courts should ask whether the legislature had a rational basis for excluding certain groups from the special law. This strikes a balance between providing deference to the legislature and allowing the judiciary to step in when the legislature acts in a countermajoritarian manner, a function typically reserved for courts.

II. FACTS AND HOLDING

In 2012, the Cities of Aurora, Cameron, and Oak Grove, Missouri ("Cities") brought a declaratory judgment action against CenturyLink, an internet service company, alleging that it had not paid all the required license taxes owed under the Cities' respective ordinances.[17] The Cities also alleged that CenturyLink failed to enter into right-of-way agreements with Cameron and Wentzville and failed to pay linear foot fees under Cameron's right-of-way ordinance. [18] CenturyLink denied failing to pay the taxes and linear foot fees.[19] CenturyLink also denied being required to enter into right-of-way user agreements with Cameron and Wentzville.[20] Section 67.1846.1 of the Missouri Revised Statutes banned cities from enacting linear foot fees but created an exception that allowed grandfathered political subdivisions to continue their fees.[21] The Cities asserted that this exception allowed their linear foot fees to be enforceable.[22] CenturyLink claimed that the exception for grandfathered political subdivisions was a constitutionally invalid special law under Article II of the Missouri Constitution which prohibits any special law

[17] *City of Aurora*, 592 S.W.3d at 770–71. The Cities' ordinances included a license tax on telephone companies. *Id.* A license tax is a fee paid to the government for the privilege of being licensed to do something. There was also an ordinance which required certain utilities to enter into a public right-of-way agreement. *Id.* A public right-of-way agreement is an agreement that a city makes, typically with utility companies, that allows the company to use city property to provide utilities. The last contested ordinance was a linear foot fee which required fees for utilities using the public right-of-way. Linear foot fees are fees paid to the city in exchange for the right to use the public right-of-way. *Id*.

[18] *Id.*

[19] *Id.*

[20] *Id.* at 771–72.

[21] *Id*. at 772; MO. REV. STAT. § 67.1846 (2016). Under the statute, a grandfathered political subdivision is any political subdivision that has enacted linear foot fees on a public right-of-way user before May 1, 2001. *City of Aurora*, 592 S.W.3d at 772 n.4.

[22] *Id.* at 772.

where a general law could be made.[23] CenturyLink claimed this law was special because it applied only to certain subdivisions, and no other cities could ever enter into the class included in the statute because of the date restriction.[24]

The Cities moved for partial summary judgment as to the license tax and the right-of-way agreements.[25] The trial court granted partial summary judgment, holding the linear foot fees to be constitutional and ordering CenturyLink to pay the fees.[26] The case proceeded to trial in 2016 on the limited issue of damages.[27] After trial, the parties cross-appealed.[28] Since CenturyLink raised a constitutional issue the appeal went directly to the Supreme Court of Missouri.[29] The Supreme Court held that the legislature had a rational basis for the grandfathered political subdivision exception under section 67.1846.1, and it was therefore enforceable and a permissible special law under Article III of the Missouri Constitution.[30]

III. LEGAL BACKGROUND

Special laws are statutes that benefit an individual or specific group of individuals instead of the public.[31] Many state constitutions include prohibitions on specific types of special laws and include a provision that does not allow a special law where a general law would work instead.[32] In

[23] *Id.*; MO. CONST. art. III, § 40 (29); MO. REV. STAT. § 67.1846 (2016). CenturyLink asserted two more affirmative defenses. *City of Aurora*, 592 S.W.3d at 772. First, that the Cities' claims were barred to the extent that they sought to collect tax on services and revenue streams beyond what was permitted by the Cities' ordinances. *Id.* CenturyLink also contended that Cameron and Wentzville's user permits created and impermissible mandatory franchise for use of the public right-of-way. *Id.*

[24] *Id.* at 774.

[25] *Id.* at 772.

[26] *Id.* Before trial, the Cities filed for partial summary judgment again on the basis of additional license taxes and back taxes. The trial court found in favor of the Cities on both issues. *Id.*

[27] *Id.* at 773. The trial court found for the Cities' and declared each Cities' tax base for purposes of calculating the damages for unpaid taxes. *Id.*

[28] *Id.* at 774. CenturyLink appealed on a claim that the trial court should not have awarded the Cities' linear foot fees since it is an unconstitutional special law. *Id.* The Cities' appealed the trial court's determination of damages. *Id.* at 793.

[29] *Id.* at 774.

[30] *Id.* at 782 (referring to MO. CONST. art. V, § 3 (1945)).

[31] Zoldan, *supra* note 9, at 315.

[32] Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth–Century United States*, 46 AM. J. LEGAL HIST. 271, 271 (2004).

Missouri, according to Article III §40, judicial review is the mechanism for determining which special laws are permissible.[33] Allowing judges to strike down special laws they deem impermissible because a general one would be applicable potentially gives the judiciary a broad power to override laws enacted by a democratically elected legislature.

A. The Principle of Judicial Deference

Since our country's founding, the role of the judiciary in the United States has been largely debated.[34] The doctrine of separation of powers dictates that the legislature's role is to create laws.[35] While in certain situations, the judiciary has the power to strike down those laws, it should only do so if absolutely necessary.[36] Additionally, according to what is known as the "Countermajoritarian Difficulty," if the foundation of our governmental system is democracy, unelected judges should not have the ability to strike down laws created by a legislature elected by a majority of the people.[37]

Ideas about what amount of judicial deference to the legislature is appropriate have fluctuated throughout history.[38] It is widely agreed that judicial deference was at its lowest level during the early 1900s, known as the *Lochner* Era.[39] During this period, the Supreme Court articulated the belief that it was the judiciary's role to carefully examine legislation that interfered with the freedom to contract.[40] By scrutinizing economic legislation, the Court essentially treated the freedom to contract as a fundamental right.[41] Since then, this judicial activism by the Court has largely been renounced.[42] *Lochner* is seen as part of the Supreme Court "anti-canon" because unelected judges were substituting their values for those of the democratically elected legislatures to protect rights that were

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[33] MO. CONST. art. III, § 40(30).

[34] *See* Marbury v. Madison, 5 U.S. 137, 138 (1803); BICKEL, *supra* note 2, at 16.

[35] I.N.S. v. Chadha, 462 U.S. 919, 951 (1983).

[36] *See Marbury*, 5 U.S. at 178.

[37] BICKEL, *supra* note 2, at 16.

[38] *See Marbury*, 5 U.S. at 177; *see* Lochner v. New York, 198 U.S. 45, 57 (1905); *see* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[39] David E. Bernstein, Lochner v. New York*: A Centennial Retrospective*, 83 WASH. U. L. Q. 1469, 1472 (2005).

[40] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 667 (6th ed. 2019).

[41] *Id.* at 666.

[42] *Id.* at 668–69, 672.

not expressly protected by the Constitution.[43] Additionally, post-*Lochner* decisions held that the Court should defer to laws that regulate the economy because the right of contract is not a fundamental right.[44]

The *Lochner* Era ended with *West Coast Hotel v. Parrish.*[45] Since then, the widely accepted answer to the Countermajoritrian Difficulty and the appropriate amount of judicial deference is found in the *Carolene Products* footnote number four.[46] The *Carolene Products* footnote states that the judiciary should only invalidate laws that violate fundamental rights specified in the Constitution, disadvantage discrete or insular minorities, or undermine the political process.[47] This approach promised judicial deference and allowed the legislature to create economic regulations.[48]

B. Development of Missouri Special Laws Jurisprudence

In 1875, after the first inclusion of a special laws provision in the Missouri Constitution, courts immediately began to grapple with what counts as a special law and which ones were permissible.[49] When reviewing whether a special law was permissible, courts first asked whether there was a reasonable basis for the classification in the law.[50] This standard of review was eventually renamed rational basis but asked the same question.[51] However, courts eventually altered the standard by introducing the substantial justification test.[52] *City of Aurora* resolves these inconsistencies in the standard of review for special laws and represents a return to early special laws doctrine.[53] This section outlines how the Supreme Court of Missouri has changed its view on special laws and created varying standards of review over time.

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[43] *Id.* at 672–73. The anticanon are a small group of Supreme Court decisions that have been widely recognized as mistakes. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011).

[44] *See id.* at 673.

[45] *See generally* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); *see also* CHEMERINSKY, *supra* note 40, at 675.

[46] United States v. Carolene Prod. Co., 304 U.S. 144, 152 n.4 (1938).

[47] *Id.*

[48] Chemerinsky, *supra* note 1, at 60–61.

[49] *See* State ex rel. Lionberger v. Tolle, 71 Mo. 645, 649 (1880).

[50] Miners Bank v. Clark, 158 S.W. 597, 599 (1913).

[51] Blaske v. Smith & Entzeroth, Inc, 821 S.W.2d 822, 829 (Mo. 1991) (en banc).

[52] *See* Dishman v. Joseph, 14 S.W.3d 709 (Mo. Ct. App. 2000).

[53] *See* City of Aurora v. Spectra, 592 S.W.3d 764, 777 (Mo. 2019) (en banc).

1. Early History of Special Legislation

The term "special legislation" refers to statutes that benefit an individual as opposed to the public.[54] Special legislation made up eighty-seven percent of state legislation passed in Missouri before 1859 and was popular in state legislatures nationwide.[55] Special legislation topics varied.[56] Many special laws benefitted well-connected individuals that had the political power to ask the lawmakers from their county to grant them a favor that a judge was unlikely to do.[57] Other special laws benefitted specific municipalities by giving them advantages that the legislature would be unwilling to give to the state as a whole.[58] Examples included laws enacted to divorce couples, change interest rates at individual banks, alter terms in wills and trusts, and create local tax laws and special tax exemptions.[59]

The prevalence of special legislation caused legislators to spend their time persuading fellow legislators to exchange votes for each other's special laws.[60] Since special legislation did not apply to other legislators' districts, many lawmakers voted for special legislation without considering the merits of the bill.[61] Effectively, individual legislators had vast powers concerning every legislative matter that affected their localities.[62] The popularity of special legislation transformed the state legislatures into countermajoritarian institutions, institutions that did not respond to the majority in a democratic society.[63] Instead, the laws passed came only from the will of the wealthy elite.[64] This allowed powerful lobbyists and corruption to take hold.[65] This phenomenon was prevalent

[54] Ireland, *supra* note 32. Local legislation is a type of special legislation that benefits specific localities rather than the state as a whole. *Id.* Typically, both special and local legislation are governed using the same standards and the terms are used interchangeably. *Id.*

[55] Jefferson Cnty. Fire Prot. v. Blunt, 205 S.W.3d 866, 868 (2006).

[56] Ireland, *supra* note 32.

[57] *Id.* at 274.

[58] *Id.* at 283.

[59] *Id.* at 280–91; *see generally* Long, *supra* note 10, at 726.

[60] Ireland, *supra* note 32, at 273–74; Long, *supra* note 10, at 727.

[61] Ireland, *supra* note 32, at 274.

[62] *Id.*; Long, *supra* note 10, at 726.

[63] Ireland, *supra* note 32, at 274; BICKEL, *supra* note 2, at 9.

[64] Ireland, *supra* note 32, at 274.

[65] Ireland, *supra* note 32, at 274.

in state legislatures across the country, and the public rarely received notice of pending special legislation.[66]

Eventually, a movement to end special laws advanced from state to state.[67] By 1875, at the Missouri Constitutional Convention, there was a "unanimous desire to provide against special legislation."[68] The delegates felt that the practice had caused "neglect and prejudice of public interests.[69] As a result, the Constitutional Convention of 1875 included a prohibition on certain special laws.[70] Subsequent constitutional conventions have continuously included the prohibition in the following revisions of Article III of the Constitution.[71] The special laws provision of the Constitution banned certain categories of special laws.[72] The convention felt that judicial intervention was required to protect public interests from the economic elite minority that had grabbed hold of the legislature through special laws.[73]

The current version of the constitutional prohibition on special legislation lists several specific categories of special laws that the legislature cannot pass.[74] The provision also states that the legislature cannot pass any special law where a general law could be made applicable.[75] Whether a general law could be applicable is a judicially determined question.[76]

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[66] Ireland, *supra* note 32, at 276.

[67] Long, *supra* note 10, at 728.

[68] 5 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 60 (Isidor Loeb & Floyd C. Shoemaker eds., The State Historical Society of Missouri 1938) (Statement of Mr. Priest).

[69] 2 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875 878 (Isidor Loeb & Floyd C. Shoemaker eds., The State Historical Society of Missouri 1920).

[70] Jefferson Cnty. Fire Prot. Dist. Ass'n v. Blunt, 205 S.W.3d 866, 870 (Mo. 2006) (en banc).

[71] *See id.*

[72] MO. CONST. art. III, § 40 (1)–(29).

[73] *See* 2 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, *supra* note 69; *Blunt*, 205 S.W.3d at 869.

[74] MO. CONST. art. III, § 40 (1)–(29). Some of the specific categories of special laws that the legislature cannot pass include granting divorces, changing the venue in criminal or civil case, and giving effect to informal or invalid wills or deeds. MO. CONST. art. III, § 40 (2)–(3), (10).

[75] MO. CONST. art. III, § 40 (30).

[76] *Id.* The Constitution also specifies that the legislature may not indirectly enact a special law by partially repealing a general law. MO. CONST. art. III, § 41. The Constitution also indicates that the government cannot pass a special law without providing notice in the locality affected at least 30 days before the introduction of the bill to the general assembly. MO. CONST. art. III, § 42.

In 1880, the Supreme Court of Missouri explained the difference between special and general laws.[77] In *State ex rel. Lionberger v. Tolle*, the court stated that a statute that refers to persons or things as a class is a general law.[78] In contrast, a statute related to specific persons or things of a class, regardless of how many, is special.[79] A few years later, in *Humes v. Missouri Pac. Ry. Co.*, the Supreme Court of Missouri revisited the issue and stated that "class legislation is not necessarily obnoxious to the constitution."[80] The court further clarified what counts as a special law holding that a legislative act that applies to all people who are or who may come into similar situations and circumstances is not special.[81] Art. III, Sec. 40 asserts that the question of whether a law is special is a question for the courts.[82] However, the *Humes* court specified that courts should approach the striking down of legislative acts with caution and that the ballot box better corrects the errors of the legislative body.[83]

2. The Introduction of Reasonable Basis Review

The Supreme Court of Missouri continued employing both *Humes* and *Lionsberger* when determining whether a law was a permissible "special" law until 1914 when it decided *Miners Bank v. Clark*.[84] The court did not abandon the previous definitions but instead added to them by announcing the reasonable basis standard.[85] The reasonable basis standard asks whether the legislature had a reasonable basis for creating the special law.[86] If it did, the law is a permissible special law.[87] In *Miners*, the statute in question allowed certain property owners to object to street paving without giving other property owners who did not live in the area that right.[88] The court found that this special law was acceptable under the Constitution because there was a reasonable basis for including only landowners who owned property in the area to be paved.[89] In *City of*

[77] State ex rel. Lionberger v. Tolle, 71 Mo. 645, 650 (1880).
[78] *Id.*
[79] *Id.*
[80] Humes v. Mo. Pac. Ry. Co., 82 Mo. 221, 231 (1884).
[81] *Id.*
[82] MO. CONST. art. III, § 40 (30).
[83] *Humes*, 82 Mo. at 231–32.
[84] Miners Bank v. Clark, 158 S.W. 597 (Mo. 1913).
[85] *Id.* at 599.
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.*

Springfield v. Stevens, the court upheld a law prohibiting taxi cab drivers from possessing or transporting alcoholic beverages.[90] Even though the law was special since it excluded other vehicles used for transportation of passengers, the court upheld the law because it included all who were similarly situated, and there was a reasonable basis for the classification.[91]

The *McKaig v. Kansas City* court overturned a law that prohibited automobile sellers from keeping their place of business open on Sundays.[92] As in *City of Springfield*, the court looked at the larger class of which automobile sellers were a part, which included sellers of all other merchandise, and asked whether there was a reasonable basis to exclude the rest of the class.[93] The court found no reasonable basis for singling out people who sold automobiles and excluding those who sold other machines.[94] *McKaig* emphasized the importance of questioning the suitability of those excluded from the law.[95] According to the justices, it is not what a law includes that makes it special but what it excludes.[96]

In 1991, *Blaske v. Smith & Entzeroth* asked the Supreme Court of Missouri whether a statute of repose was an impermissible special law.[97] The statute specifically protected architects and engineers from liability arising out of an unsafe condition of any improvement made on real property.[98] The plaintiff challenged the law under both the Missouri special laws constitutional provision and as a violation of federal equal protection.[99] The court held that the statute of repose was a permissible special law and did not violate equal protection.[100] The court noted the similarity of special laws doctrine to federal equal protection law in circumstances where neither a fundamental right nor suspect class is involved.[101] When neither a fundamental right nor a suspect class is involved, the appropriate standard of review is rational basis to determine

[90] City of Springfield v. Stevens, 216 S.W. 2d 450, 455 (Mo. 1949) (en banc).

[91] *Id.* (The court specified that when analyzing special laws and whether a general law could be made applicable under § 40, there is a presumption that the law is constitutional, which a party challenging the law must overcome).

[92] McKaig v. Kansas City, 256 S.W. 2d 815, 817–18 (Mo. 1953) (en banc).

[93] *Id.* at 818.

[94] *Id.*

[95] *Id.* at 817.

[96] *Id.*

[97] Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822, 825 (Mo. 1991) (en banc).

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.* at 829.

whether a special law is permissible or not.[102] The justices continued to employ the substance of the reasonable basis test but added equal protection language to institute rational basis review for special laws.[103] According to *Blaske*, the test for whether special legislation is permissible is whether there is a rational basis for the legislature's distinction.[104]

3. The Shift to Substantial Justification Test

Eventually, the court altered rational basis review and added the substantial justification test for special legislation cases.[105] This test created a tiered standard of review that essentially found all special laws that were based on close ended characteristics to be impermissible.[106] Under this test, courts first ask whether the classification in the special law is based on open-ended or close-ended characteristics.[107] A law is open-ended if others may fall into the classification.[108] An example of an open-ended classification is one based on population because as cities shrink or grow, they can fall into or out of a class.[109] A law that is based on open-ended characteristics is not facially special and is presumed to be constitutional.[110] Once a law is presumed to be constitutional, rational basis review is used.[111] To meet rational basis review, the party challenging the statute's constitutionality must show that the classification is arbitrary and has no rational relationship to a legislative purpose.[112] A classification that focuses on immutable characteristics is close-ended.[113]

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[102] *Id.*

[103] *Id.*

[104] *Id.* The court found there was a rational basis for the statute in question in Blaske. *Id.* at 831.

[105] *See* City of Saint Louis v. State, 382 S.W.3d 905, 915 (Mo. 2012) (en banc). Rational basis review was not completely abandoned by the court and was used in Blaske. *Blaske*, 821 S.W.2d at 829. However, in the cases directly before and after Blaske, the court used alternative tests. Other than in Blaske, the court did not return to rational basis until City of Aurora. City of Aurora v. Spectra, 592 S.W.3d 764, 781 (Mo. 2019) (en banc).

[106] *See, e.g.*, *City of Saint Louis*, 382 S.W.3d at 914; City of Normandy v. Greitens, 518 S.W.3d 183, 191 (Mo. 2017) (en banc); Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 870 (Mo. 2006).

[107] *City of Saint Louis*, 382 S.W.3d at 914.

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *See id.* at 915.

[112] *Id.*

[113] Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. 1997) (en banc).

Examples of close-ended characteristics include historical facts, geography, or constitutional status.[114] A constitutional status is a status set out for a group in the Missouri Constitution.[115] An example of a status set out in the Missouri Constitution is that the Highway Department is a part of the executive branch of government as opposed to the legislative.[116] If a statute is based on close-ended characteristics, it is presumed to be unconstitutional since others cannot enter and leave the group.[117] The burden shifts to the party defending the statute to demonstrate substantial justification for the special treatment.[118] In creating the tiered standard of review, the court implicitly conflated the question of whether a classification is based on close or open-ended characteristics with the initial determination of whether the law was special. In most cases, if the law was based on close-ended characteristics, it would be overturned as an impermissible special law.[119] In contrast, if the law was based on open-ended characteristics, it would survive review regardless of whether the law was special.[120]

The beginnings of this test can be traced back to *Walters v. City of Saint Louis*.[121] Under *Walters,* legislation that is specific to cities with a certain population size is not special.[122] "So long as it applies to all within, or that may come within, the enumerated class during its effective period" it is not special legislation.[123] The court called this the rule of open-endedness.[124]

The court reasoned that classifications based on population and the rule of open-endedness allowed the legislature to address unique problems of cities of certain sizes.[125] Cities that grow or shrink could be brought into the new classification and have legislation already tailored to the

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[114] *City of Saint Louis*, 382 S.W.3d at 914.

[115] Kasch v. Dir. of Revenue, State of Mo., 18 S.W.3d 97 (Mo. Ct. App. 2000).

[116] *Id.*

[117] City of Normandy v. Greitens, 518 S.W.3d 183, 191 (Mo. 2017) (en banc).

[118] *Id.* at 196.

[119]*See, e.g.*, *City of Saint Louis*, 382 S.W.3d at 914; City of Normandy v. Greitens, 518 S.W.3d 183, 191 (Mo. 2017) (en banc); Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 870 (Mo. 2006).

[120]*See, e.g.*, *City of Saint Louis*, 382 S.W.3d at 914; *City of Normandy*, 518 S.W.3d at 191; *Blunt*, 205 S.W.3d at 870.

[121] *See* Walters v. City of Saint Louis, 259 S.W.2d 377 (Mo. 1953) (en banc).

[122] *Id.* at 383.

[123] *Id.*

[124] *Id.* at 382.

[125] *Id.*

needs of that population size.[126] According to *Walters*, the logical conclusion must be that classifications based on population are open-ended, so the rule of open-endedness applies.[127] Therefore, the statute is a general law, even when it appears that practically no other city will come within that population classification.[128] The court then concluded that when a statute is open-ended the correct level of review is rational basis.[129]

Next, *Airway Drive-In Theatre Co. v. City of St. Ann* introduced the term substantial justification.[130] This case reviewed the constitutionality of a license tax under a different provision of the Missouri Constitution.[131] The Supreme Court of Missouri deemed the tax to be unconstitutional because it was arbitrary and not substantially justified.[132] The phrase substantial justification was then used in the dissenting opinion of an equal protection case. The dissent equated substantial justification with rational basis.[133] After *Walters* and *Airway*, the court frequently used both substantial justification and open versus close-ended language in special laws cases while maintaining reasonable basis language of earlier cases without instituting a clear standard of review.[134]

In 1993, *O'Reilly v. City of Hazelwood* combined all of these cases to create new doctrine in the form of the completed substantial justification test.[135] The statute at issue allowed any first-class county with a charter government that adjoined a city not within a county to create a boundary commission for annexation.[136] The City of Hazelwood and St. Louis County created a boundary commission to annex the unincorporated areas around them.[137] In response, O'Reilly sued claiming that the law was an impermissible special law because the only county that met the statute's specification was St. Louis County. The court declared the statute

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[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 379.

[130] Airway Drive-In Theatre Co. v. City of St. Ann, 354 S.W.2d 858, 861 (Mo. 1962) (en banc).

[131] *Id.* at 859.

[132] *Id.* at 861.

[133] Associated Indus. of Mo. v. State Tax Comm'n, 722 S.W.2d 916, 925 (Mo. 1987) (en banc).

[134] *See, e.g.*, *Airway*, 354 S.W.2d 858 (Mo. 1962) (en banc); *Walters*, 259 S.W.2d 377 (1953).

[135] O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993) (en banc).

[136] *Id.*

[137] *Id.* at 98.

unconstitutional.[138] The law was based on close-ended characteristics, and St. Louis County did not show substantial justification for why the statute included certain counties while excluding other similar counties.[139]

The open versus close test was modified for the final time in *Jefferson County Fire Protection v. Blunt*.[140] The court stated that in certain situations, a narrow population range can be considered a close-ended classification and therefore presumed to be a special law requiring substantial justification.[141] In *Jefferson County Fire Protection*, the statute did not allow certain fire protection districts to adopt fire protection codes for home construction.[142] The statute applied to fire protection districts with more than 198,000 but fewer than 199,200 inhabitants. According to the court, the rationale found in *Walters* for classifying population as open-ended fails where the classification is so narrow that others practically will never fall into it.[143]

The court provided a three-prong test to overcome the presumption that a population-based classification is constitutional.[144] The presumption is overcome if (1) a statute contains a population classification that includes only one political subdivision, (2) other political subdivisions are similar in size to the targeted political subdivision, yet are not included, and (3) the population range is so narrow that the only apparent reason for the narrow range is to target a particular political subdivision and to exclude all others.[145] If all three elements of this test are met, the law is not presumed to be constitutional, and those defending the law must show substantial justification for the classification.[146]

In the past sixty years, the transition to combining the traditional rational basis review with substantial justification to create new doctrine seemed to be cemented as the special laws test. However, in *City of Aurora v. Spectra*, the court abandoned the substantial justification test and returned to the traditional rational basis review.[147]

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[138] *Id.* at 99.

[139] *Id.*

[140] Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 870 (Mo. 2006).

[141] *Id.* at 872.

[142] *Id.* at 867.

[143] *Id.*

[144] *Id.* at 870–71.

[145] *Id.*

[146] *Id.* at 871.

[147] City of Aurora v. Spectra Communs. Grp., 592 S.W.3d 764, 781 (Mo. 2019).

IV. INSTANT DECISION

In *City of Aurora*, the Supreme Court of Missouri re-instituted rational basis review for special laws cases.[148] The court decided whether CenturyLink should be forced to pay the linear foot fees under the city of Cameron's right-of-way ordinance.[149] CenturyLink argued that such fees were prohibited by statute and the exemption that purported to allow the fees under 67.1846.1 was a constitutionally invalid special law.[150] To decide whether the exemption allowing linear foot fees was an unconstitutional special law, the court first analyzed the threshold requirement of whether the statute was a special law in the first place.[151] If a statute is not a special law, neither the notice requirement under Article III, Section 42 nor the specific prohibitions under Article III, Section 42 subdivisions 1-30 apply.[152]

In her opinion, Judge Breckenridge accepted the *Humes* test that "a statute which relates to persons or things as a class is a general law, while a statute which relates particular persons or things of a class is special, and that classification does not depend on numbers."[153] Judge Breckenridge also acknowledged that special legislation is not necessarily obnoxious to the constitution.[154]

According to the majority, a legislative act that applies to all persons who are or may come into similar situations and circumstances is not a special law.[155] The court endorsed the historical view that if a reasonable basis supports the criteria for a class in a statute, then the statute is not a special law, and therefore the constitutional analysis can stop there.[156] Judge Breckenridge held that the Supreme Court of Missouri correctly adopted reasonable basis review in 1913.[157] The opinion explicitly analogized the special laws review to equal protection rational basis doctrine.[158]

The majority recognized that the rational basis analysis had diminished over the years and that the substantial justification test had

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[148] *Id.*
[149] *Id.* at 771.
[150] *Id.* at 774.
[151] *Id.* at 776.
[152] *Id.*; *see supra* notes 74–76.
[153] *Id.* at 776 (citing State ex rel. Lionberger v. Tolle, 71 Mo. 645, 650 (1880)).
[154] *Id.*
[155] *Id.* (citing Humes v. Mo. Pac. Ry. Co., 82 Mo. 221, 230 (1884)).
[156] *Id.* (citing Blaske v Smith & Entzeroth, Inc, 821 S.W.2d 822 (1991)).
[157] *Id.*
[158] *Id.* at 777.

gained traction.[159] The court stated that incorrect distinctions between open-ended and close-ended criteria had been made in the past.[160] According to Judge Breckenridge, the last step in the wrong direction was taken when the court placed the burden of presenting evidence of substantial justification on the party defending the statute.[161]

The expansion of the analysis to encompass whether a statute's classification is based on open or close-ended criteria and to require substantial justification does not "comport with the plain language of Article III, Section 40.[162] According to the court, the correct reading of Article III, Section 40 does not suggest that certain special laws are presumptively invalid.[163] Therefore, the idea that such presumption can be overcome if the classification is supported by substantial justification is also wrong.[164]

Instead, the court asserted that every law is entitled to a presumption of validity under the constitution.[165] If the classification drawn by the legislature is supported by a rational basis, the law is not considered special and the analysis ends.[166] If there is no rational basis for the classification, the threshold requirement for Article III, Section 40 is met and the party challenging the statute must show the second element of the test.[167] The second question asks whether the law violates one of the specific prohibitions on special laws in Article III, Section 40, subdivisions 1 through 29 or if the law is one where a general law can be made applicable under subdivision 30.[168] The court clearly stated that a law will be presumed valid and the burden of showing both elements will ordinarily reside with the party challenging the statute.[169]

The court went on to explain that by shifting the burden of proof to the party defending the law to show substantial justification, courts had turned the burden of persuasion that normally applies to a party charged with showing a lack of rational basis in a constitutional context into a mandatory requirement for the production of evidence to defeat summary

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[159] *Id.* at 778.
[160] *Id.*
[161] *Id.* at 779.
[162] *Id.*
[163] *Id.* at 779–80.
[164] *Id.*
[165] *Id.* at 780.
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

judgment.[170] According to the court, this burden shifting unnecessarily heightens the level of scrutiny used in the threshold determination of whether a statute is a special law.[171] Judge Breckenridge noted that this heightened level of scrutiny blurs the line between the threshold requirement of whether a statute is a special law in the first place and whether it is a special law that is unconstitutional.[172] Instead, the court must first decide whether the law is special and then move to the question of whether it is a special law that is impermissible.[173] The court explicitly overturned the substantial justification doctrine by stating that the burden-shifting and the substantial justification test have no basis in Article III, sections 40–42, and should no longer be followed.[174] According to the majority, the court should return to rational basis review.[175]

The court then went on to apply rational basis review to the linear foot fees.[176] The exemption under section 67.1846.1 that claims to allow linear foot fees does not apply to all subdivisions.[177] Instead, the provision excludes any subdivision that enacted linear foot fees after May 1, 2001.[178] The court noted that normally, the party defending the constitutional validity of a statute under rational basis review does not bear the burden of proof at trial.[179] However, because the Cities moved for summary judgment, they bore the burden of showing the provision was supported by a rational basis.[180]

Under rational basis review, the court will uphold the statute if it finds a "reasonably conceivable state of facts that provide a rational basis for the classifications."[181] Finding a rational basis is an objective inquiry that does not depend on the legislature's subjective intent in creating the classification.[182] Judge Breckenridge clarified that whether the statute is based on open-ended or close-ended criteria can shed light on whether

[170] *Id.*
[171] *Id.* at 781.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.* at 782.
[177] *Id.* at 781.
[178] *Id.* at 782.
[179] *Id.* at 781.
[180] *Id.*
[181] *Id.*
[182] *Id.*

there is a rational basis for the classification, but it does not decide the issue.[183]

Here, the court found that cities have likely chosen not to pursue revenue from other sources by enacting linear foot fees.[184] Existing revenue would be lost without the provision allowing linear foot fees to continue if they were enacted before May 1, 2001.[185] Protecting previous sources of revenue for subdivisions that enacted linear foot fees before May 1, 2001 supports a rational basis for creating the classification.[186] This classification balances the reasonable reliance of the subdivisions that chose linear foot fees to raise revenue when doing so was lawful with the legislature's motive to implement a policy that stops cities from continuing the use of that method of raising revenue.[187] That balance was a logical effort to create new policy without disrupting those which prompted the legislature to enact linear foot fees before the change in policy, and therefore 67.184.1 is not a special law.[188]

V. COMMENT

After *Spectra*, the standard of review for special laws is rational basis.[189] While the court did clarify uncertainty in special laws doctrine, the holding falls short. Rational basis could potentially be used to effectively interpret the Missouri special laws provision out of the constitution. To give the effect to the provision while balancing judicial review, the court should have clarified that the standard of review for special laws is whether the legislature had a rational basis for the class that was excluded from the special law.[190]

Rational basis is a low standard. This raises the question of whether such a low standard of review would make the prohibition on special laws ineffective since almost any law can survive review.[191] If the prohibition no longer has effect, the judiciary could be seen as abdicating the responsibility constitutionally delegated to the court in the special laws provision of the Missouri Constitution.

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[183] *Id.* at 781–82.

[184] *Id.* at 782.

[185] *Id.* at 782.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] *Id.* at 781.

[190] *Id.*

[191] Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational Basis Bite?*, 90 N.Y.U. L. REV. 2070, 2070 (2015).

Special laws doctrine must strike a balance between allowing the judiciary to step in when the legislature has acted in a countermajoritarian manner by enacting a special law unfairly benefiting a single group while still observing judicial deference to the elected legislature. Special laws provisions were enacted into many state constitutions in the late 1800s as a reaction to wealthy, well-organized institutions with narrow preferences dominating the legislative process.[192] The movement towards restricting special laws aimed to protect the democratic process from the capture of elite economic minorities.[193] According to the historical context of the special laws provision, the role of courts should be to intervene when powerful minorities are receiving unfair advantages in the legislative process.[194] Judicial review of statutes and ordinances created by elected bodies raises countermajoritarian concerns.[195] However, special laws raise their own countermajoritarian concerns as they go against the majority to benefit a specific group.[196]

At the same time, the legislature needs the ability to address the specific needs of certain groups.[197] The role of the courts is not to usurp legislative power with judicial activism.[198] The Missouri Constitutional Convention did not envision a system where courts use special laws doctrine to insert their own beliefs and override the will of the elected legislature.[199] In fact, the concerns that gave rise to the enactment of special laws provisions were rooted in the idea that legislation should be based on a will of the majority of the people and not directed toward an elite minority.[200] If too much power is given to judges to strike down special laws, the purpose of the special laws provision to protect the majority from an elite minority will be defeated and instead the power will have gone from one elite minority to another. Therefore, a special laws test which provides a certain level of deference to the legislature elected by the people is most appropriate.

The substantial justification test previously used by the court is problematic because it creates a heightened level of review for special laws which are mainly economic regulations. The substantial justification test

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[192] Ireland, *supra* note 32, at 294–99.

[193] Long, *supra* note 10, at 726–27.

[194] *See id.*

[195] *See id.* at 722.

[196] *Id.*; BICKEL, *supra* note 2, at 17.

[197] Walters v. City of Saint Louis, 259 S.W.2d 377, 386 (1953).

[198] BICKEL, *supra* note 2, at 128.

[199] 2 DEBATES OF THE MISSOURI CONSTITUTIONAL CONVENTION OF 1875, *supra* note 69.

[200] Long, *supra* note 10, at 719.

mirrors the immutable characteristics doctrine of equal protection.[201] Under federal equal protection doctrine, statutes that classify based on immutable characteristics such as race and gender are given a heightened standard of review by courts.[202] Similarly, the substantial justification doctrine affords statutes that classify based on close-ended characteristics a heightened standard of review of substantial justification.[203] Immutable characteristics create the same concern that close-ended characteristics do.[204] Immutable characteristics are concerning in equal protection jurisprudence because they are characteristics that attach themselves to an individual, are often part of their identity and cannot easily be changed.[205] Similarly, close-ended characteristics such as historical facts, geography, or constitutional status attach themselves to the thing being regulated and are not easily changed.[206]

The issue with treating close-ended characteristics in a manner similar to immutable characteristics is that special laws prohibitions are for the most part meant to regulate economic interests.[207] Whenever the judiciary strikes down a law created by a democratic legislature, the Countermajoritarian Difficulty is raised.[208] *Carolene Products* offers an answer to that difficulty by reserving heightened strict scrutiny for laws that burden fundamental rights, undermine the political process, or discriminate against discrete and insular minorities.[209] During the reign of Lochnerism, courts sometimes treated economic interests as close to immutable.[210] However, this view has been rejected and the modern view is that economic regulations should be reviewed with minimal judicial scrutiny.[211]

Courts have recognized that legislatures must, in the nature of their work, make classifications.[212] These classifications may sometimes benefit one party over another.[213] However, classifications based on race or gender are not of the type that are desirable for the government to

[201] *See* O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993) (en banc).
[202] Long, *supra* note 10, at 745–46.
[203] *O'Reilly*, 850 S.W.2d at 99.
[204] Long, *supra* note 10, at 745–47.
[205] *Id.* at 746.
[206] *O'Reilly*, 850 S.W.2d at 99.
[207] Long, *supra* note 10, at 746.
[208] BICKEL, *supra* note 2, at 17.
[209] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).
[210] Long, *supra* note 10, at 746.
[211] *Id.* at 747.
[212] *See* O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. 1993) (en banc).
[213] *See id.*

make.[214] Therefore, such classifications deserve a heightened scrutiny.[215] In contrast, economic regulations, even ones tailored to the specific needs of one group or locality, are necessary and at times desirable.[216] Therefore, when reviewing special laws courts should defer to the legislature. The substantial justification test created too high of a standard of review for the nature of the topics special laws regulate.[217]

Some scholars argue that due to gerrymandering and districting, state legislatures are often the least majoritarian branch.[218] On the other hand, state judges or the governors that appoint them are elected by a statewide election.[219] Under this theory, the Countermajoritarian Difficulty is lessened when judges strike down laws because the legislature is not elected by a majority of the people.[220] In some circumstances, judicial intervention in striking down laws may even be enforcing majoritarian principles.[221] However, the role of the courts is not to create their own policy.[222] Fundamentally, the role of the legislature is to create laws, especially economic laws.[223] The role of the judiciary is to deferentially review these laws and provide a countermajoritarian check on democratic decision making.[224] If the legislature has turned into a countermajoritarian institution, the institution itself should be fixed. The solution should not come from altering the fundamental role of the courts. If the solution to the legislature turning into a countermajoritarian institution is giving the judiciary more power, our democratic process will be undermined. Instead of fixing the issue, our system of government would consist of two countermajoritarian institutions- the legislature and the judiciary.

After *Spectra*, a law is only special if it does not apply equally to all members of a given class and its disparate treatment of the class members

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[214] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

[215] *Id.*

[216] *Id.*

[217] *See, e.g.*, City of Saint Louis v. State, 382 S.W.3d 905, 914 (Mo. 2012) (en banc); City of Normandy v. Greitens, 518 S.W.3d 183, 191 (Mo. 2017) (en banc); Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt, 205 S.W.3d 866, 870 (Mo. 2006).

[218] Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1735 (2021).

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] BICKEL, *supra* note 2, at 17.

[223] *Id.* at 21.

[224] *Id.*

has no rational basis.[225] However, even if a law qualifies as a special law, the legislature may still enact the law if it is not prohibited by Article III, Sec. 40.[226] While the court has committed to rational basis review, it needs to further clarify how to implement this standard in the context of special laws. There are two ways to apply rational basis review with respect to special laws.[227] One approach is to ask whether there is a rational basis for the inclusion of a certain group.[228] In contrast, courts could ask whether there was a rational basis for what was excluded from the law.[229] If the court interprets the rational basis test to ask whether there is a rational basis for what is included in the law, the special laws provision will effectively be read out of the Missouri Constitution. This is because the legislature almost always finds some conceivable reason for creating the law. The group included likely has some special characteristic that makes the law favorable to them. Therefore, when framing the question as whether the law meets the low bar of a rational basis for including a group, the answer will almost always be yes. This will be true even when a similar group would have also benefitted from legislation but was excluded.

Instead, if the court looks at whether there is a rational basis for the legislature excluding certain groups, the special laws provision will have more force behind it. The analysis for whether the legislature had a rational basis for excluding similar groups would force courts to explicitly compare the groups that were excluded with what was included. In contrast, if the court just looks at whether there is a rational basis for what was included the court does not have to consider the excluded groups at all. While rational basis is still a relatively low bar, the version of the analysis that looks at what groups were excluded forces legislatures and cities to ensure that they are including all groups that are similar and would benefit from legislation instead of favoring just one group.

VI. CONCLUSION

Rational basis review, when used in a way that asks whether there is an actual justifiable basis for the exclusion that honors the intentions of the Missouri Constitutional Convention in including a provision restricting

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[225] Crestwood v. Affton Fire Protection Dist., 620 S.W.3d 618, 623 (Mo. 2021) (en banc).

[226] *Id.*; MO. CONST. art. III, § 40. The law also must comply with the notice requirement in Art. III, Section 42. MO. CONST. art. III, § 40.

[227] Blaske v Smith & Entzeroth, Inc., 821 S.W.2d 822, 832 (Mo. 1991) (en banc).

[228] State v. Gilley 785 S.W.2d 538, 540 (Mo. 1990) (en banc).

[229] McKaig v. Kansas City, 256 S.W.2d 815, 817 (Mo. 1953) (en banc).

special laws. This analysis strikes a balance between maintaining deference to the legislature and the interest in protecting the people from the disproportionate influence of wealthy minorities. Inquiring into the class excluded from the law gives the court the opportunity to actually inquire into whether it was reasonable to exclude a class from the statute or whether the legislature granted unfair benefits to specific groups. Courts should focus the review on whether there is a rational basis for the groups that were excluded from the law. If there is no actual rational basis for excluding similarly situated groups, then the law is an impermissible special law.