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ARTICLES

EQUITY OUTSIDE THE COURTS

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In the Nicomachean Ethics, *Aristotle defined "equity" as the process that intervenes when law fails because of its generality. Equity is largely assumed to be the province of courts and framed primarily as the domain of judges: Should the court apply a general law when its application results in unforeseen or unfortunate consequences? But equity operates outside the courts also. Within legislatures and administrative agencies, equity operates to make general laws more specific, create exceptions, and pass narrowing amendments or regulations. In fact, the lion's share of equitable work has been done outside the courts for much of this nation's history. This Article draws on these histories to expand the field within which equity is identified to include legislatures and agencies. By contrast to the court-centered functional account of "equity," equity outside the courts is a dynamic and discursive practice—not simply a pro-*

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cess—that members of the public engage in as they lobby or petition for exceptions or amendments to general laws—either new or previously proposed or passed. Because these institutions aim to be "representative," equity within legislatures and agencies has fulfilled a representative function and has allowed marginalized and subordinated groups to shape law and shift power. Yet, seeking equity often pushes laws toward specificity and away from the ideal of generality identified by Lon Fuller and others—thereby raising rule of law concerns. A less court-centered account of equity teaches that the generality principle might overlook equity's representational function—integral when making law to govern plural jurisdictions.

INTRODUCTION

"*The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules. This may be stated as the requirement of generality.*"

— Lon Fuller, *The Morality of Law* (1964 AD).[1]

"*When therefore the law lays down a general rule, and thereafter a case arises which is an exception to the rule, it is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect . . . . This is the essential nature of the equitable: it is a rectification of law where law is defective because of its generality.*"

— Aristotle, *Nicomachean Ethics* (4th century BC).[2]

In 1963, the year of John F. Kennedy's assassination and the year the South erupted in violent white backlash against the Civil Rights Movement,[3] Lon Fuller delivered the William L. Storrs Lectures at Yale Law School.[4] He titled his lectures the *Morality of Law* and in them took issue with what he saw as the core failing of the legal realist movement—that is, the separation of law and morality.[5] As the centerpiece of his lectures, Fuller offered eight principles that, if followed, promised law would be less likely to perpetrate the worst of injustices: generality, publicity, pro-

1. Lon L. Fuller, The Morality of Law 46 (1964) [hereinafter Fuller, Morality of Law].

2. Aristotle, Nicomachean Ethics bk. V, at 315, 317 (T.E. Page, E. Capps & W.H.D. Rouse eds., H. Rackham trans., Harv. Univ. Press 2d ed. 1934) (4th century BC).

3. See Lawrence Glickman, How White Backlash Controls American Progress, Atlantic (May 21, 2020), https://www.theatlantic.com/ideas/archive/2020/05/white-backlash-nothing-new/611914 [https://perma.cc/3CDE-K9N3].

4. Fuller, Morality of Law, supra note 1, at v.

5. See L. L. Fuller, American Legal Realism, 82 U. Pa. L. Rev. 429, 461–62 (1934) ("[T]he cleft between Is and Ought causes acute distress to the realist.").

spectivity, clarity, consistency, reasonableness, durability, and congruence with state action.[6] Fuller took his first principle for granted, offering in support only that "the requirement of generality rests on the truism that to subject human conduct to the control of rules, there must be rules."[7] The generality requirement needed no support because generality formed the heart of the very definition of law.[8] To be law, law must be general.

A specific law, to Fuller, was at risk of being declared not law at all. He offered two examples in his lectures: administrative agencies and "private bills" or "special legislation."[9] He declared the former a failure in making law: "In recent history perhaps the most notable failure to achieve general rules has been that of certain of our regulatory agencies . . . ."[10] The latter presented a more complicated case.[11] Private bills did not violate the desideratum of generality because they treated similarly situated people differently; rather, they violated the generality requirement simply by not being general and, therefore, not establishing law at all.[12]

Yet the complexity of "private bills" and the movement to prohibit them continued to haunt Fuller. When fashioning the published manuscript of his lectures in *The Morality of Law*, he appended a footnote that explored the complexity of private bills in greater depth.[13] In this footnote, Fuller cited to the *Index of State Constitutions*, which documented the ubiquity of prohibitions against specific legislation at the state level.[14] Yet, rather than embracing these prohibitions as reinforcing the generality requirement, Fuller puzzled over them. These prohibitions, he observed, had "produced much difficulty for courts and legislatures."[15] To illustrate the difficulty, Fuller described one of the "apparently disingenuous" devices used by legislatures to circumvent the prohibition—that of passing a general rule that applied conditionally "to all cities in the state which

6. Fuller, Morality of Law, supra note 1, at 38–39.

7. Id. at 49.

8. Id.

9. Id. at 46–47 (internal quotation marks omitted) (quoting Special, Local or Private Laws, *in* Index of State Constitutions 938, 938 (Richard A. Edwards ed., 2d ed. 1959)).

10. Id. at 46.

11. What constitutes "special legislation" often defies easy definition—as this Article demonstrates in greater detail in Part I. The paradigmatic example of "special legislation" is a private bill—or a law that is crafted to apply to only a single person, a small group, or a single corporation. See Christopher M. Davis, Cong. Rsch. Serv., R45287, Private Bills: Procedure in the House 1 (2019). A "private bill" is a formal designation. Legislatures, Congress among them, are able to pass "private bills" in addition to "public bills"—the former become "private laws" following bicameralism and presentment. See id.

12. See Fuller, Morality of Law, supra note 1, at 47 (distinguishing principles of fairness, which "belong[] to the external morality of the law," from "the demand of the law's internal morality that, at the very minimum, there must be rules of some kind, however fair or unfair they may be").

13. Id. at 47 n.4.

14. Id. (citing Special, Local or Private Laws, *in* Index of State Constitutions 938, 939 (Richard A. Edwards ed., 2d ed. 1959)).

15. Id.

according to the last census had a population of more than 165,000 and less than 166,000."[16] While "apparently disingenuous," Fuller was quick to defend the circumvention: "Before condemning this apparent evasion we should recall that the one-member class or set is a familiar and essential concept of logic and set theory."[17] Specific laws, according to Fuller, could be used to abuse power—in the context of criminal law, in particular—but they were also necessary when regulating a diverse world.[18] It was the recognition of American pluralism and the need to accommodate it in the lawmaking process that brought Fuller in line with Aristotle: Law must aspire to generality. But specificity must intervene when law fails because of that generality, and general law is destined to fail in a plural society. Plural societies, as Lon Fuller observed, are teeming with "one-member class[es]."[19]

Fuller defined his puzzle in terms of generality and specificity. But the dynamic he identified is better understood as what Aristotle defined as "equity"—that is, the process that pushes general laws toward specificity when those laws fail because of their generality.[20] It is this dynamic process, between general rules and equity, that this Article aims to identify and theorize. Notably, Fuller identified this puzzle by bringing to bear the empirical realities of lawmaking upon his abstract model. Initially, in delivering his lectures, Fuller dismissed private bills and administrative lawmaking out of hand. But by further reflecting on the reality of regulating "one-member classes," not only does Fuller begin to sketch a nascent model of the tensions inherent in equity, he begins to identify the centrality of administrative rulemaking and private bills to equity outside the courts. In undertaking his ad hoc empiricism, Fuller inadvertently joined Pierre Bourdieu's campaign to develop a "rigorous science of the law" that draws upon empiricism in order to better understand the fundamental nature of law and legal systems.[21] Bourdieu contrasted his "science of the law" against the discipline of "jurisprudence"—a discipline subscribed to by Fuller and, according to Pierre Bourdieu, a field unable to ever wholly bridge the seeming contradiction that law is simultaneously fixed, yet also malleable by society over time.[22] Because Fuller did not explore in depth those empirical realities, his principle of generality remains incomplete.

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16. Id.

17. Id.

18. See id. (citing the California Constitution of 1952, art. VI, § 25, which prohibits special criminal laws that modify state courts' granting of divorces).

19. Id.

20. See Aristotle, supra note 2, at 315, 317.

21. Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field, 38 Hastings L.J. 814, 814–16 (1986) [hereinafter Bourdieu, Force of Law] (stressing the significance of studying the "social practices of the law," the internal logic of which is governed by both "specific power relations" and "the internal logic of juridical functioning").

22. See id. at 815–16.

Aristotle suggests that equity is predominantly the province of judges and lawmakers.[23] He, as well as Fuller, paid far less attention to the role of the one-member classes in shaping the characteristics of law and in defining equity. A more empirically grounded study of the history of American lawmaking, especially into the realities of legislatures within the United States, reveals a more complex model of lawmaking and equity than the simple, top-down model proffered by Fuller and others. Now primarily seen as an interpretive problem for courts to muddle through as they apply general law to a specific set of facts,[24] the question of what to do when law fails because of its generality used to be the province of legislatures—that is, something for the legislative process to solve. If a general law would cause unfortunate or unforeseen consequences, the aggrieved could file a petition in their state legislature or Congress seeking an exception or amendment.[25] Given the evolution of our lawmaking institutions, today this work is largely done by the courts and administrative state.[26] Belying this history, modern models and theories of equity focus almost entirely on the role of courts—for example, in discussing the fusion of law and equity,[27] the role of equitable remedies,[28] and statutory interpretation's

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23. See Aristotle, supra note 2, at 315, 317.

24. See, e.g., William N. Eskridge, Jr., Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms, 57 St. Louis L.J. 865, 906 (2013) ("[L]egal officials engage in a hermeneutical enterprise that entails retrieving past decisions, evaluating them in light of current circumstances and the facts of the case, and figuring out the best way to go forward within the confines of legal conventions."); John F. Manning, The New Purposivism, 2011 Sup. Ct. Rev. 113, 181–82 (arguing that the Supreme Court has adopted a "new purposivist" approach to statutory interpretation that "respect[s] the level of generality at which Congress speaks").

25. See infra Part II.

26. Maggie McKinley, Petitioning and the Making of the Administrative State, 127 Yale L.J. 1538, 1579–600 (2018) [hereinafter McKinley, Petitioning] (documenting "the siphoning of petition volume from the congressional petition process and into the modern state—revealing the roots of the modern state in the petition process").

27. See, e.g., Samuel Bray, Form and Substance in the Fusion of Law and Equity, *in* Philosophical Foundations of the Law of Equity 231, 233 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2019) (providing a historical account of the fusion of law and equity that focuses predominantly on courts); P.G. Turner, Fusion and Theories of Equity in Common Law Systems, *in* Equity and Law: Fusion and Fission 1, 1–3 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019) (compiling an edited volume on the fusion and fission of law and equity that focuses predominantly on courts).

28. While works in the equity literature have focused on different topics within the scope of judicial remedies, none have addressed equitable remedies outside the courts. See, e.g., Samuel L. Bray, Multiple Chancellors: Reforming the National Injunction, 131 Harv. L. Rev. 417, 418–19 (2017) (nationwide injunctions by federal district courts); Samuel L. Bray, The Supreme Court and the New Equity, 68 Vand. L. Rev. 997, 999–1001 (2015) (Supreme Court jurisprudence); Samuel L. Bray, The System of Equitable Remedies, 63 UCLA L. Rev. 530, 532–36 (2016) [hereinafter Bray, Equitable Remedies] (judicial remedies more broadly); Daniel J. Bussel, Doing Equity in Bankruptcy, 34 Emory Bankr. Dev. J. 13, 14–15 (2017) (federal bankruptcy courts); Layne S. Keele, Enhanced Ongoing Royalties: The Inequitable Equitable Remedy, 119 W. Va. L. Rev. 469, 470–71 (2016) (court-awarded

ongoing battle between textualism and purposivism[29]—with some scattered mention of the equitable work done by administrative agencies.[30] But these models overlook the important—and distinctive—equitable work done within legislatures throughout American history.

This Article offers equity outside the courts as a dynamic and discursive process and one that has long been integral to American lawmaking. Historically, equity within legislatures was a bottom-up process, driven largely by Fuller's one-member classes. Individuals and minorities insisted on their right to be heard by lawmakers, brought their own moral judgments to bear on the unfortunate and unforeseen consequences of general laws, and petitioned their legislatures for exceptions and amendments to those earlier codified general laws. Fuller argued that generality kept law and morality conjoined.[31] But the opposite may also prove true. Specific laws are often a result of empowered individuals and minorities practicing equity—that is, insisting that lawmakers take note of varied circumstances and varied visions of justice while reforming general laws through exceptions and amendments. Rather than accepting Fuller's proposition that generality is the primary principle holding together law and morality, this Article argues that specific law can sometimes be the result of previously dominated groups successfully wielding power to shape

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royalties); Caprice L. Roberts, Remedies, Equity & *Erie*, 52 Akron L. Rev. 493, 494–95 (2018) (judicial remedies more broadly); Zayn Siddique, Nationwide Injunctions, 117 Colum. L. Rev. 2095, 2100–01 (2017) (nationwide injunctions in the public and private law contexts).

29. Compare John F. Manning, Textualism and the Equity of the Statute, 101 Colum. L. Rev. 1, 8–9, 35–36 (2001) [hereinafter Manning, Textualism] (concluding that the English common law doctrine of "equity of the statute," which was a method of statutory interpretation that rectified specific unforeseen harms of general laws, does not accord with American constitutional structure and "never gained a secure foothold in the federal courts"), with William N. Eskridge, Jr., All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806, 101 Colum. L. Rev. 990, 995–98 (2001) [hereinafter Eskridge, All About Words] (refining understanding of the "equity of the statute" doctrine and analyzing the Marshall Court's transition from equity-based doctrines "toward sophisticated analysis of statutory provisions as part of a coherent body of law").

30. See Alfred C. Aman, Jr., Administrative Equity: An Analysis of Exceptions to Administrative Rules, 1982 Duke L.J. 277, 280 ("Administrative equity serves as a bridge between collectively determined rules and the reality of the particular case. It refers to the substantive principles and norms that may justify individual exceptions to rules of general applicability."); Henry E. Smith, Equity and Administrative Behaviour, *in* Equity and Administration 326, 328–29 (P.G. Turner ed., 2016) [hereinafter Smith, Administrative Behaviour] (arguing that equity has played an important role in administrative law as a counter to the opportunism of regulated entities); Henry E. Smith, Property, Equity, and the Rule of Law, *in* Private Law and the Rule of Law 224, 236 (Lisa M. Austin & Dennis Klimchuk eds., 2014) [hereinafter Smith, Property] (referring to the history of administrative law as "the new equity").

31. Using the example of an employer setting rules for his employee, Fuller describes how the inner morality of general laws limits the employer's conduct as well. See Fuller, Morality of Law, supra note 1, at 47–48 ("If in distributing praise and censure, [the employer] habitually disregards his own rules, he may find his system of law disintegrating, and without any open revolt, it may cease to produce for him what he sought to obtain through it.").

law and legal institutions. Thus, law more likely embodies justice when lawmaking institutions strike the proper balance of generality and specificity.

Given the centrality of equity to the legislative process, this Article also fashions two historical case studies to better understand the dynamics of equity empirically. These case studies bring together, for the first time, two distinct historiographies to study the process of equity as it operated within national and subnational legislatures, articulate the dynamics of this distinctive form of equity, and build a more nuanced and accurate model of equity as it has operated within the United States. One historical strain documents the state-level revolt against private bills and local lawmaking in the early to mid-nineteenth century cited by Fuller,[32] and the other charts the celebration of private bills and the petition process generally at the national level well into the twentieth century.[33] These two distinctive and conflicting responses to equity outside of the courts offer interesting lessons for equity more broadly.

A deeper appreciation of these histories—national, state, and local—has much to offer our understanding of law and equity. In particular, they teach that equity is not simply a dynamic borne into courts from the structure of law and the necessity of interpretation[34] but also that practices of seeking equity in the United States originated outside the courts and largely remained within legislatures for the first five decades following this country's birth. Moreover, equity outside the courts often takes on a more discursive and bottom-up form than does our traditional court-focused model of equity as it is driven largely by public advocacy and engagement.

These sharply diverging histories also illustrate the inadvertent consequences that arise when practices of seeking equity are foreclosed within legislatures—here, through the mandating of general laws and the prohibition of private bills. Foreclosing practices of seeking equity within legislatures—which may have offered a more level playing field for dominated groups—often disadvantages the most politically vulnerable in a population and forces them to seek equitable redress elsewhere. These other fields may have greater barriers to entry than legislatures, including the requirement of professional expertise or other forms of social capital. The first case study documents a state-level movement against equity by state and local lawmakers in the mid-nineteenth century aimed at ending government capture and "democratizing" the lawmaking process—particularly, by opening access to corporate charters.[35] The state-level movement accomplished these aims by forcing state legislatures toward

32. See infra section II.B.1.

33. See infra section II.B.2.

34. See, e.g., Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1176–77 (1989) (citing to Aristotle's definition of equity and exploring deviations from the "general rule of law" as solely the province of courts).

35. See infra section II.B.1.

general laws.[36] A byproduct of this forced generality was the closure of equitable channels into legislatures—a particular disadvantage for individuals and minorities who could not wield electoral power because they either were unenfranchised or could never command majority rule.[37] But this case study also illustrates the persistent and hydraulic nature of equity: Many of these individuals and minorities continued to seek equitable redress through administrative processes and the courts. The second case study documents equity outside the courts at the federal level where, by contrast, equitable practices continued in earnest within Congress well into the twentieth century—potentially a result of federal law regulating an even broader and more diverse national landscape, foreclosing the possibility of a blanket prohibition against specific lawmaking.[38] Although members of Congress referred to the institution as "a court of equity" well into the late nineteenth century, Congress quickly became overwhelmed by the workload required to satisfy demands for equity by the public; it began to siphon equitable practices into innovative forms of commissions, boards, and agencies—an apparatus to which we now refer as the administrative state—and into the federal courts.[39] Both histories chart the path of equity over time, from a practice predominantly focused on legislatures to one that focused on the courts and administrative agencies. These histories reveal the fundamental connection between the two areas of lawmaking puzzled over by Fuller during his lectures—administrative lawmaking and private bills—and the integral role each played in fostering equity. In revealing these connections, these histories teach that prevailing theories about the rule of law might be too simplistic in prioritizing generality and could overlook the complicated but integral role of equity—especially when making law to govern large, heterogeneous, and plural jurisdictions.

Modern lawmaking institutions maintain, like Fuller does, a blind fidelity to generality as ideal within the lawmaking process. These institutions struggle to strike the proper balance between maintaining the ideal of generality and allowing equity to work specificity into law. Understanding equity as a process that originated within American legislatures offers lessons for better resolving these struggles. First, they show how current approaches to generality and specificity—that is, unquestioned praise for general laws and suspicion of specific laws—may be misguided.[40] The ideal of generality may be a historically contingent solution to particular crises

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36. See infra notes 239–244 and accompanying text.

37. See Laura F. Edwards, James and His Striped Velvet Pantaloons: Textiles, Commerce, and the Law in the New Republic, 107 J. Am. Hist. 336, 337–38 (2020) (discussing that "people of marginal status," despite being unenfranchised and without "the full array of rights," were able to use their ownership of textiles to affirm recognition of certain property rights outside the legislature).

38. See infra section II.B.2.

39. McKinley, Petitioning, supra note 26, at 1601–03.

40. See infra Part III.

of governance and not a principle that promises that laws remain just. Specific law might fulfill an equally important role in the lawmaking process and could result from dominated groups engaging in practices of seeking equity and successfully shifting existing power relationships. Second, this Article recommends that legislatures address concerns over corruption and special interest capture head-on, rather than assuming that specific laws are somehow intrinsically flawed, wholly unnecessary, or even readily identifiable.[41] Finally, these histories reveal the hydraulics of equity—that is, to the extent that one institution is closed to practices of equity, the public will force equity elsewhere. As a consequence, this means that mandating general laws could result in the courts and the administrative state playing a greater role in the lawmaking process through equitable interpretation and administrative lawmaking.[42] Similarly, prohibiting equitable interpretation by courts and mandating textualism will press legislatures and administrative agencies away from a principle of generality and toward more specific lawmaking. Identifying this hydraulic process could provide important lessons for modern advocates for general laws, textual interpretation, and the abolition of administrative lawmaking: These positions are, in essence, aiming to ban equity from our lawmaking process entirely. Not only might banning equity from our lawmaking process be unwise, it may also be antithetical to the way that American lawmaking has always functioned, with law and equity in constant conversation.

This Article proceeds in four parts. Part I introduces the concept of equity within legislatures and articulates it as a concept beyond the meaning ascribed to it historically: legislatures overriding court judgments in the name of equity. Part I next addresses generality and specificity in lawmaking with a review of the theoretical literature to date and then explores the implications for theorization of generality and specificity of legislative equity. Part II describes case studies that present the two strains of historiography that have developed around the "private bill system" and local lawmakers at the subnational level and the "petition process" at the national level. Part III surveys modern struggles within courts, legislatures, and administrative agencies to address rule of law concerns raised by specificity. Part IV explores the historical case studies to better theorize equity outside the courts and offer lessons to better resolve modern struggles over generality and specificity, before concluding.

41. See infra section IV.A.

42. See infra sections IV.B–.C.

I. BROADENING THE "FIELD" OF EQUITY

Pierre Bourdieu—sociologist, anthropologist, and father of modern practice theory[43]—famously took the discipline of jurisprudence to task for its lack of a broader, more empirical, and more socially grounded approach to the understanding of law.[44] It was only through this empiricism, Bourdieu wrote, that longstanding disputes between formalists like Fuller, who viewed the law as an independent and closed system operating according to its internal dynamics, and "instrumentalists" or legal realists, who viewed law as simply politics all the way down and as entrenching existing power inequities, could be resolved.[45] Bourdieu envisioned that law—like all other areas of human life[46]—might be understood through empirical science. Such a science would study the law within the "entire social universe"—what he termed a "field"—in which law is "produced and exercised."[47] Along similar lines, for many years scholars of legislation have been calling for a deeper, more empirically grounded understanding of legislatures to add proper nuance to those abstract models of law and lawmaking that undergird our legal theory.[48]

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43. Pierre Bourdieu, Outline of a Theory of Practice (Ernest Gellner, Jack Goody, Stephen Gudeman, Michael Herzfeld & Jonathan Parry eds., Richard Nice trans., Cambridge Univ. Press 1977) (1972) [hereinafter Bourdieu, Theory of Practice]; see also David Berliner, Michael Lambek, Richard Shweder, Richard Irvine & Albert Piette, Anthropology and the Study of Contradictions, 6 HAU: J. Ethnogr. Theory 1, 6 (2016) (referencing Bourdieu's observations in modern practice theory in a discussion of anthropology as the study of human contradictions).

44. See Bourdieu, Force of Law, supra note 21, at 815–16.

45. Id. at 814–16.

46. Id. at 819.

47. Id. at 816.

48. See, e.g., Abbe R. Gluck, Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking, 129 Harv. L. Rev. 62, 83–85 (2015) (describing how courts justify their use of canons of statutory constructions with "purported empirical understandings of how Congress actually works or what rules Congress actually knows" when the theory underpinning these canons assumes that "judges cannot or should not try to understand what exactly Congress is doing" (emphasis omitted)); Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 907–11 (2013) (surveying 137 congressional counsels in order "to illustrate how undertheorized the canons have been and to highlight the kinds of normative questions that arise from testing the connection between legal doctrine and legislative drafting practice"); Victoria F. Nourse & Jane S. Schacter, The Politics of Legislative Drafting: A Congressional Case Study, 77 N.Y.U. L. Rev. 575, 576–77 (2002) (interviewing staffers on the Senate Judiciary Committee "to paint a more textured picture of the drafting process" and "to begin empirical scrutiny of what might be called the judicial story of how laws are written"); Shu-Yi Oei & Leigh Z. Osofsky, Constituencies and Control in Statutory Drafting: Interviews with Government Tax Counsels, 104 Iowa L. Rev. 1291, 1295 (2019) (offering "the first extensive empirical examination of how those responsible for creating tax legislation make drafting and articulation choices, and what factors they consider when they do so"); Jarrod Shobe, Agencies as Legislators: An Empirical Study of the Role of Agencies in the Legislative

A. *Equity, Generality, and Specificity*

The following subsections aim to expand the field in which equity is studied beyond that of courts, to include legislatures and administrative agencies. They then move on to clarify the particular concerns over generality and specificity raised within that expanded field by the generality principle, drawing a distinction from the typical form of generality and specificity addressed more frequently in the rules and standards literature. Finally, these subsections address modern debates within the literature over the generality principle, highlighting a growing body of literature within jurisprudence critiquing the principle. Then, in closing, section I.B draws upon literature from sociology and anthropology to offer new methods that might better articulate, and potentially better resolve, the ongoing tensions between the generality principle and equity.

1. *Equity in Historical and Institutional Context.* — Scholars of modern theories of equity have long recognized that the term "equity" is notoriously ambiguous.[49] The term "equity" could denote "fairness, a type of

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Process, 85 Geo. Wash. L. Rev. 451, 454–57 (2017) (surveying agency staff in fourteen executive agencies and eleven independent agencies to document how agencies influence the legislative process); Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L. Rev. 669, 671 (2019) (revealing through a search of the Statutes at Large that "Congress frequently includes legislative findings and purposes in enacted bills, but these enacted texts have mostly been ignored in ongoing debates over theories of statutory interpretation"); Jarrod Shobe, Intertemporal Statutory Interpretation and the Evolution of Legislative Drafting, 114 Colum. L. Rev. 807, 810–11 (2014) (exploring changes in the modern legislative drafting process and their implications for statutory interpretation); Ganesh Sitaraman, The Origins of Legislation, 91 Notre Dame L. Rev. 79, 84–86 (2015) (providing "a comprehensive typology of the origins of legislative drafts," explaining "the factors members of Congress and their staffs consider in deciding which drafting pathway to take," and exploring "the implications of the origins of legislation on legal debates related to statutory interpretation"); Christopher J. Walker, Legislating in the Shadows, 165 U. Pa. L. Rev. 1377, 1382–96 (2017) ("We have barely begun to incorporate empirical realities into our theories of agency statutory interpretation and administrative governance . . . . [R]ecent empirical work confirms what has long been noted anecdotally . . . : federal agencies are involved regularly and extensively in the legislative process.").

49. See Samuel L. Bray, A Student's Guide to the Meanings of "Equity" 1–8 (July 20, 2016) (unpublished manuscript), https://osf.io/sabev (on file with the *Columbia Law Review*) [hereinafter Bray, Meanings of "Equity"]. Professor Samuel Bray, a scholar of equity, identifies at least three distinct ways in which the term is used within the legal academy. See id. at 1. First, equity is used in the Aristotelian sense—that is, equity is working specificity into a general rule when that rule fails because of its generality. Id. Second, equity is used to describe a moral reading of the law. Id. at 3. Third, equity is used to describe the particular "doctrines and remedies developed in the English courts of equity, especially the Court of Chancery." Id. at 4. The third usage is quite distinct from the other two. Yet, according to Bray, this is the meaning of equity that is "pervasive in law school courses." Id. Consistent with the study of equity *outside* the courts, this Article takes the path less trodden and eschews the third definition of equity, which ties the word to a judicial institution. Id.

Instead, this Article adopts a meaning of equity that draws on the first two usages identified by Bray. These two definitions are quite similar. Perhaps so much so that the two usages present a distinction without a difference. Often, exceptions to the general rule are

jurisdiction, types of remedies and defenses, an owner's stake in an asset subject to a security interest and other ownership interests, as well as a set of maxims, among other things."[50] Scholars often trace each of these meanings back to American courts of equity[51]—the heirs apparent of the particular "doctrines and remedies developed in the English courts of equity, especially the Court of Chancery."[52] Given the fusion of law and equity in the nineteenth century—a fusion broadly accepted as beneficial—and the recognition that American courts of equity ceased to exist by the early twentieth century, skepticism reigns in the legal academy over whether the vestiges of "equity" offer any meaningful contribution to academic discourse and the study of the law.[53]

Yet, the vestiges of equity persist and remain sticky within the legal academy, as well as within legal doctrine. Recently, equity has begun to experience a sort of renaissance and rebirth within the field of private law theory. In recent years, Henry Smith, a scholar of equity, has begun to refine a functionalist account of equity that draws heavily on Aristotle[54]—that is, envisioning equity as a solution when "law is defective because of its generality"[55]—and that is only "very loosely identified with historical equity jurisdiction and jurisprudence."[56] Smith's functionalist account describes equity as a decisionmaking mode distinct from that of interpreting and applying the law. Instead, equity is an "intervention into" or "qualification of" the law when the law is deemed "inadequate on account of its generality."[57] General laws, written with imperfect information in advance of the events the lawmakers aim to regulate, "must be over an[d] under-

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motivated by moral reasons. Moreover, Aristotelian equity presents its own moral view of the law in offering a moral hierarchy that values specificity as "superior . . . to the error" arising from generality. Aristotle, supra note 2, at 317. Yet, Aristotelian equity could present a broader definition than exceptions to general rules caused by moral considerations. Because Aristotelian equity envisions exceptions beyond those morally motivated, it also looks approvingly upon exceptions created to better facilitate legislative intent: "[I]t is then right, where the lawgiver's pronouncement because of its absoluteness is defective and erroneous, to rectify the defect by deciding as the lawgiver would himself decide if he were present on the occasion, and would have enacted if he had been cognizant of the case in question." Id. It is this expansive definition of equity on which this Article draws in order to identify and examine equity outside the courts.

50. Henry E. Smith, Equity as Second-Order Law: The Problem of Opportunism 1 (Harvard Pub. L. Working Paper No. 15-13, 2015), http://ssrn.com/abstract=2617413 (on file with the *Columbia Law Review*) [hereinafter Smith, Second-Order Law].

51. See, e.g., id. at 4–5 & n.15 (grounding equity's anti-opportunist theoretical underpinnings in the practice of equity judges and commentators, including Justice Story's *Commentaries on Equity Jurisprudence*).

52. Bray, Meanings of "Equity," supra note 49, at 1.

53. Smith, Second-Order Law, supra note 50, at 1–2.

54. Id. at 4–6 & n.19, 21–22.

55. Henry E. Smith, Fusing the Equitable Function in Private Law, *in* Private Law in the 21st Century 173, 177 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2016) (internal quotation marks omitted) (quoting Aristotle, supra note 2, at 99).

56. Smith, Second-Order Law, supra note 50, at 1.

57. Id. at 3.

inclusive."[58] Equity performs a necessary function within law because of this inherent imperfection. This function, Smith envisioned, operates on a "second level as a kind of meta-law"—that is, a law that is made about other laws—and a "safety valve" against negative consequences caused by this imperfection.[59] Although Smith was quick to define the relationship between his functional account of equity and the historical American and English courts of equity as only "very loosely identified," he didn't hesitate to buffer his account with support from historical sources focused entirely on courts of equity, as well as their judges and theorists.[60] This focus reveals an underexplored presupposition at the core of Smith's functionalist account: He models equity's function with courts as the lone institutional actor.

With some notable exceptions,[61] theorists of equity continue to operate on abstract models, stripped of empirical inquiry, and continue to center courts,[62] despite growing cautionary literatures warning of the inaccuracy of court-centered models of lawmaking.[63] These court-focused

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58. Id.

59. Id.

60. Id. at 1.

61. The notable exceptions focus entirely on equity within the administrative state. See, e.g., Aman, supra note 30, at 278 ("The exercise of substantive and remedial equity is not confined solely to federal and state courts . . . . Agencies at all levels often seek to do equity in particular cases by entertaining requests for exceptions to regulatory legislation or to agency rules."); Smith, Administrative Behaviour, supra note 30, at 328 ("Administrative law grew out of the same needs that equity courts did. As a mixture of executive and quasi-judicial expert decision-making, administration could be more flexible than regular courts."); see also Shyamkrishna Balganesh & Gideon Parchomovsky, Equity's Unstated Domain: The Role of Equity in Shaping Copyright Law, 163 U. Pa. L. Rev. 1859, 1863 (2015) (explaining how equity "modulates copyright law as a substantive and adjectival gloss on doctrine," but still focusing on the role of the courts and statutory interpretation as the medium of that modulation); Smith, Property, supra note 30, at 224–26 (describing the relevance of equity to property law and distinguishing between the roles of micro and macro equity in maintaining the rule of law). Scholars have yet to study processes of equity within legislatures and how those processes developed over time.

62. For two of the most recent comprehensive edited volumes touching on equity, see Introduction, *in* Philosophical Foundations of the Law of Equity, supra note 27, at 11 (introducing essays that undertake a "[p]hilosophical analysis . . . of equity in general and Equity in common law legal systems" in order to "help us understand and better shape these developments"); Turner, supra note 27, at 1–3 (introducing an edited volume focused on explaining the fission and fusion of law and equity in the modern common law system). Both present pathbreaking essays, but the majority of these essays focus on equity within courts.

63. These literatures have even coined the terms "legisprudence" and "demosprudence" in an effort to reclaim legal theory from the court-centric mantle of "jurisprudence"—an allegedly generic term, which is used to define all theorization of the law. See, e.g., Julius Cohen, Legisprudence: Problems and Agenda, 11 Hofstra L. Rev. 1163, 1163–64 & n.2 (1983) (contrasting the term "legisprudence," which describes the theoretical study of the legislative-centered legal philosophy, with "judicativeprudence," which is "a theoretical study of the *judicial* component of the legal order" (citing Julius Cohen, Towards

models often presume that legislatures pass general laws and leave the work of equity entirely to courts. Thus, in modeling the particular function of equity, they overlook the sometimes distinctive function of equity as a process that operates within legislatures and administrative agencies. Within Congress, for example, equity does not operate as a "second-order" intervention into statutes crafted elsewhere. Rather, it is an integral aspect of an ongoing and iterative lawmaking process. As in the courts, equity's role within legislatures was historically separate but became more fused over the late nineteenth century to mid-twentieth century.[64] Yet, equity has long operated as a distinct mode and necessary safety valve for lawmaking.[65] Smith's functional account of equity also emphasizes the role of equity in resolving complex issues that involve the rights and interests of a range of individuals, settling conflicts between the rights of individuals, and preventing opportunistic circumvention of the law by those well-positioned to disregard it.[66] In the context of a court-centered functionalist model, this list might appear to cobble together a mélange of loosely related issues. Yet, in the context of a legislature, these issues are all deeply related. The process by which conflicting perspectives among the polity are taken into consideration and resolved, as well as the processes of resolving complex issues and preventing circumvention, all fall under a single area of inquiry: that of "representation."[67] Theories of representation aim to answer questions like: Should a lawmaker preference the interests of the politically powerful over those of the politically powerless? Should the lawmaker look not to the indices of liberalism—individuals and interests—but to the good of the public and of the community? Should the lawmaker look to some higher moral authority, their own moral commitments, or recognize plural visions of the good? Should lawmakers allow

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Realism in Legisprudence, 59 Yale L.J. 886, 897 (1950))); Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2750 n.30 (2014) ("Jurisprudence predominantly deals with the question of the application and interpretation of the law by the judge. Legisprudence uses the tools and insights of legal theory to study legislation and regulation, i.e., the creation of law by the legislator."); see also William N. Eskridge, Jr. & Philip P. Frickey, Legislation Scholarship and Pedagogy in the Post-Legal Process Era, 48 U. Pitt. L. Rev. 691, 693 (1987) (discussing the term "legisprudence"); Luc J Wintgens, Legislation as an Object of Study of Legal Theory: Legisprudence, *in* Legisprudence: A New Theoretical Approach to Legislation 9, 29–39 (Luc J Wintgens ed., 2002) (drawing from "within the legal system relying on its own dynamics according to the hermeneutic point of view of authoritative actors" to develop a legisprudential approach of law that elaborates on the "concrete criteria of rational legislation").

64. See infra section II.A.

65. See Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism 1 (Northwestern L. & Econ. Rsch. Paper, Paper No. 13-15, 2013), https://ssrn.com/abstract=2245098 (on file with the *Columbia Law Review*).

66. See Smith, Second-Order Law, supra note 50, at 3–4.

67. See, e.g., Hanna F. Pitkin, The Concept of Representation 1–13 (1967) (introducing a "single, highly complex" meaning of representation that diverges from solely formalistic definitions based in authority and accountability and instead accounts for "the substance of the activity itself").

circumvention of the law? Should the intentions or the identity of the person circumventing the law enter into the inquiry? By crafting a transinstitutional account of equity's function, we are able to look beyond functions specific to courts and to envision equity performing an important practical role by fostering and structuring representation of the public within the lawmaking process.

Another theorist who has built upon a functionalist account of equity is Lawrence Solum, who has argued that law and equity have wholly fused within American lawmaking: "The rule of law is not a law of rules."[68] But Solum shares common cause with Smith in arguing that, despite this fusion, equity still performs a distinctive function within the lawmaking process and that recognition of equity remains normatively good. First, Solum offers that equity provides a more structured approach for judges trying to resolve cases not squarely addressed by the law as written[69]—cases in the "penumbra," to adopt the terminology of Ronald Dworkin and others.[70] Such an approach would recognize that deviations from the law do occur and would provide a principled basis on which to resolve those cases beyond a simple "[c]oncern for the coherence of the law as a whole."[71] Second, he recognizes that equity operating within the lawmaking process might support "the values of predictability and regularity" in the law by avoiding the "arbitrary and unpredictable results" often produced by a literal application of the law as written.[72] Lastly, he offers that acknowledging openly the function of equity within law could "increase the regularity and predictability of rule application in the legal system as a whole."[73] Recognizing and accepting the safety valve of equity allows actors within the legal system to accept the binding power of rules without turning to creative practices of "interpretation" to avoid improper outcomes.[74]

Solum's critique has much to teach a nascent theory of equity outside the courts, but his critique remains court-centric and is explicitly designed

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68. Lawrence B. Solum, Equity and the Rule of Law, 36 Nomos 120, 145 (1994).

69. See id. at 138–39 ("Virtue theory accepts that judges sometimes engage in Herculean theory building in order to construct legal principles but insists that judges with practical reason sometimes depart from the general rules and principles on the basis of their legal and moral perception of the facts of the particular case.").

70. Ronald Dworkin, Law's Empire 39–40, 419 & n.34 (1986) (citing H.L.A. Hart, The Concept of Law 129–50 (1961); H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593 (1958)) ("Hart relies on the distinction between core and penumbra in explaining why judges must have discretion to repair gaps in statutes, and then suggests that the master rule . . . is itself likely to have a penumbral area that can generate disputes in which 'all that succeeds is success.'" (quoting H.L.A. Hart, The Concept of Law 149 (1961)).

71. Solum, supra note 68, at 139.

72. Id.

73. Id. at 140 (reasoning that without the safety valve that is equity, "judges will have good reason to engage in interpretative practices that give them considerable freedom of choice in every case and not just the exceptional one").

74. Id.

around his "virtue-centered theory of judging."[75] This court-centric approach has limitations that Solum himself recognizes. Most notably, he acknowledges that the imposition of moral norms and an individualized vision of the good by a single judge, no matter how "virtuous," could prove improper in a "modern, pluralist society."[76] No doubt a broader focus on equity—not only as a practice that exists beyond the insulated institutional form of the courts, but also as a dynamic, discursive process within institutions designed to deal with questions of representation and driven by those communities and individuals with diverse views of the good—could help respond to the limitations of Solum's court-focused, static view of equity.

This Article offers a broader functional account of equity rooted in an empirical understanding of legislatures to better inform both rule of law principles and theories of equity. This account aims to delineate the function of equity within legislatures and to chart the transfer and transformation of that function over time. This empiricism takes the form of historical case studies, one drawn from the secondary literature and a second from original research on petitions within Congress. A historical view is particularly important here, where the aim is to identify processes of equity. Because equity in the nineteenth century was facilitated by formal, public processes involving petitions and private bills, public engagement in the legislative process was far more transparent than it is today.[77] Moreover, over time, the closure of legislatures to equitable claims meant that the function of equity moved elsewhere within the lawmaking process—particularly, to the courts and administrative agencies—and was likely transformed by the distinct institutional structure of those other branches.[78]

Because petitioning was a formalized and well-documented process until the mid-twentieth century, it makes visible the discursive and dynamic process by which legislatures made law. The petitioning process, like a court of equity, was a distinctive institution with its own set of procedures that operated within the lawmaking process, before petitioning and lawmaking were "fused" in the twentieth century. That said, petitioning may not be entirely coextensive with equity. But a study of petitions offers a means of laying bare the practice of seeking equity outside of court proceedings, allowing scholars to identify and name the process for the first time. By contrast to modern legislatures, lawmaking bodies in the nineteenth century did not aim for generality. From the Founding until 1850,

75. See id. at 129–35 ("The essential point about a virtue-centered theory of judging is that it creates a conceptual link between the correctness of a legal decision and the decision that would be made by a virtuous *judge*." (emphasis added)).

76. Id. at 140–45.

77. See infra section II.A.

78. See infra section II.B.

seventy to ninety percent of laws passed by state legislatures were specific.[79] Legislatures across the United States were also unabashedly accessible during this period. They engaged with members of the public directly to create amendments and exceptions to previously passed or proposed laws or to pass new laws specific to those individual's circumstances.[80] Members of the public employed petitions as the central means by which this engagement occurred.[81] These petitions also allow observation of equity's hydraulics. For example, the closure of one forum to equitable grievances meant that petitioners would take their grievances and claims for representation elsewhere and force equity back in to the lawmaking process through their advocacy.[82] Lawmakers also understood the important representational function of equity and, when they did foreclose one channel for equitable grievances, often took care to open another.[83]

This project follows methodologically on recent legal history scholarship studying equity and procedure in the nineteenth century by Professor Amalia Kessler.[84] In her book on the development of adversarial procedure within courts of equity and non-adversarial courts within the United States, Kessler identifies a trend in scholarship studying legal procedure to "adopt an exclusively internalist approach" that studies changes in procedure as internal to the legal system itself, rather than studying changes as motivated "from the bottom up, as a matter of social practice."[85] Kessler's study combines the internalist view of procedural and institutional change with the view that "externalist, law-and-society–oriented historians have long insisted that we ought to focus attention."[86] From this combination, Kessler uncovers "[o]ur own forgotten, non-adversarial history—our history of equity courts and conciliation courts (especially Freedman's Bureau courts)."[87] This forgotten history reveals "equity" even within the paradigmatic context of chancery courts as a highly historically contingent and contested category—and a term often more aspirational than descriptively accurate.[88]

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79. See Robert M. Ireland, The Problem of Local, Private, and Special Legislation in the Nineteenth-Century United States, 46 Am. J. Legal Hist. 271, 271–73 & n.1 (2004) (noting additionally that specific legislation passed by Congress "once represented a significant portion of annual federal legislation," which "of late has substantially diminished").

80. See infra section II.A.

81. See infra notes 171–177 and accompanying text.

82. See infra notes 179–193 and accompanying text.

83. See infra Part II.

84. Amalia D. Kessler, Inventing American Exceptionalism: The Origins of American Adversarial Legal Culture, 1800–1877 (2017).

85. Id. at 344.

86. Id. at 343–44.

87. Id. at 345.

88. Id. at 48–61 (describing equity procedure within the courts of equity in the Antebellum Era as only partially adhering to the ideals of equity practice described by James Kent and Joseph Story).

Kessler's forgotten history may offer some explanation for the modern stickiness around a vision of equity that centers courts and, particularly, centers the courts and procedures of the English Chancery. Contemporaneous to the antebellum reform movements toward general laws, equity experienced a "rebirth" in the early nineteenth century at the hands of two powerful advocates, Chancellor James Kent of the New York Court of Chancery and Justice Joseph Story of the United States Supreme Court.[89] The roots of American equity predated the fierce tending of Kent and Story. American chancery courts and their first procedural rules predated Kent's appointment to the court.[90] However, the systematization and theorization of equity within the study of the law owe much to Kent and Story's views, and their views elevated courts—and particularly judges—to the center of American equity.[91] At the heart of their view of equity "lay an idealized, heroic conception of the equity judge."[92] Kent and Story located the pedigree of American equity in the history of the English Chancery and the civil law tradition of continental Europe, a tradition "which borrowed heavily from the law of the Romans"[93] and "Roman wisdom."[94] Given Kent and Story's impact on the legal academy, it should come as little surprise that their framing of American equity remains the dominant view of equity in the academy today.[95] That said, it could be time to move beyond this historical contingency to better understand the structure and functions that constitute and shape our lawmaking process.

2. *Clarifying the Generality Principle.* — Before we move beyond the court-centered model of lawmaking, a point of clarification is in order as to what forms of "generality" and "specificity" are at issue here. Often, as Fuller described, law involves generalization. But law can be made general and specific across a range of dimensions that have yet to be teased apart and clarified. Law often regulates more than one act. Law could aim to regulate generally *all* acts of that kind. Law also generalizes in its prospectivity. Regulating something that has not yet occurred, even if regulating a single act, requires defining that act at a level of generality and

89. Id. at 22–23.

90. See id. at 23, 33–36 (concluding that while "there were a number of ways that New York Chancery failed to comply with the many rules of the English equity tradition" before Kent and Story, the New York Chancery Court's "overarching structure and logic were borrowed directly from its English counterpart").

91. See id. at 36 (noting that Kent, who "proclaim[ed] himself the founder of American equity . . . [,] served, in essence, as a systematizer, advocating more rigorous adherence to all aspects of the English quasi-inquisitorial model" of procedure in equity).

92. Id. at 37.

93. Id. at 41.

94. Id. (internal quotation marks omitted) (quoting Joseph Story, Assoc. J., U.S. Sup. Ct., Progress of Jurisprudence, Address Before the Members of the Suffolk Bar (Sept. 4, 1821), *in* The Miscellaneous Writings of Joseph Story 198, 234–35 (William M. Story ed., 1852)).

95. See, e.g., Bray, Equitable Remedies, supra note 28, at 536–38 (acknowledging the multiplicity of definitions of equity but focusing on the set of "remedies and related doctrines that were initially developed in the Court of Chancery").

abstraction made necessary by prediction. The no vehicles in the park hypothetical presents a particularly popular example.[96] Specificity, too, is necessary in crafting the language of a law to communicate its shape to those who must conform to it. Specificity is also necessary when regulating a plural nation and, by regulating some acts or actors and not others. Specificity of this type allows law to address, as Aristotle described, varied circumstances.[97] Yet, there is a dearth of legal literature offering a more nuanced and comprehensive view of generality and specificity. This dearth may contribute to an ongoing and perhaps harmful set of presumptions about generality and specificity that fundamentally shape our law and law-making institutions. This Article begins to remedy that dearth by providing a preliminary taxonomy of types of generality and specificity within the law. But a full taxonomy of this type is beyond the scope of this Article. That which is offered here is intended as a rough and nonexhaustive sketch only.

a. *Generality and Specificity in the Rules and Standards Literature.* — Although the literature addressing specificity and generality is sparse, there does exist a vast literature on rules and standards in lawmaking.[98] But the rules and standards literature does not offer the comprehensive treatment necessary to resolve Fuller's puzzle over the principle of generality—that is, the application of a law to a particular actor or set of facts to whom that application might cause unforeseen or unfortunate circumstances.[99]

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96. See H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958) [hereinafter Hart, Separation of Law and Morals].

97. See supra note 49.

98. See, e.g., Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 11 (1991) (emphasizing that law is not just "a system of rules" because those rules would "need to be *defined* in conformity with the objectives of a legal system" and "some of those objectives may be ill-served by rule-bound decision-making"); Larry Alexander, "With Me, It's All er Nuthin'": Formalism in Law and Morality, 66 U. Chi. L. Rev. 530, 530 (1999) (arguing that law is meant to solve informational problems and thus must consist of rules); Louis Kaplow, Rules Versus Standards: An Economic Analysis, 42 Duke L.J. 557, 621–23 (1992) (undertaking an economic analysis and concluding that "[t]he central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct"); Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev 1685, 1701–13 (1976) (noting how the rules and standards modes deal with the question of the form in which legal solutions are presented); Eric A. Posner, Standards, Rules, and Social Norms, 21 Harv. J.L. & Pub. Pol'y 101, 101 (1997) (connecting "the economic literature on rules and standards, the economic approach to social norms, and the rule of law"); Frederick Schauer, The Convergence of Rules and Standards, 2003 N.Z. L. Rev. 303, 305 (theorizing that "the adaptive behaviour of rule-interpreters and rule-enforcers" may cause rules and standards to converge); Pierre Schlag, Rules and Standards, 33 UCLA L. Rev. 379, 380 (1985) (contending that "much of legal discourse . . . might be nothing more than the unilluminating invocation of 'canned' pro and con arguments about rules and standards").

99. It bears further noting that much of this literature focuses on the courts or treats lawmaking by both legislatures and courts as identical without deeper reflection. See, e.g.,

First, although the rules and standards literature does treat generality and specificity in law, it addresses generality and specificity along only one axis and overlooks the other ways in which laws can be general and specific. To illustrate, discussions of generality and specificity in the rules and standards literature usually define rules as specific and standards as general.[100] The literature then addresses concerns over generality and specificity in that context only. Observations regarding generality and specificity in that context, while potentially accurate, do not address the kind of generality that the generality principle raises. The example of traffic laws adds context: A law that requires all vehicles to drive sixty-five miles per hour is specific with respect to conduct, making it a rule. But the law is also general, thereby conforming to Fuller's generality principle, when it comes to the class of actors and actions to which the law applies. Thus, rules are specific along one axis, but they can also be general along another axis that comports with the generality principle. Contrast a law that requires all vehicles to drive sixty-five miles per hour with two laws: one that require cars to drive sixty-five miles per hour and one that requires trucks over a certain tonnage to drive fifty-five miles per hour. The former law is still as specific or rule-like as the latter laws when it comes to conduct, but the former law better conforms to Fuller's generality principle than the latter

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Frank Cross, Tonja Jacobi & Emerson Tiller, A Positive Political Theory of Rules and Standards, 2012 U. Ill. L. Rev. 1, 3 (arguing for a court-focused "Positive Political Theory" analysis of "both higher and lower courts" to better understand "how and why the dominant doctrinal forms of rules and standards are created"); Jamal Greene, The Rule of Law as a Law of Standards, 99 Geo. L.J. 1289, 1293 (2011) (theorizing that proportionality analysis, when followed "after requiring the government to justify its actions by reference to a limited set of objectives and procedural options," gives rise to a kind of rule of law); Thomas W. Merrill, The *Mead* Doctrine: Rules and Standards, Meta-Rules and Meta-Standards, 54 Admin. L. Rev. 807, 809, 825–26 (2002) (arguing that the *Mead* Court should have imposed a meta-rule that determined whether rule-like *Chevron* or standard-like *Skidmore* doctrine applied); Kathleen M. Sullivan, Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 27 (1992) (taxonomizing Supreme Court Justices into "Justices of rules," who "suspect that standards will enable the Court to translate raw subjective value preferences into law," and "Justices of standards," who "believe that custom and shared understandings can adequately constrain judicial deliberation").

The few exceptions to the court-centered general rule focus primarily on sentencing reform. See, e.g., Russell D. Covey, Rules, Standards, Sentencing, and the Nature of Law, 104 Calif. L. Rev. 447, 450–51, 461 (2016) (discussing the difficulty that congressional sentence reformers faced when pursuing reform "by imposing a regime of rules"); Kenneth G. Dau-Schmidt, An Agency Cost Analysis of the Sentencing Reform Act: Recalling the Virtues of Delegating Complex Decisions, 25 U.C. Davis L. Rev. 659, 661–62 (1992) (contending that "criminal sentencing is too complex a task for the rote application of general rules" as developed by Congress). Yet, to the extent that the literature addresses legislatures at all, it nonetheless still focuses on separation of powers questions and the discretion afforded or not afforded to courts by legislation.

100. Schlag, supra note 98, at 381–82 & n.16 ("[R]ules prescribe definite, detailed legal consequences to a definite set of detailed facts; standards, by contrast, specify a general limit of permissible conduct requiring application in view of the particular facts of the case[.]" (citing Roscoe Pound, Hierarchy of Sources and Forms in Different Systems of Law, 7 Tul. L. Rev. 475, 482–83, 485–86 (1933))).

laws by being general with respect to class. Similarly, standards can be general along one axis and specific along another. A traffic law requiring all vehicles to drive a "reasonable" speed is general with respect to what is regulated. But a law requiring cars to drive a "reasonable" speed and another requiring trucks to drive fifty-five miles per hour or a "reasonable" speed create standards that are general, while also being specific enough to potentially violate Fuller's generality principle.

As these examples illustrate, the rules and standards literature is primarily concerned with the way that the language of the statute specifies in detail the actor or act regulated. Here, generality and specificity are qualities located in the text of the law. This form of generality and specificity primarily affects how discretion is distributed within a lawmaking system. In particular, generality and specificity within the text of the law might direct lawmaking power and discretion to the courts—in the form of general standards—or to the legislature—in the form of specific rules. The distribution of discretion—or where equity is located—necessarily impacts equity indirectly, by shaping equitable processes into one institution over another. But it is less core to the process of equity directly—that is, the process whereby specificity is worked into law because of the failures of law's generality.

Second, because Fuller's generality principle addresses generality and specificity on this other axis, generality and specificity raise distinct rule of law concerns that often operate in opposition to those raised by rules and standards. In the context of rules and standards, it is the generality of laws that raises rule of law concerns—largely motivated by separation of powers values.[101] For example, a standard directing vehicles to drive "reasonably" on a highway delegates discretion to the courts to decide what is reasonable. A rule that directs vehicles to drive under sixty-five miles per hour on a highway—presumably a rule passed by a legislature—has essentially decided what is reasonable and, for some, left lawmaking to the proper legislative lawmaker. By contrast, because broader discussions of generality and specificity focus on law made by legislatures—they raise fewer separation of powers concerns. Instead, these broader discussions focusing on generality of class to which the law applies envision rule of law concerns with specific, rather than general, laws. In such instances, general laws cure, whereas specific laws cure in the rules and standards context.

These tensions remain even when addressing rule of law concerns in the rules and standards context beyond separation of powers. Another rule of law concern raised in the rules and standards context addresses the notice that is given to the public to guide their conduct in accord with the law.[102] Again, these rule of law concerns operate in opposition to those raised in the broader discussion over generality and specificity. For example, a general standard that directs the public to drive "reasonably" raises

101. See id. at 386–87.

102. Id. at 387–89.

more rule of law concerns over notice than a specific rule that directs the public to drive "under sixty-five miles per hour." The more general the direction, the more likely it is that the law provides inadequate notice to the public on lawful conduct. Although Fuller raised concerns over notice to the public, he primarily saw these concerns resolved by other principles—those of publicity and clarity—rather than the generality principle.[103]

This is not to say that the rules and standards literature has nothing to contribute to the theorization of generality and specificity more broadly. Most notably, the literature on rules and standards identifies definitively that generality and specificity do real work within the law, even if scholars disagree on the type or magnitude of that work.[104] This literature demonstrates that generality and specificity can shape the distribution of equity between institutions and can guide the public through proper information and notice. But the relevance of the rules and standards literature to understanding the generality principle stops with that observation. Instead, through what it does not address, it demonstrates that generality and specificity operate along multiple axes—axes that will need better articulation to address the tensions between the generality principle and the specificity of equity.

b. *Generality and Specificity Beyond the Rules and Standards Literature.* — Beyond the rules and standards literature there exist other dimensions upon which laws can be general and specific. First, law can be specific in that it can apply to certain actors and not others. Here, generality and specificity are often located in the text of the law, but not always. To illustrate, the paradigmatic example of a specific law is a private law—or a law that applies to only a single person. There, the law itself states the name of the person in the text of the law. However, the text of the law need not reveal its specificity, if the law regulates conduct engaged in by some people and not others—likely very few people. Take a law regulating the use of wheelchairs. The law may not specify that it affects one class of people more than others, but the reality is that only a few will feel the effect of the law. Second, law can be specific in that it can apply to certain objects and not others. Again, here, generality and specificity are often located in the text of the law—but not always. In the nineteenth century, a common piece of narrow legislation at the national level was the grant of a post office or post road in a particular geography, stated in the bill.[105] A less

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103. See Fuller, Morality of Law, supra note 1, at 49–51, 63–65.

104. See, e.g., Schlag, supra note 98, at 382 n.16, 383–84 (noting that "rules are distinguished from standards on the grounds of precision and generality," and that lawyers and judges find rules and standards arguments to be "important and persuasive" (citing Isaac Ehrlich & Richard A. Posner, An Economic Analysis of Legal Rulemaking, 3 J. Legal Stud. 257, 258 (1974))).

105. Don Heller, US Post Office, 1789 to 1901: Congressional Statutes, Resolutions, Treaties, Pa. State Univ.: Dep't of Comput. Sci. & Eng'g (Mar. 5, 2020), http://www.cse.psu.edu/~deh25/post/Timeline_files/US-Statutes.html [https://perma.cc/6ZMW-DV7Y].

paradigmatic example would include laws that are "public laws" and appear general on their face but apply quite narrowly. Take for example Section 704 of the American Jobs Creation Act of 2004, which seemingly provided a general law for accelerated tax depreciation for "motorsport entertainment complexes."[106] But the law limited the tax break to "complexes" put into service during a three-year time span—thereby narrowing the actual application of the law to a single NASCAR racetrack.[107] Finally, law can be specific in that it can apply to certain jurisdictions and not others. Laws can be crafted to apply only to densely populated areas or rural areas, for example.[108]

It is generality and specificity along this other axis—that is, actor, object, or jurisdiction—at which the process of equity outside the courts aims and allows equity to perform an important function of fostering representation. The generality or specificity of actor, object, or jurisdiction to which a law applies are all means of affording legislatures the power to tailor law to the plurality of norms and preferences required by a diverse world and an often conflicted polity. Laws made more specific by tailoring their application to certain actors and jurisdictions also afford more power to shape the law to those actors and jurisdictions—further fostering an important representational function. But it bears noting that, along this other axis, the rule of law concerns are both different and operate on different lines than generality and specificity concerns along the axis identified in the rules and standards literature—that is, separation of powers and notice. Rule of law principles at stake with respect to laws that do not apply generally to all actors, objects, and jurisdictions are distinct. On the one hand, specific laws are in tension with presuppositions that many hold over how the law functions. Moreover, specific laws could be symptomatic of discrimination, preferential treatment, government capture, and more. Yet, like the issue Fuller puzzled over in his Storrs Lectures, general laws also raise rule of law concerns—including issues of proper and reasonable governance of a diverse polity and world, as well as concerns over representation of diverse polities. But resolving those rule of law concerns by idealizing generality for generality's sake, as Fuller suggests, seems to address only one set of concerns and only indirectly.

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106. American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418, 1548 (codified as amended at I.R.C. § 168).

107. Brian Kellher Richter, Krislert Samphantharak & Jeffrey F. Timmons, Lobbying and Taxes, 53 Am. J. Pol. Sci. 893, 896 (2009).

108. See Rural Electrification Act of 1936, Pub. L. No. 74-605, § 2, 49 Stat. 1363, 1363 (codified as amended at 7 U.S.C. ch. 31) ("The Administrator is authorized and empowered to make loans . . . for rural electrification and the furnishing of electric energy to persons in rural areas who are not receiving central station service . . . [and] to make . . . reports concerning the condition and progress of the electrification of rural areas . . . .").

B. *Modern Debates over the Generality Principle and Equity*

Despite the ongoing lack of clarity around the terms, it often appears as though generality and specificity are everywhere and nowhere within legal doctrines and literatures. The recurring specters of generality and the generality principle are commonly raised in discussions of fairness and procedure. The presumption is that generality is fairer; specificity is seen as less fair. The generality principle is often raised and implemented as a solution to corruption, discrimination, and unequal representation; specificity is often identified as symptomatic of malfeasance. But there are glimmers of a more nuanced perspective on generality and specificity. Occasionally, specificity is seen as positive and as a means to afford those affected by the specific law more participation and representation in the lawmaking process. Yet, generality and specificity in lawmaking are rarely addressed comprehensively.

1. *The Generality Principle Within Jurisprudence.* — Although Fuller's principle of generality has been notably sticky within legislatures and is often invoked within the field of legislation without much reflection, generality has not been without its critics. Most famously, H.L.A. Hart took Fuller to task over his principles writ large.[109] Rather than tussle with Fuller's principle of generality specifically, Hart described the entire project of focusing on procedural rule of law principles as misguided.[110] Laws would not remain just, in Hart's view, simply because the lawmaking process followed certain guidelines and the structure of the laws themselves took certain forms.[111] In fact, Hart countered that rule of law principles could make unjust laws more difficult to identify because the procedural formality and proper form of those laws could disguise the immorality of their application.[112] Nazi Germany, to invoke a case often debated by Hart and Fuller,[113] may have made an even stronger argument for upholding the laws that structured the Holocaust had the state followed rules of generality, clarity, and prospectivity. Fuller assumed without evidence that the laws of Nazi Germany would have been less likely to be enacted were they to have adhered to his rule of law principles.[114] But Hart was far less con-

109. See Hart, Separation of Law and Morals, supra note 96, at 627–29.

110. See H.L.A. Hart, Book Review, 78 Harv. L. Rev. 1281, 1285–86 (1965) (reviewing Fuller, Morality of Law, supra note 1).

111. See Hart, Separation of Law and Morals, supra note 96, at 596–600 ("[I]t could not follow from the mere fact that a rule violated standards of morality that it was not a rule of law; and, conversely, it could not follow from the mere fact that a rule was morally desirable that it was a rule of law.").

112. See id. at 596–97 ("[T]he time might come in any society when the law's commands were so evil that the question of resistance had to be faced, and it was then essential that the issues at stake at this point should neither be oversimplified nor obscured.").

113. See, e.g., Fuller, Morality of Law, supra note 1, at 40–41; Hart, Separation of Law and Morals, supra note 96, at 615–20.

114. See Lon L. Fuller, Positivism and Fidelity to Law: A Reply to Professor Hart, 71 Harv. L. Rev. 630, 649–50 (1958).

vinced that the power of rule of law principles would prevent the enactment of unjust laws.[115] History, in part, supports Hart as the poll taxes and literacy tests of the nineteenth and twentieth centuries suggest. It may take longer to recognize the injustice of laws that are general in their form, yet disparate in their impact.[116]

Yet, it bears noting that Hart in no way rejected the principle of generality as an important ideal within the lawmaking process.[117] Rather than interrogating it, Hart readily embraced generality within his other writings. Hart's magnum opus on jurisprudence, *The Concept of Law*, published a few years following the famed Hart–Fuller debates, tied closely the concept of justice with "the very notion of proceeding by rule."[118] He praised the value of general rules applied without "prejudice, interest, or caprice" in different cases as an integral aspect of justice.[119] In later writings, often without citation to Fuller, Hart invoked analogues to Fuller's rule of law principles as ideals to be upheld to maintain a functioning lawmaking system.[120] In fact, Hart pointed to the principle of generality as the "minimum meaning" required to constitute a legal system.[121] Like Fuller, Hart approached "the very notion of law" as one that by definition required "general rules."[122] However equivocal and ambiguous, Hart's principle of generality seemingly diverged from Fuller's in important ways. Hart saw the principle of generality as embodied not in the character of the law as written, but in its administration: "This is justice in the administration of

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115. See Hart, Separation of Law and Morals, supra note 96, at 615–21. In response to criticisms that the Nazis exploited positivist subservience to the law, he argued that conjoining law and morality would not have prevented these injustices; the rule of law principles were "really dependent upon an enormous overvaluation of . . . the bare fact that a rule may be said to be a valid rule of law, as if this, once declared, was conclusive of the final moral question: 'Ought this rule of law to be obeyed?'" Id. at 617–18.

116. Our modern Supreme Court doctrine supports this thesis: Laws with indirect immoral effects continue to be evaluated under a less stringent constitutional standard than those laws with direct immoral effects. Compare Washington v. Davis, 426 U.S. 229, 242 (1976) (establishing the modern disparate impact standard for generally applicable laws), with Obergefell v. Hodges, 576 U.S. 644, 675–76 (2015) (finding that the right to marriage is fundamental and, in turn, invalidating laws that directly denied government recognition of marriage for one disfavored group).

117. See, e.g., Neil MacCormick, H.L.A. Hart 194 (Stan. Univ. Press 2d ed. 2008) (1981) ("Nobody could deny either the reality of [Hart's] concern for justice or the firmness of his contentions that a precondition of justice as defined within his critical morality is the existence of a well working legal system . . . .").

118. H.L.A. Hart, The Concept of Law 156–57 (1961) [hereinafter Hart, Concept of Law].

119. Id.

120. See, e.g., H.L.A. Hart, Problems of the Philosophy of Law, *in* Essays in Jurisprudence and Philosophy 88, 115 (1983) ("Thus, general rules clearly framed and publicly promulgated are the most efficient form of social control.").

121. Hart, Separation of Law and Morals, supra note 96, at 623 (defining general rules "both in the sense that they refer to courses of action, not single actions, and to multiplicities of men, not single individuals").

122. Id. at 624.

law, not justice of the law."[123] But Hart's position on generality remains rife with inconsistencies. Clear statements regarding generality as *administration* are often followed immediately in Hart's writings with his reflections on generality as a foundational *structural* feature of law and lawmaking: "So there is, in the very notion of law consisting of general rules, something which prevents us from treating it as if morally it is utterly neutral, without any necessary contact with moral principles."[124] Jeremy Waldron and others have since taken Hart, justifiably, to task over his equivocation.[125] Waldron further blames the lack of development and critique of Fuller's principles in the field of jurisprudence on Hart's undue focus on the separation of law and morality, as well as his discounting of Fuller's principles writ large.[126]

In more recent years, scholarly critiques of generality have begun to gain steam within the field of jurisprudence.[127] Although these literatures have not yet diffused fully into legislation scholarship and into the practice of legislatures, scholars have increasingly begun to take a more critical stance on Fuller's principle of generality, on Hart's value of administering general rules by treating like cases alike, and even on the dichotomy of law and equity in American lawmaking. At the forefront of this critique is the work of Professor Frederick Schauer, who has, in a series of articles,[128] begun to unpack "law's obsession with generality."[129] This "obsession" that he identifies is rooted in the twin values of stability and authority.[130]

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123. Id.

124. Id.

125. See, e.g., Jeremy Waldron, Positivism and Legality: Hart's Equivocal Response to Fuller, 83 N.Y.U. L. Rev. 1135, 1138 (2008).

126. See id. at 1168–69.

127. See, e.g., Timothy A.O. Endicott, The Generality of Law, *in* Reading H.L.A. Hart's *The Concept of Law* 14, 14–15 (Luis Duarte d'Almeida, James Edwards & Andrea Dolcetti eds., 2013) ("[That] Hart says that particular orders are either exceptional, or are 'ancillary accompaniments' of general forms of direction . . . is the most striking incompleteness in his account of generality." (quoting Hart, Concept of Law, supra note 118, at 21)); William Lucy, Abstraction and the Rule of Law, 29 Oxford J. Legal Stud. 481, 497–98 (2009) (arguing that "Fuller's position on juridical generality is hasty" because interpreting the generality requirement as a prohibition of certain laws would converge on common sense accounts of generality and potentially muddle the distinction between internal and external moralities of law); Dimitris Tsarapatsanis, Representative Legislatures, Grammars of Political Representation, and the Generality of Statutes, 31 Ratio Juris 444, 444–45 (2018) (comparing the "grammars" of political representation between the French and American constitutional traditions and noting the former's comparatively insistent approach that "norms formulated by representatives be general").

128. See Frederick Schauer, The Generality of Law, 107 W. Va. L. Rev. 217, 218 (2004) [hereinafter Schauer, Generality of Law]; Frederick Schauer, The Jurisprudence of Reasons, 85 Mich. L. Rev. 847, 849 (1987) (reviewing Ronald Dworkin, Law's Empire (1986)); Frederick Schauer, On Treating Unlike Cases Alike, 33 Const. Comment. 437, 437–38 (2018) (reviewing Randy J. Kozel, Settled Versus Right: A Theory of Precedent (2017)).

129. Schauer, Generality of Law, supra note 128, at 233.

130. Id. at 223–34.

Stability is fostered by treating cases alike—even when determining whether cases are truly "alike" might be an impossible charge[131]—because, as Justice Brandeis famously articulated, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."[132] Instability not only violates rule of law principles by creating a system ruled by people and not law but also allows for discretion that could lead to abuse.[133] The value of authority limits the power of the law to the enactments of certain institutions or sources.[134] A legislature might make better decisions about policy than a single judge unchecked by deliberative processes. But, as Schauer observes, the values of stability and authority supported by the principle of generality preference a certain vision of the law and human nature—to the exclusion of other values, other visions, and other worldviews.[135] Rather than creating a legal system that preferences stability and Burkean conservatism, law could instead be constructed as a tool of progress and justice.[136] It could instead foster and celebrate the "better angels of our nature," rather than check the flaws of the human condition.[137] To preference the principle of generality is not simply to uphold an ideal at the heart of the definition of law, it is to choose one definition of law over another—potentially as a detriment to the design of the legal system as a whole.

2. *The Generality Principle and Equity Outside of Jurisprudence.* — Outside of jurisprudence, Pierre Bourdieu has raised a critique of the generality principle that remains underrecognized and underexplored within the legal academy.[138] Before turning to the principle of generality specifically, Bourdieu began his foray into legal theory with a sociological critique of the methodology of jurisprudence writ large: The seemingly intractable debate between "formalists" and "positivists" in the discipline of jurisprudence over the nature of law, he reflects, has been rooted in the shortcomings of methodology often applied by the discipline and not in the intrac-

131. See id. at 233.

132. Id. (internal quotation marks omitted) (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

133. See id. at 234 ("[L]aw looms large, and law may be the institution charged with checking the worst of abuses even if in doing so it becomes less able to make the best of changes.").

134. See id. ("[A]uthority is about treating the emanations from certain sources—certain courts, certain books, certain institutions—as being important just because of their source.").

135. See id.

136. See id.

137. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), reprinted in Abraham Lincoln: Speeches and Writings, 1859–1865, at 215, 224 (1989); cf. Cooper v. Aaron, 358 U.S. 1, 26 (1958) (Frankfurter, J., concurring) ("Lincoln's appeal to 'the better angels of our nature' failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals . . . is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.").

138. Bourdieu, Force of Law, supra note 21; see also supra notes 21–22, 43–47 and accompanying text.

tability of the question.[139] Because scholars of jurisprudence by and large study law in the abstract rather than empirically and within the broader social field in which law is constructed and embedded, both formalists and legal realists have failed to understand how law functions sociologically and see that their debates aren't so intractable after all.[140] Application of a methodology more sociologically grounded and more empirical, Bourdieu argued, would offer a more nuanced understanding of generality and specificity in law.[141]

The generality principle was itself born amidst this seemingly intractable debate between formalists and realists. At the time Fuller developed his principles, the field of legal positivism was gaining dominance and displacing the seemingly antiquated formalist view. Positivists—early predecessors to today's legal realist movement[142]—envisioned law as a creation of bodies politic and their legal institutions and, therefore, as simply an extension of politics that entrenched and replicated power structures elsewhere.[143] By contrast, formalists like Fuller saw law as a system that both operated according to its own internal logic and could influence the world independent of politics.[144] Formalists, although eschewing the full tenets of natural law, seemed to still cling to some of its features.[145] Fuller proposed his principles to argue that law has an internal logic distinct from the worldly institutions that created it and to show that this internal logic could be leveraged to better secure the relationship between law and jus-

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139. See Bourdieu, Force of Law, supra note 21, at 814–16 (theorizing that legal formalism and instrumentalism "together simply ignore the existence of an entire social universe . . . , which is in practice relatively independent of external determinations and pressures").

140. See id.

141. Id. ("[T]his [social] universe cannot be neglected if we wish to understand the social significance of the law, for it is within this universe that juridical authority is produced and exercised.").

142. See Brian Leiter, Rethinking Legal Realism: Toward a Naturalized Jurisprudence, 76 Tex. L. Rev. 267, 315 (1997).

143. See Jennifer Nadler, Hart, Fuller and the Connection Between Law and Justice, 27 Law & Phil. 1, 6 (2007) (summarizing Hart's Rule of Recognition as providing that "a rule exists among a group if and only if the officials of the system abide by the rule and have some reason for thinking the rule ought to be obeyed"); Dennis Patterson, Theoretical Disagreement, Legal Positivism, and Interpretation, 31 Ratio Juris 260, 267 (2018) ("[T]he validity conditions for legal propositions . . . achieve their status solely in virtue of the ongoing willingness of officials in the legal system to recognize them as such.").

144. See Peter P. Nicholson, The Internal Morality of Law and Its Critics, 84 Ethics 307, 311 (1974) ("His case . . . is . . . that form and content are not separable in the way that both sides to the dispute assume, but are necessarily connected: the form of law is itself morally good.").

145. See id. ("Fuller himself conceives his position to be a variety of natural law, describing it as a 'procedural, as distinguished from a substantive natural law,' dealing with the construction and administration of the law." (quoting Fuller, Morality of Law, supra note 1, at 96–97)).

tice.[146] General laws, according to the internal logic of the law identified by Fuller, could make laws made by people more just.

Although Bourdieu's foray into the study of law was brief and merely scratched the surface of these issues, Bourdieu's broader body of work building sociological theory grounded in empiricism could prove helpful in resolving the longstanding conflicts between formalists and realists. After all, it is difficult to understand the functions of law and the regulation of human conduct without an accurate understanding of how the social world functions. The heart of Bourdieu's theoretical project aimed to reconcile the apparent conflict between the idea that the social world was constructed by people and their institutions—like law itself, but that the world would somehow also limit and, at times, subordinate those same individuals.[147] His project aimed to address questions such as: If the world is socially constructed, why is it so often duplicated and why do its structures seem so immalleable and impervious to change? The structures of the human world—including law and legal institutions—have often oppressed huge swaths of the individuals who participated in their construction. Why would individuals—seemingly blessed with individual will—participate in the construction of their own oppression? Or, to put it within the technical terms of the sociological debate, how could one reconcile the inherent tensions between structure and agency?[148]

At base, the fields of sociology and jurisprudence seem to be aiming at a similar tension: How can law be both constructed by humankind, yet binding upon it? Bourdieu offered a theoretical framework and a methodology that promised insights into this seemingly intractable contradiction in both sociology and law: centering the empirical study of "practices" or practice theory.[149] Practices ought to be centered in the study of the social world, including the law, because that world is constructed by an aggregate of "practices"—a term Bourdieu borrowed from Aristotle's *praxis*—undertaken by individuals.[150] Everyday practices are something people are socialized into and that individuals often undertake without much cognitive or moral reflection.[151] These practices constitute and shape the *habitus*—a term Bourdieu borrowed from the medieval translations of Aristotle's *hexis*—or an individual's holistic world view that one experiences as the "natural" world.[152] Together, the collective understanding of the objective rules and proper conduct within a social field constitute the

146. See Nadler, supra note 143, at 18–20 (explaining Fuller's use of the allegory of Rex and his subjects to illustrate how the law's internal logic is critical both to its status as law at all and to its just administration).

147. See Pierre Bourdieu, The Logic of Practice 52–65 (1990) [hereinafter Bourdieu, Logic of Practice].

148. See id.

149. See id. at 80–97.

150. See id.; Bourdieu, Theory of Practice, supra note 43, at 73–75.

151. See Bourdieu, Logic of Practice, supra note 147, at 80–97.

152. See Bourdieu, Theory of Practice, supra note 43, at 59–74, 93–94.

doxa—again borrowed from Aristotle—or the world that people experience as so self-evident that they take it for granted.[153] In so doing, people construct their social world through their practices because they cannot imagine any other way.[154] What people take for granted about the world often limits their ability to change the way it is constructed.[155] Because so much of the world that people construct is taken for granted, they often participate in the social construction of worlds that entrench unequal and unfair distributions of power—even to their own detriment. Thus, socially constructed worlds often seem immalleable and impervious to change.

To provide a simple example, in the United States, individuals drive their cars on the right-hand side of the road. This practice is not universal. In England, as well as in many former British colonies, people drive their cars on the left-hand side of the road. But people growing up in the United States take driving on the right-hand side of the road for granted. They come to experience driving on the right side as "natural" and would evaluate driving on the left side of the road as unnatural or even dangerous. When teaching their children to drive, they socialize them into the practice of driving on the right. Folks who grew up within the United States have trouble driving in countries that practice driving on the left-hand side of the road and are not seen as competent drivers. Folks who immigrate as adults to the United States from countries that practice driving on the left side similarly struggle. As a consequence, many individuals in the United States now take driving on the right side of the road for granted. Those individuals, even if they wished to change the way that the field of driving was socially constructed, would struggle with their ability, as well as the materiality of the situation. Although Americans drove on the right in cars with steering wheels on the right, the left, and in the center well into the late nineteenth century, left-hand driving cars are no longer commonly available for purchase in the United States.[156] This is not to say that socially constructed worlds are wholly impervious to change. Canada, a commonwealth country, for example, drove on the left until the practice was consciously changed in the 1920s to facilitate safe border crossings with the United States.[157] But the change resulted from centralized coordination and regulation and was still met with intense fear that chaos would result.[158]

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153. See id. at 68–69; see also Bourdieu, Force of Law, supra note 21, at 848 ("[D]oxa is a normalcy in which realization of the norm is so complete that the norm itself, as coercion, simply ceases to exist as such.").

154. See Bourdieu, Theory of Practice, supra note 43, at 167–70.

155. See id.

156. See M. G. Lay, Ways of the World: A History of the World's Roads and the Vehicles that Used Them 197–201 (1992).

157. See Kevin Griffin, Week in History: Switching from the Left Was the Right Thing to Do, Vancouver Sun (Jan. 1, 2016), http://www.vancouversun.com/life/week+history+switching+from+left+right+thing/11625241/story.html [https://perma.cc/CA3C-PH5T].

158. Id.

Applying the methodology of practice theory to the study of law allows us to better understand what "law" is, how it functions, and how it constrains. It could also bring together the warring camps of formalists and realists who gave birth to the generality principle by resolving the alleged tension between the fact that law is socially constructed by individuals and legal institutions and the belief that law limits. Once people understand how individuals function within a broader society, they understand that the practices of these worlds will create path dependence in the way those worlds work, thereby limiting individual action within that world. Like driving, this is similarly true of the law, which will require its own empirical evaluation to understand. Bourdieu's methodology understood that the study of politics or power was not enough. Studying each social field empirically, according to Bourdieu, requires examining the "internal logic" of that field—a logic that "constantly constrains the range of possible actions and, thereby, limits the realm of specifically juridical solutions."[159] Rather than pointing to natural law or some other abstract model, practice theory aims to study the practices, habitus, and doxa of a particular field—such as with driving practices and their history.[160] But although Bourdieu deemed the study of power alone insufficient, his methodology also recognized that the study of power was necessary to understand a social field—thereby possibly satisfying the realists.[161] In addition to studying the internal logic of a field, one must also examine "the specific power relations" of that field.[162] For example, one could not have made sense of the observation that former British colonies drove on the left without understanding the power distribution between imperial powers and the colonized; nor could one have understood Canada's decision to alter its driving practice—as opposed to the United States—without understanding the power distribution created by economic markets.

Further, applying the methodology of practice theory reveals the tensions between the generality principle and equity. Bourdieu's brief essay provides an example of what his methodology offers the debate between generality and specificity.[163] He found that generality actually produced the *opposite* of what scholars of jurisprudence like Fuller predicted with their abstract models: Law might be more just and the result of more equal power relationships when it is fractured, specific, or "differentiated."[164]

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159. Bourdieu, Force of Law, supra note 21, at 816.

160. See Richard Terdiman, Translator's Introduction to Pierre Bourdieu, The Force of Law: Toward a Sociology of the Juridical Field, 38 Hastings L.J. 805, 811–13 (1987).

161. See Bourdieu, Force of Law, supra note 21, at 814–15 (characterizing instrumentalists as interested in the "direct reflections of existing power relations, in which economic determinations and . . . the interests of dominant groups are expressed," but noting that they have neglected "the social basis of that autonomy" and the "field of power").

162. Id. at 816.

163. See id. at 847–52.

164. See id. at 850–52 (observing that as the power of once-dominated groups increases, differentiation tends to increase as well, which "helps to foster [a] return to social realities").

Although Bourdieu's empirical analysis focused wholly on the courts, it remains ripe for application elsewhere within the lawmaking system. Bourdieu observed in the field of judge-made law that generalization—or homogolization, according to Bourdieu's specialized terminology—"sanction[ed] the effort of dominant or rising groups to impose an *official representation* of the social world which sustains their own world view and favors their interests."[165] Because the field in which law is made is often unequal in terms of power distribution, Bourdieu observed that it is often only the most powerful who can generalize their world view into law.[166] Marginalized or dominated groups have less of a chance to restructure power across the entire field of lawmaking.[167] But these groups may have the opportunity of restructuring law within particular subdomains.[168] Thus:

> [V]ariation [in the law] depends notably upon variations in power relations within the social field . . . . For example, as the power of dominated groups increases in the social field and the power of their representatives (parties or unions) grows in the political field, differentiation within the [law] tends to increase. This was illustrated in the second half of the nineteenth century by the development of commercial law and labor law and, more generally, of social welfare law.[169]

Potentially drawing on Aristotle once again, Bourdieu envisioned the fracturing of law—or in Aristotelian terms, equity—as the process that steps in when law fails because of its generality. By contrast to Aristotle, however, Bourdieu envisioned the fracturing of law as a dynamic process brought about by social practice.[170] Although the connections between Bourdieu's theoretical framework and equity remain to date undertheorized within the legal academy, Bourdieu's empirical and sociological approach to the study of equity offers an innovative path forward. The following sections aim to apply the methodology of practice theory to the historical study of the practice of petitioning—as a means to better understand and resolve the tensions between the generality principle and the function of equity outside the courts.

II. CASE STUDIES: EQUITY OUTSIDE THE COURTS OVER THE LONG NINETEENTH CENTURY

Despite causing recurring issues within lawmaking institutions and increasingly muddled doctrine within the courts, the practice of seeking

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165. Id. at 848.

166. See id. at 847–48.

167. Id. at 850 ("Those who occupy inferior positions in the field . . . have less chance of overturning the power relations within the field than they do of contributing to the adaptation of the juridical corpus and, thereby, to the perpetuation of the structure of the field itself.").

168. See id.

169. Id.

170. See id. at 816, 848.

equity outside of the courts remains underexplored—and often completely overlooked. To better identify and theorize this practice this Part offers three historical case studies. The first draws upon women's petitions from the early nineteenth century to illustrate in greater detail the representational function of equity, the role of legislatures in fostering that function, and the role of individuals—empowered and not—in enforcing the representational function of equity through the use of repeated petitions. The main contribution of this case study is to broaden the field in which equity is identified and studied by highlighting the practice of seeking equity outside the courts as a distinctive and integral aspect of American lawmaking. It further explores in depth the practices and logics of this broader field and illustrates how the practices for seeking equity within legislatures distributed power more widely among the population—thereby serving a distinctive representational function in the lawmaking process.

The second two case studies draw on two disparate but related historiographies of petitioning from the nineteenth century. To date, researchers have largely studied "petitioning" and the "private bill system" as distinct phenomena. Consequently, literatures celebrating the practice of petitioning at the national and local levels as empowering individuals and minorities and literatures decrying petitioning at the state level as corruptive to the rule of law have not yet been brought into conversation. This Article bridges these historiographies and fashions them into case studies on the petition process—the most visible means by which individuals engaged in the practice of seeking equity in the United States over the long nineteenth century.

These latter two case studies demonstrate that the practice of seeking equity outside the courts has had roots within our legislatures since the Founding. They also chart the dynamics of this practice over time and between lawmaking institutions. These case studies illustrate how the practice of seeking equity has long raised tensions over generality and specificity in the lawmaking process and that these tensions have followed predictable dynamics: Members of the public sought equity from whatever institution offered them redress—commonly through the practice of petitioning legislatures. Historically, petitioning a legislature provided a broader vision of representation than the vote, as well as other mechanisms of representation, and a more level playing field for all groups—including the dominated—to shape law and wield power. As dominated groups forced proper representation from and gained power within lawmaking institutions, law became more fractured and specific as Bourdieu had predicted. Yet the broader form of representation that equity offered within legislatures often fostered conditions for capture by powerful interests seeking rents. Movements against "corruption" called to limit the practice of seeking equity from legislatures by mandating general laws. But members of the public inevitably continued the practice of seeking equity from whatever institution offered redress, which meant

that mandating general laws in legislatures merely shifted the hydraulic nature of equity and its representational function elsewhere within the lawmaking system—either into the courts through equitable or "dynamic" interpretation or into administrative lawmaking.

These case studies have much to teach about the practice of seeking equity outside of the courts and the generality principle. In particular, they teach that prevailing theories about the rule of law might be too simplistic in prioritizing generality and might overlook the complicated, but integral functional role of equity in facilitating representation, especially when making law to govern large, heterogeneous, and plural jurisdictions. Prevailing theories of equity might similarly be too simplistic and overlook the important functional role of equity in facilitating representation, as well as the contribution of the public—particularly individuals and minorities—in shaping equity and wielding equitable practices to craft the law and shift power. Lastly, these case studies teach that inherent suspicion of specific laws or blanket prohibitions against them may be misguided, and that the ideal of generality may be a historically contingent solution to particular crises of governance, not a deeply held or well-interrogated Founding Era value. Rather, equity and the specificity that results may also be an integral aspect of the lawmaking process, as individuals and minorities continue to shape the law and the lawmaking process in their campaigns for proper representation and for particularized justice.

A. *Introducing Equity's Representational Function: Widows' Petitions*

Unlike the vote, petitioning was the practice seen as most paradigmatic in facilitating the function of representation within American democracy and was open to all—franchised and unenfranchised alike.[171] Women, free African Americans, Native Americans, the foreign born, and even children petitioned their legislatures for redress.[172] Petitions were the primary means by which these communities sought to seek representation within the lawmaking process and to shape the law to better serve them.[173] Molding the law to serve their communities, as equity often does, regularly drove laws toward greater specificity—as petitioners petitioned for amendments and exceptions to a general rule.

Although many still seek representation and redress from Congress directly today, the process is far less public and transparent than the formalized system of the nineteenth century.[174] Thus, petition archives from this period allow modern eyes to see marginalized populations demanding

171. See Maggie McKinley, Lobbying and the Petition Clause, 68 Stan. L. Rev. 1131, 1137 (2016) [hereinafter McKinley, Lobbying].

172. See id. at 1136–37.

173. See id.

174. See id. at 1138 (noting in addition that "[m]uch like a complaint filed with a court, Congress treated each petition on equal footing—no matter the petition's source and without regard to the political power of the petitioner").

representation for themselves and others, wielding lawmaking power, and enacting legal change. From 1789 until 1865, for example, women submitted more than nine thousand petitions to Congress and, although many of these petitions were denied, others resulted in formal legal change.[175] The first wave of petitions by women were so-called "widows' petitions"—individual petitions and petition campaigns crafted by women that aimed to secure pensions for the wives of fallen soldiers and reform the national pension system.[176] These petitions were not themselves unique—other than they sought redress from the newly constituted Congress. Rather, the widows' petitions were part of a broad culture of seeking representation and redress from all levels of government through the practice of petitioning—a culture that women were integral in shaping.[177] The following section draws on early women's petitions to illustrate how equity operated within Congress during the long nineteenth century. Not only does the representational function of equity step in to create exceptions to the general rule, as Aristotle described,[178] it eventually reshapes the general rule—presenting a much more discursive relationship between law and equity than previously theorized.

A common dynamic occurred around the operation of equity within legislatures. A legislature would establish a general rule that an affected community found to be regressive. Individuals within that community would then seek representation for themselves within the lawmaking process by leveraging petitions as a means to share their perspective and to set

175. McKinley, Petitioning, supra note 26, at 1559.

176. See Kristin Collins, "Petitions Without Number": Widows' Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements, 31 Law & Hist. Rev. 1, 2–4 (2013).

177. See Lori D. Ginzberg, Untidy Origins: A Story of Women's Rights in Antebellum New York 27–30 (2005) (using a petition for equal rights to the 1846 New York Constitutional Convention, filed by six women from Jefferson County, New York, to frame a history of women's political rights in America); Alisse Portnoy, Their Right to Speak: Women's Activism in the Indian and Slave Debates 52–86 (2005) (documenting the efforts of women to file petitions against the removal of Native Americans from their lands, indicating "women's federal activism in a space declared national and political"); Susan Zaeske, Signatures of Citizenship: Petitioning, Antislavery, and Women's Political Identity 1–15 (2003) (emphasizing the increased influence of women by petitioning against slavery and the resulting "appetite for further political participation and more rights"); Dan Carpenter & Colin D. Moore, When Canvassers Became Activists: Antislavery Petitioning and the Political Mobilization of American Women, 108 Am. Pol. Sci. Rev. 479, 481–82 (2014) ("Women's experience in the day-to-day moral and ethical persuasion required by antislavery petitioning, moreover, trained them in tactics of political rhetoric and, in a sense, campaigning (not for a party, but for a cause)."); Mary Hershberger, Mobilizing Women, Anticipating Abolition: The Struggle Against Indian Removal in the 1830s, 86 J. Am. Hist. 15, 25–35 (1999) (outlining the organizing, production, and canvassing process of the Ladies Circular in the 1830s, which advocated against Native American removal, and its reception); McKinley, Petitioning, supra note 26, at 1559.

178. See supra notes 2, 49 and accompanying text.

the agenda.[179] Petitioning by women within the early period illustrates this dynamic in greater detail. One of the responsibilities of the new national government was to resolve the debts of independence, and, from the Founding, Congress assumed responsibility over the administration and provision of pensions to soldiers wounded or killed in service of the Revolutionary War.[180] The Continental Congress granted pensions to the widows of revolutionary soldiers, but—continuing the English tradition—limited those pensions to widows of officers.[181] This regressive general rule meant that widows of rank-and-file soldiers would not receive a pension.[182] The first Congress ratified the general rule of limiting widows' pensions to officers at the Founding and continued it until the Antebellum Era.[183] Yet, focusing solely on formal legal changes to the general rule overlooks the important incremental effects of equity in the intervening years. Widows' petitions for both individual and class-based exceptions flowed into Congress's docket from the Founding and, because the petition process was treated more like litigation at the time, Congress responded to each petition with hearings, fact-finding, committee reports, and private bills that created individual exceptions to the general rule.[184] Not only did widows' petitions put their concerns on the national agenda by requiring formal parliamentary response and thereby securing congressional attention, they also offered a forum for women to present and shape the moral arguments for deviating from—or reforming—the general rule.

Thus, one important aspect of the representational function of equity does not rest in formal legal change per se but in the ability to have the perspectives of a community heard within the walls of Congress and, through the procedural requirements of petitioning, to set the legislative agenda. For example, widows generally petitioned Congress for pensions under one of two circumstances.[185] The first was when a widow had determined that her case fell outside of the general rule limiting pensions to officers and the like.[186] Rather than attempt to seek a pension through the administrative apparatus established to process pension petitions, she would streamline the process with a petition to Congress for a private bill granting a pension in her particular case.[187] The second was when a widow

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179. See, e.g., McKinley, Lobbying, supra note 171, at 1145–46 (documenting a successful attempt in the eighteenth century by free African Americans who petitioned the Virginia legislature to remove a tax imposed only on Black women).

180. Collins, supra note 176, at 2–3; McKinley, Petitioning, supra note 26, at 1586.

181. Collins, supra note 176, at 3.

182. See id.

183. Id.

184. See id. at 17 (documenting one widow's series of resubmitted petitions over the span of eleven years, which created "a raft of committee reports and numerous prolonged floor debates").

185. Id. at 27.

186. Id.

187. Id.

had tried to obtain a pension through the administrative process and been denied.[188] In response, she filed a petition in Congress aiming to either amend the general rule or grant a pension through a private bill.[189] No doubt the language of the petitions sounded in stereotypes of the day. Many widows leaned heavily on narratives of female dependence and vulnerability in seeking redress.[190] But the petitions placed the centrality of women's experiences front and center inside Congress—an institution that was short on women and women's perspectives through other mechanisms of representation like the electoral process and the vote.

Moreover, in addition to fostering representation internally within Congress, the practice of petitioning fostered representation externally. The persistence and determination behind the petitions reveal a level of political entitlement rarely recognized in marginalized communities over the long nineteenth century. Not only did these marginalized communities seek representation through the practice of petitioning, they also fostered a belief in their right to representation.[191] These women may have trafficked in stereotypes, but their determination to leverage every political lever at their disposal and eventually enact real legal change belied every feminine cliché. Widows petitioned any institution that would accept their petitions, often multiple times, and they began to organize around petition campaigns.[192] Although Congress expressed regular reluctance at granting redress piecemeal,[193] it continued to grant the widows' petitions, and women began to shape the law as it was developed to address new situations.

Over time, petitions for representation by individuals often came to reshape the general rule—first, through the process of granting individual exceptions through private bills; then, through the process of amendment; and, finally, by reformation of the general rule entirely. Aside from private bills, one of the earliest markers of amendment of the general rule came in response to the War of 1812; Congress in 1814 and in 1816 granted pensions to widows of rank-and-file navy seamen, privateers, and army soldiers who had served in the War of 1812.[194] In 1818, Congress provided pensions for widows of all rank-and-file soldiers involved in the so-called First Seminole War, fought to remove Native Nations from the land that would become the state of Florida.[195] This piecemeal approach came in response to a number of widows' petitions praying for expansion of the pension statutes beyond the widows of officers.

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188. Id.
189. Id.
190. See id. at 5.
191. Ginzberg, supra note 177, at 27–30.
192. See Collins, supra note 176, at 26–29.
193. See id. at 6.
194. Id. at 8–9.
195. Id. at 9 & n.20.

By the time of the Second Seminole War, the circumstances had changed. Negotiations to remove the Seminole had been ongoing since 1825, if not before.[196] But the Seminole Nation refused to move.[197] Following the election of Andrew Jackson to the presidency in 1828, the national government began to increase the military presence in the South, including the territory of Florida.[198] The mid-1830s marked the beginning of the height of Indian Removal.[199] The United States would force thousands of Cherokee men, women, and children down the Trail of Tears a few years later in 1838.[200]

In direct response to a petition from a group of widows, Congress—motivated by a need to fund the brutal removal of the Seminole Nation from their homelands—abandoned the piecemeal approach and amended the general rule for widows' pensions in 1836.[201] In 1836, just months after losing their husbands, the widows of Major Francis Langhorne Dade, Captain G.W. Gardiner, and Lieutenant Bessinger petitioned Congress on behalf of themselves, their children, and on behalf of all widows and children of "officers, non-commissioned officers and men" killed during military efforts to remove the Seminole Nation.[202] Major Dade led just over one hundred military men south, deep into Seminole country.[203] The Seminole confronted Dade and his troops on December 28, 1835, leaving only three survivors.[204] Soon after, the widows of soldiers killed on December 28 petitioned Congress as a class.[205]

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196. See Claudio Saunt, Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory 236 (2020).

197. See id. at 236–37.

198. See id. at 82–83.

199. See id. at 232; see also Committee of Claims, Major Dade, et al.—Pensions to Widows and Children, H.R. Rep. No. 24-415, at 3 (1836) (addressing "[t]hose who were made widows and orphans" by what in Congress's view was "the late Indian war at the west, or more recently . . . the hostilities of the Indians at the south").

200. See Saunt, supra note 196, at 280.

201. Id. at 31; cf. H.R. Rep. No. 24-415, at 3–4 ("Those who were made widows and orphans by the late Indian war . . . are . . . entitled to the paternal care of the Government . . . . [T]he law should . . . give a pledge to the citizen soldier, if he dies of wounds received in the service, his wife and children shall not beg their bread.").

Although this example presents an inspiring story of advocacy by women in early American politics, the picture it presents is more complicated. In addition to providing an avenue for the unenfranchised to shape and ultimately influence the lawmaking process, petitioning also fueled the engine of American colonialism by funding the removal of Native Nations from Native land. See, e.g., Saunt, supra note 196, at 136 (describing a petition to Congress to remove the Senecas of Sandusky, Ohio, and how, "[s]ince the Senecas were reluctant to relocate, an eager subagent named Henry Brish, a recent arrival from Maryland, decided to compel their departure by auctioning their property").

202. Collins, supra note 176, at 30–31 (internal quotation marks omitted) (quoting H.R. Rep. No. 24-415, at 1).

203. See Saunt, supra note 196, at 239.

204. See id.

205. H.R. Rep. No. 24-415, at 1.

Congress referred the 1836 widows' petition to the Committee on Claims for reviewing, fact-finding, and reporting.[206] In response, the Committee offered a detailed report, highlighting the long history of affording pensions to officers' widows as a matter of course and to rank-and-file soldiers' widows only on an ad hoc basis.[207] The Committee report also presented detailed normative arguments in support of expanding pension availability—many of them echoing earlier moral arguments made by widows in their petitions of dependency, vulnerability, and the inability to avoid starvation except on the charity of others.[208] Just a few weeks later, on March 19, 1836, Congress drafted and passed a new general pension statute that extended pension benefits to all, including non-commissioned officers and the rank-and-file.[209] Not only had the widows' petitions fostered individual representation through private bills, exceptions, and amendments[210] but they also reshaped representation for an entire community, and reshaped the general rule with their normative arguments and their persistence.

Finally, it bears deeper reflection that the function of representation that equity performed and the persistent belief by petitioners that they were due that representation—that is, the ultimate belief in the practice of petitioning and their entitlement to equitable redress—created a discursive relationship between law and equity that existed over time. Petitions for equitable redress were initially resolved piecemeal—either through private bills or incremental exceptions or amendments to the general rule. Over time, like water on rocks, petitioners came to reshape the general rule itself through their petitions. But reshaping the general rule did not mean that the petitioners abated and that water and rock never came in contact again. Rather, once petitioners reshaped the general rule, they continued to seek representation and further relief from that reshaped general rule. For example, after the widows' success in reforming the general rule in 1836, Amanda M. Dade, widow of Major Dade, petitioned Congress again in 1841 via the territorial legislature of Florida for an extension by private bill of her widow's pension past its earlier five-year term.[211] In this way, the relationship between law and equity within legislatures was discursive—that is, a one-time conversation between formal lawmaking institutions and the public over morals and

206. See id. (indicating that the Committee of Claims "was referred a petition in behalf of the widow and children of Major Dade . . . and such other widows and children of officers" and issued a report in March 1936).

207. See id. at 2–3.

208. See id. ("[I]t is not expected that Congress can repair their loss, but that it can, and [the petitioners] trust will, alleviate their distresses, by feeding the widows, and enabling the mothers to feed and educate their children."); Collins, supra note 176, at 5.

209. Collins, supra note 176, at 31 (citing Act of Mar. 19, 1836, ch. 44, §§ 1, 5, 5 Stat. 7, 7).

210. See id.

211. See Resolution No. 1, *in* Acts and Resolutions of the Legislative Council of the Territory of Florida Passed at Its Nineteenth Session: Which Commenced on the Fourth Day of January, and Ended on the Fourth Day of March, 1841, at 61, 61 (1841).

norms—and its dynamic continued over time. By performing the function of representation, equity is not simply the process that steps in when law fails because of its generality—it is the ongoing process that mediates between a subset of the polity and the lawmaking process over time.

B. *Equity's Representational Function over Time and Across Institutions*

"[I]n all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State."

— Indiana Constitution, Article IV, Section 23.[212]

"Why is so much attention paid to trifling memorials? . . . And why should we support men at Congress to trifle away their time upon them? The answer to questions of this kind is obvious. Justice is uniform. It is the same when administered to an individual, a state, or a nation . . . . There is a mutual dependence between the supreme power and the people. And since the whole government is composed of individuals, does it appear inconsistent that individuals should be heard in the public councils? . . . In order to gain the confidence of the people they must be fully convinced that their memorials and petitions will be duly attended when they are not directly repugnant to the interest and welfare of the community."

— Extract from a Speculation Signed Candidus in the Framer's Journal (1790).[213]

Within the historical literature, a fissure has formed between historiographies of legislatures at the national and subnational—that is, state and local—levels.[214] This Article brings these studies together for the first time to better understand the generality principle in historical context and to explore the representational function of equity over time and across lawmaking institutions. As the previous section describes, the practice of seeking equity outside the courts often results in Bourdieu's prediction coming to fruition: Law becomes more fractured in a context where previously marginalized groups gain more power. Historically, legislatures afforded petitioners who could not wield power through the electoral process a field in which power was more available. Thus, law within early American legislatures was predominantly specific. The following case studies explore the differential logics of legislatures at the state and national level and their varied responses to the fracturing of law, as well as the hydraulic nature that the practice of seeking equity took on in response to these logics.

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212. Ind. Const. art. IV, § 23.

213. Extract from a Speculation Signed Candidus in the Farmer's Journal of May 27, Gazette of the U.S., June 5, 1790, at 1.

214. The fission that has formed between the historiographies of national and subnational legislatures is likely due to the fission that has formed in the literature between studies of private bills and of petitioning—literatures that treat the two as wholly distinct without further reflection. See McKinley, Petitioning, supra note 26, at 1554 (reviewing the literature).

Recent historical work examining state legislatures during the nineteenth century has begun to unsettle the presumption of the generality principle as a universal ideal within law. Rather, this work has gathered aggregate data on state legislatures and state constitutions, and it identifies the movement against specific law and in support of general lawmaking within legislatures in an Antebellum Era crisis over public finance. The movement against private bills or so-called "special legislation" began at the state level in the early- to mid-nineteenth century, in parallel with the movement against local courts and local lawmaking.[215] These movements are not often seen as parallel, but they subscribed to similar ideologies: Specificity in law allowed for too much discretion on the part of lawmakers and had led to corruption of the lawmaking process. The solution to both was an explicit prohibition on specific legislation and a requirement of generality—often codified at the highest level in each state constitution.[216] Thus, the Antebellum Era saw Lon Fuller's first principle embodied in state after state in constitutional law. This recent research highlights the potential historical contingency of valuing generality above equity and specificity.

Notably, the movement against specificity and in favor of generality also operated differently at the national and subnational levels—providing a convenient case study in the varied dynamics of equity within legislatures and between lawmaking institutions over time. Specificity was celebrated at the federal level well into the twentieth century.[217] The petition process and the private bill system that supported it remained an active and intrinsic part of Congress for over one hundred years, until the legislative restructuring of the mid-1940s siphoned off its vestiges into the administrative state and the federal courts.[218] Even then, the prohibition on private bills in Congress was not motivated by a sense of corruption, but instead by arguments about relative institutional competency and the maximization of scarce legislative resources.[219] Congress, it was argued at the time, was an institution built for national questions and should no longer labor over narrow, local matters; narrow issues were for the administrative apparatus or the federal courts to resolve.[220]

Although legislatures at both levels eventually relocated the representational function of equity elsewhere within the lawmaking process—

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215. See Naomi R. Lamoreaux & John Joseph Wallis, Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy, J. Early Republic (forthcoming) (manuscript at 2–4) (on file with the *Columbia Law Review*).

216. See id.

217. McKinley, Petitioning, supra note 26, at 1547–48.

218. Id. at 1548 (arguing that the passage of the Administrative Procedure Act and Legislative Reorganization Act in 1946 "dismantled an infrastructure rendered vestigial after Congress siphoned off the petition process" and documenting the "range of substantive areas" that had been siphoned).

219. See id. at 1575–79.

220. See id. at 1577–78.

either into the courts or into administrative agencies—the motivations, timelines, and procedures by which the relocation occurred were notably different. Concerns over corruption motivated state legislatures,[221] while concerns over capacity motivated Congress.[222] Congress, in contrast to state legislatures, has never passed a mandate for general laws or instituted a blanket prohibition against specific laws. Practices of seeking equity also endured at the national level for over a hundred years beyond their extinction at the state level. Over those hundred years, Congress took great care in building out the infrastructure necessary to protect practices of seeking equity by creating innovating agencies, boards, commissions, and courts to receive and resolve those pleas. These contrasting case studies also help to better understand the impact on the representative function of equity that petitioners had by relocating their practices of seeking equity from one distinctive lawmaking institution to others—and by conforming their practices to the requirements of those other institutions, which offered varied forms of representation.

1. *Generality and Specificity at the Subnational Level.* — As economic historians Naomi Lamoreaux and John Wallis describe in their most recent comprehensive study of state-level constitutional reform, the ideal that law should be general arose during the 1840s and 1850s, not at the Founding, and within state governments, not at the national level.[223] Our origin story, that our exceptional vision of American equality requires laws that are general and impersonal, not special and individual, is not a product of our origins at all.[224] The United States Constitution permitted, and even protected, the right to petition for specific laws at the national level for over a hundred and fifty years after its birth.[225] State and local governments experienced similar support for specific lawmaking for decades following the Founding. Professor Laura F. Edwards's deep history of local law in the antebellum South revealed an extensive system of local lawmaking whose goal was not generality or consistent application, but the maintenance of "peace" within local communities.[226] Rather than forming within the origin story of the United States, it is possible that Fuller's desideratum of generality sprung from a debate that began in antebellum American discourse and as state-level responses to particular crises of governance.

a. *Generality in State Legislatures.* — As described, the principle of generality was not implemented in American legislatures writ large until the mid-nineteenth century, when the movement for general legislation

221. See infra section II.B.1.

222. See infra section II.B.2.

223. Lamoreaux & Wallis, supra note 215, at 2.

224. Id.

225. See infra note 465.

226. See Laura F. Edwards, The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South 6–7 (2009); see also supra text accompanying note 79 ("From the Founding until 1850, seventy to ninety percent of laws passed by state legislatures were specific.").

within state legislatures began with the public finance crisis of the early 1840s.[227] "[E]ight states . . . and the territory of Florida defaulted on their bonded debt, and several other states, including Alabama, New York, Massachusetts, and Ohio, narrowly avoided a similar fate."[228] Each of the failing states found itself unable to repay funds it had borrowed to finance infrastructure projects—in the North this usually meant transportation systems and in the South, mortgage lending to support slave plantations.[229] But despite their differences, both northern and southern states found themselves in similar dire financial straits, and politicians and voters from the North and South located the problem in government "corruption."[230] Both northern and southern states experienced popular movements for extensive constitutional reform to fix the problems of corruption.[231] Beginning with Indiana in 1851, struggling state after struggling state banned specific legislation and local laws for specified subject matter areas in their constitutions, and many mandated general laws in all other areas.[232] The majority of states entering the union after the financial crisis also included similar prohibitions in their first state constitutions.[233]

These amendments had a near immediate impact on the legislatures they governed. Following the 1851 amendments, the percentage of general laws enacted in Indiana as a share of all enacted laws, which includes special, local, or private legislation, increased more than five-fold.[234] Instead of passing private bills to resolve particular issues, the Indiana legislature, like the federal government, used nonlegislative institutions to process individual grievances.[235] For example, Indiana and several other states passed general incorporation laws that required only that a company's founders file a document listing "the company's name, its business object, the amount of its capital, and the names of its initial officers" with a government official.[236] Previously, corporate charters had been obtained through a petition to the legislature, which the legislature would grant with a private bill.[237] State legislatures also began to siphon off petitions to the courts. For example, the Indiana legislature enacted a statute in 1852 that established procedures whereby petitioners would submit their peti-

227. See Lamoreaux & Wallis, supra note 215, at 3.

228. Id. at 14.

229. Id. at 14–15.

230. See id. at 19–25.

231. See id.

232. Id.

233. See id.

234. See id. at 33–34 & tbl.1 (exhibiting additionally that, despite the increase in number of general laws enacted and a transition to biennial sessions, the total number of enacted laws decreased from the pre-1851 average). Instead, "Other parts of the government now handled tasks that had previously taken up a considerable amount of legislative time." Id. at 26.

235. See id. at 26.

236. See id. (citing Act of May 20, 1852, 1852 Ind. Acts 358).

237. See id. at 2.

tions for divorce to a court, rather than to the legislature. The law also set the parameters within which courts would grant the divorce petitions.[238]

During the state constitutional convention that led to the amendments, delegates to the convention made an explicit connection between the state's financial distress and special and local legislation as they called for prohibitions on "this special and local legislation that has . . . heaped upon us burdens of taxation for no good purpose."[239] Constitutional prohibitions were necessary, according to the delegates, in part because of corruption. Legislative capture by "corporations and combinations of wealthy men" had corrupted the legislature "to secure special privileges and partial legislation."[240] Delegates identified that through legislative corruption political powers "have been given to corporations which ought not to be intrusted to any man or set of men."[241] The petition process had also disrupted proper process and deliberation during the lawmaking process by flooding the legislature with so many petitions that "bills have often been passed through the General Assembly without being once read, without their true character being understood."[242] The proposed constitutional amendments explicitly did away with this "evil" via the general incorporation law and the prohibition on special legislation.[243] The amendments passed with little opposition, by a vote of 116-13.[244]

In the decades that followed Indiana's reform process in 1851, nearly every other state followed Indiana's lead in decrying private bills as an inherent source of corruption and prohibiting them in some form in their constitutions.[245] Thus, by the time Fuller delivered his lectures, the principle of generality had crystallized into fact and had become the presumptive logic of state legislatures. But generality wasn't an inherent characteristic of law made within American legislatures, as Fuller presumed. It was one possible solution to government corruption that was

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238. See Act of May 13, 1852, 1852 Ind. Acts 233; Lamoreaux & Wallis, supra note 215, at 26. One of Kansas's early constitutions similarly mandated, "The Legislature shall have no power to grant divorces, to change the names of individuals, or direct the sales of estates belonging to infants or other persons laboring under legal disabilities, by special legislation, but by general laws shall confer such powers on the courts of justice." Lamoreaux & Wallis, supra note 215, at 24 (internal quotation marks omitted) (quoting Kan. Const. of 1857, art. V, § 24).

239. 2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana 1032 (1850) [hereinafter Report of the Debates].

240. 1 Report of the Debates, supra note 239, at 683.

241. Id. at 369.

242. Id.

243. See Lamoreaux & Wallis, supra note 215, at 1–2, 20.

244. Id. at 21.

245. See id. at 22–24, 35 tbl.2. Only Iowa, Kansas, and Oregon had mandated general laws more broadly in the years following Indiana's amendment; twelve states total, including Indiana, had revised their constitutions by 1860 to ban special corporate charters. Id. at 35 tbl.2.

put into place in the mid-nineteenth century and that the passing of time had crystallized into taken-for-granted fact by the year of Fuller's lecture.

b. *Generality Within Local Legislatures and Courts.* — Neither did local lawmaking implement the principle of generality until the late nineteenth century, and even after generality made its way into state legislatures, local lawmaking continued to foster the practice of seeking equity outside the courts. Local lawmaking allowed for a broader swath of the public to have direct access to the lawmaking process—thereby fostering equity and its representative function. As Professor Edwards has documented, post-Revolutionary North and South Carolina developed extensive systems of local law, administered by justices of the peace with direct participation by local community members, that operated according to wholly distinct principles and dynamics than that of law at the state level.[246] State law aspired to Fuller's principle of generality and aimed to create this generality by centralizing the process of lawmaking. Local law, by contrast, celebrated plural sovereignties and "recognized multiple sources and sites of legal authority, including customary arrangements as practiced, on the ground, in local communities."[247] Justices of the "peace" administered and created local law in direct conversation with members of the community and aimed to maintain the "peace," "a well-established Anglo-American concept that expressed the ideal order of the metaphorical public body."[248] Unlike state law, local law could not simply disregard those community residents without formal legal status—women, African Americans, Native Americans, the foreign born, and children—because maintaining the peace required recognition of and often participation of those without rights or the franchise. The system of localized law allowed any member of the community direct access to the lawmaking process. "Everyone participated in the identification of offenses, the resolution of conflicts, and the definition of law."[249] Keeping the peace at the level of a community meant the participation of all within that jurisdiction.

Local lawmaking institutions also celebrated the specificity of law and processes of equity that specificity fostered. These local institutions eschewed stare decisis and, instead, fostered extensive variation in application from jurisdiction to jurisdiction.[250] They celebrated the specificity of law because it recognized cultural pluralism and allowed each community to keep the peace on its own terms:

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246. See Edwards, supra note 226, at 7–8 (describing a court system that focused on resolving "highly personal, idiosyncratic disputes" and often turned to "an individual's 'credit'" in their community).

247. Id. at 4.

248. Id.

249. Id. at 7.

250. Eschewing stare decisis meant that local law was "composed of inconsistent local rulings, which offered future courts various options rather than precedents; there was no uniform 'law' to appeal to." Id. at 8. These "inconsistencies were accepted elements of the system: they actually *constituted* law at the time; they were not deviations from it." Id. at 28.

> [E]ach jurisdiction produced inconsistent rulings aimed at restoring the peace. The peace constituted a hierarchical order that forced everyone into its patriarchal embrace and raised its collective interests over that of any given individual. Beyond that, the content of the peace remained purposefully vague, because it both governed and was constituted by relationships and practices that varied from locality to locality.[251]

This system of localized law, seen during the Antebellum Era, was an outgrowth of post-colonial democracy and an effort to reclaim representation from a colonial power. To dismantle the imperialist government that existed before the Revolution, many states turned to systems of local law in order to reclaim and to develop their independent sovereignty as well as to ensure the proper representation of their polity.[252] This led to the "radical decentralization" of government from 1787 to 1840, first seen in North and South Carolina but later nationwide.[253] State governments delegated their power to local institutions—including "magistrates' hearings, inquests, and other ad hoc forums"—to move power away from British institutions and officials appointed by Britain.[254] State law and institutions continued to develop side by side with local law and institutions in initially comfortable coexistence.[255] Whereas state law in the early republic was the domain of the elite—ruled by a professional class of lawyers, focused on the private law of property, and increasingly shaped in terms of individual rights[256]—localized law continued to govern the public life of ordinary people in the districts and counties of North and South Carolina.[257] But as state institutions grew in strength over the Antebellum Era, state law increasingly began to assert its superiority over local law and institutions.[258]

Yet, even as practices of seeking equity were pushed out of one lawmaking institution, individuals and communities remained steadfast in forcing their practices of seeking equity and the representational function those practices performed elsewhere within the lawmaking process. The law of divorce, also the subject of Lamoreaux and Wallis's study,[259] provides an illustrative example of this dynamic between state legislatures and local law. Before 1814, married residents had to petition the North Carolina legislature for a separation or divorce.[260] A localist movement began in 1790 to strip the legislature of jurisdiction over petitions for divorce, but it was the overwhelming workload of processing divorce petitions and not

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251. Id. at 7.
252. See id. at 5.
253. Id. at 5–6.
254. Id. at 5.
255. See id. at 3.
256. See id. at 4–5.
257. See id. at 4–6.
258. See id. at 8–9.
259. See Lamoreaux & Wallis, supra note 215, at 2.
260. Edwards, supra note 226, at 212.

the influence of activists' voices that motivated the legislature in 1814 to pass a generalized divorce statute that directed divorce petitioners to the superior courts.[261] Prior to the act, the legislature had claimed broad discretion for itself in deciding the grounds for granting a divorce, but it cabined the discretion of the local courts to two: impotence and adultery.[262] The legislature also greedily held to the reins of power by requiring legislative approval to finalize a divorce.[263] Because the legislature remained deeply involved in the process for divorce, petitioners who failed to see their grievances remedied by the local courts and the narrowed general divorce statute quickly returned to the legislature for redress. In 1827, lawmakers lamented the persistent stream of divorce petitions: "[T]he law . . . giving the Superior Courts[] jurisdiction in cases of Divorce and Alimony was intended to relieve the Legislature from a pressure of business with which it was then troubled at every session. But we find, notwithstanding this law, a number of cases yet find their way here . . . ."[264] The solution offered to revise the general divorce act required revision so as to "keep business of this kind from coming to the Legislature in [the] future."[265]

The discursive and deeply enmeshed relationship that formed between the public, the courts, and the legislature illustrates the complex dynamic that forms when practices of seeking equity are foreclosed in one aspect of the lawmaking process. Most often, individuals continued to engage in these practices, but they relocated such practices into whatever institution would accept them. In this way, the representational function of equity took on a hydraulic form within the lawmaking process—moving from one institution to another, transformed but never wholly foreclosed. For example, the general divorce statute initially defined the term "cruelty" as whenever a "person shall either abandon his family or maliciously turn his wife out of doors, or by cruel or barbarous treatment endanger her life, or offer such indignities to her person as to render her condition intolerable or her life burthensome."[266] Many local courts began to interpret "cruelty" more broadly than the legislature had and, in 1828, the legislature passed an expanded general divorce statute that included within "cruelty" circumstances when "a man shall become an habitual drunkard or spendthrift, wasting his substance to the impoverishment of his family."[267] The phrase "wasting his substance" long held meaning in local law, as women had shaped the meaning of the peace through their

261. See id.

262. Id.

263. See id. at 213.

264. State Legislature: House of Commons, Raleigh Reg., Jan. 9, 1827, at 2.

265. Id.

266. Edwards, supra note 226, at 213 (quoting Guion Griffis Johnson, Ante-Bellum North Carolina: A Social History 223 (1937)).

267. Id. at 214 (quoting Guion Griffis Johnson, Ante-Bellum North Carolina: A Social History 223 (1937)).

steady complaints of their husbands' misappropriations of family resources.[268] Initially, state and local law were able to coexist side by side, and the North Carolina legislature codified the meaning of the peace into its general law.

But the lack of generality in local law and the inconsistency it wrought soon became too distracting for state institutions as their capacity for attention and intervention grew. In the 1820s, the North Carolina state court of appeals "stepped into this amalgam of state law and persistent localism, rendering decisions intended to stabilize the meaning of the statutes and to provide a uniform interpretation applicable throughout the state."[269] But petitioners' appeals to the state legislature persisted. Following the 1835 constitutional convention, North Carolina amended its constitution to prohibit the legislature from passing private bills in the context of divorce, granting alimony, administering a name change, legitimating illegitimate children, and restoring rights to those convicted of a crime.[270] The amendments did make clear that the legislature retained the ability to pass general legislation with respect to these subjects and that it could still pass private bills in other contexts, so long as it provided public notice of such pending private bills thirty days in advance of their passage.[271] It took some time for these institutional changes to wholly wind their way into law. But by the 1850s, state law, with its idealization of generality and its individual rights discourse, had come to dominate public life—further driving practices of seeking equity elsewhere within the lawmaking process.[272]

2. *Generality and Specificity at the National Level.* — By contrast to state legislatures, which were seen as corrupted by narrow legislation, the national legislature embraced private bills for another hundred years. Congress was also much more methodical in preserving practices of seeking equity by building out innovative commissions, boards, agencies, and courts to accommodate equity and preserve its representational function.[273] Also, by contrast to state legislatures, the consideration of petitions was central to the practice of lawmaking from the Founding onward as Congress recognized that many of those petitions required specific legis-

268. Id.

269. Id. at 214 (citing Scroggins v. Scroggins, 14 N.C. (3 Dev.) 535, 537–39 (1832)).

270. See N.C. Const. amends. of 1835, art. 1, § 4, cls. 3–4, reprinted in Proceedings and Debates of the Convention of North-Carolina, Called to Amend the Constitution of the State, Which Assembled at Raleigh, June 4, 1885, to Which Are Subjoined the Convention Act and the Amendments to the Constitution, Together with the Votes of the People app., at 421 (Raleigh, Joseph Gales & Son 1836).

271. See id. § 4, cl. 5.

272. Edwards, supra note 226, at 220–21 (stressing the importance of a North Carolina court's 1856 decision in *State v. Preslar*, which determined the defendant's "fate through abstract legal principles" instead of community-based concerns such as property interests and social networks, thereby reflecting "the reach of state law into . . . public issues previously left to local jurisdictions" (citing State v. Preslar, 48 N.C. (3 Jones) 421 (1856))).

273. See McKinley, Petitioning, supra note 26, at 1580.

lation to resolve.[274] Petitioning, as well as the practice of seeking equity and the function of representation that it fostered, was celebrated well into the twentieth century.[275] Although the principle of generality was, at times, raised in broader debate over best practices around the lawmaking process, Congress never enacted a blanket prohibition against specific legislation and, unlike the states, it never foreclosed practices of seeking equity without consideration of the consequences.[276] Instead, it built out the American state to support specific lawmaking and the representation it offered particular communities; even when Congress itself seemed skeptical of its capacity to resolve claims for equity, it created or found a home for those claims within administrative agencies or within the courts.[277]

The electoral process is often understood as not simply the primary, but the sole, connection between the government and the governed—as well as the sole mechanism of representation. Yet, for the majority of American history, there was more. Petitioning stood aside the vote as a second formal mechanism fostering representation between lawmakers and those regulated.[278] And, because the petition process was not limited to white males and to landholders, representation by petition was broader and more inclusive than the vote and allowed for a broader swath of the public to have representation within the government, as well as a larger share of the governed to have a voice in the lawmaking process.[279] At the time that state legislatures experienced a backlash against individualized treatment in the lawmaking process, the right to petition and the individualized treatment it protected remained celebrated at the national level:

> [The right to petition] would seem unnecessary to be expressly provided for in a republican government, since it results from the very nature of its structure and institutions. It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen.[280]

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274. See id. at 1555–60 (documenting the sources of early petitions that were submitted to Congress and stressing that, since the Founding, the petition process was "formal," governed by "[p]arliamentary rules," recorded by a clerk in the House's "docket book," and "was presumed to be a public process").

275. Id. at 1548.

276. See Lamoreaux & Wallis, supra note 215, at 25.

277. See McKinley, Petitioning, supra note 26, at 1580 ("Congress often began by constructing infrastructure within Congress to resolve petitions . . . . But it quickly turned to the courts and executive offices and agents to build out the infrastructure of the petition process. Finally, Congress turned to . . . independent commissions, boards, agencies, and specialized courts.").

278. See id. at 1547 ("[T]he petition process provided a mechanism of representation for individuals and minorities not represented by the majoritarian mechanism of the vote.").

279. See id. at 1547.

280. 3 Joseph Story, Commentaries on the Constitution of the United States 745 (Boston, Hilliard, Gray & Co. 1833).

Respect for the dignity of the petition process and the representation it fostered began during the early days of the Founding. Honoring its commitment in the First Amendment to protect the right "to petition the Government for a redress of grievances,"[281] Congress began to receive and process petitions just seven days after achieving quorum.[282] The first Congress established the formal procedures by which petitions would be considered even before it established the procedures by which it would present a bill to the President for signature.[283] The petition process was formalized, meaning that Congress passed and published formal rules; it was more similar to the public and equal process of a court than it was the rough and tumble process of lawmaking and lobbying that we see in Congress today.[284] Each petitioner knew what process was due and what to expect in response to a petition submission. The process was also public. Petitions were read in full on the floor of Congress, making them part of the formal record.[285] Each procedural step in the petition process was recorded in the *Record* and the *Journals*, as well as in a docket book kept by the House clerk that tracked each petition from submission to reporting to disposition.[286] The process was also equal: The political power of the petitioner and the petitioner's characteristics did not drive the process provided to each petition. The petition process was open to all, including the unenfranchised—women, African Americans, Native Americans, the foreign born, and even children submitted petitions—and all were afforded process on par with that which was afforded their enfranchised counterparts.[287]

The distinctive approach to practices of seeking equity within Congress and the reaction to equity within state legislatures was not due to differences in the specificity of the laws passed. Moreover, examination of petitions and their resolution within Congress reveals the complexity in determining what is "general" and what is "specific" legislation. Like the petition process in state legislatures, petitions to Congress resulted in an array of legislation—from public to private, general to specific, and many shades in between.[288] Public and private laws, like general and specific laws, are often viewed as binary phenomena. But early congressional responses to petitions reveal that generality and specificity are better understood as opposite ends of a sliding scale in lawmaking. The first Congress, for example, received 621 petitions: 598 to the House and twenty-three to the Senate.[289] Many of these petitions were resolved through the passage of a

281. U.S. Const. amend. I.
282. See McKinley, Petitioning, supra note 26, at 1560.
283. See id. at 1560–61.
284. See id. at 1561.
285. Id.
286. Id.
287. Id. at 1547.
288. See id. at 1563.
289. Id. at 1569.

private bill. Congress generally relied on private bills to resolve petitions for what modern parlance now terms "claims" regarding pensions, contracts, intellectual property, and other government benefits.[290] Some petitions submitted to the first Congress resulted in changes to general law by affecting or motivating the passage of general bills.[291] But the first Congress resolved the majority of the petitions with the passage of legislation that could neither be categorized as specific or general.[292] Like the Indiana and North Carolina legislatures, Congress quickly began to establish general processes and infrastructure to resolve specific classes of petitions—most commonly, Congress established independent commissions, boards, or agencies to resolve floods of petitions that addressed particular subject matters.[293]

Moreover, rather than enact a blanket prohibition against the specific laws required to resolve petitions that would usually result in narrower legislation, Congress instead took the careful step of aggregating those narrow requests and creating through general law a process to resolve those petitions—thereby preserving processes of equity. To illustrate, the first Congress received a number of petitions requesting intellectual property protection. Rather than following the practice of state legislatures, which issued private bills in response to each petition, Congress expressed concern at its ability to resolve the volume of intellectual property petitions that might originate from a much larger national population.[294] Instead, the committee that received the petitions reported out a bill that became the first Patent Act, which President Washington signed into law on April 10, 1790.[295] The Act established infrastructure outside the legislature to resolve petitions for intellectual property and, essentially, created the first independent agency at the federal level. Specifically, the Act established a commission comprising three executive officials: the Secretary of the Treasury, the Secretary of War, and the Attorney General.[296] The Patent Board could resolve petitions even in the absence of a private bill, by a simple majority vote and a presidential signature.[297]

Congress continued to build out national infrastructure to resolve classes of petitions and to siphon off jurisdiction over those petitions into

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290. Id. at 1577–78.

291. See id. at 1563.

292. See id. at 1563–64 ("[R]esolving a petition involved what would today be perceived as nontraditional lawmaking—processes which at the Founding were viewed as equally within Congress's power to control. To illustrate, petition declinations [did not] require bicameralism and presentment.").

293. See id. at 1579–600 (detailing the building out of the administrative state to address specific classes of petitions).

294. Id. at 1565.

295. Id.

296. Id. at 1565 n.120.

297. See Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109–10.

that infrastructure for over one hundred and fifty years.[298] This infrastructure addressed a range of substantive areas, from education to pensions to post offices and post roads to commerce to Indian affairs, and the list continues.[299] Congressional practice of building infrastructure and siphoning petitions continued in earnest until the passage of two statutes in 1946 that dismantled the last vestiges of the petition process in Congress and transferred exclusive jurisdiction over most petitions to the administrative state and the federal courts.[300] Passed months apart, the Legislative Reorganization Act and the Administrative Procedure Act fundamentally restructured the petition process in Congress.[301] The Acts achieved this dismantling by reducing the standing committees in each chamber by more than half, by explicitly transferring jurisdiction over petitions in certain substantive areas, and by prohibiting Congress from passing private bills in those substantive areas.[302] Following the passage of those two statutes, the petition volume in Congress dropped to near zero levels, a lower rate per capita than that seen at the Founding.[303]

Although Congress did experience some movement toward general legislation and away from specificity in the mid-twentieth century, the puzzle remains in that the ideal of generality took a hundred years longer to take hold at the national level than it did at the state level and Congress continues to pass private and narrow legislation today. Also unlike the states, reforms enacted at the federal level did not aim to root out corruption, nor did they mandate general legislation. Rather, national reforms aimed to better focus the capacity of the legislature on matters of national concern and to leave representation of plural and diverse communities and jurisdictions to the administrative state and to the courts. Instead of leaving the process of relocating equity to those members of the public bringing petitions, Congress took the affirmative step to create by statute those alternative forums in which to bring equitable claims and to empower those forums to make the specific laws necessary to preserve the representative function of equity.

Although the equitable and representative function of administrative agencies and courts has fallen into disarray as their original purpose has faded from memory, lawmaking at the national level during the long nineteenth century more closely resembled the antebellum lawmaking of North Carolina—that is, the ideals of generality and equity coexisted side by side. The representational function of equity allowed common people, not only elites with rights, to participate in the lawmaking process. Through its preservation of the petition process, Congress maintained a

298. See McKinley, Petitioning, supra note 26, at 1579–600.

299. Id. at 1548.

300. Id. at 1575–79.

301. See id. at 1579–600.

302. The standing committees had served as the loci of processing for petitions. Id.

303. Id. at 1574–75.

discursive relationship with the public, the courts, and the commissions, boards, and agencies it created. As had the women who had participated in the making of general divorce law in North Carolina, petitioners at the federal level were able to interject the diverse values of their communities into general statutes through legislative tools such as amendment or exception; they created narrow laws to regulate issues that affected them and their communities particularly strongly. Moreover, the representational function of equity influenced the very architecture of the national government, as petitions raising equitable claims helped to create a massive national infrastructure designed—at least initially—to hear diverse perspectives and to craft law to diverse circumstances.

III. MODERN STRUGGLES

The massive national infrastructure created over the long nineteenth century to facilitate equity still exists today. The dynamic of equity outside the courts captured by the historical case studies here is still very much alive in our government—although, rarely do we recognize its existence and importance. More often than not, the existence of equity operating outside the courts and the representational function it fulfills within these other institutions is lost to modern memory. Legislatures often adhere to Fuller's principle of generality without much reflection. Administrative agencies are theorized not as representative or participatory institutions but as sites of technocratic governance. Neither seem to embrace fully or comfortably their role in facilitating representation of the marginalized, the subordinated, and the politically powerless—even the unenfranchised. As a consequence, lawmaking institutions have repeatedly struggled to strike the proper balance between generality and specificity in lawmaking, to build the proper infrastructure to handle the specific lawmaking demanded by those who seek equity, and to recognize and balance a commitment to equity even in the face of common problems of governance—corruption, discrimination, and tyranny, for example.

Although many of these modern struggles tell new stories, the underlying dynamics share fundamental characteristics with our historical case studies: Legislatures make law in conversation with the public and in response to public requests for equitable redress. This discursive form of lawmaking—and the broader distribution of power it facilitates to the marginalized and subordinated—presses legislatures toward more specific laws. Specific laws are abused in some fashion or are simply presumed to be improper. The government responds by mandating general laws, thereby closing channels within the legislature for public redress and pushing equitable demands elsewhere within the lawmaking system—most often administrative agencies or courts. Efforts to require general laws usually fail over time, as the prohibitions are both difficult to enforce and contrary to persistent demand by the public for the form of representation that equitable redress offers. As a consequence, our lawmaking institutions

have swung between mandates of generality and pressure from the public to create specific laws for the past two hundred years, without much self-reflection in either case.

The inability to recognize and theorize comprehensively equity outside the courts has also contributed to a modern struggle within the courts. Courts have long struggled to enforce prohibitions on specific laws without any real guidance on the purpose of the prohibition. Courts have also become sites for equitable redress—as legislatures close off equitable channels—through the development of methods of "interpretation" that, on closer inspection, resemble more similarly equity and its representative function than a search for meaning within text. However, because courts participate in processes of equity under the guise of "interpretation"—a function now deemed more traditionally legitimate for the judiciary—judges and other institutional actors often overlook their own facilitation of equity. As a result, judges will often reject equitable arguments made by parties or omit equitable considerations from their published opinions—even when those arguments are driving the judgment. In addition to contributing to muddled doctrine as courts aim to facilitate equitable processes under the guise of interpretation, the courts have similarly created muddled doctrines in their efforts to police attempts to facilitate equity and its representative function by other branches. Over time, courts have developed complex doctrines for legislatures and administrative agencies. They have even attempted to limit their own participation in equity by setting firmer limits on practices of interpretation.

Calls to police equity outside the courts and the specific, fractured law that equity often generates are generally motivated by three loose categories of concerns over governance: corruption, discrimination, and tyranny. Although the initial push for general laws in response to concerns over corruption began at the state level and in the Antebellum Era, the generality principle has made its way into the modern Congress in the face of various corruption scandals. For example, in 2007, Congress enacted strict disclosure rules in each chamber for rifle shot legislation—spending or revenue bills that regulated a single individual or a small group—in order to prevent corruption following the Jack Abramoff lobbying scandal.[304] But many have criticized the ban as failing to understand the legislative process, and the United States Code remains replete with narrow laws—from the complexity of the tax code to the narrow law of American colonialism,

304. See, e.g., Megan S. Lynch, Cong. Rsch. Serv., R45429, Lifting the Earmark Moratorium: Frequently Asked Questions 2–5 (2018); Rebecca M. Kysar, Listening to Congress: Earmark Rules and Statutory Interpretation, 94 Cornell L. Rev. 519, 521 & nn.6 & 9, 539 n.99 (2009). For more on the Abramoff scandal, see Maggie McKinley, Reforming Lobbying, *in* Democracy by the People: Reforming Campaign Finance in America 261, 263 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) [hereinafter McKinley, Reforming Lobbying] ("Abramoff was a federally registered lobbyist who committed such egregious acts of fraud that his actions led to an extensive corruption investigation, beginning in 2004, and to many of his associates either pleading guilty or being found guilty of crimes.").

codified in Title 25, "Indians."[305] Most state legislatures continue to prohibit "private" or narrow legislation in their constitutions following the backlash against corruption in the mid-nineteenth century. Yet, the majority of states have struggled to enforce the prohibitions with a workable standard.[306] The civil rights revolution ushered in an increased concern over discrimination, and the narrowest cases have been litigated under the so-called "class-of-one" equal protection doctrine.[307] But—like the state court doctrine against specific legislation—the courts have struggled to create a workable standard to enforce the prohibition, and, as a result, the class-of-one doctrine has fallen into disfavor. The effort to resolve concerns over tyranny by mandating general laws and prohibiting specific laws has suffered a similar fate, as the courts continue to struggle over a workable standard.[308]

In a recent high-profile case, technology company Huawei brought suit against the United States, arguing that by passing legislation that prohibited federal contractors and agencies from purchasing certain equipment manufactured only by Huawei, the government had violated separation of powers principles as well as Huawei's due process rights..[309] Notably, Huawei did not raise an equal protection claim and instead put forward claims for violation of the Bill of Attainder Clause, the Due Process Clause, and separation of powers.[310] In its due process claim, Huawei argued that due process required that laws must be general and that Congress violated due process by passing specific legislation.[311] As the slow demise of the class-of-one doctrine demonstrates, however, the courts have struggled to fashion a functional doctrine that can identify whether legislation is "specific" and to strike the proper balance between generality and specificity. It is unclear whether this new round of due process doctrine will suffer a similar fate.

Finally, administrative agencies face identical criticism today as that which they received at Fuller's hands: Administrative lawmaking is seen as unlawful, in part, because it fails to create rules general enough to be "law."[312] The discretion afforded to the agencies by allowing the power of

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305. 25 U.S.C. §§ 1–5506 (2018).

306. See infra section III.A.

307. See infra section III.A.2.

308. See infra section III.A.3.

309. See Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607, 626 (E.D. Tex. 2020).

310. Id. at 628.

311. See id. at 651, 653.

312. See, e.g., Philip Hamburger, The Administrative Threat 6–7, 16–17 (2017) (comparing agency rulemaking to the "Star Chamber" of King James of England, which was a method of legislation outside of Parliament that used adjudicatory proceedings to issue regulations, and calling administrative power "not law but a mode of evasion" that is tantamount to absolute power); see also Philip Hamburger, Is Administrative Law Unlawful?

specific lawmaking is seen by some as the path to tyranny and necessarily suspect.[313] The following sections describe the struggle to resolve these concerns in greater detail before turning in Part IV to lessons that might better inform or resolve these struggles.

A. *Policing the Generality Principle*

The following sections survey a range of doctrines and legislative solutions—from state to federal. Largely the courts, but also legislatures, have developed these doctrines in an effort to police generality and specificity in lawmaking but have done so without a deeper sense of what generality and specificity are doing within the lawmaking process. Many of these struggles have resulted in muddled, unworkable doctrines and legislative solutions that would benefit from a deeper dive into the dynamics and values behind the equitable concerns underlying them.

1. *Corruption: National and State Prohibitions on "Specific" Laws.* — As described earlier, subnational government experienced a public backlash against special legislation and private bills much earlier than the national government, which continues to issue private bills today.[314] But Congress has seen similar—albeit far less sweeping—movements toward general laws in response to historical controversies over corruption. Like state legislatures, Congress has struggled to enforce general law mandates, and reforms are quickly eroded toward more specific lawmaking as the public continues to press for equitable redress. The following sections describe these struggles at the state and national levels.

a. *National Prohibitions.* — A very visible struggle arose just ten years ago in Congress, in the wake of the Jack Abramoff corruption scandal. Abramoff and his associates ran a lobbying firm in the early 2000s.[315] Over the next few years, he and his associates defrauded a number of clients while lavishing gifts upon members of Congress in order to obtain access and legislative favors.[316] As ruthless with the legislative process as he was with his Native American clients—whom he referred to as "troglodytes"

125–26 (2014) ("Rather than apply to a group identified in general terms, each [administrative] waiver excuses a specified person, usually a corporation or other such entity. . . . Waivers clearly do not even pretend to be a mode of legislation, and they therefore cannot be justified as a type of delegated legislative power.") [hereinafter Hamburger, Is Administrative Law Unlawful?].

313. See Hamburger, Is Administrative Law Unlawful?, supra note 312, at 411–12 (summarizing that administrative law is extralegal, absolute power that threatens the rule of law, exists "above the law," and "eclipse[s] the government's essential fragmentation, including its specialized, representative, divided, and federal character").

314. See supra text accompanying note 303; see also Davis, supra note 11, at 1 ("Since 2007, four private laws have been enacted. Private provisions are also occasionally included in public legislation.").

315. See Peter H. Stone, Casino Jack and the United States of Money: Superlobbyist Jack Abramoff and the Buying of Washington 7 (2010).

316. See id. at 170 (explaining how Abramoff defrauded four tribes of $19.7 million in a kickback scheme and conspired to bribe public officials).

and "monkeys"[317]—Abramoff and his associates were charged with fraud, ethics violations, conspiracy, and tax evasion in 2005.[318] But the public wanted more than just criminal charges against a few bad actors. Many called for fundamental reform of the lawmaking process in order to prevent similar corruption in the future.[319] Like state legislatures in the 1830s, members of Congress turned to general laws as a means to curb corruption and enacted a series of reforms prohibiting "rifle shot" or narrow legislation, including a ban on earmarks.[320] Earmarks are the narrowest of the narrow laws—provisions in appropriations bills that specify funds for a particular purpose.[321] The Honest Leadership and Open Government Act of 2007—an amendment to the Lobbying Disclosure Act—similarly prohibited irrelevant provisions from being added to a bill in conference, as well as the common practice of adding narrow provisions after the bill had been deliberated on in both chambers.[322] Yet, even in announcing the bans on earmarks, lawmakers lamented them. The late-Senator Daniel Inouye, for example, announced the 2011 ban on appropriations earmarks in his role as chairman of the Senate Appropriations Committee while also decrying it: "The reality . . . is that critical needs in communities throughout the country will be neglected: roads and bridges in disrepair,

317. Richard L. Hasen, Fixing Washington, 126 Harv. L. Rev. 550, 556 (2012) (book review) (discussing Abramoff's book on corruption in Washington and describing his effort to explain away his racist epithets as "inherently incredible").

318. Susan Schmidt & James V. Grimaldi, Abramoff Pleads Guilty to 3 Counts, Wash. Post (Jan. 4, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/01/03/AR2006010300474.html (on file with the *Columbia Law Review*).

319. See, e.g., Elisabeth Bassett, Reform Through Exposure, 57 Emory L.J. 1049, 1049 (2008) ("By mid-April 2006, Congress had introduced fifty-one bills to reform the relationship between lobbyists and legislators."); William V. Luneburg, Proposals to Amend the Lobbying Disclosure Act of 1995, Admin. & Regul. L. News, Summer 2006, at 2, 2 ("When, in January 2006, Abramoff pled guilty to charges of fraud, tax evasion and conspiracy to bribe public officials and agreed to provide evidence about Members of Congress, the legislative 'hoppers' overflowed with lobbying reform bills.").

320. See, e.g., CNN Wire Staff, Report: Dramatic Drop in Earmarks' Number, Cost, CNN (Apr. 17, 2012), https://www.cnn.com/2012/04/17/politics/congress-earmarks-report/index.html [https://perma.cc/RV6E-E829]; see also Jacob R. Straus, Cong. Rsch. Serv., RL34377, Lobbying Registration and Disclosure: The Role of the Clerk of the House and the Secretary of the Senate 1 (2008) (detailing how in 2007, Congress amended the 1995 Lobbying Disclosure Act "to further enhance disclosure and reporting requirements for lobbyists and lobbying firms").

321. What Is an Earmark?, Wash. Post, https://www.washingtonpost.com/investigations/what-is-an-earmark/2012/01/27/gIQAK6HGvQ_story.html (on file with the *Columbia Law Review*) (last visited Oct. 2, 2020).

322. Honest Leadership and Government Act of 2007, Pub. L. No. 110-81, § 511(a), 121 Stat. 735, 757 ("Conferees shall not insert in their report matter not committed to them by either House, nor shall they strike from the bill matter agreed to by both Houses.").

job training programs shuttered, and vital resources for national defense and law enforcement cut off, to name just a few."[323]

Ten years later, there is a growing bipartisan call to bring back narrow legislation.[324] In 2018, much to the surprise of his party, President Trump told members of Congress to consider bringing back narrow legislation—including earmarks.[325] Many, including the President, identify the prohibition on narrow legislation as one of the main causes for congressional deadlock and dysfunction today.[326] Some conservative watchdogs argue that earmarks have already returned to appropriations bills, circumventing the earmark ban through the vague language—citing even a 15.6% year-

323. Jennifer Steinhauer, Lawmakers' End of Earmarks Affects Local Programs Large and Small, N.Y. Times (Feb. 7, 2011), https://www.nytimes.com/2011/02/08/us/politics/08earmark.html (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Senator Inouye).

324. See, e.g., Matt Loffman, The Bipartisan Movement to Bring Back Earmarks in Congress, PBS NewsHour (Mar. 2, 2018), https://www.pbs.org/newshour/politics/the-bipartisan-movement-to-bring-back-earmarks-in-congress [https://perma.cc/58Y8-DDCC].

325. See, e.g., Alan Rappeport, To Grease the Wheels of Congress, Trump Suggests Bringing Back Pork, N.Y. Times (Jan. 10, 2018), https://www.nytimes.com/2018/01/10/us/politics/trump-earmarks-pork-barrel-spending.html (on file with the *Columbia Law Review*); Aubree Eliza Weaver, Trump Endorses Earmarks as a Path Toward Bipartisanship, Politico (Jan. 9, 2018), https://www.politico.com/story/2018/01/09/trump-endorses-earmarks-329575 [https://perma.cc/3JEX-LCRJ].

326. See, e.g., Geoffrey W. Buhl, Scott A. Frisch & Sean Q. Kelly, Appropriations to the Extreme: Partisanship and the Power of the Purse, *in* Politics to the Extreme: American Political Institutions in the Twentieth Century 1, 19 (Scott A. Frisch & Sean Q. Kelly eds., 2013) ("As the Appropriations process is currently operating—Continuing Resolutions, Omnibus and Minibus bills all devoid of earmarks, the executive has been greatly empowered at the expense of representative government."); Aaron Hedlund, Pork-Barrel Politics and Polarization, 101 Fed. Rsrv. Bank St. Louis Rev. 57, 66–67 (2019) ("By creating competition for local funds between legislators in different districts, the process for earmarking partially replaces the role of ideology in policymaking with a 'bring home the bacon' motive, thereby reducing polarization in Congress."); Diana Evans, A Return to Earmarks Could Grease the Wheels in Congress, Conversation (Mar. 26, 2018), http://theconversation.com/a-return-to-earmarks-could-grease-the-wheels-in-congress-91811 [https://perma.cc/72Z2-4LAR] ("[E]armarks helped transportation committee leaders pass three massive highway bills, overcoming significant policy controversies surrounding each bill . . . . [Earmarks] were often helpful in passing appropriations bills."); Jonathan Rauch, Earmarks: The One Thing Trump Gets Right About Congress, Brookings: Fixgov (Jan. 17, 2018), https://www.brookings.edu/blog/fixgov/2018/01/17/earmarks-the-one-thing-trump-gets-right-about-congress [https://perma.cc/CWJ4-W64B] ("Earmarking is just one of many factors affecting Congress's performance, and allowing its return would likely make only a marginal difference in the big scheme of things. But every little bit helps."); Alex Theodoridis, Peter Hanson & Travis Johnston, Trump Just Praised Earmarks. Here's What the Fuss Is About, Wash. Post (Jan. 12, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/12/trump-just-praised-earmarks-heres-what-the-fuss-is-about (on file with the *Columbia Law Review*) ("Studies . . . show that the desire of members for earmarks helps leaders win votes for bills.").

over-year increase in earmarks from fiscal year 2019 to fiscal year 2020.[327] Others argue that congressional bans on narrow legislation have simply pushed narrow lawmaking into the executive branch and that, in so doing, Congress has abdicated its constitutional responsibility to oversee the budget.[328] Rather than turning to general legislation as a solution for corruption, proponents of bringing back earmarks are calling for transparency and conflict of interest provisions as an alternative approach to prevent corruption.[329] By requiring public disclosure of all narrow pieces of legislation and a confirmation that members of Congress have no personal interest at stake, these proposals instead take aim at corruption head-on.

b. *State Prohibitions.* — As Part II describes, the majority of states included some form of an explicit mandate of general legislation and a prohibition against private bills or specific legislation in their nineteenth-century constitutions. Most state constitutions still contain those prohibitions on private bills in particular substantive areas. But a closer examination of the doctrine reveals the difficulty encountered by state courts in attempting to enforce these prohibitions—that is, the inability of courts to identify an administrable rule that will determine whether a law is "general" or "specific." This difficulty then results in no prohibition whatsoever. New York law is illustrative of the typical struggles encountered with crafting a rule for enforcement that aims to evaluate generality and specificity in the character of the law. As one New York Supreme Court justice explained,

> What is a 'local law' or 'special law' very early became a troublesome problem of definition to the judges who dealt with it. Various approaches were made. Its inherent difficulty was conceded on all sides . . . . So, in effect, the amendment of 1874 purporting to exclude the Legislature from acting by local or private laws in the thirteen fields stated by the Constitution, did not restrain the Legislature at all.[330]

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327. See, e.g., Breaking: Watchdog Uncovers $16.1 Billion in Defense Earmarks, Taxpayers Prot. All. (Dec. 24, 2019), https://www.protectingtaxpayers.org/earmarks/breaking-watchdog-uncovers-16-1-billion-in-defense-earmarks [https://perma.cc/6TXM-N3QT]; Ross Marchand, Lawmakers' Military Earmarks Are Exploding like Fireworks, Am. Conservative (July 3, 2020), https://www.theamericanconservative.com/articles/lawmaker-military-earmarks-are-exploding-like-fireworks [https://perma.cc/L9ET-MSF6].

328. See, e.g., John Hudak, Presidential Pork: White House Influence over the Distribution of Federal Grants 1–10 (2014) (asserting that presidents regularly and systematically engage in "pork barrel politics," manipulating the allocation of discretionary funding to advance their political interests).

329. See, e.g., Dan McCue, House Majority Leader Hoyer Proposes Restoring Earmarks, Well News (Mar. 13, 2019), https://www.thewellnews.com/house-majority-leader-hoyer-proposes-restoring-earmarks [https://perma.cc/E576-VWEJ]; Mark Strand, How to Reinstate Earmarks Responsibly Without Political Considerations, Hill (Sept. 6, 2018), https://thehill.com/blogs/congress-blog/politics/405347-how-to-reinstate-earmarks-responsibly-without-political?rnd=1536248306 [https://perma.cc/LD65-EGXU].

330. Stapleton v. Pinckney, 50 N.Y.S.2d 409, 410–11 (Sup. Ct. 1944).

But New York has not abandoned the challenge. The Court of Appeals has developed a flexible standard, which looks to the specific facts of each case to determine whether a statute is "general" or "special" in its terms and effect.[331] The two foundational cases, articulating this flexible standard, both upheld the challenged statutes as constitutional—finding both statutes "general."[332] How the court reached its determination, however, is a bit of a puzzle when looking to the statutes themselves: The first statute created a single administrative agency, the Office of Commissioner of Jurors, that regulated a narrow swath of counties—"each county of the state having a population of more than four hundred thousand and less than five hundred thousand."[333] The second statute carved out exceptions to the 1954 Uniform Jury Law for a narrow swath of counties—"counties having a population of less than 100,000 . . . [and] the five counties in the City of New York."[334] Like many states, New York's standard has abandoned looking to the text of the statute for any indication of generality or specificity. The New York Court of Appeal's standard does not consider "title, form or phraseology" of a statute to be dispositive when determining its generality.[335] Rather, it looks to whether the law is general or local in its *effect*—that is, whether the impact of the law is general or local.[336] Yet even that standard has proved unworkable. An effect can be general, according to the standard, even when it applies to only a certain locality or even to a specific organization or individual.

The rare statutes to be deemed "local" under the standard and held unconstitutional have been those that affect a class that "is at once so narrow and so arbitrary that duplication of its content is to be ranked as an unexpected freak of chance, a turn of the wheel of fortune defying probabilities"[337]—and, even in those instances, it was largely the evidence of explicit rent-seeking that likely drove the determination, rather than the characteristics of the statute itself.[338] Even when the Court of Appeals determined that a statute regulated a class that would never again include

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331. See Farrington v. Pinckney, 133 N.E.2d 817, 821 (N.Y. 1956) ("It has many times been said that there is difficulty in laying down any definite or general rule by which the question of whether a law is local or general may be determined . . . ."); Clay v. Saunders, 52 N.Y.S.2d 837, 839 (Sup. Ct. 1945) ("The Courts have found difficulty in laying down any definite rule, by which the question of whether a law is local or general, may be solved. It depends largely upon the special circumstances of the case.").

332. See *Farrington*, 133 N.E.2d at 831; *Clay*, 52 N.Y.S.2d at 839–40.

333. *Clay*, 52 N.Y.S.2d at 839.

334. *Farrington*, 133 N.E.2d at 820.

335. Sloup v. Town of Islip, 356 N.Y.S.2d 742, 748 (Sup. Ct. 1974).

336. See id. ("[S]ubstance and operation must be considered." (citing In re Henneberger, 155 N.Y. 420 (1898))).

337. In re Elm St. in New York, 158 N.E. 24, 26 (N.Y. 1927).

338. Id. at 25–26 (holding as unconstitutionally "local" a statute that extended the statute of limitations to receive a voucher for awards "for the purpose of opening, widening, or extending a street" that had been issued, as one particular award to American Express had, but not yet paid).

another such instance, the court would create exceptions to its flexible standard to deem the statute "general" and constitutional. For example, a challenge to the 1875 Act that codified the compact between New York and New Jersey that afforded New York jurisdiction over the waters of the Bay of New York was upheld as a constitutional, general law.[339] Even though the statute was undeniably "local" in that it regulated only a single bay, the Court of Appeals held that it was "general" because the public of New York writ large had an interest in the well-being of its harbor, which could "directly affect the prosperity of the state."[340]

Perhaps given the difficulty faced by courts in establishing a rule to identify whether a law is "general" or "specific," most state high courts have turned to federal equal protection doctrine to enforce state constitutional prohibitions on specific lawmaking.[341] The majority of states now apply "rational basis review" when evaluating a challenge to a statute under a specific law prohibition, and some states explicitly incorporate federal equal protection doctrine in applying rational basis.[342] The New Jersey Supreme Court led the charge in 1958, treating state constitutional challenges to specific laws as identical to equality challenges and relying on an equality doctrine identical to that developed by the Supreme Court to resolve equal protection challenges to economic legislation.[343] Decided only three years after the Court issued *Williamson v. Lee Optical*,[344] the New Jersey Supreme Court in *Robson v. Rodriguez* crafted an equal protection doctrine that deferred largely to the legislature to decide the means to enact its own policies—even if those policies were applicable only to a narrow subset—so long as those policies bore a rational relation to the statute's object.[345] Then, in a few short sentences, the New Jersey Supreme Court held that its equal protection analysis was coextensive with its analysis for a challenge based on the special law prohibition—and, thus, to satisfy one was to satisfy the other.[346] The majority of states—including Illinois, Nevada, and Wyoming—followed.[347] Further, even those states that did not incorporate federal equal protection analysis now explicitly apply a rule that generally tracks the highly deferential rational basis standard applied to economic legislation challenges under the Equal

339. Ferguson v. Ross, 27 N.E. 954, 955 (N.Y. 1891).

340. Id.

341. See Justin R. Long, State Constitutional Prohibitions on Special Laws, 60 Clev. St. L. Rev. 719, 732–37 (2012).

342. See id. at 732, 734 n.83.

343. See Robson v. Rodriquez, 141 A.2d 1, 4–5 (N.J. 1958).

344. 348 U.S. 483 (1955).

345. See *Robson*, 141 A.2d at 2.

346. Id. at 6 ("The test of whether a law constitutes special legislation is essentially the same as that which determines whether it affords equal protection of the laws . . . . Meeting as it does the test of equal protection, [the challenged law] is not violative of the prohibition against special legislation.").

347. Long, supra note 341, at 732–34.

Protection Clause.[348] Outlier states that aim to craft doctrines independent of the federal equal protection clause analysis, such as New York, struggle to craft a coherent standard that captures the purpose of the specific law prohibitions[349]—all the more so now that the purpose of the prohibitions has been lost to recent memory.

2. *Discrimination: Class-of-One Doctrine.* — A similar doctrinal muddle has formed around the federal Constitution's Equal Protection Clause and efforts to draw on the Clause to strike down specific legislation. This doctrine, known as the "class-of-one doctrine," is of a fairly recent vintage but has rapidly fallen into disfavor. Recognized for the first time in a per curiam opinion issued in the 2000 Term,[350] the class-of-one doctrine has since been called a "doctrinal morass" by then judge, now law professor, Michael McConnell.[351] There is a notable difference between the federal class-of-one doctrine and the state-level prohibition on private laws. In contrast to the specific law doctrine at the state level—which involves challenges most commonly brought by those who are not regulated by the specific law and, therefore, not able to access its benefits—class-of-one claims are commonly brought by those regulated, because the specific law is causing harm to those affected by the law.[352] As a consequence, the class-of-one doctrine largely is used to challenge legislation that burdens the claimant, while the state-level specific law doctrine is used to challenge legislation that benefits someone other than the claimant.[353]

Yet, despite this difference, the doctrines have encountered similar struggles. Like the state-level specific law doctrine in outlier states, the

348. See id. at 734–36.

349. See id. at 736–37. It bears noting that some scholars have recently decried the deferential standard adopted nearly nationwide, leaving the constitutional prohibitions against specific legislation without any real mechanism for enforcement. Legislation scholar Evan Zoldan, for example, has called for a more robust standard at the state level, as well as an adoption of a similar standard at the federal level based on a "stand-alone constitutional value" of "legislative generality." Evan C. Zoldan, Reviving Legislative Generality, 98 Marq. L. Rev. 625, 631 (2014). Zoldan's support for a constitutional value of legislative generality, however, rests upon an analysis of only the First Congress in isolation and draws on dated secondary sources. Id. at 650–60, 679–83. His proffered analysis is in tension with more recent empirical work studying specific legislation in Congress and in state legislatures. See supra Part II.

350. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000).

351. Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n, 483 F.3d 1025, 1043 (10th Cir. 2007) (McConnell, J., concurring in part and dissenting in part). It is without irony, however, that Professor McConnell now calls for essentially the re-creation of the equal protection "class-of-one" doctrine in the form of a due process claim. Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1726–29 (2012).

352. See Alex M. Hagen, Mixed Motives Speak in Different Tongues: Doctrine, Discourse, and Judicial Function in Class-of-One Equal Protection Theory, 58 S.D. L. Rev. 197, 213 (2013) ("Class-of-one analysis is generally not pitched at legislation, but at specific discretionary action by a public official that allegedly deprived the plaintiff of the equal protection of the laws.").

353. See id.

class-of-one doctrine does not look to the text of the statute to determine specificity. Notably, specific treatment is insufficient to violate the Equal Protection Clause. Rather, like the New York Court of Appeals, the United States Supreme Court has created a flexible case-by-case standard that looks to the *effect* of the statute. To state a prima facie claim for a class-of-one equal protection violation, a plaintiff must allege specific treatment and must refute every rational basis for the differential treatment.[354] The latter allegations are required, according to the Court, because the Equal Protection Clause protects against intentional discrimination, not specific lawmaking and differential treatment per se.[355] In the foundational case for the doctrine, *Village of Willowbrook v. Olech*, the Court considered a class-of-one claim brought by Grace and Thaddeus Olech.[356] The couple's local government, the Village of Willowbrook, had required the couple to provide a thirty-three-foot easement on their property to supply water service to the couple's home when their neighbors had only provided a fifteen-foot easement.[357] After the couple's objection, the Village of Willowbrook relented and provided water service with a fifteen-foot easement.[358] The Olechs then brought a claim against the Village alleging that the additional easement requirement was in retaliation against the couple for an earlier filed lawsuit against the Village.[359] In a per curiam opinion, the Court recognized formally, for the first time, the class-of-one doctrine and held that the Olechs had stated a claim under the Equal Protection Clause.[360] The Court recognized the claim, despite the fact that the couple had not alleged that they had been targeted because they belonged to a particular disfavored class or group—which was the traditional structure of an equal protection claim.

The *Olech* decision was met with confusion: What does it mean to be treated differently? How does a plaintiff show discrimination without having to prove actual animus? The courts have responded to this confusion in their typical judicial fashion: by, first, heightening standards and, then, cabining the doctrine. Doctrinal muddles don't typically have long life spans in the courts, and the class-of-one doctrine is no exception. In attempting to apply *Olech*, the lower courts gave form to the requirement of showing differential treatment by requiring a plaintiff to allege the existence of actual third parties who were similarly situated—often requir-

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354. *Olech*, 528 U.S. at 564 ("Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." (citing Allegheny Pittsburgh Coal Co. v. Comm'n of Webster City, 488 U.S. 336 (1989); Sioux City Bridge Co. v. Dakota County, 260 U.S. 441 (1923))).

355. See id.

356. See id. at 563.

357. Id.

358. Id.

359. Id.

360. See id. at 564–65.

ing the similarity to be "extremely high" and articulated in great detail[361]—yet treated differently.[362] Moreover, in addition to requiring extensive pleading by a plaintiff that negated every possible rational basis for the specific treatment, some courts continued to require proof that the government's specific treatment was grounded in animus.[363] Government decisionmaking—even specific and arbitrary—was given a presumption of rationality that a claimant must overcome.[364] Essentially, during its short life, the class-of-one doctrine suffered from the same shortcomings as the state-level doctrine: The prohibition on specific lawmaking was no prohibition at all.

This much-criticized "doctrinal morass" returned to the Supreme Court just eight years later, when the Court categorically limited the doctrine and began to disclaim the class-of-one claim as distinct within equal protection.[365] In *Engquist*, the Court categorically rejected class-of-one claims in the context of public employment—relying heavily on the preexisting distinction in the doctrine between state action as sovereign and state action as employer.[366] But the Court also went further to hint at the fact that class-of-one claims might be inapplicable to any circumstances when the government exercises discretion. *Olech*, the Court was careful to clarify, "was not so much a departure from the principle that the Equal Protection Clause is concerned with arbitrary government classification, as it was an application of that principle"[367] and that the doctrine was relevant only when there existed a clear standard against which to evaluate specific treatment.[368] In *Olech*, as well as the cases the Court drew on in *Olech*, it was clear that the government made decisions mechanically—one fifteen-foot easement after another, for example—until the specific treatment of the Olechs arose. The Court in *Engquist* contrasted that type of case against government decisions that were inherently discretionary:

> Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to

361. Clubside, Inc. v. Valentin, 468 F.3d 144, 159 (2d Cir. 2006).

362. See William D. Araiza, Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights, 62 SMU L. Rev. 27, 50 n.143 (2009) [hereinafter Araiza, Constitutional Rules] (collecting cases).

363. Id. at 53 ("[A] significant number of post-*Olech* courts continued to insist that class-of-one plaintiffs allege and prove animus.").

364. See Wroblewski v. City of Washburn, 965 F.2d 452, 459–60 (7th Cir. 1992).

365. See Engquist v. Or. Dep't of Agric., 553 U.S. 591, 598 (2008) ("[T]he class-of-one theory of equal protection does not apply in the public employment context.").

366. Id. at 598–600.

367. Id. at 602.

368. Id. ("What seems to have been significant in *Olech* and the cases on which it relied was the existence of a clear standard against which departures, even for a single plaintiff, could be readily assessed.").

> say that the officer has created a class of people that did not get speeding tickets, and a "class of one" that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification . . . . [A]llowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.[369]

Lower courts have read, and rightly so, the Court's reasoning in *Engquist* as foreshadowing the cabining of the doctrine to contexts entirely free of discretion and have begun to limit the doctrine accordingly.[370]

3. *Tyranny: Separation of Powers and Due Process.* — On March 9, 2019, Huawei Technologies USA filed suit against the United States in the Eastern District of Texas challenging Section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 as unconstitutional.[371] In its complaint, Huawei put forward three claims by which the provision was unconstitutional: First, Huawei alleged that Section 889, which prohibited federal contractors from purchasing Huawei technology, violated the Bill of Attainder Clause, because it singled out Huawei for "legislative punishment."[372] Second, Huawei alleged that the provision violated the Due Process Clause because it deprived Huawei of "liberty" through a law that wasn't general.[373] Huawei argued in its complaint that the Constitution mandated any deprivation of liberty to be conducted through "general rules," citing to a law review article and two Supreme Court cases.[374] Third, Huawei alleged that Section 889 was an unconstitutional violation of separation of powers because the legislative power was limited to creating general laws and it was solely the province of the executive and the judiciary to apply general laws to specific individuals.[375] Notably, but not surprisingly given the current state of the doctrine, Huawei did not put forth a claim under the Equal Protection Clause class-of-one doctrine.

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369. Id. at 603–04.

370. See William D. Araiza, Flunking the Class-of-One/Failing Equal Protection, 55 Wm. & Mary L. Rev. 435, 450–51 nn.77–83 (2013) (collecting cases).

371. Complaint at 1–2, Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607 (E.D. Tex. 2020) (No. 4:19-cv-00159), 2019 WL 1076892.

372. Id. at 38–44.

373. Id. at 44–46.

374. Id. at 44–45 (citing United States v. Winstar Corp., 518 U.S. 839, 897–98 & n.43 (1996) (plurality opinion); Hurtado v. California, 110 U.S. 516, 535–36 (1884); Chapman & McConnell, supra note 351, at 1734).

375. Id. at 46–48.

Because Huawei's Bill of Attainder Clause claim rests on shaky footing,[376] this section focuses on the due process and separation of powers claims. Upon further inspection, the claims are essentially identical. Huawei's due process claim rests on the presupposition that "due process" for deprivation of "life, liberty, or property" requires general laws.[377] Similarly, Huawei's separation of powers claim—notably inspired by an article authored by Professors Nathan Chapman and Michael McConnell[378]—rests on the nearly identical presupposition that legislative power is limited to the creation of general rules and the application of general rules to specific facts is left to the executive and the judiciary.[379] It is the separation of the power to create general laws and the power to apply those laws, according to Huawei, that protects liberty.[380] To create a specific law is to engage in application of law or "congressional adjudication" and not lawmaking.[381]

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376. The Supreme Court has on only five occasions since the Founding held unconstitutional a statute as a violation of the Bill of Attainder Clause. See United States v. Brown, 381 U.S. 437, 440 (1965); United States v. Lovett, 328 U.S. 303, 315 (1946); Pierce v. Carskadon, 83 U.S. (16 Wall.) 234, 239 (1872); Ex parte Garland, 71 U.S. (4 Wall.) 333, 381 (1866); Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 324 (1866). The Court has developed a three-element test that requires a claimant to prove the disputed statute's "specification of the affected persons," infliction of "punishment, and lack of a judicial trial." Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp., 468 U.S. 841, 847 (1984) ("A bill of attainder was most recently described by this Court as 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" (quoting Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977))).

The standard for meeting proof of punishment in particular is exceedingly high. See id. (declining to tether punishment to the severity of the sanction, legislative intent, or retroactive retribution, and instead concluding that "though the governing criteria for an attainder may be readily indicated, 'each case has turned on its own highly particularized context'" (quoting Flemming v. Nestor, 363 U.S. 603, 616 (1960))). A claimant must prove that the statute imposed a punishment—not merely a burden—and by the clearest proof, because statutes are presumed constitutional under the standard. Heller v. Doe ex rel. Doe, 509 U.S. 312, 320 (1993); Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 83 (1961) (quoting *Flemming*, 363 U.S. at 617). Given this high standard and Huawei's lack of allegations that the National Defense Authorization Act constituted punishment, this claim is unlikely to succeed.

377. Complaint, supra note 371, at 44 (internal quotation marks omitted) (quoting U.S. Const. amend. V).

378. Chapman & McConnell, supra note 351.

379. See Complaint, supra note 371, at 46–48 ("The limited, enumerated legislative powers encompass only the power to make legislative rules, not the power to apply legislative rules to individuals, because the power to apply legislative rules to individuals constitutes the exercise of executive and/or judicial power." (citations omitted)).

380. See id. ("This usurps functions properly committed to the Executive and Judiciary, and deprives Huawei of the structural protections available when such functions are exercised by their constitutionally-assigned branches . . . .").

381. Id.; see also Plaintiffs' Motion for Summary Judgment at 34, Huawei Techs. USA, Inc. v. United States, 440 F. Supp. 3d 607 (E.D. Tex. 2020) (No. 4:19-cv-00159), 2019 WL 7639028 ("Section 889, however, adjudicates facts and applies law to Huawei . . . . This is the kind of congressional adjudication that the Vesting Clauses prohibit.").

The Huawei litigation presents an interesting case that brings to the fore the muddle forming around generality and specificity in the due process and separation of powers doctrines. Within the due process doctrine, the muddle is well illustrated by two Progressive Era cases issued in the early twentieth century.[382] In the first case, *Londoner v. City and County of Denver*, authored in 1908, the Supreme Court struck down a Colorado tax assessment for violating the Due Process Clause of the U.S. Constitution because the board of public works had not provided notice to the assessed landowners and afforded them the opportunity to object by petition and for a hearing.[383] Seven years later, the Supreme Court cabined this holding in *Bi-Metallic Investment Co. v. State Board of Equalization* and upheld against constitutional challenge an effort by the tax assessor of Denver to increase the valuation of all taxable property by forty percent.[384] In distinguishing *Londoner*, the Court stated that the distinction of what process is due rested on whether the act challenged is general or specific:

> Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.[385]

With respect to general laws, redress for those affected is limited to whatever process is due to them by the lawmaking process—there is no constitutional floor provided by the Due Process Clause. With respect to specific laws, the Constitution might provide additional procedural protections for those affected. The Supreme Court has trended toward finding statutes general—for example, a reduction in welfare benefits across the board without a hearing did not violate the due process rights of a specific welfare recipient[386]—but lower court judges, including Judge Richard Posner of the Seventh Circuit, have applied the Due Process Clause to statutes they found specific.[387] What exactly makes a statute general or specific, however,

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382. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915); Londoner v. City and County of Denver, 210 U.S. 373 (1908).

383. See *Londoner*, 210 U.S. at 386.

384. See *Bi-Metallic*, 239 U.S. at 443, 446.

385. Id. at 445.

386. See Atkins v. Parker, 472 U.S. 115, 130 (1985).

387. See, e.g., Club Misty, Inc. v. Laski, 208 F.3d 615, 621 (7th Cir. 2000) ("When the Illinois legislature stepped from allowing a precinct's voters to vote the precinct dry to allowing the voters to expel a particular disfavored licensee, it crossed the line that protects property holders from being deprived of their property without due process of law."); Nasierowski Bros. v. City of Sterling Heights, 949 F.2d 890, 896–97 (6th Cir. 1991) (holding

is crafted on a case-by-case basis and without any deeper theorization as to what generality and specificity signify in the context of due process.

A similar muddle is beginning to form in our separation of powers doctrine. In 2016, Justice Ginsburg wrote for the Court in *Bank Markazi v. Peterson* and upheld Section 8772 of the Iran Threat Reduction and Syria Human Rights Act of 2012 against a separation of powers challenge.[388] The provision made assets in a New York bank available for the Central Bank of Iran to use to satisfy unpaid court judgments.[389] The separation of powers challenge centered on whether the statute unconstitutionally intervened in the judicial process.[390] Notably, the statute mentioned not only the specific assets but also the docket number of the case in which judgment was issued.[391]

In *Markazi*, the Supreme Court rejected squarely, in a 6-2 decision, the presuppositions that "there is something wrong with particularized legislative action" and that "legislation must be generally applicable."[392] Such a reading of separation of powers would render the Bill of Attainder Clause a nullity, the Court reasoned, because any narrow law—regardless of whether that law exacts a punishment—would violate separation of powers under that theory.[393] The Court also collected cases where it and the lower federal courts had upheld narrow statutes against challenges that the statutes violated the Takings Clause and separation of powers.[394]

Notably, the opinion inspired a vigorous dissent by Chief Justice Roberts, joined by Justice Sotomayor.[395] The dissenters' arguments were primarily historical and largely drawn from an earlier Supreme Court opinion, *Plaut v. Spendthrift Farm, Inc.*,[396] supplemented with reputable,

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that the city's failure to afford the appellant fair notice and an opportunity to challenge the proposed amendment constituted a due process violation); RR Village Ass'n v. Denver Sewer Corp., 826 F.2d 1197, 1199, 1205 (2d Cir. 1987) (holding that the town denied homeowners due process by approving retroactive increases in sewage disposal rates without affording the homeowners notice or opportunity to be heard).

388. See 136 S. Ct. 1310, 1316–17 (2016).

389. Id.

390. Id. at 1321–22.

391. Id. at 1317.

392. Id. at 1316, 1327 (internal quotation marks omitted) (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 n.9 (1995)).

393. See id. at 1327 (quoting *Plaut*, 514 U.S. at 239 n.9).

394. See id. at 1328. The Court cited cases in which it had upheld narrow legislation. Regional Rail Reorganization Act Cases, 419 U.S. 102, 158–61 (1974) (legislation on specific railroads in one region); Pope v. United States, 323 U.S. 1, 9–14 (1944) (legislation on giving a contractor the right to recover additional compensation from the government); Clinton Bridge, 77 U.S. (10 Wall.) 454, 462–63 (1870) (legislation on one bridge); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 430–32 (1856) (legislation on one bridge).

395. See *Markazi*, 136 S. Ct. at 1329 (Roberts, C.J., dissenting).

396. 514 U.S. 211.

albeit partially dated secondary historical literatures.[397] In *Plaut*, authored by Justice Scalia in 1995, the Court struck down Section 27A(b) of the Securities Exchange Act for violating separation of powers.[398] The Court's decision rested solely on the finding that Section 27A(b) improperly impinged on the judicial power by mandating that courts reopen final judgments in cases dismissed with prejudice.[399] Leaning heavily on history, the Court described in great detail the history of "legislative equity" or early American legislatures' deep involvement in the judicial process—including providing legislative appeals, reopening judgments, and directing verdicts in particular cases.[400] According to the Court's retelling of history, it was this version of legislative and judicial powers that the Founding Fathers rejected in drafting the Constitution.[401] Although the Court described the Founders as "liv[ing] among the ruins of a system of intermingled legislative and judicial powers, which had been prevalent in the colonies long before the Revolution,"[402] that problematic intermingling did not require legislatures to pass only general laws and to leave narrow lawmaking to the courts.[403] Rather, Justice Scalia recognized that "[w]hile legislatures usually act through laws of general applicability, that is by no means their only legitimate mode of action. Private bills in Congress are still common . . . . Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid . . . ."[404] Justice Breyer concurred in the judgment, quoting Chief Justice Marshall to argue that part of the Court's holding should rest on the narrowness of the legislation: "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."[405] The Court, however, explicitly rejected Justice Breyer's argument.[406]

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397. See, e.g., *Markazi*, 136 S. Ct. at 1330–31 (Roberts, C.J., dissenting) (quoting *Plaut*, 514 U.S. at 219) (citing Gordon Wood, The Creation of the American Republic 1776–1787, at 155–56 (1969)) (characterizing colonial legislatures at the time of the Revolution to be judicial bodies as well, followed by a sharp break between the two institutions after independence).

398. See *Plaut*, 514 U.S. at 213, 217–18.

399. See id. at 218–19.

400. See id. at 219–21.

401. See id. at 221–23.

402. Id. at 219.

403. Id. (characterizing colonial legislatures as "courts of equity of last resort" that would often "correct" judicial decisions through the use of bills and legislation).

404. Id. at 239 n.9.

405. See id. at 242 (Breyer, J., concurring in the judgment) (internal quotation marks omitted) (quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)).

406. See id. at 238–39 (majority opinion) ("It makes no difference whatever to [the] separation-of-powers violation that it is in gross rather than particularized (*e.g.*, 'we hereby set aside *all* hitherto entered judicial orders'), or that is not accompanied by . . . an 'almost' violation of any . . . constitutional provision.").

In drawing on *Plaut* in his *Markazi* dissent, Chief Justice Roberts drew more heavily from the reasoning in Justice Breyer's concurrence than *Plaut*'s majority opinion.[407] Not only did the dissent describe as problematic the meddling of colonial legislatures with court proceedings, it also took issue with legislatures considering and resolving petitions to "redress grievances"—a practice engaged in from the Founding and a right protected by the plain text of the Constitution.[408] Like Justice Breyer, the dissent saw a distinct separation of powers issue in the narrowness of the legislation, in addition to the statute's meddling in court proceedings.[409]

The muddle created by *Markazi* and *Plaut* most recently reared its head just two years ago, in a highly fractured separation of powers opinion, *Patchak v. Zinke*.[410] Justice Thomas, writing for the Court, upheld the Gun Lake Trust Land Reaffirmation Act against a separation of powers challenge.[411] The Act affirmed the Secretary of the Interior's power to take land into trust for the Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians and to strip jurisdiction from the federal courts to challenge the Act.[412] In the midst of vigorous and unfavorable litigation, the Match-E-Be-Nash-She-Wish Band of Pottawatomi had persuaded Congress to pass the Act, which explicitly applied to a particular trust land decision and litigation surrounding that decision.[413] Following passage of the Act, the district court dismissed the pending action challenging the taking of land into trust.[414] Writing for the plurality, Justice Thomas emphasized that the Act did not violate separation of powers because it was narrow.[415] The Court, he described, had upheld legislation even when that "legislation 'govern[s] one or a very small number of specific subjects'" and includes "narrow statutes that identified specific cases by caption and docket number in

407. See Bank Markazi v. Peterson, 136 S. Ct. 1310, 1332–33 (2016) (Roberts, C.J., dissenting).

408. Id. at 1331 (internal quotation marks omitted) (quoting Report of the Committee of the Pennsylvania Council of Censors 42 (Francis Bailey ed., 1784)); see also U.S. Const. amend. I.

409. See *Markazi*, 136 S. Ct. at 1332 ("This case is about . . . unconstitutional interference with the judicial function, whereby Congress assumes the role of judge and decides a particular pending case in the first instance. Section 8772 . . . chang[es] the law—for these proceedings alone—simply to guarantee that respondents win.").

410. 138 S. Ct. 897 (2018) (plurality opinion).

411. See id. at 902–03.

412. Id. at 903–05.

413. See id. at 904; see also S. Rep. No. 113-194, at 1–2 (2014) (noting that amid litigation that "places in jeopardy the Tribe's only tract of land held in trust and the economic development project that the Tribe is currently operating on the land . . . [,] [t]he bill would provide certainty to the legal status of the land").

414. *Patchak*, 138 S. Ct. at 904.

415. See id. at 910.

their text."[416] Justice Breyer and Justice Sotomayor wrote separately but concurred in the plurality judgment.[417] But Justice Sotomayor's concurrence in the judgment was ambivalent, and she stated that she "agree[d] with the dissent" that Congress could not have narrowly stripped jurisdiction over the case.[418]

Chief Justice Roberts again dissented in *Patchak*, joined this time by Justices Kennedy and Gorsuch.[419] He again doubled down on his historical argument, this time taking more explicit issue with specific legislation as an independent violation of separation of powers and Article III in particular.[420] Drawing on dicta from earlier separation of powers opinions, Justice Roberts's dissent crafted a full-throated criticism of narrow laws:

> The Constitution's division of power thus reflects the "concern that a legislature should not be able unilaterally to impose a substantial deprivation on one person." The Framers protected against that threat, both in "specific provisions, such as the Bill of Attainder Clause," and in the "general allocation" of the judicial power to the Judiciary alone. As Chief Justice Marshall wrote, the Constitution created a straight forward distribution of authority: The Legislature wields the power "to prescribe general rules for the government of society," but "the application of those rules to individuals in society" is the "duty" of the Judiciary.[421]

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416. See id. (alteration in original) (quoting Bank Markazi v. Peterson, 136 S. Ct. 1310, 1328 (2016)) (citing *Markazi*, 136 S. Ct. at 1326–27). The Court noted also that it had cited approvingly to cases that had upheld statutes stripping jurisdiction from courts over a single memorial. See id. (citing *Markazi*, 136 S. Ct. at 1328).

417. Id. at 911–12 (Breyer, J., concurring); id. at 913–14 (Sotomayor, J., concurring in the judgment).

418. Id. at 913 (Sotomayor, J., concurring in the judgment).

419. Id. at 914–22 (Roberts, C.J., dissenting, joined by Kennedy & Gorsuch, JJ.).

420. Id.

421. Id. at 915 (citations omitted) (first quoting Immigr. & Naturalization Serv. v. Chadha, 462 U.S. 919, 962 (1983) (Powell, J., concurring in the judgment); then quoting Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810)). In *Fletcher v. Peck*, the Court for the first time struck down a state law as unconstitutional, here invalidating under the Contracts Clause a state law that attempted to repeal an earlier law granting title to public lands. *Fletcher*, 10 U.S. (6 Cranch.) at 137, 139.

The deep mismatch between the particular facts of *Fletcher* and the use to which Justice Roberts has now put the case bears noting. *Fletcher* involved a challenge to a law that attempted to repeal an earlier land grant statute. See id. at 87. The public believed that the earlier land grant statute had been secured through corruption. Id. at 88–89. Both laws were narrow: The first sold lands held by a Native Nation within a reservation for pennies on the dollar, and the second repealed that earlier law. Id. But the Court struck down only the second law for violation of the Contracts Clause because it was not within the power of the legislature to transfer property rights from individuals to the public. See id. at 138. The deep irony of the opinion is that, in so holding, the Court also upheld the original law—a law that transferred land held by Native Nations to the public for sale to the four development companies. See id. at 92. Nothing in the case turned on whether the laws were general, as Chief Justice Roberts's dissent appears to indicate. See *Patchak*, 138 S. Ct. at 914–22 (Roberts, C.J., dissenting).

The lack of clarity surrounding not only the history of this nation's legislatures but also the constitutional values at stake in creating specific laws has led to a fracture in separation of powers doctrine. This doctrine would benefit from a better understanding of American legislatures and their history, as well as a deeper understanding of petitioning, private bills, and how these activities facilitated the process of equity outside the courts.

B. *Interpretation as Equity: Interpreting General Laws and the Closure of Equity Outside the Courts*

In addition to the doctrinal uncertainty over courts' attempts to police generality and specificity in the lawmaking process, another doctrinal and theoretical morass has formed around how courts ought to interpret and apply general laws to the specific—often unforeseen—facts presented to them in a particular case. The debate has largely played out between the warring perspectives of textualism and purposivism in statutory interpretation. In the last two decades, Professor John Manning has led the textualist charge, claiming that the primary role of the courts is to act as a "faithful agent[]" of the legislature and to "decode legislative instructions according to the common social and linguistic conventions shared by the relevant community."[422] According to textualists, the courts approach statutes as interpreters of meaning and aim to follow the text, provided that the text is clear.[423] Professor Bill Eskridge has led the purposivist charge with a theory of "dynamic statutory interpretation" that envisions the courts as deviating from the text of the statute when the result would conflict with the aim of the statute—as embodied in legislative history and past practice.[424]

Beyond parting ways on the relative values of each approach to statutory interpretation, textualists and purposivists also disagree on their interpretive methods' historical pedigrees. In a heated debate in the early 2000s, proponents of purposivism began to invoke historical arguments to demonstrate that purposivism was more deeply rooted in the American constitutional tradition than was textualism.[425] In particular, purposivists pointed to the equity of the statute doctrine and numerous historical sources—Blackstone among them—that envision courts "expound[ing]

422. Manning, Textualism, supra note 29, at 16.

423. Id. at 15–17.

424. See William N. Eskridge, Jr., Dynamic Statutory Interpretation, 135 U. Pa. L. Rev. 1479, 1481–82 (1987) [hereinafter Eskridge, Dynamic Statutory Interpretation].

425. See supra note 29. Compare Manning, Textualism, supra note 29, at 58–59 (arguing that, by separating the legislative and judicial powers, "the Founders expressed a marked preference for values such as predictability, transparency, and constraint, rather than the flexibility implicit in a more discretionary approach to statutory interpretation"), with Eskridge, All About Words, supra note 29, at 996–98 ("Just as the United States created a new kind of constitutionalism, popular and written, so its new constitutionalism inspired a new kind of statutory interpretivism, text-based but principled, sometimes equitable, and frequently dynamic.").

the statute by equity . . . where some collateral matter arises out of the general words" of a statute.[426] Textualists, disclaiming the historical relevance of the equity of the statute doctrine, argued for formal separation of powers in the lawmaking process.[427] Lawmaking should be left to legislatures.

While these two perspectives seem at odds, they nonetheless share the presumption that the generality of statutes is itself inherent to the lawmaking process and a constant over history. The paradigmatic case for purposivist interpretation illustrates the central role of the generality presumption in the debate surrounding interpretive methodologies. In *Church of the Holy Trinity v. United States*, the Supreme Court held that the Alien Contract Labor Law—which prohibited "the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories, and the District of Columbia"—did not apply to a contract to employ a minister, who was a foreign national, in New York State.[428] Despite the fact that the statute, by its plain text, forbade any and all employment contracts with foreign nationals, the Court held that application of the statute to these particular facts was not within the "spirit" of the legislation.[429] The Court's reasoning is replete with entreaties to the failings of general language within laws and to the central role of the courts in remedying the failures of this general language: "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character."[430]

The purposivists hold up *Holy Trinity* as the paradigmatic case for centering the purpose of legislation in the act of interpreting statutory meaning. The textualists disclaim *Holy Trinity* as "nothing but an invitation to judicial lawmaking."[431] Yet, both perspectives seem to begin with the presumptions that general language is something inherent to law and that the failings of general law are an interpretive problem for the courts to either solve or to endure with the aim of preserving formal separation of powers.

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426. Eskridge, Dynamic Statutory Interpretation, supra note 424, at 1502 (internal quotation marks omitted) (quoting William Blackstone, Commentaries on the Laws of England 91 (1765)). See generally William H. Loyd, The Equity of a Statute, 58 U. Pa. L. Rev. 76 (1909) (recounting the history of the phrase "Equity of a Statute" in the English legal literature).

427. See Manning, Textualism, supra note 29, at 58 ("[T]he separation of the legislative and judicial powers . . . was designed . . . to limit governmental discretion and promote rule of law values . . . . [A]ssimilating the equity of the statute into the judicial power would contradict important objectives underlying the American separation of powers.").

428. 143 U.S. 457, 463, 472 (1892).

429. Id. at 459.

430. Id. at 461 (internal quotation marks omitted) (quoting United States v. Kirby, 74 U.S. (7 Wall.) 482, 486–87 (1868)).

431. Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 21 (1998).

As Part IV describes, a deeper understanding of the lawmaking process—and the complex and dynamic history of equity outside the courts—might close seemingly permanent distance between textualism and purposivism.

IV. LESSONS

This Article identifies and describes practices of seeking equity from legislatures and administrative agencies as a dynamic that has been central to American lawmaking from the Founding. Identifying these practices helps better theorize what functions equity performs across lawmaking institutions, including the important function of representation. It has also tracked the hydraulic development of equity outside the courts over time to better understand its dynamics and the relationship between general laws, dynamic interpretation, and administrative lawmaking. Movements toward generality within legislatures did not dissuade petitioners from seeking redress—they merely pushed those petitions elsewhere. Understanding the representational function of equity could also help to articulate a more nuanced principle of generality that captures both the benefits, in terms of fairness, as well as the harms, including the potential closure or transformation of equitable channels. Understanding these dynamics in greater depth can help to resolve modern struggles over generality and specificity across branches of government. The following sections draw from the historical case studies identifying and charting equity outside the courts in order to offer lessons for each branch of government so that they may better resolve these issues and debates in the future.

A. *Lessons for Legislatures*

The primary lesson for legislatures is that problems of corruption and workload should be resolved directly, rather than through a call for generality. Legislatures should instead recognize that generality is not a characteristic intrinsic to American lawmaking and not a panacea for every problem of governance. Moreover, they should aim to understand the representational function of equity and the values protected by specificity—for example, allowing disempowered groups in plural societies to participate and wield power within the lawmaking process. Lessons drawn from the historical case studies offered here can, at the very least, unsettle the often unexamined presumption that generality is the ideal for which American legislatures should strive and that specificity is per se evidence of rent-seeking and corruption. At best, they can guide future reform efforts to resolve concerns over both workload and corruption.

With respect to corruption, legislatures should muster the courage to resolve these problems head-on. Scholars of the law of democracy have long called for better regulation of the American campaign finance and

lobbying systems.[432] Innovative schemes have taken root at the state and local levels around public financing of campaigns and the distribution of tax credit vouchers in order to equalize elections and refocus the attention of candidates on small-dollar donors.[433] Lobbying reform has seen less experimentation in practice, although I have proposed elsewhere a series of concrete reforms to create a fair, transparent, and accessible forum in which the public can access the lawmaking process.[434] Generality might be the more politically palatable solution to problems of corruption, but that might be because it has again and again proven ineffective against the politically powerful interests entrenched against democracy reform.

By not treating generality as a panacea, legislatures can also begin to explore the benefits of equity and the representational function that it facilitates within legislatures for the disempowered—even if equity results in less general laws. Reflection upon the history of specific lawmaking within legislatures could allow members of Congress to recognize the institution's central role in facilitating equity in the lawmaking process—

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432. See, e.g., Richard L. Hasen, Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections 93–94 (2016) (arguing for "the constitutionality and desirability of reasonable campaign finance limits in order to promote political equality" and proposing limitations on campaign contributions paired with a voucher program, a multiple small match program, or other programs); Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—and a Plan to Stop It 264–72 (2011) (arguing that "the intended dependence 'upon the People alone' has been compromised by a competing dependence upon the funders" and suggesting "small-dollar-funded elections" that extend campaign contribution "vouchers" to voters as a potential solution); Richard Briffault, Reforming Campaign Finance Reform: The Future of Public Financing, *in* Democracy by the People, supra note 304, at 103, 103–06 ("By offsetting the financial role of large donors and interest groups, public financing can constrain inequality of influence within the election and, potentially, reduce the influence of large donors over government decision-making."); Fred Wertheimer & Susan Weiss Manes, Campaign Finance Reform: A Key to Restoring the Health of Our Democracy, 94 Colum. L. Rev. 1126, 1127–28 (1994) (arguing that the campaign finance system has created a crisis in public confidence that threatens democracy and proposing steps for real reform, including an overhaul of the FEC to provide oversight and enforcement of finance laws).

433. The City of Seattle instituted a particularly innovative campaign finance reform initiative called "Democracy Vouchers" in 2015 by a citywide referendum. About the Program—Democracy Voucher, City of Seattle, http://www.seattle.gov/democracyvoucher/about-the-program [https://perma.cc/7FX7-WRHF] (last visited Sept. 1, 2020). The Washington Supreme Court recently upheld the program as constitutional against a First Amendment Free Speech Clause challenge. Elster v. City of Seattle, 444 P.3d 590, 595 (Wash. 2019) ("The Democracy Voucher Program does not alter, abridge, restrict, censor, or burden speech. Nor does it force association between taxpayers and any message conveyed by the program."), cert. denied, 140 S. Ct. 2564 (2020).

434. See McKinley, Reforming Lobbying, supra note 304, at 261, 272–80 (outlining a reform proposal that would displace the lobbying system with a formal petition process protected from disruption caused by campaign finance activities); see also Richard L. Hasen, Lobbying, Rent-Seeking, and the Constitution, 64 Stan. L. Rev. 191, 237–38 (2012) (arguing that the government's interest in promoting national economic welfare could support regulations like longer anti-revolving door restrictions and bans on lobbyist-led campaign fundraising).

thereby preserving equity's important function of representation for individuals and minorities. Specific laws are necessary tools of lawmaking when regulating a plural society, especially at the national level where the polity is even more diverse and the disempowered in greater number. Thus, a more nuanced form of representation than the simplistic, binary form of representation offered by the electoral process is required. Specific laws allow the regulation of difference within the polity, and they also allow regulation to be responsive to individuals and minorities that seek equitable redress from the legislature in the form of specific laws or exceptions and amendments to general laws. As described in the historical case studies, equity outside the courts has long fostered a dynamic and discursive form of lawmaking within legislatures.[435] This process is likely still occurring today, as many laws passed by American legislatures remain specific—despite prohibitions and restrictions. But the process by which the public seeks equity from Congress has become a maze, as historical developments have relocated much of its formal and public structures to administrative agencies and the courts. Despite the existence of a multi-billion-dollar industry of public engagement with Congress, this formal relocation has driven the process of public engagement with Congress underground. Recognition of the value of equity outside the courts and its longstanding and integral role within American legislatures could begin a conversation on how best to distribute, design, and facilitate public engagement with the lawmaking process and, thus, processes of equity within lawmaking—now that we finally accept that the process fulfills an integral role of representation within legislatures.

B. *Lessons for Courts*

As Part III describes, courts have primarily struggled around generality and specificity in the context of enforcing prohibitions on specific lawmaking and in the context of interpretation of general laws. The following two sections address each of these struggles in turn.

1. *Policing the Generality Principle.* — The primary lesson for courts, as they attempt to enforce prohibitions on specific laws, is that generality and specificity are indirect means of addressing other issues. Generality and specificity are not something intrinsic to law or American lawmaking, nor do they provide a sturdy enough foundation on which to build an administrable doctrine. At both the national and subnational levels, courts have struggled to create workable standards to evaluate whether laws are general or specific, and most have begun to look behind the text of the law to evaluate measures other than generality and specificity.[436] Rather than addressing those other issues indirectly, through the guise of an analysis of generality and specificity, courts should aim to address the primary issue head-on. Many doctrines have already begun to incorporate this advice, as

435. See supra Part II.

436. See supra section III.A.

they have pushed aside unworkable standards.[437] But others, the separation of powers doctrine most paradigmatically, are on the precipice of incorporating generality and specificity as a determinative factor in the doctrine.[438]

With respect to state constitutional prohibitions on special or private laws, the courts should look to the history of the prohibitions in order to determine the primary issue at which the movements for generality aimed. As Lamoreaux and Wallis's recent research reveals, most if not all of prohibitions on specific laws had their roots in concerns over corruption of the lawmaking process.[439] Rather than trying to craft a formal measure by which a court can discern whether a statute is "specific" or by simply deferring to the legislature in all instances, state courts should instead aim to craft a standard that turns on whether there is evidence of corruption in the lawmaking process.

Essentially, this is what some courts are already doing with state law. In the rare case to strike down a statute as "specific," the New York Court of Appeals saw before it a statute, passed in April 1925, that would unsettle a judgment of the New York Court of Appeals issued in December of 1924.[440] The judgment of the court had held that American Express Company was barred from collecting a voucher from the City of New York for its earlier construction work on a New York City road because the statute of limitations for collection had passed and the city was expressly prohibited from waiving the statute of limitations.[441] Months following the judgment, the state legislature passed a statute that would allow American Express Company to collect.[442] The statute was crafted in general terms, but the court determined that it would apply to American Express's case only.[443] It was in light of this other evidence of corruption—as well as legislative usurpation of home rule and meddling with the court's own judgments—that Justice Cardozo struck down the law.[444] But the reasoning of the opinion focused on the local effect of the statute.[445] Rather than approaching corruption indirectly, courts should address these concerns head-on. State legislatures could also facilitate these improvements to the doctrine by both amending state constitutional prohibitions to allow for specific lawmaking and to instead develop better regulatory schemes to prevent corruption directly—good government reforms, lobbying bans, campaign finance reform, recusal rules, ethics provisions, and the like.

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437. See supra notes 365–370 and accompanying text.

438. See supra notes 410–421 and accompanying text.

439. See supra section II.B.1.a.

440. In re Elm St. in New York, 158 N.E. 24, 24–25 (N.Y. 1927).

441. Id.

442. Id. at 25.

443. Id. at 26.

444. See id. at 25–26.

445. See id. ("We must . . . inquire whether it is general or local 'in its effect.'").

With respect to federal constitutional law, the courts should aim to determine the real values at stake at the heart of doctrines like equal protection, due process, and separation of powers, rather than attributing constitutional value to generality alone. The lower courts have been essentially taking this approach with respect to the class-of-one equal protection doctrine by requiring plaintiffs to show proof of animus—thereby crafting a rule that focuses on the problem of discrimination rather than specificity per se.[446] The Equal Protection Clause, at base, protects the constitutional value that the government shall not engage in unjust discrimination, and the class-of-one doctrine aims to root out discrimination that is perpetrated through narrow exercises of power. The narrowness of the exercise of power is, however, of no independent constitutional concern. Instead, the U.S. Constitution was founded upon a deep respect for pluralism—a respect that the Equal Protection Clause further solidified[447]—and an ongoing acceptance of the narrow lawmaking required to regulate a plural nation.[448] Rather than discrimination, narrow lawmaking could reflect subordinated groups wielding power within the lawmaking process.[449] Holding these laws unconstitutional based solely on their narrowness could serve to disempower the groups that movements against discrimination were intended to protect.[450] However unlikely, there is some possibility that the class-of-one equal protection doctrine could be rehabilitated from its current "morass" by refashioning the rule to focus entirely on evidence of animus and discrimination within the lawmaking process and by moving away from standards based solely on specificity.

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446. See Araiza, Constitutional Rules, supra note 362, at 50 n.143.

447. William N. Eskridge, Jr., A Pluralist Theory of the Equal Protection Clause Symposium: The Second Founding, 11 U. Pa. J. Const. L. 1239, 1246–58 (2008) [hereinafter Eskridge, Pluralist Theory].

448. McKinley, Lobbying, supra note 171, at 1149, 1183–84; McKinley, Petitioning, supra note 26, at 1559.

449. Bourdieu, Force of Law, supra note 21, at 850; see also supra notes 164–169 and accompanying text.

450. One paradigmatic example of generality being used to disempower historically subordinated groups comes from the Supreme Court's equal protection doctrine in the context of race: In *City of Richmond v. J.A. Croson Co.*, the Court struck down as unconstitutional a law that limited the assignment of public construction contracts to companies that would subcontract a certain percentage of their work to "minority business enterprises." 488 U.S. 469, 486 (1989). The Court reasoned that heightened scrutiny was necessary in that case, in part, because "blacks constitute approximately 50% of the population of the city of Richmond" and "[f]ive of the nine seats on city council are held by blacks." Id. at 495–96. This reasoning ignored the fact that "minority business enterprises" included racial and ethnic minorities beyond the Black community; the Court aimed to build a standard that made narrow lawmaking more difficult in the context where a subordinated group wielded power in the lawmaking process—favoring instead the generality principle in that instance. See id. A standard that aimed more at preserving the value of antidiscrimination—rather than generality as a standalone constitutional value—could better protect the constitutional values at stake in the context of equal protection while also preserving equity within the lawmaking process.

But what would an equal protection doctrine that aimed to identify discrimination in the lawmaking process while also respecting pluralism look like? Ten years ago, Professor Eskridge proposed a pluralism-based standard for equal protection that directed courts to look to the lawmaking process for failures of both process, lack of deliberation and exclusion, and substance—oppression and subordination.[451] Such a standard would root evaluation of these failures in the democratic precepts of participatory deliberation—a precept similar to normative theories of deliberative democracy—as well as minority protection and libertarian neutrality.[452] A law would not violate equality values so long as it was crafted through inclusive deliberation, did not discriminate or oppress minorities, and did not use the power of the state to exclude.[453] Eskridge's pluralism-based standard provides a powerful foundation upon which to build an equal protection doctrine, but it could be strengthened by more modern historical and theoretical work on lawmaking. In particular, his standard drew heavily on abstract models of lawmaking at the Founding that read modern research on public choice theory and the primacy of the electoral process back into the historical sources.[454] For example, he declares certain groups "[i]rrelevant to American politics in 1789," such as "persons of African descent, Native Americans, women, and men who did not have either land or money."[455] This abstract model of lawmaking also clung to a modern concept of democracy that envisions deliberative democracy as the ideal form for legislative process.[456]

A pluralism-based standard that is informed by a more empirically driven notion of the lawmaking process throughout American history—one that recognizes equity outside the courts and the integral function of representation that it performs—could build upon Eskridge's foundation while incorporating some important refinements. The foundation of this standard would remain the same: Courts would continue to look to the lawmaking process for failures of process and substance. What constitutes a "failure," however, would vary. Most importantly, it would not uphold the precept of deliberative democracy—a precept that has been readily criticized for burdening minorities: Making laws through "deliberation" forces minority voices as a condition of participation and self-governance to engage with and persuade hostile, uninformed, uninterested, or self-inter-

451. See Eskridge, Pluralist Theory, supra note 447, at 1240.

452. Id.

453. See id.

454. Id. at 1240–41.

455. Id. at 1241.

456. Id. at 1240–41.

ested majorities,[457] similar to the failure of elections to provide an inclusive form of representation.[458]

But lawmaking within American legislatures has never functioned through processes of strict deliberation—pluralism was fostered through processes of equity and equitable claimsmaking.[459] Instead, courts could look to the participation in the lawmaking process by those groups—which have included women, African Americans, Native Americans, and the foreign born from the Founding—in order to determine whether a law was driven by the political advocacy of the groups themselves through equitable claims. If the committees regulated by the law drove the process, that would serve as evidence weighing in favor of holding that the law does not violate equal protection. Counterintuitively, this would prove true even if the law was fractured or specific and did not treat the general public "equally." In contrast to Eskridge's precept of "minority protection,"[460] a pluralism-based standard informed by this history would value minority *empowerment* over simple *protection* and would look to the participation of these groups in the lawmaking process as liberty enforcing.

The due process and separation of powers doctrines present a slightly more complicated case. The Due Process Clause protects the value of proper procedure generally and, in this context, the proper procedures for lawmaking more specifically. In the cases following *Londoner* and *Bi-Metallic*, the Court has crafted a line between the types of laws that are subject to the constitutional value of due process and the types of laws that are not.[461] Essentially, the constitutional value of proper lawmaking, for pragmatic reasons, turns on whether or not a law is general or specific.[462] Those affected by laws crafted in specific language obtain constitutional protection, while those affected by laws crafted in general language do not. This arbitrary outcome is necessary simply because the Court had to create a line somewhere and reasoned that the government cannot reasonably provide an intricate process for every individual interested in a potential law.[463] Given the ubiquitous confusion over how to determine whether a

457. See John S. Dryzek, Deliberative Democracy and Beyond: Liberals, Critics, Contestations 10 (2002) (documenting more broadly the rise of deliberative democratic theory in the late twentieth century to early twenty-first century, and surveying the theory's critics).

458. See id. at 80 (noting that influence through elections is "sporadic" and "indirect" because they are distorted by money and arbitrary according to social choice theory); see also supra notes 432–434 and accompanying text.

459. See supra Part II.

460. Eskridge, Pluralist Theory, supra note 447, at 1240.

461. Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445–46 (1915); Londoner v. City and County of Denver, 210 U.S. 373, 386 (1908).

462. See supra notes 382–385 and accompanying text.

463. See *Bi-Metallic*, 239 U.S. at 445 ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption.").

law is general or specific,[464] however, this does not seem like the best way to run a constitution or, for that matter, a government.

Instead, as argued elsewhere,[465] the courts would best protect due process by setting a minimum standard for process due to the public during the lawmaking process writ large. Rather than setting this process explicitly, however, it should force lawmaking institutions to establish a particular minimum level of process and to implement that process by the legislature's own terms. This is essentially the approach the Court took in *Londoner* when the city failed to follow its own procedures to provide notice and an opportunity to petition.[466] In developing future due process doctrine, the Court should reject the notion that constitutional values turn on whether a law is general or specific. This would also mean that Huawei's creative due process claim should fail.[467] In its complaint, Huawei asserts an interpretation of the due process doctrine that holds narrow laws unconstitutional simply for regulating narrowly.[468] In aiming to constitutionalize generality, the claim is, in essence, a revival of the worst of the equal protection class-of-one doctrine already rejected by the Court as non-administrable.[469]

With respect to separation of powers, courts should resist the currents pressing our doctrine toward holding specific laws unconstitutional as a per se violation of separation of powers. On the Supreme Court, this charge has been led most recently by Chief Justice Roberts in *Patchak v. Zinke*. In *Patchak*, Roberts argued that legislative power includes only the power to pass "general rules" and that the Founding generation rejected squarely any notion that legislative power includes the power to grant exceptions from general rules or to resolve questions over rights.[470] According to Roberts's version of Founding history, narrow regulation was seen as adjudication and solely within the province of judicial power.[471] As

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464. See supra section III.A.1 (surveying the muddled standards developed to evaluate generality and specificity in state constitutional doctrine).

465. In earlier work, I have argued for an equivalence between the right protected by the Petition Clause and the right of procedural due process—a right that would mandate courts intervene in the lawmaking process sufficient to set a constitutional floor such that Congress must provide equal, transparent, and formal public access to the lawmaking process. See McKinley, Lobbying, supra note 171, at 1182–86 ("The petition right preserved only the procedures of acceptance, consideration, and response for each petition without respect to the political power of the petitioner. The petition right also shared the principles of transparency that underlie the due process right."); McKinley, Petitioning, supra note 26, at 1623 (explaining how "administrative law doctrine has long recognized the quasi-procedural due process right of the kind promised by the Petition Clause").

466. See *Londoner*, 210 U.S. at 385.

467. See Complaint, supra note 371, at 44–46.

468. See id.

469. See supra section III.A.2.

470. Patchak v. Zinke, 138 S. Ct. 897, 914–22 (2018) (Roberts, C.J., dissenting).

471. Id.

this Article—as well as Justice Scalia's research[472]—shows, this understanding of history may be normatively appealing from a modern perspective, but it is inaccurate. Moreover, rather than invading liberty with specific lawmaking, equity outside the courts often facilitated the protection of liberty and participatory liberty for the most vulnerable and marginalized.[473] Joined by Justice Sotomayor, Chief Justice Roberts, without any sense of irony also took issue with Congress considering and resolving petitions—despite the fact that the right to petition is protected by the explicit text of the Constitution, while separation of powers is not.[474] Congress developed formal procedures for petitions and began accepting and considering them before it had even debated the text that became the Bill of Rights.[475] Acceptance and consideration of petitions—narrow and general—were wholly unaffected by the ratification of the Fifth and Fourteenth Amendments.[476]

This is not to say that the legislative power to pass specific legislation is not limited by other parts of the Constitution. As Chapman and McConnell recently documented, courts in the early Republic relied on the Ex Post Facto, Bill of Attainder, and Contracts Clauses to invalidate narrow laws that punished individuals retroactively or interfered with vested rights.[477] But nothing in Chapman and McConnell's historical account supports Chief Justice Roberts's position that specific laws were themselves suspect in American legislatures at the Founding.[478] To the

472. See supra notes 396–404 and accompanying text.

473. See Hans Kelsen, Pure Theory of Law 144–45 (2005) (offering one account of political rights wherein an individual may "participate in the creation of the norm by which the validity of an unconstitutional statute that violates the guaranteed equality or freedom is repealed generally . . . or individually"); Maria Paula Saffon & Nadia Urbinati, Procedural Democracy, the Bulwark of Equal Liberty, 41 Polit. Theory 441, 462 (2013) ("If, despite the formal operation of democracy, the most relevant decisions of society are taken outside of it, democracy becomes trivial. This can induce citizens to think that participating in democracy is irrelevant for their interests or their liberty . . . .").

474. U.S. Const. amend I.

475. See McKinley, Petitioning, supra note 26, at 1560–61.

476. See id. at 1568–75 (charting the petition introductions in Congress from the Founding until 1950 and finding a reduction only in the twentieth century); see also Maggie Blackhawk, Daniel Carpenter, Tobias Resch & Benjamin Schneer, Congressional Representation by Petition: Assessing the Voice of Voteless with a Comprehensive New Database, 1789–1949, 45 Legis. Stud. Q. (forthcoming 2020) (manuscript at 5) (on file with the *Columbia Law Review*).

477. Chapman & McConnell, supra note 351, at 1717–20 (noting that these clauses were "[t]he only clauses relevant to due process principles" and targeted "two related but distinguishable legislative abuses: special laws passed by a legislature that deprive an identifiable individual of rights, and laws that operate retrospectively").

478. Indeed, Chapman and McConnell expressly disclaim the connection between private bills and their due process argument:

> In addition [to the impeachment power, the power to adjudicate election disputes, and to punish its own members], the Constitution left Congress the power to enact special bills for the benefit (but not the detriment or

extent that it does, this Article contravenes that historical account at all levels of government.[479] As this history shows, to the extent that *state* legislatures rejected specific lawmaking at all, it was decades after the Founding and was a historically contingent response to particular crises of governance.[480] General laws were not a deeply held Founding Era value and even less so at the national level.

Rather than following the suggestion of Chief Justice Roberts in crafting a separation of powers doctrine that turns on generality and specificity as an independent constitutional value, the Court should focus on the constitutional values at stake. The Founding generation was deeply concerned with legislative intervention into the judicial process but showed little concern with legislatures creating exceptions and narrow laws. Intervening in court proceedings was the only form of "legislative equity" with which the Founders took issue, and they did so primarily to protect the independence of the courts from ubiquitous meddling, rather than to prevent legislatures from regulating narrowly.[481] A separation of powers doctrine that evaluates the extent to which legislative action meddles in judicial proceedings would better protect the constitutional values at stake than a doctrine that turns on the generality or specificity of the law. As this Article shows, not only is such a standard not administrable, it is also novel and antithetical to the way law has been made in this country since the Founding.

2. *Preserving the Vestiges of Equity Outside the Courts: Interpretation as Equity.* — The primary lesson for courts, as they fashion practices and doc-

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> punishment) of identifiable individuals, such as land grants to specific companies. Such bills were commonly enacted by Parliament and by state legislatures, including granting compensation to petitioners in cases sounding in tort or contract, which would otherwise have been barred by sovereign immunity, or pensions to soldiers and their families. The Due Process Clause does apply to such bills, but only to quasi-judicial acts that "deprive[]" someone of "life, liberty, or property."

Id. at 1719–20 (quoting U.S. Const. amend. V).

479. See supra section II.B. To the extent that Chapman and McConnell can be read to argue that the Due Process Clause requires any "deprivation" by Congress of "life, liberty, or property," Chapman and McConnell are mistaken. First, as the historical case studies in Part II show, petitions to protect rights to life, liberty, or property were declined and often without more than the vote of a single committee or chamber. From its earliest days, Congress did not require a general law to decline a petition, which would fit the definition of deprivation described by Chapman and McConnell. Further, one of Chapman and McConnell's own examples demonstrates the folly of the idea that a private law "that did not hurt anyone" could be enacted. Chapman & McConnell, supra note 351, at 1719. For example, Chapman and McConnell describe "land grants to specific companies" as a special bill that benefitted someone, but hurt no one. Id. at 1720. But the example overlooks the obvious fact that the land grants often came at the expense of the Native Nations who held title to the land. See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 142–43 (1810) (holding that Indian titles are not absolved from the possibility of seizure by the state). Distribution of goods, even goods held by the government, often enact a similar "deprivation" elsewhere.

480. See supra section II.B.1.a.

481. See supra notes 400–401 and accompanying text.

trines of interpretation, is that when applying general law to specific facts, they may not be doing the work of discerning meaning at all. Rather, part of the work that we now term "interpretation" could be courts performing the equitable function that was historically performed by legislatures before movements toward general laws relocated petitions for equitable redress into the courts. Debates between Professors Eskridge and Manning over textualism and dynamic interpretation have begun to capture this observation and history.[482] But, because both scholars focused their attention on the history of courts and doctrine, portions of this lesson have been overlooked.

By excavating the equity of the statute doctrine, Eskridge uncovered a range of ways that late-eighteenth-century courts exercised power over statutes in ways beyond simple interpretation of text—from suppletion to amelioration to voidance.[483] Late-eighteenth-century judges—whom Eskridge surveys primarily at the state level—applied general law to unforeseen circumstances, created exceptions when application to a specific case would have worked injustice, and even voided statutes that would result in injustice in application.[484] At the time, this work was also done by legislatures in response to petitions.[485] In many cases, the courts would, quite literally, reenact what the petition process would look like within a legislature while deciding what the equity of the statute doctrine required:

> In order, says he, to form a right judgment whether a case be within the equity of a statute, it is a good way to suppose the law maker present, and that you asked him the question—did you intend to comprehend this case? Then you must give yourself such answer as you imagine, he *being an upright and reasonable man*, would have given.[486]

Manning's historical account critiques Eskridge's by showing that the Supreme Court, although it did not reject the equity of the statute doctrine, applied it only rarely in the nineteenth century—and more often approached statutes as a faithful textualist.[487] Both historical accounts,

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482. See supra notes 29, 422–427 and accompanying text; see also Balganesh & Parchomovsky, supra note 61, at 1860 ("In the traditional common law this use of equity [by English courts] came to be known as the process of 'equitable interpretation.' Used in this conception, it authorized courts to extend or restrict the otherwise clear words of a statute to give effect to the statute's '*ratio* or purpose.'" (footnote omitted) (quoting Manning, Textualism, supra note 29, at 22, 29)).

483. Eskridge, All About Words, supra note 29, at 1018–30.

484. See id.

485. See supra section II.A.

486. Eskridge, All About Words, supra note 29, at 1026 (internal quotation marks omitted) (quoting Rutgers v. Waddington, Opinion of the New York Mayor's Court (Aug. 27, 1784), reprinted in 1 The Law Practice of Alexander Hamilton: Documents and Commentary 393, 396 (Julius Goebel, Jr. ed., 1964)).

487. Manning, Textualism, supra note 29, at 85–102 ("Although the federal courts at times invoked the equity of the statute until well into the nineteenth century, the law as early as the Marshall Court began to shift to the faithful agent theory as the dominant constitutional foundation of statutory interpretation.").

however, seem to overlook the operation of equity and the centrality of the petition process within legislatures during the same period.

Dynamic interpretation today largely describes the courts' approach to general laws. Like dynamic interpretation, the equity of the statute doctrine could have been crafted in response to a growing number of general laws and the closure of equitable channels outside the courts, as legislatures were pressed toward generality. As the historical case studies reveal, legislative approaches to lawmaking and, particularly, general and specific lawmaking have not been consistent across time and across jurisdictions.[488] Manning's observation, for example, that in the nineteenth century the Supreme Court more often applied textualist methods of interpretation than did state courts could be, in part, a response to the fact that specific lawmaking—and the processes of equity that it facilitated—continued in earnest in Congress into the mid-twentieth century. It wasn't until the late nineteenth century, amidst the full flowering of the administrative state and the nascent movement for general laws, that the Supreme Court embraced equitable interpretation in *Holy Trinity*.[489]

Manning's and Eskridge's historical accounts also part ways when it comes to their respective accounts of early understanding of separation of powers. Eskridge relies on Alexander Hamilton's Federalist No. 78 to argue that the Founding generation envisioned a strong role for the judiciary in reining in, through equitable interpretation, the legislative branch.[490] Manning, again, counters with additional historical evidence that Hamilton believed that judges should limit their approach to law to implementing the will of the legislature.[491] He further reads the absence of debate over the equity of the statute doctrine at the Founding as likely inconclusive.[492] But in focusing on the Founding Era alone, each of these histories overlooks important institutional developments within legislatures across the long nineteenth century that are central to the development of equitable interpretation.

The reality of legislative lawmaking in the eighteenth and nineteenth century complicates Eskridge and Manning's simple story, but it may also

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488. See supra section II.B.

489. Church of the Holy Trinity v. United States, 143 U.S. 457, 461 (1892); see also supra notes 428–430 and accompanying text.

490. Eskridge, All About Words, supra note 29, at 1049–57 ("[T]he firmness of the judicial magistracy is of vast importance in mitigating the severity, and confining the operation of [unjust and partial] laws . . . . [I]t operates as a check upon the legislative body in passing [laws]." (emphasis omitted) (internal quotation marks omitted) (quoting The Federalist No. 78, at 470 (Alexander Hamilton) (Clinton Rossiter ed., 1961))).

491. Manning, Textualism, supra note 29, at 80–85 (noting that Hamilton never mentioned equity of the statute in Federalist No. 78 and instead warned of judicial overreach of legislative power).

492. See id. at 84–85 ("Although the Anti-Federalists' assumptions accurately reflected the English background against which the Constitution was adopted, the Federalists' rejoinders more accurately reflected the Constitution's careful separation of legislative from judicial power and the strong intellectual tradition that this arrangement reflected.").

provide a path forward. Charting separation of powers means understanding also how those powers have changed in important ways over time. Legislative power at the Founding was largely the power to make specific laws.[493] The majority of laws passed during the early republic were specific, rather than general. Part of this legislative power involved facilitating equity outside the courts and supplementing, ameliorating, and voiding law through the petition process.[494] General laws, the primary target of equitable interpretation, were largely a response to the debt crisis of the 1830s and 1840s and were primarily the domain of state legislatures.[495] Thus, the Founding generation saw the work of legislatures as fundamentally different than we do today and were unlikely to afford much debate at the Founding to a dynamic that would only arise forty years later. But it was clear that institutional actors, as well as the public, saw equity and specific lawmaking as vital to the lawmaking process. Members of Congress began accepting petitions shortly after reaching quorum,[496] and even Hamilton considered early petitions for equitable redress.[497]

Courts often adapted their approach to interpretation in response to fundamental institutional shifts in the way legislatures made law. As recent work by Professor Farah Peterson has shown, judges from the 1790s through the early 1820s envisioned "equitable interpretation," at least in the state courts, as a means to take a morass of private law, drafted by nonexperts, and to make it more general.[498] The lack of general lawmaking by legislatures left the work of creating coherent rules and treatises to the courts.[499] It was only in the 1840s, after state prohibitions on private laws pressed more of the work of equity into the courts that judges began to see the judicial power as applying a general rule to a particular case.[500] Proponents of general laws, however, saw them not simply as a means to push equity out of legislatures but aimed instead to push equity out of the

493. See supra section II.B.

494. See supra section II.A.

495. See supra section II.B.1.a.

496. See supra note 282 and accompanying text.

497. See, e.g., Alexander Hamilton, Report on Several Petitions Seeking Indemnification for Various Sums of Paper Money Received During the Late War (Nov. 17, 1792), reprinted in 13 The Papers of Alexander Hamilton 153, 153–55 (Harold C. Syrett, Jacob E. Cooke, Jean G. Cooke, Dorothy Twohig, Cara-Louise Miller & Patricia Syrett eds., 1967) (discussing petitions received by Hamilton as the Secretary of Treasury to grant equitable relief of indemnification for depreciation of paper money).

498. Farah Peterson, Interpretation as Statecraft: Chancellor Kent and the Collaborative Era of American Statutory Interpretation, 77 Md. L. Rev. 712, 713, 733–35 (2018) ("By the early nineteenth century, some of the most respected jurists . . . insisted that judges were *required* to use their equitable powers when interpreting statutes in order to take into account the spirit of the laws they were interpreting and to supply whatever details the legislature may have overlooked.").

499. See id. at 713, 734.

500. See id. at 771–72 ("As statutes focused more on general principles, judges shifted from the mechanical application of private bills to individuals to the more 'law-like' distillation of rules in particular cases.").

lawmaking process entirely. As a consequence, equitable processes within courts went underground. Rather than pointing to equity directly, judges envisioned the power to apply general law to a specific case as "scientific," and courts developed complicated doctrines to discern meaning and intent from text.[501] Thus, the work of equity became the work of "interpretation." But, as Eskridge has shown, practices of supplementing, ameliorating, and voiding statutes remained the same even under the guise of interpretive science.[502]

So how does clarification of this history offer a path forward? First, it shows how some of the work termed "dynamic interpretation" done by the courts is not an invention of the twentieth century at all. Rather, it has been central to the lawmaking process since the Founding. Fundamental changes to legislatures *after* the Founding—through reforms mandating general laws—led to the relocation of this equitable work from legislatures and into the courts. So, to the extent that scholars are concerned with separation of powers, they should raise deeper concerns over how those powers have fundamentally changed over time. Second, it shows that the work of "dynamic interpretation," however, is not in fact interpretation at all. It is instead equity and the dynamic and discursive process of lawmaking that allowed for better representation and regulation of a diverse and plural society. Both Eskridge and Manning are, in essence, correct. Courts should, when interpreting statutes, discern the meaning of the statute from the statute's text. But, given this history and the changes to the lawmaking process over time, modern courts also have a central role in facilitating equity. To the extent that equitable concerns are raised about a general statute and there is—contrary to what the Founding generation envisioned—no process within the legislature to resolve the concern courts should provide a forum for redress.

C. *Lessons for Agencies*

The primary lesson for agencies is that their function is, in part, to facilitate processes of equity and the function of representation that equity performs. Scholars such as Henry Smith and Alfred Aman have already begun to draw the connections between administrative lawmaking and equity.[503] Administrative agencies, commissions, and boards arose largely in response to petitioners demanding equitable redress of their grievances. These bodies should, rather than focusing solely on a Weberian vision of technocratic governance, aim to continue to facilitate this process.[504] This process inspired the creation of, what has been termed elsewhere, the "participatory state"—that is, the political technology by

501. Id.

502. See Eskridge, Dynamic Statutory Interpretation, supra note 424, at 1506–07.

503. See supra note 30.

504. See McKinley, Petitioning, supra note 26, at 1603.

which individuals and minorities could participate in government outside the vote even as the petition process changed form over time.[505]

Recognizing the connection between equity and the administrative state more broadly could help scholars better understand the representational function of the administrative state, thereby fostering better design decisions. For example, many scholars, including myself, have recently opened the call to democratize the administrative process.[506] Taking part in this movement, Matthew Cortland and Professor Karen Tani have offered ways to reclaim notice-and-comment and have also documented a growing trend of creating guidebooks for members of the public to submit their own comments and thereby influence administrative rulemaking.[507] They envision notice-and-comment as:

> [M]ore than just a tool in the battle over the administrative state. It is also an opportunity for marginalized people—people whose voices are often diluted or excluded in the realm of formal electoral politics—to call out the power dynamics they see operating in the world and to name the casualties.[508]

As petitioning for equitable redress and the notice-and-comment process share deep roots, it should come as no surprise that Cortland and Tani frame their comments in moralistic terms similar to early petitions.[509] These comments, like the petitions before them, offer a means through

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505. Id. at 1601–03.

506. See, e.g., Jody Freeman, Private Parties, Public Functions and the New Administrative Law, 52 Admin. L. Rev. 813, 825 (2000) (positing that private contractual relationships "undermine public participation in decision making"); Neil Komesar & Wendy Wagner, The Administrative Process from the Bottom Up: Reflections on the Role, if Any, for Judicial Review, 69 Admin. L. Rev. 891, 907–08 (2017) (detailing Congress's attempt to abridge the "democratic deficit" in agencies by allowing interest groups to influence and challenge agency actions); Miriam Seifter, Second-Order Participation in Administrative Law, 63 UCLA L. Rev. 1300, 1318–25 (2016) (proposing that interest groups legitimize agencies by "keep[ing] agencies in line with the public will"); Wendy Wagner, The Participation-Centered Model Meets Administrative Process, 2013 Wis. L. Rev. 671, 678–81 (highlighting the lack of public-interest representation in public-relevant rulemaking areas); Wendy Wagner, Katherine Barnes & Lisa Peters, Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards, 63 Admin. L. Rev. 99, 104–09 (2011) (arguing that interest group participation risks derailing the public interest regulation goals of agency rulemaking due to the diminished influence of public interest groups on rules compared to regulated and business parties). But see Edward Rubin, It's Time to Make the Administrative Procedure Act Administrative, 89 Cornell L. Rev. 95, 146–57 (2003) (arguing that the APA's dependence on public participation is outdated and should be amended to craft the administrative state into a new form of technocratic governance).

507. See Matthew Cortland & Karen Tani, Reclaiming Notice and Comment, Law & Pol. Econ. Project (July 31, 2019), https://lpeblog.org/2019/07/31/reclaiming-notice-and-comment [https://perma.cc/CR5W-Y5C9]. Matthew Cortland is a disability rights lawyer and one such author of these regulatory advocacy guidebooks. See Matthew Cortland, Medicaid Crash Course: Submitting Comments to CMS, Patreon (Aug. 8, 2018), https://www.patreon.com/posts/20618943 [https://perma.cc/DDR5-HET4].

508. Cortland & Tani, supra note 507.

509. See id.

which individuals and minorities affected directly by regulation can share their moral perspective and vision of the good.[510] Better design decisions can improve how these comments are considered, recorded, and reviewed by the courts. Given the importance of these comments to facilitating longstanding processes of equity within our lawmaking process, it is particularly important to open a discussion about how to provide these petitioners greater process and voice within agencies. Professor Nancy Chi Cantalupo, along with Cortland and Professor Tani, has suggested crowdsourcing as a means to better consider the flood of comments that agencies receive.[511] Algorithms could offer another means by which agencies could consider multiple comments—especially those with duplicate language—efficiently and internally, without turning to the public to crowdsource support.[512]

Identifying this connection could also help articulate better defenses against calls to abolish or limit administrative lawmaking—especially by those proponents who presume that legislatures pass general laws only. As the historical case studies show, it was the push for general laws that relocated processes of equity elsewhere and motivated the creation of much of what we now call the "administrative state." To the extent that abolitionists continue to take aim at the existence of the administrative state and administrative lawmaking, they must also confront the historical reality that processes of equity have been hydraulic within American lawmaking and that American democracy has always afforded venues for disempowered groups to make equitable claims. Therefore, advocating for the abolition of administrative lawmaking will result in equity relocating yet again to either the legislatures, the courts, or both. Rather than promoting more general lawmaking, it will instead result in more specific lawmaking elsewhere or more dynamic interpretation within the courts.

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510. See supra section II.A.

511. See Nancy Chi Cantalupo, Matthew Cortland & Karen Tani, Reclaiming Notice and Comment: Part II, Law & Pol. Econ. Project (Aug. 2, 2019), https://lpeblog.org/2019/08/02/reclaiming-notice-and-comment-part-ii/#more-2784 [https://perma.cc/WQ95-G2UW]. The authors highlight the use of crowdsourcing comments by the Big Comment Catalog Project, which uses volunteer coders to classify comments to proposed Title IX changes. See The Big Comment Catalog Project: What Did the Public Say About DeVos's Proposed Changes to Title IX?, Title IX Comment Catalog, https://sites.google.com/view/title-ix-comment-count/home?authuser=0 [https://perma.cc/EZ82-XT7T] (last visited Aug. 31, 2020).

512. One option to make coding text more efficient is to use randomized coding done by humans to train a coding algorithm through machine learning. See, e.g., Fabrizio Sebastiani, Machine Learning in Automated Text Categorization, 34 ACM Computing Surys. 1, 2 (2002). This is the methodology that we used to code over 500,000 petition introductions to Congress for the Congressional Petitions Database. See McKinley, Petitioning, supra note 26, at 1570, 1631. Using this approach would allow the government to reduce the required amount of coding needed from humans by training an algorithm to complete the majority of categorizations. See id. at 1631.

CONCLUSION

In 1963, Lon Fuller outlined the principles that he claimed would hold together law and morality—including the principle of generality. The legal realists were quick to respond with ways that a law could satisfy all of Fuller's principles, yet still be unjust. Despite these critiques and a growing literature problematizing the principle of generality, legislatures and doctrine continue to adhere to the ideal of generality without deeper reflection. In an era when America has begun to struggle yet again with ways to guarantee that law remains just, this Article offers a friendly amendment to the oft-invoked principle that to ensure justice, law must be general. Instead, generality might move law further away from justice in certain circumstances—by foreclosing those channels by which individuals and minorities can present their morals and norms, and seek equity within the lawmaking process. Foreclosing equity through the mandating of general laws also diminishes the vital representative function equity offers for subordinated and disempowered groups. As Bourdieu observed, the result of disempowered groups wielding power is often law that is fractured into narrowed statutes. In this way, narrow legislation is a result of a more equitable field for lawmaking, rather than a corrupt one. Specific laws might also better protect plural visions of the good because lawmakers can tailor legislation to regulate some facets of a plural society and not others. Facilitating equity outside the courts and allowing law to fracture might also allow equity to work change upon the general rule over time. In this way, allowing for specific laws aims to construct a legal system that envisions law as a tool for progress and maintains the vital connection between legal reform and the public—in the form of social movements and otherwise. Rather than forcing lawmakers toward general rules in all instances, it might be that specificity better holds together law and morality by facilitating a process of confrontation between lawmaker and the regulated. It is in striking the proper balance between generality and specificity—thereby preserving equity—that law and morality remain conjoined.

Recognizing equity outside the courts as a dynamic central to the lawmaking process from the time of the Founding has important lessons for today. Most importantly, equity outside the courts demonstrates that movements toward general laws, textualism, and the abolition of administrative lawmaking are misguided; at the very least, these movements rest on a historically inaccurate vision of American lawmaking. American history has never had a period that accomplishes all three at once. Moreover, American government historically made available venues for underrepresented minorities and individuals. Thus, the attempt to foreclose all three venues is unprecedented. Generality in lawmaking was not a deeply held Founding Era value. Rather, movements toward general laws were, at least in part, historically contingent reactions to particular crises of governance—crises that could have been resolved differently. Moreover, the push toward general laws usually resulted in more administrative

lawmaking and dynamic interpretation by courts—and vice versa. Movements toward general laws also never wholly accomplished the aim of foreclosing equity within the lawmaking process. Unlike generality, the persistent demand for equity from the government has always been rooted deeply in the American ethos. Individuals and minorities continued to seek equitable redress, thereby forcing equity back into the lawmaking process. At no point have we rid the lawmaking process of equity entirely, and it is important to recognize the harms caused to the most politically vulnerable by attempting to foreclose equitable channels. A more empirically grounded understanding of American lawmaking supports dynamic interpretation, specific laws, and the legitimacy of the administrative state: Identifying equity outside the courts helps us see that these three areas are interrelated and that they often serve the same representative function.

Finally, recognizing equity outside the courts offers lessons for equity more generally. Although this Article aims to identify and describe equity elsewhere, equity outside the courts and equity within the courts may share more similarities than differences. Equity outside the courts, as is described here, is a bottom-up, dynamic process that is driven by practice—it has long formed an integral part of American political culture. Because of the design of these other branches, equity outside the courts offers a richer functional account of equity—one that includes the representative function facilitated by equity. But so, too, could equity within courts be similarly dynamic and bottom-up. Equity within courts could similarly facilitate representation. Movements toward general laws pushed equity from legislatures to inside the courts, as courts applied general laws to specific facts and developed processes of equitable interpretation. Rather than a stark dichotomy between the juriscentric account of equity and equity within legislatures and agencies, equity, both outside and within the courts, may in fact be a continuum. Ultimately, we may better understand equity generally by recognizing and studying it across all domains in which it functions.